C.A. No. 14-1248

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

and

DEEP QUOD RIVERWATCHER, INC., AND DEAN JAMES
Plaintiffs-Intervenors-Appellants,

v.

MOON MOO FARM, INC.
Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW UNION, THE HONORABLE ROMULUS REMUS PRESIDING

Brief for Deep Quod Riverwatcher, Inc., and Dean James, Plaintiff-Intervenor-Appellant

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STATEMENT OF JURISDICTION

The United States District Court for New Union had proper jurisdiction under 33 U.S.C. § 1365(a) (2006), and entered its final decree on April 21, 2014. This Court granted parties' petitions for Appeal on September 15, 2014. Jurisdiction rests in this Court under 28 U.S.C. § 1291 (2012).

STATEMENT OF THE ISSUES

I. Can the public trust doctrine grant a public right of navigation to a man-made body of water, such as the Queechunk Canal?

II. If the Queechunk Canal is not a public trust navigable water, does the exclusionary rule apply to civil enforcement proceedings brought under the Clean Water Act?

III. Does a discharge of a manure and acid whey mixture from Moon Moo Farm's fields through a ditch subject it to Clean Water Act permitting requirements as a concentrated animal feeding operation?

IV. If Moon Moo Farm is not a concentrated animal feeding operation, do excess nutrient discharges from its landspreading operation preclude it from the agricultural stormwater exemption, and subject it to Clean Water Act permitting requirements?

V. Does Moon Moo Farm's manure and acid whey mixture constitute a solid waste subject to Resource Conservation and Recovery Act regulation when the excessive application of the mixture reduces its usefulness as a fertilizer?

VI. Is Moon Moo Farm subject to regulation under the Resource Conservation and Recovery Act when its manure and acid whey mixture is allowed to enter Farmville's drinking water, and "may constitute an imminent and substantial endangerment" to infants?

STATEMENT OF THE CASE

This case is about a community whose drinking water has been contaminated by nitrates and fecal coliform. Farmville residents complained to Deep Quod Riverwatcher, Inc., along with Dean James (collectively, "Riverwatcher") about the water in the Deep Quod River ("River"), which serves as the source of its drinking water. Riverwatcher investigated and discovered that the pollutants originated from a landspreading operation on Moon Moo Farm's property.

Riverwatcher sent notice to Moon Moo Farm, the New Union Department of Environmental Quality (DEQ), and the United States Environmental Protection Agency (EPA), of its intent to file a citizen suit. Riverwatcher sought to enforce Clean Water Act (CWA) and Resource Conservation and Recovery Act (RCRA) regulations against Moon Moo Farm because it discharges a manure and acid whey mixture ("MAWM") into the City of Farmville's drinking water supply, via the Queechunk Canal ("Canal"), and poses a health risk to infants.

In response to Riverwatcher's notice, EPA filed a complaint seeking to enforce National Pollutant Discharge Elimination System (NPDES) permitting requirements against Moon Moo Farm, and claimed it is a confined animal feeding operation (CAFO) that discharges MAWM through a ditch, into the Canal, and then into the River. Subsequently, Riverwatcher intervened as a plaintiff and Moon Moo Farm filed counterclaims against Riverwatcher, alleging that it had trespassed onto its property, and that any evidence obtained therefrom was inadmissible. Moon Moo Farm sought damages and injunctive relief.

After a hearing on the motions, the District Court granted Moon Moo Farm's motion for summary judgment and awarded $832,560 in damages. Both Riverwatcher and EPA filed timely Notices of Appeal in this Court. On June 1, 2014, this Court issued an Order directing parties to brief the issues of the case.

STATEMENT OF FACTS

New Union was incorporated as a State prior to 1940. R. at 4. The City of Farmville derives drinking water from the River. R. at 5. Because Farmville is located in a "heavily farmed" watershed, nitrate advisories were issued in Farmville in 2002, 2006, 2007, 2009 and 2010. R. at 7. In 2013, the Farmville Water Authority "issued a 'nitrate' advisory," warning Farmville families to use bottled water because the "high levels of nitrates" in the River were

"hazardous" to infant health. R. at 6. In April 2013, Riverwatcher was prompted to investigate Moon Moo Farm when it received complaints from Farmville citizens, stating that the River "smelled of manure and was an unusually turbid brown color." R. at 6.

Just ten miles from Farmville, Moon Moo Farm operates as an animal feeding operation (AFO). R. at 5. Moon Moo Farm is incorporated and has its principal place of business in New Union. R. at 4. It is located "at a bend in the course of the" River, and in the 1940s, a previous owner "excavated" the Canal in order "to alleviate flooding at the river bend." R. at 5. Subsequently, most of the River's flow "is diverted" into the Canal, which is "fifty yards wide, three to four feet deep, and can be navigated by a canoe or other small boat." R. at 5. The River "flows year round and runs into the Mississippi River, which is a navigable-in-fact interstate body of water that has long been used for commercial navigation." R. at 5. Moon Moo Farm owns the land on either side of the Canal, and "has prominently posted the Canal with 'No Trespassing' signs"; however, "the Canal is commonly used as a shortcut up and down" the River. R. at 5.

In 2010, Moon Moo Farm increased the size of its facility from 170 cows to 350 cows so that it could "serve the growing demand for milk for Greek yogurt production at the Chokos Greek Yogurt processing facility in Farmville," which opened in 2009. R. at 5. The cows are "housed in a barn and are not pastured." R. at 4. Manure and liquid waste from the barn is channelled "through a series of drains and pipes" and then stored inside an outdoor lagoon so that it can later be used as fertilizer. R. at 4–5. The lagoon is "designed to contain all manure produced by the dairy operation without overflowing during a 25-year rainfall event." R. at 5. The use of whey as a soil conditioner is a "longstanding practice" in New Union, and, Moon Moo Farm has added "acid whey produced by the Chokos plant" to the lagoon since 2012. R. at

5, 6. Moon Moo Farm loads the MAWM into tank trailers, and transfers it from the lagoon to its 150-acres of Bermuda grass fields with tractors. R. at 5. Moon Moo Farm then spreads the MAWM on the fields, intending to fertilize the fields. R. at 5.

Moon Moo Farm is regulated as a "no discharge" facility because it "does not normally have a direct discharge from its manure handling facilities to waters of the State in conditions up to and including the 25-year storm event." R. at 5. Moon Moo Farm is required to comply with a "Nutrient Management Plan" (NMP), which "sets forth planned seasonal manure application rates, together with a calculation of expected uptake of nutrients by the crops grown on the fields where the manure is spread." R. at 5. Moon Moo Farm's records indicate that "it has applied manure to its fields at rates consistent with the NMP filed with the Farmville Field Office at all relevant times." R. at 6. The NMP does not prohibit Moon Moo Farm from spreading MAWM to its fields during a rain event. R. at 6–7. However, the New Union Department of Agriculture (DOA) "does not ordinarily review submitted NMPs, nor is there any provision for public comment on NMPs filed by [a] no-discharge animal feeding operation." R. at 5.

Moon Moo Farm does not have an NPDES permit even though MAWM flowed into the Canal during the land application. R. at 5–6. On April 12, 2013, Mr. James navigated down the Canal "in a small metal outboard craft known as a 'jon boat,'" during a rainstorm, *not* a 25-year storm event. R. at 6. "He observed and photographed discolored brown water flowing from the fields through a drainage ditch into" the Canal, and he "took samples of the water flowing from the ditch." R. at 6. Test "results showed highly elevated levels of nitrates and fecal coliforms." R. at 6.

At the hearing, Riverwatcher provided an agronomist, Dr. Ella Mae, whose undisputed expert opinion was that even though Bermuda grass tolerates "a wide range of soil pH

conditions," the slight acidity of MAWM, with a pH of 6.1, prevented the crop from absorbing "the nutrients in the manure."[1] R. at 6. The nutrients in the manure were then "released to the environment," the River, "by leaching into groundwater and through runoff during rain events." R. at 6. Dr. Mae opined that applying MAWM "during a rain event is a very poor management practice and will nearly always result in excess runoff of nutrients from fields." R. at 6.

