No. 155-CV-2014

IN THE
UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant, and

DEEP QUOD RIVERWATCHER, INC., and DEAN JAMES,

Plaintiffs-Intervenors-Appellants

v.

MOON MOO FARM, INC.,

Defendant-Appellee

Appeal from the United States District Court for New Union in No. 155-CV-2014, Judge Romulus N. Remus

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BRIEF FOR APPELLANT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

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STATEMENT OF JURISDICTION

The District Court had jurisdiction pursuant to 28 U.S.C. § 1331, 33 U.S.C. § 1365, and 42 U.S.C § 77972(a)(1)(A-B). The District Court dismissed all claims under the Federal Rule of Civil Procedure 12(b)(6). The Court of Appeals has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. *THE QUEECHUNK CANAL IS A PUBLIC TRUST NAVIGABLE WATER ALLOWING FOR PUBLIC RIGHT OF NAVIGATION. THE CANAL IS ALSO SUBJECT TO THE FEDERAL NAVIGATIONAL SERVITUDE ALLOWING THE RIGHT OF PUBLIC ACCESS.*

II. *EVIDENCE OBTAINED THRU TRESPASS BY DEAN JAMES IS STILL ADMISSIBLE IN THIS PROCEEDING THE 4TH AMENDMENT DOES NOT APPLY TO EVIDENCE OBTAINED BY A PRIVATE PARTY FOR HIS OWN USE OR TO WASTE WATER WITH NO REASONABLE EXPECTATION OF PRIVACY.*

III. *WHETHER MOON MOO FARM REQUIRES A PERMIT UNDER THE CLEAN WATER ACT NPDES PERMITTING PROGRAM.*

IV. *MOON MOO'S APPLICATION OF FERTILIZER AND SOIL AMENDMENT DOES NOT CONSTITUTE DISCARDING OF A SOLID WASTE UNDER THE MEANING OF THE RESOURCE CONSERVATION AND RECOVERY ACT BECAUSE THE FERTILIZER IS VALUABLE, IS USED FOR ITS INTENDED PURPOSE AND IS NOT OVERAPPLIED.*

V. *MOON MOO'S LAND APPLICATION OF FERTILIZER AND SOIL ONCIDITON PERESENT AN IMINENT AND SUBSTANTIAL ENDANGERMENT TO HEALTH OR THE ENVIROMENT BECAUSE IT CONTRIBUTED TO UNSAFE NITRATE LEVELS IN THE DRINKING WATER.*

STATEMENT OF THE CASE

Moon Moo Farm operates a dairy farm ten miles from the City of Farmville in the State of New Union. The Farm, with an additional 150-acres of fields, is located upstream Farmville at a bend in the course of the Deep Quod River. At the river's bend is the Queechunk Canal. The Canal diverts most of the river's flow to alleviate flooding, and then returns flow to

the Deep Quod River downstream. As part of its operations Moon Moo grows feed for its cows. The feed is comprised of Bermuda grass grown and harvested on fields within the farm. Moon Moo applies fertilizer to these fields. The fertilizer is made in part of manure collected from the dairy operations. The manure is collected through a series of drains and then stored in a liquid manure lagoon where acid whey from a local yogurt plant is added. When Moon Moo is ready to apply the fertilizer it is hauled to the fields by tractor and spread directly on the earth. The acid whey and manure mixture reduces the soil pH and reduces nitrogen uptake by the Bermuda Grass. The use of such whey as a soil conditioner is a long standing practice in New Union. The fertilizer is applied at rates and times consistent with local permitting requirements.

The land on either side of the canal is owned by Moon Moo Farm and is posted with prominent "No Trespassing" signs. There is no evidence Moon Moo used physical obstructions to prevent public access to the canal. Boaters have common, unrestricted use of the canal. The Deep Quod River flows year round and runs into the Mississippi River, a navigable- in-fact interstate body of water that has long been used for commercial navigation. Farmville uses the River as source of drinking water. In the late winter and early spring of 2013, Deep Quod Riverwatcher, a nonprofit organization incorporated in the State of New Union, received complaints that the Deep Quod River smelled of manure and was an unusually turbid brown color. Shortly thereafter,the Farmville Water Authority issued a "nitrate" advisory for its drinking water. The advisory warned that the water was unsafe for consumption by infants, but still safe for adult consumption. The advisory was issued independently and not at the request of the Deep Quod Riverwatcher organization.

In response to the river turbidity complaints, James, the Deep Quod "Riverwatcher" and a citizen of the State of New Union, made an investigatory patrol of the Deep Quod River in a

small metal outboard craft known as a "jon boat" on April 12, 2013. There is no evidence that Dean James or any other member of the Riverwatcher Organization were in contact with any government agency, including the EPA, concerning the complaints, or concerning any issue regarding Moon Moo Farm, or any polluted discharge water being released from the farm. James entered the Queechunk Canal during his patrol, and there is no evidence of any obstructions other than "No Trespassing" signs on the bank to prevent his access into the canal. There he observed and photographed manure spreading operations taking place on Moon Moo Farm's fields. He also observed and photographed discolored brown water flowing from the fields through a drainage ditch into the Queechunk Canal. There is no evidence of any mechanisms, or constructed deviations such as a lagoon to prevent the discharge water from flowing into the canal. James took samples of the water flowing from the ditch where it entered the canal and later had them tested by a water testing laboratory. The test results showed highly elevated levels of nitrates and fecal coliforms. This area of the Deep Quod watershed is heavily harmed and nitrate advisories have been issued in the past. Expert testimony at trial indicated Moon Moo Farm contributed to the most recent advisory but to what extent was unclear. This litigation followed.

SUMMARY OF THE ARGUMENT

The Queechunk Canal is a public navigable river. The canal's integration with the flow of the Deep Quod River, its common usage by the public, and the lack of action by owners canal owners to preserve its private nature, all support that the court should find the Queechunk Canal a public navigable river in accordance with persuasive state authorities. The District Court improperly relied on *Kaiser Aetna v. U.S.* as to whether the Queechunk Canal qualifies as a

public trust navigable water. *Kaiser Aetna* addresses the scope of the federal navigational servitude doctrine, a distinct doctrine. Thus, the Queechunk Canal is a public navigable river.

The Queechunk Canal is an extension of the Deep Quod River and subject to the flow of the Mississippi River. The Mississipi River is an interstate river long used for interstate commerce and subject to the federal navigable servitude. The court should abandon the ruling of no public access for an artificial private waterway under the navigational servitude found in *Kaiser Aenta* in application to the Queechunk Canal. Factual distinctions between the Queechunk Canal and the Kuapa Pond from *Kaiser Aetna v. U.S.* such as the historical private nature of Kuapa Pond, the pond's non navigability prior to dredging distinguish these two water bodies. Instead, the similarities between the Queechunk Canal and the canals in *Vaughn v. Vermillion* such as the private owners intent to transform the nature of the Deep Quod River and creation of a navigable waterway by means of diversion should cause the court to apply the legal distinction in *Vaughn*. Ultimately, the court should find the construction of the Queechunk Canal is an artificial diversion of preexisting natural navigable waterway incapable of private ownership, and a navigational servitude exists over the Queechunk Canal allowing for right of public access.

