Team 4

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,
Plaintiff-Intervenors-Appellants

v.

MOON MOO FARM, INC.,
Defendant-Appellee.

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

BRIEF FOR UNITED STATES OF AMERICA
Plaintiff-Appellant

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JURISDICTIONAL STATEMENT

Appellant United States of America, on behalf of the United States Environmental Protection Agency, filed a complaint in the United States District Court for New Union seeking summary judgment against Moon Moo Farm, Inc. under 33 U.S.C § 1342. Intervenor-Appellants Deep Quod Riverwatcher, Inc. and Dean James, filed a complaint seeking summary judgment under the Resource Conservation and Recovery Act citizen suit provisions. On June 1, 2014, the district court denied the E.P.A.'s motion for summary judgment on all counts. 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 Moon Moo Farm, Inc. requires a National Pollutant Discharge Elimination System permit under the Clean Water Act (CWA) because it is a concentrated animal feeding operation with a point-source discharge of its manure.

2. Whether Moon Moo Farm, Inc. is subject to National Pollutant Discharge Elimination System permitting and liability because it discharged a pollutant into the Queechunk Canal, a publicly navigable waterway.

3. Whether evidence should be admitted against Moon Moo Farm, Inc., which was gathered from Queechunk Canal, a publically navigable waterway, to prove Moon Moo Farm Inc.'s CWA violations. Alternatively, whether evidence, gathered through private trespass, may be used against Moon Moo Farm, Inc. to prove CWA violations.

4. Whether Moon Moo Farm, Inc. is subject to a citizen suit under the Resource Conservation and Recovery Act because the manure mixture is a solid waste that constitutes an imminent and substantial endangerment to human health.

STATEMENT OF THE CASE

This is an appeal from the final order of the District Court of New Union on June 1, 2014. (R. 1). The United States of America, on behalf of Environmental Protection Agency (E.P.A.), appeals the district court's holding that defendant-appellee Moon Moo Farm, Inc. is not a Concentrated Animal Feeding Operation (CAFO) subject to permitting under the National Pollutant Discharge Elimination System (NPDES) permit program pursuant to the Clean Water Act (CWA). (R. 1). The E.P.A. appeals the district court's ruling that evidence of the Farm's discharge was obtained by trespass and such evidence is not admissible in a civil enforcement proceeding. (R. 1). Further, the E.P.A. supports Riverwatcher's appeal of the district court's dismissal of the organization's citizen suit claim under RCRA§ 7002(a)(1)(B). (R. 1-2).

Moon Moo Farm, Inc. (Farm) is a dairy farm ten miles from the City of Farmville in the State of New Union. (R. 4). In 2010, the Farm increased its milking herd from 170 cows to its current 350 cows in response to the growing demand for yogurt production at the Chokos Greek Yogurt processing facility, which opened in 2009. (R. 5). The Farm also includes 150 acres of fields used to grow Bermuda grass. *Id*. The liquid waste from the cows is collected in an outdoor lagoon. (R. 4-5). Since 2012, the Farm has added acid whey accepted from the Chokos plant to the manure lagoons. *Id*. The liquid manure mixture—waste from cows mixed with acid whey from yogurt plant—is periodically pumped from the lagoon and spread on the farm fields. *Id*.

The Farm does not hold any NPDES permits administered under CWA § 402. (R. 5-6). The State of New Union has the delegated authority to issue CWA permits. (R. 5). The Deep Quod River is a water of the United States, and is subject to CWA permitting jurisdiction. (R. 7). The Farm is regulated as a "no-discharge" animal feeding operation—an animal feeding operation that does not normally have a direct discharge from its manure handling facilities,

including during conditions of the 25-year storm event. (R. 5). As a no-discharge operation, the Farm must submit a Nutrient Management Plan (NMP) to the State of New Union Department of Agriculture (DOA). *Id*. The NMP sets planned seasonal manure application rates, along with calculations of expected nutrient uptake by crops. *Id*. Although DOA has the authority to reject an NMP that is found to be insufficient, the DOA does not ordinarily review submitted NMPs, nor is there any provision for public comment on an NMP filed by a no-discharge animal feeding operation. *Id*. According to records at the Farm, it has applied manure to its fields at rates consistent with its NMP filed with the DOA. (R. 6).

The organization Deep Quod Riverwatcher (Riverwatcher) received complaints in late winter and early spring 2013 that the Deep Quod River smelled of manure and was an unusually turbid brown color. (R. 6). Responding to the complaints, Dean James made an investigatory patrol of the Deep Quod River on behalf of Riverwatcher on April 12, 2013. *Id*.

The Farm and its fields are located at a bend in the Deep Quod River (River). (R. 5). The previous owner of the property made a bypass canal in the river in the 1940s to alleviate flooding at the River bend, but now it is more commonly used as shortcut up and down the River. *Id*. The canal—Queechunk Canal—is fifty yards wide, three-to-four feet deep, and subsumes most of the River's natural flow. *Id*. Both Canal and River are navigable by small boat. *Id*. The River flows year round and runs into the Mississippi River, a navigable-in-fact interstate body of water. *Id*.

James paddled out on the River in his small metal boat and proceeded through the Canal, disregarding "No Trespassing" signs, as the Canal has been commonly used as a shortcut for decades. (R. 6, 5). While on the Canal, which cuts through the Farm's property, James observed and photographed manure-spreading operations taking place on the fields. (R. 6). James also observed and photographed discolored brown water flowing from the fields through a drainage

ditch into the Canal. *Id*. He took samples of the water flowing from fields to a drainage ditch into the Canal. *Id*. Once tested, the samples confirmed highly elevated levels of nitrates and fecal coliforms. *Id*.

The Farmville community is located downstream of the Farm and uses the Deep Quod River as a source for drinking water. (R. 5). In early 2013, the Farmville Water Authority issued a "nitrate advisory" for its drinking water customers. (R. 6). The advisory included a warning that the high levels of nitrates in the River made the municipal water supply unsafe for infants. *Id*. The contaminated water was hazardous to infants less than two years old, and customers were advised to give any infants bottled water. *Id*.

Riverwatcher's agronomist, Dr. Ella Mae, provided expert testimony that the Farm's Bermuda grass was prevented from effectively taking up nutrients because of an increased acidity in the manure mixture, which was the result of adding the new acid whey from the yogurt facility to the animal waste. *Id*. The Farm's agronomist expert, Dr. Emmet Green, does not dispute that the acid whey addition reduced the soil pH and reduced nitrates, but he indicated the application of whey as a soil conditioner has been practiced in New Union since the 1940s and that Bermuda grass tolerates a wide range of soil pH conditions. *Id*.

Mae explained that the unprocessed nutrients were released into the environment, including the River, by leaching into groundwater and through runoff during rain events. *Id*. Between April 11 and 12, 2013, while James collected the samples, two inches of rain fell in the Farmville area. *Id*. Mae testified that land application of manure during a rain event is a very poor management practice and will nearly always result in excess runoff of nutrients from fields. *Id*. However, the Farm's agronomist, Green, opined that the Farm's NMP does not technically prevent the Farm from land applying manure during a rain event. (R. 6-7).