STANDARD OF REVIEW

The district court granted Moon Moo Farm's motion for summary judgment. This Court reviews a district court's decision to grant a motion for summary judgment *de novo*. *Lefevers v. GAF Fiberglass Corp.*, 667 F.3d 721, 723 (6th Cir. 2012).

SUMMARY OF THE ARGUMENT

New Union serves as trustee of the navigable waters within its borders for the benefit and enjoyment of the public. Because the Canal is navigated by small boat it is subject to the public trust doctrine.

If the Court finds that Mr. James trespassed onto Moon Moo Farm's property by accessing the Canal, the evidence is still admissible because the exclusionary rule only applies to Fourth Amendment violations. Mr. James is not an agent of the EPA because he obtained the evidence under his own free will. If the Court determines Mr. James is an agent, the nonexistent deterrent effect of government wrongdoing is outweighed by the societal cost of applying the rule.

As a CAFO, Moon Moo Farm is subject to NPDES permitting for any discharge of pollutants into waters of the United States. Failure to provide a buffer zone between its landspreading operation and the ditch, the River, and the Canal prevents Moon Moo Farm from

[1] Moon Moo Farm's expert, Dr. Green, did not disagree with this assessment. R. at 6–7.

claiming its discharge is agricultural stormwater. If Moon Moo Farm is not a CAFO, its ditch is a point source subject to NPDES permitting for its non-agricultural stormwater discharge. Alternatively, Moon Moo Farm cannot seek the safe-harbor of a nutrient management plan that was never subject to public comment and meaningful review and because the NMP allowed the application of nutrients in excess of the benchmark "sufficiency for plant growth."

If Riverwatcher's CWA claim fails, then there is a sufficient basis to allow its citizen suit against Moon Moo Farm under RCRA. MAWM is a solid waste because Moon Moo Farm disposed of it when it was allowed to leach into the groundwater and runoff into the ditch *during* the landspreading operation, which dumped into the Canal, and flowed into the River, where Farmville derives its drinking water. MAWM is not exempt from being solid waste because excessive spreading prevents Bermuda grass from absorbing nutrients.

Additionally, the nitrates from the MAWM have contributed to the contamination of Farmville's drinking water, and are hazardous to infant health. It is not necessary for Moon Moo Farm to be the "but for" cause of the nitrates in Farmville's drinking water for this Court to grant relief, and the existence of a nitrate advisory recommending that households with infants use bottled water does not negate the potential risk of harm. Finally, Riverwatcher's RCRA claim should prevail because the notion that Farmville families should be responsible for the cost of an alternate water supply when they are the victims of the contamination offends public policy. For these reasons, the District Court's dismissal of Riverwatcher's RCRA claims should be reversed.

ARGUMENT

I. New Union holds the Canal in public trust, by virtue of the equal footing doctrine, because the Canal is regularly used for travel.

The equal footing doctrine granted New Union title to the navigable waters within its territory and holds those waters in public trust. *Mumford v. Wardwell*, 73 U.S. 423, 436 (1867).

Furthermore, the Canal is subject to the public trust doctrine because it is a navigable-in-fact water body. *Daniel Ball*, 77 U.S. 557, 563 (1871).

A. New Union holds a public trust in the navigable waters within its territory, including the River.

Under the equal footing doctrine, new states admitted to the Union had "the same rights, sovereignty and jurisdiction . . . as the original States possess within their respective borders." *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313, 318 (1973). Consequently, when New Union was admitted as a state, it acquired title to the lands underlying navigable waters within its boundaries. *Id.* The equal footing doctrine promotes "the strong presumption of state ownership," and ensures that the public has access to navigable waters. *Idaho v. Coeur D'Alene Tribe*, 521 U.S. 261, 284 (1997). This recognition of public interest and rights in waters of the state has led title to be divided into *jus privatum* (private legal title to submerged land) and *jus publicum* (the interest to public access and use of navigable waters). *Id.* However, the *jus publicum* is superior to *jus privatum* because it is "tied in a unique way to sovereignty." *Id.* at 286. To protect *jus publicum*, the public trust doctrine makes New Union trustee of the lands under navigable waters for the public's "benefit and enjoyment . . . subject to reasonable legislative regulation, for navigation, fishing and commerce." *State ex rel. Rohrer v. Credle*, 369 S.E.2d 825, 828 (N.C. 1988).

Here, New Union holds the River in trust because it is a navigable water body. The test for navigability is whether the water body is navigable-in-fact, or in other words, "susceptible of being used, in [its] ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." *Daniel Ball*, 77 U.S. 557, 563 (1870). Here, the "[R]iver is navigable . . . both upstream and downstream of the Queechunk Canal." R. at 5. Therefore, the River can be used for commerce and travel rendering

it a navigable water body, and is held in public trust because New Union has owned the lands under the River since it became a state. R. at 5; *Daniel Ball*, 77 U.S. at 563.

B. The Canal is subject to the public trust doctrine because it is a navigable water.

The Canal is subject to the public trust doctrine notwithstanding it being constructed with private funds because it is a navigable water. Under the public trust doctrine, New Union, is trustee of all navigable waters within its borders. *Fish House, Inc.*, 693 S.E.2d 208, 210 (N.C. Ct. App. 2010). Navigable waters include water bodies "susceptible of being used" for trade or travel. *Daniel Ball*, 77 U.S. at 563. Here, water from the River continuously flows through the Canal, and members of the public frequently navigate it as a shortcut. R. at 5. Thus, the Canal is a navigable water subject to the public trust doctrine because it is used for travel. *Daniel Ball*, 77 U.S. at 563; *Fish House, Inc.*, 693 S.E.2d at 210.

In *Fish House, Inc.*, a canal bordered the parties' property. 693 S.E.2d at 210. The plaintiff filed a trespass action to enjoin the defendant from using the canal. *Id.* The court concluded that "the public ha[s] the right to [] unobstructed navigation as a public highway for all purposes of pleasure or profit, of all watercourses . . . *in their natural condition* capable of such use." *Id.* at 211 (quoting *Bauman v. Woodlake Partners, LLC*, 681 S.E.2d 819, 824 (N.C. Ct. App. 2009) (alteration in original). The court further concluded that "any waterway, whether man[-]made or artificial, which is capable of navigation by watercraft constitutes [a] 'navigable water' under the public trust doctrine." *Id*. at 212. In *Fish House, Inc.*, the canal was navigated by "members of the public . . . for commercial purposes." *Id.* Similarly, here, members of the public customarily navigate their boats on the Canal as a shortcut up and down the River. R. at 5. Therefore, the Canal is a navigable water subject to the public trust doctrine.

Moon Moo Farm may argue that *Kaiser Aetna v. United States* applies because the United States Supreme Court held that the plaintiffs could deny the public access to its marina; however unlike the case at bar, the public did not have a history accessing the pond. 444 U.S. 164, 179–80 (1979). The plaintiffs converted a private pond into a marina and connected it to an ocean bay. *Id.* at 167. The marina was surrounded by "approximately 1,500 . . . waterfront lot lessees [who] . . . pa[id] fees for maintenance of the pond and for patrol boats that remove[d] floating debris, enforce[d] boating regulations, and maintain[ed] the privacy and security of the pond." *Id.* at 167–68. The Court reasoned that because the pond had always been considered to be private property under Hawaiian law, the plaintiffs had a right to exclude others from using it. *Id.* at 179–80.

Nevertheless, *Kaiser Aetna,* is inapplicable here because the Court concluded that the pond had always been considered to be private property under Hawaiian law and, as a result, was distributed to private owners under the Hawaiian Feudal system in 1848. *Id.* Here, the Canal was not characterized as private property by a government entity and awarded to a private owner. R. at 5. The Canal was excavated on private land, and water owned by New Union flowed from the River into the bed of the Canal. R. at 5. Furthermore, the Canal should not be characterized as a private waterway because unlike the pond in *Kaiser Aetna*, the public has "commonly" used the Canal to access the River, and unlike where the pond was patrolled in *Kaiser Aetna*, Moon Moo Farm does not have a history of excluding others from the Canal. R. at 5.

