C.A. No. 14-1248

D. Ct. No. CV 155-CV-2014

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

UNITED STATES OF AMERICA,
a political subdivision

Plaintiff-Appellant, and

DEEP QUOD RIVERWATCHER, INC., and DEAN JAMES,
a corporation and individual

Plaintiffs-Intervenors-Appellants

- v. -

MOON MOO FARM, INC.,
a corporation

Defendant-Appellee.

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

BRIEF OF APPELLANT, United States of America

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES **PAGE**

REGULATIONS **PAGE**

ADMINISTRATIVE MATERIALS **PAGE**

LEGISLATIVE HISTORY **PAGE**

Jurisdictional Statement

The case in controversy arises under the Clean Water Act ("CWA"), 33 U.S.C. § 1251 et. seq. (2004), and the Resource and Conservation Recovery Act ("RCRA") 42 U.S.C. § 6901 et. seq., both of which are federal statutes. Congress granted the federal courts statutory authority to hear federal question cases, which include questions that arise under federal statutes. 28 U.S.C. § 1331. This is an appeal from a final judgment of the District Court in a civil case. The District Court had jurisdiction pursuant to 28 U.S.C. §§1331 and 1355, and entered judgment on April 21, 2014. Appellant filed a timely notice of appeal.

Issues Presented for Review

Admissibility of Evidence

I. The Queechunk Canal passes through the Moon Moo Farm, diverting most of the Deep Quod River. Under the public navigation doctrine, is the Queechunk Canal a publicly navigable water of New Union?

II. If the Queechunk Canal is not a publicly navigable water, then James trespassed on Moon Moo Farm property when he collected evidence of the alleged CWA violations. Under the Fourth Amendment and the exclusionary rule, should James's evidence be admissible in a civil enforcement of CWA §§ 309(b), (d), and 505?

Clean Water Act

III. Moon Moo Farm discharged into a water of the United States which requires a NPDES permit unless an exemption applies. Under CWA § 502 does Moon Moo Farm's discharge constitute agricultural stormwater?

IV. Moon Moo Farm operates a dairy farm with 350 cattle. Under 40 C.F.R. § 122.23(b)(6), does Moon Moo Farms meet the requirements for a Medium Concentrated Animal Feed Operation?

Resource Conservation and Recovery Act

V. Moon Moo Farm fertilizes and conditions the soil of its 150 acres of fields using manure and acid whey. Moon Moo Farm's dairy herd provides the manure while the yogurt processing facility, which buys Moon Moo Farm's milk, provides the acid whey. Both materials are byproducts of each facility's primary operation. Under RCRA's definition of "solid waste," does Moon Moo Farm "discard" the materials used to benefit its fields?

VI. Moon Moo Farm's fertilizing and soil conditioning mixture was observed draining from its fields into a river that contributes to a nearby community's water supply. The drainage sample had a high nitrate level and around that same time a nitrate advisory for drinking water was issued. Under RCRA's citizen suit provision, may Moon Moo Farm be contributing to the imminent and substantial endangerment of health?

Statement of the Case

I. Procedural History

On April 12, 2014, a member of Plaintiff Deep Quod Riverwatcher ("Riverwatcher"), a non-profit organization, conducted an investigation of the Deep Quod River and Defendant Moon Moo Farm, and alleged violations by the farm under the CWA and RCRA. ER 6, 7. Under the citizen suit provisions of the CWA § 505 and RCRA § 7002, Riverwatcher properly served a letter of intent to sue on Moon Moo Farm, the New Union Department of Environmental Quality, and the Environmental Protection Agency ("EPA"). ER 7. Prior to the expiration of the waiting period notice under CWA § 505, the EPA began a civil enforcement action against Moon Moo Farm under the CWA §§ 309(b) and (d), seeking injunctive relief and civil penalties. ER 7. Following the ninety-day waiting period required under the RCRA citizen suit provision RCRA § 7002, Riverwatcher alleged violations by Moon Moo Farms under RCRA's prohibition against "open dumping of solid waste," RCRA § 4005. ER 10. The EPA did not join Riverwatcher in its RCRA claims. ER 10. Riverwatcher also intervened in the EPA's CWA claim as a plaintiff, pursuant to CWA § 505(b)(1)(B). ER 7. Moon Moo Farm answered the complaint and made a counterclaim against Riverwatcher and James for trespass. ER 12. Both sides moved for summary judgment. ER 7. The District Court ruled in favor of Defendant Moon Moo Farm on all counts. Plaintiffs EPA and Riverwatcher timely filed a Notice of Appeal with this Court.