The Deep Quod River watershed is heavily farmed, leading to nitrate advisories in the past—2002, 2006, 2007, 2009 and 2010. (R. 7). Riverwatcher's environmental health expert, Dr. Susan Generis, stated in her deposition that, while it may be impossible to prove, it was her opinion that the Farm's discharges contributed to the April 2013 nitrate advisory. *Id.*

Dean James and Riverwatcher served a letter of intent to sue the Farm under citizen suit provisions of CWA § 505 and Resource Conservation and Recovery Act (RCRA) § 7002. (R. 7). The E.P.A. commenced a civil environment action against the Farm, seeking civil penalties under CWA § 309(d) and injunctive relief under CWA § 309(b). *Id.* Riverwatcher intervened, joining the E.P.A. action pursuant to CWA § 505(b)(1)(B), as well as bringing claims under the citizen suit provision of RCRA §7002. *Id.* E.P.A. and Riverwatcher moved for summary judgment on all claims. *Id.* The Farm asserted a counter claim and asked for summary judgment for damages and injunctive relief for trespass again Riverwatcher and James. *Id.*

On June 1, 2014, the United States District Court for New Union denied all E.P.A. and Riverwatcher motions for summary judgments. (R. 1, 12). The district court ruled that the Farm was not a CAFO and did not require an NPDES permit under the CWA because the court found James trespassed when he entered the Canal and thus poisoned the evidence under the exclusionary rule; the only evidence of the discharge came from James's visit to the canal. (R. 9). The district court also held the Farm's discharges fell under the stormwater exemption of the CWA. *Id.* Further, the district court denied both RCRA citizen suit summary judgment motions: the Riverwatcher's open dumping claim, as well as the E.P.A.'s and Riverwatcher's joint claim of imminent and substantial endangerment. (R. 10-12). Finally, the district court approved the Farm's motion for damages against Riverwatcher for trespass. (R. 1-2).

STANDARD OF REVIEW

This Court reviews a district court's dismissal of a motion for summary judgment under a *de novo* standard of review. *Copeland v. Wasserstein, Perella & Co.*, 278 F.3d 472, 477 (5th Cir. 2002). The district court is to grant summary judgment when "there is no genuine issue as to any material fact . . . and the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). "In deciding a motion for summary judgment, the court must view the factual evidence and draw all reasonable inferences in favor of the nonmoving party." *Lefevers v. GAF Fiberglass Corp.*, 667 F.3d 721, 723 (6th Cir. 2012).

SUMMARY OF THE ARGUMENT

The district court erred in holding Moon Moo Farm, Inc. is not a concentrated animal feed operation (CAFO) under 40 C.F.R. § 122.23(b)(6) (2012) because Moon Moo Farm, Inc. is an animal feed operation that discharges pollutants into the waters of the United States. This Court should hold that Moon Moo Farm, Inc. (Farm) is a CAFO because it discharges manure into the waters of the United States; the manure flows from the Farm's drainage ditch into the Mississippi River via a continuous surface. However, the district court properly held the discharge, done in compliance with a nutrient management plan, is exempt from National Pollutant Discharge Elimination System permitting and liability, as the discharge is a result of stormwater runoff. Accordingly, this Court should affirm the Farm's agricultural stormwater runoff exemption.

The district court also erred when it excluded evidence provided by Dean James. James collected water samples and photographs from his boat on a federally and locally navigable body of water, the Queechunk Canal. Alternatively, were the canal private, and thus the evidence

collected during a trespass, the evidence would still be admissible because James is a private individual who acted of his own free will and not under any direction from governmental authorities. The Fourth Amendment's exclusionary rule only applies to governmental intrusions on privacy, so this Court should overturn the lower court's decision to exclude James's evidence against the Farm.

The district court erred in denying summary judgment on Riverwatcher's citizen suit claim under Resource Conservation and Recovery Act (RCRA) § 7002(a)(1)(B). This Court should grant the summary judgment because the manure mixture is a solid waste—it has long since served its intended purpose as a fertilizer. Further, the discarded solid waste poses an imminent and substantial endangerment to health, as demonstrated by the April 2013 nitrate advisory. However, this Court should affirm the district court's dismissal of citizen suit claim under RCRA § 4005, which prohibits the practice of open dumping of solid waste. The district court was correct in deny the summary judgment because E.P.A. regulations exclude land applications of agricultural products.

ARGUMENT

I. MOON MOO FARM IS A CAFO NORMLLY SUBJECT TO NATIONAL POLLUTION DISCHARGE ELLIMINATION SYSTEM LIABILITY AND REQUIREMENTS.

Moon Moo Farm, Inc. (Farm) is a Concentrated Animal Feeding Operation (CAFO) under the Clean Water Act. 40 C.F.R. § 122.23(b)(6) (2012). The Farm is a CAFO normally subject to permitting and liability under the National Pollution Discharge Elimination System, pursuant to the Clean Water Act. 40 C.F.R. § 122.23(d)(1) (2012). The Farm's manure application is done in accordance with its Nutrient Management Plan (NMP), exempting any discharge—from permitting requirements normally accorded to CAFOs—as agricultural stormwater. 40 C.F.R. § 412.4(c)(1) (2003).

A. Moon Moo Farm is a Medium CAFO.

The Farm is a Medium CAFO, 40 C.F.R. § 122.23(b)(6) (2012), normally subject to National Pollution Discharge Elimination System (NPDES) permitting requirements. 40 C.F.R. §123.23(d)(1) (2012). The Farm has 350 milk cows, which designates it an Animal Feeding Operation (AFO). 40 C.F.R. § 122.23(b)(6)(i)(A) (2012). The Farm is a Medium CAFO because it discharges pollutants via a drainage ditch into the Queechunk Canal, which runs into the Mississippi River. 40 C.F.R. § 122.23(b)(6)(ii)(A) (2012).

The Farm's ditch is connected to the Mississippi River, a "water of the United States," via the Queechunk Canal. 33 U.S.C. § 1362(7) (2012); *see IMTT-Gretna v. Robert E. Lee SS,* 999 F.2d 105, 106 (5th Cir. 1993) (stating the Mississippi River is a navigable water of the U.S.); 33 U.S.C. § 641 (2012). Though the Farm's drainage ditch does not directly discharge pollutants into the Mississippi River, it does so through the Deep Quod River, which is almost entirely diverted through the Queechunk Canal abutting the Farm. *See Rapanos v. U.S.*, 547 U.S. 715,

742 (2006). The Deep Quod River, flowing into the Mississippi River, has a contiguous surface flowing year round, which demonstrates the Deep Quod River is also a water of the United States requiring protection under the Clean Water Act. *Rapanos*, 547 U.S. at 742 ("*only* those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the Act."); *see* discussion *infra* Part II.B. The *Rapanos* decision—where it narrows definitions—should not restrict NPDES requirements; the narrow definition would still encompass the Deep Quod River and the Queechunk Canal as connecting the Farm to navigable waters of the United States. *Id.* at 745.

The Farm's man-made drainage ditch empties into the Queechunk Canal, which is a water of the United States. It has been held a number of times that a CAFO "point source" should be "broadly interpreted." *Community Ass'n for Restoration of the Environment v. Henry Bosma Dairy*, 305 F.3d 943, 955 (9th Cir. 2002) (quoting *Dague v. City of Burlington*, 935 F.2d 1343, 1954 (2nd Cir. 1991)). "Thus, from the time of the CWA's enactment, lower courts have held that the discharge into intermittent channels of any pollutant *that naturally washes downstream* likely violates § 113a, even if the pollutants discharged from a point source do not emit 'directly into' covered waters, but pass 'through conveyances' in between." *Rapanos*, 547 U.S. at 743. Here, the Farm regularly applies manure to the fields during rain, which will likely result in excess nutrient runoff. This runoff can reach the Mississippi River only because the water first leaves the farm through drainage ditches. The excess runoff will naturally flow into the Queechunk Canal, eventually ending in the Mississippi River because it naturally washes downstream. The man-made drainage ditch at the Farm is thus a "ditch" under § 122.23(b)(6)(ii)(A) (2012), and the Farm is a CAFO.

