

CA. No.14-1248

**In the United States
Court of Appeals for the Twelfth Circuit**

UNITED STATES OF AMERICA,

Plaintiff-Appellant, and

DEEP QUOD RIVERWATCHER, INC., and DEAN JAMES,

Plaintiffs-Intervenors-Appellants

V.

MOON MOO FARMS, INC.,

Defendant-Appellee

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

BRIEF OF DEEP QUOD RIVERWATCHER, INC., and DEAN JAMES
PLAINTIFFS-INTERVENORS-APPELLANTS

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JURISDICTIONAL STATEMENT

Appellants the United States of America on behalf of the United States Environmental Protection Agency (collectively referred to as the EPA), along with appellant-intervenors Deep Quod Riverwatcher, Inc. and Dean James (collectively referred as Riverwatcher), filed a complaint in the United States District Court for the District of New Union seeking review under 28 U.S.C. § 1331. On June 1, 2014, the district court granted Moon Moo Farm, Inc.’s motion for summary judgment on all counts and denied the EPA and Riverwatcher’s summary judgment motion. The district court’s order is final, and jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the Queechunk Canal is public-trust navigable water that allows for a public right of navigation.
 - a. If not, whether evidence obtained through trespass and without a warrant is admissible in a civil enforcement proceeding brought under section 309 of the Clean Water Act.
2. Whether Moon Moo Farm requires a permit under the Clean Water Act National Pollutant Discharge Elimination System permitting program.
3. Whether Moon Moo Farm is subject to a citizen suit under the Resource Conservation and Recovery Act.

STATEMENT OF THE CASE

Appellant United States of America (“EPA”), on behalf of the United States Environmental Protection Agency, commenced this action for civil penalties and injunctive relief against Moon Moo Farm, Inc. (“MMF”) for violations of the Clean Water Act (“CWA”), 33 U.S.C. § 1311(a), 1319(c), (d), 1342. (R. at 4.) EPA alleges that MMF violates the CWA, because pollutants were discharged through a drainage ditch into the Queechunk Canal, ultimately contaminating waters of the United States. (R. at 8.)

Deep Quod Riverwatch, an environmental organization, along with Dean James (“James”), a citizen of the State of New Union, (collectively “Riverwatcher”), intervened in this action asserting claims against MMF under CWA § 505, and Resource Conservation and Recovery Act (RCRA) § 7002. (R. at 4.) Riverwatcher alleges that MMF’s manure practices violate either the CWA or RCRA. *Id.*

The defense counterclaimed for common law trespass, alleging James entered illegally to obtain evidence of stormwater runoff from its fields. *Id.* The district court dismissed all claims against MMF and granted a motion for summary judgment in its favor on its counterclaim for trespass. *Id.* The district court held:

- (1) MMF. is not a Concentrated Animal Feeding Operation (“CAFO”) subject to permitting under the National Pollutant Discharge Elimination System (“NPDES”) permit program pursuant to the CWA, § 33 U.S.C. § 1342 (2012);
- (2) The evidence of MMF’s discharge was obtained by trespass, rendering it inadmissible in a civil enforcement proceeding;
- (3) Discharges from MMF’s fields fall under the agricultural stormwater exemption of the CWA.

(R. at 1.)

EPA appeals the district court’s decision with respect to the first two holdings. *Id.*

Riverwatcher appeals the district court’s decision with respect to all holdings listed above. *Id.*

STATEMENT OF THE FACTS

Moon Moo Farm operates a dairy farm with 350 head of milk cows. (R. at 4.) The farm is located only ten miles from the City of Farmville in the State of New Union. *Id.* Moon Moo Farm collects manure and liquid waste from the cows and stores it in an outdoor lagoon until it is used as fertilizer. (R. at 4-5.) The manure in the lagoon is spread onto 150 acres of fields of

Bermuda grass, which is dried and harvested each summer as silage for the dairy cows. (R. at 5.) Moon Moo Farms began accepting acid whey produced by the Chokos Greek Yogurt processing facility in Farmville in 2012. *Id.* For two years now, Moon Moo Farms has included the acid whey in its manure lagoons and in what is spread onto the Bermuda grass fields. *Id.*

Moon Moo Farms is currently regulated by the State of New Union as a ‘no-discharge’ animal feeding operation; as such, it must submit a “Nutrient Management Plan” (NMP) to the Farmville Regional Officer of the State of New Union Department of Agriculture (DOA). *Id.* This NMP sets forth the farm’s planned seasonal manure application rates in addition to a calculation of the expected uptake of the nutrients by the crops grown on the field on which the manure is spread, which is Bermuda grass. *Id.* The New Union DOA does not ordinarily even review submitted NMPS, even though it has the power to reject them. *Id.* There is no opportunity of public comment of a submitted NMP filed by a no-discharge animal feeding operation. *Id.* New Union also has the authority to issue Clean Water Act discharge permits; however, at this time Moon Moo Farm does not hold any permit issued pursuant to the National Pollutant Discharge Elimination System (NPDES) permitting system administered under the Clean Water Act § 402. (R. at 6.)

Moon Moo Farm is situated at a bend in the Deep Quod River, which connects to the Mississippi River. (R. at 5.) The Mississippi River is a navigable-in-fact interstate body of water. *Id.* In order to alleviate flooding, the prior owner excavated a bypass canal, known as the Queechunk Canal diverting the flow of the Deep Quod River into the Canal. *Id.* This Canal is fifty yards wide, three to four feet deep, and can be navigated by a canoe or a small boat. *Id.* Moon Moo Farms owns the land on either side of the canal and has placed “No Trespassing”

signs on the banks, but the Canal is frequently used as a shortcut up and down the Deep Quod River. *Id.* The community of Farmville uses the Deep Quod River as a drinking water source.

In the late winter and early spring of 2013, the Farmville Water Authority issued a nitrate advisory for its drinking water customers. (R. at 6.) The water was designated as unsafe for drinking by infants. *Id.* Customers were advised to give their infants bottled water instead of the public drinking water supply. *Id.*

Deep Quod Riverwatcher received complaints that the river “smelled of manure and was an unusually turbid brown color.” *Id.* On April 11 and 12, two inches of rain fell in the Farmville Region. *Id.* On April 12, 2013, in response to these complaints, James Dean, the designated Deep Quod “Riverwatcher”, investigated the Deep Quod River in a small boat. *Id.* His investigation included the Queechunk Canal, where he took photographs of the Moon Moo Farm property, manure spreading operations, and drainage ditch into the Canal. *Id.* The drainage ditch was funneling discolored brown water flowing from the fields into the Canal. *Id.* Dean took samples of the water from the ditch. *Id.* A water-testing laboratory then tested the samples and the results indicated high levels of nitrates and the presence of fecal coliforms in the water. *Id.*

Deep Quod Riverwatcher submitted the affidavits of two experts, an agronomist and an environmental health expert. The agronomist, Dr. Mae, determined that the low pH of the acid whey lowered the pH of the soil. *Id.* This in turn prevented the Bermuda grass from effectively absorbing the nutrients in the manure mixture. *Id.* In turn, these unprocessed nutrients were released into the environment, including the Deep Quod River, by leaching into groundwater and through runoff during rain events, such as the April storm. *Id.* Dr. Mae also stated that “land application of manure during a rain event is a very poor management practice” that will result in excess runoff of nutrients from the fields. *Id.* The environmental health expert also opined that

the excess nutrient discharge contributed to the April 2013 nitrate advisory. (R. at 7.) In addition to these two experts' testimony, Moon Moo Farm's own expert agronomist, Dr. Green, did not dispute that the application of acid whey to the fields reduced the soil's pH and reduced nitrogen absorption by the Bermuda grass. (R. at 6.)

