Team 2

No. 14-1248

IN THE UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellant,
and
DEEP QUOD RIVERWATCHER, INC. AND DEAN JAMES,
Plaintiffs-Intervenors-Appellants

vs.

MOON MOO FARM, INC.,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR NEW UNION, THE HONORABLE ROMULUS N. REMUS PRESIDING

CASE NO. 155-CV-2014

BRIEF OF APPELLEE MOON MOO FARM, INC.

ORAL ARGUMENT REQUESTED

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GLOSSARY

CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act
CAFO	Concentrated Animal Feeding Operation
Chokos plant	Chokos Greek Yogurt processing facility
CWA	Clean Water Act
River	Deep Quod River
New Union DOA	State of New Union Department of Agriculture
EPA	United States Environmental Protection Agency
FWA	Farmville Water Authority
ISE	Imminent and Substantial Endangerment
NPDES	National Pollutant Discharge Elimination System
NMP	Nutrient Management Plan
OSHA	Occupational Safety and Healthy Administration
RCRA	Resource Conservation and Recovery Act
Riverwatcher	Deep Quod Riverwatcher

JURISDICTION

This case arises from Riverwatcher and EPA's claim that Moon Moo Farm requires a federal permit for the alleged discharge of pollutants into navigable waters of the U.S. in violation of the CWA NPDES permitting program, 33 U.S.C. § 1342. The Act grants district courts federal question jurisdiction without regard to amount in controversy or diversity. 33 U.S.C. § 1365(a). Riverwatcher also alleges that Moon Moo Farm dumped solid waste in violation of the open dump provisions of RCRA 42 U.S.C. § 6945(a), or, in the alternative, that Moon Moo Farm contributed to an ISE in violation of RCRA, 42 U.S.C. § 7002(a)(1)(B). The Act grants district courts federal question jurisdiction without regard to amount in controversy or diversity. 42 U.S.C. § 6972(a)(1)(A)-(B). Moon Moo Farm filed a counterclaim against Riverwatcher for trespass damages. Since the facts constituting the trespass are inextricably bound up with the occurrences giving rise to Riverwatcher's affirmative federal claims, the Court has supplemental jurisdiction pursuant to 28 U.S.C. § 1367(a). The lower court's final order granted Moon Moo Farm's motion for summary judgment, dismissing all complaints from Riverwatcher and EPA, and awarding Moon Moo Farm $832, 560 in damages on its counterclaim. Appellant's Riverwatcher and EPA filed a timely notice of appeal. Fed. R. App. P. 4(a)(1)(A). This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the Queechunk Canal, a man-made water body, is a public trust navigable water of the State of New Union allowing for a public right of navigation despite private ownership of the banks on both sides and the bottom of the canal by Moon Moo Farm.
2. If the canal is not a public trust navigable water, whether evidence obtained through trespass and without a warrant is admissible in a civil enforcement proceeding brought under CWA §§ 309(b), (d), and 505.
3. Whether Moon Moo Farm requires a permit under the Clean Water Act NPDES permitting program because:

a. It is a CAFO subject to NPDES permitting by virtue of a discharge from its manure land application area.

b. If it is not a CAFO, excess nutrient discharges from its manure application fields remove it from the agricultural stormwater exemption and subject it to NPDES permitting liability.

4. Whether Moon Moo Farm is subject to a citizen suit under RCRA because:

   a. Its land application of fertilizer and soil amendment (a mixture of manure and acid whey from a yogurt processing facility) constitutes a solid waste subject to regulation under RCRA Subtitle IV.

   b. Plaintiffs can establish that the mixture constitutes an imminent and substantial endangerment to human health subject to redress under RCRA § 7002(a)(1)(B).

STATEMENT OF THE CASE

The EPA brought this action for civil penalties and injunctive relief for claimed violations by defendant Moon Moo Farm of the permitting requirements of the CWA, 33 U.S.C. §§§ 1311(a), 1319(c), (d), 1342. Plaintiffs-Intervenors, an environmental organization known as Riverwatcher, intervened as plaintiffs and asserted claims under CWA, 33 U.S.C. § 1365, and RCRA, 42 U.S.C. §7002(a)(1)(A)-(B), in connection with Moon Moo Farm's manure management practices. Moon Moo Farm counterclaimed for common law trespass, alleging that Riverwatcher and Dean James illegally entered its property in order to obtain evidence of stormwater runoff from its fields.

The District court disposed of the case by denying plaintiffs' motions for summary judgment on their CWA and RCRA claims, and granted defendant's motion for summary judgment dismissing the CWA and RCRA claims as well as defendant's motion for summary judgment in favor of its trespass counterclaim.

Following the issuance of the Order of the District court dated June 1, 2014, the EPA, Riverwatcher, and Dean James each filed a Notice of Appeal. The EPA took issue with the District court's holdings whether Moon Moo Farm is a CAFO subject to permitting under the

NPDES permit program pursuant to the CWA, that evidence of Moon Moo Farm's discharge was obtained by trespass, and that such evidence was not admissible in the enforcement proceeding. Riverwatcher and Dean James joined the EPA's appeal of each issue, and also took issue with the District court's holding that discharges from Moon Moo Farm's fields fell under the agricultural stormwater exemption of the CWA, the dismissal of Riverwatcher's open dumping and ISE claims under RCRA, and the award of damages against them based on Moon Moo Farm's trespass claim.

STATEMENT OF THE FACTS

Moon Moo Farm. Moon Moo Farm owns and operates a dairy farm with 350 head of milk cows in the City of Farmville in the State of New Union. Moon Moo Farm houses the cows in a barn on their property and collects their manure and liquid waste to use as fertilizer. R. at 4. The manure and liquid waste is collected through a drainage and pipe system that fills an outdoor lagoon and is stored there until further use. R. at 5. Moon Moo Farm uses the manure and liquid waste as fertilizer by pumping the contents of the lagoon into tank trailers hauled by tractors which then spread the fertilizer over 150 acres of their field. R. at 5. On these fields, Moon Moo Farm grows Bermuda grass, which they harvest every summer as silage. R. at 5. Moon Moo Farm is a "no-discharge" animal feeding operation regulated by the State of New Union under the authority of the CWA. R. at 5. Moon Moo Farm, as a "no discharge" operation, must submit a "Nutrient Management Plan" ("NMP") to the Farmville Regional Office of the State of New Union Department of Agriculture ("DOA"). R. at 5. Records show that Moon Moo Farm applied manure to its fields at rates consistent with their NMP at all relevant times. R. at 6.

Chokos Greek Yogurt. Chokos Greek Yogurt owns and operates a Greek yogurt processing facility in Farmville. In order to serve Chokos Greek Yogurt's growing demand for

milk, Moon Moo Farm increased its milking herd of cows from 170 to 350 heads of cows in 2010. R. at 5. Since 2010, Moon Moo Farm has accepted acid whey from the Chokos Greek Yogurt, which the farm adds to its fertilizer. R. at 5.

Deep Quod River and Queechunk Canal. Moon Moo Farm is situated at the bend of the Deep Quod River. R. at 5. The Deep Quod River flows year round running into the Mississippi River: a navigable, interstate body of water that has been used for commercial navigation. R. at 5. In the 1940s Moon Moo Farm's predecessor in interest created a bypass canal to alleviate flooding at the river bend; this canal is now known as the Queechunk Canal. R. at 5. The Queechunk Canal is 50 yards wide, three to four feet deep, and the flow from the Deep Quod River is now diverted into the Canal. R. at 5. The Canal is navigable by small recreational boating vessels and is often used as a shortcut despite Moon Moo Farm's prominently placed "No Trespassing" signs. R. at 5. Moon Moo Farms owns the land on both sides of the Canal. R. at 5.

