Team 28

C.A. No. 155-CV-2014

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,

v.

MOON MOO FARM, INC.,

Defendant-Appellee.

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

BRIEF FOR MOON MOO FARM, INC.,
DEFENDANT-APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Supreme Court Opinions

District Court Opinions

JURISDICTIONAL STATEMENT

Plaintiff-Appellant brought suit against Moon Moo Farm in the United States District Court for New Union. The order of the district court, issued June 1, 2014, dismissed all claims against Moon Moo Farm and granted summary judgment in favor of Moon Moo Farm on its counter claim for trespass. EPA and Riverwatcher challenge the rulings in favor of Moon Moo Farm on appeal. The district court's order is final, and jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1291 (current through P.L. 113-174 approved 9-26-14).

STATEMENT OF THE ISSUES

1. Whether the Queechunk Canal is a publically navigable waterway of the State of New Union under Clean Water Act §502(7).

2. If the Queechunk Canal is a public trust navigable water, whether the evidence obtained through trespass and without warrant is admissible in a civil enforcement proceeding brought under CWA §§309(b), (d) and 505.

3. Whether or not Moon Moo Farm requires a permit under the Clean Water Act National Pollutant Discharge Elimination System.

4. Whether Moon Moo Farm is subject to citizen suit under RCRA Subtitle D and RCRA § 7002(a)(1)(B).

STATEMENT OF THE CASE

A. Statement of Facts

Defendant Moon Moo Farm is a privately operated dairy farm located 10 miles from the City of Farmville in the State of New Union. R. at 4. Moon Moo Farm sits at a bend in the Deep Quod River, which flows year round and runs into the Mississippi River, a navigable-in-fact waterway used for commercial activity. R. at 5. The Farmville community uses the Deep Quod River as a drinking source. R. at 5. In the 1940s, the farm's previous owners excavated the Queechunk Canal to alleviate flooding at the river bend. R. at 5. The Queechunk Canal is fifty yards wide, three to four feet deep, and navigable only by small boat. R. at 5. Moon Moo has prominently posted signs to indicate its private ownership of the land on both sides of the Canal. R. at 5.

Moon Moo Farm operates with 350 head of milk cows, which are housed in a barn and not pastured. R. at 4. Moon Moo increased its milking herd from 170 cows to 350 cows in 2010 to respond to the growing need for milk at the Farmville Chokos Greek Yogurt processing facility. R. at 5. The Chokos plant opened in 2009, and Moon Moo has accepted acid whey produced by the plant since 2012. R. at 5. A lagoon on Moon Moo property stores cow manure and liquid waste that flows to it through a drainage system from the barn. R. at 4, 5. The lagoon holds all manure produced "without overflowing during a 25-year rainfall event." R. at 5. Trailers periodically take liquid manure from the lagoon to spread it across 150 acres of Moon Moo Farm fields growing Bermuda grass for silage. R. at 5.

The State of New Union regulates Moon Moo Farm as a "no-discharge" animal feeding operation because it does not normally directly discharge the contents of its

manure facilities into state waters in conditions "up to and including the 25-year storm event." R. at 5. Moon Moo must submit a Nutrient Management Plan (NMP) to the Farmville Regional Office of the State of New Union Department of Agriculture (DOA) but does not hold any permit pursuant to the National Pollutant Discharge Elimination System (NPDES) under CWA §402. R. at 5,6.

At the start of 2013, Deep Quod "Riverwatcher", received complaints that the water of the Deep Quod River smelled and was a brown color. R. at 6. Around that time, the Farmville Water Authority issued a "nitrate" advisory warning that high levels of nitrate in the Deep Quod River made the city water supply unsafe for infants to drink. R. at 6. However, the levels of nitrates posed no threat to adult health. R. at 6. Acting on these complaints, Dean James, the Deep Quod "Riverwatcher", investigated Moon Moo Property on April 12, 2013 without a warrant. R. at 6. Ignoring "No Trespass" signs, James traveled in a small "jon boat" up the Queenchunk Canal, taking photos of Moon Moo's manure spreading activity and private property waters. R. at 6. Further, James took samples of water flowing from a ditch running alongside the canal on Moon Moo private property. R. at 6. Thereafter, James took the improperly obtained sample to a testing lab, which reported it to contain high levels of nitrates and fecal coliforms. R. at 6.

Records confirm that Moon Moo applied manure to its fields at rates consistent with the NMP filed with the Farmville Field Office. R. at 6. Dr. Ella Mae, agronomist for Riverwatcher, tested the liquid manure/whey combination and determined it was a weak acid with a pH of 6.1. R. at 6. Though Dr. Mae asserted this acidity prevented grass crops from absorbing nutrients on Moon Moo's field, Dr. Emmet Green (another expert agronomist) recognized "land application of whey as a soil conditioner" as a longstanding

practice in New Union and asserted that Bermuda grass tolerates wide-ranging soil pH conditions. R. at 6, 7.

Previous nitrate advisories had been issued in Farmville before the increase in Moon Moo's operations. R. at 7. According to expert testimony of environmental health expert Dr. Susan Generis, it was impossible to pinpoint Moon Moo Farm as the "but for" cause of the April 2013 nitrate advisory. R. at 7. Following these events, litigation ensued to regulate Moon Moo farm operations through regulations set forth and enforced by the Federal Environmental Protection Agency (EPA).

B. Course of Proceedings

Plaintiffs properly served on Moon Moo Farm, the New Union Department of Environmental Quality (DEQ), and the United States Environmental Protection Agency (EPA) a letter of intent to sue under the citizen suit provisions of the Federal Clean Water Act (CWA) § 505 and Resource Conservation and Recovery Act (RCRA) § 7002. R. at 7, 12. Before the expiration of the waiting period after notice, EPA commenced this civil enforcement action against Moon Moo Farm, seeking civil penalties under CWA § 309(d) as well as injunctive relief under CWA § 309(b). R. at 7, 12. At the conclusion of the ninety-day RCRA waiting period, Riverwatcher intervened as a plaintiff in the EPA action pursuant to CWA § 505(b)(1)(B), and alleged additional causes of action under the citizen suit provision of RCRA § 7002. R. at 12.

EPA and Riverwatcher claim Defendant Moon Moo Farm, Inc. is a Concentrated Animal Feeding Operation (CAFO) subject to permitting under the National Pollutant Discharge Elimination System (NPDES) permit program pursuant to the Clean Water Act (CWA), 33 U.S.C. § 1342 (2012). R. at 7-8. EPA and Riverwatcher further argue Moon

Moo Farm violated RCRA §4005 in its practice of "open dumping of solid waste" and the waste mixture constitutes an "imminent and substantial endangerment" to human health subject to redress under RCRA, § 7002(a)(1)(B). R. at 10-11.

Moon Moo Farm asserted a counterclaim to the complaint, seeking damages and injunctive relief for trespass against Riverwatcher and James. R. at 12. After discovery, both sides moved for summary judgment. R. at 12.