II. Statement of the Facts

Moon Moo Farm

Moon Moo Farm operates a dairy farm in the State of New Union. ER 4. In addition to its 350 cows, the farming operation utilizes 150 acres of fields to grow Bermuda grass. ER 5. Once

harvested the grass is dried for silage. ER 5. The farm's milking herd supplies a substantial amount of milk to a Chokos Greek Yogurt processing facility in Farmville. ER 5. The manure and liquid waste from the cows is collected through a series of drains and pipes and deposited into an outdoor lagoon to be stored for use as fertilizer. ER 4-5. The lagoon was constructed to hold the manure without overflow even in rain events of five inches in a twenty-four hour period. ER 6. Since 2012, the farm has added acid whey from the yogurt plant to its lagoon. Moon Moo Farm applies the mixture of manure and acid whey to the Bermuda grass. ER 5. The manure mixture has a pH of 6.1 and its land application as a soil conditioner has been a traditional practice in New Union since the 1940s. ER 5, 6.

The farm is situated at a bend in the course of the Deep Quod River, which ultimately runs into the Mississippi River. ER 5. The river flows year round and provides drinking water to the City of Farmville, ten miles downstream from Moon Moo Farm. ER 4-5. The Deep Quod watershed is heavily farmed and periodic nitrate advisories have been issued in the past, with at least five advisories between 2002 and 2010. ER 7. In the late winter and early spring of 2013, the Farmville Water Authority ("FWA") issued another "nitrate" advisory for its drinking water customers. ER 6. Though it did not pose any health threats to adults, the FWA warned that high levels of nitrates in the Deep Quod River made the Farmville municipal water supply hazardous to infants less than two years old. ER 6. Customers were advised to give infants bottled water. ER 6.

Riverwatcher Collects Evidence of Discharge

In the same time period that the FWA issued its nitrate advisory, Plaintiff Deep Quod Riverwatcher ("Riverwatcher") received complaints that the Deep Quod River smelled of manure and was an unusually turbid brown color. ER 6. Between April 11 and 12, 2013, a significant

rain event resulted in two inches of rainfall in the Farmville area. On April 12, James, a member of Riverwatcher, responded to the complaints by making an investigatory patrol of the Deep Quod River in a small metal boat. ER 6. During his investigation, James entered the Queechunk Canal, which passes through Moon Moo Farm's property and is marked at the entrance by "No Trespassing" signs. ER 6.

A previous owner of the property excavated the canal in the 1940s to alleviate flooding at a bend in Deep Quod River, diverting most of the river's flow into the canal. ER 5. Though Moon Moo Farm owns the land on both sides of the canal, the canal is commonly used as a shortcut up and down the Deep Quod River. ER 5.

While in the canal, Riverwatcher observed and photographed Moon Moo Farm's manure-spreading operation on its Bermuda grass fields. ER 6. He also observed and photographed discolored brown water flowing from the fields through a drainage ditch into the canal. ER 6. Tests of the water flowing from the ditch showed highly elevated levels of nitrates and fecal coliforms. ER 6.

Regulatory Status of Moon Moo Farm

Moon Moo Farm does not hold a permit pursuant to the National Pollutant Discharge Elimination System ("NPDES") administered under CWA § 402. ER 5-6. Instead, Moon Moo Farm is regulated by the State of New Union as a "no-discharge" animal feeding operation. As a "no-discharge" operation, the farm submits a "Nutrient Management Plan" ("NMP") to the New Union Department of Agriculture ("DOA"). The NMP sets forth the farm's 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. ER 5. Though the New Union DOA has the authority to reject an NMP it finds insufficient, the New Union DOA does not ordinarily review

the NMPs that are submitted. ER 5. Nevertheless, 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. ER 6. Nothing in the NMP prevents the farm from applying manure during a rain event. ER 7.