Dean James is not a trespasser. The water sample he obtained came from an area that was not shielded from public access. In fact, the area is frequented by the public, and because the sample was unobtrusively obtained from a commercial operation Moon Moo can not reasonably expect privacy affording 4th amendment protections. Additionally, because the sample obtained was not protected by the 4th amendment is that this sample was taken at a point right before it was to irretrievably reenter the diverted flow of the Deep Quod River. At the location the water was discharged it was right about to reenter public waters which would make the water public

property. If Moon Moo expected to retain privacy interests over this water it could have constructed some kind of mechanism to stop the flow of this water back into the river, or more clearly indicated or obstructed access into the Queechunk Canal.

Dean James is not a government agent. No evidence exists to show James had any contact and agreement with EPA or any other government official prior to obtaining the evidence. James brought his own lawsuit on behalf of himself and the Riverwatcher organization, thus it cannot be argued that he intended to act as a government agent in obtaining the sample. Under these factual circumstances, the court should hold the evidence obtained by Dean James is admissible as it was obtained by a private individual and retains its private nature even while being used by a government agency.

Upon the admission of evidence obtained by Riverwatcher, Moon Moo Farm falls within the regulatory definition of a concentrated animal feeding operation (CAFO). Moon Moo Farm's operates with a requisite number of dairy cows confined in area separate from where crops are produced. As a result, Moon Moo Farm's designation as CAFO requires a NPDES permit because the pollutants discharged into the waters of the United States are from Moon Moo Farm's production area.

In the alternative, if Moon Moo Farm is not defined as a CAFO, the Farm is in compliance with an approved nutrient management plan (NMP) issued by the State of New Union's Department of Agriculture. The NMP exempts Moon Moo Farm from the NPDES permitting requirements.

Moon Moo Farm's fertilizer application does not violate RCRA. Whether land application of fertilizer constitutes discarding of solid waste is a fact specific inquiry. The facts surrounding Moon Moo Farm's manner and use of the fertilizer do not show a violation of

RCRA. The fertilizer is not overapplied and thus further falls outside RCRA's purpose to regulate solid waste disposal. Finally, the EPA explicitly excludes certain agricultural products and wastes from its definition of solid waste. Moon Moo's activities fall within the EPA exclusion and thus outside the reaches of RCRA. Moon Moo is not in violation of RCRA, the citizen suit alleging solid waste violations should be dismissed, affirming the District Court.

If Moon Moo's fertilizer application is a solid waste then Moon Moo is also contributing to an imminent and substantial endangerment to human health. The nitrates flowing from Moon Moo's fertilizer is contributing to unsafe nitrate levels in the Deep Quod River. These levels are dangerous to children below a certain age and have resulted in drinking water advisories. It is not conclusive that Moon Moo is not the only contributor; the statute only requires some causation for RCRA liability to attach. The elements of the citizen suit are satisfied, the dismissal by the District Court should be reversed.

ARGUMENT

PART ONE:
THE QUEECHUNK CANAL IS A PUBLIC TRUST NAVIGABLE WATER ALLOWING FOR PUBLIC RIGHT OF NAVIGATION. THE CANAL IS ALSO SUBJECT TO THE FEDERAL NAVIGATIONAL SERVITUDE ALLOWING THE RIGHT OF PUBLIC ACCESS.

A. In the absence of New Union cases defining the scope of the Public Trust Doctrine, the Queechunk Canal may qualify as a public trust navigable water as it is commonly and historically used for navigation purposes by the public, and effectively an artificial extension of the Deep Quod River - in accordance with Supreme Court and state court decisions

The Supreme Court and federal government consistently recognize the Public Trust Doctrine as a matter of state law. *PPL Montana, LLC v. Montana,* 132 S.Ct. 1215, 1234-35 (2012). Specifically, the Supreme Court has held that it is a state power to "determine the scope of public trust over waters within their borders", whereas federal law asserts its authority in other matters such as determining the riverbed title under the equal footing doctrine, or the navigability

of waters under the navigational servitude doctrine. *PPL Montana,* 132 S.Ct. at 1234. However, the Supreme Court has upheld law concerning the general scope of the Public Trust Doctrine for public navigable waters. *Arnold v. Mundy* establishes the public trust doctrine applies to "navigable rivers, where the tide ebbs and flows" and "for the purposes of passing and trespassing, navigation, fishing, fowling, sustenance, and all other uses of the water and its products." *Arnold v. Mundy* 6.N.J.L. 1, 12 (1821). As noted in the district court's opinion, this right also extends to navigable freshwater bodies. *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co*. 429 U.S. 363, 374 (1977). States vary in determining which waters are considered public trust waters affording public access; specifically with regard to declaring man made and artificial waterways state public trust waters. Some states hold that a navigable canal or other man made waterway must be made open to the public and considered a public navigable water. *Hughes v. Nelson*, 303 S.C. 102, 107 (Ct. App. 1990). As defining the scope of the public trust doctrine over state waters is a purely state issue, the United States requests the court adopt the persuasive reasoning in these state decisions and find the Queechunk Canal is a public trust navigable water.

Although some states determine the status of public navigable waters on the equal footing doctrine, other states declined to do so. States such as South Carolina asserted a public navigable water status based on a private waterway's historic use, and constructive character. In *Hughes v. Nelson* the South Carolina Court of Appeals found that a privately constructed canal diverting water from the Edisto River for fishing purposes was a public navigable water. *Hughes v. Nelson*, 303 S.C. 102, 104 (Ct. App. 1990). The court looked to the nature of the canal's use in making its decision. *Id*. For a continuous amount of time after the construction of the canal and for the majority of the canal's existence, the public enjoyed the use of the canal to fish in. *Id*.

Only for a brief amount of time did the defendant Nelson attempt to obstruct public use of this canal by installing a gate and putting up no trespassing signs. *Id*. Additionally, the court cited South Carolina law making the policy argument that the canal's artificial nature was not controlling to determine that it remain private, since the canal in its connection with the river had "become the functional equivalent of natural streams." *Hughes,* 303 S.C. at 106.