STANDARD OF REVIEW

The District Court's conclusions of law are reviewed *de novo*. See *Lindstrom v. A-C Prod. Liab. Trust*, 424 F.3d 488, 492 (6th Cir. 2005). The District Court below granted Moon Moo Farm's motion for summary judgment on all claims, including its counterclaim, and dismissed EPA's and Riverwatcher's motions for summary judgment. Summary judgment is upheld on appeal only when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. See also, *Dallas v. Am. Gen. Life & Acc. Ins. Co.*, 709 F.3d 734, 736 (8th Cir. 2013). Thus, the court will "[view] the evidence in the light most favorable to the nonmoving party and giving the nonmoving party the benefit of all reasonable inferences." *Am. Gen. Life & Acc. Ins. Co.*, 709 F.3d 734 at 736 (8th Cir. 2013) (citing *Crawford v. Van Buren Cnty., Ark.*, 678 F.3d 666, 669 (8th Cir.2012)).

SUMMARY OF THE ARGUMENT

The district court erred in holding that the Queechunk Canal was not publicly navigable and wrongly excluded essential discharge evidence. (R. at 1.) The Queechunk Canal, a man-made water body, is a public trust navigable water of the State of New Union allowing for a public right of navigation despite private ownership of the banks on both side and the bottom of the canal by Moon Moo Farm. (R. at 2.) The Queechunk Canal fulfills the CWA's definition as being a navigable body of water. 33 U.S.C. § 1362(7); 40 C.F.R. § 122.2 (2014). Further, it fulfills the requirements set forth by the Supreme Court. *Rapanos v. United States*, 547 U.S. 715, 716 (2006). Because the Queechunk Canal is navigable, it is found to be public under the Public

Trust Doctrine, which is an interest established in the Commerce Clause of the United States Constitution. Appellants may rely on the evidence obtained even if Dean's action constitutes a trespass. Dean's inspection of Moon Moo Farm was reasonable given the complaints he had received. The exclusionary rule does not apply in civil enforcement proceedings under the Clean Water Act. Moreover, Dean is a private citizen not a government agent.

Additionally, the district court erred when finding Moon Moo Farm, Inc. not to be a Concentrated Animal Feeding Operation, subject to permitting under the National Pollutant Discharge Elimination System permit program pursuant to the CWA. (R. at 1.) Moon Moo Farm falls under the definition of a "Medium Animal Feeding Operation and pollutants were discharged through a drainage ditch into the Queechunk Canal; therefore, Moon Moo Farm establishes the necessary conditions set forth, ultimately proving that it is in fact a CAFO. The district court also incorrectly determined the excluded discharge fall under the agricultural stormwater exemption of the CWA. *Id.* Moon Moo Farm does not qualify for an agriculture stormwater exception because they do not implement proper landspreading practices, the application practices did not ensure the appropriate utilization of the nutrients in the manure, and the discharge comes from a "point source."

The District Court erred in determining that Moon Moo Farm is not subject to a citizen suit under RCRA. Moon Moo Farm's land application practices constitute the disposal of a non-hazardous solid waste in violation of the Resource Conservation and Recovery Act. The mixture of manure and acid whey is a solid waste subject to regulation under RCRA Subtitle D because the mixture has been discarded through over-application; over-application of fertilizer creates a solid waste that is regulated under RCRA. Additionally the District Court erred when it determined that the mixture did not present an imminent and substantial endangerment to health

or the environment. The District Court reasoned that a party has to be proved the “but-for” cause of an endangerment to be subject to a citizen suit, however, this is false as shown through the plain language of the 42 U.S.C. § 6972.

ARGUMENT

I. APPELLANT IS ENTITLED TO JUDGMENT AS A MATTER OF LAW BECAUSE THE QUEECHUNK CANAL IS A PUBLICLY NAVIABLE WATER.

A. The Queechunk Canal, a man-made water body, is a public trust navigable water of the State of New Union allowing for a public right of navigation despite private ownership of the banks on both side and the bottom of the canal by MMF.

The CWA only defines navigability as being “waters of the United States.” 33 U.S.C. § 1362(7). “Waters of the United States” include all tributaries to navigable waters, all interstate waters, and all inter and intrastate waters that affect interstate commerce. 40 C.F.R. § 122.2 (2014). The Queechunk Canal is a tributary of Deep Quod River and therefore navigable water as defined by the CWA. *See Id.* Further, the Queechunk Canal is navigable in fact, because it is capable of being used in its ordinary condition as an avenue for commerce, “over which trade and travel are or may be conducted in the customary modes of trade and travel on water.” *The Daniel Ball*, 77 U.S. 557, 563 (1870); *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215, 1219, 182 L. Ed. 2d 77 (2012).

Alternatively, two tests have been recently implemented by the Supreme Court to define navigable. *Rapanos v. United States*, 547 U.S. 715, 716 (2006) (CWA applied to wetlands adjacent to nonnavigable tributaries of traditional navigable waters). The plurality, authored by Justice Scalia, further included “relatively permanent, standing or continuously flowing bodies of water . . . ,” *id.* at 739, that are connected to traditional navigable waters, *id.* at 742. (relatively permanent does not exclude seasonal rivers that have dry months). Further, the concurring opinion, authored by Justice Kennedy, only requires a “‘significant nexus’ to waters that are or

were navigable in fact or that could reasonably be so made.” *Id.* at 759 (quoting *SWANCC*, 531 U.S. at 167, 172) (only need to affect the chemical, physical and biological integrity of traditional navigable waters, in the aggregate). Although the circuit courts disagree over how to apply the tests in *Rapanos*, it is clear that the Queechunk Canal is navigable.

The Queechunk Canal, fifty yards wide and about four feet deep, is navigable by a small boat or canoe both upstream and downstream to the Deep Quod River. (R. at 5.) The canal has been used as a shortcut by the public to the River and was navigated by Dean on a jon boat, in April 2013. *Id.* Thus it logically follows that the Queechunk Canal is navigable in fact. *See* 40 C.F.R. § 122.2 (2014). The majority of the year-round-flow of the Deep Quod River is diverted into the Canal, but the Deep Quad River also runs into the Mississippi River, navigable-in-fact interstate water long used for commercial navigation. *Id.* The Deep Quod River is a resource for drinking water for a community downstream from MMF. *Id.* Further, the Queechunk Canal fulfills the definition of navigable provided by the Supreme Court, because it is relatively permanent, connected to traditionally navigable water, and certainly has a significant nexus to navigable in fact water. *See Rapanos*, 547 U.S. at 716.

