C.A. No. 14-1248

In the United States Court of Appeals for the Twelfth Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellant, and

v.

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

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JURISDICTIONAL STATEMENT

This case is an appeal from a judgment in the United States District Court for the District of New Union. The district court had proper subject matter jurisdiction over the case because the issues arise under the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251 (2012) et seq., and the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6903 (2012) et seq., laws of the United States, and federal district courts have original jurisdiction over any civil action arising under the laws of the United States. 28 U.S.C. § 1331 (2012). The United States Court of Appeals for the Twelfth Circuit has proper jurisdiction to hear appeals from any final decision of the United States District Court for the District of New Union. 28 U.S.C. § 1291 (2012).

STATEMENT OF THE ISSUES

I. Whether public trust navigability applies to a man-made canal, where the canal was built with private funds on private property for a private purpose, it was constructed after statehood, the diversion of water does not impact the existing navigable water, and it was not expressly dedicated to public use

II. Whether the exclusionary rule applies to CWA civil enforcement proceedings, where evidence was obtained by a private citizen without a warrant while trespassing on private real property with intent to assist the government, and where the owner had a reasonable expectation of privacy, did not consent, and is not in a closely regulated industry.

III. Whether a dairy farm is obligated under the CWA to apply for a NPDES permit because it is a CAFO, where the alleged discharge occurred during a heavy precipitation event from the land application area, the farm operates in accordance with a state approved NMP, evidence of its surface discharge was illegally obtained, and alleged seepage of contaminate into groundwater is not regulable because it is not a "water of the U.S."

IV. Whether a dairy farm's land application of manure and acid whey as fertilizer and soil amendment is "solid waste" regulated under RCRA, where the mixture is being used in an ongoing agricultural process, it has not yet fulfilled its intended purpose, there is insufficient evidence to show the farm was the proximate cause of the contamination, and the substance poses a minor and avoidable risk to a small subset of the population.

STATEMENT OF THE CASE

This appeal is from the United States District Court for the District of New Union, which granted summary judgment in favor of defendant-appellee, Moon Moo Farm ("Moon Moo"). R. at 4. The district court held that Moon Moo Farm was not in violation of the Clean Water Act ("CWA") or the Resource Conservation and Recovery Act ("RCRA"). *Id*. Plaintiff-appellant, the United States of America on behalf of the U.S. Environmental Protection Agency ("EPA"), and plaintiff-appellee-intervenor, Deep Quod Riverwatcher and Dean James ("Riverwatcher"), appeal. *Id*.

Moon Moo is home to 350 head of milk cows and grows Bermuda grass on 150 acres. R. at 4-5. The farm is in the State of New Union, located ten miles upstream from the City of Farmville. R. at 4. New Union became a state prior to 1940. *Id*. Riverwatcher is an environmental organization, which actively monitors water quality in the region. R. at 6. EPA is the federal agency charged with enforcing the CWA and RCRA.

Moon Moo is located at a bend on the banks of the Deep Quod River ("Deep Quod"), which is navigable by small boat, flows year round, and is tributary to the Mississippi River. R. at 5. Historically, flooding made it impossible to utilize all the land for crop production. *Id*. To mitigate this, the previous owner of the farm constructed the Queechunk Canal ("Canal") in the 1940s. *Id.* A portion of the Deep Quod is diverted into the Canal, which is fifty yards wide, only three to four feet deep, and can be navigated by a small recreational craft. *Id*.

In order to fertilize the Bermuda grass, which it uses as silage for its cows, Moon Moo utilizes the manure as fertilizer and stores it in an outdoor lagoon, adds other nutrients, and spreads the fertilizer on its crops, which is a common farming practice in the region. *Id*. The lagoon contains all the manure produced by the dairy operation. *Id*. Moon Moo is regulated as a

no-discharge animal feeding operation ("AFO") by the State of New Union Department of Agriculture ("DOA"), meaning it does not normally discharge into waters up to a 25-year rain event, defined as five inches in a 24 hour period. *Id*. In addition, Moon Moo submits a "Nutrient Management Plan" ("NMP") to the DOA's Farmville Regional Office, which provides manure application rates and expected uptake of nutrients. *Id*. The DOA approved Moon Moo's NMP even though it has the authority to reject is as insufficient. *Id*. Thorough review of the applications is not common, and the public does not generally participate in the commenting process. *Id*. Further, New Union has delegated authority from EPA to issue National Pollution Discharge Elimination System ("NPDES") permits under the CWA. R. at 5-6. However, they have not directed Moon Moo to apply for a permit. R. at 5.

In 2010, Moon Moo increased its milking herd from 170 cows to 350 cows to serve the Chokos Greek Yogurt processing facility in Farmville, which opened in 2009 and is helping fuel Farmville's economy. *Id*. Moon Moo reuses acid whey ("whey") produced by the Chokos facility as a soil conditioner in its fertilizer. R. at 6. Moon Moo has always applied its fertilizer in accordance with its NMP, and nothing in the NMP prevents it from applying fertilizer during a rain event. *Id*. At trial, Dr. Ella Mae, an agronomist and Riverwatcher's expert, testified that the application of the whey lowered the pH of the soil, which reduced the amount of nitrogen absorbed by the Bermuda grass. *Id*. In addition, Dr. Mae testified that the land application of fertilizer during rain events was not a best management practice, and that these substances were likely released into the environment through leaching into the groundwater and stormwater runoff. *Id*. However, Dr. Emmet Green testified that the application of whey as a soil conditioner was a longstanding practice in New Union, and although it does lower the pH of soil, it does not harm the Bermuda grass. *Id*.

The Farmville Region is heavily farmed and the Farmville Water Authority periodically issues nitrate advisories, which warn citizens that the municipal water supply may contain hazardous levels of nitrates to infants under the age of two. *Id*. Advisories were issued in 2002, 2006, 2007, 2009, and 2010. *Id*. In late winter and early spring of 2013, Farmville issued a nitrate advisory. *Id*. Around that time, Riverwatcher received complaints that the Deep Quod was odorous and brown in color. *Id*. On April 11-12, the Farmville Region experienced a significant rain event in which two inches of rain fell in a 24-hour period. *Id*. During the heavy rain event, Riverwatcher intentionally navigated past prominent "No Trespassing" signs, entered the Canal in his "jon boat," traveled through Moon Moo's property, and observed stormwater runoff from fields draining into the Canal. *Id*. He took samples from the drainage area, which revealed elevated levels of nitrates and fecal coliforms. *Id*.

EPA brought this action for civil penalties and injunctive relief for Moon Moo's alleged illegal discharge under the CWA. Riverwatcher intervened as plaintiffs and asserted a claim under CWA § 505, or in the alternative, for illegally dumping solid waste under RCRA § 7002. R. at 4. Moon Moo counterclaimed for common law trespass. *Id*. The court below granted Moon Moo's motion for summary judgment, dismissing the CWA and RCRA claims, and granting it relief in the amount of $ 832,560. R. at 12. EPA and Riverwatcher appeal from the summary judgment entered by the court below. R. at 1.

STANDARD OF REVIEW

This case involves an appeal from the district court's grant of summary judgment. Summary judgment is appropriate where "there are no genuine issues as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

Therefore, the issues before this court are questions of law and should be reviewed de novo. *Pierce v. Underwood*, 487 U.S. 552, 557 (1988).

SUMMARY OF THE ARGUMENT

1. The public trust doctrine is a state common law principle where states takes title to the water, bed, and banks of navigable rivers at the time of statehood, and hold them in trust for the public. The scope of public trust varies; most jurisdictions hold there is no public access on private, man-made waterbodies. *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *Vaughn v. Vermilion Corp*., 444 U.S. 206 (1979). An artificial waterway on private real property is beyond the scope of public trust, because the waterway was built after statehood on privately held property, thus, title could not pass to a state. Exceptions apply when navigability of an existing natural waterway is affected by the artificial waterway. *Vaughn*, 444 U.S. 206. The public trust doctrine does not apply to the Queechunk Canal because it is a private, man-made waterway built for flood mitigation on private property, its diversion of water does not affect the navigability of the Deep Quod River, and it has not been expressly dedicated. *Vaughn*, 444 U.S. 206;*Harvey v. Potter*, 19 La. Ann. 264 (La. 1867).