North Carolina adopted the approach of keeping the state's navigable waters open and navigable for use under the public trust doctrine even when a waterway is artificial and privately owned. In *Fish House v. Clarke*, the Old Sam Spencer Ditch, a canal, lay on the border between two adjacent properties, and the owner of eastern property and canal brought a trespass action against the owner of the western property for allowing boats to enter and dock in the canal. *Fish House v. Clarke*, 204 N.C. App. 130, 132 (2010). The North Carolina Supreme Court had declared that if a stream is navigable in fact then it is navigable in law, subject to the public trust doctrine. *Id*. The Court of Appeals followed this precedent and declared the canal a navigable water under the public trust doctrine. *Fish House,* 204 N.C. App. at 133. Additionally, the court interpreted preceding authority in the state court of appeals to find navigability water in its natural condition was determined by "the manner in which the water flows without diminution or obstruction. *Fish House,* 204 N.C. App. at 135. The court also distinguished its decision from *Kaiser Aetna v. U.S.* and *Vaughn v. Vermillion Corp*, declaring that the other two decisions were based off "the general public use of navigable waters in the context of interstate commerce" and therefore not applicable in a public trust proceeding. *Fish House,* 204 N.C. App. at 134 (citing *Kaiser Aetna v. United States*, 444 U.S. 164, (1979) and *Vaughn v. Vermilion Corp*., 444 U.S. 206, (1979)).

The Queechunk Canal should be declared a public navigable water. The factual similarities in *Hughes* and *Fish House*, should persuade the court to decide in accordance and uphold the policy decisions as they are applicable to the case. Primarily, as in *Hughes*, the water flowing through the Queechunk Canal is diverted from a navigable water of the state, the Deep Quod River. As the court found this diversion in effect established the canal as an extension of the public navigable river, this is more so true of the Queechunk Canal. As the Queechunk Canal creates a bypass shortcut through the bend of the river, not only does it divert the flow of the river, the flow then returns, effectively creating not only an extension, but also an alternate flow route. The nature of the diversion and return flow created by the Queechunk Canal almost certainly has altered the Deep Quod River and nature of the River's flow so fundamentally that the canal should be considered even more integral an extension of the river than the canal in *Hughes*.

Lack of obstruction is an important factor in public navigability. The courts in both *Hughes*, and *Fish House* determined lack of obstructions to public navigability in the canals created another factor establishing the canals as public navigable waters. Similarly to *Hughes*, the public has continuously used the Queechunk Canal and physical entry has not been restricted for the majority of its existence. Although "No Trespassing" signs are on the banks of the canal, it is unknown how long these signs have been present. In light of the decision in *Hughes*, posting signs is a minimal effort to retain the private nature of the canal. There have been no attempts other than the posting of the signs to prevent the navigability of the canal, and it is established that the canal is navigable-in-fact. As, the canal has been used for the majority of its existence as a shortcut through the river's bend, this usage undermines an argument for the private nature of the canal.

The District court improperly relied on *Kaiser Aetna*. That case did not deal with the scope of a public trust navigable water, but with the navigational servitude doctrine. The navigational servitude, although related to the public trust doctrine in asserting authority over the navigational aspect of public waters, is a separate matter of law drawn from the Congress's power from the Commerce Clause and interest in furthering navigation thereof.

In conclusion, due to the integral nature of the Queechunk Canal to the flow of the Deep Quod River, its common usage by the public, and the lack of action by owners of the canal to preserve its private nature, the court should find the Queechunk Canal a public navigable river in accordance with persuasive state authorities.

B. The Queechunk Canal is subject to the federal navigational servitude and allows for the right of public access as the canal was constructed as a diversion of the Deep Quod River, a preexisting natural navigable waterway.

The federal navigational servitude, unlike the public trust doctrine, is a federal regulatory doctrine that derives its power from the United States Constitution Article 1 §8 giving Congress the power to regulate interstate commerce commonly known as the "Commerce Clause". U.S. Const. art.1, §8. In *Gibbons v. Ogden*, the court clarified Congress's power under the Commerce Clause extends to the regulation of navigation. *Gibbons v. Ogden*, 22 U.S. 1, 3 (1824). As a result of this power to regulate, the navigational servitude "defines the boundaries within which the government may supersede private ownership interests to improve navigation." *Alameda Gateway, Ltd. v. United States,* 45 Fed. Cl. 757 (1999). The Supreme Court has determined that although a privately constructed waterway maybe subject to federal regulatory authority if it is "navigable in fact", this does not guarantee a right of public access. See *Kaiser Aetna*. To determine which private and artificial water bodies fall within the bounds of a federal navigational servitude the Supreme Court has found the original manner of how the water body

was constructed can change the manner of regulation. See *Vaughn*. Specifically, a factual showing of the body of water in question was constructed, as a diversion from a preexisting natural navigable waterway could be a defense under federal law to provide for public use of canals and other artificial, private waterways. *Id*. The plaintiffs assume, the Queechunk Canal because of its connection to the Deep Quod River, subject to the ebb and flow of the Mississippi a commercially navigated interstate water, is subject to federal regulation as a navigable water if the United States.

Generally, the bounds of the navigational servitude over private waterways only include the right of federal regulation concerning the waterway's navigability. However, in *Kaiser Aetna* the court makes a factual distinction concerning the origins and construction of a private waterway precluding it from a navigational servitude allowing for the right of public access. The court recognized the waterway at issue, Kuapa Pond, is a historically private fishing pond, and part of land allotments within the Hawaiian feudal system. *Kaiser Aetna*, 444 U.S. at 168. The pond was closed off and "incapable of being used as a continuous highway for the purpose of navigation in interstate commerce" until the pond was dredged and connected to Maunalua Bay and the Pacific Ocean. *Kaiser Aetna*, 444 U.S. at 168-179. The court cited this as the controlling factor in determining that enforcing a right of public access would constitute a government taking. *Kaiser Aetna*, 444 U.S. at 179. The court drew a distinction based on Kuapa Pond's original character and manner of construction in comparison to the 'great navigable stream' concept the Supreme Court held to be incapable of private ownership and thus open to free public access. *Kaiser Aetna*, 444 U.S. at 179-80 *(*citing *United States v. Chandler – Dunbar Co*. 229 U.S., at 69*)*. Based on this factual distinction between the streams that are navigable in their natural state and Kuapa Pond that was made navigable artificially, the court held that although

the pond was made a navigable water and is now subject to federal regulation, a right of public access could not be imposed without invoking the eminent domain power requiring the government to pay just compensation. *Kaiser Aetna*, 444 U.S. at 180-81.

The court released the opinion in *Kaiser Aetna* the same day as *Vaughn v. Vermillion*, to clarify the courts position on which waterways were afforded public as a part of the navigational servitude. *Vaughn v. Vermillion*, 444 U.S. at 207. In *Vaughn* the Vermillion Corporation posessed a large amount of acreage traversed with a series of canals that were navigable in fact. *Vaughn v. Vermillion*, 444 U.S. at 208. The canals were also man made, constructed with private funds, and entered into other naturally navigable waterways. *Id.* The petitioners in the case argued they were entitled to public access of the canals, including the right to enter without permission and fish. *Vaughn v. Vermillion*, 444 U.S. at 209. The court distinguished this case from the Kuapa Pond in *Kaiser Aetna,* saying the difference in the two cases occurs because the construction of the canals in *Vaughn* either deviated or destroyed the navigability of the surrounding natural waterways. *Id.* When a factual showing of this nature could be definitively made, the court concluded it could constitute a defense for asserting a right of public access over the canals. *Id.* The dissent further clarified this point saying that if this factual showing were proven, the defendants had taken it upon themselves to transform the land and natural navigable waterways that are part of the public controlled sphere, and by entering into this construction they subjected themselves to federal regulation and "surrendered the right to control the canals." *Vaughn v. Vermillion*, 444 U.S. at 210.