B. Navigation of the Queechunk Canal is not a trespass because all navigable waters of the State of New Union must remain open to navigation by the public.

The Public Trust Doctrine provided the public with the right to navigation in waters subject to the ebb and flow of the tide. *See Barney v. Keokuk*, 94 U.S. 324, 338 (1877) (extending the right to navigable fresh bodies of water). In accordance with the public trust doctrine, the Court has held navigable waters to be public. *E.g., Utah Div. of State Lands v. U.S.*, 482 U.S. 193 (1987); *Montana v. U.S.*, 450 U.S. 544, 551 (1981). “The interest of the United States in the flow of a navigable stream originates in the Commerce Clause.” *U.S. v. Twin City*

Power Co., 350 U.S. 222, 224 (1956). The United States controls all navigable waters, whether the state or an individual retains ownership rights to the shore and submerged soil. *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 375 (1977); *Gibson v. U.S.*, 166 U.S. 269, 271 (1897). The Public Trust Doctrine is broad in scope and continues to promote public access. See *National Audubon Soc'y v. Superior Court (Mono Lake)*, 33 Cal. 3d 419, 437, cert. denied, 464 U.S. 977 (1983) (navigable tributaries with a nexus to navigable waters); *Gould v. Greylock Reservation Comm'n*, 350 Mass. 410, 419(1966) (state parklands); *Montana Coalition for Stream Access v. Curran*, 682 P.2d 163 (Mont. 1984) (waters susceptible for recreational use); *Van Ness v. Borough of Deal*, 78 N.J. 174, 181 (1978) (dry sand area of beach). The Supreme Court has even interpreted it as a *per se* public easement. See *Summa Corp. v. California ex rel. State Lands Comm'n*, 466 U.S. 198, 200, 204-05, 209 (1984). Historically, it has not mattered whether a navigable waterway is wholly artificial, see *Ex parte Boyer*, 109 U.S. 629, 631 (1884), or how long a waterway has been navigable for, see *Philadelphia Co. v. Stimson*, 223 U.S. 605, 634 (1912).

The Queechunk Canal is an artificial navigable body of water, built before the current owners took possession, over seventy years ago. (R. at 5.) Although the Court found a navigable, man-made marina to be exempt from free public access, making it public would have interfered with the purpose behind its creation to serve as a business. *Kaiser Aetna v. United States*, 444 U.S. 164, 171, 100 S. Ct. 383, 388, 62 L. Ed. 2d 332 (1979). Here, MMF's business purpose is not affected; they are not using the canal to charge admission, rather for drainage to avoid flooding. (R. at 5.) Further, the Queechunk Canal has been used by the public, presumably since it was built, without interfering with MMF's operations. *Id.* Even though there are no State of New Union cases regarding the Public Trust Doctrine, by applying the broad scope the federal

courts have interpreted it to carry, this court must find the Queechunk Canal to be publicly navigable. (R. at 9.)

II. ALTERNATIVELY, IF THIS COURT FINDS THE SITE VISIT TO BE A TRESPASS, EPA AND RIVERWATCHER ARE ENTITLED TO USE THE EVIDENCE.

A. EPA and Riverwatcher may rely on evidence obtained without a warrant.

Appellants may rely on the evidence obtained even if Dean’s action constitutes a trespass, because he reasonably believed that the waters were publicly navigable. The “touchstone of the Fourth Amendment is reasonableness.” *Florida v. Jimeno*, 500 U.S. 248, 250 (1991). Reasonableness is objectively determined through totality of the circumstances. *Ohio v. Robinette*, 519 U.S. 33, 39, 117 S. Ct. 417, 421, 136 L. Ed. 2d 347 (1996); *U.S. v. Knights*, 534 U.S. 112, 114 (2001) (“general” approach to measuring reasonableness examines totality of circumstances). Reasonableness of a search is assessed by legitimacy of the search and balancing “the need to search against the invasion which the search entails.” *Camara v. Mun. Ct. of City and County of San Francisco*, 387 U.S. 523, 537 (1967). The conduct of the search is reasonably related in scope if it correlates with the purpose of the search and nature of the violation. *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985). Under *Herring v. United States*, the Court refused to suppress evidence if the actions were negligent rather than flagrant. 555 U.S. 135, 140, (2009); *Illinois v Gates*, 462 US 213, 233 (1983) (unreasonable searches do not automatically implicate the exclusionary rule).

Here, Dean’s actions were reasonable in light of the public’s regular use of the canal as a shortcut. *See Id.* Dean reasonably believed his actions were permissible, because he reasonably responded to complaints received about the water being brown and smelling of manure. (R. at 6.) Dean relied on the idea that this was permissible, regardless of the signs since no further action

had been taken to dissuade outsiders from using the canal. *Id.* Dean merely responded to complaints and looked in a place that was likely causing them; the inspection was not invasive. *Id.* Further, Dean is a private citizen, not a government agent, thus the protection afforded by the Fourth Amendment was not violated. *See T.L.O.*, 469 U.S. at 336 (1985) (Fourth Amendment applies to all governmental action but not actions of private citizens).

Appellants have special needs in this situation because the contamination caused by Moon Moo Farm harmed the drinking water of a community. Special needs are “permitted exceptions...beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.” *Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987). A search can be reasonably conducted without probable cause if there is a special need. *See id.* Appellants have a duty to uphold the regulations and conduct reasonable inspections, because the health and welfare of a community could be adversely affected by violations.

B. The exclusionary rule does not apply in civil enforcement proceedings under the Clean Water Act.

The exclusionary rule orders that “evidence obtained in violation of the Fourth Amendment cannot be used in criminal proceeding against the victim of an illegal search and seizure.” *United States v. Calandra*, 414 U.S. 338, 347 (1974). This has been upheld in the criminal context to promote judicial integrity and deterrence of police; “if the government becomes a lawbreaker it breeds contempt for the law.” *Elkins v. United States*, 346 U.S. 206 (1960); *see Silverthorne Lumber Co. v United States*, 251 U.S. 385, 392 (1920). However, the driving force behind the rule has shifted away from remedying violations of personal privacy, as it is not a constitutional right, and it no longer prohibits all illegally obtained evidence in all proceedings or against all individuals. *Stone v Powell*, 428 U.S. 465, 486 (1976); *see Calandra*,

414 U.S. at 348. Further, the state's use of improperly obtained evidence does not itself violate the Constitution. *United States v. Leon*, 468 U.S. 897, 906 (1984).

Exclusion is only applicable where its deterrence benefits outweigh the substantial social costs inherent in precluding consideration of reliable probative evidence. *Id.* Further, the Court has never suggested that it must be applied wherever it may provide some deterrence. *Alderman v United States*, 394 US 165,174 (1969); *Pennsylvania Board of Probation and Parole v Scott*, 524 US 357, 365 (1998) (exclusion is incompatible with administrative procedures). More recently, the Court has rejected exclusion as an appropriate remedy, suggesting that it is outdated. *Hudson v Michigan*, 547 US 586, 597 (2006). While warrantless searches of private homes and commercial businesses are *per se* unreasonable, many exceptions are recognized where business premises may be reasonably inspected. *See v. Seattle*, 387 U.S. 541, 545 (1967); *Arizona v. Grant*, 129 S. Ct. 1710 (2009).