2. The Fourth Amendment's unreasonable search and seizure protections apply to commercial agricultural property and the exclusionary rule bars evidence obtained in its violation. *Pearl Meadows Mushroom Farm, Inc. v. Nelson*, 723 F. Supp. 432 (N.D. Cal. 1989). These protections apply to civil enforcement actions that are punitive in character. *Trinity Industries, Inc. v. Occupational Safety & Health Review Commission*, 16 F.3d 1455 (6th Cir. 1994); *Smith Steel Casting Co. v. Brock*, 800 F.2d 1329 (5th Cir. 1986). Generally, the exclusionary rule does not apply to private citizens; however, where a citizen obtains evidence with intent to assist the government and is encouraged through citizen suit provisions,

constitutional protections and the exclusionary rule apply. *United States v. Smyth*, 84 F.3d 1240, 1243 (10th Cir. 1996). EPA cannot avoid constitutional limits on warrantless searches and seizures by encouraging Riverwatcher to obtain evidence for it. Therefore, the court correctly held because the water samples relied upon by EPA and Riverwatcher were obtained unlawfully, the exclusionary rule bars admission of the evidence.

3. The CWA prohibits "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). A point source is defined as "any discernible, confined and discrete conveyance," including a CAFO; however, specifically excluded from the definition of a point source are agricultural stormwater discharges. Additionally, agricultural stormwater runoff is exempted from the CAFO rule when applied in accordance with an NMP to a land application area. 40 C.F.R. § 122.23(e). Here, Moon Moo is exempt from regulation under the CWA because the runoff occurred during a precipitation related event from the land application area, and operates in accordance with its NMP approved by New Union. Further, Moon Moo is not a CAFO because Riverwatcher did not present admissible evidence establishing a discharge. Finally, groundwater is not regulable under the "CWA" because it is not a "navigable water," thus Moon Moo is not required to obtain a NPDES permit.

4. RCRA regulates the "treatment, storage, and disposal of solid . . . waste." *Meghrig v. KFC Western, Inc*., 516 U.S. 479, 483 (1996). To trigger RCRA, the material sought to be regulated must be "solid waste" that is "discarded," *Safe Air v. Moyer*, 373 F.3d 1035 (9th Cir. 2004); it must have served its intended purpose, and it must potentially pose "an imminent and substantial endangerment to human health." 42 U.S.C. § 6972(a). Here, Moon Moo is not subject to a citizen's suit under RCRA because it is not discarding material, rather, it is applying reused and recycled manure and whey to its crops in an ongoing agricultural process as fertilizer

and soil amendment which has not yet served its intended purpose. In addition, Riverwatcher has not met its burden of showing that Moon Moo's alleged discharge caused the nitrate advisories in Farmville, nor has it shown that the nitrate advisories pose a threat to human health because there is a low likelihood of exposure.

ARGUMENT

I. The Queechunk Canal is not a public trust navigable water in New Union subject to public access because it is a private, man-made water body constructed after New Union statehood on private real property, its artificial diversion of water does not affect the navigability of the natural watercourse of the Deep Quod River, and it was never dedicated to public use.

This case presents a matter of first impression for the Twelfth Circuit: public access of private, man-made waterways. The district court properly entered summary judgment because there is no genuine issue of material fact, and Moon Moo is entitled to judgment as a matter of law. The public trust doctrine "is a title held in trust for the people of the State that they may enjoy: [t]he navigation of the waters … freed from the obstruction or interference of private parties." *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387, 452 (1892). The U.S. government inherited title of the waters, bed, and banks of navigable rivers from the King of England, and granted ownership to states on entrance to the Union. *Martin v. Waddell's Lessee*, 41 U.S. 367, 410-11 (1842). Because title to an artificial waterway cannot pass to a state prior to the waterway's existence, public access to artificial waterways on private real property requires analysis beyond traditional public trust tests of navigability. Most jurisdictions hold there is no public access on private, man-made waterbodies. *Kaiser Aetna*, 444 U.S. 164; *Vaughn*, 444 U.S. 206. Only where artificial waterways affect the navigability of existing natural waters of the U.S., will public access outweigh property rights. *Ilhenny v. Broussard*, 135 So. 669 (La. 1931); *Vaughn*, 444 U.S. 206. The district court properly found the Canal should not be expropriated for public use because it is a private, man-made waterway built for flood mitigation, and the

diversion does not affect the navigability of the Deep Quod. *Vaughn*, 444 U.S. 206. Further, many jurisdictions require canals be expressly dedicated to public use, which the Canal was not. *Harvey*, 19 La. Ann. 264; *Robinson v. Chamberlain*, 34 N.Y. 389 (N.Y. 1866).

A. The Queechunk Canal is not subject to public access because it is a private, man-made waterbody built on private property purchased by Moon Moo.

Multiple jurisdictions hold that canals constructed with private funds on private property remain privately owned and not subject to public trust navigability. *Vaughn*, 444 U.S. 206; *National Audubon Society v. White*, 302 So. 2d 660 (La. Ct. App. 1974). To recognize the rights of real property owners, artificial waterbodies are generally not considered "waters of the U.S." under the public trust doctrine. *National Audubon*, 302 So. 2d 660. The Illinois Supreme Court articulated "[t]he commonsense rationale underlying [the man-made waters rule] is that, unlike a natural body of water, which exists because of natural processes, an artificial body of water is the result of someone's labor. An artificial body of water is not a natural resource to be shared by all." *Alderson v. Fatlan*, 898 N.E.2d 595, 601 (2008).

In *Vaughn*, a lessee sought to enjoin people from trespassing on leased property, owned by Exxon. 444 U.S. 206. Exxon's canal system was built with private funds on private property to enhance accessibility across the property, which lies between two navigable waters of the U.S. *Vaughn*, 444 U.S. at 207. The Supreme Court affirmed Louisiana law providing that private canals are similar to private roads constructed with private funds for a private purpose, and held there was no public access to private canals simply because the canals are navigable-in-fact and connect to navigable waterways. *Vaughn*, 444 U.S. at 208-09. If not, property owners would lose the fundamental "right to exclude." *Kaiser Aetna*, 444 U.S. at 171-73, 179-80. In *Kaiser Aetna*, where property owners dredged an existing non-navigable lagoon to create a private marina, the Supreme Court found it was subject to federal regulation because it became

navigable-in-fact. *Id*. at 172-73. Yet the Court held that navigational servitude was not an exception to the Takings Clause; and the government must invoke eminent domain and provide just compensation in order for the private marina to require public access. *Id*. at 180.

North Carolina diverted from the majority of jurisdictions, and held that any waterway, natural or man-made, capable of navigation by watercraft constitutes a "navigable water" under the state's public trust doctrine. *Fish House, Inc. v. Clarke*, 693 S.E.2d 208 (2010). The *Fish House* court found "natural condition" to pertain to the water flow, not the actual waterway. *Id*. at 211. This interpretation of "natural condition" is antithetical to most jurisdictions.

The *Vaughn* Court did not extend the scope of public access to a navigable-in-fact canal constructed with private funds on private property, and neither should this Court. Constructed by the previous owner, Moon Moo purchased the title and property rights to the Canal when it purchased the real property. Title to a privately constructed canal should not "[become] 'vested in a whole nation,' simply because it contained running water or because it was dug deep enough to become navigable." *National Audubon*, 302 So. 2d at 665. Here, the Canal was created to mitigate flooding at the river bend, not as a public highway or a shortcut for the Deep Quod. R at 5. Moreover, it was built entirely with private funds to serve a private purpose. To find that it is subject to a public right of navigation would subvert Moon Moo's property rights, debilitate real property rights throughout New Union, and ignore Supreme Court precedent respecting the fundamental property right to exclude. Therefore, the lower court's ruling that the Canal is not subject to the public access because it is a man-made waterbody should be upheld.