Summary of the Argument

Evidentiary Issue

This Court should reverse the District Court's ruling that Queechunk Canal does not have a public navigation servitude. The Supreme Court held in *Vaughn v. Vermillion Corp.* that a canal that diverted or destroyed a naturally publicly navigable waterway may have acquired the waterway's public navigation servitude. The District Court, therefore, must first determine if the Queechunk Canal diverted or destroyed the public navigability of the Deep Quod River before ruling as a matter of law that the canal did not acquire the river's public navigation servitude. Since the District Court did not determine whether the Deep Quod River was diverted or destroyed by the Queechunk Canal, this Court should reverse the ruling and remanded for full consideration of that issue.

If this court finds that the District Court ruled properly about the Queechunk Canal's public navigation servitude, then James would have trespassed when he entered the canal to collect evidence. Even if James trespassed, however, this Court should reverse the District Court's ruling that the evidence James collected should be ruled inadmissible under the exclusionary rule. The exclusionary rule only applies to governmental action, and here, James acted as a private individual without sufficient connections to the EPA to make him an agent of the government. Even if this Court rules that James acted as an agent of the EPA, James trespassed under the assumption that he was a private individual and the good-faith exception to

the exclusionary rule applied to his actions. Therefore, the District Court erred in its ruling that the evidence James collected was inadmissible, and this Court should reverse the summary judgment and find the evidence admissible.

Clean Water Act

The Clean Water Act regulates discharge from point sources. The definition of point source excludes "agricultural stormwater" from its definition, thereby making agricultural stormwater exempt from CWA and NPDES liability. In order for a discharge to be classified as agricultural stormwater the discharge must have occurred during regular activities in compliance with a valid nutrient management plan (NMP) and have been caused by precipitation. The discharge at issue in this case occurred during Moon Moo Farms land application of manure. The land application was in compliance with its NMP and the discharge that resulted was caused by a substantial amount of rain. Therefore, the Court should uphold the District Court and find that the discharge is agricultural stormwater and Moon Moo Farms is not subject to NPDES liability.

Separate from the agricultural stormwater determination is the question of whether Moon Moo Farm is a Medium Concentrated Animal Feeding Operation ("CAFO"). In order to be a medium CAFO Moon Moo must have the statutorily required number of cattle, and discharge must occur through a manmade ditch. This Court should reverse the District Court and find that Moon Moo Farm meets the statutory requirements for a medium CAFO. While CAFOs are generally subject to NPDES liability, the discharge in question is exempt as agricultural stormwater.

The Clean Water Act regulated discharges from point sources. The definition of point source excludes "agricultural stormwater" from its definition, thereby making agricultural stormwater exempt from CWA and NPDES liability. In order for a discharge to be classified as

agricultural stormwater the discharge must occurred during activities in compliance with a valid nutrient management plan (NMP) and have been caused by precipitation. The discharge in question occurred while Moon Moo Farms applied manure to its fields in compliance with its NMP and because of a substantial amount of rain. Therefore, the discharge is agricultural stormwater and Moon Moo Farms is not subject to NPDES liability.

Resource Conservation and Recovery Act

Moon Moo Farm's land application of a manure and acid whey mixture does not constitute "open dumping" of "solid waste" in violation of RCRA § 4005. The mixture is not a "solid waste" because rather than disposing of the materials and contributing to the national "waste problem," Moon Moo Farm puts the material to beneficial use. In fact, the materials fertilize and condition the soil of the farm's 150-acre Bermuda grass fields. Furthermore, even if the material was considered a solid waste, the material is "agricultural waste" that is returned to the soil as fertilizer and soil condition, which is specifically exempt from open dumping regulations.

Though the EPA cannot regulate Moon Moo Farm's manure mixture for the reasons listed above, it should still have the authority to regulate the material to the extent that contributes to the imminent and substantial endangerment of health. Specifically, murky water was observed discharging off of Moon Moo Farm's fields. Tests of the water indicated that the water's nitrate level was elevated. Around that same time, Farmville, a community ten miles downriver from the farm was warned of dangerously high nitrate levels in their drinking water supply. Because the Farmville community's water supply is sourced from the same water that Moon Moo Farm's high-nitrate discharge leaked into, it is sufficiently established that Moon Moo Farm contributed to the imminent and substantial endangerment of the health of Farmville residents.