Deep Quod Riverwatcher. Deep Quod Riverwatcher is a non-profit organization that received complaints about the Deep Quod River in the spring of 2013. R. at 6. At around the same time the Farmville Water Authority issued a "nitrate" advisory warning their drinking customers that there were high levels of nitrate in the Deep Quod River making the water unsafe for infants. R. at 6. The Farmville Water Authority recommended that infants under two years old should drink bottled water. R. at 6. The level of nitrates in the water did not pose any health threats to adults. R. at 6. Nitrate advisories by the Farmville Water Authority have also been issued in 2002, 2006, 2007, 2009, and 2010 because the Deep Quod watershed is a heavily farmed area. R. at 7.

James Dean. A citizen of the State of New Union conducted an investigation of the Deep Quod River on April 12, 2013. R. at 6. Before Dean's investigation, from April 11 to April 12, 2013, there was two inches of rain in the Farmville region. R. at 6. James' investigation took him into the Queechunk Canal where he ignored Moon Moo Farm's "No Trespassing" signs. R. at 6. In the Canal, Dean observed and took pictures of Moon Moo Farm's operations and collected samples of the water flowing into Queechunk Canal. R. at 6.

SUMMARY OF THE ARGUMENT

This case arises under the Clean Water Act and the Resource Conservation and Recovery Act, 33 U.S.C. § 1342 *et seq*. (2012); 42 U.S.C. §§ 6901 – 6972 (2012). Appellant EPA brought a suit under CWA and Riverwatcher brought a CWA and a RCRA citizen suit against Moon Moo Farm for allegedly discharging pollutants into the Deep Quod River. The district court dismissed appellants' claims. Moon Moo Farm maintains that the district court was correct in all of its holdings.

The district court was correct when it ruled that Dean James was trespassing when he ignored the "No Trespassing" signs and entered the Queechunk Canal because his entry into Moon Moo Farm's property was not protected by the public trust doctrine. The district court reasoned that since the State of New Union had no law regarding its public trust authority, it was reasonable to use a United States Supreme Court case, which held that there is no public right of navigation in a man-made body of water. The district court was correct in looking at "federal common law" because there is a unique federal interest regarding navigable waters of the U.S.

The district court correctly ruled that the evidence obtained by Dean James' trespass was not admissible for the civil enforcement proceeding brought under the CWA because of the Fourth Amendment exclusionary rule. The Fourth Amendment exclusionary rule applies in civil

actions where a civil penalty is sought. The rule should also apply when a public individual obtains evidence unlawfully and that evidence is used in a civil action for correcting civil violations.

The district court properly dismissed EPA and Riverwatcher's claims that Moon Moo Farm required a permit under the CWA NPDES permitting program. There is no admissible evidence to support that Moon Moo Farm required a permit, Moon Moo Farm is not a CAFO, and even if it was a CAFO, Moon Moo Farm is exempt from NPDES permitting requirements. Moon Moo Farm applied manure on its fields in a manner consistent with a nutrient management plan.

Lastly, the district court correctly held that Moon Moo Farm is not subject to a citizen suit under RCRA. The manure and acid whey combination that Moon Moo Farm uses as a fertilizer is not a "discarded material" within the meaning of the "solid waste" definition pursuant to the open dumping or ISE provisions of the statute. Even if the fertilizer was a solid waste, the district court correctly reasoned that the open dumping claim still must fail because the EPA regulations specifically exclude land application of agricultural products, such as the manure and acid whey that Moon Moo Farm uses. Additionally, the district court properly ruled that Riverwatcher presented insufficient evidence to establish that the present conditions of the Deep Quod River indicate an ISE.

STANDARD OF REVIEW

A court must grant summary judgment "if the movant shows 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. This Court must review the district court's grant of summary judgment de novo,

applying the same legal standards as the district court. *Berquist v. Washington Mut. Bank*, 500 F.3d 344, 348 (5th Cir. 2007).

ARGUMENT

I. The district court was correct in ruling that Dean James was trespassing when he ignored the "No Trespassing" signs and entered the Queechunk Canal because his entry into Moon Moo Farm's property was not protected by the public trust doctrine.

Under the equal-footing doctrine, a state acquires title to the land beneath "navigable water" at the time the state entered the Union. *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215, 1219 (2012). Since the Queechunk Canal was not excavated until 1940, the state did not acquire title to that land under the equal-footing doctrine, and Moon Moo Farm retains title to the land beneath the Queechunk Canal. R. at 5. Nonetheless, land that a state acquires under the equal-footing doctrine does not necessarily undermine its public trust authority to regulate "navigable water" above the land it did not acquire. *Id.* at 1235. However, the State of New Union does not have any laws regarding its public trust authority, and since there is a unique federal interest over "navigable water" of the U.S., the district court was correct in looking to "federal common law" to determine whether Moon Moo Farm has the right to exclude public access to the Queechunk Canal. Under "federal common law," the government may not create a public right of access to a man-made body of water so far beyond ordinary regulation or improvement for navigation as to amount to a taking. *Kaiser Aetna v. U.S.,* 100 S. Ct. 383, 384 (1979). Therefore, the government may not create a public right of access to the Queechunk Canal, and James trespassed when he ignored the "No Trespassing" signs and entered Queechunk Canal. R. at 6.

A. Moon Moo Farm retains title to the land beneath the Queechunk Canal because the State of New Union did not acquire title to that land under the equal-footing doctrine.

The equal-footing doctrine allows states, in their capacity as sovereigns, to hold "title in the soil of rivers really navigable." *PPL Montana*, 132 S. Ct. at 1219 (citing *Shively v. Bowlby*, 14 S. Ct. 548, 559 (1894)). Pursuant to that doctrine, upon its date of statehood, a state gains title within its borders to the beds of waters then navigable. *PPL Montana*, 132 S. Ct. at 1219. Since the Queechunk Canal did not exist at the time of Statehood, the State of New Union did not acquire title to that land under the equal-footing doctrine and thus title to the land beneath the Queechunk Canal passed to Moon Moo Farm when sold as private property.

To determine whether the State of New Union acquired title to the land underneath the Queechunk Canal, the only question to ask is whether the water was "navigable in fact" at the time of statehood. *Id*. The term "navigable in fact" means "used, or are susceptible to being used, . . . as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel." *Id*. The Queechunk Canal was excavated in the 1940's by a private landowner; thus there can be no doubt that the Queechunk Canal was not used for commerce at the time of statehood and is not "navigable in fact." Since the State of New Union did not acquire title to the land under the equal-footing doctrine, the title to the land under the Queechunk Canal remains the private property of Moon Moo Farm.

B. The district court was correct in looking at "federal common law" to determine the property rights of a man-made canal that eventually connects to an interstate body of water because there is a unique federal interest.

The land that a State acquires under the equal-footing doctrine does not necessarily undermine its public trust doctrine[1] authority to regulate navigable water above land it did not acquire. *Id.* at 1235. Unlike the equal-footing doctrine, which is the constitutional foundation

[1] The public trust doctrine grants states authority to regulate navigable waters and their beds in trust for the public for purposes of navigation and fishing rights. *PPL Montana*, 132 S. Ct. at 1235. States retain residual power to determine the scope of the public trust over waters within their borders, while federal law determines riverbed title under the equal-footing doctrine. *Id*.

for the navigability rule of riverbed title, the public trust doctrine remains a matter of state law. *Id*. However, the State of New Union does not have any laws or common law regarding its public trust authority generally, or more specifically, whether a man-made canal is subject to its public trust authority. In the absence of state law, the district court was correct in applying "federal common law" regarding the public trust doctrine because the navigability of a river connected to an interstate body of water is subject matter that involves a unique federal interest.