The district court erred when referring to Occupational Safety and Healthy Act ("OSHA") cases as analogous in the context of civil penalty actions with the present action, because the Court held that an inspection without a warrant or its equivalent pursuant to a section of OSHA violated the Fourth Amendment. *Marshall v. Barlow's, Inc.*, 436 U.S. 307,313 (1978). Thus it logically flows that the circuit courts have suppressed evidence, showing deference to the high court's narrow ruling. *Trinity Indus. v. OSHRC*, 16 F .3d 1455, 1462 (6th Cir. 1994); *Smith Steel Casting Co. v. Brock*, 800 F .2d 1329, 1334 (5th Cir. 1986). The Supreme Court has held that search warrants are not necessary for all types of environmental inspections. *Air Pollution Variance Board of Colorado v. Western Alfalfa Corp.*, 416 U.S. 861 (1974) (inspection of smoke from an open field does not require a warrant); *Dow Chemical v. United States*, 476 U.S. 227 (1986) (aerial inspection and photography from navigable airspace does not require a warrant).

In determining whether the exclusionary rule should apply in administrative proceedings, a balancing test has been applied. *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 1033 (1984) (illegally obtained evidence not excluded in immigration proceeding). The expected social benefits of excluding the improperly seized evidence must be weighed against the probable social costs. *United States v. Janis*, 428 U.S. 433, 454 (1976) (exclusionary rule not applied in civil cases where the person who illegally obtained evidence is different from who is using it).

EPA and Riverwatcher are entitled to use the evidence at trial, because it is admissible and the exclusionary rule is not applicable. The deterrent effect of excluding this evidence is nominal, because Dean is unlikely to do this again. *See Leon*, 468 U.S. at 906. Moreover, there is no indication that he was acting on behalf of the EPA when conducting his investigation, rather replying to a public outcry. (R. at 6.) The social costs at issue are high, because an entire community of people uses the contaminated water for drinking purposes. *Id.* Further, here the people are not at-will employees in a hazardous workplace, rather they are being endangered in their own homes due to the actions of Moo Moo Farms –their children are being endangered – through a necessity of life- drinking water. *See Barlow's*, 436 U.S. at 313. The probative value of the evidence clearly outweighs the potential deterrent effect; therefore, the evidence should not be excluded. *See Janis*, 428 U.S. at 433.

III. THE DISTRICT COURT ERRED IN HOLDING THAT MOON MOO FARM WAS NOT A CAFO.

The District Court dismissed Riverwatcher's CWA complaint reasoning that, after reviewing the admissible evidence, Moon Moo Farm was not considered a CAFO. The District Court decided there was no admissible evidence to prove the discharge because the evidence proving there was a discharge through a man-made ditch was the result of a civil and criminal trespass. (R. at 8.) Moon Moo Farm currently falls within the definition of a "Medium Animal Feeding

Operation” (AFO) under 40 C.F.R. § 122.23(b)(6). In order for a medium AFO to be considered a CAFO, one of two conditions must be met: A) the pollutants are discharged into waters of the U.S. through a man-made ditch, flushing system, or other similar device; or B) the pollutants are discharged directly into the waters of the U.S. 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(b)(6)(ii).

There is no claim that any waters of the U.S. pass over, across, or through Moon Moo Farm’s facility or come into direct contact with the animals confined in the operation. (R.at 8.) Thus, in order for Moon Moo Farm to be considered a CAFO the pollutants must be discharged through a “man-made ditch, flushing system, or other similar device.” 40 C.F.R. § 122.23(b)(6)(ii).

As per Section I above, the samples and photographs taken of the discharge will be admissible evidence. James from Riverwatcher observed and photographed “discolored brown water” flowing from the fields, through a drainage ditch, and finally passing into the Queechunk Canal. (R.at 6.) Hence, Moon Moo Farm would satisfy the requirement for CAFO designation because there was a discharge through a drainage ditch into the Queechunk canal. (R.at 5.) Thus, the District Court erred when it failed to classify Moon Moo Farm a CAFO.

IV. THE DISTRICT COURT ERRED IN HOLDING THAT MOON MOO FARM’S DISCHARGE WAS EXEMPT UNDER THE AGRICULTURAL STORMWATER EXEMPTION.

The District Court dismissed Riverwatcher’s CWA complaint reasoning that 40 C.F.R. § 122.23 (e) exempts as agricultural stormwater landspreading that is performed in accordance with a Nutrient Management Plan (NMP). Moon Moo Farm argued that it qualified as an agricultural stormwater exception because it was applying manure in accordance with it NMP.

(R. at 9.) The discharge of manure to waters of the United States from a CAFO as a result of the application of that manure to land areas is a discharge subject to NPDES permit requirements unless it qualifies as an agricultural stormwater exception. 40 C.F.R. § 122.23(e). To qualify as an agricultural stormwater exception a defendant must show: (1) the manure was applied in accordance with site specific nutrient management practices, (2) the practices ensure appropriate agricultural utilization of the nutrients in the manure, (3) the discharge was due to precipitation. *Id.*

The District Court erred when it held that Moon Moo Farm’s discharge qualified as an agricultural stormwater exception for two reasons. First, while the manure was being applied according to the NMP, the exemption was not intended to cover entities that do not utilize proper landspreading practices. Second, Moon Moo Farm’s application practices did not ensure the appropriate agricultural utilization of the nutrients in the manure.

A. The agricultural stormwater exemption is not intended to cover entities that do not utilize proper landspreading practices.

In order for a CAFO’s discharge to be considered under the agricultural stormwater exception the manure must be applied in accordance with site-specific nutrient management practices. *Id.* The District Court below erred because it only considered whether Moon Moo Farm applied manure to its fields at rates consistent with its NMP. (R. at 6.) However, the court should have also considered whether the manure was being applied according to proper landspreading practices. *See Nat’l Pork Producers Council v. U.S. E.P.A.*, 635 F.3d 738, 744 (5th Cir. 2011) (“An NMP required a CAFO to establish ‘best management practices’ (BMPs)); *Cnty. Ass’n for Restoration of Env’t (CARE) v. Sid Koopman Dairy*, 54 F. Supp. 2d 976, 981 (E.D. Wash. 1999) (“The agricultural stormwater discharge...does not relieve CAFO farmers

from responsibility to over applications and misapplications of CAFO animal wastes to fields in amounts or locations which will then discharge into the waters of the United States”).