Discharging pollutants through a man-made ditch makes an Animal Feeding Operation (AFO) a Concentrated Animal Feeding Operation (CAFO). The lower court appropriately cites *Alt v. U.S. E.P.A.*, 979 F. Supp. 2d 701 (N.D. W. Va 2013), for guidance when determining whether an AFO is a CAFO. *Deep Quod Riverwatcher, Inc. v. Moon Moo Farm*, 155 CV 2014, at 9 (D.N.U. 2014). In the *Alt* case, Alt's farm raised chickens, and the E.P.A. claimed the stormwater runoff from that operation qualified the farm as a CAFO. *Alt*, 979 F. Supp. at 704–05. The court found the Alt farm was a CAFO not subject to NPDES permitting because its discharge to navigable waters fell under the stormwater exception. *Id.* at 715. Alt's discharges were directly related to precipitation events, if they were not, Alt farm's discharge would fall outside the stormwater exception. *See id.* at 712, 715. However, this is not the present case. Currently, the Farm is discharging pollutants through a drainage ditch. Dean James's samples from the drainage ditches from the Farm were taken during manure-spreading processes—the application, not the storm, led to the discharge. The Farm discharges pollutants into federal waters, not solely caused by rain, so the Farm is a CAFO under the Clean Water Act.

This standard has been held in courts of precedential value. In a Second Circuit case, the court held that the stormwater exemption only applies when the CAFO acts in accordance "with site specific nutrient management practices," and those discharges are directly related to precipitation events. *Waterkeeper Alliance v. U.S. E.P.A.*, 399 F.3d 486, 508–09 (2nd Cir. 2005); *see Concerned Area Residents for the Environment v. Southview Farm*, 34 F.3d 114 (2nd Cir. 1994). The Fifth Circuit has subsequently adopted the same standards as the Second Circuit. *See National Pork Producers Council v. U.S. E.P.A.*, 635 F.3d 738 (5th Cir. 2011). Thus, the Farm is liable for any discharges not caused by precipitation events.

Any CAFO that discharges pollutants must obtain a NPDES permit. NPDES requirements were enacted to regulate discharges into the waters of the United States. *National Pork Producers Council*, 635 F.3d at 751 (citing 33 U.S.C. § 1342 (2006)). CAFOs that discharge pollutants into navigable waters have a duty to apply for a permit, as it is unlawful to discharge pollutants without a permit. *Id.* (citing 33 U.S.C. § 1311 (2006)). Currently, the Farm discharges pollutants into navigable waters, without an NPDES permit. The Farm is a CAFO, and thus must have a NPDES permit to legally discharge pollutants into the Deep Quod River that don't result from precipitation events. For the foregoing reasons, the Farm is a Medium CAFO under the Clean Water Act.

B. The Farm's Nutrient Management Plan Exempts the Farm from NPDES Liability When Discharge is Agricultural Stormwater Runoff.

Agricultural stormwater is exempt from Clean Water Act permitting requirements. 33 U.S.C. §1362(14) (2012); 40 C.F.R. § 122.26 (2012). Furthermore, the Farm has a nutrient management plan (NMP), which explicitly removes it from NPDES permitting requirements if the discharge is connected to a precipitation-related event, so long as it adheres to that plan. 40 C.F.R. § 122.23(e) (2012). In accordance with its NMP, the Farm is exempt from regulation of its agricultural stormwater runoff or any NPDES requirements resulting therefrom.

An established NMP exempts a CAFO from NPDES permitting requirements relating to agricultural stormwater runoff. Every CAFO is subject to NPDES permitting for any wastewater arising from its land application. 40 C.F.R. § 122.23(e) (2012). However, if the CAFO has a site-specific NMP it is exempted from any NPDES requirements concerning discharge that is "precipitation-related" as "agricultural stormwater discharge. *Waterkeeper Alliance, Inc.*, 399 F.3d at 496 (citing 40 C.F.R. § 122.23(e) (2003) and 33 U.S.C. § 1362(14) (2003)). The Clean Water Act does not seek to punish those who responsibly farm and make use of manure. *See*

Waterkeeper, 399 F.3d at 508–09 ("where a CAFO has taken steps to ensure appropriate agricultural utilization of the nutrients in manure, litter, and process wastewater, it should not be held accountable for any discharge that is primarily the result of 'precipitation.'"). This stormwater exemption is based on the fact that precipitation-related runoff is not a numerical effluence limit, and thus does not fall under the purview of NPDES requirements. *Contra id.* at 502. In the present case, the Farm has a NMP, which was approved by the State of New Union Department of Agriculture, and details the seasonal application rates of manure, as well as the expected crop uptake of the manure nutrients. This NMP acts to shield the Farm from liability for agricultural stormwater runoff because the Farm's NMP practices "ensure appropriate agricultural utilization" of manure. *See* 40 C.F.R. § 122.23(e) (2012).

Failure to review an NMP does not assign liability to a Medium CAFO. The Clean Water Act does not require permitting authorities to review NMPs. 40 C.F.R. § 412.4(c)(1) (2012). The Second Circuit has found that review is necessary for a NMP to discharge liability from the polluter. *Waterkeeper*, 399 F.3d at 502. This is done to ensure the NMP complies with "all applicable effluent limitations and standards." *Id.* While those goals support the CWA's goals, it is not applicable in the present case. *Waterkeeper* dealt with Large CAFOs, whereas the Farm here is a Medium CAFO. Large CAFOs may raise "literally millions of animals in one location," which could pose serious health and environmental risks if not properly overseen. *Id.* at 493–94. The court was concerned with misrepresentation and misunderstanding of the laws. *Id.* at 500–01. However, while Medium CAFOs are not subject to review of their NMPs, they pose a much less substantial risk to human health and the environment. The Farm in the present case raises a mere 350 cows. The concern for necessary review should then be diminished. This Court should find the reasoning in *Waterkeeper* inapplicable to Medium CAFOs, such as the

Farm, because Large CAFOs have a substantial increased risk to pose serious health and environmental impacts. For the foregoing reasons, the Nutrient Management Plan exempts the Farm from NPDES permitting requirements.

II. THE EVIDENCE GATHERED BY JAMES SHOULD BE ADMITTED AT TRIAL.

Dean James collected samples and photographs from the Queechunk Canal, a federally navigable waterway, which gave James a right to be in the canal and the evidence he collected at the canal should be admitted. *Vaughn v. Vermillion Corp.*, 444 U.S. 206, 208, 210 (1979). Alternatively, the Queechunk Canal is a body of water protected by the Public Trust Doctrine of the State of New Union, which should have allowed James access to the canal, thus making his collections admissible evidence. *See Bott v. Commission of Natural Resources of State of Michigan Dept. of Natural Resources*, 415 Mich. 45, 128 (1982). Even if the Queechunk Canal were private property, James's trespass into the canal was not spurred by state action, thus any evidence he collected should be admitted. *U.S. v. Jacobson*, 466 U.S. 109, 115 (1984).

A. The Queechunk Canal Is Open for Public Access.

The Queechunk Canal is a man-made canal, a fact which serves no purpose in determining whether it is subject to the federal navigational servitude. *U.S. v. DeFelice*, 641 F.2d 1169, 1173 (5th Cir. 1981). The Queechunk Canal is a federally navigable water of the United States according to the reasoning from the most recent Supreme Court case determining that standard, which grants the public access to the canal. *See Rapanos v. U.S.*, 547 U.S. 715, 718, 757–758 (2006). Whether the federal navigability test applies, the Queechunk Canal is protected by the Public Trust Doctrine, which grants the public a right to access it. *See Bott*, 415 Mich. at 128.

1. Man-made Canals Are Not Excluded from Federal Public Access.

Man-made canals may be subject to federal navigational servitude if the canal was created by a private actor, was not made with government approval, which did not create a privacy interest—chiefly the right to exclude—in previously non-navigable waters. *See Kaiser Aetna v. U.S.*, 444 U.S. 164, 179–80 (1979). The claim for public access is stronger if the man-made canal appropriates the majority of federally navigable waters without governmental permission. *Vermillion Corp.*, 444 U.S. at 208–10.