Next, Moon Moo Farm may argue that this case is like *Vaughn v. Vermilion Corp.*, 444 U.S. 206, 208–09 (1979). In *Vaughn,* the United States Supreme Court held that a navigable water built on private property with private funds and connected to other navigable waterways, did not create a general right of use in the public; however, unlike Moon Moo Farm, Vermilion

Corp. zealously excluded others from its canal rendering the case at bar distinguishable. *Id.* In *Vaughn*, man-made canals were "constructed with private funds." *Id.* at 207. The respondent subleased portions of the land contiguous to the canals "to [sportsmen] and the right to use the canals [was] a part of the sublease agreement." *Id*. To regulate "access to the land and the canals, over 400 'No Trespassing' signs [were] posted in various locations." *Id.* Respondent also "employ[ed] people to supervise activities in the canals and on the land," and excluded "strangers from entering and using the property." *Id.* The petitioners argued that they have a right "to enter the property, travel the canals, and engage in commercial fishing and shrimping activities." *Id.* at 207–08.

Nevertheless, this case is distinguishable because, while, in *Vaughn*, Respondent placed over 400 "No Trespassing" signs around the canal, employed people to supervise activities in the canals, and had a history of denying access to strangers, here, there is a custom of travelers accessing the Canal, and aside from the presence of a few "No Trespass" signs, there is no indication that Moon Moo Farm has done anything to actively exclude the public from the Canal. *Id*. at 207; R. at 5. Therefore, the Court's reasoning in *Vaughn* should not be applied here because the public customarily uses the Canal. R. at 6.

II. If the Canal is not a public trust navigable water, the evidence obtained through trespass is admissible in a civil proceeding because applying the exclusionary rule would not deter government wrongdoing.

The evidence obtained by Mr. James should be admitted because Mr. James is not a government officer thereby rendering the exclusionary rule inapplicable. *Honeycutt v. Aetna Ins. Co.*, 510 F.2d 340, 349 (7th Cir. 1975). Mr. James is not an agent of the government because he obtained the evidence under his own free will. *Coolidge v. N.H.*, 403 U.S. 443, 487 (1971). Furthermore, even if Mr. James was a government agent, the societal cost of applying the

exclusionary rule outweighs the deterrent effect of government wrongdoing. *United States v. Janis*, 428 U.S. 433, 443–44 (1976).

A. The evidence obtained by Mr. James is admissible because it was not unlawfully obtained by a government officer.

Even if the Canal is not a public trust navigable water, the evidence obtained through trespass, and without a warrant, is admissible in a civil enforcement proceeding brought under the CWA because the exclusionary rule only applies when government officials offend the requirements of the Fourth Amendment. "It has long been settled that the Fourth Amendment protection against unlawful searches and seizures applies only to governmental action. We have found no other rule, constitutional, statutory or judicial, which would compel the rejection of logically relevant evidence obtained by a private person through an unauthorized search and seizure." *Honeycutt*, 510 F.2d at 349. In *Honeycutt*, Aetna and a photographer entered Honeycutt's property, without permission, to investigate the cause of a fire to Honeycutt's house. *Id*. The Court held that exclusionary rule did not apply because there was no Fourth Amendment violation. *Id.* Similarly, here, the government did not commit the trespass. R. at 5. Because Riverwatcher is not a government entity, there is no Fourth Amendment violation and the exclusionary rule does not apply. R. at 6.

In *Coolidge* the defendant's wife gave the defendant's guns and clothing to the police after being asked for them at their home. 403 U.S. at 487. The Court stated that "[h]ad Mrs. Coolidge, wholly on her own initiative, sought out her husband's guns and clothing and then taken them to the police station . . . there can be no doubt under existing law that the articles would later have been admissible in evidence." *Id.* Because Mr. James acted of his own free will and took samples of the Canal water the evidence is admissible. *Id.*; R. at 5. Therefore,

even if Mr. James is considered an agent of the government the exclusionary rule does not apply because Mr. James was acting of his own free will. *Coolidge*, 403 U.S. at 487; R. at 5.

Furthermore, even if Riverwatcher obtained the evidence on behalf of a government agency it would still be admissible in civil proceedings. In *NutraSweet Co. v. X-L Eng'g Corp.*, Plaintiff tested soil on a part of its property that bordered Defendant's property. 227 F.3d 776, 780 (7th Cir. 2000). Test results revealed high levels of hazardous volatile organic compounds. *Id.* Subsequently, Plaintiff contacted the Illinois Environmental Protection Agency and the Illinois State Police, both of whom conducted investigations, including "sampl[ing] . . .wastewater." *Id*. In district court, Defendants "move[d] . . . to suppress . . . evidence . . . [and] argue[d] that the investigators never obtained a warrant to enter upon their land, thus violat[ing] their Fourth Amendment rights." *NutraSweet Co. v. X-L Eng'g Corp.*, 926 F. Supp. 767, 769 (N.D. Ill. 1996). The district court found that the Seventh Circuit had already rejected Defendant's argument when it held that the Constitution "d[oes] not require in civil cases that the exclusionary rule be extended to [circumstances] where private parties seek to introduce evidence obtained through unauthorized searches made by state officials." *Id.* Subsequently, the court found that evidence is not subject to the exclusionary rule even when initially obtained by the state, and the suppression motion was denied. *Id*.

Here, as in *NutraSweet*, Riverwatcher sought to admit, in a civil action, evidence obtained from an unauthorized search. R. at 9. However, the evidence against Moon Moo Farm was not obtained by a government entity, and, therefore, applying the exclusionary rule here would be illogical because the purpose of the rule is to deter government from illegal conduct and would allow Moon Moo Farm's practice of polluting the river to go unchecked. R. at 6; *United States v. Calandra*, 414 U.S. 338, 354 (1974).

B. Alternatively, the evidence is admissible because the societal cost of applying the exclusionary rule outweighs the deterrent effect of government wrongdoing, in this case.

If this Court concludes that Riverwatcher was acting as an agent of a government officer, then the evidence should still be admissible because the societal cost of applying the exclusionary rule outweighs its deterrent effect of government wrongdoing. *Janis*, 428 U.S. at 454. To determine whether the exclusionary rule applies in a civil case, the court must "weigh the cost to society of extending the [exclusionary] rule" against its deterrence of government wrongdoing. *Id.* In *Janis*, a magistrate issued a warrant based on unreliable information to determine whether the defendant violated local gambling laws. *Id.* at 434. The defendant subsequently sued the government for refusing to return money seized as a result of the illegal search and moved to suppress the evidence obtained from the search. *Id.* at 438. The Court applied the exclusionary rule and determined that the "exclusion from federal civil proceedings of evidence unlawfully seized by a state criminal enforcement officer ha[d] not been shown to have a sufficient likelihood of deterring the conduct of the state police so that it outweigh[ed] the societal costs imposed by the exclusion," and, subsequently, the Court declined to extend the rule. *Id*. at 454.

Here, the cost of expanding the exclusionary rule outweighs the nonexistent deterrence of unlawful searches because it was not the government who collected evidence against Moon Moo Farm, and, therefore, that evidence should not be excluded for the purposes of this federal civil proceeding. R. at 6; *Janis*, 428 U.S. at 454. Furthermore, the societal cost is substantial because the discharge of MAWM has already forced the community to resort to bottled drinking water and may be hazardous to infants less than two years old. R. at 6.