On June 1, 2014, in Civ. 155-2014, the District Court for New Union ruled in favor of Defendant, Moon Moo Farm, Inc., granting summary judgment on the issue of trespass. R. at 1. The District Court held that Moon Moo Farm is not a CAFO subject to NPDES permitting under the CWA, 33 U.S.C. § 1342 (2012), that evidence of Moon Moo Farm's discharge was obtained by trespass, and that such evidence was inadmissible in a civil enforcement proceeding. R. 1-2. Further, the District Court held that discharges from Moon Moo Farm's fields fell under the agricultural stormwater exemption of the CWA and dismissed Riverwatcher's open dumping and imminent and substantial endangerment claims under (RCRA), 42 U.S.C. §§ 6901-6992k (2012). R. 1-2.

The District Court awarded damages against the United States, Riverwatcher, and Dean James based on Moon Moo Farm's successful trespass claim. R. 1-2. The United States Court of Appeals for the Twelfth Circuit then granted this appeal. R. at 1-3.

STANDARD OF REVIEW

This appeal was taken from the district court's grant of summary judgment. This Court reviews a district court's grant of summary judgment *de novo*. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988).

SUMMARY OF THE ARGUMENT

The district court correctly dismissed the charges against Moon Moo Farm and correctly granted Moon Moo Farm's motion for summary judgment on trespass. Because the Queechunk Canal is a manmade body of water constructed to alleviate flooding, it is not a public trust navigable water. Therefore, when Dean James, acting as agent for the EPA, ignored Moon Moo's signage demarcating its private property, James trespassed. Because Fourth Amendment protection against unreasonable searches and seizures applies to this civil case, any evidence illegally obtained by James is inadmissible in this action because it was gathered during a trespass.

The district court properly dismissed EPA and Riverwatcher's claims because Moon Moo Farm is not a CAFO subject to NPDES permitting. Because the water sample submitted by EPA is not admissible in this case, there is no proof that Moon Moo Farm "discharges" pollutants into a navigable water, and therefore the farm is not a CAFO subject to NPDES permitted. Even if Moon Moo is a CAFO, any alleged discharge comes from the whey fertilizer, not from animals on Moon Moo Farm. Any discharge is thus exempt from permitting as agricultural stormwater.

Finally, the district court properly dismissed the citizen suit brought against Moon Moo Farm under RCRA. Because Moon Moo Farm's manure mixture does not qualify as a "solid mixture" under RCRA standards and does not present an "imminent and substantial endangerment" to human health under RCRA, the citizen suit was correctly determined improper.

ARGUMENT

I. THE QUEECHUNK CANAL IS NOT A PUBLIC TRUST NAVIGABLE WATER OF THE STATE OF NEW UNION, AND THEREFORE, RIVERWATCHER OBTAINED EVIDENCE BY WAY OF TRESPASS.

There is no public right of navigation to the Queechunk Canal under the common law or as defined by specific provisions of the CWA because the waterway was manmade with the goal of alleviating flooding. 33 U.S.C. §§1251-1387. Courts may take judicial notice of the navigable character of an important river that is navigable within "common knowledge." *Harrison v. Fite*, 148 F. 781, 785 (8th Cir. 1906). However, when the navigability of a water of "insignificant capacity and doubtful utility" is questioned, navigability is to be determined by the evidence produced, and the burden of proof rests upon the party asserting the existence of the public servitude. *Id.* Accordingly, in this case, the EPA and Riverwater, as intervener, bear the burden of establishing the Queechunk Canal as a navigable waterway.

The CWA defines "navigable waters" specifically as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7); *Rapanos v. U.S.*, 547 U.S. 715, 730-31 (2006). Although this definition is broad, the Canal is not a public navigable waterway because it was manmade on private property for the purpose of alleviating flooding at the bend of the Deep Quod River. The mere fact that the Canal is connected to other navigable rivers does not establish the Canal's navigable status.

Even if the Queenchunk Canal is publically navigable, the activities of Riverwatcher and Dean James exceeded the scope of the public right of access incidental to navigation, and thus classify as trespass.

A. Although connected to the navigable Deep Quod and Mississippi Rivers, the Queechunk Canal is not subject to public navigability because it is a manmade canal constructed for the purposes of alleviating flooding.

Although the Queechunk Canal connects to other navigable waterways, the Canal is not subject to general public access because the canal was man made on private property. R. at 5. The regulatory definition of "navigable waters" includes "'tributaries' of navigable-in-fact waters." *In re Needham*, 354 F.3d 340, 345 (5th Cir., 2003) (citing 40 C.F.R. § 300.5 (2003)). However, "tributaries" or "adjacent" waters do not include "every possible source of water that eventually flows into a navigable-in-fact waterway." *Needham*, 354 F.3d at 347 (citing *Rice v. Harken Exploration Co.,* 250 F.3d 264, 267 (5th Cir.2001) (citing 33 U.S.C. § 1362(7)(2000))).

Generally, even if a nexus exists to a navigable-in-fact waterway, the navigational servitude in favor of the public does not extend to "waterways created by the direct actions of human beings, such as private dredging, so long as those actions do not displace naturally navigable water." 33 USCA §403. Further, as in this case, "where waters were not previously navigable, the public does not acquire the right to navigate an artificial channel made by the owner of the underlying soil." 33 USCA §403.

In *Kaiser Aetna v. U.S.* the Court held that the extent of the public navigable servitude depended not on connection to navigable waters, but on whether the waterway itself was "natural" or privately developed. *Kaiser Aetna v. U. S.*, 444 U.S. 164, 185 (1979). Following this reasoning, the Supreme Court in *Vaughn v. Vermilion Corp.*, upheld the Louisiana Court of Appeal's determination that canals built on "private property with private funds in such a manner that they ultimately joined with other navigable waterways" carried no general right of public use. 444 U.S. 206 (1979).

Instead, the Court's ruling protected the full range of ownership interests in privately constructed waterways. *Id.* Respecting the right to exclude others from private property, the Court found privately constructed waterways justified classification as private property from which others could be excluded.

In *In re Needham*, a canal was classified as a "navigable water" based on witness testimony characterizing the canal as an "industrial corridor" between two other navigable-in-fact waters. *Needham*, 354 F.3d at 347. The witness observed the canal contained "shipyards, repair facilities, dry docks, [and a] gas freeing operation." *Id.* Due to its industrial nature, the inland waterway which "support[ed] commerce, [was] unobstructed, and [was] traversed on a consistent basis" was navigable. *Id.*

In this case, the previous owner of the Moon Moo Farm facility excavated the Queechunk Canal in the Deep Quod River during the 1940's. R. at 5. These owners excavated the canal specifically to "alleviate flooding at the river bend," not to divert the Deep Quod River. R. at 5. Although the Queechunk connects with the navigable-in-fact Deep Quod and Mississippi Rivers, it is not an "industrial corridor," like the canal in *In Re Needham.* The Queechunk lacks the commerce-supporting facilities identified in *In Re Needham* and exists to alleviate flooding, not to sustain commerce. Pursuant to *Vaughn*, there is no general right of public navigability over privately funded canals built on private property that ultimately join with other navigable waters. R. 5. Just as the *Vaughn* Court ruled to protect the owner's right to exclude others from private premises, this Court must rule in favor of Moon Moo to protect the general right of a private owner to exclude others. If classified as a navigable water, Moon Moo's ownership rights will be cast aside. This court should avoid setting such a precedent that may have the effect of

trampling the property rights of our citizens. Because of its private, manmade, and noncommercial nature, the Queechunk Canal is not a publically 'navigable water' despite its ultimate connection to other navigable waters.