The lower court mistakenly read *Kaiser Aetna v. U.S.*, 444 U.S. 164 (1979), to support man-made bodies of water are excluded from federal servitude. *Deep Quod Riverwatcher, Inc. v. Moon Moo Farm*, 155 CV 2014, at 9 (D.N.U. 2014); *see Kaiser Aetna*, 444 U.S. at 172–73 (the man-made marina could not be federal waters without abridging the Takings Clause); *Boone v. U.S.*, 944 F.2d 1489, 1502 (9th Cir. 1991). However, there the Court focused on the consent the government gave to private construction of the marina—not merely that it was a man-made body of water. *Kaiser Aetna*, 444 U.S. at 179–80; *see Boone*, 944 F.2d at 1502 ("The Court placed significant weight on . . . investment-backed expectations"); *U.S. v. DeFelice*, 641 F.2d 1169, 1173 (5th Cir. 1981) (artificial and privately owned canals are not excluded from becoming navigable bodies of the U.S.). The Court found that the waters were, in fact, federally navigable after private improvement, but were not navigable prior to the improvements. *Kaiser Aetna*, 444 U.S. at 178–79, 174. The Court spent the final section of the opinion evaluating the application of federal servitude to the marina as a taking: the government could not require public access to the marina without compensation. *Id.* at 175–80 (before the improvements the wetland was private land under Hawaiian law). The Court stated that the government could have demanded a right of public access when approving the project, and in not doing so the

government created a private right to exclude. *Id.* at 179–80. The importance of the marina being man-made is not in assessing whether there is public access, but that it creates the new issue of whether the Taking Clause applies. *See id.* The present case is distinct because the Queechunk Canal (Canal) was not made with government approval, as the marina was in *Kaiser Aetna*. *Id.* at 179.

A body of water supplied by water subject to the federal navigational servitude is open to public access. In 1979, the Supreme Court dealt with a similar privately constructed waterway next to federal waters. *Vermillion Corp.*, 444 U.S. at 206. The Court found that public access may be available if the privately-created waterway was done so "by means of diversion . . . of a pre-existing natural navigable waterway." *Id.* at 208, 210. In the present case, the Canal drains the majority of the water from a federal body of water, the Deep Quod River.[1] For the foregoing reasons it does not matter that the Canal was a privately-funded, man-made construction because the canal was built by diverting the Deep Quod River, a water of the United States, thus subjecting it to the federal servitude. For the foregoing reasons man-made canals may be subject to the federal servitude.

2. The Queechunk Canal Is a Body of Water Under Federal Jurisdiction.

The Queechunk Canal is undeniably linked to federally navigable waters, chiefly through its appropriation of the majority of the Deep Quod River. The canal has both a continuous surface connection—as it flows all year—and a significant nexus with the waters of the United States—it is a fifty yard wide by three-to-four foot canal, which eventually flows into the Mississippi River. *Id.* For those reasons the Canal is open to public use.

[1] *See* discussion *infra* II.A.2.

The current test for federal navigability is unclear; however, the Queechunk Canal would certainly be public, federal water under the direction the Supreme Court has provided.[2] The Supreme Court issued a plurality opinion when it most recently addressed the scope of "waters of the United States." *See Rapanos v. U.S.*, 547 U.S. 715, 718, 757, 758 (2006). The waters of the United States, subject to federal jurisdiction under the Clean Water Act (CWA), are either definitively "relatively permanent, standing or continuously flowing bodies of water" or vaguely share a "significant nexus" with federal waters. *Rapanos v. U.S.*, 547 U.S. 715, 734–35, 739, 787 (2006) (plurality opinion) (Kennedy, J., concurring) (Congress abrogated the previous standard by statute). In either case the Queechunk Canal would fall under the federal navigability servitude.

The former standard, issued by four justices, found isolated wetlands did not constitute waters of the United States because there was not a "continuous surface connection" between the wetland and federal water, *id.* at 741–45; federal jurisdiction requires the adjacent channel contains federal water and the waters have a "continuous surface connection." *Id.* at 742. In the present case, the Queechunk Canal is connected to federal water, the Mississippi River—a navigable-in-fact body of water via the Deep Quod River. *See Rapanos*, 547 U.S. at 739–42 (holding the connection may be "adjacent" where "boundary-drawing problem[s]" would arise due to surface connection). The Canal shares a continuous surface connection with the Mississippi River because the canal actually subsumes most of Deep Quod River's flow leading to the Mississippi, which is continuous throughout the year, and is subject to federal servitude.

Justice Kennedy's concurrence requires adjacent waters share a "significant nexus" with federal waters to establish jurisdiction over those waters. *Rapanos*, 547 U.S. at 786. That nexus

[2] It is hard to determine which of the tests in *Rapanos* is the narrower grounds, so both are addressed. Plurality opinions are treated as authoritative when applying the "narrowest grounds" established by one of the concurrences. *Marks v. U.S.*, 430 U.S. 188, 193 (1977).

should be found if the waters share a hydrologic connection: an "interchange of waters." *Id.* That is certainly present in this case by the virtue of the fifty-yard-wide, three-to-four foot deep canal emptying into the Deep Quod River, which flows into the Mississippi River, and establishes the Queechunk Canal as subject to federal servitude.

Federal navigability means there is a public right to access the waterway. The Fifth Circuit decided whether a stream fell under the federal navigational servitude, which if found, would grant public access to the stream. *U.S. v. Harrell* 926 F.2d 1036, 1038–39 (5th Cir. 1991). The Fourth Circuit has also explicitly stated waters under the navigational servitude are open to public use. *Loving v. Alexander*, 745 F.2d 861, 868 (4th Cir. 1984) (at least extending public access to the water's surface). The Queechunk Canal is subject to the navigational servitude, or federal navigability, which granted Dean James a right to access at least the surface of the water; Dean James only took photos from his boat, so he was within his rights to float on the Queechunk Canal.

For the foregoing reasons the Queechunk Canal is subject to the federal navigational servitude, granting access to the public and therefore Dean James.

3. The Public Trust Doctrine Should Establish the Queechunk Canal as Publically Accessible Water.

States are given rights over the underlying beds of bodies of water, and may alienate that land appropriately. *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374 (1977). However, those rights do not necessarily extend to the water's surface. Each state defines its own Public Trust Doctrine, and many states have made that test a boatable-recreational standard for public access. *E.g. State v.* McIlroy, 268 Ark. 227, 237-38 (1980). Even under the most restrictive interpretation of the Public Trust Doctrine, the Queechunk Canal

would constitute a publically accessible body of water. *Bott v. Commission of Natural Resources of State of Michigan Dept. of Natural Resources*, 415 Mich. 45, 128 (1982).

The bed underlying a body of water belongs to the title-holder, but that does not necessarily extend ownership to the water's surface.[3] The Supreme Court held in 1977 that the beds of federally navigable bodies belong to the states, but the navigable waters are subject to federal servitude. *Oregon ex rel. State Land Board*, 429 U.S. at 374. In a riparian system, a landowner abutting water may exclude access to his land, but he may not exclude access to the surface water. *E.g. Loving*, 745 F.2d at 868 ("the surface of the disputed section of the Jackson River may be used by the public, the use of its bed and its banks are matters of state law," subject to the navigational servitude). In the present case, James never left his boat; he merely floated on the water's surface to take pictures and water samples. The Farm may exercise property rights over only the water's underlying bed, not the surface of the water, because it is subject to federal servitude.

The Public Trust Doctrine is defined by state law, but the state's duty is to the public's benefit. The Supreme Court held the underlying water beds are granted to the states upon entry into the Union—those beds are granted up to the tidal mark. *Phillips Petroleum Co.*, 484 U.S. 469, 476 (1988). It is up to the individual states to define the scope of the doctrine. *PPl Montana, LLC v. Montana*, 132 S. Ct. 1215, 1235 (2012). However, the state may not simply do with those beds as they wish; the Public Trust Doctrine functions as a "restraint on the states' ability to alienate submerged lands in favor of public access to and enjoyment of the waters above those lands." *Alec L. v. Jackson*, 863 F. Supp. 2d 11, 13 (D.D.C. 2012).