Similarly, in *Waco v. Bridges*, the defendant and another teenager dug up an ice chest containing approximately $500,000 in cash on a ranch owned by a third party. 710 F.2d 220, 223 (5th Cir. 1983). While trying to run away with the money, police stopped the defendants and confiscated the money after an illegal search. *Id.* Litigation ensued to determine whom the money belonged to, and whether the IRS was entitled to a share of the money. *Id.* at 223–24. An interpleader filed an amended complaint to join as a defendant. *Id.* at 224–25. The court held that to apply the exclusionary rule, "the deterrent benefit of the exclusion must outweigh the detriment to the public interest." *Id.* at 225. The court reasoned that the governmental entity responsible for the illegal search, the Interpleader, would in no way be deterred since they "ma[d]e no claim to the money and except for their role in bringing th[e] interpleader action, [we]re not a party to it," which rendered the exclusionary rule inapplicable. *Id.*

While, like the interpleader in *Bridges*, Riverwatcher was responsible for the illegal search, applying the exclusionary rule here would not have a significant deterrent effect because, considering the fact that Riverwatcher is not a government agency, it would not dissuade future government wrongdoing. *Id.*; R. at 6. Thus, the evidence should not be subject to the exclusionary rule.

Moon Moo Farm may argue that the exclusionary rule applies to civil cases; however, the rule does not apply here because the purpose of Riverwatcher's claim is to bring Moon Moo Farm in compliance with the provisions of the CWA, not to punish it for past violations. In *I.N.S. v. Lopez-Mendoza*, Justice O'Connor, writing for the majority, stated that "[a]pplying the exclusionary rule in [civil] proceedings that are intended not to punish past transgressions but to prevent their continuance or renewal would require the courts to close their eyes to ongoing violations of the law." 468 U.S. 1032, 1046 (1984). Riverwatcher's objective is not to punish

past transgressions but to protect the River from present and future harm caused by Moon Moo Farm by requiring Moon Moo Farm to acquire a NPDES permit in order to prevent "ongoing" discharges of MAWM into the River. *Id.*; R. at 2.

The *Smith Steel Casting Co. v. Brock* court based its analysis on Justice O'Connor's analysis in *Lopez-Mendoza*. 800 F.2d 1329, 1334 (5th Cir. 1986). In *Smith Steel Casting Co.*, an "OSHA compliance officer . . . conducted a general inspection of Smith's plant and noted potential hazards to the health of some Smith employees." *Id.* at 1331. The next day an "industrial hygienist" hired by OSHA was denied access to Smith resulting in the Secretary of Labor applying for an "ex parte warrant to inspect and test Smith's plant." *Id.* The Secretary inspected Plaintiff's facility and issued citations for violations. *Id.* Plaintiff appealed and an administrative law judge found the warrant invalid. *Id.* The *Smith Steel Casting Co.* court concluded that the exclusionary rule "does not extend to [civil] proceedings conducted for the purpose of correcting violations of [administrative regulations]. The rule is applicable, however, where the object of the proceeding is to punish the employer for past violations of [administrative] regulations . . . ." *Id.* at 1331. Here, the exclusionary rule does not apply because Riverwatcher's general goal is to protect the River by requiring Moon Moo Farm to be subject to NPDES permitting in order to prevent present and future harm to the River. R. at 2.

III. Moon Moo Farm is subject to CWA permitting requirements because it is a CAFO; pollutants discharge from point sources under its control; it does not follow best management practice; and, because its NMP is invalid, Moon Moo Farm cannot claim the agricultural stormwater exemption.

The purpose of the CWA is to eliminate the "discharge of all pollutants into the navigable waters." 33 U.S.C. § 1251(a)(1). Although Congress exempts agricultural stormwater from permitting, because it did not define the term, "best management practices," outlined in EPA regulations must be adhered to by all landspreading operations to achieve the CWA's purpose.

Lois Alt v. United States EPA, 979 F. Supp. 2d 701, 708 (N.D. W.Va. 2013); *see generally* Terence J. Centner, *Nutrient Pollution From Land Application of Manure: Discerning a Remedy for Pollution*, 21 STAN. L. & POL'Y R. 213, 219 (2010) (explaining that the EPA landspreading regulations applicable to CAFOs are instructive to all landspreading operations). Moon Moo Farm, as a CAFO, is subject to NPDES permitting because it does not comport with best practices, such as setback requirements, and any discharge cannot be considered agricultural stormwater. *See infra* § 3A. In the alternative, if it is not a CAFO, Moon Moo Farm is subject to permitting because pollutants are discharged through the ditch and tank trailers, themselves point sources, into the Canal, a navigable water. R. at 5. Additionally, Moon Moo Farm's nutrient management plan is defective because it was not subject to public comment or any meaningful state review and thus the plan does not insulate the discharge from permitting. *Sierra Club Mackinac Chapter v. Dep't of Envtl. Quality*, 747 N.W.2d 321, 327 (Mich. Ct. App. 2008).

A. Because Moon Moo Farm is a CAFO, pollutants discharge into navigable waters from point sources on its property, and it does not follow best management practices, it is subject to NPDES permitting under the CWA.

Moon Moo Farm is subject to NPDES permitting because, as a CAFO, it is a point source that discharges pollutants into the waters of the United States. 33 U.S.C. § 1342(14). A point source is "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel . . . concentrated animal feeding operation . . . from which pollutants are or may be discharged . . . [but] does not include agricultural stormwater discharges." *Id.* Moon Moo Farm is a point source because it is a CAFO. In order to be a medium CAFO Moon Moo Farm must satisfy three elements: first, it must be an animal feeding operation ("AFO"); second, it must have between "200 and 699 mature dairy cows, whether milked or dry;" and, third, "[p]ollutants [must be] discharged into waters of the United States through a man-made ditch."

40 C.F.R. § 122.23(b)(6). Because Moon Moo Farm satisfies each of these elements, it is a CAFO, subject to NPDES permitting requirements for any discharge pursuant to the CWA.

1. Moon Moo Farm is a CAFO subject to NPDES permitting.

Moon Moo Farm is a CAFO because it is an AFO that houses 350 cows in its barn. An AFO is defined as "a lot or facility . . . where . . . [a]nimals . . . are . . . stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period, and . . . [c]rops . . . are not sustained in the normal growing season over any portion of the lot or facility." 40 C.F.R. § 122.23(b)(1). In order to be a CAFO, the facility must have between "200 and 699 mature dairy cows, whether milked or dry." 40 C.F.R. § 122.23(b)(6)(i)(A). Moon Moo Farm is regulated as an AFO. R. at 5. The District Court found that Moon Moo Farm is an AFO, and the designation has not been challenged. R. at 8. Therefore, Moon Moo Farm meets the first two requirements of the CAFO definition because it is an AFO that keeps 350 cows in its barn. 40 C.F.R. §122.23(b)(6).

Finally, Moon Moo Farm is a medium CAFO because "[p]ollutants are discharged into waters of the United States through a man-made ditch." 40 C.F.R. § 122.23(b)(6)(ii)(A). The "discharge of a pollutant" is defined by statute as "any addition of any pollutant to navigable waters from any point source."[2] 33 U.S.C. § 1362(12). A "point source" includes a ditch. 33 U.S.C. § 1362(14). Ditches are "made by digging," thus by implication, the Moon Moo Farm ditch is man-made. WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 536 (3d 1983). Mr. James witnessed brown water, which was tested and found to contain high concentrations of pollutants, flowing from Moon Moo Farm's Bermuda grass fields, through the ditch on Moon Moo Farm's property, into the Canal, which is, itself, a navigable water. R. at 6; *See supra* §

[2] The CWA defines "navigable water" as "the waters of the United States." 33 U.S.C. § 1362(7).

I(B). Because pollutants are discharged from Moon Moo Farm's property through a ditch into a navigable water, Moon Moo Farm is a CAFO subject to NPDES permitting under the CWA.[3]

2. Moon Moo Farm must have a permit to discharge because the ditch, and the tractor and tank trailer are themselves point sources.

