TEAM 27

C.A. 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
Intervenor-Plaintiff-Appellant, Cross-Appellee,

vs.

MOON MOO FARM, INC.,
Defendant-Appellee

On Appeal from the United States District Court for the District of New Union,
The Honorable Romulus N. Remus, District Judge Presiding.

Case No. 155-CV-2014

BRIEF FOR APPELLEE MOON MOO FARM, INC.
Defendant-Appellee

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STATEMENT OF JURISDICTION

The United States of America ("EPA"), Claimant, and Deep Quod Riverwatcher, Inc. and Dean James (collectively "Riverwatcher" or "James"), Intervenor, appealed the United States District Court for the State of New Union Order issued on April 21, 2014. The District Court properly exercised federal question jurisdiction over the Clean Water Act ("CWA") and Resource Conservation and Recovery Act ("RCRA"), and appropriately acknowledged that it could therefore also exercise supplemental jurisdiction over Moon Moo Farm, Inc.'s ("the Farm") state law trespass claims pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1367(a). The Order granted the Farm's motion for summary judgment on all claims including its counterclaim. Judgment was entered dismissing the EPA's and Riverwatcher's claims. The order is final; thus jurisdiction is proper for this appeal pursuant to 28 U.S.C. § 1291.

STANDARD OF REVIEW

The present matter is an appeal from the District Court's Order granting Moon Moo Farm's motion for summary judgment on the CWA and the RCRA claims and its trespass counterclaim. Most matters before this court are questions of law to be reviewed *de novo*. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988). Questions of fact are reviewed for clear error. *Id.*

STATEMENT OF THE ISSUES

1. The Queechunk Canal is a not public trust navigable water of the State of New Union obviating a public right of navigation because the canal is a man-made water body, and both sides of its banks as well as its bed are privately owned by the Farm.

2. Evidence illegally obtained through a common law trespass and without a warrant is inadmissible in a civil enforcement proceeding initiated under the Clean Water Act.

3. The Farm does not require a Clean Water Act National Pollutant Discharge Elimination System ("NPDES") permit because the Farm falls within the agricultural storm water exemption and is not a concentrated animal feeding operation.

4. The Farm is not subject to a citizen suit under the Resource Conservation Recovery Act because the Farm's land application of manure and whey neither constitutes the disposal of a solid waste, nor does the manure and whey mixture pose an imminent and substantial endangerment to human health.

STATEMENT OF THE CASE

Initially, Riverwatcher served a letter of intent to sue on the New Union Department of Environmental Quality, the EPA, and the Farm, relying upon the citizen suit provisions of the Clean Water Act, 33 U.S.C. § 1365, and the Resource Conservation and Recovery Act, 42 U.S.C. § 6972. (R. at 4, 7.) The EPA then commenced a civil action before the close of the notice period against the Farm for purported violations of the permitting requirements of the CWA, 33 U.S.C. § 1311(a), 1319(b), (d), and 1342. (R. at 4.) After the close of RCRA's ninety-day notice period, Riverwatcher intervened as claimant in the EPA's civil enforcement action under 33 U.S.C. § 1365(b)(1), and alleged additional RCRA violations of 42 U.S.C. § 6945(a) pursuant to 42 U.S.C. § 6972(a)(1)(b).

The EPA and Riverwatcher filed motions for summary judgment on the CWA and RCRA claims. Similarly, Moon Moo Farm filed a motion for summary judgment on the CWA and RCRA claims as well as a counterclaim against Riverwatcher for trespass, i.e. Riverwatcher's illegal entry on to the Farm's property to collect evidence of stormwater runoff during a severe rain event. (R. at 4, 6.) The District Court granted the Farm's motion for summary judgment on all claims, including the trespass counterclaim. (R. at 12.) In so doing, the District court held: (1) there is no public right of navigation to the Queechunk Canal, therefore Riverwatcher's entry in the canal was a common law trespass; (2) the evidence obtained during Riverwatcher's trespass is inadmissible to establish either the EPA or Riverwatcher's claim of the Farm's alleged discharges; (3) the Farm is not a concentrated animal feeding operation ("CAFO") and the agricultural storm water exemption applies to the Farm's discharges; and (4) the fertilizer and

soil conditioners are neither solid wastes under RCRA nor does its land application pose an imminent and substantial endangerment to human health. (R. at 7-10.)

The EPA and Riverwatcher each filed a Notice of Appeal. (R. at 1.) The EPA contests the District Court's holdings that: the Queechunk Canal is a publicly navigable waterway; the illegally obtained evidence is admissible for the CWA claims; and the Farm is a CAFO. (R. 7-10.) Riverwatcher challenges all of the District Court's holdings. (R. 7-12.) The Farm does not dispute any of the District Court's holdings and respectfully requests that the lower court's decision be upheld, on all claims. *Id*.

STATEMENT OF THE FACTS

The Farm is located at a bend in the Deep Quod River where the farm's previous owner excavated a bypass canal – the Queechunk Canal – to reduce the flood risks to his property. (R. at 5.) The Deep Quod River flows year round and is hydrologically connected to the Mississippi River, a navigable-in-fact waterway. *Id*. While a large amount of the water from the Deep Quod River is diverted through the Queechunk Canal ("Canal"), both the canal and the river are navigable. *Id*. As the farm holds legal title to the bed of the canal and the banks on either side, the Farm has prominently posted "No Trespassing" signs along the canal to deter unlawful entry. *Id*. Although there are signs forbidding entry, the canal is used as a shortcut up and down the Deep Quod River. *Id*.

The farm is a modestly sized dairy with 350 heads of milk located ten miles outside of the City of Farmville, New Union. (R. at 4.) The farm also boasts 150 acres of Bermuda grass fields which are harvested each year for silage. (R. at 5.) Downriver from the Farm is the Chokos Greek Yogurt processing facility, to which the Farm sells its milk and at no cost gives the Farm its acid whey ("whey"). *Id*. As the Farm's dairy cows are housed in the Farm's barn, a series of

pipes of drains collect the liquid waste and manure from the barn for transport to an outdoor lagoon where it is stored for later use as fertilizer. *Id*. It is in these outdoor lagoons where the farm mixes the acid whey with the manure to make its fertilizer and soil conditioner (collectively, "manure mixture"). *Id*.

The Farm does not hold any CWA NPDES permits because the farm is a "no discharge" animal feeding operation, i.e. there are no direct discharges from the manure handling facilities to the waters of New Union in conditions up to a twenty-five year storm event. *Id*. The Farm must submit a Nutrient Management Plan ("NMP") to the State's Department of Agriculture that outlines the application rates and expected nutrient uptake of the Bermuda grass grown where the manure is applied. *Id*.

During late winter to early spring of 2013, the Deep Quod River was reported to be unusually brown, cloudy, and smelling of manure. (R. at 6.) The Water Authority issued a nitrate advisory for the drinking water, stating that there were higher levels of nitrates present which could be unsafe if drank by infants. *Id*. The town of Farmville is downstream of the Farm and uses the river as its drinking water source. (R. at 5.) Nitrate advisories are not uncommon for Farmville as the Deep Quod watershed is heavily farmed; advisories were issued in 2002, 2006, 2007, 2009, and 2010. (R. at 7.)

An unusually severe storm hit the Farmville area; within two days, two inches of rain fell. (R. at 6.) This rain event, however, was below the twenty-five year storm event for which the farm is rated – five inches of rain in a twenty-four hour period. *Id*. During this storm, Riverwatcher enter the Queechunk Canal in his small boat to reach the Farm's property, disregarding the No Trespassing signs, and photographed the farm spreading manure on its fields. *Id*. Riverwatcher also photographed runoff from the fields into a ditch that is connected to

the Queechunk Canal. *Id*. He tested the water where the ditch and the canal meet and the results revealed elevated levels of nitrate and fecal coliforms. *Id*. Nonetheless, the Farm has continuously applied the manure in accordance with its NMP. *Id*.