[3] As there is no State of New Union law on the Public Trust Doctrine, we must look to other jurisdictions for guidance.

The *Alec L.* court noted that the Public Trust Doctrine has extended to ensure public access to waters for swimming, recreation, environmental and biological conservation, and aesthetic enjoyment, *id.* (citing *District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1083 (D.C. Cir. 1984)); a standard many jurisdictions have adopted. *E.g. Esplanade Properties, LLC v. City of Seattle*, 307 F.3d 978, 987 (9th Cir. 2002) (finding Washington's Public Trust Doctrine guarantees a public right to recreate in state waters); *State v. McIlroy*, 268 Ark. 227, 237–38 (1980) (moving the Public Trust test from commercial navigability to a boatable-recreational test for public use, in line with California, Minnesota, and Oregon); *see e.g. Casitas Municipal Water District v. U.S.*, 102 Fed. Cl. 443, 455 (2011) (noting California's doctrine protects the public's right to recreate). States protect the public's interest in being able to boat and recreate in state waters. In the present case Dean James never left his boat and thus never stepped onto the underlying riverbed; he merely used a common route for boaters. He floated on the canal as the public has done since the 1940s. Because the Queechunk Canal is state water the Farm has no right to exclude the public's use of the canal—especially James, who was merely boating.

Some states have adopted a restrictive "necessity" requirement before invoking the Public Trust Doctrine. Michigan declined to use the recreational boating test—as discussed above—instead stating, "navigability must reflect prevailing public necessities for use of waterways." *Bott v. Commission of Natural Resources of State of Michigan Dept. of Natural Resources*, 415 Mich. 45, 128 (1982). In that case, the court held that lakes with no navigable inlet or egress could be considered private, and the owner may exclude the public from using any non-navigable entry or exit. *Id.* at 119–126. The present case is entirely different. Dean James floated on the Queechunk Canal, which uses most of the water that would flows through the Deep Quod River. Anyone wanting to move from the North to the South side of the river by

water may need to use the canal. Furthermore, there is no question that the Canel is navigable, as it is fifty yards wide by three-to-four feet deep. In both scenarios the Canal is open to public use under the restrictive Michigan rule, thus James did not trespass against the Farm.

For the foregoing reason Dean James had a right to access the Queechunk Canal.

B. Alternatively, the Evidence James Gathered is Admissible Even if James Trespassed.

Even if Dean James's April 12, 2013, excursion into the Queechunk Canal was a trespass against Moon Moo Farm (Farm), it was not a trespass spurred by state action or state request, and is thus admissible under the Fourth Amendment's exclusionary rule. *U.S. v. Jacobson*, 466 U.S. 109, 115 (1984).

The lower court inappropriately cited *Trinity Industries, Inc. v. OSHRC*, 16 F.3d 1455 (6th Cir. 1994), as its basis for ruling James's evidence inadmissible in court. *Deep Quod Riverwatcher, Inc. v. Moon Moo Farm*, 155 CV 2014, at 9 (D.N.U. 2014). The court in *Trinity Industries* held that evidence improperly obtained by OSHA—a state actor—could still be admitted if it was obtained in good faith. *Trinity Industries, Inc.*, 16 F.3d at 1462 (holding OSHA's Secretary's reliance on a facially valid warrant made evidence obtained under that warrant admissible). In that opinion the court quoted a previous Fifth Circuit Case,[4] which held that improperly obtained evidence could not be admitted for the purpose of assessing penalties to an OSHA violator, *id.* at 1461–62 (quoting *Smith Steel Casting Co. v. Brock*, 800 F.2d 1329, 1334 (5th Cir 1986)); however, the Fifth Circuit also recognized that the good faith exception exists when determining the admissibility of improperly obtained evidence by a state actor. *Smith Steel Casting Co. v. Brock*, 800 F.2d 1329, 1334 (5th Cir. 1986). Those cases are inapplicable here because those cases present issues surrounding evidence obtained by state

[4] Also relied upon by the lower court judge here. *Deep Quod Riverwatcher, Inc*., 155 CV at 9.

actors. *Trinity Industries*, 16 F.3d at 1457; *Smith Steel Casting Co*., 800 F.2d at 1331. In the present case James—a member of the nonprofit, non-governmental organization: Deep Quod Riverwatcher—acted alone and under direction from no person or agency when collecting samples from the Queechunk Canal.

The evidence James collected from the Queechunk Canal is admissible because James's actions were his own, and not the product of state action. The Supreme Court has held that a private individual may provide evidence against another person without amounting to search and seizure, which would require state action. *See Coolidge v. New Hampshire*, 403 U.S. 443, 486–89 (1971) (finding a wife's voluntary choice to proffer her husband's guns to police would not invoke the exclusionary rule). Evidence may only be excluded when there has been some "unconstitutional police conduct" in gathering that evidence. *Id.* at 488. That is not to say that a private individual may not function as police under the Fourth Amendment, but that requires some attempt by governmental actors to direct a private person or use him as an "instrument." *Id.*; *U.S. v.* Smythe, 84 F.3d 1240, 1243 (10th Cir. 1996) ("The police in no way instigated, orchestrated or encouraged the search," so Fourth Amendment protections did not apply); *U.S. v. Walther*, 652 F.2d 788, 791 (9th Cir. 1981) (some interaction between the private actor and police, beyond minimal contacts, is required to establish Fourth Amendment violations); *see U.S. v. Perez*, 118 F.3d 1, 6 (1st Cir. 1991). There is no indication of state—here the E.P.A.—action in this case causing James to collect samples from the Queechunk Canal.

The Supreme Court subsequently affirmed the requirement of state action to invoke Fourth Amendment Protections, even if the private actor's intrusion is itself unreasonable. *U.S. v. Jacobson*, 466 U.S. 109, 115 (1984) ("Whether those invasions were accidental or deliberate, and whether they were reasonable or unreasonable, they did not violate the Fourth Amendment

because of their private character."). In the present case, Dean James collected water samples from his jon boat on the Queechunk Canal in response to Farmville's water customers alone—there is no indication he had any contact with the E.P.A., let alone direction from the E.P.A. He later had the samples analyzed at a laboratory—he did not give them to the E.P.A. to analyze, thus James lacked any motivation implicating government interest and direction. The samples Dean James procured from the Queechunk Canal are admissible because he was not acting, in any way, on the state's behalf or at the state's behest.

For the foregoing reasons the evidence collected by Dean James at the Queechunk Canal on April 12, 2013, should be admitted.

III. RIVERWATCHER IS ENTITLED TO SUMMARY JUDGMENT FOR ITS CITIZEN SUIT UNDER RCRA § 7002(a)(1)(B) BECAUSE THE MANURE MIXTURE IS A SOLID WASTE THAT CONSITUTES AN IMMINENT AND SUBSTANTAL ENDANGERMENT TO HUMAN HEALTH.

RCRA was created in 1976 as a way to regulate the disposal of discarded materials and hazardous wastes. *Price v. U.S. Navy*, 39 F.3d 1011, 1019 (9th Cir. 1994). Further RCRA was designed to help eliminate "the last remaining loophole in environmental law, that of unregulated land disposal of discarded materials and hazardous wastes." H.R. Rep. No. 94-1491, at 4 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238. RCRA governs the treatment, storage, and disposal of solid and hazardous waste, "so as to minimize the present and future threat to human health and the environment." *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 483, (1996). Any qualified person may commence a civil action:

> against any person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, 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.*

RCRA § 7002(a)(1)(B), 42 U.S.C. § 6972(a)(1)(B) (2012) (emphasis added).