If Moon Moo Farm is not a CAFO, because, as a corporation, it is a "person" under the CWA, it is prohibited from discharging pollutants from a point source without a permit. 33 U.S.C. § 1311(a); 33 U.S.C. § 1362(5) (defining a person to include a corporation). Both the ditch and the tank trailer and tractor are point sources subject to permitting under the CWA. "[T]he definition of a point source is to be broadly interpreted." *Concerned Area Residents for the Env't v. Southview Farm*, 34 F.3d 114, 118 (2d Cir. 1994). The definition of a point source specifically includes a ditch. 33 U.S.C. § 1362(14). In *Southview Farm*, the discharge of liquid manure via a swale and pipe that led to a ditch that flowed into navigable waters, was a point source. 34 F.3d at 118. *Southview Farm* held that, in the alternative the "manure spreading vehicles themselves were point sources . . . [because] the manure directly flow[ed] into navigable waters." *Id*. Because Moon Moo Farm controls the discharge of MAWM from a tanker, itself a point source, which flows directly into the ditch, Moon Moo Farm is subject to NPDES permitting.

3. The agricultural stormwater exemption does not apply because Moon Moo Farm does not follow best management practices.

Moon Moo Farm contends that it is exempt from NPDES permitting because the discharge from the ditch is agricultural stormwater runoff; however, the agricultural exemption is inapplicable because Moon Moo Farm failed to conform to best management practices

[3] As a point source, a CAFO is liable for any discharge from its land regardless of how the discharge occurs, including when nutrients from the MAWM leach into groundwater and flow into the River as a result of over- application during Moon Moo Farm's landspreading operation. *Waterkeeper Alliance, Inc. v. United States EPA*, 399 F.3d 486, 510 (2d Cir. 2005); R. at 6.

("BMPs"). BMPs prohibit Moon Moo Farm from applying manure "closer than 100 feet to any downgradient surface waters . . . or other conduits to surface waters." 40 C.F.R. § 412.4(c)(5). Moon Moo Farm spreads MAWM on all of its 150 acres of fields, which are "located at the bend in the course of the Deep Quod River." R. at 5. *A fortiori*, there is no buffer between the ditch, Canal, or the River and the spreading of MAWM. By spreading MAWM on all 150 acres of its fields, Moon Moo Farm is not in compliance with "setback requirements" found in 40 C.F.R. § 412.4(c)(5).

A discharge resulting from a CAFO "not in compliance with [nutrient management] practices . . . would be an unpermitted discharge in violation of the CWA." *Lois Alt*, 979 F. Supp. 2d at 708. Although Moon Moo Farm contends that the discharge would not have occurred but-for the precipitation, the practice of applying MAWM at the water's edge ensures that a discharge will occur regardless of precipitation. Centner, *supra* at 221 n.71. In a similar landspreading operation, the proximity of a drain to the spray fields, together with other factors, such as the "likelihood of the misapplication or overapplication of animal wastewaters," was sufficient to subject the defendant to CWA jurisdiction. *Community Ass'n for Restoration of the Env't v. Henry Bosma Dairy*, 65 F. Supp. 2d 1129, 1152 (E.D. Wash. 1999). In *Henry Bosma Dairy*, the dairy operation was required to obtain an NPDES permit because its spreading operation was adjacent to a drain which flowed into navigable waters. *Id*. at 1148, 1152. Similarly, the application of MAWM so close to a ditch that empties into the Canal, subjects Moon Moo Farm to NPDES permitting. Additionally, spreading manure without setbacks from the ditch, Canal, *and* the River, cannot fall under the stormwater exemption because runoff from Moon Moo Farm will occur even in the absence of precipitation, thus the runoff cannot be classified as stormwater runoff. Centner *supra* at 219–20.

It is clear that spreading during a rain event does not automatically exempt any ensuing discharge because the runoff must be "caused by precipitation [to be] exempt." *Lois Alt*, 979 F. Supp. 2d at 712 (citing *Southview Farm*, 34 F.3d at 121). The *Lois Alt* Court held that no NPDES permit was required, in part, because the operation "implement[ed] management practices and procedures to reduce the amount of manure and litter that [was] exposed to precipitation." *Id*. at 704. Unlike *Lois Alt,* there is strong evidence that Moon Moo Farm's pollutants would be carried to the River regardless of precipitation because by spreading MAWM on all 150 acres of its fields, located at the bend in the River, it applied MAWM at the water's edge. *Id*. at 704; Centner *supra* at 221 n.71. Therefore, Moon Moo Farm's discharge was not the *result of* precipitation but was caused, at least in substantial part by application *sans* buffer zones.

If this case is upheld, Moon Moo Farm, and other CAFOs, will use rain as a smoke screen to freely dispose waste that it could not otherwise over-apply to its fields. Because Moon Moo Farm applies MAWM at the edge of waterways its discharge is not exempt as agricultural stormwater, and thus becomes subject to NPDES permitting.

B. Moon Moo Farm's NMP is invalid because it allows over- and misapplication of manure and acid whey mixture on its fields and because it was never subject to meaningful review or public comment.

Even if Moon Moo Farm is not a CAFO, it is still subject to NPDES permitting because the over- and misapplication warrant permitting because such applications give rise to the discharge. Additionally, the NMP is invalid because (1) there was no public comment on the plan and (2) there was no meaningful review of the plan by the New Union DOA. R. at 5.

Moon Moo Farm contends that the runoff that Mr. James observed was agricultural stormwater runoff exempt from NPDES permitting because the landspreading of MAWM was

done in compliance with the NMP; however, even if it is not a CAFO, the landspreading regulations are still applicable under the sufficiency for plant growth benchmark, and the nutrients applied and entering waters of the United States via the ditch are not agricultural stormwater runoff. 40 C.F.R. §122.42 (e)(1)(viii); Centner *supra* at 219.

The term "point source" specifically excludes any agricultural stormwater runoff but Congress has not defined this term. *Lois Alt*, 979 F. Supp. 2d at 707. According to *Lois Alt*, the correct interpretation of this statutory exemption is whether the "discharges were the result of precipitation." *Id*. As discussed above, discharges would occur regardless of precipitation because application of MAWM without an appropriate buffer zone ensures discharges. The *Lois Alt* Court noted that "a discharge of liquid manure would not be exempt just because it happened to be raining at the time, but a discharge of such manure *caused by* precipitation would be exempt." *Id*. at 712 (emphasis in original). In *Lois Alt*, the Court noted that the CAFO's manure "would remain in place and not become [a] discharge[] of a pollutant unless and until stormwater conveyed the particles to navigable waters." *Id*. at 714. The *Lois Alt* discharge simply would not have happened without precipitation. *Id*. The high concentrations of nitrates and fecal coliform suggests that Moon Moo Farm's MAWM ran off and picked up precipitation along its route, rather than the other way around. Since the runoff is not agricultural stormwater, Moon Moo Farm is subject to NPDES permitting by virtue of the ditch being a point source.

1. The NMP allows Moon Moo Farm to apply more nutrients than are required for plant growth, thus the NMP is invalid and a permit is required to discharge under the CWA.

In its manure spreading operations, Moon Moo Farm does not "ensure appropriate agriculture utilization of the nutrients in the manure." 40 C.F.R. § 122.23(e). Over- and misapplication lead to discharges of pollutants subjecting Moon Moo Farm to NPDES

permitting. *See, e.g.*, *Henry Bosma Dairy*, 65 F. Supp. 2d at 1155–56 (holding that even though the polluter had a valid NPDES permit, and an NMP, the discharger was in violation of the CWA because misapplication of wastewater caused an untested and uninvestigated discharge "spilling green-brown manure water"). Even if Moon Moo Farm is not a CAFO, the "federal CAFO regulations offer a standard for reasonable manure application: nutrient sufficiency for plant growth. Any deviation from the standard leading to discharges of nutrients into waters may be unreasonable" because the regulations create a "benchmark for determining what constitutes reasonable manure application practices." Centner *supra* at 219–20. By adding acid whey to its liquid manure *and* spreading the pollutant-cocktail during a rainstorm, Moon Moo Farm created a scenario in which the Bermuda grass crop could not "effectively tak[e] up the nutrients in the manure." R. at 6. Contamination results from over-application of manure to fields. Centner *supra* at 219. Here, nutrients are applied according to the NMP and because evidence has been adduced that these nutrients cannot be utilized, the NMP allows over-application and is not within reasonable agricultural standards for landspreading. R. at 6. Because nutrients are discharged into the Canal, regardless of precipitation, the agricultural stormwater exemption does not apply and Moon Moo Farm is subject to NPDES permitting.