SUMMARY OF THE ARGUMENT

This case presents determination the question whether a no-discharge farm that uses manure and whey as fertilizer and soil conditioners is regulated under the CWA and in the alternative the RCRA. The District Court was correct in holding that: the Queechunk Canal is not subject to a public right of navigation; the evidence gathered during Riverwatcher's trespass upon the Farm's land is inadmissible; the Farm is not a CAFO and falls within the purview of the storm water exception of the CWA; and the Farm's manure mixture is not a solid waste regulated under RCRA and does not present an "imminent and substantial" threat to human health.

The Queechunk Canal is not a public trust waterway because it is a man-made water way. There is no creation of a public right of navigation simply because a man-made water way connects to another natural navigable waterway. Certainly there is no right of ownership to the water that runs through the canal, but there is a private of ownership to a waterway that is exclusively upon the lands of an individual. Any finding in the alterative would result in a taking of the Farm's property, as it owns the bed and the banks on either side of the Queechunk Canal.

The Fourth Amendment protects both private and commercial property owners from unreasonable searches and seizures, and excludes evidence collected during warrantless searches. Because Dean James trespassed upon the Farm's property when he gathered evidence that allegedly supports his and EPA's claims, and had no authority to enter the Farm's property under the CWA, the evidence he presented should be excluded from this Court's review. Without evidence of a discharge under the CWA, these claims fail as a matter of law.

The CWA exempts agricultural stormwater discharges from its definition of point sources. The Farm is an agricultural pursuit, and the alleged discharge of the Farm's manure mixture occurred during a rainstorm. Additionally, the Farm meets New Union's requirements for its land application, including submission of and compliance with an NMP. Since the Farm's purported discharge is an agricultural stormwater runoff, it is exempt as a nonpoint source and the Farm is not subject to NPDES permitting.

The CWA and related regulation define the characteristics of CAFOs. These include first being designated as an animal feeding operation ("AFO"), a minimum number of certain classifications of animals, and discharge of pollutants into the waters of the United States. The record does not indicate that the Farm is an AFO according to regulation, the specific animal counts under the Farm's control, or a discharge, due to the fact that the only evidence of discharge is not admissible. Furthermore, even if the Farm is a CAFO, the alleged discharge meets the CAFO agricultural stormwater runoff exemption, which mirrors the CWA exemption.

The land application of the manure and whey does not constitute a solid waste under RCRA because the statute specifically exempts both agricultural wastes returned to the soil as fertilizers, and materials which are recycled for use as effective substitutes for commercial products. Even if the manure does not fall within the aforementioned exceptions, the manure is not a solid waste because it is not "discarded." The term "discarded" is given its ordinary meaning – to abandon or throw away. The Farm does not discard the manure because it serves a beneficial use to the farm: it fertilizes the Bermuda grass. Discarded material cannot simultaneously represent materials that are to be reused for a beneficial purpose. The fact that the Bermuda grass may not have absorbed the entire nutrient spectrum of manure does not render the manure mixture a solid waste.

Finally, the land application of the manure mixture does not present an "imminent and substantial harm to human health," even though a nitrate advisory has been issued. This claim requires a showing that the Farm's land application of the manure mixture contributed to the presence of the nitrates, as well as the probability that the nitrates in the groundwater will in fact result in harm to human health, and the severity of any harm that could ensue if the nitrates were ingested. That burden has not been met. The nitrate advisory only affects a small subset of the population and the mere inconvenience of using bottled water is insufficient to establish an imminent and substantial endangerment claim. Appellant Moon Moo Farm respectfully requests that this Court affirm the District Court's findings in their entirety.

ARGUMENT

I. THE QUEECHUNK CANAL MAY BE A NAVIGABLE WATERWAY, HOWEVER IT IS A MAN-MADE, PRIVATELY OWNED WATERWAY THAT IS NOT SUBJECT TO THE PUBLIC TRUST DOCTRINE BECAUSE SUCH AN IMPOSITION IS TANATAMOUNT TO A TAKING.

The public trust doctrine does not extend to man-made navigable water bodies such as the Queechunk Canal. The public trust doctrine licenses the public use of navigable waters and the lands beneath them to the low water mark for fishing, commerce, navigation, and other recreational uses. James C. Smith. *Neighboring Property Owners* § 9:18. While there is no private right of ownership to the running water in a navigable stream, there is a private right to ownership to a private stream wholly upon the lands of an individual. *United States v. Chandler–Dunbar Water Power Co.,* 229 U.S. 53, 60 (1913). Title to the beds of navigable waters of the United States can be held either by the state in which the waters are located as a matter of state sovereignty, or in the private owners of the land bordering the waters. Id. Whether the title lies in one or the other is a question of state law. *Id*.

There is no public right of access for artificial channels connected to navigable waters. *Kaiser Aetna v. United States*, 444 U.S. 164 (1979). In *Kaiser Aetna,* a privately owned shallow lagoon, Kuapa Pond, was dredged to facilitate boat access for marina-style subdivision. *Id*. The lagoon was connected to a navigable bay and the Pacific Ocean, separated from each only by a barrier island. *Id*. at 165. Significant improvements to the Kuapa Pond were made: increase in the depth of the lagoon from two to eight feet; erection of retaining walls; and elimination sluice gates to allow for boats to enter the lagoon. *Id.* at 166. The government asserted that these changes gave the public a right to use Kuapa Pond as a continuous highway for navigation, i.e. the pond was subject to the navigational servitude. *Id.* at 170. Although the pond became a "navigable" water body, the court stated that the navigability of a waterway was not dispositive to it becoming subject to a public right of access. *Id.* at 172. The court based its holding on the following factors: in its natural state the pond could not have been navigated; the pond was not comparable to the major natural bodies of water to which the servitude has been previously applied; the pond was privately owned under Hawaiian law; the pond was made navigable by the petitioners with the use of private funds; and the government had previously consented to the improvements of the pond. *Id.* at 178-79; *see also Vaughn v. Vermilion Corp.,* 444 U.S. 206 (1979) (channels built on private property and with private funds in such a manner that they ultimately join with other navigable waterways are not open to use by all citizens of the United States).

It is undisputed that the Queechunk Canal is a navigable water body. (R. at 8.) However, the Queechunk Canal is the result of the former Farm owner's excavation efforts to create a bypass channel to reduce the impact of flooding on his property. It is a man-made waterway that was likely created with private funds and is on private property. (R. at 5.) "[N]o general right of

use in the public arose by reason of the authority over navigation where channels were built, with private funds, in such a way that they join with other navigable waterways." *Vaughn,* 444 U.S. at 207. In order for a public right of access to exist on the Queechunk Canal, the State of New Union must utilize its eminent domain powers because creating a public right access would result in a taking of the Farm's property. "[T]he Government must condemn and pay for before it takes over the management of the landowner's property." *Kaiser Aetna*, 444 U.S. at 178. *See also Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1922). As no such funds have been paid, the canal is not subject to the public trust doctrine. But for the improvements of the former farm owner, the canal would not be a navigable water, or even exist. The Queechunk Canal is not "the sort of great navigable stream that this Court has previously recognized as being [incapable] of private ownership." *Kaiser Aetna*, 444 U.S. at 179 (internal quotations omitted).