Standard of Review

A district court's summary judgments are reviewed *de novo*. *Northwest Environmental Advocates v. U.S. EPA*, 537 F.3d 1006, 1014 (9th Cir. 2008); *Northern Plains Resource Council v. Fidelity Exploration and Development Co.*, 325 F.3d 1155, 1160 (9th Cir. 2003).

Argument

I. THIS COURT SHOULD REVERSE THE DISTRICT COURT'S FINDING THAT JAMES WAS TRESPASSING BECAUSE THE QUEECHUNK CANAL WAS A PUBLICLY NAVIGABLE WATERWAY.

The District Court erred when it ruled that James trespassed onto Moon Moo Farm's land by entering the Queechunk Canal. The Queechunk Canal was dug at a bend in the Deep Quod River by a previous land owner of the Moon Moo Farm, and Moon Moo Farm currently owns the land on both sides of the canal. ER 5. The District Court asserted that the Supreme Court's decision in *Kaiser Aetna v. U.S.* applied here, and that a man-made canal remained private property even when it connected to a navigable water. ER 9. *See also Kaiser Aetna v. U.S.*, 444 U.S. 164, 179 (1979). However, the Queechunk Canal represents the exception found in *Kaiser Aetna*'s companion case, *Vaughn v. Vermillion Corp.*, 444 U.S. 206 (1979). In *Vermillion*, the Court held that where a man-made canal diverted or destroyed a naturally navigable-in-fact waterway, the court could not hold as a matter of law that the canal was not publicly navigable. *Vermillion*, 444 U.S. at 209. Here, the Deep Quod River is a naturally navigable-in-fact waterway with a public navigation servitude, and the Queechunk Canal assumes the Deep Quod's navigation servitude by diverting most of the river into the canal. ER 5. Therefore, this Court should reverse the District Court's holding, and find that James was traveling on a publicly navigable waterway and not trespassing.

A. The Deep Quod was navigable-in-fact at time of statehood, and therefore subject to a public navigation servitude.

The Deep Quod River is navigable by small boat in the stretch above and below Moon Moo Farm's land. ER 5. The river has at least enough flow in it to fill a 150-foot-wide canal up to four feet deep. ER 5. That flow makes it likely that the Deep Quod River is susceptible to commercial navigation, and therefore navigable-in-fact. When the Queechunk Canal diverted most of the river, it assumed the Deep Quod River's public navigation servitude.

The test of navigability used by the Supreme Court was stated in *The Daniel Ball*:

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their 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.

The Daniel Ball, 10 Wall. 557, 563 (1870). The Court clarified in later opinions that the mode of travel or the difficulty of travel did not matter, but only whether it was a fact that the waterway could be used for useful commerce. *U.S. v. Utah*, 283 U.S. 64, 76 (1931) (citing *The Montello*, 20 Wall. 430, 441-42 (1874); *U.S. v. Holt State Bank*, 270 U.S. 49, 56 (1925)). The Supreme Court looked at all the circumstances of use and susceptibility of use on a river, and determined whether a river is available for navigation. *U.S. v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407 (1940). This totality of the circumstances test is necessary for determining the susceptibility to commerce of a river, and must be applied here before the court can determine as matter of law if the Deep Quod River is not navigable-in-fact.

Here, the river has been used to float small boats and canoes. ER 5. Such use has been found to be acceptable in finding that a river is susceptible to use in commerce. In *The Montello*, the Supreme Court found evidence that the use of Durham boats (trading boats around 70 feet long and needing two feet of water to float when loaded) on a river showed a susceptibility of use in commerce. Here, the canal, which takes most of the water from the river, has a width of

150 feet and a depth of three-to-four feet. ER 5. In its natural state, then, the Deep Quod would have something close to that amount of water in it, and would be able to float something like a Durham boat. That makes it likely that the river was susceptible to use in commerce in its natural state, and therefore is navigable-in-fact.

B. Because the Queechunk Canal diverts most of the flow of the Deep Quod River, the canal acquires the river's public navigation servitude.