B. The Queechunk Canal is a private, man-made waterbody not subject to public access, because the Canal's artificial diversion of water does not destruct the pre-existing natural navigability of the Deep Quod River.

Common law principles provide courts may find an artificial waterway is "natural" when it destroys the navigable capacity of a natural navigable river. *Ilhenny*, 135 So. at 670; *Dwinel v.*

Barnard, 28 Me. 554 (1848). When an artificial waterway destroys the navigable capacity of a navigable river, the artificial waterway becomes subject to public trust. *United States v. Rio Grande Dam and Irrigation Co*., 174 U.S. 690, 708 (1899). The issue becomes whether the artificial waterway is subject to public navigation because of necessity for commerce. Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. § 403. These principles are not applicable here, because the Canal does not alter the navigability of the Deep Quod, nor was it created to enhance the navigability of the river. The "artificial to natural rule" provides that "[a]n artificial waterway or stream may … have the characteristics and incidents of a natural watercourse." *Saelens v. Pollentier*, 131 N.E.2d 479, 482 (Ill. 1956) (citing 56 Am. Jur. § 151). Courts consider: (1) whether the waterway or stream is temporary or permanent: (2) the circumstances under which it was created; and (3) the mode in which it has been used. *Id*. This rule does not apply here because the Canal was created to ease flooding on private property, not to aid public navigation of the Deep Quod, and application of this rule would subvert Moon Moo's property rights.

Louisiana courts find that a party must allow public use when the man made channel alters or obstructs the previously navigable waterway. *Ilhenny*, 135 So. at 670 (citing *Dwinel*, 28 Me. 554). Although the Canal is fifty yards wide and diverts some of the flow of the Deep Quod, the Canal only serves as a shortcut to the navigable river. R. at 5. If the Deep Quod's navigability around the bend were affected by the diversion, only then would the Canal be considered "natural" and subject to navigability. Here, the Canal does not affect, obstruct, or destroy the Deep Quod's navigability as to require public access. Thus, this Court should uphold the finding that the Canal is not subject to public trust navigability.

C. The Queechunk Canal is a private, man-made waterbody not subject to public trust navigability because the Canal was not dedicated to public use.

The common law principles of dedication provide that real property owners may dedicate their property to use by the public, either expressly or implicitly. *Harvey*, 19 La. Ann. 264. Express dedication is where the owner must expressly dedicate the canal to public use through tolling. *Id.* Implied dedication is acquiescence by the owner to allow his property to be used by the public. *National Audubon*, 302 So.2d at 665.

Here, neither Moon Moo nor its previous owners dedicated the Canal to public use. Prominent "No Trespassing" signs lined the Canal for decades, conveying Moon Moo's intent to keep it private. The dairy operation should not be expected to maintain the extensive security operations to prohibit trespassing. *Vaughn*, 444 U.S. 206. As the Louisiana court recognized in *National Audubon*, the toleration of trespass under misconceived notions of permission does not equate to tacit or implied dedication by the canal owner's action or its ancestor in title. *National Audubon*, 302 So.2d at 665. Moon Moo intended to keep the Canal a private waterway through its use of "No Trespassing" signs. This Court should affirm the district court's holding, because it appropriately applied Supreme Court precedent and found no public right of navigation in a man-made waterbody, providing sound public policy that balances the public right of navigation with essential private real property rights.

II. The Fourth Amendment applies to punitive civil enforcement proceedings under the CWA, and evidence obtained through trespass on the private Canal is inadmissible under the exclusionary rule because Riverwatcher acted as an instrument of EPA, and no Fourth Amendment exceptions apply.

This Court should uphold the district court's ruling that evidence obtained unlawfully by Riverwatcher is inadmissible, and EPA cannot avoid constitutional limits on warrantless searches and seizures by encouraging volunteers to obtain evidence for it. R at 9. The lower court correctly found Riverwatcher acted as an instrument of EPA during its April 12, 2013, trespass

on Moon Moo Farm. *Id*. The court properly held protections under the Fourth Amendment of the U.S. Constitution apply to the CWA civil enforcement actions because they are punitive in character. *Trinity Industries, Inc. v. Occupational Safety & Health Review Commission*, 16 F.3d 1455 (6th Cir. 1994); *Smith Steel Casting Co. v. Brock*, 800 F.2d 1329 (5th Cir. 1986). Because the water samples EPA relies on were obtained unlawfully, the exclusionary rule bars admission of that evidence, and this case should be dismissed for lack of evidence. *United States v. Hajduk*, 396 F. Supp. 2d 1216 (D. Colo. 2005).

A. Fourth Amendment exclusionary rule applies to CWA civil enforcement proceedings because the objective is to punish the crime.

The Fourth Amendment guarantees "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. . . ." U.S. Const. Amend. IV. The prohibition against unreasonable search and seizure applies to commercial property as well. *Donovan v. Dewey*, 452 U.S. 594, 598-99 (1981). The exclusionary rule excludes evidence obtained by the government in violation of the Fourth Amendment as a policy of deterrence and judicial credibility. Two Circuits have held when civil enforcement actions under Occupational Safety and Health Act ("OSHA") are "for purposes of 'punishing the crime'" the exclusionary rule applies. *Trinity*, 16 F.3d at 1462; *Smith Steel*, 800 F.2d at 1334.

The CWA is also a civil enforcement action used "for purposes of 'punishing the crime'" of polluting waters of the U.S. Like OSHA's proceedings, which regulate the health and safety of employers' premises, the CWA regulates the health and safety of U.S. waters. 29 U.S.C. §§ 651-78 (1970). Further, the CWA provides language indicating Congress' intent to recognize Fourth Amendment protections and the right to privacy by stating "the Administrator or his authorized representative (including an authorized contractor acting as a representative of the Administrator), *upon presentation of his credentials* (i) shall have a right of entry to, upon, or

through any premises in which an effluent source is located . . . ." 33 U.S.C. § 1318 (emphasis added). Therefore, this Court should uphold the district court's ruling that the exclusionary rule applies to this CWA civil enforcement action brought for a punitive purpose.

B. The exclusionary rule applies to water samples obtained by Riverwatcher James because he was acting as an instrument or agent for EPA subject to constitutional limits when he trespassed on Moon Moo's property.

A search and seizure by a private citizen does not customarily violate the Fourth Amendment. *See Walter v. United States*, 447 U.S. 649 (1980). However, its protections apply when a private citizen acts as an "instrument or agent" of the government. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). The circuit courts use two factors in determining whether a private entity acted as an "instrument or agent" of the government: (1) the private party's intent to assist the government through the search and seizure and (2) the extent of the government's knowledge, encouragement, and participation. *United States v. Lambert*, 771 F.2d 83, 89 (6th Cir. 1985); *United States v. Pervaz*, 118 F.3d 1, 6 (6th Cir. 1985); *United States v. Walther*, 652 F.2d 788, 792 (9th Cir. 1981); *United States v. Smyth*, 84 F.3d 1240, 1243 (10th Cir. 1996). Here, Riverwatcher clearly intended to assist EPA by seizing water samples, and EPA's institutional practices consistently encourage and rely on citizen monitoring.

Constitutional limits apply when a private citizen has "formed the necessary intent to assist in the government's investigative or administrative functions." *United States v. Attson*, 900 F.2d 1427, 1433 (9th Cir.1990). On April 12, 2013, Riverwatcher James, responded to complaints and struck out on an "investigatory patrol" of the Deep Quod. R. at 6. He acted for the purpose of obtaining evidence of Deep Quod pollution to assist EPA and New Union's investigative and administrative functions. *Id*. Therefore, Riverwatcher James formed the necessary intent to assist the government, bringing him within the Fourth Amendment's scope.