Moon Moo Farm has contended that its discharge falls under the agricultural stormwater exception because it was applying manure in accordance with an NMP and cites in support *Alt. v. EPA*, 979 F. Supp. 2d 701 (N.D. W. Va. 2013). (R. at 9.) *Alt* is distinguishable because the manure and litter in the farmyard that became the source of the discharge was not placed there in a negligent or malfeasant manner. *Id.* at 714. Instead, the court in *Alt* noted that “with the agricultural stormwater exemption ‘Congress was affirming the impropriety of imposing liability for agriculture-related discharges triggered not by negligence or malfeasance. 979 F. Supp. 2d at 714. Courts have also concluded that over-saturation of fields in a manner inconsistent with proper landspreading practices did not prevent the CAFO from being liable for any resultant discharges. *See Waterkeeper Alliance, Inc. v. U.S. E.P.A.*, 399 F.3d 486, 508 (2d Cir. 2005) (liability imposed when run-off was primarily caused by the over-saturation of fields rather than the rain); *Reynolds v. Rick’s Mushroom Serv., Inc.*, No. CIV .A. 01-3773, 2004 WL 620164, at *4 (E.D. Pa. Mar. 29, 2004) (Liability imposed when leachate was not applied in a manner to prevent discharge into a body of water, was not ensured that vegetation was capable of absorbing the volume of nutrients applied, and improperly operated its spray irrigation system when the ground was frozen, saturated, or otherwise incapable of absorbing leachate); *Concerned Area Residents for The Env’t v. Southview Farm*, 834 F. Supp. 1410, 1419 (W.D.N.Y. 1993) (Discharge attributed to a combination of improper manure application practices); *United States v. Oxford Royal Mushroom Products, Inc.*, 487 F. Supp. 852, 854 (E.D. Pa. 1980) (Discharges resulted from “spraying an overabundance of waste water onto the surface of the irrigation fields).

In all of the abovementioned cases the court considered whether the manure was applied in a manner so as to prevent a discharge into a body of water. When James from the Riverwatchers witnessed manure spreading operations at Moon Moo Farm on April 12 the rain event was already in progress and had been for a day. (R. at 6.) While Moon Moo Farm’s NMP does not prevent it from land applying manure during a rain event, it is still required for the CAFO to apply manure so as to prevent a discharge. (R. at 7.) In addition, Riverwatcher’s expert agronomist, Dr. Mae, contends that the land application of manure during a rain event is poor management practices and will increase the probability of excess runoff from fields. (R. at 6.) Moo Moon Moo Farm’s expert agronomist, Dr. Green, does not address whether applying manure during a rain event is a proper landspreading practice. (R. at 6-7.) Moon Moo Farm was not applying manure in a proper manner so as to prevent a discharge because it was applying manure during a storm event. Consequently, the lower court below erred when it failed to consider whether the manure was applied according to proper landspreading practices.

B. Moon Moo Farm’s application practices did not ensure the appropriate utilization of the nutrients in the manure.

1. Acidic soil is harmful to Bermuda Grass

In order to be covered under the agricultural stormwater exemption, the CAFO must also show that the land application ensured the “appropriate agricultural utilization of the nutrients in the manure.” 40 C.F.R. § 122.23 (e). The District Court erred because it did not consider the effects of the acidic whey on the soil. (R. at 9.)

Dr. Mae stated in her expert opinion that the addition of the acid whey increases the manure’s acidity. (R. at 6.) Moon Moo Farm’s expert did not dispute this statement. *Id.* Also, scientific evidence tends to support the assumption that acidic soil has harmful effects on Bermuda Grass. According to Larry A. Redmon, *Bermudagrass Decline*, Texas Cooperative

Extension: Forages 16 (2002), *available at* <http://forages.tamu.edu/PDF/scs-2002-16.pdf>,
“Phosphorous (P)..is generally low in many of the acid soils where bermudagrass is grown.”
Therefore, “the addition of limestone to increase soil PH...can improve plant available P.” This suggests that increasing the PH, rather than decreasing the PH as occurred in this situation, in an already acidic soil will improve Bermuda Grass health. Also, there is much debate concerning what the proper range of soil PH is for Bermuda Grass. For example, some sources claim Bermuda Grass can survive in acidic soil. *See* Aaron Patton & Stephen Vann, *Bermudagrass Spring Dead Spot*, University of Arkansas Division of Agriculture: Agriculture and Natural Resources (2007), *available at* <http://turf.uark.edu/publications/factsheets/Bermudagrass%20Spring%20Dead%20Spot%20FSA-7551.pdf> (“If soil PH is high...lower soil PH in a range of 6.0 to 6.8). Meanwhile, other sources claim Bermudagrass should be kept in soils with a more neutral PH. *See* Austin Hagan, *Control of Spring Dead Spot and Bermudagrass Decline*, Alabama Cooperative Extension System (2003), *available at* <http://www.aces.edu/pubs/docs/A/ANR-0371/ANR-0371.pdf> (“Maintain soil pH at 5.8 to 6.2”); Cliff Snyder, *Nitrogen, Phosphorous, Potassium, Sulfur and Magnesium for Bermudagrass Pastures and Hay Meadows*, Potash & Phosphate Institute: News and Views (1998), *available at* [http://www.ipni.net/ppiweb/ppinews.nsf/0/468b3a27db2fb5f68525691c005eb102/\\$FILE/98081-CSS-NPKSMg.pdf](http://www.ipni.net/ppiweb/ppinews.nsf/0/468b3a27db2fb5f68525691c005eb102/$FILE/98081-CSS-NPKSMg.pdf) (“maintain the soil pH in the preferred range of pH 5.5 to 6.2”).

Riverwatcher’s expert agronomist opined that the increased acidity of the manure resulted from the added acid whey. (R. at 6.) She also concluded that the increased acidity of the manure increased the acidity of the soil. *Id.* She determined that the liquid manure had a PH of 6.1 making it a “weak acid.” *Id.* In addition, Moon Moo Farm’s expert agronomist confirmed

that the acid whey increased the acidity of the soil, however, he believed the Bermuda Grass was able to tolerate the change in soil PH.. *Id.* Regardless of which expert or what sources are correct, it is presumed that the PH of Moon Moo Farm’s soil would continue to increase as the whey manure was continuously applied. Moon Moo Farm was already straddling the threshold between an acceptable and unacceptable PH at 6.1. *Id.* If Moon Moo Farm continued to apply the whey manure, it would eventually reach the minimum limit of acidity for even the more lenient sources. There are no facts indicating that Moon Moo Farm was taking into consideration current PH levels and scientific evidence indicates that the soil would continue to acidify unless corrective measures were taken. Moon Moo Farm was not applying the manure to ensure the appropriate utilization of the nutrients in the manure because it was not considering the appropriate level of PH in order to grow a healthy Bermuda Grass harvest. Thus, Moon Moo Farm would not be covered under the agricultural stormwater exception.

2. Moon Moo Farm should have accounted for the change in PH and revised its NMP.

A CAFO must update its NMP when there are changes that would likely increase the risk of nitrogen and phosphorous transport to waters of the U.S. 40 C.F.R. § 122.42. Thus, the District Court erred because it did not address whether Moon Moo Farm should have updated its NMP due to the acid whey’s effects on the soil. (R. at 9.)