In *Vaughn v. Vermillion Corp.*, the companion case to *Kaiser Aetna*, the plaintiffs sought to keep the defendants out of their man-made canals through "No Trespassing" signs. *Vermillion Corp.*, 444 U.S. at 207. The canals connected to a navigable-in-fact waterway, and were themselves navigable-in-fact. *Id.* The defendants claimed the construction of the canals diverted or destroyed the publicly navigable waterway, and therefore, the canals could be used as substitutes for the destroyed waterway, acquiring the public navigation servitude. *Id.* The Supreme Court held that a court could not hold as a matter of law that a private waterway does not have a public navigation servitude. *Id.* The court reversed the summary judgment and remanded the matter to the lower courts to determine if the canal had in fact diverted or destroyed the publicly navigable waterway. *Id.* at 210.

Here, the record shows the Queechunk Canal diverts most of the flow of the Deep Quod River. ER 5. That alone should have prevented the District Court from finding a summary judgment. However, the District Court only cited the holding from Kaiser Aetna that no public navigation servitude is found in a man-made body of water. ER 9. In *Kaiser Aetna*, the court held that when a private landowner dredged a non-navigable pond to make it navigable, and then connected that pond to a naturally navigable-in-fact ocean bay, the land owner retained ownership of the pond and it is not publicly navigable. *Kaiser Aetna*, 444 U.S. at 178. However, it has been long recognized at common law in many states that a land owner may assume the

public navigation servitude of a natural waterway by diverting it into a private waterway. See *Dwinel v. Barnard*, 28 Me. 554 (1848) (finding that a land owner who diverted a river from its natural course so that it could not be used normally would authorize the public to use the private canal as if it were a public waterway).

Here, the District Court did not determine the effect of the canal on the Deep Quod River in order to arrive at its conclusion that the Queechunk Canal had not acquired a public navigation servitude. The Supreme Court's holding in *Vermillion Corp.*, however, requires that determination. Therefore, because Deep Quod River had a public navigation servitude, and the Queechunk Canal most likely assumed the public navigation servitude when it diverted most of the Deep Quod's flow, this court should reverse the District Court's decision and remand to the District Court for a full trial.

II. EVEN IF JAMES WAS TRESPASSING, THIS COURT SHOULD REVERSE THE DISTRICT COURT BECAUSE THE EXCLUSIONARY RULE DOES NOT APPLY TO EVIDENCE OBTAINED BY A PRIVATE INDIVIDUAL.

The District Court ruled that the Queechunk Canal had no public navigation servitude, and, therefore, James was trespassing when he obtained water samples and photographic evidence. The court then ruled that the Environmental Protection Agency's ("EPA") use of James's illegally-obtained evidence was inadmissible because it was subject to the exclusionary rule. The District Court ruled in error.

The exclusionary rule prohibits the admission of evidence obtained by government action if it violated a defendant's Fourth Amendment rights. *Elkins v. U.S.*, 364 U.S. 206, 209 (1960) (citing *Weeks v. U.S.*, 232 U.S. 383 (1914)). The purpose of the exclusionary rule is to deter government officials from violating the Fourth Amendment by removing any incentive, i.e. admission of evidence gathered in an unreasonable search or seizure. *Id.* at 217. However, the Supreme Court also has held that the exclusionary rule does not apply to evidence gathered

illegally by a private individual, reasoning that the Fourth Amendment only applies to unreasonable searches or seizures by the government. *Burdeau v. McDowell*, 256 U.S. 465, 476 (1921). Here, James collected evidence as a private individual, not an agent of the EPA, as the District Court assumed. Even if the EPA was required to obtain a warrant to gather evidence, James gathered the evidence on his own, and the exclusionary rule does not apply here. James's evidence, therefore, is admissible in this proceeding, and this Court should reverse the District Court's ruling.

The Supreme Court first applied the exclusionary rule to federal law enforcement officials in federal cases in *Weeks v. U.S.*, 232 U.S. 383 (1914). The Court then expanded the rule to apply to: state law enforcement obtaining evidence for federal criminal cases (*Elkins v. U.S.*, 364 U.S. 206 (1960); all state law enforcement in state criminal cases (*Mapp v. Ohio*, 367 U.S. 463 (1961); and quasi-criminal cases, i.e. civil cases that seek to penalize for the offense (*One 1958 Plymouth Sedan v. Com. of Pa.*, 380 U.S. 693 (1965)). However, the exclusionary rule has not been explicitly extended to all civil cases. In *U.S. v. Janis*, the Supreme Court declined to extend the exclusionary rule in a federal civil tax case, where state law enforcement collected evidence in violation of the Fourth Amendment. *U.S. v. Janis*, 428 U.S. 433, 454 (1976). The Court reasoned that the exclusionary rule applies only when it can be a deterrent, and state law enforcement would not be deterred by excluding the evidence from a federal civil trial. *Id.* Combined as a general rule, then, for an agency enforcing federal laws that entail significant civil penalties, the exclusionary rule applies where the government collects evidence in an unreasonable search or seizure.