The Queechunk Canal is a navigable waterway; however it is not subject to the public right of navigation. It is a man-made waterway that was created to alleviate flooding. Its bed and banks on either side are privately owned. For the public right of navigation to apply to the man-made canal, the government would need to pay just compensation to the Farm as such an imposition would be tantamount to a taking of the Farm's property. The District Court agreed, correctly holding that James trespassed when he entered the Canal.

II. DEAN JAMES' ENTRY TO MOON MOO FARM'S PROPERTY WAS A TRESPASS, AND THEREFORE NO PURPORTED EVIDENCE OBTAINED IS ADMISSIBLE.

Dean James, the so-called Deep Quod Riverwatcher, entered Moon Moo Farm's land via the Farm's Queechunk Canal, which is prominently posted with "No Trespassing" signs. That he did so without authority is clear from the record, and that the Canal is not a public trust navigable water has been established previously. Based on information allegedly gathered during his

unauthorized trip onto the Farm's property, James intervened in the EPA's CWA claims and instituted a citizen suit under RCRA against the Farm. Because the only alleged evidence that potentially meets the necessary elements under the CWA was gathered during this trespass, this putative evidence should be suppressed and the U.S. District Court for the District of New Union's opinion affirmed.

A. Fourth Amendment jurisprudence protects the privacy interests of commercial property owners like Moon Moo Farm from warrantless searches.

The Fourth Amendment protects private property owners from invasion by unreasonable searches and seizures as well as warrantless searches. U.S. CONST. amend. IV. While this protection is greatest for persons in their own homes, the Supreme Court has affirmed the extension of the Fourth Amendment to private commercial property. *Donovan v. Dewey*, 452 U.S. 594, 598 (1981); s*ee also Marshall v. Barlow's Inc.*, 436 U.S. 307 (1978); *See v. City of Seattle*, 387 U.S. 541 (1967); *Go-Bart Importing Co. v. U.S.*, 282 U.S. 344 (1931). The *Donovan* Court's test for a warrantless inspection is understood as a three-pronged test: 1) the inspection must be related to a regulatory scheme that furthers a substantial government interest; 2) the inspection must be necessary to further the regulatory scheme; 3) the investigatory scheme must provide a constitutionally adequate substitution for a warrant. 452 U.S. at 601-604.

Exceptions to the requirement of searches by warrant alone exist for "pervasively regulated businesses" and "closely regulated" industries that have been "long subject to close supervision and inspection." *United States v. Biswell*, 406 U.S. 311, 316 (1972) (firearms dealers accept a federal license with knowledge that records and business are subject to inspection); *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 77 (1970) (liquor establishments are closely regulated, but Congress did not fashion a warrantless search provision for these

businesses by law). In *Colonnade*, the Court echoed its holding in *See* by noting our "Nation's traditions that are strongly opposed to using force without definite authority to break down doors," whether those doors are to an individual's home or a business establishment. *Id*. The Court also noted, "Where a statute authorizes the inspection but makes no rules governing the procedures that inspectors must follow, the Fourth Amendment and its various restrictive rules apply." *Id*.

Furthermore, "[s]earches conducted without warrants have been held unlawful 'notwithstanding facts unquestionably showing probable cause,'" *Katz v. United States*, 389 U.S. 347, 357 (1967) (quoting *Agnello v. United States*, 269 U.S. 20, 33) (1925)). *Katz* elucidated the principle that literal physical penetration of a space, once the hallmark of Fourth Amendment inquiry (*See, e.g.*, *Olmstead v. United States*, 277 U.S. 438 (1928); *Goldman v. United States*, 316 U.S. 129 (1942)), is not the threshold – Fourth Amendment protection does not turn simply upon physical intrusion into a space. *Katz*, 389 U.S. at 353.

Under *Katz*, whether James committed the tort of trespass is immaterial, because his obvious physical intrusion is not at issue. Instead, the question is first whether James or a government agent would have needed a warrant in order to enter the Farm's property according to the terms of the CWA, to which the answer is yes, and then whether any of James' findings are admissible, to which the answer is no.

The Farm is a going concern, established and operating in New Union. It is not recognized as a CAFO, nor does it operate as one, which is discussed below. Therefore, the CWA's only direct application to the Farm for purposes of investigation is that an "authorized representative, *upon presentation of his [or her] credentials* … shall have a right of entry to … any premises in which an effluent source is located." 33 U.S.C. § 1318(B)(i) (emphasis added).

States may adopt more stringent standards than these according to 33 U.S.C. § 1318(c), but the record is silent regarding any New Union laws regarding "inspection, monitoring, and entry." Under a *Donovan* analysis, the Farm concedes that the CWA furthers a substantial government interest in human health, but not that James' intrusion is necessary to further the CWA, nor that the CWA provides an adequate substitute for a warrant under these facts.

James is not an authorized representative of the EPA or New Union Department of Agriculture ("DOA"), and the record shows that he presented nothing to the Farm prior to entering the Canal. The Farm has several implements that may be considered "point sources," including the Canal and drainage ditches, and therefore may be effluent sources, but the Farm operates under state law as a no-discharge farm. No inspection was ever deemed necessary by either the EPA or the DOA, and James was not instructed to carry out such an inspection. The Farm itself is not a CAFO, which is explained below, and the record is silent regarding any state regulation beyond the filing of an NMP. Therefore, the Farm is not a "pervasively" or "closely" regulated business like the sort subject to Fourth Amendment exceptions under the *Biswell/Colonnade* analysis. *See Barlow's, Inc.*, 436 U.S. at 313. Though some courts have found that dairy farms are "pervasively regulated" and subject to warrantless searches, these findings have accompanied extensive state laws stating affirmative government rights to enter the property that are not present in the record or in New Union. *See, e.g.*, *Lundeen v. Wisconsin Dep't of Agric., Trade & Consumer Prot.*, 525 N.W.2d 758, 761 (Wisc. Ct. App. 1994).

James' trespass was therefore not sufficiently related to the regulatory scheme of the CWA, did not further the purpose CWA, and falls completely outside of Fourth Amendment warrant and search jurisprudence. To allow a third-party do-gooder to subvert the statutory

requirement of presentation of credentials in order to search by taking the place of a state or federal agent would violate the Farm's important Fourth Amendment rights.

B. Dean James trespassed on Moon Moo Farm's property when he entered Queechunk Canal on April 12, 2013, and therefore any evidence he purportedly gathered should be suppressed and not considered by the Court in this civil action.

Trespass is a common law tort: "one is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally (a) enters land in the possession of the other …" Restatement (Second) of Torts § 158 (1965). While many jurisdictions have adopted trespass statutes, the record is silent as to whether New Union has done so. The record is clear, however, that James ignored "No Trespassing" signs, entered the Canal, observed the Farm, and took water samples, all without permission. This unauthorized entry of the Farm's land is precisely the sort of action defined by the tort of trespass.

The Fourth Amendment is generally invoked to prevent government agents or entities from utilizing information gathered in an unreasonable or warrantless search or seizure in a criminal context. However, as the District Court noted, Fourth Amendment protection can be applied to civil actions. (R. at 9.) In *Trinity Indus., Inc. v. OSHRC*, the Sixth Circuit found that warrants were necessary to effect administrative inspections of employer property, and that the underlying law did not provide an outlet for warrantless inspection. 16 F.3d 1455 (6th Cir. 1994). And in *Smith Steel Casting Co. v. Brock*, the Fifth Circuit found that the exclusionary rule applies to evidence obtained in the object of assessing penalties for violations of OSHA unless the good faith rule of *U.S. v. Leon* protects the tainted evidence from exclusion. *Smith Steel Casting Co. v. Brock*, 800 F.2d 1329, 1334 (5th Cir. 1986). The *Leon* rule requires a warrant to

be relied upon by responding officers or agents that is facially valid. *Leon*, 468 U.S. 897, 920 (1984).