Manure discharges on farm fields that are related to a concentrated animal feeding operations (CAFOs) can be difficult to manage because the Clean Water Act (CWA) provides an "agricultural stormwater discharge" exemption. C.F.R. § 122.23(e) (2012). However that does not minimize CAFOs impacts on waterways. CAFOs generate an estimated 500 million tons of manure annually (three times more than the amount of human sanitary waste generated each year in the United States). NPDES Permit Regulation and Effluent Limitation Guidelines and Standards for CAFOs, 68 Fed. Reg. 7176, 7180 (Feb. 12, 2003).

This Court should overturn the district court and grant summary judgment to Riverwatcher because, under the Resource Conservation and Recovery Act (RCRA) § 7002(a)(1)(B), there was a "*disposal of any solid or hazardous waste* which may present an *imminent and substantial endangerment to health or the environment*." First, the manure is a "solid waste" because it has been discarded and no longer serves any use. Second, that discarded solid waste poses an "imminent and substantial endangerment to health." Finally, while Riverwatcher does have a citizen suit claim under RCRA § 7002(a)(1)(B), it does not have a valid claim under RCRA § 4005, which prohibits the practice of open dumping of solid waste, since regulations exclude land applications of agricultural products.

A. The Manure Mixture Is a Discarded Material, and Therefore a Solid Waste.

RCRA defines "solid waste" as "any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other *discarded material,* including solid, liquid, semisolid or contained gaseous material resulting from . . . agricultural

operations....”42 U.S.C. § 6903(27) (2012) (emphasis added). While RCRA does not define “discarded material,” the Ninth Circuit has defined the term as “to cast aside; reject; abandon; give up.” *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1041 (9th Cir. 2004).

Under RCRA, the term “hazardous waste” means a solid waste that may “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)(B) (2012).[5] Because “hazardous waste” is a narrower definition, and subset, of the term “solid waste,” this Court only needs to find the discarded manure mixture a solid waste.[6]

The district court erred in not finding the manure mixture a discarded solid waste because it is no longer being used in any way, and cannot be recycled. Additionally, even though there are some regulatory exceptions for agricultural applications, the manure mixture was still a discarded solid waste because the amount of excessive manure runoff went beyond the ordinary use necessary to serve its intended purpose.

1. The Manure Mixture Has Been Discarded Because it Reached the End of its Useful Life.

A product is a solid waste when it has “has served its intended purpose and is no longer wanted by the consumer” *Ecological Rights Foundation v. Pacific Gas and Elec. Co.,* 713 F.3d 502, 515 (9th Cir. 2013) (citation omitted). The D.C. Circuit Court defined “discarded” as “’disposed of,’ ‘thrown away’ or ‘abandoned.’” *Am. Min. Cong. v. U.S. E.P.A.*, 824 F.2d 1177, 1183-84 (D.C. Cir. 1987). “Discarded material” does not include materials that “are destined for beneficial reuse or recycling in a continuous process by the generating industry itself.” *Safe Food*

[5] The E.P.A. has listed certain wastes as hazardous. 40 C.F.R. § 261.30 (2012). A waste can also be considered hazardous if it exhibits certain characteristics. 40 C.F.R. §§ 261.20 (2012).
[6] See Footnote 7 in *Safe Air for Everyone*, 373 F.3d at 1042, where court found “hazardous waste under RCRA is a subset of ‘solid waste,’ and the definition of ‘solid waste’ at issue in *ILCO* was the same as that before us.”

& Fertilizer v. E.P.A., 350 F.3d 1263, 1268 (D.C. Cir. 2003) *on reh'g in part*, 365 F.3d 46 (D.C. Cir. 2004). However RCRA does state that a recycled material can be considered a discarded solid waste if it is used in a manner constituting disposal or "applied to or placed on the land in a manner that constitutes disposal." 40 C.F.R. § 261.2(c)(1) (2012).

Here, the Farm's manure runoff is a mixture of cow waste combined with acid whey from the yogurt business, but that does not mean that this mixture is a recycled material. Similar to the reasoning by the courts in the Ninth and D.C. Circuits above, the manure mixture from the Farm has reached the end of its useful life even though it consists of recycled product—the yogurt facility's whey. The manure runoff that was not absorbed into the soil, and instead overflowed into public waterways is a demonstration that it is no longer of use to the Farm.

The manure mixture is not designed to treat water (where it eventually settled), which makes this solid waste different from a pesticide application addressed in *No Spray Coal., Inc. v. City of New York*, 252 F.3d 148 (2d Cir. 2001). In that case, the court found pesticides are not discarded when sprayed in the air when that is the design effecting their intended purpose. *Id.* 252 F.3d at 150. However, here the manure runoff is not designed to land in, accumulate in, or treat the public waterways. The manure mixture was originally designed as soil fertilizer for the land. There is only so much soils can absorb when it comes to nutrients. So, the manure runoff from the field application to the public waterways has been discarded because it is no longer serving its intended purpose. Instead it is accumulating and doing more damage downstream.

2. There Is No Blanket Exemption for All Animal Waste Disposal Practices.

E.P.A. regulations provide an exemption in federal waste disposal standards for "agricultural wastes, including manures and crop residues, returned to the soil as fertilizers or

soil conditioners." 40 C.F.R. § 257.1(c)(1) (2012).[7] This exception is not a blanket exception for *any* agricultural wastes. RCRA includes criteria for determining which solid waste disposal practices pose a reasonable probability of adverse effects on health or the environment. 40 C.F.R. § 257.1 (2012). Two of these criteria show that there is not a blanket animal waste exemption "solid waste" definition. First, "the 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(c)(1) (2012) (emphasis added). Secondly, the definition also excludes "solid waste 1) generated by "raising of animals, including animal manures"... 2) *"and* which are *returned to the soils* as fertilizers." 40 C.F.R. § 261.4(b)(1) (2012) (emphasis added).

Thus the determination if manure is a solid waste is an inquiry into the functional use of the animal waste products rather than the agriculture waste definition. Here, the solid waste from the Farm is not returned to the soil. Rather, it is discarded as a waste, not a fertilizer, and is actually disposed of in the waterway—here, the Queenchunk Canal and Deep Quod River.

Further, the practical ramifications of reading the agricultural exemption as allowing disposal of *all* agricultural wastes without considering how applied and in what amounts (as long as it touches a farm field at some point) makes the intent of Clean Water Act meaningless. "[I]t is equally 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." *Cmty. Ass'n for Restoration of the Env't, Inc. v. George & Margaret LLC*, 954 F. Supp. 2d 1151, 1158 (E.D. Wash. 2013). The distinguishing feature is whether a material was discarded in the course of its *ordinary use* in amounts necessary to serve its intended purpose. *(See Ecological Rights Found. v. Pac. Gas & Elec. Co.*, 713 F.3d 502, 516 (9th Cir. 2013)

[7] *See Safe Air for Everyone* on Congress' intent: "[a]gricultural wastes which are returned to the soil as fertilizers or soil conditioners are not considered discarded materials in the sense of this legislation." *Safe Air for Everyone*, 373 F.3d at 1045–46.

(emphasis added). Simply because the manure mixture was spread on a field, does not mean that the nitrate runoff in the waters can never be discarded. See *Safe Air for Everyone*, 373 F.3d at 1046 (finding the determination of whether grass residue has been discarded is made independently of *how* the materials are handled).

Here, the ordinary use of the manure mixture was as a soil fertilizer. When the soil can no longer take up the nutrients—nitrates in this case—then the Farm has exceeded amounts necessary to serve its intended purpose. If the Farm is allowed to spread any amount of manure mixture at any time, generating excessive nutrient and nitrates runoff into waterways, it would make the Nutrient Management Plan (NMP) a meaningless tool in maintaining clean water.