B. Even if the Canal is classified as a public trust navigable water, Riverwatcher and Dean James' activities exceeded the scope of use granted to the public on a public trust navigable water.

Even if this court determines that the Queechunk Canal is a public trust navigable waterway, James' sample extraction from the ditch on Moon Moo property exceeded the scope of that public use because the state of New Union has not granted public access past the Canal's high-water mark. When a public trust navigable water exists, the state holds the area for public use only "from high-water mark to the middle of the channel of the river." *Barney v. City of Keokuk*, 94 U.S. 324, 333 (1876). Because states control property held for public use, jurisprudential definitions of the scope of the public's right of use differ from state to state. *Id.*

In *Bott v. Commission of Natural Resources of State of Mich. Dept. of Natural Resources*, owners of land on both sides of a creek succeeded in a trespass action against local landowners who wanted to access the creek. 327 N.W.2d 838, 842-43 (Mich., 1982). The *Bott* court applied Michigan law to define the scope of the public's right to a public trust navigable waterway. *Id.* The rights of the public were defined as "as an incident of the navigational servitude" and were not "co-extensive with the rights of riparian and littoral owners". *Id.* at 842. While the court recognized fishing as an incident of the navigational servitude in inland rivers and lakes, fowling and hunting rights were not incidental to the navigational servitude. *Id.* (citing *Attorney General ex rel. Director of Conservation v. Taggart,* 11 N.W.2d 193 (Mich., 1943)). Instead, hunting and fowling

were reserved to riparian and littoral owners. *Id.* The court reasoned "the right of the public to use the water is not paramount but must be balanced against the rights of riparians to make use of the water, bed and banks of waterways." *Id.* at 875. The court recognized the public policy interest of preserving a landowner's full spectrum of ownership rights and upheld the right to exclude others from private premises.

In this case, when James reached the Queechunk Canal, he ignored the "No Trespassing" signs and proceeded up the Canal through Moon Moo Farm's property. R. at 6. Even if the Canal is a public-trust navigable water as defined by *Barney v. City of Keokuk*, James' right to public access did not extend past the high-water mark of the canal. Thus, when James took samples of the water flowing from the inland drainage ditch on land owned by Moon Moo, James exceeded the scope of the public right of use. R. at 6. Further, water sample extraction from the drainage ditch is not incidental to the public right to navigation as required by *Bott*. Instead, monitoring the privately owned and operated farm (by way of photography and water sample extraction) is a right reserved to the riparian landowner, Moon Moo Farm. As *Bott* recognized the importance of preserving an owner's full ownership rights, the Court in this case must respect Moon Moo's right to exclude others from its privately held property in the interest of preserving the full range of Moon Moo's rights. If Riverwatcher's improper access to private land is tolerated with no consequence, the rights of Moon Moo will be violated, opening the precedential door to unlimited violations of the full ownership rights of other landowners. Accordingly, because James' actions exceeded the scope of the public navigational servitude as defined in *Bott*, James' actions on the Queechunk Canal constituted a trespass even if the Queechunk Canal is considered a public-trust navigable water.

Although the Canal reaches other navigable rivers, the Canal is not subject to public navigability because it was manmade on private property for the purpose of alleviating flooding and serves no commercial purpose. Even if the Canal is navigable, the activities of Riverwatcher exceeded the scope of the public right of access incidental to navigation, and thus qualify as trespass.

II. BECAUSE THE FOURTH AMENDMENT EXCLUSIONARY RULE APPLIES TO THIS CIVIL PROCEEDING AND RIVERWATCHER'S ACTIONS CONSTITUTE A DELIBERATE UNREASONABLE SEARCH UNDER THE FOURTH AMENDMENT, THE EVIDENCE OBTAINED THROUGH TRESPASS AND WITHOUT A WARRANT BY RIVERWATER IS INADMISSIBLE IN A CIVIL ENFORCEMENT PROCEEDING UNDER CWA §§309(b), (d) AND 505.

The evidence obtained by Riverwatcher and Dean James is inadmissible in a civil enforcement proceeding under CWA §§309(b), (d) and 505. In order to bring a citizen suit under the Clean Water Act, a plaintiff must establish: "(1) the defendant polluted in violation of a National Pollutant Discharge Elimination System (NPDES) permit; (2) in a body of water in which the plaintiff has an interest; and (3) the pollutant caused the injury the plaintiff has suffered; and (4) the injury can be redressed by a favorable court decision." *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972). The CWA has limited its citizen-suit provision to "any citizen," defined as "a person or persons having an interest which is or may be adversely affected." *Id.*

The Fourth Amendment applies in this civil proceeding to the actions of Dean James, "Riverwatcher" and agent of the EPA. James served as a government agent attempting to locate a "suspected public nuisance" where Moon Moo Farm had a reasonable expectation of privacy on its private property. Because Riverwatcher's acts as agent of the EPA violated this expectation of privacy, constituting an unreasonable search, application of the Fourth Amendment exclusionary rule bars admission of the

improperly obtained water sample. U.S. CONST. amends. 4; see also *Mapp v. Ohio*, 367 U.S. 643 (1961).

A. Because the Fourth Amendment applies to government actors in civil cases where a searched party has a reasonable expectation of privacy, the EPA's water sampling by its agent, Dean James, is subject to restrictions under the Fourth Amendment.

The Supreme Court has held that the Fourth Amendment protection from unreasonable searches and seizures is "applicable to the activities of civil as well as criminal authorities." *New Jersey v. T.L.O.*, 469 U.S. 325, 335 (1985) (citing *Camara v. Municipal Court,* 387 U.S. 523, 532–33 (1967)). "The basic purpose of this Amendment . . . is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Id.* The Supreme Court has applied the Fourth Amendment's prohibition on unreasonable searches and seizures to various types of government agents and workers. *T.L.O.*, 469 U.S. at 335 (extending the exclusionary rule to cover actions beyond merely police activity). The Fourth Amendment has thus been characterized as a limitation on *all* "'governmental action'—that is, 'upon the activities of sovereign authority.'" *Id.* (emphasis added) (citing *Burdeau v. McDowell,* 256 U.S. 465, 475 (1921)).

In *Camara v. Municipal Court,* the Fourth Amendment was applied to limit an unreasonable search and seizure conducted by building inspectors. *T.L.O.*, 469 U.S. at 335 (citing *Camara*, 387 U.S. at 528). The Fourth Amendment has also been applied to limit the actions of Occupational Safety and Health Act inspectors. *Id* (citing *Marshall v. Barlow's Inc.,* 436 U.S. 307, 312–313 (1978)); *see also Smith Steel Casting Co. v. Brock*, 800 F.2d 1329, 1334 (5th Cir. 1986); *see also Trinity Industries, Inc. v. OSCHRC*, 16 F.3d 1455, 1462 (6th Cir. 1994).