In the present case, James presented evidence to the District Court gathered wholly during his trespass upon the Farm's land. In addition to entering the Canal and ignoring "No Trespassing" signs, he took water from the Farm's drainage ditch and the Canal. These actions are classical trespass, and, based on Fourth Amendment jurisprudence applied to civil suits, the evidence gathered is not admissible.

Finally, the canon of lenity can be applied to this case because violators of the CWA are subject to both civil and criminal penalties. 32 U.S.C. § 1319(b)-(c). The canon of lenity states,

> when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implication.

United States v. Universal C. I. T. Credit Corp., 344 U.S. 218, 221-222 (1952).

The 9th Circuit applied the canon of lenity in a civil action when employees sent company information to a former employee in order to start a competing business, construing the Computer Fraud and Abuse Act narrowly "so that Congress will not unintentionally turn ordinary citizens into criminals." *U.S. v. Nosal,* 676 F.3d 854, 863 (9th Cir. 2012).

In order to protect ordinary businesses like Moon Moo Farm from inadvertently being punished as criminal organizations under the CWA, the law should be read narrowly when determining whether the Farm is guilty of a violation, whether civil or criminal. While the Fourth Amendment is not part of the CWA, the constitutional precepts invoked do affect the reading of the statute in this case. In particular, even if this Court determines that the evidence James allegedly gathered during his trespass is admissible in this action, the question of precisely what Congress meant when it exempted agricultural stormwater runoff from the CWA definition of

point sources should be read to include the discharge that Riverwatcher's trespass allegedly discovered, as further described below.

III. IF MOON MOO FARM DID DISCHARGE EXCESS NUTRIENTS FROM ITS MANURE APPLICATION FIELDS, THESE ARE INCLUDED IN THE AGRICULTURAL STORMWATER EXEMPTION OF THE CWA, COMPLY WITH THE FARM'S NMP ACCORDING TO NEW UNION'S REGULATION, AND, BECAUSE THE FARM IS NOT A CAFO, DO NOT REQUIRE AN NPDES PERMIT.

Moon Moo Farm is regulated by New Union as a "no-discharge" animal feeding operation. (R. at 5.) In compliance with the state's regulations, the Farm submitted an NMP to the proper state regulatory department. *Id*. Riverwatcher and the EPA allege that the Farm discharged a pollutant into navigable waters from a point source, and that this discharge does not comport with the agricultural stormwater exemption found in the definition of "point source" in the CWA. However, this claim fails because the only evidence of the Farm's alleged discharge is inadmissible due to Riverwatcher's trespass, as previously discussed. Even if this Court could consider this evidence, the alleged discharge falls within the agricultural stormwater exemption and does not require an NPDES permit.

The CWA's stated goal is to eliminate the discharge of pollutants into the navigable waters. 33 U.S.C. § 1251. The CWA further states that the "discharge of any pollutant by any person shall be unlawful" except in compliance with permitting laws and regulations. 33 U.S.C. § 1311(a). "Discharge of pollutants" is defined to mean "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). "Point source" is defined as

> [a]ny discernible, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

33 U.S.C. § 1362(14).

In 1973, the agricultural stormwater discharge exemption was not part of the CWA, but certain classes of point sources were exempted by regulation under the rationale that the EPA's limited resources had to be focused on the most significant point sources of pollution. *Natural Res. Def. Council, Inc. v. Costle*, 568 F.2d 1369, 1373 (D.C. Cir. 1977). *Costle* affirmed the holding of *Natural Res. Def. Council v. Train*, in that the EPA had no authority to choose to exempt any class of point source not specifically contemplated by Congress, according to the CWA and NPDES permitting program, and therefore these regulatory exemptions were voided. 396 F.Supp. 1393, 1396 (D.C. Cir. 1975).

In 1987, Congress amended the point source definition to exempt agricultural stormwater discharges, but neither Congress nor the EPA defined this term by law or regulation. "The term 'agricultural stormwater discharge' was not and has not been defined in the statute. The fact that Congress found it unnecessary to define the term indicates that the term should be given its ordinary meaning." *Alt v. U.S. E.P.A.*, 979 F. Supp. 2d 701, 707 (N.D. W. Va. 2013), *appeal dismissed* (Oct. 2, 2014). This reading conforms to traditional rules of statutory interpretation. "A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42 (1979).

The Second Circuit examined this provision in the context of CAFO's agricultural stormwater exemption, which looks directly to the exemption found in the definition of "point source," by looking to contemporary dictionaries to define "agricultural," finding that

> Webster's New World Dictionary defined the term 'agriculture' to include, *inter alia,* 'work of cultivating the soil, producing crops, and raising livestock.' Webster's New World Dictionary Of American English 26 (3rd College Ed.1988). The Oxford English Dictionary similarly defined agriculture to include, *inter alia,* 'cultivating the soil,' 'including the allied pursuits of gathering in the crops and rearing live stock.' I The Oxford English Dictionary 267 (2d Ed.1989).

Waterkeeper Alliance, Inc. v. U.S. E.P.A., 399 F.3d 486, 509 (2d Cir. 2005). The Court further found that "stormwater" includes discharges that are caused primarily by rain. *Id*. at 508; *see also Concerned Area Residents for Env't v. Southview Farm*, 34 F.3d 114 (2d Cir. 1994) (holding that a CAFO's discharge of nitrates after a land application was not an exempt as an agricultural stormwater discharge when the cause was over-saturation of the fields rather than precipitation).

Moon Moo Farm is a dairy farm with 350 head of milk cows that also grows 150 acres of Bermuda grass. (R. at 4-5.) Both of these activities are directly contemplated under the term "agricultural," because the Farm's normal operations involve "cultivating the soil, producing crops, and raising livestock." That New Union treats the Farm as an AFO and requires an NMP to be filed is further evidence of the agricultural nature of the Farm's operation. There is no reasonable construction wherein the Farm is not primarily an agricultural pursuit.

Agricultural runoff is traditionally treated as a nonpoint source outside the ambit of the CWA's point source law. *See, e.g.*, *Concerned Area Residents*, 34 F.3d at 120; *Nat'l Pork Producers Council v. U.S. E.P.A.*, 635 F.3d 738, 743 (5th Cir. 2011). And courts have found that the exemption is applicable to any discharge caused by precipitation, even as the discharge moves into other point sources:

> With respect to legislative purpose, we believe it reasonable to conclude that when Congress added the agricultural stormwater exemption to the Clean Water Act, it was affirming the impropriety of imposing, on "any person," liability for agriculture-related discharges triggered not by negligence or malfeasance, but by the weather – even when those discharges came from what would otherwise be point sources.

Waterkeeper Alliance, 399 F.3d at 507; *see also*: *Alt*, 979 F.Supp.2d at 714. The record shows that the Farm's alleged discharge happened during a "significant storm event," and that all evidence gathered during James' trespass was a result of that rainfall. (R. at 6.) Therefore, even if

this Court considers the discharge of pollutants further down the system, i.e. from the Canal to the River, the fact that the original discharge is an agricultural stormwater runoff caused by the rain exempts the discharge from CWA point source liability.

Finally, James' claim that the Farm's alleged excess nutrient discharge is not covered by the agricultural stormwater discharge exemption is in error. It appears this claim is predicated on the theory that the nutrient discharge is an excess by virtue of a comparison to the Farm's NMP filed with the State. In fact, the law is the other way around: while there are specific regulations pertaining to CWA violations for CAFOs that discharge pollutants above and beyond "site-specific nutrient management practices that ensure appropriate agricultural utilization" in land applications of manure according to 40 C.F.R. § 122.23(e)(1)(vi)-(ix), there is no similar regulation for non-CAFO entities. 40 C.F.R. § 122.23(e). That the Farm is not a CAFO is further explained below.