The Supreme Court considered whether an agency's inspection is unreasonable in *Marshall v. Barlow's, Inc.* The Supreme Court held that the Fourth Amendment protected a

business from an unreasonable search by an Occupational Safety and Health Administration (OSHA) inspector without a warrant. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 325 (1978). The Court reasoned that, regardless of whether the motivation is regulatory enforcement or criminal investigation, the Fourth Amendment protected the privacy of individuals against arbitrary government entry, and the individual's privacy suffered when the government forced entry. *Id.* at 312-13 (citing *Camara v. Municipal Ct.*, 387 U.S. 523, 528 (1967)). The Court did not address the issue of whether the exclusionary rule would apply in civil regulatory cases. However, following the *Barlow's* decision, the EPA issued a guidance memo requiring its agents to obtain either permission or a warrant before entering premises for an inspection. *Memorandum from Assistant Administrator for Enforcement to Regional Administrators Re: Conduct of Inspections after the Barlow's Decision*, U.S. EPA (April 11, 1979) ("Barlow's Guidance Memo"). Because *Barlow's* likely extended the Fourth Amendment protections to inspections by the EPA, the exclusionary rule also likely applies to evidence obtained in an unreasonable search by the EPA. Here, however, EPA inspectors did not gather the evidence – James did – and the exclusionary rule does not extend to private individuals.

The Supreme Court has long held that the Fourth Amendment, and therefore, the exclusionary rule, only applies to evidence gathered by government agents, not private individuals. *Burdeau v. McDowell*, 256 U.S. 465, 473-74 (1921). In *Burdeau v. McDowell*, private detectives stole incriminating papers belonging to the defendant by blowing open his safe, and then handed those papers over to federal agents in a criminal matter against the defendant. *Id.* The Court held that, while the seizure was criminal, it was not an unreasonable search or seizure by the government, and therefore not subject to the Fourth Amendment or the

exclusionary rule. *Id.* at 475-76. Courts have consistently upheld *Burdeau*, and also have articulated the circumstances in which a private individual becomes the agent of the government.

For example, in *U.S. v. Miller*, a victim of theft went to the defendant's property at the request of law enforcement agents, looking for his trailer and its cargo. *Miller*, 688 F.2d 652, 655 (9th Cir. 1982). Then, acting on his own initiative, the victim pretended to be purchasing trailers, entered the property, and took photographs of his stolen trailer and its cargo, which he showed to law enforcement. *Id.* at 656. The Ninth Circuit held that the victim acted as a private individual, not a government agent, even though the government suggested that he go the property. *Id.* The Court determined "two critical factors" determined whether the victim was a government agent or private individual: 1) whether the government "knew of and acquiesced" in the search or seizure; and 2) whether the individual intended to help law enforcement, or conducted the search for his own ends. *Id.* at 657 (citing test from *United States v. Walther*, 652 F.2d 788 (9th Cir. 1981)). The Court found that the government acquiesced to the search, but that the victim acted to recover his property and not to assist law enforcement, and therefore the victim was not a government agent. *Id.*

Here, even more clearly than in Miller, James acted as a private individual, not a government agent. Unlike in *Miller*, nothing in the record here indicates that the EPA "knew of and acquiesced" to James's collection of evidence from the Moon Moo Farm property. Indeed, the EPA only became involved after James and Deep Quod Riverwatcher filed a letter of intent to sue under the citizen suit provisions of RCRA and CWA. ER 7. Therefore, the EPA did not acquiesce to the unlawful search. As to the second factor in the test from *Miller*, Deep Quod Riverwatcher and James acted to further their own ends. They are dedicated to protecting the Deep Quod River, and James sought the evidence as part of his organization's mission: to

prevent the contamination of the river. The use of James's evidence by the EPA does not make James an agent of the government. Rather, he is a private individual, and therefore his evidence cannot be excluded even if he gathered it during an unlawful trespass.