Still further, the Fourth Amendment has applied to "firemen entering privately owned premises to battle a fire." *Id.* see also *Michigan v. Tyler,* 436 U.S. 499, 506 (1978). *Michigan v. Tyler*, established that the "Fourth Amendment extends beyond the paradigmatic entry into a private dwelling by a law enforcement officer in search of the fruits or instrumentalities of crime." *Id.* at 504-05. *Tyler* established the Fourth Amendment also applies to officials, such as "health, fire, or building inspectors" whose purpose may be to locate "a suspected public nuisance" or perform a routine inspection. *Id.* Reasoning that "innocent fire victims retain protectable expectations of privacy in whatever remains of their property," the Supreme Court applied the Fourth Amendment to fireman entering private premises. *Id.* at 505.

In this case, the EPA (acting through Riverwatcher and Dean James) is a government official acting to locate a "suspected public nuisance" and is thus subject to the Fourth Amendment, as were the firemen in *Michigan v. Tyler*. Further analogizing the cases, the alleged goal of the EPA in this suit (protecting public health) is not unlike the goal of the firefighters in. *Tyler.* Just as *Tyler* required firefighters to respect the expectation of privacy on private premises, the EPA must respect Moon Moo's reasonable expectation of privacy.

The only evidence offered against Moon Moo in this case is a water sample invalidly obtained by Dean James. R. at 5-6. This is the sole evidence offered in this suit by EPA, further demonstrating that Dean James acted as an agent of the EPA in his entry onto Moon Moo property to collect that sample. R. at 6. James, as an agent of the EPA, ignored "No Trespassing" signs on the non-navigable Queechunk Canal as he proceeded up the Canal through Moon Moo private property on April 12, 2013. R. at 6. James, as an

agent of EPA, disregarded Moon Moo's right to privacy by photographing the private premises and extracting a water sample from a ditch on Moon Moo property. R. at 6. The EPA cannot circumvent the Fourth Amendment by acting through an agent. Because James' search directly served the EPA, James acted as an EPA government agent and official. Thus, James' actions are subject to the Fourth Amendment restriction against unreasonable searches and seizures as were the activities of the firefighters in *Tyler*.

B. The actions of EPA agent Dean James constitute a deliberate, unreasonable search in violation of the Fourth Amendment, therefore, the exclusionary rule bars admission of evidence obtained by the search.

In this case, the exclusionary rule bars admission of the evidence obtained by the EPA and Riverwatcher through trespass and without a warrant because the government official's actions constitute a deliberate, unreasonable search under the Fourth Amendment. An "unreasonable" search occurs under the Fourth Amendment when a subjective expectation of privacy, which is also objectively reasonable, is violated by government officials' conduct. *Katz v. U.S.*, 389 U.S. 347, 355-58 (1967). Courts have acknowledged a reasonable expectation of privacy with regard to commercial wastewater on commercial property may exist in specific circumstances. *Id; See also Dow Chem. Co. v. United States,* 476 U.S. 227, 238 n. 5 (1986) (stating reasonable expectation of privacy issues "must be decided on the facts of each case, not by extravagant generalizations"); *See also United States v. Burnette,* 375 F.3d 10, 16 (1st Cir. 2004).

If a search is "unreasonable", it is illegal, and the evidence obtained in the search will be excluded from trial under the exclusionary rule of the Fourth Amendment. U.S. Const. amends. 4; see also *Mapp v. Ohio*, 367 U.S. 643 (1961). The Supreme Court has applied a "cost-benefit analysis" that weighs the costs of applying the exclusionary rule

(the loss of credible evidence) against the benefits of its application (the deterrence of Fourth Amendment violations). *United States v. Janis*, 428 U.S. 433 (1976) (finding the exclusionary rule does not prohibit admission of unlawfully seized evidence "in a civil tax proceeding where state officers had in good faith relied on a defective search warrant")); *see also United States v. Leon*, 468 U.S. 897 (1984). When evidence is obtained by "deliberate violations of the Fourth Amendment," the probative value of that evidence "cannot outweigh the need for a judicial sanction." *Id.* at 582.

In *Riverdale Mills Corp. v. Pimpare*, the First Circuit Court of Appeals assessed whether a company had a reasonable expectation of privacy in industrial wastewater held on a private street, underneath a large manhole cover. 392 F.3d 55, 63 (1st Cir. 2004). The wastewater was located 300 feet away from, and ultimately flowed into, a public sewer system. *Id.* The Court denied applying a per se rule that wastewater is not entitled to a reasonable expectation of privacy. *Id.* If for example, wastewater from "a sewage holding tank attached to a mobile home of a sole occupant" was seized for evidence of drug use, a reasonable expectation of privacy would exist. *Id.* (citing *Skinner v. Ry. Labor Executives Ass'n,* 489 U.S. 602, 617 (1989) (finding "a chemical analysis of a urine sample" was a 'search' for Fourth Amendment purposes because the tested subject has a reasonable expectation of privacy).

A physical entry by an EPA officer into private property has been identified to raise similar privacy concerns. *Dow Chem. Co.*, 476 U.S. at 237 (citing *See v. City of Seattle*, 387 U.S. 541, 543 (1967)). Under *Dow Chemical*, businessmen, like the occupant of a residence, are entitled to "a constitutional right to go about . . . business free from unreasonable official entries upon his private commercial property." *Id.* (finding no

"search" under the Fourth Amendment when EPA officials took aerial photographs of a chemical manufacturing facility because aircraft was lawfully in navigable airspace).

In *Rochin v. California,* the court made clear that the purpose of the exclusionary rule is to deter government misbehavior and people acting in an egregious manner. *Rochin v. California,* 342 U.S. 165 (1952). In *Ronchin*, the arresting officers used physical means to constitute "deliberate" violations of the Fourth Amendment. *Id.* at 166; However, Courts have acknowledged "deliberate" Fourth Amendment violations are not restricted to actions involving physical violence. *Adamson v. C.I.R.*, 745 F.2d 541, 545 (9th Cir. 1984); *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 1050 (1984).

In this case, Moon Moo Farm is entitled to a reasonable expectation of privacy on its commercial properties as identified by *Dow.* Moon Moo, a commercial operator as identified in *Dow*, had a subjective expectation of privacy in this case, evidenced by its clear posting of "Do Not Trespass" signs on both sides of the Queechunk Canal. Given the non-navigable nature of the Canal and Moon Moo's private ownership of the farmland, this subjective exception of privacy was objectively reasonable. By posting trespass signs, which were ignored by EPA agent James, Moon Moo put the public on notice of its *private* commercial operations. R. at 5, 6.