IV. MOON MOO FARM DOES NOT REQUIRE AN NPDES PERMIT BECAUSE IT DOES NOT FALL WITHIN THE STATUTORY AND REGULATORY MEANING OF A CAFO.

The CWA and related federal regulations provide specific definitions of the minimum requirements for an operation to be considered a CAFO. Whether the Farm is a CAFO is important because, with certain exceptions, CAFOs are considered to be point sources under the CWA, and therefore any discharge from the Farm could be subject to civil or criminal penalty. In order to determine whether the Farm falls within the meaning of CAFO, the CWA's terms and related regulation must be examined. Because the Farm does not meet these minimum requirements, it is not a CAFO and is not subject to NPDES permitting. Even if the Farm was considered a CAFO under the CWA, there is no admissible evidence that the farm made a

discharge, and as a no-discharge operation the Farm is not required to apply for or acquire an NPDES permit.

Because CAFOs are considered to be point sources, the addition of any pollutant to navigable waters from CAFOs are prohibited by the CWA unless otherwise exempted from the regulation or the discharge is permissible by a permit, such as an NPDES permit.

The CWA protects water quality through two measures: effluent limitations and water quality standards. The "primary means" of enforcement of these limitations is the NPDES. *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992). The NPDES is described at 33 U.S.C. § 1342.

While the NPDES is a federal law, states may apply for and be delegated authority to issue NPDES permits under the CWA. 33 U.S.C. § 1342(b), (c); 40 C.F.R. § 123.25. States must meet a number of requirements in order to be delegated this authority, including the ability to "abate violations through civil or criminal penalties or other means of enforcement," and once the state is granted authority its program runs in lieu of the federal program. *Ringbolt Farms Homeowners Ass'n v. Town of Hull*, 714 F.Supp. 1246, 1253 (D. Mass., 1989); *State of Cal. v. U.S. Dep't of Navy*, 845 F.2d 222, 225 (9th Cir. 1988) (internal quotations omitted). A state-run NPDES program may adopt standards that are more stringent than under the federal CWA, but cannot adopt standards that do not meet the federal standard. 33 U.S.C. § 1370.

New Union has the delegated authority to issue permits under the CWA. (R. at 5.) The record is silent as to whether New Union has adopted more stringent standards than appear in the NPDES. It is therefore presumed that the terms of the CWA are in effect as if under federal law.

A. The Farm is not an AFO under EPA regulation, and therefore cannot be a CAFO.

In order to be considered a CAFO, an operation must first meet the definition of an AFO. An AFO is a "lot or facility" where both "[a]nimals … have been, are, or will be stabled or

confined and fed for a total of 45 days or more in any 12-month period," and "[c]rops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility." 40 C.F.R. § 122.23(b)(1)(i)-(ii).

The Farm feeds 350 milk cows (R. at 4.), and therefore meets the first part of the definition of an AFO. However, the second requirement is in question due to the ambiguous definition of "lot or facility." If a "lot or facility" were meant to be synonymous with the "confined area" where animals are housed, that terminology certainly would have been used. Indeed, the terminology was changed to "lot or facility" from "confined area" after public comments on the proposed regulation and incorporated into the final rule. 41 FR 11458-01 (1976). When a proposed rule uses a narrower term than a final rule, the term must have a broader meaning in the final rule. *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver*, 511 U.S. 164, 176 (1994).

"Facility" is defined as "any NPDES 'point source' or other facility or activity (including land or appurtenances thereto) that is subject to regulation under the NPDES program." 40 C.F.R. § 122.2. Therefore, this definition "includes any CAFO and the land appurtenant thereto – which includes the 'farmyard.'" *Alt*, 979 F.Supp.2d at 713. And while current regulations define terms such as "production area," "animal confinement area," "manure storage area," "raw materials storage area," and "waste containment area," the term "lot" is not defined.

Moon Moo Farm is a dairy farm operation that grows crops or vegetation on 150 acres of its facility. That its crops are not grown inside of the barn that houses its dairy cows is not an abnormality, it is a feature of likely every serious farming operation in the nation. A cattle barn is much like a "confined area," while an entire farm is more like a "lot or facility." A CAFO is a point source according to 33 U.S.C. § 1362(14), which further suggests that the entire Farm

should be considered when determining the status of a facility under the AFO regulation. Because the Farm sustains crops and/or vegetation on the lot or facility during the normal growing season, Moon Moo Farm does not meet the minimum requirement to be considered an AFO. Therefore, the Farm cannot be a CAFO. *See In re Reichmann Land & Cattle, LLP*, 847 N.W.2d 42, 49 (Minn. Ct. App. 2014), *review granted* (Aug. 5, 2014).

B. The Farm is not a CAFO according to EPA regulation.

In the event that this Court finds that the Farm does meet the regulatory definition of an AFO, it is still not subject to CWA regulation unless it also meets the regulatory definition of a CAFO.

An operation that meets the definition of an AFO as described above is only a CAFO if it meets further regulatory definition. Pertinent to this case, a Medium CAFO is an AFO when "the type and number of animals that it stables or confines falls within" either of "200 to 699 mature dairy cows, whether milked or dry," or "300 to 999 cattle other than mature dairy cows," and the AFO has discharged pollutants "into the 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)(i). An AFO may be designated a CAFO by an "appropriate authority," specifically the State Director or Regional Administrator in states authorized by the EPA, after determining that the facility either meets the regulatory definition of a CAFO or that it "is a significant contributor of pollutants to waters of the United States." 40 C.F.R. § 122.23(c).

While the record clearly states that the Farm is treated as a no-discharge AFO under New Union's delegated authority, there is no mention of the Farm being designated a CAFO. This designation is the purview of the State Director, and the record does not show that the State Director has determined that the Farm is a CAFO. There is also no record of the Regional

Director making a determination that the Farm meets the regulatory requirements of 40 C.F.R. § 122.23(c)(1)-(2). Without being designated according to regulation, the Farm cannot be a CAFO unless it is categorically a CAFO under 40 C.F.R. § 122.23(b)(4), (6).

Furthermore, the number of cattle required to be designated a Medium CAFO under the regulation is not met in the record. The cattle minimum is not reached – this count is a matter of fact, and it is clear error to ascribe a specific count per statute when only a general count appears in the record. The record only notes that there are 350 dairy cows on the Farm, with no mention of the number of mature dairy cows, or the count of total cattle that are not mature dairy cows. Without a specific finding pursuant to regulation, the Farm cannot be a CAFO.

It is also not clear that the Farm has met the second qualification of the discharge of a pollutant. As previously discussed, evidence of the discharge of a pollutant is necessary to qualify an AFO as a CAFO. As the District Court for the District of New Union noted, the only purported evidence of the Farm's discharge is not admissible due to James' trespass. Lacking a required element of the regulatory definition, the Farm cannot be designated a CAFO.

Even if this Court considers the Farm to be a CAFO, the alleged discharge falls within the CAFO agricultural stormwater discharge exemption regulation. 40 C.F.R. § 122.23(e) states:

> The discharge of manure, litter or process wastewater to waters of the United States from a CAFO as a result of the application of that manure, litter or process wastewater by the CAFO to land areas under its control is a discharge from that CAFO subject to NPDES permit requirements, except where it is an agricultural storm water discharge as provided in 33 U.S.C. § 1362(14). For purposes of this paragraph, 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.