There is of course, "no federal general common law." *Erie R. Co. v. Tompkins*, 358 S. Ct. 817, 822 (1938). Nevertheless, the court has recognized the need and authority in some limited areas to formulate "federal common law." *Texas Indus., Inc.,* 101 S. Ct. at 2067. These instances are restricted and fall into essentially two categories: those in which a federal rule of decision is necessary to protect uniquely federal interests, and when Congress has given the courts the power to develop substantive law. *Id*. Congress has not passed any statutes regarding the public trust doctrine, and the State of New Union has no common law regarding its public trust authority. Therefore the only question that remains is whether there is a unique federal interest in protecting the property rights of a man-made canal that eventually connects to a navigable-in-fact interstate body of water.

When Moon Moo Farm's predecessor in interest excavated the Queechunk Canal, the canal became navigable by a small boat both up and downstream of the Deep Quod River. R. at 5. The Deep Quod River flows year round and runs into the Mississippi River, a navigable-in-fact interstate body of water that has long been used for commercial navigation. R. at 5. There can be no doubt that Moon Moo Farm's property was subject to state property laws prior to its transformation into the Queechunk Canal. The land was under the authority of a private landowner, and that landowner retained one of the most essential sticks in the bundle of rights

commonly characterized as property — "the right to exclude others." *Kaiser Aetna*, 100 S. Ct. at 391.

But after the private landowner excavated the Queechunk canal, the canal became subject to public trust authority of the State of New Union, subject only to the power of the United States to control such waters for purposes of navigation in interstate and foreign commerce." *PPL Montana*, 132 S. Ct. at 1219. Since the State of New Union has no state law regarding its public trust authority, but the United States still has control of such waters for purposes of navigation in interstate and foreign commerce due to its eventual connection to a navigable-in-fact interstate body of water, there is a unique federal interest and the court may look to "federal common law."

C. Under "federal common law," the federal government may not create a public right of access to the Queechunk Canal so far beyond ordinary regulation or improvement for navigation as to amount to a taking.

In *Kaiser Aetna*, the Supreme Court held that even though a dredged pond had become a "navigable water" of the U.S., the navigational servitude[2] does not allow the government to create a public right of access to an improved pond so far beyond ordinary regulation or improvement for navigation as to amount to a taking. *Kaiser Aetna*, 100 S. Ct. at 384. The Queechunk Canal is an excavated bypass canal that has become a "navigable water" of the U.S., and the federal government retains control of that water for purposes of the navigational servitude. However, since use of the Queechunk Canal by small boat and canoe have nothing to do with the government's use of the navigational servitude, the government may not create a public right of access through the canal. Therefore, James' use of the canal was a trespass.

[2] The navigational servitude, which exists by virtue of the Commerce Clause in navigable streams, gives rise to an authority of the federal government to assure that such streams retain their capacity to serve as continuous highways for purpose of navigation in interstate commerce. *Kaiser* at 391.

In *Kaiser*, private landowners converted a shallow lagoon into a marina that connected the pond to a navigable bay. *Id.* The landowners controlled access to the pond and use of the pond, which Hawaiian law deemed private property. *Id*. The landowners charged fees to maintain the pond. *Id.* at 385. The Army Core of Engineers, the Federal Agency that has jurisdiction over "navigable waters of the United States," tried to limit the landowners' future improvements to the marina they created, and tried to stop the landowners from denying access to the public. *Id.* at 387.

The court reasoned that since the pond was incapable of being used as a continuous highway for the purpose of navigation in interstate commerce prior to the landowners improvements, its maximum depth at high tide was a mere two feet, and its principal commercial value was limited to fishing, it was not the sort of "great navigable stream" that the court recognized as being "incapable of private ownership." *Id* at 388. Lastly, the pond was always considered private property under Hawaiian Law. *Id*. Therefore, the interest of the landowners in the dredged marina was strongly similar to that of owners of land adjacent to navigable water, in which the landowners have the "right to exclude." *Id.* at 389.

Similar to the scenario in *Kaiser*, the Queechunk Canal was not used for purpose of navigation prior to the landowners' improvements, its maximum depth is only three to four feet deep, and its only commercial value is recreation for canoeing. Based on the holding in *Kaiser*, the Queechunk Canal is not the sort of "great navigable stream . . . incapable of private ownership." Furthermore, Moon Moo Farm owns the land underneath the Queechunk Canal, as well as the land on both sides of the Queechunk Canal, and is clearly considered private property under state law. Thus, Moon Moo Farm's interest is strongly similar to that of owners of land adjacent to navigable water, in which the landowners have the "right to exclude."

There is no doubt that the federal government can regulate the Queechunk Canal for navigation purposes since it is now connected to a navigable-in-fact interstate body of water; however, under the holding in *Kaiser*, the federal government cannot assert a right to prohibit Moon Moo Farm from limiting access to the public without using its Eminent Domain Powers. *Id.* at 393. James therefore trespassed when he ignored the "No Trespass" signs and entered the Queechunk Canal.

II. The district court was correct in ruling that the evidence obtained by Dean James' trespass was not admissible for the civil enforcement proceeding brought under 33 U.S.C. § 1319(b), § 1319(d), and 33 U.S.C. § 1365 because of the Fourth Amendment exclusionary rule.

The district court was correct when it determined that the exclusionary rule applied to appellant's civil actions under 33 U.S.C. § 1319(b), (d). 33 U.S.C. § 1319(b) authorizes the United States to bring a civil action for certain violations of the CWA while 33 § 1319(d) permits the United States to seek a civil penalty. The district court also correctly applied the exclusionary rule to civil actions brought by citizen suits under 33 U.S.C. § 1365.

Courts are split on whether the Fourth Amendment exclusionary rule applies in non-criminal actions. *See Trinity Indus., Inc. v. Occupational Safety and Health Review Comm'n*, 16 F.3d 1455, 1461-62 (1994) (exclusionary rule applies for assessing penalties of past OSHA regulations but not for OSHA enforcement actions); *see also Nutrasweet Co. v. X-L Engineering Corp.*, 926 F. Supp 767, 769 (1996) (exclusionary rule does not apply in civil actions brought under CERCLA when investigators did not have a warrant to enter defendants land).

The exclusionary rule applies to the assessment of civil penalties under 33 U.S.C. § 1319(d) for violating certain provisions of the CWA. In *Smith Steel Casting Co. v. Brock*, the court held that illegally obtained evidence for OSHA violations could not be used for assessing penalties against an employer for past OSHA violations. *Smith Steel Casting Co. v. Brock*, 800

F.2d 1329, 1334 (1986). The United States here is seeking a civil penalty under 33 U.S.C. § 1319(d) for what would be a past violation.

The district court finds support in applying the exclusionary rule to 33 U.S.C. § 1319(b) and 33 U.S.C. § 1365 in *Trinity Industries* and *Steel Smith Casting*. *Trinity Indus., Inc.,* 16 F.3d at 1461-62; *Steel Smith Casting*, 800 F.2d at 1334. But, in *Trinity Industries* and *Smith Steel Casting* both courts held that the exclusionary rule actually did not apply to OSHA enforcement actions, a non-criminal action, correcting violations of occupational safety and health standards. *Trinity Indus., Inc.,*16 F.3d at 1461-62; *Steel Smith Casting*, 800 F.2d at 1334. Nonetheless, the district court was correct in applying the exclusionary rule to 33 U.S.C. § 1319(b) and 33 U.S.C. § 1365 because the relevant facts here are materially different from both cases.

A. The exclusionary rule applies to the assessment of civil penalties under 33 U.S.C. § 1319(b) because the purpose of 33 U.S.C. § 1319(b) is to punish, rather than correct the violation.

33 U.S.C. § 1319(b) subjects any person who violates certain sections of the CWA, such as a permit issued or an order, to a civil penalty not to exceed $25,000. The United States alleges that Moon Moo Farm is subject to 33 U.S.C. § 1319(b) for its manure spreading operations in violation of the CWA and seeks civil penalties.