While Moon Moo Farm may contend that the longstanding custom permits the addition of acid whey to its liquid manure, custom does not save a practice which adds pollutants to our nation's waterways because it would be contrary to the CWA's goal to eliminate water pollution. 33 U.S.C. §1251(a)(1). While this may be a traditional practice, the addition of acid whey creates conditions in which the nutrients cannot be completely absorbed. R. at 6. Although the custom of adding acid whey to manure predates the CWA, the Act should trump custom because Moon Moo Farm did not engage in the custom until 2012, and because "custom does not warrant

the continuation of abuses that the Act was created to rectify." *Tennessee C., I. & R. Co. v. Muscoda Local No. 123*, 135 F.2d 320, 322 (5th Cir. 1943), *aff'd*, 321 U.S. 590 (1944) (holding that custom cannot save what is statutorily prohibited). Custom cannot stand in the way of clean water.

Because Moon Moo Farm applies more manure in excess of what is necessary to sustain plant growth, its manure spreading operation necessarily discharges pollutants into waters of the United States and requires an NPDES permit.

2. Moon Moo Farm's discharges are subject to NPDES permitting because the NMP was not reviewed by the DOA and the public was not given the opportunity to comment.

Moon Moo Farm contends that compliance with an NMP allows it to avoid NPDES permitting; however, its NMP cannot shield it from liability because there was no public comment on the plan and because the State failed to review the NMP. Public participation in the NMP approval process is mandated by Congress. 33 U.S.C. § 1251(e); *Sierra Club Mackinac Chapter*, 747 N.W.2d at 327. New Union must meaningfully review Moon Moo Farm's NMP lest the outcome become a "self-regulatory regime" in which CAFOs would "determine and adopt application rates for disposal of waste." *Id*. at 327, 333. In *Sierra Club Mackinac Chapter*, the Court was confronted with a similar fact pattern: an NMP was not subjected to public hearings or meaningful review by the State of Michigan. 747 N.W.2d at 327–28. After submitting an "'executive summary' of its comprehensive [NMP]" to Michigan Department of Environmental Quality ("MDEQ"), certain dischargers were covered under an applicable general NPDES permit. *Id*. at 326. The Michigan NMPs were not reviewed, but could be reviewed by the MDEQ. *Id*. The public never had access to, and were unable to comment on the NMPs. *Id*. at 328. The *Sierra Club Mackinac Chapter* Court concluded that, while "it makes sense to

include CAFOs in the process of developing discharge rates and plans; the [CWA] requires the [State] to conduct a meaningful review of the comprehensive [NMP]." *Id*. at 333. "Michigan's CAFO permit program does not satisfy the requirements of the [CWA] because . . . it does not provide for the requisite public participation." *Id*. at 335. The State of New Union did not "conduct a meaningful review of the [NMP]" as required under the CWA. *Id*. at 333; R. at 5. An NMP issued without meaningful state review and without public participation cannot be used to relieve Moon Moo Farm from NPDES permitting. *See, e.g.*, *People v. Hacker*, 76 Misc. 2d 610, 612 (Suffolk County 5th Dist. 1973) (stating that an illegally issued permit creates no vested rights). Had this NMP been reviewed, the State of New Union would have inquired into application rates and procedures, implicitly forbidding application when the ground is oversaturated or frozen because application at such times would cause runoff of nutrients. *See Waterkeeper Alliance*, 399 F.3d at 510 n.25 (stating that application to saturated fields would cause runoff and subject the operation to permitting). Public participation in the NMP would likely have prompted the City of Farmville and Riverwatcher to make such suggestions to prevent discharges. *See Tex. Comm'n on Envtl. Quality v. City of Waco*, 413 S.W.3d 409 (Texas 2013) (detailing a city's efforts to protect its water source using public hearings and other tactics designed to reduce discharges made by upstream dairy farms). Since the NMP is faulty, any discharge purportedly resulting from agricultural stormwater is not exempt from permitting because Congress made clear that such plans are subject to public review. 33 U.S.C. § 1251(e). Therefore, if Moon Moo Farm is not itself a CAFO, it is still subject to NPDES permitting because its NMP is procedurally deficient and allows it to over-apply nutrients beyond the benchmark of sufficiency for plant growth.

IV. If Riverwatcher's CWA claim fails, there is a sufficient basis to allow its citizen suit against Moon Moo Farm under RCRA because the manure and acid whey mixture is a solid waste by virtue of groundwater contamination and runoff as a result of over-application to the fields, which has contributed to an increase of nitrates in Farmville's drinking water, constituting an imminent and substantial endangerment to infant health.

If Riverwatcher's CWA claim fails, then there is a sufficient basis to allow its citizen suit against Moon Moo Farm under RCRA. MAWM is not exempt from being a solid waste because it is not used as a fertilizer when it runs off the fields into the water *during* the spreading operation. R. at 6; *See Community Ass'n for Restoration of the Environment, Inc. v. D & A Dairy*, No. 13-CV-3018-TOR, 2013 WL 3188846, at *4 (E.D. Wash. June 21, 2013) ("it is . . . untenable that the over-application or leaking of manure that was initially intended to be used as fertilizer can *never* become 'discarded' merely because it is 'unintentionally' leaked or over-applied"). Additionally, MAWM "may constitute an imminent and substantial endangerment to human health" by contributing to the April 2013 nitrate advisory, and, despite the bottled water advisory, the nitrates may pose a "potential," "serious" harm to infants. R. at 6; *Burlington N. and Santa Fe Ry. Co. v. Grant*, 505 F.3d 1013, 1020–21 (10th Cir. 2007). Finally, Riverwatcher's claim should prevail because requiring Farmville families—the victims of nitrate contamination—to be responsible for the cost of bottled water while Moon Moo Farm continues to contribute to the contamination is contrary to public policy. *See United States v. Price*, 688 F.2d 204, 214 (3d Cir. 1982) (stating, "if a threat to human health can be averted only by providing individuals with an alternate water supply, that remedy . . . may be granted under the authority of section 7003"). For these reasons, the District Court's dismissal of Riverwatcher's RCRA claims should be reversed.

A. The manure and acid whey mixture is a solid waste because Moon Moo Farm disposes of it by storing it in the lagoon and then spreading it in excess of fertilization levels on the Bermuda grass fields.

MAWM is a solid waste, subject to regulation under RCRA, because Moon Moo Farm disposes of it by storing it in the lagoon and then spreading it in excess of fertilization levels on the Bermuda grass fields. In part, RCRA defines solid waste as "any garbage, refuse . . . and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from . . . agricultural operations . . . ." 42 U.S.C. § 6903(27). To be a solid waste, MAWM has to be "discarded." *Id*. RCRA does not define the term "discarded material"; however, in part, EPA regulation defines "discarded material" as "any material which is . . . [a]bandoned . . . ." 40 C.F.R. § 261.2(a)(ii). "Solid waste is defined very broadly." *Zands v. Nelson*, 779 F. Supp. 1254, 1262 (S.D. Cal. 1991). However, the definition "would not include materials that still are useful products." *Id*. There is "no blanket animal waste exemption [that] excludes animal waste from the 'solid waste' definition." *Waterkeeper Alliance, Inc. v. Smithfield Foods, Inc.*, Nos. 4:01-CV-27-H(3), 4:01-CV-30-H(3), 2001 U.S. Dist. LEXIS 21314, at *12 (E.D. N.C. 2001). Even though EPA regulation states, "[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(c)(1)), "[t]he question of whether [Moon Moo Farm] return[s] animal waste to the soil for fertilization purposes or instead appl[ies] waste in such large quantities that its usefulness as . . . fertilizer is eliminated is a question of fact." *Smithfield Foods, Inc.*, 2001 U.S. Dist. LEXIS 21314, at *13.