James deliberately and unreasonably violated the reasonable expectation of privacy on Moon Moo's private property when he entered the grounds to access the water sample from the drainage ditch. In accordance with *Adamson v. C.I.R.*, a Fourth Amendment search that is deliberate and unreasonable need not include physical brutality. The goal of prohibiting unreasonable searches is to deter government officers

and their agents from obtaining evidence in such egregious fashions as did the EPA in this case. If Riverwatcher, as an agent of the EPA, is allowed to so deliberately violate Moon Moo's reasonable expectation of privacy in this case, the very purpose of the prohibition against unreasonable searches and seizures will be eroded. This Court should avoid this unwarranted result by finding the EPA's actions constitute an unreasonable search in violation of the Fourth Amendment. Any evidence obtained in the governments unreasonable search (in this case, the collected water sample) is inadmissible under the Fourth Amendment Exclusionary rule.

Accordingly, because the Fourth Amendment protection against unreasonable searches and seizures applies, and the EPA's actions constitute a violation of this protection, the evidence obtained by the EPA and Riverwatcher is not admissible in this case.

III. MOON MOO FARM DOES NOT REQUIRE A PERMIT UNDER THE CLEAN WATER ACT NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (NPDES) PERMITTING PROGRAM BECAUSE IT IS NOT A CONCENTRATED ANIMAL FEEDING OPERATION (CAFO) SUBJECT TO NPDES PERMITTING, AND, BY VIRTUE ITS COMPLIANCE WITH A NUTRIENT MANAGEMENT PLAN (NMP), MOON MOO FARM'S WASTE IS EXEMPT IT FROM NPDES PERMITTING REQUIREMENTS AS AGRICULTURAL STORMWATER.

A. The sample obtained by EPA and Riverwatcher Moon Moo Farm is inadmissible in this case as described in Part II, therefore there is no evidence of discharge from Moon Moo Farm's ditches into waters of the United States and accordingly, Moon Moo is not a CFAO subject to NPDES permitting.

Because the evidence purported against Moon Moo is inadmissible in this case, there is no proof that any "discharge" from Moon Moo ditches has entered waters of the United States. Therefore, because "discharge" is required to classify as a CAFO subject

to NPDES permitting, even if the Queenchunk Canal is a navigable water of the United States, Moon Moo Farm cannot fall under the statutory definition of a Medium CAFO subject to NPDES permitting.

The Code of Federal Regulations sets forth the definition of a medium concentrated animal feeding operation ("Medium CAFO") under EPA regulations. 40 C.F.R. §122.23(6)(2011). Relevantly, an AFO with "200 to 699 mature dairy cows, whether milked or dry" may be classified as a CAFO if one of two further requirements are satisfied: "(A) Pollutants are discharged into waters of the United States through a manmade ditch, flushing system, or other similar manmade device; or (B) Pollutants are discharged directly into waters of the United States which originate outside of and pass over, across, or through the facility or otherwise come into direct contact with the animals confined in the operation." 40 C.F.R. § 122.23 (6)(i). In this case, no waters of the United States pass over, across, or through Moon Moo Farm's milk production area, so the only possible way for Moon Moo Farm to be considered a CAFO is if it "discharges pollutants" "into waters of the United States" through a manmade ditch, flushing system, or other similar man-made device. *Id.*

A "discharge" is any addition of any pollutants, including "solid waste, ... sewage, ... biological materials, ... and agricultural waste," into navigable waters from any point source. *Concerned Area Residents for Environment v. Southview Farm*, 34 F.3d 114, 117 (2nd Cir., 1994)*;* citing 33 U.S.C. § 1362(12).

Any "discharge of pollutants" to the "waters of the United States" by a CAFO without a NPDES or in violation of its terms violates the CWA. *Community Ass'n for Restoration of Env't (CARE) v. Sid Koopman Dairy*, 54 F.Supp.2d 976, 981 (E.D.Wash.,

1999) (citing 33 U.S.C. § 1311). Importantly, the CWA "does not empower the agency to regulate point sources themselves; rather, EPA's jurisdiction under the operative statute is limited to regulating the *discharge of pollutants*." *Nat'l Pork Producers Council v. U.S. EPA.*, 635 F.3d 738, 750-51 (5th Cir. 2011) (emphasis added); *see also Waterkeeper Alliance, Inc. v. U.S. EPA.*, 399 F.3d 486, 505 (2nd Cir. 2005). "[U]nless there is a discharge of any pollutant, there is no violation of the Act..." *Waterkeeper Alliance*, 399 F.3d at 504.

In *National Pork Producers Council v. U.S. EPA.*, the Fifth Circuit affirmed that there must be proof of *actual discharge* into a navigable water to "trigger the CWA's requirements and the EPA's authority." *Nat'l Pork Producers*, F.3d at 751. Limiting the EPA's authority to the regulation of CAFOs that actually discharge, the 5th Circuit struck down an EPA requirement that CAFOs that merely "*propose*" to discharge must apply for an NPDES permit. *Id* (emphasis added).

In this case, as stated by the District Court, there is no claim that any waters of the United States "pass over, across, or through Moon Moo Farm's milk production area", so the only possible way for Moon Moo Farm to be considered a CAFO is if it discharges pollutants 'through a manmade ditch, flushing system, or other similar manmade device.'" As the Fifth Circuit set forth in *National Pork Producers Council*, in order for the EPA to have permitting authority over Moon Moo Farm, there must be evidence of a "discharge" of a "pollutant" into a navigable water. In this case, the only evidence to prove a discharge was improperly obtained through trespass and thus, inadmissible to establish a "discharge." The court in *National Pork Producers Council* refused to grant the EPA authority over CAFOs that only "propose" to discharge, restricting authority to

cases in which an "actual" discharge is proven. Similarly, in this case, the EPA has no authority to regulate Moon Moo as a CFAO until evidence of an "actual discharge" is established. Because no admissible evidence was offered to prove a discharge by Moon Moo into the waters of the United States, Moon Moo farm cannot be defined as a Middle CAFO subject to NPDES permitting.

B. Alternatively, Moon Moo Farm is not subject to NPDES permitting because Moon Moo's application of manure is in compliance with a nutrient management plan (NMP) exempting it from NPDES permitting requirements as agricultural stormwater.

Even if the evidence of a "discharge" is admissible in this case, Moon Moo Farm is immune from NPDES permitting because its application of manure is in compliance with a nutrient management plan (NMP) and classified as agricultural stormwater, exempt from permitting requirements.

For purposes of interpreting relevant EPA regulations under 40 C.F.R. § 122.23, the term "point source" includes "any discernible, confined and discrete conveyance, including but not limited to any ... concentrated animal feeding operation..." *Southview Farm*, 34 F.3d at 177 (citing 33 U.S.C. § 1362(14)). However, this term does not include agricultural stormwater discharges and return flows from irrigated agriculture." *Id.* (limiting the exception to only those flows which do not contain additional discharges from activities unrelated to crop production).

Under EPA regulations, "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).” 40 U.F.C. § 122.23. For purposes of this paragraph, where the manure, litter or process wastewater has been applied in accordance with site specific NMPs “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.” *Id.* Thus, even if Moon Moo farm is a CAFO, “discharge from an area under the control of a CAFO can be considered . . . an agricultural stormwater discharge that is not subject to regulation.”