The CWA § 505 citizen suit provision codifies Congressional intent to encourage EPA and state governments to rely on citizens to report violations. By doing this, the government knowingly and actively encourages searches and seizures of evidence for CWA violations. *Smyth*, 84 F.3d at 1243. Riverwatcher, well-known in the community as an advocate and an instrument for EPA and state enforcement, investigated the Deep Quod because of the CWA's encouragement. The district court correctly held Riverwatcher James illegally seized evidence for EPA in violation of the Fourth Amendment. This Court should affirm and find Riverwatcher acted as an instrument of EPA during his warrantless seizure, which is subject to the exclusionary rule, and is therefore inadmissible here.

C. Moon Moo has a reasonable expectation of privacy to the Bermuda grass fields and connected areas under the curtilage doctrine because of "the nature of the uses to which the area is put."

The Fourth Amendment protections apply to places and objects where the party's expectation of privacy is objectively reasonable. *Kyllo v. United States*, 533 U.S. 27, 33 (2001). The curtilage doctrine applies if "the area in question is so intimately tied to the home itself that it should be placed under the homes' umbrella of Fourth Amendment protection." *Pearl Meadows*, 723 F. Supp. at 440 (citing *United States v. Dunn*, 480 U.S. 294, 301 (1987)). Courts recognize the curtilage doctrine extends to commercial property. *Dow Chemical Co. v. United States*, 476 U.S. 227 (1986). In *Dow Chemical Co. v. United States*, the Supreme Court noted the type of invasion that occurred forms the basis of the reasonable expectation of privacy analysis. *Id*. at 237 n. 5. In *Pearl Meadows*, the court found the curtilage doctrine extended to the commercial agricultural property because "'the nature of the uses to which the area is put' is especially relevant where the nature of the business requires production within the curtilage adjacent to the buildings." 723 F. Supp. at 432. The court held the farm's "reasonable expectation of privacy to be free from physical intrusion" was violated when INS agents, without

a warrant and without consent, entered areas of the nurseries where the public was restricted and production work took place. *Id*. at 441.

Here, Moon Moo has the same "reasonable expectation to privacy free from physical intrusion" on their commercial agricultural property. The Bermuda grass fields and connected areas, including the Canal, are protected by the Fourth Amendment because the nature of the dairy farm requires the production of silage within the curtilage adjacent to the buildings as in *Pearl Meadows*. Riverwatcher violated Moon Moo's reasonable expectation to privacy by ignoring "No Trespassing" signs and invading its property. This Court should affirm the lower court's ruling, and find Moon Moo had a reasonable expectation of privacy to the curtilage of the dairy facility, which Riverwatcher and EPA violated contrary to Fourth Amendment protections.

D. The Fourth Amendment exceptions do not apply because Moon Moo did not consent to the search, it is not a closely regulated industry, the seizure of samples is beyond the open fields doctrine, and evidence was not obtained in good faith.

There are recognized exceptions to Fourth Amendment warrant requirements: consent, exceptions for "closely regulated industries," open fields doctrine, and good faith exception. None apply here. Consent to a search is a basic Fourth Amendment exception. *See U.S. v.Hadjuk*, 396 F. Supp. 2d 1216 (D. Colo. 2005). Riverwatcher James did not announce his entry or present his credentials as specified by CWA § 308(a)(1)(B), therefore Moon Moo was not given an opportunity to consent.

"Closely regulated industries" are exempt from the general rule that warrantless administrative searches of commercial property are forbidden. *New York v. Burger*, 482 U.S. 691 (1987). This is inapplicable here because dairy farms are not within a "pervasively regulated industry," and the CWA authorizing the search applies to all industries, not specifically dairy

farms. *Hadjuk*, 396 F. Supp. 2d at 1233. Thus, Moon Moo is not in a "closely regulated industry," and susceptible to warrantless administrative searches.

The open fields doctrine provides that the government may inspect open areas of property without a warrant, and may use any evidence openly visible in the open field. *Oliver v. United States*, 466 U.S. 170 (1984). In *Hajduk*, the court did not extend the open fields doctrine to encompass the taking of water samples, stating, "the searches here went beyond visual inspection; they involved physical contact with and removal of samples of water." *Hadjuk*, 396 F. Supp. 2d at 1235-36. It analogized the limits in taking and testing water samples to the prohibited taking and testing of smoke emissions within a factory complex. *Id*. at 1235 (citing *Air Pollution Variance Board v. Western Alfalfa Corp.*, 416 U.S. 861, 867 (1974)). Here, Riverwatcher James went beyond visual inspection, and removed water samples from Moon Moo to be used as evidence in this punitive action. Thus, this court should hold the open fields doctrine does not apply to samples taken from private property not openly visible.

Finally, the good faith exception does not apply here because Riverwatcher James knowingly trespassed on Moon Moo's private property and disobeyed EPA policy. Under the good faith exception, evidence obtained by agents that neither knew nor should have known they were violating the Fourth Amendment will be admissible, even if they acted illegally. *United States v. Leon*, 468 U.S. 897 (1984). But here, Riverwatcher James knew or should have known he was illegally obtaining evidence. The EPA guide on stream monitoring provides volunteers should "ensure legal access," U.S. EPA, *Volunteer Stream Monitoring: A Methods Manual*, at 42 (1997); because "[i]t is not EPA's intent to deprive any permittee of its Fourth Amendment rights, [and the] presentation of credentials and such other documents as may be required by law." 61 Fed. Reg. 64463 (1996). Riverwatcher, the community's water quality watch-dog,

should have known EPA guidelines when investigating alleged violations of the CWA. By disregarding EPA policy and not gaining legal access, Riverwatcher violated Moon Moo's rights. This Court should uphold that evidence illegally obtained by Riverwatcher is inadmissible under the exclusionary rule and no exceptions apply.

III. Moon Moo is exempt from CWA regulation because the runoff is agricultural stormwater, which occurred during a heavy rain event from a land application area, the farm operates in accordance with its NMP, there is insufficient evidence to establish it is a CAFO, and seepage of nitrates into groundwater is not regulable as a "water of the U.S."

The lower court correctly held that any discharge, regardless of Moon Moo's categorization as a CAFO, was exempt as agricultural stormwater runoff because the discharge occurred during a significant rain event from the land application area in accordance with its NMP. Further, the court correctly concluded that Moon Moo is not a CAFO because Riverwatcher and EPA failed to present admissible evidence to establish a discharge under the CWA. Finally, groundwater is not regulated by the CWA because it is not a navigable "water of the U.S.," thus, any alleged seepage of contaminant from Moon Moo is not subject NPDES permitting. Therefore, this Court should affirm that the CWA does not apply to Moon Moo.

A. Moon Moo's alleged discharge is agricultural stormwater runoff exempt from the CWA because the land application discharge occurred during a significant rain event and the operation is in compliance with the NMP.

The lower court correctly applied the agricultural stormwater exemption under the CWA, and the CAFO rule, in finding that Moon Moo's operations are not subject to CWA liability. Moon Moo is not a CAFO, and thus any discharge would have to originate from a "point source." 33 U.S.C. § 1362(14). Here, the land application discharges are the result of precipitation and fall under the agricultural stormwater exemption to point sources. *Id*. However, if the Court finds Moon Moo is a CAFO, the agricultural stormwater exemption applies regardless because the alleged discharge occurred during a significant storm event from

an agricultural land application area in compliance with its NMP. 40 C.F.R. § 122.23(e) (2012). Further, it is contrary to Congress' intent and legislative history to impose liability for agricultural stormwater because weather-related events are unpredictable and impossible to avoid. Therefore, the lower court's decision should be upheld.

i. Regardless of Moon Moo's status as a CAFO, the discharge is not subject to CWA liability because it is agricultural stormwater runoff.