MAWM is solid waste because it was "abandoned by being . . . [d]isposed of," when Moon Moo Farm allowed it to enter the ditch during the spreading operation. R. at 6; 40 C.F.R. § 261.2(b). RCRA defines "disposal" as "the discharge, deposit, injection, dumping, spilling,

leaking, or placing of any solid waste . . . into or on any land or water so that such solid waste . . . may enter the environment or be emitted into the air or discharged into any waters, including ground waters." 42 U.S.C. § 6903(3).

In *Zands*, the court was asked to determine whether gasoline that leaked from an underground storage container constituted solid waste under RCRA. 779 F. Supp. at 1261. The defendants argued that the gasoline could not be a solid waste because it was a "useful product." *Id*. at 1262. While the court agreed that "the intention in placing the gasoline into the underground tank was that it would be subsequently taken out of the tank and sold," it concluded that "gasoline is no longer a useful product after it leaks into, and contaminates, the soil," because it "cannot be reused or recycled." *Id*. Subsequently, the court found that the "gasoline h[ad] been abandoned via the leakage (even if unintentional) into the soil," and held "that an exception is not created for gasoline simply because in some circumstances it is a useful product." *Id*. Here, Moon Moo Farm may store MAWM in the lagoon with the intent to use it as a fertilizer; however, like in *Zands*, not all of the MAWM is fulfilling that purpose because over-application caused it to enter the groundwater, and runoff into the ditch; and, the acidity of the MAWM prevented the crop from absorbing nutrients. R. at 6.

Similarly, in *D & A Dairy*, the plaintiff relied on *Zands* and claimed that the defendants "applied [the manure] to agricultural fields at above-agronomic levels . . . thereby causing high levels of nitrates in underground drinking water." 2013 WL 3188846, at *1. Defendants contended that the "manure [wa]s a useful byproduct that [wa]s transformed into compost, and applied to surrounding agricultural fields as fertilizer after being stored as liquid manure in lagoons." *Id*. at *3. Further, the defendants argued that "the manure [wa]s 'useful' as a

fertilizer, and [wa]s not transformed into 'solid waste' [because] it [wa]s over-applied or leaked as an unintended consequence of its intended use." *Id.* at *3.

The court concluded that, "it is plausible for manure to be 'solid waste' after it has ceased to be 'beneficial' or 'useful' when it is over-applied to the fields," because while there was an "express finding by Congress that '[a]gricultural wastes which are returned to the soil as fertilizers or soil conditioners are not considered discarded materials,'" the court reasoned that "it is equally untenable that the over-application . . . of manure that was initially intended to be used as fertilizer can *never* become 'discarded' merely because it is 'unintentionally' . . . over-applied." *Id.* at *4 (referencing *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1045–46 (9th Cir. 2004)). Consequently, the court found that the plaintiff provided evidence that "the [d]efendants over-applied and improperly applied manure to their fields . . . qualifying it as 'solid waste' under RCRA." *D & A Dairy*, 2013 WL 3188846, at *5. Here, like in *D & A Dairy*, the MAWM has not "served its intended purpose," because it was over-applied and runoff occurred. R. at 6. Consequently, this Court should conclude that MAWM is a solid waste subject to RCRA regulation.

Additionally, MAWM is a solid waste because the runoff did not occur as a "natural, expected consequence" of the landspreading process. *Ecological Rights Found. v. Pac. Gas & Elec. Co.*, 713 F.3d 502, 518 (9th Cir. 2013). In *Ecological Rights Found.*, the court held that "PCP-based wood preservative that [wa]s released into the environment as a natural, expected consequence of its intended use–as a preservative for wooden utility poles–is not automatically 'solid waste' under RCRA's definition of that term." *Id.* The "natural, expected consequence" of the preservative aging over time did not, itself, constitute "discarded" material, and thus, was not "solid waste." *Id.*

Here, the nitrates from the MAWM did not enter the environment as a "natural, expected consequence" of its "intended purpose" (to fertilize) but, instead, entered the environment because Moon Moo Farm actively over-applied MAWM which led to the occurrence of runoff *during* the landspreading process. R. at 6. Moon Moo Farm may intend to fertilize the crop and condition the soil; however, it spread MAWM in excess of an "agronomic" level, evidenced by the acidification of the soil, the addition of nitrates into Farmville's drinking water due to runoff, and the discoloration of the River. R. at 6; *D & A Dairy*, 2013 WL 3188846, at *1. Consequently, MAWM should qualify as a solid waste.

The *Safe Air* court's holding may inform Moon Moo Farm's argument; however, that court focused on the *benefits* of the open burning of bluegrass residue, (including prolonged longevity of the crop; restoration of "minerals and fertilizers to . . . fields"; and the significant decrease in pests), when it held that that material did not constitute a solid waste. 373 F.3d at 1043–44. The *Safe Air* court relied on the following factors when it determined whether the bluegrass residue was solid waste: "'(1) whether the material is 'destined for beneficial reuse or recycling in a continuous process by the generating industry itself' . . . (2) whether the materials are being actively reused, or whether they merely have the potential of being reused . . . [and] (3) whether the materials are reused by its original owner, as opposed to use by a salvager or reclaimer." *Id*. at 1043.

Here, Moon Moo Farm has not identified *any* benefit to the over-application of MAWM to its Bermuda grass fields. *See supra* Summary of Facts. Also, Moon Moo Farm neither entirely "generated" the MAWM, nor is the MAWM being used by the "original owner" because while Moon Moo Farm produced the manure, the acid whey is a byproduct of Chokos' Greek

yogurt production. R. at 5. Finally, the MAWM is not being "actively reused" because Moon Moo Farm's the landspreading operation caused it to runoff into the ditch. R. at 6.

Finally, the court's ruling in *Oklahoma v. Tyson Foods, Inc.*, that poultry litter was not a solid waste, may support Moon Moo Farm's argument; however, there, the plaintiff argued that the poultry litter was "'discarded' when a forage crop needs a nitrogen from poultry litter, but does not need the phosphorous contained in the litter." No. 05-CV-0329-GKF-PJC, 2010 WL 653032, at *10 (N.D. Okla. Feb. 17, 2010). The court ruled that just because one component of a product is not utilized does not mean that the entire product is "discarded." *Id*. Here, Riverwatcher asserts that the MAWM was discarded because it was over-applied to the field, not because one of its components (acid whey) did not fulfill the ascribed purpose (fertilization). R. at 6. Therefore, the dismissal of Riverwatcher's RCRA claim should be reversed because MAWM is a solid waste which Moon Moo Farm discarded when it was overspread and runoff occurred *during* the land-application process.

B. Nitrates released from the manure and acid whey mixture during Moon Moo Farm's spreading operation "may constitute an imminent and substantial endangerment to human health" because they enter Farmville's drinking water and are hazardous to infants.

Moon Moo Farm's spreading operation adds nitrates to Farmville's drinking water, which "may constitute an imminent and substantial endangerment to human health," because it is hazardous to infants. R. at 6; 42 U.S.C. § 6972(a)(1)(B). The District Court erred when it stated that Riverwatcher's claim could not be established because Moon Moo Farm was not the "but for" source of nitrates in Farmville's drinking water. R. at 11. It is not necessary for a defendant to be the *only* source of the contaminant to succeed on a RCRA claim. *See Oklahoma v. Tyson Foods Inc.*, 565 F.3d 769, 778–79 (10th Cir. 2009). Therefore, whether the nitrates pose a risk of harm remains a live issue in this case.

A person may succeed with a citizen suit under RCRA where that person can prove that the solid waste "may present an imminent and substantial endangerment to health or the environment." *Ecological Rights Found.*,713 F.3d at 514 (*citing* 42 U.S.C. § 6972(a)(1)(B); *Prisco v. A & D Carting Corp.*, 168 F.3d 593, 608 (2d Cir. 1999)).