As seen in the discussion in *Vaughn*, the difference between *Kaiser Aetna* and the present case is the nature of the man made waterway's construction. Unlike the non-navigable body in *Kaiser Aetna*, the Queechunk Canal is different. *Kaiser Aetna*, 444 U.S. at 168-179. The

Queechunk Canal is factually more comparable to the canals described in *Vaughn,* as The Queechunk Canal is an artificial private waterway that diverts over half the flow of the Deep Quod River, a pre-existing natural navigable waterway. Additionally, as in *Vaughn,* the construction of the Queechunk Canal was undertaken by private parties to transform the nature of a navigable water.

Conclusively, the integral factual distinctions between the Queechunk Canal and the Kuapa Pond including the distinction between the historical private nature of Kuapa Pond, the non navigability of the pond prior to dredging should move the court to abandon the ruling in *Kaiser Aetna* in application to the Queechunk Canal. Instead, the similarities between the Queechunk Canal and the canals in *Vaughn* in the private owners intent to transform the nature of the Deep Quod River and creation of a navigable waterway by means of diversion should cause the court to apply the legal distinction in *Vaughn*. And, the court should find the construction of the Queechunk Canal is an artificial diversion of preexisting natural navigable waterway incapable of private ownership, and a navigational servitude exists over the Queechunk Canal allowing for right of public access.

PART TWO:
EVIDENCE OBTAINED THRU TRESPASS BY DEAN JAMES IS STILL ADMISSIBLE IN THIS PROCEEDING THE 4TH AMENDMENT DOES NOT APPLY TO EVIDENCE OBTAINED BY A PRIVATE PARTY FOR HIS OWN USE OR TO WASTE WATER WITH NO REASONABLE EXPECTATION OF PRIVACY

A. Dean James obtaining water samples from the Queechunk Canal does not qualify as a search under the 4th amendment as the location at which the water was discharged is semi- public and often frequented by boat travelers, and the flow of the discharge would inevitably ended up in public waters, all showing Moon Moo Farm had no reasonable expectation of privacy.

The 4th Amendment provides that unreasonable search and seizures conducted by the government or its agents are illegal and any evidence obtained by these parties is inadmissible in a criminal or civil enforcement proceeding. U.S. Const. art 4. As explained in *Hooper v. Sachs*

A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed." *Hooper v. Sachs*, 618 F. Supp. 963, 967 (1985). When and if a search occurs also depends on the reasonable expectation of privacy the offended party may have under the law. Specifically, courts consistently hold in the case of wastewater and pursuant in part to the open field doctrine "whether there is a reasonable expectation of privacy depends on a variety of factors in addition to the character of the substance as wastewater." *Riverdale Mills Corp. v. Pimpare,* 392 F.3d 55, 64 (1st Cir. 2004). Factual findings that wastewater may be discharged in a semi public area, and flowing irretrievably into an entirely public area lessens the expectation of privacy and constitute a defense to the 4th amendment, even in light of trespass. *Id.*

The right to privacy preventing a search under the 4th Amendment is not absolute. Especially in the case of wastewater, the court has found that certain facts surrounding the flow and location of the wastewater establish the open field doctrine, and do not afford the discharging party protections from search. See *Riverdale* 392 F.3d 55. In *Riverdale* the court analyzed whether or not there existed a reasonable expectation of privacy in the wastewater discharged into the Riverdale facility sewer line and sampled on private property without consent. In this case two Environmental Protection Agency ("EPA) inspectors without warrant or consent took wastewater samples from beneath a manhole located on land belonging to the defendants Riverdale Mills Corp. *Riverdale,* 392 F.3d at 56. The manhole in question was located on a road that although paved was privately owned by Riverdale as well as the sewer line beneath the manhole. *Riverdale,* 392 F.3d at 57. The privately owned sewer line joined the public sewer line further down the street. *Id.* The EPA agents took periodic sampling throughout the day, and at the time of the specific sampling in question they had done so without permission or supervision of Riverdale employees, although the EPA agents contend they had so on the street in full plain

view of the plant and employees. *Riverdale,* 392 F.3d at 59. In its determination of whether Riverdale had a reasonable expectation of privacy, the court first cited that as a commercial operation Riverdale's expectation of privacy may be reduced. *Riverdale,* 392 F.3d at 63 (citing *Dow chemical Co. 476 U.S. at* 237 -38, 106 S. Ct. 1819*).* Additionally, although the manhole was located on private property, the nature of the location was similar to the open field doctrine in which "the general rights of property protected by the common law of trespass have little or no relevance to the applicability of the Fourth Amendment." *Id.* (citing *Katz,* 389 U.S. at 351, 88 S.Ct. 507). The court made the distinction that the wastewater was not held in a lagoon or "shielded from public access" which would establish greater expectations of privacy. *Id.* Finally, the controlling fact in the court's decision was that the wastewater was, from the manhole the sample was taken, irretrievably flowing into the public sewer. *Id.* So, similarly to trash left on the street, within a short period of time any member of the public could sample and obtain the water as it was discarded and left to become public property. *Id.* Additionally, no mechanism stopped the flow of water into the public sewer so the wastewater was only one destination, being its exposure to the public. *Id.*

In *United States v. Spain* the court found facts similar to those in *Riverdale* as well as facts concerning the testing method's unobtrusiveness that ultimately established the defendant's expectation to privacy was unreasonable and no 4th amendment protection applied. See *United States v. Spain*, 515 F. Supp. 2d 860 (2007). The defendants all employees of Crown Chemical Inc., a chemical cleaning products company, moved in this case to suppress evidence of waste water discharge obtained by an agent of the EPA. *Spain*, 515 F. Supp. 2d at 860. The agent obtained wastewater samples by "entering an unmarked manhole that was accessible to any person who happened to stroll onto the Crown's driveway." *Spain*, 515 F. Supp. 2d at 868. The

court also found that the agent placing testing devices just inside the company's sewer line was an extremely unobtrusive method, as opposed to entering an area clearly shielded from public access. *Spain*, 515 F. Supp. 2d at 869. Additionally, the samples were taken from a point where the company's wastewater was just about to flow into the public sewer system, where they become public property. *Id*.