3. The Farm's NMP Does Not Prohibit Manure from Being Defined as a Discarded Solid Waste.

A citizen suit is prohibited when a state has undertaken certain environmental response actions. 42 U.S.C. § 6972(b)(1)(C) (2012). However, the prohibition only applies where the state is prosecuting "an action" under RCRA. *Toledo v. Beazer Materials & Services*, 833 F.Supp. 646 (N.D.Ohio 1993) (stating 'action' has been interpreted to mean an action in a court; state administrative proceedings are insufficient to create a bar to a citizen RCRA suit).

Here, the Farm filed an NMP with the State of New Union Department of Agriculture (DOA). Although the DOA has the authority to reject and NMP that is found to be insufficient, the DOA does not ordinarily review submitted NMPs. Thus filing an NMP, or acceptance of the NMP by the DOA, does not constitute an "action" by the state. Regardless if the NMP has been followed the RCRA citizen suit can, and should, be found valid.

Further, the definition of a solid waste applicable to a RCRA citizen suit is not limited by application rates or expected uptake of nutrients that may be part of the NMP. Manure that has runoff into public waterways (drinking water) from over-applied fields is "discarded" because it

has been abandoned and no longer serves a useful purpose. See *Cmty. Ass'n for Restoration of the Env't, Inc. v. George & Margaret LLC*, 954 F. Supp. 2d 1151, 1157 (E.D. Wash. 2013) (reversing lower court's dismissal of citizen suit based on claims that dairy farm over-applied manure to fields, thus making it a solid waste).[8]

In this case, the manure mixture's ordinary use is to fertilize farm fields. When it ceases to serve that purpose, and instead runs into and accumulates in waterways, it becomes a discarded solid waste. While the manure runoff had at one time served an agricultural purpose on the land, there is no blanket exception to permit any and all agricultural waste disposal.

B. The Nitrate Runoff is an Imminent and Substantial Endangerment to Health.

The second prong of the citizen suit requirement under RCRA § 7002(a)(1)(B) is demonstrating the disposal of solid waste "may present an *imminent and substantial endangerment to health or the environment*." 42 U.S.C. § 6972(a)(1)(B) (2012) (emphasis added). An imminent and substantial endangerment exists if there is "reasonable cause for concern that someone or something may be exposed to a risk of harm . . . if remedial action is not taken." *Foster v. U.S.*, 922 F. Supp. 642, 661 (D.D.C. 1996). "RCRA implies that there must be a threat which is present now, although the impact of the threat may not be felt until later." *Price v. U.S. Navy*, 39 F.3d 1011, 1019 (9th Cir. 1994). "A reasonable prospect of future harm is adequate to engage the gears of RCRA § 7002(a)(1)(B) so long as the threat is near-term and involves potentially serious harm." *Maine People's Alliance And Natural Res. Def. Council v. Mallinckrodt, Inc.*, 471 F.3d 277, 295-96 (1st Cir. 2006). "The threshold matter is in the clause 'may present an imminent and substantial endangerment.' Thus, [the plaintiff] must demonstrate that the [solid or hazardous waste] 'may present' such a danger." *Attorney Gen. of Oklahoma v.*

[8] *See also Zands v. Nelson*, 779 F.Supp. 1254, 1261–62 (S.D.Cal.1991) (finding gasoline leaked from gas station tanks is a disposal of solid waste because it is no longer a useful product after it leaks into the soil, because it has been "abandoned").

Tyson Foods, Inc., 565 F.3d 769, 783 (10th Cir. 2009) (citation omitted). In fact, the word "may" has been seen as expansive language, "intended to confer upon the courts the authority to grant affirmative equitable relief to the extent necessary to eliminate *any risk* posed by toxic wastes." *Dague v. City of Burlington,* 935 F.2d 1343, 1355 (2d Cir. 1991) (emphasis in original).

Additionally, on the whole, legislative history supports an expansive reading of the "imminent and substantial endangerment" standard for liability under RCRA § 7002(a)(1)(B). *Mallinckrodt, Inc.*, 471 F.3d at 295-96. Legislative history provides substantial evidence that the citizen suit provision was intended to empower private citizens by granting them relatively broad authority to litigate when E.P.A. had not acted in the face of a reasonable prospect of serious, near-term harm. *Weinberger v. Rossi,* 456 U.S. 25, 35 (1982).

In the present case, the district court did not apply the expansive approach taken in other courts to find that there is indeed both an imminent and substantial danger to health from the manure runoff. Here, the manure runoff containing excess nitrates posed an immediate and substantial endangerment. First, the threat is imminent because of the April 2013 nitrate advisory warning of immediate drinking water threats to infants. Second, there is a substantial endangerment because the unsafe nitrate levels impacts the most vulnerable populations (with risks including death). Further, the nitrates do not have to be proven to be solely from the Farm to find a citizen suit to be valid, because it can be shown that the Farm contributed to the unsafe levels of contaminants, which pose an imminent and substantial endangerment to health.

1. The Threat to the Health of Farmville Citizens Is Imminent.

The Ninth Circuit found that the word "imminent" in 42 U.S.C. § 6972(a)(1)(B) "implies that there must be a threat which is present *now,* although the impact of the threat may not be felt until later." *Price v. U.S. Navy,* 39 F.3d 1011, 1019 (1994). A finding of "imminent" does not

require a showing that actual harm will occur immediately so long as the risk of threatened harm is present. *Environmental Defense Fund, Inc. v. Environmental Protection Agency,* 465 F.2d 528, 535 (D.C.Cir. 1972).[9] Imminence refers "to the nature of the threat rather than identification of the time when the endangerment initially arose." *U.S. v. Price,* 688 F.2d 204, 213 (3d Cir.1982) (quoting H.R. Comm. Print. No. 96-IFC 31, 96th Cong., 1st Sess. at 32 (1979), *reprinted in* 1974 U.S.C.C.A.N. 6454). Similarly, a finding of imminent "does not require a showing that actual harm will occur immediately as long as the risk of threatened harm is present." *Burlington Northern and Santa Fe Railway Comp. v. Grant,* 505 F.3d 1013, 1020 (10th Cir. 2007). Rather, the key is that the threat itself is present now, even if the impact of that threat "may not be felt until later." *Id.* (quoting *Meghrig v. KFC Western, Inc.,* 516 U.S. 479, 485–86 (1996)).

Even if the public is warned of the danger—and can minimize their risk by finding an alternative water supply—that does not mean the danger is no longer imminent. "[T]he 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." *Davies v. Nat'l Co-op. Refinery Ass'n,* 963 F. Supp. 990, 999 (D. Kan. 1997) (citation omitted). In *Davies,* the court found that employees could still operate a radio station without an imminent threat to their health because they used bottled water instead of groundwater. *Id.*

However, in this case, the impact and danger is imminent to more than just a handful of adults that are employees of a radio station. Here, the April 2013 Nitrates Advisory was issued for the entire Farmville community. As the court states in *Davies,* just because there is some way of avoiding the threat, does not mean the danger is no longer imminent. *Id.* If that were the case, any alternative solution no matter how problematic or expansive—bottled water for an

[9] The court quoted E.P.A. Statement of Reasons Underlying the Registration Decisions to find "an 'imminent hazard' may be declared at any point in a chain of events which may ultimately result in harm to the public.").

entire community—would allow the pollution to continue, and citizens would have no recourse. The nitrate advisory and suggestion to buy bottled water is not enough to avoid any enforcement. Further, there is an immediate threat to the entire Farmville community (not just one household or business). The advisory notes that the municipal water supply from the Deep Quod River is unsafe for all infants. This Court should find the threat is imminent because the nitrate advisory provides clear evidence that the threat is happening now and impacting an entire community.