Courts have consistently held that the exclusionary rule applies in enforcement actions of civil penalties by government agencies. *Trinity Indus.*, 16 F.3d at 1462; *Smith Steel Casting Co.*, 800 F.2d at 1334. In *Trinity Industries* the defendant challenged OSHA citations for health and safety violations by claiming that the evidence obtained by OSHA were from an inspection of their facility with an invalid warrant. *Trinity Indus*., 16 F.3d at 1458. The court, agreeing with *Smith Steel Casting*, which also involved an invalid warrant search for OSHA violations, held that the exclusionary rule does apply for "purposes of assessing penalties against an employer

after the fact for OSHA violations . . . " *Trinity Indus.*, 16 F.3d at 1462. There is a good faith exception to applying the exclusionary rule to assessing civil penalties for invalidly or unlawfully obtained evidence. *Id.*

While both *Trinity Industries* and *Smith Steel Casting Co.* held that the exclusionary rule applied specifically to civil penalties for *OSHA enforcement actions,* the cases are analogous to the CWA's civil penalties sought by the EPA. The EPA and OSHA are both federal agencies with delegated powers to levy civil penalties against persons for violating federal law. OSHA is charged with ensuring safe and healthy work conditions pursuant to the Occupational Safety and Health Act of 1970. The EPA enforces various federal environmental protection laws including the CWA. Here, appellant James trespassed onto Moon Moo Farm's property and obtained the evidence relied upon by the United States in their 33 U.S.C. § 1319(b) action seeking a civil penalty. James did not have a warrant or any other right to enter the property. R. at 6. The entrance to the canal where James entered on his "jon boat," had clearly posted "No Trespassing" signs. *Id.* His entrance into the property and acquisition of evidence was therefore illegal. Thus, in accordance with *Trinity Industries* and *Smith Steel Casting Co.*, the district court properly applied the exclusionary rule to James' illegally obtained evidence for assessment of a civil penalty under 33 U.S.C. § 1319(b).

The United States might argue that even if James' trespass onto Moon Moo Farm's property was made in good faith, the exclusionary rule should not apply. However, courts have only applied the good faith exception against the exclusionary rule in criminal cases where a judge has issued an invalid search warrant but law enforcement's reliance on the judge's probable-cause determination was objectively reasonable. *U.S. v. Leon*, 468 U.S. 897, 922 (1984). In *Trinity Industries* the court applied the good faith exception and found that the OSHA

Secretary had relied on a facially valid warrant to conduct an inspection and thus the exclusionary rule did not apply to evidence obtained in the inspection. *Trinity Indus.*, 16 F.3d at 1462. Here, James was neither a government official nor law enforcement. James also did not have a warrant and was trespassing onto Moon Moo Farm's property. R. at 6. The facts do not suggest that James had a good faith reason to think he was allowed into the canal despite the prominently posted "No Trespassing" signs. *Id.* Therefore the good faith exception to the exclusionary rule will not apply to the evidence obtained by James' in his trespass in assessing civil penalties for 33 U.S.C. § 1319(b).

B. The exclusionary rule applies to civil actions under 33 U.S.C. § 1319(b) 33 U.S.C. § 1365 when the evidence is illegally obtained by a public individual.

33 U.S.C. § 1319(b) authorizes the United States to commence a civil action for relief of violations of the CWA. 33 U.S.C. § 1365 authorizes any U.S. citizen to commence a civil action against another person, including the U.S. or government agency, for violations under the CWA.

The district court, interpreting *Trinity Industries* and *Smith Steel Casting*, held that the exclusionary rule applied to both 33 U.S.C. § 1319(b) and 33 U.S.C. § 1365. R. at 9. However, both *Trinity Industries* and *Smith Steel Casting* actually held that for OSHA violations, the exclusionary rule does not apply "for purposes of correcting violations of occupational safety and health hazards." *Trinity Indus.*,16 F.3d at 1462; *Smith Steel Casting*, 800 F.2d at 1334. § 1319(b) and § 1365 are civil suits brought to correct ongoing violations of the CWA. 33 U.S.C. § 1319(b); 33 U.S.C. § 1365(a)(2). Both *Trinity Industries* and *Smith Steel Casting* base their holdings on *I.N.S. v. Lopez-Mendoza,* which held that the exclusionary rules does not apply in a civil deportation hearing. *I.N.S. v. Lopez-Mendoza* 468 U.S. 1032, 1046-47 (1984). Justice O'Connor writing for the majority stated:

> "Presumably no one would argue that the exclusionary rule should prevent an agency from ordering correct action at a leaking hazardous waste dump if the evidence underlying the order had been improperly obtained…"

Id. at 1046. Similarly in *Nutrasweet Co.* the court held that evidence unlawfully obtained by government officials and law enforcement for a CERCLA civil action was not subject to the Fourth Amendment exclusionary rule. *Nutrasweet Co.,* 926 F. Supp. at 769. Thus, the holdings of *Trinity Industries*, *Smith Steel Casting*, and *Nutrasweet Co*., suggest that the civil actions brought under § 1319(b) and § 1365 are also not subject to the exclusionary rule because the statutes authorize civil actions seeking corrective remedies.

However, *Trinity Industries*, *Smith Steel Casting*, and *Nutrasweet Co.* are factually distinct from the facts of this case. In *Trinity Industries* and *Smith Steel Casting*, the evidence was unlawfully obtained, but acquired by federal officials with a warrant (though later found invalid), acting in their capacity as inspectors for a federal agency to investigate health and safety violations. *Trinity Indus*., 16 F.3d at 1458; *Smith Steel Casting*, 800 F.2d at 1331. In *Nutrasweet Co.*, the state environmental protection agency officials and law enforcement conducted a search of defendant's property without a warrant. *Nutrasweet Co.*, 926 F.Supp. at 769. In the present case, James did not have a warrant nor was he a government official or law enforcement; he was a public individual trespassing on private property. R. at 6. Furthermore there is no argument that James acted in good faith; he was conducting his own investigation and knowingly directed his boat into the canal whilst ignoring the "No Trespassing" signs. If the court had held that the exclusionary rule did not apply here, then public individuals would be able to enter private property without permission, acquire evidence, and admit this evidence in a civil action. Private property owners would then be subjected to illegal trespasses and then civil suits arising from these violations of law. *Trinity Industries* and *Smith Steel Casting* involved government officials

who, in their official capacity to enforce the law, thought they had a valid warrant to conduct an inspection. To exempt evidence from the exclusionary rule that is unlawfully obtained by a public individual for use in a civil action is contrary to the purpose of the rule and public policy.

Furthermore, in considering whether the exclusionary rule will apply to illegally obtained evidence, courts have weighed the cost of excluding the evidence with the social benefits to determine if the rule should apply. *See I.N.S.*, 468 U.S. at 1050. The court in *I.N.S.* had to decide whether the exclusionary rule should apply in civil deportations. It determined that costs of applying to exclusionary rule to civil deportations outweighed the benefits, as this "would compel courts to release from custody, persons who would them immediately resume their commission of a crime through their continuing, unlawful presence in this country." *Id.* at 1050. There is no such threat here; the social benefits of applying the exclusionary rule outweigh the costs of not applying the rule to evidence unlawfully collected by public individuals for civil actions. The evidence James collected could have been easily obtained by the EPA or government agency with a warrant. Though the alleged continuous violation by Moon Moo Farm could potentially harm the environment, the law should not provide an avenue for a public individual to unlawfully obtain evidence and use it in a civil action. For the foregoing reasons, the Court should affirm the district court's finding that the exclusionary rule applies.

III. The district court was correct in ruling that Moon Moo Farm does not require a permit under the Clean Water Act ("CWA") National Pollutant Discharge Elimination System ("NPDES") permitting program.

Land application discharges from a Concentrated Animal Feeding Operation ("CAFO") are subject to the CWA NPDES permitting program unless such discharges fall under the agricultural storm water discharge exemption. 40 C.F.R. § 122.23. As the district court properly held, Riverwatcher and the EPA's assertion that Moon Moo Farm is subject to NPDES

permitting is squarely at odds with this rule. First, Moon Moo Farm is not a CAFO. Second, regardless of whether Moon Moo Farm is defined as a CAFO, any runoff from its manure land application is exempt from NPDES permitting under the agricultural stormwater exemption.