In applying the law to the facts of the case against Moon Moo three factors establish that Moon Moo had no reasonable expectation to privacy in regards to its wastewater discharge. First, similar to both *Riverdale* and *Spain,* the canal did not explicitly shield the public from access and establish a more reasonable expectation of privacy. The canal is commonly used as a shortcut through the bend of the Deep Quod River by boaters, and despite signs reading "no trespassing" on the banks of the canal; the canal has no obstructions that prevent public access. Additionally, it is reasonable for a boater to interpret the no trespassing signs as referring to the banks and land surrounding the canal, and not the actual water flow of the canal. In many states the public trust allows public access through private land via privately constructed waterways although the land surrounding is considered trespass. Without clearly indicating or shielding entry into the canal from the public it is unreasonable for Moon Moo to argue that the Canal should have an expectation of privacy from a person such as Dean James to obtain a sample of water discharge from that specific area.

Secondly, the discharged water flow, like in both *Riverdale* and *Spain* was at a point that it was irretrievably entering public water sources. This is especially true because as noted in *Riverdale* there was no mechanism in place to stop the discharged water from entering into the public waters of the Deep Quod River where it becomes public property. If Moon Moo Farm had an expectation that the discharged water should be not be obtained by the public, then they could

have constructed some sort of mechanism to prevent the water from returning to the flow of the Deep Quod River.

Finally, Dean James method of sampling is, similar to the testing method in *Spain,* unobtrusive and done at a point where the water rejoined with the flow that irretrievably joined back with the Deep Quod River. James' method of sampling establishes that he was likely unaware that he was trespassing, and that Moon Moo did not adequately put measures into place which would establish an expectation of privacy if the method was of sampling could so easily be performed without intrusion.

In conclusion, although Dean James obtained the water samples on private property, because this water was discharged from an area that was not shielded from public access and in fact frequented by the public, and because the sample was unobtrusively obtained from a commercial operation Moon Moo can not reasonably expect a privacy affording 4th amendment protections. However, the fact that should control the court's decision to find the sample obtained was not protected by the 4th amendment is that this sample was taken at a point right before it was to irretrievably reenter the diverted flow of the Deep Quod River. At this location the discharged water was right about to reenter public waters making this water public property. If Moon Moo expected to retain privacy interests over this water it could have constructed some kind of mechanism to stop the flow of this water back into the river, or more clearly indicated or obstructed access into the Queechunk Canal. In the absence of these measures however, the court should conclude there was no reasonable expectation of privacy under these circumstances and evidence is admissible without the control of the 4th amendment.

<u>B. Evidence obtained by Dean James is admissible in a court proceeding as it was obtained by a private individual to further his own ends and not acting as a government agent, thus the evidence obtained retains its private nature although may be used for a dual purpose</u>

When a private individual trespasses and obtains evidence without a warrant, the Supreme Court has held that the protections of the 4th amendment generally do not apply to evidence obtained by the individual. *Hooper*, 618 F. Supp. at 968 (*citing U.S. v. Jennings)*. Specifically, this exception applies to an individual who "has not acted as an agent of the government or with the participation of knowledge of any government official." *United States v. Cova,* 585 F. Supp. 1187, 1193 (1984). Determining whether or not a private individual has acted as a private citizen in this respect is a highly factual question and determined by the *Coolidge* test stating "[t]he test ... is whether [the private citizen] in light of all the circumstances of the case, must be regarded as having acted as an "instrument" or agent of the state" *Id*. (*citing Coolidge* 403 U.S. at 487). This test was upheld in *Hooper* in regards to a civil action. In the case where a private individual then turns over evidence that furthers his own search to the government to use for an enforcement action, the federal district court has determined: "that dual purpose for search exists such that private person is also furthering his own ends, search generally retains its private character." *Hooper*, 618 F. Supp. at 968.

In *Hooper v. Sachs* the court declared that determining if an individual has acted as an agent of the state involves evaluating two issues: " the extent of the involvement of the government, and 2) the purpose or purposes of the private citizen in conducting the search." *Hooper*, 618 F. Supp. at 969. In *Hooper* the private individual accused of working as a government agent obtained Medicaid records in a prior discovery in her own state civil suit against the defendant Dr. Hooper who she brought suit against for Medicaid Fraud. *Hooper*, 618 F. Supp. at 963-969. There was no evidence that the private individual and plaintiff Dr. Winchell obtained the records at the behest of any government officials. *Hooper*, 618 F. Supp. at 969. Although the purpose of an individual's search may also implicate him or her as a government agent, *Hooper* upheld

when a "dual purpose for the search exists such that the private person is also furthering his own ends, the search generally retains its private character." *Hooper*, 618 F. Supp. at 970 (*citing United States v. Miller*, 688 F.2d at 657- 58). When Dr. Winchell provided the Medicaid Fraud Control Unit subsequently with the records, the court found that the original private nature of her search was not eradicated, although the evidence now served as a dual purpose. In light of all these circumstances, the court determined the evidence provided to the state was admissible. *Id*.

Similarly to the set of facts in *Hooper*, neither Dean James' actions nor purpose in obtaining evidence from Moon Moo Farm indicate he has acting as an agent or instrument of the government. According to the facts, James conducted his investigation as he was prompted by complaints made to his organization, the Deep Quod Riverwatcher. No evidence to suggests that James had any contact prior to obtaining his sample with the Environmental Protection Agency or any other government official for the purposes of obtaining evidence to bring a case against Moon Moo Farm. Additionally, using the samples he obtained as evidence for his own suit against Moon Moo and for the Deep Quod Riverwatcher organization proves James' purpose in obtaining the water samples was to further his own ends as a private individual. By subsequently giving the evidence to EPA, like in *Hooper*, the evidence now serves a dual purpose, but retains its private nature and is admissible in proceedings brought by both parties.

In conclusion, as no evidence shows that James had any contact and agreement with EPA or any other government official prior to his obtaining the evidence, and because James brought his own lawsuit on behalf of himself and the Riverwatcher organization, it cannot be argued that his intent in obtaining the sample was to act as a government agent. Under these factual circumstances, the court should hold the evidence obtained by Dean James is admissible as it

was obtained by a private individual and retains its private nature even while being used by a government agency.

PART THREE:
THE REQUIREMENT OF A NPDES PERMIT UNDER THE CLEAN WATER ACT IS DETERMINATIVE ON WHETHER THE FARM IS A CONCENTRATED ANIMAL FEEDING OPERATION.

Any discharge of pollutants into the waters of the United States by a point source without an NPDES permit violates the Clean Water Act (CWA). 33 U.S.C. §1311. The term "point source" is defined by statute as "any discernible, confined, and discrete conveyance including but not limited to… concentrated animal feeding operation… from which pollutants are or may be discharged. (Emphasis added) 33 U.S.C. §1362(14). A point source does not include agricultural stormwater discharges and return flows from irrigated agriculture. Id. Concentrated animal feeding operations (CAFOs) are point sources subject to the NPDES permitting requirements. 33 U.S.C. §1362(14). If a CAFO discharges without a permit it is strictly liable for discharging without a permit and subject to severe civil and criminal penalties. 33 U.S.C. §1319.

A facility must first meet the definition of an animal feeding operation (AFO) in order to be considered a CAFO. 40 C.F.R. §122.23(b)(2). An AFO is defined as a lot or facility where "animals have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period and crops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over an portion of the lot of facility." 40 C.F.R. §122.23(b)(1).