As this regulation looks to the definition of point source in the CWA and the attendant agricultural stormwater discharge exemption, this argument is largely duplicative of that found in section III of this brief: discharge from a CAFO is exempt from NPDES permitting if that discharge fits into the definition of agricultural stormwater. *Waterkeeper Alliance*, 399 F.3d at 507.

The relevant specified regulations mentioned above concern site-specific conservation practices, testing protocols, application in accordance with NMP to ensure appropriate agricultural utilization of nutrients in manure, and recordkeeping. 40 C.F.R. § 122.42(e)(1)(vi)-(ix). It is undisputed that the Farm did file an NMP according to New Union policy and also applied manure in accordance with the plan, as also evidenced by the Farm's recordkeeping, and the record shows that New Union has been delegated authority to issue NPDES permits. (R. at 5-6.) While James has produced an expert who opines that it is possible that nutrient uptake by the Farm's Bermuda grass is lessened by the addition of acidic whey, the Farm's expert notes that this addition is common in New Union since at least the 1940s, and the grass tolerates a range of soil pH conditions. (R. at 6.) Furthermore, because New Union has been delegated authority, its decisions about how to run the permitting program should be given deference by this Court according to cooperative federalism. Because the State has accepted the Farm's NMP under the same program it has delegated authority over, as long as an NMP is in place, discharges resulting from precipitation should not be held against the supposed polluter: "discharges from land areas under the control of a CAFO can and should generally be regulated, but where a CAFO has taken steps to ensure appropriate agricultural utilization of the nutrients in manure, litter, and process wastewater, it should not be held accountable for any discharge that is primarily the result of 'precipitation.'" *Waterkeeper Alliance*, 399 F.3d at 509.

Even if the Farm met the definition of a CAFO, its alleged discharge meets the CAFO stormwater discharge exemption according to both federal regulation and state practice, and is therefore not actionable.

V. RIVERWATCHER'S CITIZEN SUIT FAILS BECAUSE THE MANURE MIXTURE IS NOT A SOLID WASTE UNDER RCRA AND DOES NOT POSE AN IMMINENT AND SUBSTANTIAL ENDANGERMENT TO HUMAN HEALTH.

The Farm is not subject to regulation under RCRA. The purpose of the RCRA is to regulate the "treatment, storage, disposal of solid and hazardous waste." *Meghrig v. KFC Western, Inc.*, 519 U.S. 479, 483 (1996). It was partially designed to address the toothless land use regulations that were "imposed on the states to remedy groundwater contamination under § 208 of the Clean Water Act." Linda A. Malone, *Environmental Regulation of Land Use*, § 9:11 (2014) (citing Law of Environmental Protection § 14:3). However, it became apparent that the statute was inadequate. For example, in Times Beach, Mo., a formerly incorporated city within St. Louis County, the EPA confirmed that dioxin contamination was pervasive throughout the city's limits because waste oil was used to abate dust on the unpaved roadways. U.S. EPA, *NPL Site Narrative for Times Beach*, http://www.epa.gov/superfund/sites/npl/nar833.htm (last visited Nov. 24, 2014). It was cases like Times Beach that led to the EPA's greater enforcement authority and focus on minimizing and phasing out the land disposal of hazardous wastes. *See* 42 U.S.C. § 6901. In essence, RCRA is a pollution prevention statute that seeks to control waste from its creation to its disposal. RCRA is a cradle to grave system. EPA Press Release, *Statement by the U.S. EPA on the President's Signing of the Hazardous and Solid Waste Amendments of 1984* (Nov. 9, 1984) (available at http://www2.epa.gov/aboutepa/statement-us-epa-presidents-signing-hazardous-and-solid-waste-amendments-1984).

Similar to other environmental laws, RCRA contains a citizen suit statute so private citizens may enforce its provisions – in certain circumstances – allowing private citizens to serve as private attorneys general. 42 U.S.C. § 6972(a)(1)(B); *see also Meghrig*, 516 U.S. 479. For Riverwatcher to prevail on its citizen suit under RCRA § 7002(a)(1)(B), it must prove, *inter alia*, that the Farm is contributing "to the past or present handling, storage, treatment, transportation, or disposal of [a] solid or hazardous waste." 42 U.S.C. § 6972(a)(1)(B). Riverwatcher does not allege that the manure mixture is a hazardous waste; therefore, the entire focus of the issue on appeal is whether the mixture is a "solid waste" within the meaning of RCRA.

The manure mixture used on the Farm is exempt from regulation under RCRA. It falls within two regulatory exceptions of the statute, thereby precluding its classification as a solid waste: it is an agricultural waste which is returned to the soil as a fertilizer pursuant to 40 C.F.R. § 257.1(c)(1); and is used as an effective substitute for commercial products pursuant to 40 C.F.R. § 261.2(c)(ii). Notwithstanding the statutory exemptions for the Farm's manure mixture, RCRA only applies if the manure is a solid waste, i.e. is discarded, proof of which Riverwatcher is unable to demonstrate, as the district court correctly held in dismissing Riverwatcher's RCRA claims. (R. at 1.)

A. The manure mixture is exempt from regulation under RCRA.

The manure mixture falls within two exceptions of RCRA precluding its classification as a solid waste: it is an agricultural waste which is returned to the soil as a fertilizer pursuant to 40 C.F.R. § 257.1(c)(1); and is recycled by its use as an effective substitute for commercial products pursuant to 40 C.F.R. § 261.2(c)(ii).

The EPA promulgated extensive criteria "for determining which solid waste disposal facilities and practices pose a reasonable probability of adverse effects on health or the

environment," e.g. open dumps. 40 C.F.R. § 257.1(a). Specifically excluded from these criteria were solid waste disposal facilities that practice the land application of "agricultural wastes, including manures and crop residues, returned to the soil as fertilizers or soil conditioners," e.g. farms. 40 C.F.R. § 257.1(c)(1). This is reinforced by the legislative history of RCRA, which reveals that the land application of fertilizer was not the waste stream that Congress intended to regulate. "Agricultural wastes which are returned to the soil as fertilizers or soil conditioners are not considered discarded materials in the sense of this legislation." H.R.Rep. No. 94–1491(I) at 2 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6240.

The return of agricultural waste to the soil as fertilizer is precisely the Farm's manure land application procedure. The manure from the Farm's cows is collected through a series of drains and pipes which lead from the cow barn to an outdoor lagoon where it is stored for use as a fertilizer. (R. at 4-5.) Whey is added to the manure to create the Farm's manure mixture. *Id.* Even though the whey comes from off-site and is added to the lagoons on the Farm's property to create the manure mixture, the land application of whey is deeply rooted in agriculture's rich history. "The land application of whey as a soil conditioner was a longstanding practice that has been traditional in New Union since the 1940s." (R. at 6.) The manure mixture is eventually pumped into tank trailers and spread across the Farm's 150 acres of Bermuda grass. (R. at 5.) Finding that such a practice is subject to regulation under RCRA would require every farm and property that uses manure mixture as a fertilizer to operate as a landfill. *See* 42 U.S.C. § 6903(14) (an illegal "open dump" is defined as "any facility or site where solid waste is disposed of which is not a sanitary landfill").

Similarly, a material is not a regulated solid waste under RCRA if it is recycled by being "[u]sed or reused as effective substitutes for commercial products." 40 C.F.R. §261.2(c)(ii). If

used in one of the following ways, recycled material can constitute a solid waste: materials used in a manner constituting disposal; materials burned for energy recovery; reclaimed materials; or speculatively accumulated materials. 40 C.F.R. § 261.2(c)(1)-(4). *See, e.g.*, *United States v. ILCO, Inc*., 996 F.2d 1126, 1132 (11th Cir. 1993) (recycled materials can constitute a waste); *Owen Elec. Steel Co. of S.C., Inc. v. Browner,* 37 F.3d 146, 150 (4th Cir. 1994) (slag recycled after sitting approximately six months was as solid waste). However, if the recycled material is used in lieu of a commercial product, such as a manure mixture used as fertilizer, it is exempt from regulation under RCRA.