A. There is no admissible evidence that Moon Moo Farm is a CAFO subject to NPDES permitting by virtue of a discharge from its manure land application area.

The CWA generally prohibits "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). A point source is defined in the statute as "any discernible, confined and discrete conveyance including but not limited to any pipe, ditch, [or]… concentrated animal feeding operation . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362 (14). Moon Moo Farm houses 350 head of dairy cow, so the operation could potentially constitute a Medium CAFO. 40 C.F.R. § 122.23(b)(6)(i)(a). However, for the CAFO definition to apply one of two conditions outlined in EPA regulations must be met. The first condition is clearly inapplicable because there is no claim that Moon Moo Farm directly discharges pollutants into "waters of the United States, which originate outside of and pass over, across, or through the facility." 40 C.F.R. § 122.23(b)(6)(ii)(B). Riverwatcher does not assert that waters of the United States pass over, cross, or go through Moon Moo Farm's milk production area. R. at 8.

The district court properly held that the second condition was also inapplicable. If waters of the United States do not pass over, across, or through the production area then pollutants must be "discharged into waters of the United States through a man-made ditch, flushing system, or other similar man-made device" for designation as a CAFO. 40 C.F.R. § 122.23(b)(6)(ii)(A). This condition is directly tied to whether the evidence obtained by Dean James on April 12, 2013 when he trespassed onto Moon Moo Farm's private property is admissible. As previously

discussed in Issue II, *supra*, the district court properly excluded evidence from this unwarranted search and seizure. *See* Section II. Without such evidence, Riverwatcher and the EPA have no proof of *any* discharge into waters of the United States. Instead, the State of New Union properly designated Moon Moo Farm as a "no-discharge" animal feeding operation. R at 5.

Both the courts and the EPA have made it clear there is no duty for a CAFO to apply for a NPDES permit if there is no discharge. A NPDES permit allows for an addition of a pollutant to a navigable water of the United States from a point source provided certain conditions are met. 33 U.S.C. § 1342. These permits come with onerous regulations including regular monitoring, reporting and public disclosure. 33 U.S.C.A. § 1318. Given the potential difficulty and cost of such permits, not all CAFOs are required to have NPDES permits. While the EPA issued a rule in 2003 that assumed all CAFOs had the potential to discharge and thus had to apply for a NPDES permit, this rule was struck down as outside of the EPA's authority. *Waterkeeper Alliance, Inc. v. U.S. E.P.A.*, 399 F.3d 486, 504 (2d Cir. 2005). The CWA gives the EPA the authority to "regulate and control only *actual* discharges—not potential discharges, and certainly not point sources themselves." *Id*. at 505. The EPA's new rules, enacted in 2008, only require a CAFO to apply for a permit when there is actual discharge or proposed discharge of a pollutant. Revised National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines for Concentrated Animal Feeding Operations in Response to the Waterkeeper Decision, 73 Fed. Reg. 70418-01 (Nov. 20, 2008). Subjecting Moon Moo Farm to a NPDES permitting program when there is no admissible evidence of an actual discharge would be outside of EPA's authority.

B. Regardless of whether or not Moon Moo Farm is a CAFO, it is still exempt from NPDES permitting requirements because the land application of the manure was done in compliance with a nutrient management plan ("NMP")

and any discharge from the fields where the manure was applied was the result of precipitation.

Whether Moon Moo Farm is a CAFO and whether the evidence obtained through Dean James' trespass is admissible do not ultimately determine if Moon Moo Farm is subject to the NPDES permitting program. The CWA and accompanying regulations repeatedly state that agricultural stormwater discharges are exempt from NPDES permitting regardless of an operation's status as a CAFO. *See* 33 U.S.C. § 1362(14) (the term point source does not include agricultural stormwater discharges); 40 C.F.R. § 122.23(e) (discharges from a CAFO are subject to NPDES permitting "except where it is an agricultural storm water discharge"). Thus, even if Moon Moo Farm was a CAFO and the evidence obtained by Dean James was admissible, the district court was still correct in holding that Moon Moo Farm is not subject to the NPDES permitting program. Moon Moo Farm's dairy cattle operation is clearly agricultural in nature. Additionally, since any discharge that occurred on the day of Dean James' trespass was caused by precipitation, the runoff must be considered stormwater. Finally, given the division of federal and state authority under the CWA, federal NPDES permitting is inapplicable to Moon Moo Farm given the farm's compliance with a NMP approved by the State of New Union.

While agricultural stormwater can be a broad term and some courts have struggled in the past with whether a specific factual situation fits the exception, the facts in this case perfectly align with a characterization of agricultural stormwater specifically enumerated in the regulations. *See Alt v. U.S. E.P.A.*, 979 F. Supp. 2d 701, 710 (N.D.W. Va. 2013) (citing EPA guidance pertinent to land application discharges but not for manure particles that inadvertently escape confinement areas). EPA regulations specify that:

> "where 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 (*emphasis added*). Moon Moo Farm's dairy cattle operation is clearly agricultural in nature. Given the division of federal and state authority under the CWA, federal NPDES permitting is inapplicable to Moon Moo Farm given the farm's compliance with a NMP approved by the State of New Union. Finally, since any discharge was related to the heavy precipitation in the hours preceding his visit, the runoff must be considered stormwater.

i. Plain English, common sense, and precedent lead to the inescapable conclusion that Moon Moo Farm's operation is "agricultural" in nature.

While "agricultural stormwater" is repeatedly referenced in the CWA and EPA regulations, the term "agricultural" is never defined. *See Alt*, 979 F. Supp. 2d at 710 (the term "agricultural stormwater discharge" was not and has not been defined in the statute). Without guidance from the EPA as to the meaning of "agricultural," courts must rely on the ordinary meaning of the words. *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 91 (2006) (citing *Perrin v. United States*, 444 U.S. 37 (1979)). Raising livestock and cultivating soil are both part of the dictionary definition of "agricultural." *Waterkeeper Alliance, Inc.*, 399 F.3d at 509 (citing Webster's New World Dictionary of American English 26 (3rd College Ed.1988)). In *Alt v. U.S. E.P.A*, "common sense and plain English" led to the "inescapable conclusion" that an operation comprised of eight poultry confinement houses and an adjacent farmyard "is 'agricultural' in nature." *Alt*, 979 F. Supp. 2d at 704, 711. Moon Moo Farm's operation includes 350 head of dairy cows, housed in a barn just like the eight poultry confinement houses in *Alt*. R. at 4. The operation also includes 150 acres of Bermuda grass fields, which serves as silage for those dairy cows, similar to the farmyard in *Alt*. R. at 5. Moon Moo Farm, a livestock and plant cultivation

operation, is inescapably agricultural in nature, satisfying the first requirement of the agricultural stormwater exception to NPDES permitting requirements.

ii. Moon Moo Farm's land application of the manure mixture was in compliance with a valid NMP.

For the agricultural stormwater exception to apply, the land application of the manure, litter, or wastewater must have been done in accordance with site-specific nutrient management practices. 40 C.F.R. § 122.23. The district court properly held that Moon Moo Farm's application of the liquid manure mixture was done in compliance with a site-specific nutrient management practice. Moon Moo Farm followed the practices laid out in the NMP filed with State of New Union and the State of New Union's process for accepting NMPs was valid.