CAFOs may be designated by the regulatory state agency or defined by regulation as a Large CAFO, Medium CAFO, or Small CAFO based upon the number of animals an AFO has confined at its facility. See Generally 40 C.F.R. §123.23.

A. MOON MOO FARM FALLS WITHIN THE REGULATORY DEFINITION OF A MEDIUM CAFO AND IS SUBJECT TO THE CLEAN WATER ACT'S NPDES PERMITTING PROGRAM BECAUSE THE DISCHARGE OF POLLUTANTS EXEMPTION DOES NOT APPLY TO MOON MOO FARM BECAUSE THE FARM'S MANURE APPLICATION IS WITHIN THE FARM'S PRODUCTION AREA.

Moon Moo Farm satisfies the regulatory definitions of an AFO and a Medium CAFO. See 40 C.F.R. §122.23(b)(6) and 40 C.F.R §122.23(b). It is reasonable to assume that the 350 dairy cows confined at Moon Moo Farm are mature dairy cows based on upon the Farm's years of operation and the district court's opinion. District Court Opinion, citing 40 C.F.R. §122.23(b)(6), page 8. (With 350 head of dairy cattle, Moon Moo Farm falls within the regulatory definition of a Medium Animal Feeding Operation.) It is also reasonable to assume that dairy cows are confined in barns for more than 45 days within a 12-month period. The dairy cows are maintained in an area without vegetation. The 150-acre lot where grass is produced is not an area where the dairy cows graze or pasture. Moon Moo Farm does not comingle the confinement area with the area where crops are produced. "The cows are housed in a barn and are not pastured." (District Opinion, Page 4)

Moon Moo Farm subsequently satisfies the regulatory requirements that define a Medium CAFO upon the admission of evidence that displays the discharge of pollutants through a man-made ditch into the waters of the United States. See 40 C.F.R. §123.23(b)(6)(ii)(A).

It is undisputed that the runoff from Moon Moo Farm's land application fields contained pollutants and that the Deep Quod River is considered to be a 'water of the United States.' (District Court, page 7). The drainage ditch that discharged the pollutants from Moon Moo Farm's land application into the Queechunk Canal is a man-made device. The Queechunk Canal is a navigable waterway that directs most of the water from the Deep Quod River.

It is undisputed that the discharge of pollutants from a CAFO requires a NPDES permit unless the discharge is an agricultural stormwater discharge. Waterkeeper, 979 F. Supp. 2d at 710). The District Court nonetheless held Moon Moo Farm's 150-acre field exempt by agricultural stormwater discharge notwithstanding the manure land application area is within the production area. The district court incorrectly construed the reasoning articulated in Alt v. EPA, 979 F. Supp. 2d 701 (N.D. W. VA. 2013), to exempt Moon Moo Farm's operations.

In Alt v. EPA, 979 F. Supp. 2d 701 (N.D. W. VA. 2013), the owner of the CAFO at issue raised poultry in eight separate confinement houses. Each house was equipped with ventilation fans, which unintentionally spread "dust," composed of manure, litter, dander and feathers, upon the CAFO's farmyard located in between the confinement houses. The dust when combined with precipitation caused pollutant runoff into waters of the United States. The CAFO owner asserted that the precipitation caused the runoff and therefore exempted her farmyard from being a point source regulated under the NPDES permitting program. The court agreed and excluded the empty field between the poultry houses as a point source with the reliance of EPA's regulatory definition of a "production area." The court opined, "[t]he areas between the poultry houses are clearly not the animal confinement area, the manure storage area, the raw materials storage area, and the waste containment areas." Id. at 713.

Relying on Alt, the district court reasoned, "runoff from a field outside of the animal production area does not constitute a discharge… [from the CAFO itself under the EPA regulation;] rather such discharges constitute agricultural stormwater runoff." (District Court, page 9). Alt, however, does not create an overarching exemption for fields outside the production area. Alt instead excludes a "farmyard" from the definition of "production area."

The discharge from Moon Moo Farm's 150-acre lot is distinguishable from the farmyard in Alt. In Alt, the court determined the farmyard part of the CAFO's facility but not part of the CAFO's production area. The court reasoned that the farmyard was not an animal confinement area, manure storage area, raw materials storage area, or waste containment area and therefore the farmyard was considered not part of the production area.

The farmyard was located between the poultry confinement houses and grew nothing more than weeds and grass. The farmyard was limited to an area in between the confinement house. The farmyard serves no purpose in terms of production. The 150 acres produced feed for the cattle, ultimately a major purpose in terms of production. The mixture of manure, liter, dander and feathers that fell upon the farmyard was caused with no human involvement. The spread of manure onto the 150 acres was intentionally done by the Moon Moo Farm's operations.

In conclusion, Moon Moo Farm requires a NPDES permit by virtue of a discharge from its manure land application area. The discharge of pollutants exemption does not apply to Moon Moo Farm because the Farm's manure application is within the Farm's production area.

B. IF MOON MOO FARM IS NOT DETERMINED AS A CAFO, THE FARM'S COMPLIANCE WITH THE STATE OF NEW UNION NMP EXEMPTS IT FROM PERMITTING REQUIREMENTS AS AGRICULTURAL STORMWATER.

The State of New Union (State) has delegated authority under the CWA to issue discharge permits within the state. Moon Moo Farm is a facility regulated by the State's permitting program as a "no-discharge" animal feeding operation. As a designated operation, Moon Moo Farm submitted a nutrient management plan (NMP), which incorporates planned seasonal manure application rates, together with a calculation of expected uptake of nutrients by the crops grown on the 150-acreas.

The district court correctly held that the Farm's land application of manure is in compliance with its NMP.

The discharge of pollutants by agricultural stormwater exemption is available only to CAFOs. National Pork, 635 at 751 (EPA's authority is limited to the regulation of CAFOs that discharge). If Moon Moo Farm is not a CAFO by definition then the Farm is exempt from EPA's regulations.

A discharge from a CAFO includes discharges from land application areas under the control of the CAFO that are not exempt as "agricultural stormwater discharges." 40 C.F.R. §123.23(e). The regulations provide that precipitation related discharges that qualif

In Waterkeeper Alliance, Inc., v. United States EPA, 399 F.3d 486, (2nd Cir. 2005), the Second Circuit noted that the legislative purpose of the agricultural stormwater exemption imposed liability to any person "for agriculture related discharges triggered not by negligence or malfeasance, but by weather- even when those discharges came from what would otherwise be point sources." Id. at 507.

In Concerned Area Residents for the Environment v. Southview, 34 F.3d 114, (2nd Cir. 1994), the Second Circuit upheld a jury's decision that did not provide agricultural stormwater exemption to a CAFO. The court opined liability could be imposed where "the run-off primarily caused by the over-saturation…"

In conclusion, Moon Moo Farm is in compliance with an approved nutrient management plan (NMP) issued by the State of New Union's Department of Agriculture. The NMP exempts Moon Moo Farm from the NPDES permitting requirements.