Congress enacted the CWA to "restore and maintain the chemical, physical and biological integrity of the Nation's waters," which prohibits the discharge of any pollutant into navigable waters from any point source. 33 U.S.C. §§ 1251, 1362(12). A point source is defined as "any discernible, confined and discrete conveyance," including a CAFO. *Id*. § 1362(14). Specifically excluded from the definition of a point source are agricultural stormwater discharges, thereby alleviating the requirement to acquire a NPDES permit. *Id*. Further, the agricultural stormwater exemption also exists for CAFOs "where the manure … has been applied in accordance with site specific nutrient management practices … a precipitation-related discharge of manure … from land areas under the control of a CAFO." 40 C.F.R. § 122.23(e)(1). The regulation further provides:

> 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 stormwater exemption*.

Id. (emphasis added). The agricultural stormwater exemption for CAFOs is confirmed in *Waterkeeper Alliance Inc. v. EPA*, 399 F.3d 486 (2nd Cir. 2005) and *National Pork Producers Council v. Environmental Protection Agency*, 635 F.3d 738 (5th Cir. 2011), two leading cases interpreting and overruling sections of EPA's promulgated 2003 and 2008 CAFO rules, but leaving agricultural stormwater exemptions intact. "The Second Circuit determined that

congressional intent and its precedent supported EPA's exclusion of agricultural stormwater discharge, resulting from land application, from designation as a point source." *National Pork*, 635 F.3d at 745. Congress recognized the inherent unfairness in imposing "liability for agricultural-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*, 399 F.3d at 507. However, to qualify for an exemption, land application discharges must be applied in accordance with site-specific NMPs. 40 C.F.R. § 122.23(e).

Agricultural stormwater runoff is generally understood as "precipitation related discharges." *Id*.; *Concerned Area Residents for Environment v. Southview Farm*, 34 F.3d 114, 121 (2d Cir. 1994). Courts have construed the exemption to apply when the discharge is caused solely by agricultural activity and during rain events. *Alt v. Environmental Protection Agency*, 979 F. Supp. 2d 701, 710 (N.D.W. Va. 2013) (holding defendant farm was exempt because it was "agricultural in nature" and the precipitation-caused runoff was "stormwater").

In *Alt*, the court held that EPA was arbitrary and capricious in attempting to regulate a large CAFO's agricultural stormwater discharge. 979 F. Supp. 2d at 701. Precipitation fell on Alt's confinement houses and caused runoff across a neighboring pasture into an undisputed water of the U.S., Mudlick Run. *Id*. at 704. EPA argued that the agricultural stormwater exemption only applied to land application discharges. However, the court held "the fact that Congress found it unnecessary to define the term indicates that the term should be given its ordinary meaning." *Id*. at 710. According to plain English, Alt's farm was "'agricultural' in nature and the precipitation-caused runoff from her farmyard is 'stormwater.'" *Id*. at 711.

The lower court correctly applied *Alt* in holding that the agricultural stormwater exemption applied to Moon Moo. As in *Alt*, Moon Moo's land application is agricultural in

nature, and the precipitation caused runoff is stormwater. Riverwatcher's illegally obtained evidence of discharge was taken after a significant storm event in which the Canal received two inches of rain. Given its ordinary meaning, the runoff is agricultural stormwater. Moreover, unlike *Alt*, the discharge came from Moon Moo's land application, which is expressly recognized by EPA in the CAFO rule. 40 C.F.R. § 122.23(e).

Moon Moo complies with the requirements of § 122.23(e) by applying the manure land application in accordance with its NMP, which was approved by New Union. The NMP is site-specific with updated information of Moon Moo's application rates and calculation of expected uptake of nutrients by the Bermuda grass, which is annually accepted by New Union as sufficient. Moon Moo is following the State's regulatory requirements, legally and in good faith. If Riverwatcher seeks to invalidate the NMP because of a lack of public comment as required by § 122.23(h), before the issuance of the NMP, New Union should be joined under Fed. R. Civ. P. Rule 19 or a new suit should be initiated. Thus, the land application discharge is exempt as agricultural stormwater given the plain meaning of the term, the significant storm event that occurred while the evidence was acquired, and the agricultural nature of the discharge.

Riverwatcher argues that *Concerned Area Residents*, a case involving a dairy farm with twice as many animals, is comparable to the case at hand; however, the case is readily distinguishable. There, the court affirmed the jury's finding that the farm's run-off was caused by over-saturation of the manure lagoon, rather than the "result of precipitation." 34 F.3d at 120-21. Two eye-witnesses observed that "the manure was literally running off everywhere up and down," there was "severe erosion," and equipment tracks were distinguishable in the flow. *Id.* Here, a heavy rainstorm caused Moon Moo's alleged discharge, not over-application of manure as in *Concerned Area Residents.* Further, Riverwatcher James is the only eye-witness and

illegally obtained the evidence as opposed to *Concerned Area Residents* where neighbors repeatedly witnessed manure discharge not caused by significant rain events. Therefore, this Court should affirm the lower court in finding Moon Moo's runoff was caused by precipitation from an agricultural area and is thus exempt.

B. Moon Moo is not subject to NPDES permitting because there is insufficient evidence to establish that it is a CAFO and seepage of contaminants into groundwater is not regulable under the CWA as a "water of the U.S."

As the lower court correctly held, Moon Moo is not a CAFO, and thus not a point source governed by the CWA. It does not discharge pollutants directly or indirectly into waters of the U.S. as necessary for the CAFO rule to apply. Riverwatcher and EPA's alleged evidence of Moon Moo's discharge into the Canal is inadmissible because it was illegally obtained, and therefore Riverwatcher and EPA have no evidence establishing a discharge. Moreover, determining whether Moon Moo is a CAFO is strictly an administrative function within the exclusive jurisdiction of the New Union DOA. Thus, this Court should affirm summary judgment for Moon Moo.

i. No admissible evidence exists establishing that Moon Moo discharges into the Queechunk Canal thereby categorizing the farm as a CAFO.

The CWA prohibits the discharge of any pollutant into navigable waters from any point source. 33 U.S.C § 1362(12). A point source is defined as "any discernible, confined and discrete conveyance," including a CAFO. *Id*. § 1362(14). Specifically excluded from the definition of a point source are agricultural stormwater discharges. *Id*. After a point source has been designated, its owner must acquire a NPDES permit, authorizing discharges in compliance with generally applicable effluent limitations. *Id*. §§ 1342(a), 1311.

Classification as a small, medium, or large CAFO requires the AFO to meet certain criteria. 40 C.F.R. § 122.23. At issue here is a medium CAFO, because Moon Moo confines

350 cows, and thus meets the threshold criteria of confining "200 to 699" mature dairy cows. *Id.* § 122.23(b)(6)(i). However, for a potentially medium-sized AFO to be categorized as a CAFO, either one of the following conditions must be met:

> (A) Pollutants are discharged into waters of the United States through a man-made ditch, flushing system, or other similar man-made 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.

Id. § 122.23(b)(6)(ii)(A-B). Moon Moo does not meet either of the criteria necessary for categorization as a CAFO. Riverwatcher and EPA have failed to provide evidence that Moon Moo discharges pollutants into waters of the U.S. In addition, the Canal does not pass over, across, or through the facilities where the animals are confined. Moon Moo's practices are consistent with its NMP and New Union's classification of the farm as a "no-discharge" AFO. R. at 5. Even if the evidence is admissible, it was acquired during a significant storm event, where Moon Moo received two inches of rain in a 24-hour period. R. at 6. Thus, the evidence is not indicative of normal conditions.