Riverwatcher’s expert agronomist determined that the increased acidity of both the manure and soil prevented the Bermuda Grass from “effectively taking up the nutrients in the manure” and increased the likelihood of runoff during rain events. *Id.* In addition, Moon Moo Farm’s expert agronomist did not dispute that the acid whey increased the acidity of the soil and “reduced nitrogen uptake by the Bermuda Grass.” *Id.*

Due to the increased acidity in the soil, the Bermuda Grass Moon Moo Farm is growing cannot effectively uptake the nitrogen in the manure. Thus, the excess nitrogen is becoming runoff. As a result, Moon Moo Farm had a duty to update its NMP since the changes in the manure and soil PH were likely to increase the risk of nitrogen runoff into the river.

V. EVEN IF THE COURT FINDS MOON MOO FARM WAS NOT A CAFO, THE DISCHARGE WILL BE CONSIDERED AS FROM A POINT SOURCE.

Even if the court determines Moon Moo Farm is not a CAFO, the discharge will still be from a “point source.” The term “point source” is defined as, “any discernable, confined and discrete conveyance including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling, stock, concentrated animal feeding operation, or vessel or other floating craft from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14). The Clean Water Act specifically exempts “agricultural stormwater discharges and return flows from irrigation agriculture” from the definition of a point source. *See* 33 U.S.C. § 1362(14). If the water discharges are not from a point source, there is no requirement that the property owner discharging these waters have an NPDES permit. *See* 33 U.S.C. §§ 1311, 1342. The definition of what constitutes a point source is interpreted broadly. *See Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1009 (11th Cir. 2004) (“We interpret the term ‘point source’ broadly”); *Dague v. City of Burlington*, 935 F. 2d 1343, 1354 (2d Cir. 1991) (“The concept of a point source was designed to further this scheme by embracing the broadest possible definition of any identifiable conveyance from which pollutants may enter waters of the United States”).

Moon Moo Farm contends that they are not considered a CAFO and are not a point source because they fall under the agricultural stormwater exemption. (R.at 7.) As noted in Part II, Moon Moo Farm will not fall under the agricultural stormwater exemption. However, even if the present court does not find Moon Moo Farm a CAFO, it will likely be considered a point

source because its discharge is not protected under the agricultural stormwater exception. Courts have considered the following as “point sources”: manure spreading vehicles, fields where manure is stored and the ditches therein, and liquid manure spreading operations.

See, e.g., Concerned area Residents for the Env’t v. Southview Farm, 34 F.3d at 123 (2d Cir. 1994) (manure spreading vehicles and liquid spreading operations); *Cnty. Ass’n for Restoration of the Env’t v. Henry Bosma Dairy*, 305 F.3d 943, 955 (9th Cir. 2002) (fields where manure is stored and ditches therein).

It is clear that a conveyance from a ditch is explicitly listed as a point source. *See* 33 U.S.C. § 1362(14). Moon Moo Farm’s discharge was from the drainage ditch into the Queechunk Canal. (R. at 6.) However, even if the court will refuse to admit the evidence of this discharge, Moon Moo Farm’s discharge will still be considered from a point source because manure spreading practices are considered point sources. All of the abovementioned cases specifically include manure spreading operations as a point source. Thus, the tank trailers, tractors, and other manure spreading equipment Moon Moo Farm uses will be considered a point source. (R. at 5.) This point is illustrated in *Southview Farm*, where the Second Circuit Court explicitly held that manure spreading vehicles were a “point source” under the Act. 34 F.3d at 119. Consequently, the court below erred when it failed to consider whether Moon Moo Farm’s discharge was from a point source.

VI. THE DISTRICT COURT ERRED WHEN IT DETERMINED THAT MOON MOO FARM IS NOT SUBJECT TO A CITIZEN SUIT UNDER THE RESOURCE CONSERVATION AND RECOVERY ACT.

As an alternative argument, Riverwatchers argue that if Moon Moo Farms is not in violation of the Clean Water Act, it is in violation of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901. This is because RCRA’s definition of “solid waste” excludes

discharges subject to National Pollution Discharge Elimination System (NPDES) permitting under the Clean Water Act. 42 U.S.C. § 6903(27). Moon Moo Farms is engaging in open dumping of solid waste that caused groundwater and potable water contamination, resulting in a nitrate advisory.

A. MOON MOO FARM'S LAND APPLICATION PRACTICES CONSTITUTE THE DISPOSAL OF A NON-HAZARDOUS SOLID WASTE IN VIOLATION OF THE RESOURCE CONSERVATION AND RECOVERY ACT.

"RCRA is a comprehensive environmental statute that governs the treatment, storage, and disposal of solid and hazardous waste." *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 483, 116 S. Ct. 1251, 134 L. Ed. 2d 121 (1996). The purpose of RCRA is to reduce or eliminate the generation of waste and, in instances where waste continues to be generated, to treat, store, or dispose of it in a manner which minimizes "the present and future threat to human health and the environment". 42 U.S.C. § 6902(b). Under RCRA, citizens are authorized to bring suit against any person "who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment". 42 U.S.C. § 6972 (a)(1)(B). "The term 'person' means an individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, association, State, municipality, commission, political subdivision of a State, or any interstate body and shall include each department, agency, and instrumentality of the United States." 42 U.S.C. § 6903(15).

RCRA prohibits the practice of "open dumping of solid waste." 42 U.S.C. § 6945(a). An "open dump...means any facility or site where solid waste is disposed of which is not a sanitary landfill which meets the criteria promulgated under section 4004 (42 U.S.C. § 6944) and which is not a facility for disposal of hazardous waste." 42 U.S.C. § 6903(14). "Solid waste" means, in

relevant part, any “discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from . . . agricultural operations.” 42 U.S.C. § 6903(27).

The solid waste disposal activities listed under 40 C.F.R. § 257.3 “pose a reasonable probability of adverse effects on health or the environment”. Relevant activities to this case are: application of solid wastes to floodplains (40 C.F.R. § 257.3-1), application of solid wastes in a manner that may contaminate groundwater (40 C.F.R. § 257.3-4), and application of solid waste with a pH below 6.5 to food chain crop areas (40 C.F.R. § 257.3-5).

B. THE MIXTURE OF MANURE AND ACID WHEY IS A SOLID WASTE SUBJECT TO RCRA SUBTITLE D REGULATION.

The District Court erred when deciding that the manure mixture that Moon Moo Farms is spreading onto the Bermuda grass is not a solid waste. A solid waste is any “discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from . . . agricultural operations.” 42 U.S.C. § 6903(27). “The statute does not define ‘discarded,’ but the word is addressed in the Code of Federal Regulations. 40 C.F.R. § 261.2(a)(2) defines ‘discarded material’ as any material that is abandoned. 40 C.F.R. § 261.2(b) states that materials are solid wastes if they are ‘abandoned’ by being ‘disposed’ of. The statute defines the word ‘disposal,’ a word that is synonymous with ‘discarded,’ as the ‘Leaking . . . of any solid waste or hazardous waste into or on any land or water . . .’ 42 U.S.C. § 6903(3) (1983 & Supp. 1991).” *Zands v. Nelson*, 779 F. Supp. 1254, 1261-62 (S.D. Cal. 1991). Federal regulations are elaborations on statutes and this synonymous linguistic connection of definitions is created to reach an interpretation that the word “discard” is interchangeable with “dispose”. Therefore, the excess amount of manure and acid whey mixture that is not being absorbed by the plants is a solid waste subject to RCRA Subtitle D regulation.