1. When the nitrates from Moon Moo Farm's spreading operation enter Farmville's drinking water they may endanger human health because nitrates are hazardous to infants.

Moon Moo Farm's spreading operation has contributed to the high nitrate levels in Farmville's drinking water, and may endanger human health. Circuit courts have concluded that "the use of the word 'may' in RCRA [section] 7003 was intended to make the provision 'expansive' . . . [and that] 'Congress, by enacting section 7003, intended to confer upon courts the authority to grant affirmative equitable relief to the extent necessary to eliminate any risks posed by toxic waste." *Me. People's Alliance & Natural Res. Def. Council v. Mallinckrodt, Inc.*, 471 F.3d 277, 287 (1st Cir. 2006) (*quoting Price*, 688 F.2d at 213–14. Additionally, "the term 'endangerment' has been interpreted by courts to mean a threatened or potential harm; thus, it is *not necessary that [Riverwatcher] show proof of actual harm* to health or the environment." *Burlington N. & Santa Fe Ry. Co.*, 505 F.3d at 1020 (emphasis added).

Logic suggests that if, here, there was no risk of harm then a nitrate advisory, warning families to use bottled water to protect their babies, would not have been issued; therefore, the presence of the advisory and the purported use of bottled water, does not negate the fact that there is a risk of harm. R. at 6, 11. Contrary to the District Court's finding, the fact that Farmville families have been *advised* to use bottled water to feed their babies does not mean that there is no risk of harm. R. at 11; *Davies v. Nat'l Co-op. Refinery Ass'n*, 963 F. Supp. 990, 999 (D. Kan. 1997) (stating, "the court does not mean to suggest that an endangerment to health

cannot be considered imminent whenever the plaintiff has a means of avoiding the hazard"). Additionally, "if an error is made in applying the endangerment standard, the error must be in favor of protecting public health, welfare, and the environment." *Interfaith Cmty. Org. v. Honeywell Int'l., Inc*., 399 F.3d 248, 259 (3d Cir. 2005). Therefore, the district court erred when it concluded that there was no risk of harm because Farmville families were advised to use bottled water to protect their babies. R. at 11–12.

2. The risk of harm to Farmville's infant population is imminent and substantial because Moon Moo Farm's spreading operation is ongoing and nitrates are hazardous to infant health.

The endangerment to human health caused by the addition of nitrates into Farmville's drinking water from Moon Moo Farm is "imminent and substantial." 42 U.S.C. § 6972(a)(1)(B). "The term 'imminent' is not defined by RCRA but the Supreme Court has held that '[a]n endangerment can only be 'imminent' if it threatens to occur immediately . . . . Nonetheless, a finding of 'imminency' does not require a showing that actual harm will occur immediately as long as the risk of threatened harm is present." *Burlington N. & Santa Fe Ry. Co.,* 505 F.3d at 1020 (citing *Mehrig v. KFC W., Inc.*, 516 U.S. 479, 585 (1996)). A "reasonable prospect of future harm" is sufficient to support a citizen suit "so long as the threat is near-term and involves potentially serious harm." *Me. People's Alliance,* 471 F.3d at 296. Finally, in order for an endangerment to be substantial, it must be "serious." *Parker v. Scrap Metal Processors,* 386 F.3d 993, 1015 (11th Cir. 2004) (referencing *Price*, 688 F.2d at 213–14). "[A]n endangerment is substantial where 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." *Burlington N. & Santa Fe Ry Co.*, 505 F.3d at 1021 (emphasis added).

The *Me. People's Alliance* court held that "there may be an imminent and substantial endangerment" when it considered the following facts: first, that the defendant had "deposited tons of mercury-laden waste into the . . . [r]iver"; second, the plaintiff's expert witness "opined that there might be a serious endangerment to both human health and the environment resulting from mercury contamination in the [river]"; and third, evidence showed that the methylmercury at issue was "a highly toxic substance which, even in low dosages, is inimical to human health; for example, it 'attacks the nervous system, the kidneys, the immune system, and the reproductive system' and is especially damaging to a developing fetus." 471 F.3d at 280–82. Here, Moon Moo Farm "deposited" nitrates into Farmville's drinking water when it allowed the manure mixture to runoff its fields while it conducted its spreading operation; and, furthermore, the nitrate advisory warns Farmville families to only feed their babies with bottled water because nitrates are known to be hazardous to infants. R. at 6; *Me. People's Alliance*, 471 F.3d at 280. Like in *Me. People's Alliance*, where the methylmercury was highly damaging to vital organ systems in the body, here, nitrates can cause "chronic health effects, specifically because nitrate compounds cause human infants to develop methemoglobinemia, a condition that prevents proper transportation throughout the body of oxygen via red blood cells and causes damage to vital organs," and the effects were characterized as "'severe or irreversible.'" *Fertilizer Inst. v. Browner*, 163 F.3d 774, 776 (3d Cir. 1998) (referencing 42 U.S.C. § 11023(d)(2)(B)).

Similarly, the *Parker* court found that the "defendants' past handling, storage, and disposal of hazardous wastes may have presented an imminent and substantial endangerment to the environment," and human health. 386 F.3d at 1015. To inform its holding, the court considered the following evidence: hazardous waste "leak[ed]" from "drums onto the ground," "materials found on the . . . facility were explosive, and . . . they could affect the central nervous

system and cause problems in the upper respiratory system." *Id*. Here, MAWM from Moon Moo Farm contributed to the nitrate levels in Farmville's drinking water when it leached into the groundwater and when there was runoff through the ditch, and the nitrates are hazardous to infants. R. at 6. Therefore, like in *Parker*, Moon Moo Farm's landspreading practices may cause an imminent and substantial endangerment to human health.

3. Riverwatcher's RCRA claim should prevail because it is contrary to public policy for Farmville families—the victims of nitrate contamination—to have to shoulder the cost of bottled water.

Riverwatcher's RCRA claim should prevail because requiring Farmville families—the victims of nitrate contamination—to take responsibility for the cost of bottled water is contrary to public policy. When it enacted section 7003, Congress intended to establish a strict liability standard so that "those who benefit financially from a commercial activity internalize the health and environmental costs of that activity into the costs of doing business," because otherwise it would "condone a system in which innocent victims bear the actual burden of releases, which those who . . . cause such damage benefit with relative impunity." S. Rep. No. 96-848, at 13 (1980). The *Davies* court stated that "[t]he fact that [the plaintiffs] must use bottled water instead of groundwater is undoubtedly an inconvenience and an economic burden, but it is the type of injury for which an action at law provides an adequate remedy," (963 F. Supp. at 999); however, RCRA allows for the cost of bottled water to shift from Farmville families—the victims of nitrate contamination—to Moon Moo Farm, who is a contributor to the contaminated water. *See Price*, 688 F.2d at 214 ("if a threat to human health can be averted only by providing individuals with an alternate water supply, that remedy . . . may be granted under the authority of section 7003"). Additionally, when it drafted the Act, Congress recognized the "difficult burden in seeking redress through the courts." S. Rep. No. 96-848, at 13.

Riverwatcher's RCRA claim should prevail because the nitrate advisory in Farmville recommends that families use bottled water to feed their babies, and those families should not have to shoulder the burden of paying for bottled water while Moon Moo Farm continues to contribute to the contamination. R. at 6. For the foregoing reasons, there is a genuine issue of material fact regarding whether nitrates originating from Moon Moo Farm's spreading operation may pose an imminent and substantial endangerment to human health and the District Court's grant of Moon Moo Farm's motion for summary judgment and the dismissal of Riverwatcher's RCRA claim should be reversed.

CONCLUSION

For the forgoing reasons, Riverwatcher respectfully requests that this Court reverse the District Court's grant of Moon Moo Farm's motion for summary judgment, including its counterclaim, and reverse the District Court's reward in damages to Moon Moo Farm. Further, Riverwatcher respectfully requests that this Court grant its motion for summary judgment regarding its CWA and RCRA claim.