The manure and whey are byproducts of two processes: the cows' digestion and the acidification of milk to produce Greek yogurt. 21 C.F.R. § 184.1979(a)(1) (defining acid whey). The Farm's use of these otherwise waste products replaces the need to use a commercial fertilizer to supply the Bermuda grass with the mineral nutrients integral for its growth: nitrogen, phosphorus, and potassium. U.S. EPA, *Manure as Fertilizer,* http://www.epa.gov/agriculture/tfer.html#ManureasFertilizer, (last visited Nov. 11, 2014). "In the days when most families kept a milk cow or small chicken flock, manure was a standard garden fertilizer. But with the advent of chemical fertilizers, many gardeners stopped using manure. Organic gardeners have rediscovered the benefits of manure as a soil conditioner and compost ingredient." Organic Gardening, *Manure*¸ http://www.organicgardening.com/learn-and-grow/manure (last visited Nov. 24, 2014). By removing the manure and the whey from the waste stream and using them on the Bermuda grass fields, the Farm is excluded from regulation under RCRA. Because the manure and whey serve as substitutes for a commercial fertilizer, the mixture is not a solid waste.

B. The manure mixture is not a solid waste because it is not discarded.

Exemptions notwithstanding, the Farm's manure mixture is not a solid waste. Jurisprudence in statutory interpretation is well established: when interpreting a statute, the court is to defer to the statute's plain language. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.,* 467 U.S. 837, 842-43 (1984). If Congressional intent is unambiguous from the statute's language, on the precise question at issue, the court must "give effect" to that intent. *Id* at 843, n. 9. Traditional tools of statutory construction require "that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 133 (2000) (citing *Davis v. Michigan Dept. of Treasury,* 489 U.S. 803, 809 (1989)).

RCRA defines "solid waste" broadly: "any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities." 42 U.S.C. § 6903(27) (emphasis added). RCRA does not define "discarded material;" however the regulatory definition of solid waste is somewhat more tailored. Solid waste is "any discarded material," which also includes materials that which are abandoned, e.g. materials which have been "disposed of," or in limited circumstances materials which are recycled. 40 C.F.R. § 261.2(a)(1)-(b). Accordingly, whether a waste is solid waste regulated under RCRA turns on whether the waste is "discarded."

Various circuits have interpreted the term "discarded" differently. For example, the District of Columbia Circuit has found the term "discarded" conforms to its plain meaning, i.e. discarded items are those that are disposed of or abandoned, *Am. Mining Cong. v. EPA,* 824 F.2d

1177, 1185 (D.C. Cir. 1987), but materials "destined for reuse as part of a continuous industrial process" are not abandoned or thrown away. *Ass'n of Battery Recyclers, Inc. v. U.S. EPA*, 208 F.3d 1047, 1056 (D.C. Cir. 2000); *see also API v. EPA*, 906 F.2d 729, 741 (D.C. Cir. 1990) (materials "indisputably discarded" can be solid wastes). Similarly, the Ninth Circuit also gave the term "discard" its plain meaning, "to cast aside; reject; abandon; give up." *Safe Air for Everyone v. Meyer,* 373 F.3d 1035, 1041 (9th Cir. 2004). The court in *Safe Air* even developed a test from the various extra-circuit court opinions to evaluate whether or not something is a solid waste regulated by RCRA: whether the material is destined for beneficial reuse or recycling in continuous process by the generating industry itself; whether the materials are being actively reused, or whether they merely have the potential of reuse; and whether the materials are being reused by original owner, rather than by a salvager or a reclaimer. *Safe Air*, 373 F.3d at 1041 (citing *Am. Mining*, 824 F.2d at 1186); *Am. Mining Cong. v. U.S. EPA.*, 907 F.2d 1179, 1186 (D.C. Cir. 1990); *Battery Recyclers*, 208 F.3d at 1131.

1. Legislative history reveals that RCRA was not intended to regulate reclaimed agricultural waste.

An examination of RCRA's legislative history demonstrates that Congress' use of the terms "discarded material" was meant to apply to manufacturing and industrial wastes, not medium sized farms.

> It is not only the waste by-products of the nation's manufacturing processes with which the committee is concerned; but also the products themselves once they have served their intended purposes and are no longer wanted by the consumer. For these reasons the term "discarded materials" is used to identify collectively those substances often referred to as industrial, municipal or post-consumer waste; refuse, trash, garbage and sludge.

H.R.Rep. No. 94-1491, at 2 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6240; *see also Ecological Rights Foundation v. Pacific Gas and Elec. Co.*, 713 F.3d 502, 515 (9th Cir. 2013)

(determination of a solid waste depends on the product serving its intended purpose and whether it is wanted by the consumer); *No Spray Coal., Inc. v. City of New York,* 252 F.3d 148 (2d Cir. 2001) (pesticides are not "discarded" when sprayed in the air with the design of effecting their intended purpose). The House Report provides further context for the term "discarded materials," noting that solid waste is "a misleading word" with respect to Congressional concern, and that reuse of agricultural waste is not the intended target of RCRA's "a multi-faceted approach toward solving the problems associated with the 3–4 billion tons of discarded materials generated each year." H.R.Rep. No. 94-1491, at 2 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6240. "Much industrial and agricultural waste is reclaimed or put to new use and is therefore not a part of the discarded materials disposal problem the committee addresses. An increase in reclamation and reuse practices is a major objective of the Resource Conservation and Recovery Act." *Id.* RCRA's purpose is to reduce the waste in waste streams. The Farm's use of the manure mixture as a fertilizer effectuates such a purpose: the Farm consumes materials that would otherwise be wastes and puts them to an agricultural and beneficial use as fertilizer. The Farm is, in essence, a closed system, which is in concert with New Union's designation and approval of the Farm as a "no-discharge" operation.

2. RCRA does not regulate materials that are put to a beneficial purpose.

The land application of the manure mixture as a fertilizer does not render it "discarded" because the manure serves an intentional and beneficial purpose – to supply the Bermuda grass with minerals integral to the grass' growth. The manure mixture's application was performed in accordance with the state-approved NMP. (R. at 5.) RCRA does not regulate those materials that are put to a beneficial or their intended use. *Oklahoma v. Tyson Foods, Inc.*, 2010 WL 653032 (N.D. Okla. Feb. 17, 2010).

In *Tyson Foods,* the State sued multiple defendants for the land application of poultry litter within the Illinois River Watershed, alleging that the litter was a solid waste under RCRA. *Id*. at *1. While the State claimed that the litter was "discarded" because the crops to which it was applied needed only certain nutrients and not others, the court disagreed, noting that because the poultry litter served a beneficial purpose, it was not "discarded" in the ordinary meaning of the word – to dispose of, throw away or abandon. *Id*. at *10. "The State failed in its case-in-chief to show the court that poultry growers or others are applying (or have applied) poultry litter to the land simply to be rid of it." *Id*. Ultimately, the court dismissed the State's claims because there was no genuine issue of material fact, indeed, the evidence presented established that the poultry litter was not a solid waste within the meaning of RCRA. *Id.* at *11.