1. The manure and acid whey mixture has been discarded.

The District Court erred when it determined that Moon Moo Farms did not discard the manure and acid whey mixture by applying it to the Bermuda grass fields. Moon Moo Farms is in fact discarding the manure mixture when it is spreading it on to the Bermuda grass because it is over-applying the mixture. The excess fertilizer that is not being absorbed by the crop is discarded.

While the statute itself does not address the definition of ‘discarded’, it does define the word ‘disposal’, a word that is synonymous with ‘discard’. RCRA defines disposal as “the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters” 42 U.S.C. § 6903(3). The Code of Federal Regulations defines ‘discarded material’ as “any material that is abandoned”. 40 C.F.R. § 261.2(a)(2). Furthermore, the Code of Federal Regulations states that materials are solid wastes if they are ‘abandoned’ by being ‘disposed’ of. 40 C.F.R. § 261.2(b).

Discarded material does not include material that is “destined for beneficial reuse or recycling in a continuous process by the generating industry itself.” *Am. Mining Cong. v. United States EPA*, 824 F.2d 1177, 1186 (D.C. Cir. 1987). Moon Moo Farms claims it is using the acid whey in addition to manure to fertilize Bermuda grass crops to be used as silage for their dairy cows. (R. at 5.) However, the application of manure is no longer useful or beneficial when it is over-applied to the fields. *Cnty. Ass'n for Restoration of the Env't, Inc. v. Cow Palace, LLC*, 2013 U.S. Dist. LEXIS 87720 at *14 (E.D. Wash. June 21, 2013). It is “untenable that the over-application or leaking of manure that was initially intended to be used as fertilizer can *never* become ‘discarded’ merely because it is ‘unintentionally’ leaked or over-applied.” *Id.* at *14-15.

It is undisputed that the addition of the acid whey to the manure affected the Bermuda grass's ability to use the manure mixture. (R. at 6.) The mixture is not completely absorbed by the crop because of the effects that the acid whey has on the pH of the soil. *Id.* Thus, this excess amount of fertilizer that was not absorbed has been discarded.

The lowering of the pH negatively affected the soils ability to absorb the fertilizer; therefore, it can be inferred that continuing to apply the same amount of manure in addition to the acid whey to a crop that now has a lowered ability to absorb the nitrogen from the manure created an over-application. "When manure is applied in quantities greater than a crop can take in, the nutrients can leach into the soil and groundwater." *Id.* at *12. "Nitrogen, one of the substances of concern found in manure, is highly mobile. It can readily convert to nitrate and leach through the unsaturated (or vadose) zone of soils and into the local aquifer. For this reason, it is imperative that liquid manure is applied to fields only in amounts that the current crop can completely utilize." *Cnty. Ass'n for the Restoration of the Env't v. Nelson Faria Dairy, Inc.*, 2011 U.S. Dist. LEXIS 149868 at *24 (E.D. Wash. Dec. 30, 2011). The unabsorbed nitrates leach into the groundwater and runoff into water sources during rain events. (R. at 6.)

According to the District Court's logic, "any disposal process, no matter how environmentally unsound, would be exempted from the reach of RCRA as long as the waste residue was eventually returned to the soil. This could not have been Congress' intent." *Safe Air v. Meyer*, 373 F.3d 1035, 1050 (9th Cir. 2004). Therefore, the District Court erred in its decision that the manure and acid whey mixture has not been discarded; the excess amount of acid whey and manure added to the crops was discarded because it was not being absorbed by the plants and, therefore, not providing beneficial use.

2. Over-application of fertilizer creates a solid waste that is regulated under RCRA.

Subtitle D of RCRA regulates solid waste disposal facilities and practices. “Agricultural wastes, including manures and crop residues, returned to the soil as fertilizers or soil conditioners” are exempt from regulation under Subtitle D. 40 C.F.R. § 257.1(c)(1). However, Subtitle D must apply to those wastes that are not absorbed by the soil and in fact are posing harm to the environment, as the unabsorbed nitrates and other chemicals are doing so here.

In evaluating whether a material is a solid waste, the court must look to whether the material is "destined for beneficial reuse or recycling in a continuous process by the generating industry itself." *Am. Mining Cong.*, 824 F.2d at 1186. “In determining whether a material is a ‘beneficial’ product or a RCRA solid waste, courts have examined whether the material has market value, and whether the party intended to throw the material away or put it to a beneficial use.” *Oklahoma v. Tyson Foods, Inc.*, 2010 U.S. Dist. LEXIS 14941 at *43 (N.D. Okla. Feb. 17, 2010). Moon Moo Farms did not purchase the acid whey from Chokos, but merely accepted it. (R. at 5.) Chokos had no further use for the acid whey as a by-product of Greek yogurt production, so it conveniently discarded it to Moon Moo Farms. It is not stated that the acid whey produced at Chokos has monetary value.

The scientific implications of increased acid whey fertilization methods are forthcoming. Although whey is a natural by-product of food production, in large quantities, it can pose a risk to the environment if not properly managed. Mark Astley, *Greek yogurt waste 'acid whey' a concern for USDA: Jones Laffin*, Dairy Reporter (Jan. 31, 2014), <http://www.dairyreporter.com/Processing-Packaging/Greek-yogurt-waste-acid-whey-a-concern-for-USDA-Jones-Laffin>. In 2013, Justin Elliot put the Greek yogurt industry in the headlines in his article, *Whey Too Much: Greek Yogurt's Dark Side*. It describes the trouble that Greek yogurt companies, such as Chokos, are facing with the growing consumer demand for Greek yogurt.

The increased demand for Greek yogurt leads to an increased generation of a potentially toxic by-product: acid whey, “a thin, runny waste product that can’t simply be dumped . . . [because] whey decomposition is toxic to the natural environment, robbing oxygen from streams and rivers. That could turn a waterway into what one expert calls a ‘dead sea,’ destroying aquatic life over potentially large areas.” Justin Elliot, *Whey Too Much: Greek Yogurt’s Dark Side*, Modern Farmer (May 22, 2013), <http://modernfarmer.com/2013/05/whey-too-much-greek-yogurts-dark-side>. See also Molly Hart, *Whey-ing Greek yogurt’s environmental impact*, CNN Eatocracy (Jun. 12, 2013), <http://eatocracy.cnn.com/2013/06/12/whey-ing-greek-yogurts-environment-impact> (“Putting a lot of organic matter into a stream would end up exhausting all the oxygen and dissolved oxygen is what fish need to survive”); New York Department of Environmental Conservation, *Why does whey need to be managed?*, Whey Management for Agriculture (n.d.), <http://www.dec.ny.gov/chemical/94164.html> (“Although whey is a natural by-product of food production, in large quantities, it can pose a risk to the environment if not properly managed”).