So far as Congress's intent is concerned, “like the Clean Water Act itself, the CAFO Rule seeks to remove liability for agriculture-related discharges primarily caused by nature, while maintaining liability for other discharges.” *Waterkeeper Alliance*, 399 F.3d at 508-09 (citing *Southview Farm*, 34 F.3d at 114). “[W]here 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.’” *Id.* This exception is limited by the requirement that exempt discharges must be related to agriculture. *Alt v. U.S. EPA.*, 979 F.Supp.2d 701, 714 (N.D.W.Va., 2013)

In *Waterkeeper Alliance, Inc. v. U.S. EPA.,* the Environmental Petitioners contended that a CAFO was industrial by nature, not agricultural, and therefore could not be subject to the agricultural stormwater exception. 399 F.3d at 509. The Second Circuit, however, found the dictionary definition “from the period in which the agricultural stormwater exemption was adopted” defined “agriculture” or “agricultural” in a way that

could "permissibly be construed to encompass CAFOs." *Id.* Webster's New World Dictionary defined the term "agriculture" to include "work of cultivating the soil, producing crops, and raising livestock." *Id;* (citing Webster's New World Dictionary of American English 26 (3rd College Ed.1988)). Further, the Oxford English Dictionary defined agriculture to include "cultivating the soil," "including the allied pursuits of gathering in the crops and rearing live stock." *Id;* (citing Oxford English Dictionary 267 (2d Ed.1989)). Because the CAFO raised livestock, applied manure as fertilizer, and cultivated the soil, the CAFO was "agricultural" in character in accordance with the dictionary definitions. *Id.* Thus, discharge from a CAFO could fall under the agricultural stormwater exception, contrary to the petitioner's arguments. *Id.* (citing *Alt,* F.Supp.2d at 714 (finding incidental manure and litter related to the raising of poultry were related to agriculture)).

Waterkeeper, also construed the term "stormwater," to mean "precipitation-related discharge[s]." *Id.* at 508. EPA regulations were interpreted to "generally authorize[e] the regulation of CAFO discharges, but exemp[t] such discharges from regulation to the extent that they constitute agricultural stormwater." 399 F.3d at 507. The court added that agricultural stormwater discharges are exempt from regulation *"even when those discharges came from what would otherwise be point sources.*" *Id.* (emphasis added). The manure and litter in the farmyard in question qualified as "agriculture stormwater" because it would remain in place until stormwater conveyed the particles to navigable waters. *Id.* at 714.

In *Concerned Area Residents for Environment v. Southview Farm,* defendant Southview Farm, one of the largest dairy farms in the State of New York and a large

CAFO, was not exempt from NPDES permitting under the agricultural stormwater exception. *Southview Farm*, 34 F.3d at 116. The farm, which owned an animal population including over 1,000 cows kept in barns, did not pasteurize its cows and stored liquid cow manure in five storage lagoons. *Id.* Pertinent to the court's finding that Southview was not exempt under the agricultural stormwater exception was the cause of the discharge. Witnesses recounted oversaturation of manure on the Southview property fields. *Id.* at 121. Based on these and other eyewitness accounts, the Second Circuit found a jury could properly find that the run-off was "primarily caused by over-saturation of the fields rather than the rain and that sufficient quantities of manure were present so that the run-off could not be classified as 'stormwater.'" *Id.* at 121.

Like the defendant in *Waterkeeper,* Moon Moo farm raises livestock and applies manure to land, cultivating soil. The finding in *Waterkeeper* that CAFOs were agriculture in nature under the dictionary meanings of the terms, and therefore could be exempt from permitting under the agricultural stormwater exemption, is thus applicable to this case. Just as the manure material in *Waterkeeper* would remain in place until stormwater conveyed the particles to navigable waters, Moon Moo farm is a "no-discharge" animal feeding operation. R. at. 5. As a "no-discharge" animal feeding operation, Moon Moo does not normally have a direct discharge from its manure handling facilities to waters of the State "in conditions up to and including the 25-year storm event." R. at 5. As a "no-discharge" operation, Moon Moo Farm follows a "Nutrient Management Plan" (NMP) issued by the Farmville Regional Office of the State of New Union Department of Agriculture (DOA). R. at 5. Dr. Green, an expert agronomist, testified the NMP allows land application of manure during a rain event. R. at 6. Further, Dr. Mae, the agronomist

offered by Appellants, concedes that any alleged unprocessed nutrients would have entered the Deep Quod River through runoff during rain events. R. at 6. Accordingly, because of its agricultural activities and compliance with its NMP, Moon Moo farm is exempt from NPDES permitting under the agricultural stormwater exception.

The holding in *Southview* is, however, distinguishable to this case. In contrast to Southview Farm, there is no witness testimony or other evidence of oversaturation of Moon Moo's fields with manure. While the evidence of oversaturation in *Southview* lead the court to find a reasonable jury could determine runoff occurred from oversaturation, not precipitation, no reasonable jury could reach this conclusion in the case of Moon Moo Farm due to the lack of evidence on that subject. No evidence has been offered to assert Moon Moo has not complied with its NMP. R. at 6. Instead, according to records retained by Moon Moo Farm, it has applied manure to its fields at rates consistent with its NMP (filed with the Farmville Field Office at all relevant times). R. at 6. Thus, summary judgment is appropriate. Further distinguishing Moon Moo from *Southview*, Moon Moo operates on a smaller scale than Southview, with only 350 cows, far less than Southview's herd of over 1,000 cows. R. at 8. Accordingly, the manure waste generated and held by Moon Moo is much less significant than in *Southview*. Because Moon Moo has complied with its NMP, is agricultural in nature, and no evidence has been offered to prove oversaturation of Moon Moo's fields, any "discharge" is exempt from NPDES permitting as agricultural stormwater.

Moon Moo Farm does not require a NPDES permit because it is not a CAFO subject to NPDES permitting. Alternatively, Moon Moo Farm is exempt from NPDES

permitting requirements as agricultural stormwater by virtue of its compliance with a NMP.

IV. MOON MOO FARM IS NOT SUBJECT TO A CITIZEN SUIT UNDER THE RESOURCE AND CONSERVATION RECOVERY ACT (RCRA) BECAUSE ITS FERTILIZER AND SOIL AMENDMENT DOES NOT CONSTITUTE A SOLID WASTE SUBJECT TO REGULATION UNDER RCRA SUBTITLE IV NOR DOES THE MIXTURE CREATE AN IMMINENT AND SUBSTANTIAL ENDANGERMENT TO HUMAN HEALTH SUBJECT TO REDRESS UNDER RCRA §7002(A)(1)(B).

Generally, RCRA is a far-reaching environmental statute that governs the "treatment, storage, and disposal of solid and hazardous waste." *Chicago v. Envtl. Defense Fund,* 511 U.S. 328, 331-332 (1994). As identified by the Supreme Court, the primary purpose of RCRA is to reduce the "generation of hazardous waste and to ensure the proper treatment, storage, and disposal of that waste which is nonetheless generated, so as to minimize the present and future threat to human health and the environment." *Meghrig v. KFC Western, Inc.,* 516 U.S. 479, 483. (citing 42 U.S.C. § 6902(b)).