PART FOUR:
MOON MOO'S APPLICATION OF FERTILIZER AND SOIL AMENDMENT DOES NOT CONSTITUTE DISCARDING OF A SOLID WASTE UNDER THE MEANING OF THE

RESOURCE CONSERVATION AND RECOVERY ACT BECAUSE THE FERTILIZER IS VALUABLE, IS USED FOR ITS INTENDED PURPOSE AND IS NOT OVERAPPLIED.

The Resource Conservation and Recovery Act (RCRA) "is a comprehensive environmental statute that governs the treatment, storage, and disposal of solid and hazardous waste." *Ecological Rights Foundation v. Pacific Gas*, 713 F.3d 502, 506 (9th Cir. 2013)(citing *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 483 (1996). Passed in 1976, RCRA's objective is to "promote the protection of health and the environment and to conserve valuable material and energy resources…" 42 U.S.C.A. § 6902(a). This objective is accomplished through prohibitions and mandates relating waste management, disposal, and. *Id.* RCRA vests the majority of its enforcement and administration authority with the Environmental Protection Agency (EPA). *Id.* at § 6911(a). This authority is augmented by RCRA's citizen suit provision. *Id.* at § 6972(a).

Under RCRA, citizens may bring suit to enforce provisions of the Act. 42 U.S.C. § 6972(a). Two provisions of the Citizen Suit provision are most relevant here: § 6972(a)(1)(A) and § 6972(a)(1)(B). The first section enables citizen suits generally for any "alleged … violation of any … prohibition" within the Act. *Id.* at § 6972(a)(1)(A). This broad provision allows a wide range of civil actions regardless of whether the alleged violation results in harm. The second provision enables suits more narrowly where a person or organization "is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." *Id.* § 6972(a)(1)(B). The provisions are not exclusive; citizens may bring suits under one or both of the above provisions.

The first citizen suit challenge to Moon Moo Farm arises from RCRA's "open dumping" prohibition. RCRA prohibits the "open dumping of solid waste." 42 U.S.C.A. § 6945(a). To

clarify this provision, and others, RCRA provides a definition for "solid waste." Solid waste is defined within the Act as "any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and *other discarded material*, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations…" 42 U.S.C. § 6903 (emphasis added). "Other discarded material" encompasses rejected materials that are otherwise not listed in the statutory definition. Although "discard" is not defined by the act, its plain meaning is "'cast aside; reject; abandon; give up.'" *Safe Air for Everyone v. Meyer*, 373 F.3d 1035 (9th Cir. 2004)(quoting 1 The New Shorter Oxford English Dictionary 684 (4th ed.1993). Applying the plain meaning of "discard" neither completely includes nor excludes all land applications of solid waste; ambiguity remains particularly with regard to fertilizer. This ambiguity is seen in the applicable case law.

Courts vary in assessing fertilizer as a solid waste. The EPA indicated intent to exclude agricultural facilities by promulgating a rule stating that "[t]he criteria do not apply to agricultural wastes, including manures and crop residues, returned to the soil as fertilizers or soil conditioners." 40 C.F.R. § 257.1. This may seem unambiguous but courts have held that fertilizers applied in large quantities may fall outside this exemption. *See Water Keeper Alliance, Inc. v. Simthfield Foods Inc.*, 2001 WL 1715730 (E.D. N.C. 2001)(rejecting the presumption that the rule creates a blanket exclusion for all animal wastes applied to soil); *Community Ass'n for Restoration of the Environment, Inc. v. D & A Dairy*, 2013 WL 3188846 (E.D. Wash. 2013)(rejecting a motion to dismiss on the grounds the fertilizer may have been so overapplied that it was in fact discarded and thus lost its useful purpose). The court in *CARE v. George and Margaret LLC.*, supporting such a distinction by pointing out that once overapplied the fertilizer "ceased to be beneficial or useful." 954 F.Supp.2d 1151 (E.D.Wash. 2013)(internal quotations

omitted). Thus, although these cases find fertilizer can be solid waste under RCRA, the holdings are highly fact specific.

The inquiry to determine whether fertilizer applied to land is discarded solid waste is a question of fact. *Water Keeper* 2001 WL 1715730 at *5 (2001). One factor helpful in narrowing the inquiry is "whether that product has served its intended purpose and is no longer wanted by the consumer." *Ecological Rights Foundation v. Pacific Gas*, 713 F.3d 502 (9th Cir. 2013)(finding that wood preservative escaping from utility poles is not solid waste in part because the poles are still in use and the escaped preservatives were not discarded by a consumer). Similarly in *No Spray Coal., Inc., v. City of New York*, the court held that sprayed pesticides are not discarded because as they are sprayed they accomplish their purpose; killing insects. 252 F.3d 148, 150 (2d Cir. 2001). In both cases the substance, wood preservative and pesticide, was applied for a specific purpose; fertilizer application easily follows the same logic. The court in *Safe Air for Everyone v. Meyer*, found that a grass residue burned for the purpose of enriching growing fields is not solid waste. 737 F.3d 1035, 1047 (9th Cir. 2004). The court noted "no congressional… intent to prohibit [an] established farming practice." *Id*. *See also Oklahoma v. Tyson Foods, Inc*., 2010 WL 653032 (finding that poultry litter fertilizer has market value and the act of applying the litter as fertilizer lacks any intent to "throw the material away," thus supporting the conclusion the poultry litter is not a solid waste.)

Moon Moo Farms is not over applying fertilizer to their fields. Moon Moo is applying manure to its fields at "rates consistent with the NMP… at all times." R.6. While facts in the record indicate increased soil acidity; no precedent supports that an increase in pH alone constitutes over application of fertilizer such that it becomes solid waste under the definition of RCRA. Unlike the farms in *Water Keeper Alliance, Inc. v. Simthfield Foods Inc*., and

Community Ass'n for Restoration of the Environment, Inc. v. D & A Dairy the parties are not alleging a Moon Moo is applying fertilizer in substantially larger quantities than necessary. Thus, facts do not support finding the fertilizer and soil conditioner are solid waste under RCRA based on over application alone.

The fertilizer and soil conditioner mix are not solid waste because they are useful, valuable and are not discarded. The fertilizer does not lose its intended purpose at the time it is applied. Like the wood preservative in *Ecological Rights Foundation v. Pacific Gas*, when the fertilizer is applied to the land it continues its valuable purpose. In *Ecological Rights* that preservative increased the wood's longevity, here it enriches the soil, in neither case does the purpose cease to exist simply because application is complete. Similarly, the pesticides in *No Spray Coal., Inc., v. City of New York* do not lose functionality just because they are applied. Pesticides, like fertilizer, are only effective once applied. Finally, like the poultry litter in *Oklahoma v. Tyson Foods, Inc.*, the fertilizer maintains market value and its application lacks any showing of intent to abandon the product. Moon Moo collects the manure from its own operations, stores it, and then applies it with a soil conditioner to the land. This process demonstrates intent to retain possession of the fertilizer rather than any intent to abandon. Thus, Moon Moo is not discarding solid waste under the meaning of the statute.