Receivers of acid whey attempt to devise creative solutions to use the protein-rich by-product. In this case, Moon Moo Farms used the acid whey as a fertilizer for the Bermuda grass, which in turn is used as silage for the Farm’s dairy cows. (R. at 5.) However, the crop can only absorb so much before it becomes “unmanageable slop”. Justin Elliot, *Whey Too Much: Greek Yogurt’s Dark Side*, Modern Farmer (May 22, 2013), <http://modernfarmer.com/2013/05/whey-too-much-greek-yogurts-dark-side>. “Each soil will have its own maximum capacity to assimilate and treat wastes . . . This capacity will be related to the soil characteristics, environmental conditions, and crops to be grown. The maximum assimilative capacity of the soil therefore represents the maximum capacity waste loading to a soil . . . Control will be needed to avoid

biologically toxic concentrations of such material.” Raymond Loer, *Agricultural Waste Management: Problems, Processes, and Approaches*. (1974).

The effect of low soil pH on Bermuda grass can be devastating. “First, toxic levels of soluble Al [aluminum] can occur in soils where the pH has dropped too low. This effectively burns back the fine root hairs and prevents root growth. Low soil pH also reduces the availability of many of the other nutrients, such as P [phosphorous], K [potassium], Mg [magnesium], Ca [calcium], and others. In effect, low soil pH starves the plant of water and other nutrients. This starvation stress is what ultimately contributes to Bermudagrass [sic] decline. As you might imagine, when low soil pH is coupled with low K, the rate of Bermudagrass [sic] decline is even more rapid.” The University of Georgia College of Agricultural and Environmental Sciences, *What has caused my bermudagrass to thin and be less productive?*, Commodities: Field Crops: Forages: FAQs, (n.d.), <http://www.caes.uga.edu/commodities/fieldcrops/forages/questions/BermudagrassDecline.html>.

According to the Food and Agriculture Organization of the United Nations (FAO), “to avoid over-fertilization, the rate of nitrogen fertilizer to be applied needs to be calculated on the basis of the ‘crop nitrogen balance’. This takes into account plant needs and amount of N in the soil.” Edwin D. Ongley, *Control of water pollution from agriculture*, FAO irrigation and drainage paper 55 (2004), available at <http://www.fao.org/docrep/w2598e/w2598e06.htm#chapter%203:%20fertilizers%20as%20water%20pollutants>. Therefore, the District Court erred when it characterized the excess manure and acid whey mixture as a fertilizer rather than a waste; the overapplication of the mixture harmed the soil by lowering the pH and negatively affected the crop’s ability to absorb nutrients in the mixture.

C. THE MIXTURE PRESENTS AN IMMINENT AND SUBSTANTIAL ENDANGERMENT TO HEALTH OR THE ENVIRONMENT.

The District Court erred when it determined that because it could not be proved that Moon Moo Farm's practices were the "but-for" cause of nitrate advisories there is insufficient evidence of imminent and substantial endangerment. Riverwatchers filed suit under the citizen suit provision of RCRA. Under RCRA, citizens are authorized to bring suit against any person "who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment". 42 U.S.C. § 6972 (a)(1)(B). "The term 'person' means an individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, association, State, municipality, commission, political subdivision of a State, or any interstate body and shall include each department, agency, and instrumentality of the United States." 42 U.S.C. § 6903(15). The statute does not require a person to be the "but-for" or sole causation of an imminent and substantial endangerment, but states that a past or present contributor may be sued. 42 U.S.C. § 6972. Therefore, Riverwatchers only has to show that Moon Moo Farms contributed to the nitrate advisories.

Both of Riverwatchers' experts determined that Moon Moo Farms contributed to the nitrate advisory through its application of the manure and acid whey mixture. (R. at 6.) Moon Moo Farm's expert did not dispute this opinion. *Id.* While it may be the case that other farms in the area also contributed to the nitrate advisory, there is no statutory need to prove that Moon Moo Farm was the "but-for" cause of environmental or public health endangerment in order to bring a citizen suit against them. 42 U.S.C. § 6972.

Additionally, the District Court also erred in determining that there was no imminent or substantial danger because the nitrate advisory only applied to infants. In its decision, the District

Court cited to *Davies v. Nat'l Co-op Refinery Ass'n*, 963 F. Supp. 990 (D. Kan. 1997) to support its determination that there is no imminent and substantial endangerment to human health. However, *Davies* actually denies that an inconvenient alternative extinguishes the possibility of an imminent and substantial danger; “here, plaintiffs have been warned of the danger and are able to occupy the property without serious risk to their health by using an alternative water supply. In making this observation, *the court does not mean to suggest that an endangerment to health cannot be considered imminent whenever the plaintiff has a means of avoiding the hazard* . . . The fact that they [plaintiffs] must use bottled water instead of groundwater is undoubtedly an inconvenience and an economic burden, but it is the type of injury for which an action at law provides an adequate remedy.” *Id.* at 999 [emphasis added]. It is true that the nitrate advisory only applies to infants, however infants are the most precious and innocent members of our society and they are not to be excluded from RCRA’s protections.

Additionally, the imminent and substantial danger may also apply to the environment, which the District Court did not address. It can be assumed that the Deep Quod River and surrounding banks are home to an unenumerated amount of wildlife and plants. Overfertilization runoff into rivers and bodies of water causes eutrophication, which increases algae production. World Ocean Review, *Living with the Oceans: A report on the state of the world’s oceans*, World Ocean Review 1 (2010), available at <http://worldoceanreview.com/en/wor-1/pollution/over-fertilization/2/>. The increased algae use up available oxygen to the point where there is a no-oxygen zone, with no life at all. *Id.* “Putting a lot of organic matter into a stream would end up exhausting all the oxygen and dissolved oxygen is what fish need to survive.” Molly Hart, *Whey-ing Greek yogurt's environmental impact*, CNN (June 12, 2013), <http://eatocracy.cnn.com/2013/06/12/whey-ing-greek-yogurts-environment-impact/>. In addition

to this endangerment to the general Deep Quod River environment, more research may be needed to determine if there are endangered or threatened species that use the River as a habitat. Therefore, the District Court erred when it determined that the mixture did not present an imminent and substantial danger to human health or the environment.

CONCLUSION

This court should hold that appellant is entitled to judgment as a matter of law because the Queechunk Canal is a publicly navigable water. Alternatively, if this court finds the site visit to be a trespass, EPA and Riverwatcher are entitled to use the evidence. Moon Moo Farms is a CAFO and that does not fall under the agricultural stormwater exception. Alternatively, even if Moon Moo Farm is not a CAFO, the discharge is considered as from a point source. Moon Moo Farm is subject to a citizen suit under the Resource Conservation and Recovery Act and that the mixture presents an imminent and substantial endangerment to the health or the environment. Consequently, this court should reverse the District Court's order granting Moon Moo Farm's Motion for Summary Judgment and remand for further proceedings.