RCRA § 4005 "specifically prohibits the practice of open dumping of solid waste." 42 U.S.C. § 6945(a). An "open dump" is defined as "any facility or site where solid waste is disposed of which is not a sanitary landfill which meets the requirements of [guidelines for sanitary landfills promulgated by EPA]." *Id*. Though citizen enforcement of the ban against open dumping is authorized by a citizen suit brought pursuant to RCRA § 7002(a)(1), Moon Moo Farm is not subject to a citizen suit under RCRA. 42 U.S.C. § 6972(a)(1)(B). To successfully bring a citizen suit under the relevant provisions of the RCRA, the civil action must be brought against a party that allegedly 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." *Id.* Because Moon Moo does not and has not handled, stored, treated, transported or disposed of solid waste or hazardous waste which presents an imminent and substantial endangerment to health or the environment, Moon Moo Farm is not susceptible to citizen suit under the RCRA provision asserted by plaintiffs.

A. Moon Moo Farm is not subject to a citizen suit under RCRA because its fertilizer and soil amendment (a mixture of manure and acid whey from Chokos yogurt processing facility) does not constitute a solid waste subject to regulation under RCRA Subtitle IV.

Moon Moo Farm is not subject to a citizen suit under RCRA because its mixture does not constitute a solid waste subject to regulation under RCRA Subtitle IV.

For purposes of a citizen suit under RCRA, "solid waste" is defined as "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 ... agricultural operations...." 42 U.S.C. § 6903(27) (emphasis added). RCRA does not define "discarded material." The Ninth Circuit has however defined the term, according to its ordinary meaning, as "to cast aside; reject; abandon; give up." *Safe Air for Everyone v. Meyer,* 373 F.3d 1035, 1041 (9th Cir. 2004) (finding grass residue was not "solid waste" under RCRA*). See also Community Ass'n for Restoration of the Env't, Inc. v. George & Margaret LLC*, 954 F.Supp.2d 1151, 1156 (E.D.Wash., 2013).

The Ninth Circuit has also identified factors that may be considered in determining whether a material qualifies as "solid waste," particularly: "(1) whether the material is 'destined for beneficial reuse or recycling in a continuous process by the generating industry itself;' (2) whether the materials are being actively reused, or whether

they merely have the potential of being reused; (3) whether the materials are reused by its original owner, as opposed to use by a salvager or reclaimer." *Meyer,* 373 F.3d at 1043 (finding grass residue was not "solid waste" under RCRA).

In enacting RCRA, Congress found that "[a]gricultural wastes which are returned to the soil as fertilizers or soil conditioners are not considered discarded materials in the sense of this legislation." *Meyer,* 373 F.3d at 1045–46. Under a specific provision of the RCRA regulation, certain materials are not solid wastes when recycled. 40 C.F.R. § 261.2(e). Relevant to Moon Moo Farms, materials that are recycled or "reused as effective substitutes for commercial products" are not considered solid wastes. 40 C.F.R. § 261.2(e). Defendants who raise a claim that a material in question is not a solid waste, or is exempt from regulation, "must demonstrate that there is a known market or disposition for the material, and that they meet the terms of the exclusion or exemption." *Id.* Under the regulatory scheme, owners or operators of facilities claiming they recycle materials must show that they have the necessary equipment to recycle. *Id.*

In *Oklahoma v. Tyson Foods, Inc.,* poultry litter did not become a "solid waste within the meaning of the RCRA. *Oklahoma v. Tyson Foods, Inc*., 2010 WL 653032 at *10 (N.D. Okla. Feb. 17, 2010). Evidence proved that poultry litter, a mixture of poultry feces and the bedding, had been useful when spread on fields by poultry growers, cattle ranchers, and others as a fertilizer and soil amendment. *Id.* Although some aspect of the product "[was] not fully utilized," expert opinion helped establish the soil's use as a fertilizer, and therefore exemption from "solid waste" under the RCRA. *Id.* Evidence of sales of the poultry litter to other farms and actual re-use by the defendant as fertilizer

constituted sufficient proof of the recyclable nature of the litter. *Id.* at *8. Therefore, the poultry litter was not a "solid waste" for purposes of RCRA regulation. *Id.*

Similarly, in *Safe Air for Everyone v. Meyer,* the defendants presented evidence that they did not discard grass residue, which was purported by plaintiffs to be solid waste. *Meyer,* 373 F.3d at 1043. Defendants offered proof of their reuse of the grass residue "in a continuous process of growing Kentucky bluegrass" to return nutrients to bluegrass fields and facilitate open burning process. *Id.* The determination of whether grass residue had been "discarded" was made "independently of how the materials [were] handled." *Id.* at 1046 n. 13. Though the plaintiffs sought to dismiss these benefits as "incidental," RCRA's statutory language requiring that materials must be "discarded" to be considered solid waste governed. *Id.* Based on the undisputed evidence that the defendants reused the grass residue, it did not qualify as "solid waste" under RCRA, which defines "solid waste" as "discarded material."

In contrast, in *Community Ass'n for Restoration of the Env't, Inc. v. George & Margaret LLC*, defendants were denied a motion to dismiss based on the finding that their application of manure could have constituted a disposal of solid waste. Importantly, evidence established that the defendants had applied manure in "amounts *beyond* what [was] necessary to serve as fertilizer." 954 F.Supp.2d at 1158. Because the material could no longer serve its intended use when applied in such excessive amounts, the unnecessary manure application conceivably could have constituted "discarding of solid waste" under RCRA regulation. *Id.* at 1156-57. Thus, the motion to dismiss sought by defendants was denied. *Id.* at 1163.

As in *Tyson* and *Meyer*, the Moon Moo farm manure is useful as a fertilizer, and is not "discarded" and transformed into "solid waste." Contrary to the manure usage in *CARE v. George*, there is no proof that Moon Moo has over applied its manure mixture or that the mixture has leaked as an unintended consequence of its intended use. R. at 6. Instead, Moon Moo has applied manure in a manner consistent with its NMP at all times. R. at 6. As required in *Tyson,* Defendants's own fertilization efforts constitutes actual evidence of the recyclable nature of the manure. R. at 4-5. Therefore, in accordance with *Tyson* and *Meyer*, this reuse as a fertilizer does not constitute a disposal of solid waste.

Even if the manure and whey mixture is classified as a "solid waste" Riverwatcher's citizen suit for an alleged open dump is precluded by the scope of the relevant EPA regulation. 40 C.F.R. § 257.1 (c)(1). Because this regulation specifically excludes agricultural wastes, including "manures and crop residues, returned to the soil as fertilizers or soil conditioners," Moon Moo Farm is exempt from citizen suit. 40 C.F.R. § 257.1(c)(1).

B. Moon Moo Farm is exempt from citizen suit under RCRA because its mixture of manure and acid whey from a yogurt processing facility does not present an imminent and substantial endangerment to human health subject to redress under RCRA §7002(a)(1)(B).