Further, § 122.23(c)(3) clearly mandates that an AFO *shall not* be designated unless the appropriate authority–the State Director or the Regional Administrator–conducts an "on-site inspection of the operation" and determines that the farm "should and could be regulated under the permit program." Absent from the statute is a grant of authority for courts to designate a farm as a CAFO. Indeed, it is strictly DOA's administrative function, and should be properly left to New Union's administrative authority delegated under the CWA.

ii. Groundwater discharges are not within the jurisdiction of the CWA because groundwater is not a navigable "water of the U.S."

Riverwatcher's expert testified that Moon Moo polluted the Deep Quod through groundwater discharges without a NPDES permit, and thereby violated the CWA. R. at 6. This

Court should follow the majority of courts in finding that groundwater is not "navigable" and therefore not a "water of the U.S." subject to CWA liability. The CWA provides that the discharge of "any addition of any pollutant to navigable waters from any point source" by any person shall be unlawful. 33 U.S.C. §§ 1311, 1362(12)(A). Navigable waters are defined as "waters of the U.S.," and are construed broadly to include any *surface* waterbody capable of affecting interstate commerce. *Id*. at § 1362(7); *Umatilla Waterquality Protective Association Inc. v. Smith Frozen Foods, Inc.*, 962 F. Supp. 1312, 1314 (D. Or. 1996).

Although a few courts require NPDES permitting for groundwater discharges, the majority of courts have held that groundwater is not considered "waters of the U.S.," because they are not "navigable waters" and therefore do not fall within CWA jurisdiction. *Exxon Corporation v. Train*, 554 F.2d 1310, 1331 (5th Cir. 1977) (holding that Congress did not grant EPA the authority to regulate groundwater); *Kelly for and on Behalf of People of State of Michigan v. United States*, 618 F. Supp. 1103, 1107 (W.D. Mich. 1985) (holding the "unmistakably clear legislative history" demonstrated that "Congress did not intend the [CWA] to extend federal regulatory and enforcement authority over groundwater contamination."); *Umatilla Waterquality Protective Association Inc.*, 962 F. Supp. at 1318 (holding even with a showing of hydrological connection between groundwater and surface water, NPDES did not apply because Congress did not consider groundwater a "navigable water.").

In *Umatilla*, an environmental group alleged that food-processors were required to obtain a NPDES permit because they contaminated Pine Creek through groundwater seepage from their lagoon. *Id*. at 1313. Recognizing that Oregon's definition of "waters of the U.S." is more broad than the CWA's, the court still held that the "NPDES program does not apply to groundwater." *Id*. at 1318. The court looked at legislative history confirming that "Congress did not intend to

regulate groundwater in any form." *Id*. Of upmost importance to the court was the Senate report accompanying the CWA bill, which stated, "because the jurisdiction regarding groundwaters is so complex and varied from State to State, the committee did not adopt this interpretation." *Id*. (citing S. Rep. No. 414, 92d Cong., 1st Sess. 73 (1971)). Further, the court held for the food processors because the absence of groundwater in the definition of "navigable waters" was dispositive considering Congress' consistency in explicitly referencing groundwater in other areas of the Act. *Id*.

As in *Umatilla*, Riverwatcher is a water quality watchdog attempting to undermine Congressional intent by demanding Moon Moo acquire a NPDES permit for groundwater seepage. This Court should affirm the majority rule that groundwater is not a "navigable water," and thus not regulable under the CWA. Congress excluded groundwater from the CWA, and instead allowed states like New Union to continue regulating groundwater. Thus, this Court should honor legislative intent to separate groundwater from surface water, and apply the plain meaning of "navigable water" in finding that Moon Moo's alleged groundwater discharges are not within CWA jurisdiction.

IV. Moon Moo is not subject to a citizen's suit under RCRA because the application of manure and acid whey as fertilizer does not meet the statutory definition of "solid waste," and Riverwatcher has not met its burden of showing that the fertilizer poses an imminent and substantial threat to public health.

The lower court correctly applied the statutory language and policy of the Resource Conservation and Recovery Act ("RCRA") in finding that Moon Moo's operations are not subject to regulation. The land application of manure and acid whey ("whey") as fertilizer and soil amendment does not constitute a "solid waste" under RCRA. Here, Moon Moo is not discarding material; rather, it is applying the material to its crops in an ongoing beneficial agricultural process. In addition, EPA guidelines that govern solid waste disposal facilities do

not apply to Moon Moo because EPA expressly exempts agricultural wastes from regulation under the guidelines. 40 C.F.R. § 257.1(c)(1) (2013). Finally, it is counter to Congressional intent and policy to regulate materials that are being reused and recycled. Therefore, the lower court's decision should be upheld.

A. The land application of manure and acid whey is not "solid waste" under RCRA because it is not "discarded material," rather, it is recycled and used in an ongoing agricultural process as fertilizer and soil amendment.

RCRA is an environmental statute that governs the "treatment, storage, and disposal of solid and hazardous waste." *Meghrig*, 516 U.S. 479, 483 (1996). Congress passed RCRA to address the "rising tide in scrap, discarded, and waste materials . . . to reduce the amount of solid waste and . . . provide for proper and economical solid waste disposal practices." *Id.* (citing 42 U.S.C. § 6901(a)(2)-(4) (2012)). In order to prove liability under RCRA's citizen suit provision, a plaintiff must establish that the alleged violator is contributing to the "handling, storage, treatment, transportation, or disposal of any solid . . . waste which may present an imminent or substantial endangerment to health or the environment." 42 U.S.C. § 6972(a)(1)(B). Here, Moon Moo's application of fertilizer and soil amendment does not constitute a solid waste under RCRA because the materials are not "discarded" as the definition of "solid waste" requires.

RCRA defines "solid waste" as "any garbage, refuse, sludge from a waste treatment plant . . . and other discarded materials, including solid, liquid, semisolid . . . from [among other things] agricultural operations." 42 U.S.C. § 6903(27). However, RCRA and EPA's regulations do not define the term "discarded," which is an essential element in determining whether a substance constitutes a "solid waste" subject to regulation.

In *Safe Air*, the Ninth Circuit held that Kentucky bluegrass residue is not a "solid waste" and RCRA does not prohibit farmers from burning the residue in their agricultural production processes. 373 F.3d 1035 (9th Cir. 2004). The court applied the ordinary meaning of the word

"discard" defined as "cast aside; reject; abandon; give up" to determine that the burning of the grass did not constitute a solid waste because it was not being discarded or abandoned. *Safe Air*, 373 F.3d at 1035-43 (citing *The New Shorter Oxford English Dictionary* 684 (4th ed. 1993)). Rather, the court found that the burning of grass "contributes recycled nutrients and can act as a fertilizer to bluegrass fields," extends the "productive life of the fields," reduces insects, and increases crop yield. *Safe Air*, 373 F.3d at 1036. In addition, the court set forth three considerations in determining whether something is "discarded" under RCRA: (1) "whether the material is destined for beneficial reuse or recycling in a continuous process by the generating industry itself, *American Mining Congress v. Environmental Protection Agency*, 824 F.2d 1177, 1186 (D.C. Cir. 1987) ("*AMC I"*); (2) whether the materials are being actively reused, or whether they merely have the potential of being reused, *American Mining Congress v. Environmental Protection Agency*, 907 F.2d 1179, 1186 (D.C. Cir. 1990) ("*AMC II*"); and (3) whether the materials are being reused by their original owner, as opposed to use by a salvager or reclaimer, *United States v. ILCO*, 996 F.2d 1126, 1131 (11th Cir. 1993). The court held that the grass residue could not be considered discarded because it was being used in a continuous process, it was actually being used, and it was being put to use by its original owners. *Safe Air*, 373 F.3d at 1045.