Riverwatcher has similarly failed to produce sufficient evidence to establish that the manure mixture is no longer wanted by the Farm, i.e. it is "discarded." In fact, all evidence supports the contrary conclusion. The Farm collects the manure for its later application to the Bermuda grass. (R. at 5.) The Farm also actively seeks out the whey from the Chokos factory to make the manure mixture because of its effectiveness as a soil conditioner. In fact, Dr. Green, opined that the "land application of whey as a soil conditioner is a longstanding practice that has been traditional in New Union since the 1940s." Riverwatcher may postulate that the fertilizer is a solid waste because it was "discarded" by way of "over-application," however, because the manure mixture was applied for its intended beneficial use as fertilizer, this claim fails.

The fact that the Bermuda grass may not have absorbed the entire nutrient spectrum of manure does not render the manure mixture a solid waste. "[A] substance does not necessarily become a solid waste within the meaning of RCRA when it is applied to the normal beneficial usage for which the product was intended merely because some aspect of the product is not fully

utilized." *Tyson Foods*, 2010 WL 653032 at *10; *see also Safe Air*, 373 F.3d at 1046 n. 13 (grass residue becoming airborne does not automatically render the residue "discarded"); *Ecological Rights Foundation,* 713 F.3d 502 (wood preservative which escaped poles was not a solid waste because it served its intended purpose); *No Spray Coal*, 252 F.3d at 150 ("material is not discarded until after it has served its intended purpose"); *Cordiano v. Metacon Gun Club, Inc.,* 575 F.3d 199 (2d Cir. 2009) (spent munitions accumulating on a gun club's property not solid wastes as the rounds had come to rest on the land as result expected use); *but see Conn. Coastal Fishermen's Ass'n v. Remington Arms Co.*, 989 F.2d 1305 (2d Cir. 1993) (lead shot and clay targets in Long Island Sound were solid waste considering the duration of accumulation); *Cmty. Ass'n for Restoration of the Env't, Inc. v. George & Margaret LLC*, 954 F. Supp. 2d 1151 (E.D. Wash. 2013) (land application of manure in amounts beyond what is necessary to serve as organic fertilizer is a question of fact); *Cmty. Ass'n for Restoration of the Env't, Inc. v. R & M Haak, LLC*, WL 3188855, at *5 (E.D. Wash. June 21, 2013) (improper application of manure to fields and leaking liquid manure from lagoons constituted "discarding"); *Water Keeper Alliance, Inc. v. Smithfield Foods, Inc.*, 2001 WL 1715730, at *4 (E.D.N.C. Sept. 20, 2001) (land application of animal waste to the soil focuses on use the of the animal waste products). Bermuda grass is a very resilient crop that can tolerate a wide range of soil pH conditions. (R. at 6.) While Riverwatcher's expert, Dr. Ella Mae, opined that the Farm's fertilizer lowered the pH of the soil, which may have reduced the nutrient uptake of the Bermuda grass, such a change would not significantly affect the crop's ability to grow as it can survive with a range of nutrients.

No evidence has been presented to demonstrate that the Farm applied the manure mixture to the land simply to be rid of it. Discarded material cannot simultaneously represent materials

"destined for beneficial reuse," which is precisely the practice of the Farm. *Am. Mining*, 824 F.2d at 1186 (emphasis omitted). Summary judgment for the Farm is therefore entirely appropriate. Nothing in the record establishes that that the manure mixture is a solid waste as defined in RCRA, its legislative history, or even case law; consequently, Riverwatcher's claim must be dismissed and the lower court's order affirmed.

C. Riverwatcher's citizen suit fails because no facts have been adduced to support the requisite standard of proof that the land application of the manure mixture poses an imminent and substantial endangerment to human health.

RCRA allows any person to commence a citizen suit on her own behalf against any person who has 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). Even if this Court determines that the fertilizer is a solid waste regulated under RCRA, the land application of the fertilizer does not pose an imminent and substantial endangerment to human health, and Riverwatcher's claim to the contrary must fail.

RCRA does not define the terms "imminent," "substantial," or "endangerment." Therefore, case law must demonstrate the circumstances that are sufficient to establish an imminent and substantial endangerment to human health or the environment. "An endangerment can only be imminent if it threaten[s] to occur immediately, and the reference to waste which may present imminent harm quite clearly excludes waste that no longer presents such a danger." *Meghrig*, 516 U.S. at 485-86 (citing Webster's New International Dictionary of English Language 1245 (2d ed. 1934)) (internal quotations omitted). "This language implies that there must be a threat which is present now, although the impact of the threat may not be felt until later." *Price v. United States Navy,* 39 F.3d 1011, 1019 (9th Cir. 1994) (emphasis original).

Claimants must prove substantial and imminent endangerment to health or the environment "by a preponderance of the evidence." *Sullins v. Exxon/Mobil Corp.*, WL 8077086, at *1 (N.D. Cal. Jan. 26, 2011). "[U]nder an imminent hazard citizen suit, the endangerment must be ongoing but the conduct that created the endangerment need not be." *Conn. Coastal Fishermen*, 989 F.2d at 1316. The extraordinariness of measures taken to avoid the purported threat is also a factor in evaluating the endangerment to health. *See, e.g.*, *Morris v. Primetime Stores of Kansas, Inc.,* 1996 WL 563845 (D. Kan. Sept. 5, 1996) (claimants moved out of their house because of the presence of explosive vapors).

Riverwatcher has failed to produce facts demonstrating that an imminent and substantial engagement to human health exists. To prevail in his citizen suit, Riverwatcher must produce evidence regarding the "likelihood that the existing contamination will in fact result in harm to human health [or] the severity of any harm that might occur." *Cordiano*, 575 F.3d at 211; *see also Davies v. Nat'l Co-op. Refinery Ass'n*, 963 F. Supp. 990, 999 (D. Kan. 1997) (claimants' evidence was "noticeably lacking" where they failed to address the likelihood of exposure by only presenting evidence that the levels of benzene on their property were unsafe). The record is devoid of any such data, and in effect it demonstrates the opposite.

As the District Court of Kansas held, an entire population having to drink bottled water due to supposedly petroleum-contaminated groundwater was insufficient to find an imminent and substantial threat to human health, and the court refused to grant an injunction to plaintiffs. *Davies*, 963 F. Supp. at 999. The record states that at some point "in late winter and early spring of 2013" Riverwatcher received complaints that Deep Quod River smelled and was unusually brown-ish in color, whereupon the Farmville Water Authority issued a nitrate advisory, warning residents of the presence of nitrates in the water supply which are unsafe for consumption by

infants. (R. at 6.) Accordingly, households were instructed to use bottled water for infants – effectively signaling that nitrates do not pose a threat to children and adults. (R. at 6.) Riverwatcher has merely provided evidence of an inconvenience to a subset of Farmville's residents, which does not create a presumption of an "imminent and substantial threat" to human health. Indeed, the Deep Quod Watershed is a heavily farmed area and nitrate advisories in Farmville are not unheard of; nitrate advisories have been issued in 2002, 2006, 2007, 2009, and 2010. (R. at 7.) Riverwatcher has neither demonstrated the probability that the nitrates in the river water will in fact result in harm to human health, nor the severity of any harm that could ensue if the nitrates were ingested.

Furthermore, Riverwatcher's own expert is unable to demonstrate the requisite causal connection between the nitrates and the Farm. Dr. Generis testified in her deposition that it is "impossible to state that Moon Moo Farm was the 'but for' cause of the April 2013 nitrate advisory." (R. at 7.) RCRA's citizen suit does not require "but for" causation, however it does require evidence of contribution by the named defendant. The record lacks any semblance of a sufficiently perilous harm to which the Farm could have contributed.

Riverwatcher failed to adduce any issue of material fact to suggest that the Farm discarded a solid waste that presents an imminent and substantial harm to human health. Accordingly, affirming the District Court's findings is appropriate.

CONCLUSION

For the aforementioned reasons, the Farm respectfully requests this Court to affirm the District Court's decision.