Moon Moo Farm filed a NMP with the Farmville Regional Office of the State of New Union's Department of Agriculture. R. at 5. This NMP set forth planned seasonal manure application rates and included a calculation of expected uptake of nutrients by the Bermuda grass grown on the fields where the manure is spread. R. at 5. Moon Moo Farm's records indicate the manure was always applied at rates consistent with the NMP. R. at 6. Riverwatcher's own agronomist admitted she "had no basis to dispute these records." R. at 6. Riverwatcher's theory for why there was a discharge despite compliance with the NMP is that the Bermuda grass did not absorb the nutrients as anticipated because of the acid whey in the liquid manure mixture. R. at 6. This is irrelevant. A valid NMP does not ensure no discharge. As long as the land application process is in compliance with the NMP, discharge is acceptable and not subject to NPDES permitting. *Waterkeeper Alliance, Inc.*, 399 F.3d at 496 (citing 33 U.S.C. § 1362 (14)). Allowing discharge is what makes agricultural stormwater an *exception* to the NPDES rule. Given that Moon Moo Farm followed the proper procedure for liquid manure application as specified in the NMP, the discharge does not render Moon Moo Farm out of compliance. The

district court was correct in finding that it is "undisputed that Moon Moo Farm filed an NMP with the State agricultural field office, and applied manure in accordance with its filed plan" and thus is not subject to NPDES permitting.

Beyond the Moon Moo Farm's specific NMP, the NMP program administered by the New Union DOA broadly is also valid. The district court's decision highlights that the New Union DOA does not ordinarily review submitted NMPs nor solicit public comment on such NMPs. R. at 5. Both ordinary review and public comment are irrelevant though as neither is a requirement for a state to have a valid NMP program. Under the CWA, all that is required is that the State of New Union has the authority to review NMPs, not that it actually does so. The Second Circuit's case *Waterkeeper Alliance, Inc. v. U.S. E.P.A.* is the only case that references a state's duty to review NMPs. *Waterkeeper Alliance, Inc.*, 399 F.3d at 499. However, even that case does not say every NMP must be reviewed. Instead, the court held the CAFO Rule was arbitrary and capricious for "failing to provide for permitting authority review of the nutrient management plans". *Id.* There is no dispute that the State of New Union DOA has the authority to review NMPs and thus how often such NMPs are reviewed is immaterial. R. at 5. Additionally, the weight this court should give this Second Circuit opinion is minimal as the regulation cited was not subsequently amended to include rules requiring the review of NMPs by state permitting agencies. 40 C.F.R. §412.4. Given the validity of the State of New Union's NMP process and Moon Moo Farm's site specific NMP, if the discharge Dean James claims to have seen was related to precipitation, the discharge was agricultural stormwater and thus is exempt from NPDES permitting requirements.

iii. The discharge Dean James' claims to have evidence of was from lands under the control of the assumed CAFO and was related to the two inches of rain that fell in the Farmville Region in the hours preceding his visit and thus was a stormwater discharge.

Once compliance with a site-specific NMP is established, "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. Thus, if the discharge was from an area under the control of the CAFO and was related to precipitation, then any discharge was exempt from federal NPDES permitting. Riverwatcher asserts that the discharge included nutrients from the manure mixture applied to Moon Moo Farm's 150 fields of Bermuda grass, land indisputably under the control of Moon Moo Farm. R. at 5. Further, between April 11 and April 12, 2013, when Dean James trespassed into the Queechunk Canal and took water samples, two inches of rain fell in the Farmville Region. R. at 6. Clearly any discharge was related to precipitation and is clearly within the agricultural stormwater exception.

Land application areas are "an integral and indispensable part of CAFO operations." *Waterkeeper Alliance, Inc.*, 399 F.3d at 511. In *Alt v. U.S. E.P.A*, the plaintiffs tried to argue that the farmyard adjacent to the poultry confinement houses was not part of the CAFO. *Alt*, 979 F. Supp. 2d at 713. However, the court rejected such an argument by relying on the definition of a "facility" under the CWA regulations to explain what lands are under the control of a CAFO. *Id.* In reference to a NPDES point source, a facility is defined as including any "land or appurtenances thereto." 40 C.F.R. § 122.2. An appurtenance is "something that belongs or is attached to something else." Black's Law Dictionary (9th ed. 2009). The barn that houses the dairy cows, the manure lagoon, and the 150 acres of fields at Moon Moo Farm are all part of one operation. R. at 4-5. Each is located at the bend in the Deep Quod River and is tied to the overall operation as a dairy farm. R. at 5. The lagoon collects the manure that is then spread on the fields of Bermuda grass. *Id.* The Bermuda grass is eventually harvested as silage, food for the dairy cows, thus ensuring even the supposed "waste" from the animal operation is used to

support the dairy farm. *Id.* Given the proximity of the fields to the dairy cow barn and the necessity of the fields for operation of the dairy farm, the discharge Dean James claims is runoff from the land application of the manure mixture is certainly from lands under the control of the CAFO (if Moon Moo Farm can even be considered a CAFO, *see* Section III.a.).

A discharge of liquid manure is exempt from NPDES permitting requirements when related to precipitation. 40 C.F.R. § 122.23. Various courts have interpreted this to mean that CAFOs "should not be held accountable for any discharge that is primarily the result of precipitation." *Waterkeeper Alliance, Inc.,* 399 F.3d at 509; *see also Alt*, 979 F. Supp. 2d at 715 (holding that discharge "washed from the Alt farmyard to navigable waters by a precipitation event" was agricultural runoff and thus exempt from the NPDES permitting requirement of the CWA). Few cases have addressed what it means for a discharge to "result from" precipitation but the differences between the discharge Dean James claims to have witnessed and the discharge in *Concerned Area Residents for Env't v. Southview Farm* suggest any runoff from Moon Moo Farms on April 12, 2013 was related to precipitation. *Concerned Area Residents for Env't v. Southview Farm*, 34 F.3d 114, 120 (2d Cir. 1994).

In *Concerned Area Residents for Env't*, a liquid manure spreading operation was found not to fall under the agricultural stormwater exception because the runoff was not caused by rain. *Id.* Witnesses noticed the heavy liquid manure application to the fields and the liquid manure began pooling in large quantities prior to any precipitation. *Id.* at 121. The court held it was reasonable to attribute this runoff to over-saturation of the fields as opposed to the precipitation events. *Id.*

Dean James however only has evidence, assuming evidence from such a trespass is even admissible (*see* Section II), from a site visit during a significant storm event. R. at 6. Between

the day of his visit and the day before, two inches of rain fell in the Farmville region. R. at 6. Moon Moo Farm happened to be spreading liquid manure on that day, which was not prohibited in Moon Moo Farm's NMP, and thus brown water was carried through a drainage ditch into the Queechunk Canal. R. at 6-7. Given that the liquid manure application occurred on the day of this heavy rain, there is no evidence of the pooling and over-saturation evident in *Concerned Area Residents for Env't*. Instead, any discharge was washed from the fields to the water by a precipitation event and thus the agricultural stormwater exemption must apply.

In sum, while there is no evidence that Moon Moo Farm is even a CAFO under the CWA, such a finding would still not be enough to subject Moon Moo Farm to NPDES permitting. Any discharge Dean James saw on April 12, 2013 falls under agricultural stormwater exception of the CWA. Clearly the operation of the dairy farm can be considered agricultural in nature. Further, Moon Moo Farm followed all of the rules laid out in the NMP that the State of New Union approved. If a federal permitting system were to now apply, the state's important authority under the CWA would be diminished. Finally, any discharges on April 12, 2013 were the result of the significant storm event ongoing during Dean James' visit and thus are not subject to NPDES permitting. The district court properly held that any discharge from Moon Moo Farm is exempted from the NPDES permitting requirement by the agricultural stormwater exception. This Court should affirm.