Here, Moon Moo's application of fertilizer and soil amendment is not "solid waste" because it is not "discarded" for the same reasons that the burning of grass residue was not considered "solid waste" in *Safe Air*. Moon Moo is applying manure and whey to fertilize Bermuda grass and condition the soil. R.at 5. The grass is harvested and used to feed the dairy cows in its operation. *Id*. The whey is a bi-product of the process of turning Moon Moo's milk into yogurt. Both the manure and whey are utilized in a continuous agricultural process and

therefore cannot be considered discarded. As Dr. Green, the agronomist, testified, the application of whey is a longstanding agricultural practice in New Union. R. at 6. This application meets two of the three considerations set forth in *Safe Air*; the fertilizer and soil amendment are recycled by the generating dairy industry, and both are actively reused. The fact that the whey is reused by Moon Moo rather than the yogurt factory is not determinative in finding that it does not meet the statutory definition of "solid waste." The district court correctly determined that Moon Moo's land application of manure and whey as fertilizer and soil amendment are reused materials in an ongoing agricultural process, which cannot be considered discarded, and thus do not constitute a "solid waste" under RCRA.

i. The manure and whey are not discarded because neither has fulfilled their "intended purpose" of fertilizing the Bermuda grass.

Courts have held that a substance is not "discarded" under RCRA until it has served its intended purpose. *Water Keeper Alliance v. United States Department of Defense*, 152 F. Supp. 2d 163 (D.C. Puerto Rico, 2001); *No Spray Coalition v. City of New York*, 2000 U.S. Dist. LEXIS 13919 (S.D.N.Y. Sept. 25, 2000) (holding pesticide is not "discarded" for purposes of RCRA when it is sprayed because it has not served its intended purpose.) The Ninth Circuit has concluded that "the key to whether a manufactured product is a 'solid waste,' . . . is whether that product has served its intended purpose and is no longer wanted by the consumer." *Ecological Rights Foundation v. Pacific Gas and Electric Co.*, 713 F.3d 502, 515 (9th Cir. 2013) (citing H.R.Rep. No. 94-1491(I) at 2 (1976)).

In *Ecological Rights*, the plaintiffs claimed that the wood preservatives escaping from utility poles were solid waste under RCRA. 713 F.3d at 515. The court found that wood preservatives that "leak, spill, or otherwise escape" from the poles are "an expected consequence of the preservative's intended use," and are neither a manufacturing by-product nor a material

that the consumer no longer wanted. *Id*. Similarly here, the land application of manure and whey is intended to fertilize the Bermuda grass. The mixture is not automatically a solid waste merely because some of the fertilizer mixture allegedly runs off the land during a heavy rain event. It is an expected consequence of its intended use. The manure and whey are reused in an ongoing manufacturing process, and it is a product that is desirable to the consumer, Moon Moo. Therefore, the manure and whey has not served its intended purpose and is not a "solid waste" regulated under RCRA.

In *Community Association for Restoration of the Environment v. R & M Haak, LLC*, the court found that "over-application or leaking of manure that was initially intended for beneficial use" can become "discarded" where it is applied in excess of amount necessary to carry out its "intended purpose." No. 13-CV-3026, 2013 WL 3188855 *3 (E.D.Wash. June 21, 2013). The facts here are distinguishable because the record shows that Moon Moo has applied the fertilizer mixture in accordance with the requisite NMP approved by New Union. R. at 5.

Here, the "intended purpose" of the manure and whey is to fertilize the fields to increase the productivity of the agricultural operation. The mixture has not carried out its intended purpose until the nitrogen in the mixture has been utilized by the crops. Even though a significant rain event may wash some of the mixture off the land, that alone does not make the substance "discarded" under RCRA. Similar to the facts in *Ecological Rights*, the substance is still serving its intended purpose. If the fertilizer mixture was over-applied to the land, the amount applied in excess would be "discarded," but that is not the case here. The record shows that Moon Moo complies with state agency regulatory requirements and that their land application practices are reasonable. Therefore, Moon Moo application of manure and whey has not yet served its intended purpose and is not subject to regulation under RCRA.

ii. Riverwatcher's allegations that Moon Moo violated EPA's solid waste disposal guidelines are without merit because agricultural operations are explicitly exempt from regulation under the guidelines.

The EPA promulgated rules that provide States with guidance in developing regulatory programs for solid and hazardous waste management under RCRA. 40 C.F.R. § 239 et seq. (2014). Riverwatcher argues that the application of manure and whey violate EPA guidelines prohibiting: (1) the application of solid wastes to flood plains, 40 C.F.R. § 257.1-3; (2) the application of solid waste in a manner that may contaminate groundwater, 40 C.F.R. § 257.3-4; and (3) the application of solid waste with a pH below 6.5 to food chain crop areas, 40 C.F.R. § 257.3-5. However, EPA has explicitly exempted from regulation under these guidelines all "agricultural wastes, including manures and crop residues, returned to the soil as fertilizers and soil conditioners." 40 C.F.R. § 257.1(c)(1). As the district court held, both manure and whey are agricultural wastes and here, Moon Moo returns them to the soil as fertilizer and soil conditioner triggering the exception. Even if this court finds that these substances are "discarded" and subsequently "solid waste" under RCRA, EPA has explicitly exempted this type of application and these regulations do not apply.

Although multiple courts have held there is no blanket exception for agricultural wastes under RCRA, the determination of whether agricultural wastes are "solid waste" depends on the facts and circumstances of each case. *Community Association for Restoration of the Environment, Inc. v. George and Margaret, LLC,* 954 F. Supp. 2d 1151 (E.D. Wash. 2013) (holding "defendants over-applied and improperly applied manure to their fields, and allowed liquid manure to leak from lagoons, thereby 'discarding' the manure."); *Water Keeper v. Smithfield Foods, Inc.,* 2001 WL 1715730 (E.D. N.C. Sept. 20, 2001), (holding the determination "is a functional inquiry focusing on defendant's use of the animal waste products rather than the agricultural waste definition."). However, these cases are distinguishable from this case because,

in both *Community Ass'n* and *Water Keeper*, there was evidence that the growers had applied the agricultural waste in excess of what was necessary to fertilize the fields. In contrast, here, there is no indication that Moon Moo has increased its application beyond what is reasonably necessary to fertilize its crops, and this type of fertilizer application has been a common practice in New Union since 1940. R. at 6. Moon Moo has continually applied manure to its fields at rates consistent with its NMP. R. at 6. Although courts have held that under certain circumstances the application of manure applied as fertilizer may be a "solid waste" regulated under RCRA, the facts of this case do not support a finding that the fertilizer was applied in excess. These materials are spread for the beneficial purpose of fertilizing crops and are not "discarded." This Court should find that the manure and whey are not "solid waste" and are not regulated under RCRA.

iii. Regulating the reasonable application of agricultural wastes as fertilizer is counter to the Congressional intent to encourage the reasonable recycling and reuse of wastes under RCRA.

In *AMC I,* the court discerned the Congressional intent behind RCRA, and determined a primary purpose of RCRA was to "deal with the ever-increasing problem of solid waste disposal by encouraging the search for and use of alternatives to existing methods of disposal (including recycling)." 824 F.2d 1177, 1186 (D.C. Cir. 1987). The court determined whether EPA's rule regulating reused and recycled material was beyond the regulatory scope Congress had intended for the term "solid waste" under RCRA. Because the purpose behind the act was to encourage the recycling of solid waste, the court found it does not make sense to extend EPA's jurisdiction to regulate recycled material that is reused in an ongoing manufacturing process. *Id.* The court distinguished materials that are "destined for beneficial reuse or recycling," as not yet being part of the disposal waste problem, and thus, beyond the scope of the type of materials that Congress intended to regulate. *Id.*

Here, the same policy applies. Congress intended industries to develop the very type of reuse and recycling practices that Moon Moo has implemented on its farm. Therefore, it follows that Moon Moo's reuse of material is beyond the regulatory scope of RCRA because the farm reduces the solid waste disposal problems RCRA was enacted to address. Thus, the lower court's decision should be upheld as a proper statutory and regulatory interpretation of RCRA because imposing regulations on Moon Moo's reuse would be counter to Congress' intent.