Because Moon Moo Farm's application of fertilizer and soil amendment does not constitute an "imminent and substantial endangerment" to human health subject to redress under relevant RCRA provisions, Moon Moo Farm is exempt from citizen suit under the RCRA. 42 U.S.C. § 6972(a)(1)(B).

The RCRA regulation authorizing a citizen suit requires a showing that the contamination at issue may present an "endangerment" that is both "imminent" and "substantial." 42 U.S.C. § 6972(a)(1)(B); *see also Lewis v. FMC Corp.*, 786 F.Supp.2d

690, 707-08 (W.D.N.Y., 2011). State environmental standards "do not define a party's federal liability under RCRA." *Id.*

An "endangerment" has been defined by Courts as a "threatened or potential harm and does not require proof of actual harm." *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 211 (2nd Cir. 2009) (citing *Dague v. City of Burlington*, 935 F.2d 1343, 1356 (2nd Cir 1991)). The term "imminent" "implies that there must be a threat which is present *now,* [even if] the impact of the threat may not be felt until later." *Meghrig*, 516 U.S. at 485-86 (citation omitted). Further, "a vague possibility of future harm cannot satisfy 42 U.S.C. § 6972(a)(1)(B), which applies to dangers that are both imminent and substantial." *Chem. Weapons Working Grp., Inc. v. U.S. Dep't of Def.,* 61 Fed.Appx. 556, 561 (10th Cir.2003). The Second Circuit, along with at least five other Circuits, has concluded that an endangerment is "substantial" if it is serious. *Cordiano,* 575 F.3d at 210–11; *See also Burlington N. & Santa Fe Ry. Co. v. Grant,* 505 F.3d 1013, 1021 (10th Cir. 2007).

In *Tilot Oil, LLC v. BP Products N. Am., Inc.*, plaintiffs argued the presence of benzene in a building basement should be regulated under RCRA because the chemical presented an "imminent and substantial danger" to human health. *Tilot Oil, LLC v. BP Products N. Am., Inc.*, 907 F. Supp. 2d 955, 964-65 (E.D. Wis., 2012). However, the court rejected this argument, finding state regulations were the only relevant standard by which to measure benzene. *Id.* Because "RCRA does not incorporate or otherwise rely solely on reference to regulatory standards, let alone any specific standard," RCRA presented no scheme to provide insight into whether building employees were faced with harm or the threat of harm. *Id.* The court determined "EPA screening levels she[d] little

insight on whether a possible imminent and substantial endangerment exist[ed] because screening levels [were] developed solely for the purpose of setting a level at which further investigation is required." EPA screening levels were not a determination of actual danger. *Tilot Oil*, 907 F. Supp. 2d at 964-65.

In a similar vein, in *Cordiano v. Metacon Gun Club, Inc.*, a violation of a state environmental standard did not raise the possibility of "imminent and substantial endangerment" under RCRA regulations. *Cordiano*, 575 F.3d 212-13. State regulations "[did] not define a party's federal liability under RCRA." *Id.* Therefore, the fact that some samples taken from the defendant's site exceeded Connecticut's state environmental standards "provided an insufficient basis for a jury to find a reasonable prospect of future harm that was both 'near-term and ... potentially serious.'" *Maine People's Alliance*, 471 F.3d at 296; see also *Cordiano*, 575 F.3d at 212-13 (citing *Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 399 F.3d 248, 261 n. 6 (3d Cir. 2005)). Thus, there was insufficient evidence for a jury to conclude § 6972(a)(1)(B) had been violated. *Id.* Absent additional evidence, the mere fact that the samples were produced "did not support a reasonable inference that . . . Metacon's site present[ed] an imminent and substantial endangerment." *Cordiano*, 575 F.3d at 214.

As stated in *Tilot Oil*, RCRA does not provide any regulatory standard by which to measure whether the nitrate advisory in this case creates an "imminent and substantial risk" to human health. Similarly, as in *Tilot*, any alleged violation of an EPA screening level would not constitute a determination of actual danger. Instead, EPA and Riverwater must establish additional proof of the alleged imminent and substantial harm to human health. Because the nitrate advisory "did not pose any health threat to adults," the locally

instituted Farmville advisory (which has been issued in the past prior to Moon Moo's actions) does not establish a substantial harm created by Moon Moo RCRA. Just as a mere sample violating state environmental regulations in *Cordiano* was insufficient to establish an "imminent and substantial endangerment," the sample from Moon Moo's ditch is insufficient.

Even if this Court finds that the nitrate advisory classifies as an "imminent and substantial injury" to human health, Moon Moo Farm has not been identified as the "but for" cause of this advisory and therefore cannot be held responsible without further evidence of causation. Because the Deep Quod watershed is heavily farmed, nitrate advisories have been required in Farmville periodically in the past. R. at 7. Such advisories were previously issued in "2002, 2006, 2007, 2009, and 2010, before the increase in Moon Moo Farm's operations." R. at 7. Even Dr. Susan Generis, Riverwatcher's environmental health expert, conceded at her deposition that "it was impossible to state that Moon Moo Farm was the 'but for' cause of that nitrate advisory" for Farmville's drinking water customers. R. at 7. Because Riverwatcher cannot attribute Moon Moo Farm as the cause of the nitrate advisory, Moon Moo is not subject to a citizen suit under RCRA. Therefore, Moon Moo Farm's application of fertilizer and soil amendment does not constitute an "imminent and substantial endangerment to human health subject to redress under relevant RCRA provisions. 42 U.S.C. § 6972(a)(1)(B).

Because Moon Moo Farm's manure and acid whey mixture does not constitute solid waste or create an imminent and substantial endangerment to human health, Moon Moo is exempt from citizen suit under RCRA.

CONCLUSION

This Court should grant summary judgment in favor of Appellee Moon Moo Farm for four reasons. First, summary judgment is appropriate because the Queechunk Canal is not a public trust navigable water under EPA standards and is thus not subject to regulation. Further, this Court should find that evidence obtained by EPA and Riverwatcher was obtained through a violation of the Fourth Amendment and therefore is inadmissible in this action. To allow the improperly obtained evidence to be admitted would serve against the general public because property owners' rights to privacy would be violated. Without any admissible proof of a "discharge" in a navigable waterway under CWA standards, the EPA and Riverwatcher cannot prove that Moon Moo Farm is a CAFO subject to NPDES permitting. Further, Moon Moo Farm is exempt from NPDES permitting requirements under the agriculture stormwater exception. Additionally, this Court should find Moon Moo Farm is not subject to a citizen suit under RCRA because its manure fertilizer mixture is not a "solid waste" as required under RCRA Subtitle D and the mixture does not constitute an "imminent and substantial endangerment to human health" under RCRA §7002(a)(1)(B). Therefore, we respectfully request that this Court affirm the district court's denial of EPA's and Riverwatcher's motions for summary judgment and dismissal of all complaints against Moon Moo Farm. Additionally, we respectfully request that this court affirm the district court's grant of Moon Moo Farm's motion for summary judgment and its award of $832,560 in damages in favor of Moon Moo Farm on its counterclaim.

Respectfully submitted,

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Counsel for Moon Moo Farm, Inc.