2. The Threat to the Health of Farmville Citizens Is Substantial.

There is a substantial endangerment when "there is reasonable cause for concern that someone or something *may be exposed to risk of harm* by release, *or threatened release,* of hazardous substances in the event remedial action is not taken." *Price v. U.S. Navy,* 39 F.3d 1011, 1021 (9th Cir. 1994) (emphasis added). In applying this endangerment standard, courts should err on the side of "protecting public health, welfare and the environment." *Attorney Gen. of Oklahoma v. Tyson Foods, Inc.*, 565 F.3d 769, 783 (10th Cir. 2009). The requirement of an endangerment suggests "there must be a condition that creates an unreasonable risk of harm to human health or of harm to the environment." *Davies,* 963 F. Supp. at 997.

The case at hand is unlike *Safe Food,* where the court found recycled materials were not "discarded" hazardous solid waste when the materials *did not* exceed set contaminant levels, and thus did not pose substantial health and environmental risks. *Safe Food* 350 F.3d at 1270. The present case demonstrates how contaminants above a safe level to drink—enough to issue a nitrate advisory—provide enough support to find substantial health risks.

Nitrates can cause a substantial health risk to infants. Infants are generally recognized as being a subpopulation most susceptible to nitrate-induced methemoglobinemia (a condition known as "blue baby syndrome"). *Integrated Risk Information System, Nitrates,* U.S. E.P.A,

http://www.epa.gov/iris/subst/0076.htm (last visited November 24, 2014). Risk is especially high in infants exposed to water that is contaminated with bacteria, because this promotes high concentrations of bacteria in the stomach. *Id.* If an infant is fed water or formula made with water that is high in nitrates, blue baby syndrome can develop. *Nitrate in Well Water*, Minnesota Department of Health, http://www.health.state.mn.us/divs/eh/wells/waterquality/nitrate.html (last visited November 24, 2014). As the condition worsens, the baby's skin turns a bluish color, particularly around the eyes and mouth. *Id.* If nitrate levels in the water are high enough and prompt medical attention is not received, death can result. *Id.*

While infants are the most vulnerable population facing risks of unsafe nitrate levels, adults can also suffer. In healthy adults, conversion of nitrate to nitrite often occurs in the stomach if the pH of the gastric fluid is sufficiently high to permit bacterial growth. *Integrated Risk Information System, Nitrates*. However, adults with diseases such as achlorhydria or atrophic gastritis are not able to convert nitrates, and can thus be susceptible to nitrate-induced conditions like methemoglobinemia. *Id*.

Further, the nitrate advisory in practice does not provide for adequate protections for infants as well as at-risk adults. Nitrate is tasteless, odorless, and colorless. *Nitrate in Well Water*. This means that it is not easy to determine if someone's water is contaminated, and the only way to find out if unsafe levels of nitrate is in the water is to have it tested by a certified lab. *Id*. Many homeowners will not go through this process. Additionally, many community members may think that boiling the water will provide safe water, which might be a similar process to getting rid of other contaminants. However, with nitrates, boiling actually concentrates the nitrates and can make it more dangerous. *Id.* The district court erred in finding

that the recommendation to give infants bottled water will avoid "*any* potential risk." *Deep Quod Riverwatcher, Inc. v. Moon Moo Farm*, 155 CV 2014, at 11 (D.N.U. 2014) (emphasis added).

Here, the threat to the community of Farmville is substantial because of these potentially serious health concerns in infants as well as susceptible adults. With the expansive reading of "substantial endangerment" other courts have provided, it is not be required to have every single citizen facing an immediate substantial threat before a citizen suit could be valid.

3. Nitrate Contamination Does Not Have to be Proven to be Solely from the Farm to Find an Imminent and Substantial Endangerment.

The requirements for a successful RCRA citizen suit include that the alleged polluter "*contributed to, or is contributing to*, the handling, storage, treatment, transportation, or disposal of solid or hazardous waste; and that such waste may present an imminent and substantial endangerment to health or the environment." *Burlington N. & Santa Fe Ry. Co.*, 505 F.3d at 1020 (*citing Cox v. City of Dallas, Tex.*, 256 F.3d 281, 292–93 (5th Cir. 2001) (emphasis added).

In this case, the Farm is not alleged to be the only actor causing unsafe nitrate levels that has lead to the community wide nitrate advisory. However, based on the reasoning in the Tenth and Fifth Circuits, the lower court erred in denying the citizen suit because the Farm's practices are not the "but-for" cause of the nitrate advisory. *Deep Quod Riverwatcher, Inc.*, 155 CV at 11. This Court only needs to find that the Farm "contributed to" the disposal of solid waste that may present an imminent and substantial endangerment to health or environment. Here, Riverwatcher's agronomist testified that the Farm's Bermuda grass was prevented from effectively taking up nutrients from the manure. Unprocessed nutrients, like nitrates, were released into the environment, including the Deep Quod River. In fact, the Farm's expert agronomist, Dr. Emmet Green, did not dispute that the Farm has seen an increase in nitrate runoff into the Deep Quod River. Further, when evaluating the source of nitrates in a public

drinking supply source, it would be a practical impossibility to require proof of the exact source of the contaminants to allow enforcement of unsafe drinking water.

For the foregoing reasons, this Court overturn the district court and should find that Riverwatcher met both prongs of RCRA § 7002(a)(1)(B) to have a valid citizen suit. The manure mixture is a "disposed solid waste" because the excessive manure runoff has been discarded and has no useful life. And because the discarded, disposed material poses an "imminent and substantial endangerment to health," the citizen suit is valid.

C. The Farm May Not Be Subject to a Citizen Suit Under RCRA § 4005, Which Prohibits the Practice of Open Dumping Because Regulations Exclude Land Applications of Agricultural Products.

Finally, Riverwatcher does not have a citizen suit claim under RCRA § 4005, which prohibits the practice of open dumping of solid waste since E.P.A. regulations exclude land applications of agricultural products. "[A] ny solid waste management practice or disposal of solid waste or hazardous waste which constitutes the open dumping of solid waste or hazardous waste is prohibited. 42 U.S.C § 6945(a) (2012). An open dump is "any facility or site where solid waste is disposed of that is not a sanitary landfill. 42 U.S.C. § 6903(14) (2012). RCRA defines "solid waste" as "any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid or contained gaseous material resulting from ... agricultural operations...." 42 U.S.C. § 6903(27) (2012). "Discarded material" from the definition above has been further defined as "to cast aside; reject; abandon; give up." *Safe Air*, 373 F.3d at 1041. Regulations exclude land application of agricultural produces from regulation as an open dump. "The 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(c)(1) (2012).

E.P.A. agrees that Riverwatcher can establish that the manure mixture meets the definition of "solid waste." The manure mixture is a "discarded solid waste" because the excessive manure runoff has been disposed of and no longer serves a purpose. It has been discarded, now accumulating in the public waterways. This determination is similar to the analysis in satisfying the first prong of the requirement under RCRA § 7002(a)(1)(B). However, Riverwatcher's claim for a citizen suit fails because the E.P.A. regulations exclude land application of agricultural products from the open dumping regulations. And since there is no "imminent and substantial endangerment to health" prong of RCRA § 4005, the regulations excluding agricultural products is the controlling regulation. The E.P.A. agrees with the district court's determination that both the manure and whey are agricultural wastes that are being returned to the soil as fertilizer and soil conditioners. Thus, this Court should affirm the district court's denial of Riverwatcher's summary judgment claim under RCRA § 4005.

CONCLUSION

This Court should hold that Moon Moo Farm, Inc. is a CAFO by virtue of its discharge of pollutants into the waters of the United States. This Court should also admit Dean James's evidence of Moon Moo Farm, Inc.'s Clean Water Act violations. Because Moon Moo Farm, Inc.'s discharge poses an imminent and substantial danger to human health, this Court should grant summary judgment for Riverwatcher's Resource Conservation and Recovery Act suit.