B. If this court finds Moon Moo's land application is a "solid waste," Riverwatcher has failed to meet its burden of showing the fertilizer mixture is the but-for cause of the nitrate advisories in Farmville, and it does not pose an imminent and substantial threat to human health.

Moon Moo's land application of manure and whey does not meet the statutory definition of "solid waste" under RCRA, but if this court finds that it does, it is still not subject to regulation because it does not pose the requisite "imminent and substantial endangerment" to human health, as Riverwatcher contends. R. at 11. However, Riverwatcher fails to meet its burden of showing that the land application is the proximate cause of the nitrate advisories in Farmville. In addition, nitrate in the water poses neither an "imminent" nor a "substantial" threat because it does not harm adults and juveniles, and any danger posed to infants is easily avoided by administering bottled water. R. at 11-12. Therefore, this Court should affirm that Riverwatcher's RCRA claim fails.

i. Riverwatcher fails to meet its burden of showing a causal link between Moon Moo's agricultural practices and the nitrate advisories in Farmville.

In order to be regulated under RCRA, a solid waste may "present an imminent and substantial endangerment to human health or the environment." 42 U.S.C. § 6972(a). The alleged polluter must be shown to "contribute" to the contamination. *Id*. The statute does not define the term "contributor," however where terms are left undefined by statute, courts are

compelled to look at the "ordinary meaning." *Securities Industries Association v. Board of Governors*, 468 U.S. 137, 149 (1984). The common definition of "contribute" is "to play a significant part in bringing about, to help cause something to happen." *Merriam-Webster's Dictionary of English Usage*, 290 (1994). In applying the ordinary meaning of this term, courts have recognized that "similar to the development of the principle of proximate cause in the law of torts . . . there must be some limitations on the definition of contributor with respect to [RCRA]." *Zands v. Nelson*, 779 F. Supp. 1254, 1265 (S.D.Ca.1991). Courts have interpreted "contributor" to be "universally held to infer something more than mere ownership of a site; some level of causation between the contamination and the party to be held liable must be established." *Delaney v. Town of Carmel*, 55 F. Supp. 2d 237, 256 (S.D.N.Y.1999).

Following this interpretation, multiple courts have imposed a "causation" requirement in their determination of liability under RCRA. *K-7 Enterprises, L.P. v. Jester*, 562 F. Supp. 2d 819, 830-31 (E.D. Tex. 2007) ("Plaintiffs must establish some level of causation between the Defendant and the contamination to prevail in a 'contributing to' cause of action under RCRA."); *Zands*, 779 F. Supp. at 1263–64.

Here, Riverwatcher fails to meet its burden of proving that the alleged runoff originating from Moon Moo is the proximate cause of the nitrate advisories in Farmville. First, the record indicates that the Deep Quod watershed is heavily farmed and nitrate advisories are common. R. at 7. The long history of nitrate advisories in Farmville dates back prior to Moon Moo's increase in production. In addition, Moon Moo is located 10 miles upstream from Farmville. R. at 4. This long distance makes any affect Moon Moo's operations have on Farmville's municipal water supply highly attenuated. Riverwatcher has not put forth evidence to show an adequate causal link between the alleged high levels of nitrates in the Canal and the high levels of nitrates

in the municipal drinking supply in Farmville. Riverwatcher's own expert conceded that there is no way to show Moon Moo is the but-for cause of the nitrate advisory. R. at 7. Therefore, Riverwatcher has failed to meet its burden, and this court should uphold the lower court's decision and find that Moon Moo is not liable under RCRA.

ii. Nitrate in drinking water poses neither an "imminent" nor a "substantial endangerment" to human health because it will not harm adults or juveniles, and any threat posed to infants is readily mitigated through the administration of bottled water.

Under RCRA, the term "endangerment" has been interpreted as "a threatened or potential harm [not requiring] proof of actual harm to health or the environment." *Burlington Northern & Santa Fe Railroad. Co. v. Grant*, 505 F.3d 1013, 1021 (10th Cir. 2007); *United States v. Price*, 688 F.2d 204, 211 (3d Cir. 1982). The term "imminent" is not defined; however, the Supreme Court has held "an endangerment can only be 'imminent' if it threatens to occur immediately . . . ." *Meghrig v. KFC Western, Inc*., 516 U.S. 479 (1996). The term "substantial" is also not defined, but multiple courts have held that endangerment is "substantial" when it is "serious." *Burlington*, 505 F.3d at 1021; *Interfaith Community Organization v. Honeywell Int'l, Inc.*, 399 F.3d 248, 258 (3d Cir. 2005). Here, Riverwatcher has not met its burden of showing that the elevated nitrate levels in Farmville's municipal water supply pose an "imminent and substantial endangerment" to humans or the environment. Riverwatcher failed to put forth adequate evidence that there is a serious, actual, or potential threat to human health that will occur immediately.

In *Davies v. National Coop. Refinery Association*, the court considered the nature of the threat posed to landowners by groundwater contaminated with hydrocarbons originating from a petroleum refinery nearby. 963 F. Supp. 990, 992 (D. Kan. 1997). Although the court abstained from exercising jurisdiction in the case, the court found that the landowners were able to occupy

the property and continue to utilize it for its intended purpose without a threat to their health. *Id*. at 999. The court further stated that, although the landowners must use bottled water instead of groundwater, this was an "inconvenience and an economic burden," but inadequate to meet the requisite "imminent and substantial endangerment" under RCRA. *Id*.

In its order denying the oil company's motion to dismiss, the court in *Davies* stated that the "endangerment must be 'substantial,' which suggests that an exceedingly low risk of harm . . . will not support an action." 1996 WL 529208, *2 (D. Kan. July 12, 1996). The court stated that if waste is contained in a way that precludes exposure from occurring, it cannot be considered to pose an "imminent endangerment to health." *Id*. (citing *Price v. United States Navy,* 818 F. Supp. 1323, 1325 (S.D.Ca. 1992), *aff'd* 39 F.3d 1011 (9th Cir.1994). The court stated "the risk of exposure is part of the equation in determining what constitutes an imminent endangerment to health." *Id*. Additionally, "any imminent risk to the plaintiffs' health has been diminished by plaintiffs' awareness that their water should not be consumed and by the availability of an alternative water supply." *Id*. The *Davies* court ultimately held that the landowners failed to meet their burden of showing an "imminent and substantial" endangerment actually existed.

Similar to the landowners in *Davies*, Riverwatcher fails to establish that citizens of Farmville face a "substantial and imminent" endangerment due to the nitrate advisories because the nitrate in Farmville's municipal water supply does not pose an "imminent and substantial threat to human health." Here, the consumer is aware of the threat and has easy access to an alternative water supply. The only subset of the population that is potentially threatened by the elevated nitrate levels are infants under the age of two, which is easily mitigated by administering bottled water. R. at 6. There is a low risk of exposure to nitrates and the threat to

infants does not meet the requisite level of "imminent and substantial endangerment." Therefore, this court should uphold the lower court's finding that no imminent and substantial endangerment to human health exists as to the increased levels of nitrate in Farmville's municipal drinking water supply.

CONCLUSION

The summary judgment entered by the court below was proper and should be affirmed because the Queechunk Canal is a private waterway not subject to the public trust doctrine, the evidence of Moon Moo's alleged discharge was obtained through trespass in violation of the Fourth Amendment and is therefore inadmissible. Moreover, the CWA does not apply because Moon Moo is not a CAFO and any alleged discharge is agricultural stormwater runoff exempt from NPDES permitting. Finally, RCRA does not apply because the land application of manure and whey is not solid waste because it is not discarded and has not fulfilled its intended purpose, nor does it pose an imminent and substantial endangerment to human health. Therefore, there are no genuine issues of material fact and Moon Moo is entitled to judgment as a matter of law.

Respectfully submitted,

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Counsel for Moon Moo Farm