IV. The district court was correct in ruling that Moon Moo Farm is not subject to a citizen suit under RCRA.

There are two citizen suit provisions under RCRA. 42 U.S.C. § 6972(a)(1)(A) – (B). Riverwatcher brought a citizen suit under § 7002(a)(1)(A), alleging that Moon Moo Farm has violated the RCRA § 4005 open dumping provisions by spreading a combination of manure and acid whey fertilizer. 42 U.S.C. § 6945(a); 42 U.S.C. § 6972(a)(1)(A). Riverwatcher also

brought a citizen suit under § 7002(a)(1)(B), claiming that the fertilizer spreading operations created an ISE. 42 U.S.C. 6972(a)(1)(B). The § 7002(a)(1)(A) open dumping claim must fail because the manure and acid whey fertilizer is not a "discarded material" pursuant to the broad statutory or narrow regulatory definition of "solid waste." Since the fertilizer is not a "discarded material" pursuant to the statutory definition of "solid waste" the § 7002(a)(1)(B) claim also must fail. However, even if the fertilizer was a "solid waste," the § 7002(a)(1)(B) claim must still fail since the present conditions do not indicate that a substantial endangerment exists.

A. Moon Moo Farm is not subject to the open dumping provisions of RCRA Subtitle D because the fertilizer combination of manure and acid whey is not a "solid waste."

RCRA § 4005 specifically prohibits the practice of "open dumping of solid wastes." 42 U.S.C. § 6945(a). RCRA § 4005(a) authorizes citizen enforcement of this ban in a citizen suit brought pursuant to RCRA § 7002(a)(1)(A). An "open dump" is defined as any facility or site where "solid waste" is disposed of which is not a sanitary landfill . . ." 42 U.S.C. § 6903(14). Moon Moo Farm does not meet the definition of an "open dump" because the manure and acid whey[3] combination that it uses as fertilizer is a not "solid waste" pursuant to RCRA or its regulations.

RCRA authorizes two kinds of citizen suits, and under § 7002(a)(1)(A), courts have held that that narrow regulatory definition of solid waste applies, as opposed to the broader statutory definition. *Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co., Inc.*, 989 F.2d 1305, 1314-15 (1993). The statutory definition of "solid waste" means any "garbage, refuse, or sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, mining, and agricultural operations,

[3] Whey is the liquid remaining after milk has been curdled and strained.

and from community activities . . ." 42 U.S.C. § 6903(27). The regulations narrowly define "solid waste" as "any discarded material" and further limit the definition of "discarded material" to that which is "abandoned." 40 C.F.R. § 261.2(a). *See also Connecticut Coastal*, 989 F.2d at 1314. However, according to the RCRA regulations, this narrow definition of "solid waste" only applies to "wastes that are also hazardous for purposes of the regulation implementing Subtitle C of RCRA." 40 C.F.R. 261.1(b)(1); *Connecticut Coastal*, 989 F.2d at 1316.

Given that Riverwatcher is bringing this case under the 7002(a)(1)(A) citizen suit, the narrow regulatory definitions would normally apply. However, Riverwatcher is arguing a violation of Subtitle D where the broader statutory definition would normally apply. Due to this inconsistency, it makes sense to evaluate the broader statutory definition, and Riverwatcher has not met its burden to show that the acid whey and manure combination that Moon Moo Farm uses as fertilizer meets even the broader statutory definition of "solid waste". Since the acid whey and manure combination does not meet the broad statutory definition, it certainly cannot meet the narrow regulatory definition.

i. The acid whey and manure combination that Moon Moo farm uses as a fertilizer is not a "solid waste" because it is not a "discarded material" pursuant to its ordinary, contemporary, meaning.

RCRA itself does not define the term "discarded material." Accordingly, a fundamental canon of construction provides that "unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, meaning." *Wilderness Soc'y v. United States Fish & Wildlife Serv.*, 353 F.3d 1051, 1060 (9th Cir. 2003). In interpreting the ordinary, contemporary, meaning, courts throughout the circuits have used the dictionary definition to define the verb "discard" as to "cast aside; reject; abandon; give up." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1041 (9th Cir. 2004) (hereinafter "*Safe Air*") (citing the New Shorter Oxford English

Dictionary 684 (4th ed. 1993)). *See also Am. Petroleum Inst. v. EPA*, 216 F.3d 50, 50-56 (D.C. Cir. 2000) (defining "discarded" as "disposed of," "thrown away," or "abandoned"). The acid whey and manure combination that Moon Moo Farm uses is not a "discarded material" under the ordinary, contemporary, meaning because it has not been disposed of, thrown away, abandoned, or rejected, but rather, Moon Moo Farm has put it to beneficial use as a fertilizer. R. at 5.

ii. The district court was correct when it ruled that the manure and acid whey mixture used by Moon Moo farm is not "discarded material" because it does not meet any of the relevant considerations from *Safe Air*.

There are a myriad of considerations when interpreting the term "discarded materials" within the scope of RCRA's definition of "solid waste." In *Safe Air,* the Ninth Circuit synthesized cases from the different circuits to identify the relevant factors for determining whether a material is "discarded" for the purposes of identifying a "solid waste." The relevant factors are:

1. Whether the material is destined for beneficial use or recycling in a continuous process by the generating industry itself. *Am. Mining Congress v. U.S. EPA*, 824 F.2d 1177, 1186 (D.C. Cir. 1987).
2. Whether the materials are being actively reused, or whether they merely have potential of being reused. *Ass'n of Battery Recyclers v. U.S. EPA*, 208 F.3d 1047, 1056 (D.C. Cir. 2000).
3. Whether the materials are being reused by its original owner, as opposed to use by a salvager or reclaimer. *U.S. v. ILCO*, 996 F.2d 1126, 1131 (11th Cir. 1993).

Safe Air, 373 F.3d at 1041. In looking at each factor, the manure and acid whey used by Moon Moo Farm cannot be considered a "solid waste."

Neither the manure nor acid whey meet the first factor of "discarded materials" because they are both destined for beneficial use or recycling in a continuous process by the generating

industry itself. Starting with the manure, the manure and liquid waste from the cows is collected and stored in an outdoor lagoon for use as a fertilizer. R. at 5. The fertilizer is then spread on 150 acres of field containing Bermuda grass, which is dried and harvested for use as silage.[4] *Id.* The silage is then fed to the cows that produce the manure and waste, beginning the process all over again. *Id.* Based on that lifecycle, the manure is part of a continuous process utilized by the generating industry itself.

As for the acid whey, in 2010, Moon Moo Farm increased the milking herd from 170 cows to the current 350 cows in order to serve the growing demand for milk for Greek yogurt production at the Chokos Greek Yogurt processing facility ("Chokos plant") in Farmville. *Id*. Moon Moo farm accepts the acid whey produced by the Chokos plant and adds it to the manure lagoons. Thus the acid whey is included in the fertilizer mixture sprayed on the fields of Bermuda grass that is ultimately fed to the cows. The cows eat the grass, and then produce the milk, which is then sent to the Chokos plant, starting the process all over again. R. at 5. Based on that lifecycle, the acid whey is part of a continuous process utilized by the generating industry itself.

The manure and acid whey also clearly meet the second factor from *Safe Air*, which is whether the materials are being actively reused, or whether they merely have the potential of being reused. *Safe Air,* 373 F.3d at 1041 (citing *Ass'n of Battery Recyclers v. U.S. EPA*, 208 F.3d 1047, 1056 (D.C. Cir. 2000)). It is clear that Moon Moo Farm is actively reusing the manure and acid whey by spreading it on its fields as fertilizer.

[4] Silage is green fodder compacted and stored in silo or stack. Oxford English Dictionary (2d ed. 1989).

Finally, the manure and acid whey meet the third factor because the original owner is reusing the material, as opposed to a salvager or reclaimer. *Safe Air,* 373 F.3d at 1041 (citing *United States v. ILCO*, 996 F.2d 1126, 1131 (11th Cir. 1993)). There is no doubt that the original owner, Moon Moo Farm, is using the manure as fertilizer. Riverwatcher may claim that the Chokos plant, not Moon Moo Farm, is the original owner of the acid whey, and therefore the acid whey does not meet this factor. However, Moon Moo Farm's cows produce the milk, which creates the acid whey at the Chokos plant and is therefore substantially connected to the original owner.

iii. The acid whey and manure combination is a fertilizer serving its intended purpose, and a material is not "discarded" until after it has served its intended purpose.