Therefore, the facts combined with the clear intent of the EPA to exclude agricultural wastes returned to the soil as fertilizers support the conclusion that Moon Moo farms is not in violation of RCRA. No material issue of fact exists as to whether the fertilizer and soil conditioner are solid waste; the dismissal of the 42 U.S.C. § 6972(a)(1)(A) citizen suit should be AFFIRMED.

PART FIVE:

MOON MOO'S LAND APPLICATION OF FERTILIZER AND SOIL ONCIDITON PERESENT AN IMINENT AND SUBSTANTIAL ENDANGERMENT TO HEALTH OR THE ENVIROMENT BECAUSE IT CONTRIBUTED TO UNSAFE NITRATE LEVELS IN THE DRINKING WATER.

The RCRA citizen suit provision creates a cause of action against an operator "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). Courts view this provision to create a three-pronged requirement for a suit to prevail, the plaintiff must show:

> (1) [T]he defendant was or is a generator or transporter of solid or hazardous waste or owner or operator of a solid or hazardous waste treatment, storage or disposal facility, (2) the defendant has contributed or is contributing to the handling, storage, treatment, transportation, or disposal of solid or hazardous waste, as defined by RCRA, and (3) that the solid or hazardous waste in question may pose an imminent and substantial endangerment to health or the environment.

Prisco v. A & D Carting Corp., 168 F.3d 593, 608 (2d Cir. 1999). Solid waste is defined above, but this provision unlike 42 U.S.C. § 6972(a)(1)(A), also includes "hazardous waste." RCRA defines "hazardous waste" as

> [A] solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may-
> (A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible illness; or
> (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

42 U.S.C. § 6903(5). Once the existence of hazardous waste is established the inquiry continues to the second prong; whether the defendant contributed to disposal.

But-for causation is not required to show disposal. Disposal is defined within the statute as "discharge, deposit,… 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] discharged into any waters…" 42 U.S.C. § 6903(5)(emphasis added). The statute does not clearly define what constitutes "contributing to" disposal of waste, but the plain meaning of contribute requires at least "some level of causation between contamination and the party to be held liable." *Aiello v. Town of Brookhaven*, 136 F. Supp. 2d 81, 111 (E.D.N.Y. 2001)(citing *Delaney v. Town of Carmel*, 55 F. Supp. 2d 237, 256 (S.D.N.Y. 1999). Other courts have stated the plain meaning more succinctly as simply to "have a share in any act or effect." *Id*. at 112 (citing *United States v. Aceto Agric. Chems. Corp*., 872 F.2d 1373, 1384 (8th Cir.1989) (citing Webster's Third New International Dictionary 496 (1961). Thus, to contribute to a disposal some cause and effect is required.

Finally, to establish the third prong, only the threat of endangerment must be present. While not all courts agree as to the level of harm required, the statute plainly states harm exists where a substance "may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a)(1)(B). This broad permissive language should be read, "'to confer upon the courts the authority to grant affirmative equitable relief to the extent necessary to eliminate any risk posed by toxic wastes.'" *Aiello*, 136 F. Supp. at 115 (E.D.N.Y. 2001)(quoting *Dague v. City of Burlington,* 935 F.2d 1343, 1355 (2d Cir. 1991). Such a reading is consistent with the congressional intent of the suit provision. Some courts have held that more substantial harm is required. In *Davies v. National Co-Op Refinery Ass'n* the court in a footnote required harm that is "'substantial,'" which suggests that an exceedingly low risk of harm or a risk of only minor harm will not support an action."

963 F.Supp. 990 (D.Kan. 1997)(footnote 2). Similarly, the court in *Foster v. United States* required the alleged endangerment to "be substantial or serious." 922 F. Supp. 642, 661 (D.D.C. 1996). These cases both depart from a plain reading of the statute and congressional intent to

create a wide and far-reaching citizen suit provision by construing the provision too narrowly. The Second Circuit's reasoning is more persuasive and consistent with the statutory language. Thus, to establish the third prong the plaintiff need only show the disposal *may* present an imminent and substantial endangerment to health or the environment.

Moon Moo farms is an operator of a hazardous waste disposal facility. Moon Moo collects manure, augments the manure with additives and then places the product on open fields. This process involves waste generation, storgage, and disposal. As discussed above, fertilizer can be considered solid waste (*See Water Keeper Alliance, Inc. v. Simthfield Foods Inc.*, 2001 WL 1715730 (E.D. N.C. 2001)(rejecting the presumption that the EPA rule excluding agricultural wastes creates a blanket exclusion for all animal wastes applied to soil). For the purposes of this endangerment claim, the court should find the fertilizer is solid waste consistent with the definition of hazardous waste under the statute.

Moon Moo contributes to the disposal of solid waste through its land application of fertilizer and soil conditioner. Moon Moo uses the manure and yogurt whey as fertilizer. The fertilizer is placed on the land in such a way that constituents of the waste, namely nitrates, are discharged into the waters of the Deep Quod River. The nitrate level in the river is elevated beyond natural levels and expert testimony at the district court conceded Moon Moo's discharge contributed to these levels. While Moon Moo may not be the "but-for" cause of the nitrates, as the District Court noted in its opinion, the standard is not so stringent. Moon Moo need only contribute to the nitrate level. Consistent with the standard articulated by the court in *Delany*, Moon Moo has a "share in the effect" and is thus contributing to the high nitrate levels. Therefore, Moon Moo is contributing to the disposal of solid waste.

The fertilizer is a hazardous waste that may cause imminent and substantial endangerment to health or the environment. Imminence can be easily established; the nitrate water advisories have already been issued. As to substantial endangerment, the nitrate composition of the fertilizer is such that may be a danger to infants, which could cause an increase in the mortality of infants. While this is not a threat to adult humans, the statute does not required that *every* person be endangered. Rather, the plain language of the statute is permissive and broad, thus endangerment to infants is logically included. As the court noted in *Aiello*, the statute grants the courts the authority to "eliminate any risk posed by toxic wastes;" nothing in the statute indicates an age requirement for such protections. Thus, the fertilizer application does pose an imminent and substantial endangerment to human health.

Therefore, Moon Moo Farm is in violation of RCRA, 42 U.S.C. § 6903(5). Moon Moo's disposal of hazardous waste has endangered those who rely on the Deep Quod River for drinking water and thus created an imminent and substantial endangerment under the conditions of the statute. The dismissal of the 42 U.S.C. § 6972(a)(1)(B) citizen suit should be REVERSED.

CONCLUSION

For the foregoing reasons, the plaintiff-appellant, United States of America, Respectfully requests that this Court reconsider and affirm or dismiss as specified.

Respectfully submitted,