Even if manure and acid whey are individually "solid wastes," which they are not, the fertilizer that Moon Moo Farm uses is not "discarded" because it serves an intended purpose. RCRA applies to both "waste-by-products of the nation's manufacturing process, as well as manufactured products." *Ecological Rights Found. v. Pac. Gas and Elec. Co.*, 713 F.3d 502, 515 (9th Cir. 2013) (*hereinafter "ERF"*). The key to whether a manufactured product is a "solid waste," is whether that product has "served its intended purpose and no longer wanted by the consumer." *Id. See also No Spray Coal., Inc. v. City of New York*, 252 F.3d 148, 150 (2d Cir. 2001) (material is not discarded until after it has served its intended purpose).

In *ERF* a wood preservative that was on utility poles was leaking, spilling, and otherwise escaping from the poles. *ERF,* 713 F.3d at 515. The court held that the preservative that escaped from treated utility poles through normal wear and tear while those poles were in use was not a RCRA solid waste. *Id. See also No Spray Coal., Inc.,* 252 F.3d at 150 (court held that pesticides are not discarded when sprayed into the air with the design of effecting their intended purpose:

reaching and killing mosquitoes and their larvae). Though escaped wood preservative, like pesticide spray, is no longer serving its intended purpose, it has been washed or blown away by natural means as an expected consequence of its intended purpose and has therefore not been "discarded." *Id*. at 516.

Similarly, the manure and acid whey mixture used as a fertilizer by Moon Moo Farm is serving its intended purpose of fertilizing the grass. Though some manure may be running offsite by natural means, that is an expected consequence of its intended purpose, and is therefore not "discarded."

iv. Even if the acid whey and manure fertilizer is a "solid waste," the district court was correct in ruling that the claim must fail because the EPA regulations specifically exclude land application of agricultural products from regulation as an "open dump."

The EPA regulations pertaining to "solid waste" specifically exclude land application of agricultural products from regulation as an "open dump:" "(1) the criteria do not apply to agricultural wastes, including manures and crop residues, returned to the soil as fertilizers or soil conditioners." 40 C.F.R. 257.1(c)(1). *Safe Air* noted that Congress specifically declared that agricultural products that could be recycled or reused as fertilizers were not its concern, and were not to be considered "discarded materials." *Safe Air,* 373 F.3d at 1045-46.

There is no doubt that manure is an agricultural waste returned to the soil as fertilizer, and therefore excluded by the regulation. Riverwatcher may argue that the acid whey is not an agricultural product because it is a by-product of the Chokos plant; however, upon further evaluation, the district court was correct in concluding that the acid whey is an agricultural waste returned to the soil as a fertilizer. The milk produced by the animals at Moon Moo farm is supplied to the Chokos plant to produce Greek yogurt. R. at 5. The acid whey by-product from that Greek yogurt, essentially a by-product of the milk from Moon Moo Farm, is then returned

back to Moon Moo farm for use as a fertilizer. R. at 5. Therefore, even if the manure and acid whey were considered "solid waste," which they are clearly not, they are still excluded under the EPA regulations as "agricultural products."

This Court should affirm the district court's ruling that Riverwatcher's open dumping claim under 7002(a)(1)(A) must fail because the manure and acid whey that Moon Moo Farm uses as fertilizer is not a "discarded material," and therefore, it is not a "solid waste."

B. The district court was correct in ruling that the Imminent and Substantial Endangerment ("ISE") Clause of RCRA does not apply to Moon Moo Farm because there is no current or substantial endangerment.

Under RCRA §7002(a)(1)(B), a citizen may have a cause of action:

> "Against anyone . . . including a past or present generator . . . transporter . . . or operator . . . of a treatment, storage, or disposal facility, 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)(B). To bring an ISE claim, Riverwatcher must show that: (1) the conditions may present an imminent and substantial endangerment to health or the environment, (2) the potential endangerment stems from the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste, and (3) the person has contributed or is contributing to such handling, storage, treatment, transportation or disposal. *ERF,* 713 F.3d at 514. Even if Riverwatcher can show that Moon Moo Farm may have contributed to a past endangerment, Riverwatcher's claim must fail because, as explained thoroughly in the last section, the manure and acid whey combination is not a "solid waste," and even if it was, Moon Moo Farm has not contributed to conditions that currently present an imminent and substantial endangerment.

i. The district court was correct in ruling that Moon Moo Farm has not contributed to conditions that may present an imminent and substantial endangerment to health or the environment.

Moon Moo Farm has not contributed to an imminent and substantial endangerment to health or the environment because there is no current substantial endangerment. Courts have consistently ruled that ISE claims are meant to confer broad authority upon the courts to grant equitable relief to the extent necessary to eliminate any risk posed by toxic substances. *California Dep't of Toxic Substances Control v. Interstate Non-Ferrous Corp.*, 298 F. Supp 2d 930, 980 (E.D. Cal. 2003). Despite that broad mandate, the endangerment must be currently present, and therefore excludes waste that no longer presents such a danger. *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 480 (1996) (holding that there is no remedy to recover prior cost of cleaning up toxic waste that does not continue to pose danger to health or the environment at time of suit). In the current case, there was a nitrate advisory in the late winter and early spring of 2013, but there is no evidence that the water is currently unfit for drinking, thereby rendering Riverwatcher's ISE claim moot. R. at 6-7.

An endangerment is an actual, threatened, or potential harm to health or the environment. *U.S. v. Valentine,* 856 F. Supp. 621, 626 (1994) (*hereinafter Valentine I)*. Under the endangerment standard, neither certainty nor proof of actual harm is required, only a risk of potential harm. *Dague v. City of Burlington*, 935 F.2d 1343, 1356 (1991) (*hereinafter Dague I*). An endangerment is "substantial" if there is reasonable cause for concern that health or the environment may be seriously harmed. *U.S. v. Union Corp.*, 259 F. Supp. 2d 356, 400 (E.D. Pa. 2003). The endangerment is "imminent" if "the present conditions indicate that there may be future risk to health or the environment." *Price v. U.S. Navy*, 39 F.3d 1011, 1019 (9th Cir. 1994) (holding that the presence of toxic materials in soil beneath a home do not pose a present

endangerment). The language of imminence implies that there must be a threat, which is present *now*, although the impact of the threat may not be felt until later. *Meghrig,* 516 U.S. at 480.

Riverwatcher's ISE claim is moot because the *present conditions* do not indicate that there is an actual, threatened, or potential harm to health or the environment. An ISE claim can only be sustained when the threat is present now. *Id*. The Farmville Water Authority ("FWA") issued a "nitrate" advisory for its drinking water in late winter and early spring of 2013. However, there is no indication that the water is currently unfit for drinking. The fact that Moon Moo Farm did not increase operations until 2010, but the FWA has issued advisories in 2002, 2006, 2007, 2009, and 2010, reveal that the nitrate issue is typically temporary. There is currently nothing to clean up, nor any proof that an injunction on the manure spreading operations would prevent a future advisory.

Even if Riverwatcher can show that the application of manure during rain events in the future will lead to excess runoff of nutrients, Riverwatcher has not shown that the danger posed by that runoff is "substantial." The FWA's 2013 advisory was issued because the water was unsafe for drinking by infants less than two years of age. It did not pose any health threats to juveniles or adults. In the advisory, the FWA recommended to its customers to use bottled water for their infants, thereby eliminating any present danger at the time.

Riverwatcher's ISE claim must fail because the manure and acid whey fertilizer is not a "solid waste," there is no present endangerment, and even if there was, the endangerment was never "substantial." This court should affirm the district court ruling.

CONCLUSION

For the above reasons, Moon Moo Farm asks this court to affirm the district court on all issues.