The District Court ruled that, in a civil case, the exclusionary rule applies, citing two cases involving OSHA inspections. ER 9. Both circuit court cases followed the Supreme Court's ruling in *Barlow's*, and held that the exclusionary rule applied to evidence obtained during OSHA inspections. The District Court erred, however, because both cases involved evidence gathered by government agents, whereas here, James acted as a private individual.

In *Smith Steel Casting Co. v. Brock*, OSHA inspectors gathered evidence using an invalid warrant in violation of the Fourth Amendment. *Smith Steel Casting Co. v. Brock*, 800 F.2d 1329, 1331 (5th Cir. 1986). The Court held that the exclusionary rule could be applied to evidence gathered during a federal regulatory inspection by a government agent, if that evidence could be used in assessing penalties. *Id.* at 1334. In *Trinity Industries, Inc. v. O.S.H.R.C.*, the other case relied upon by the District Court, the Sixth Circuit arrived at substantially the same conclusion based on substantially similar facts. *Trinity Industries, Inc. v. O.S.H.R.C.*, 16 F.3d 1455 (6th Cir. 1994) (holding the exclusionary rule applied to evidence obtained during an OSHA inspection using an invalid warrant, based on reasoning from *Smith Steel*). Thus, the exclusionary rule applies to evidence gathered in OSHA inspections, and the District Court applied the same reasoning to EPA inspections. As the *Barlow's* Guidance Memo shows, the EPA conducts its searches with due respect for Fourth Amendment protections. *Barlow's* Guidance Memo. However, while the exclusionary rule may apply to evidence gathered during EPA searches generally, several facts here distinguish this case from both Smith Steel and Trinity.

First, in *Smith Steel* and *Trinity*, government inspectors committed the violations, based on warrants they believed valid. Here, James acted independently, without the government's knowledge, or with the purpose of assisting the government. That fact alone, as discussed above, disallows the use of the exclusionary rule, under *Burdeau*. However, even if this Court found James a government agent, the rationale for applying the exclusionary rule under *Smith Steel* and *Trinity* would not apply here. In those cases, the courts applied the good-faith exception to the exclusionary rule in a civil case. *Smith Steel*, 800 F.2d at 1334; *Trinity*, 16 F.3d at 1462. The good-faith exception, articulated by the Supreme Court in *U.S. v. Leon*, exempts evidence where the officer acts on reasonable reliance that the action taken is lawful. *U.S. v. Leon*, 468 U.S. 897, 922 (1984). Here, James entered property assuming himself to be a private individual. While it is reasonably likely that he saw the trespassing signs at the entrance to the Queechunk Canal, it is also true that the canal is used frequently by other boaters. ER 5. Based on these facts, James, even if considered a government agent, likely thought himself within the law at the time of his evidence gathering, and therefore his evidence would fall under the good-faith exception to the exclusionary rule. At the very least, these are issues not made clear by the record, and would require a full hearing to be determined by the District Court.

The District Court erred when it ruled that the evidence gathered by James should be excluded. While it is likely the exclusionary rule would apply here if the EPA had collected the evidence, it does not apply to evidence gathered by James. He acted as a private individual, not a government agent, and the exclusionary rule enforces the Fourth Amendment protections against governmental agents only. Therefore, this Court should reverse the District Court's ruling, and find that the exclusionary rule should not apply to the evidence gathered here.

CLEAN WATER ACT

III. MOON MOO IS EXEMPT FROM NPDES PERMITTING LIABILITY, AS THE DISCHARGE IN QUESTION DID NOT COME FROM A POINT SOURCE UNDER THE CLEAN WATER ACT.

The central question before the Court, under the Clean Water Act ("CWA"), is whether the alleged discharge is subject to NPDES liability. The Court should uphold the District Court's decision and find that it is not, as the discharge is exempt from liability as an agricultural stormwater. ER 10, 33 U.S.C. § 1362(14). In addition to finding that NPDES liability is improper, this Court should reverse the District Court's decision and hold that Moon Moo Farm is a Medium Concentrated Animal Feeding Operation (CAFO). ER 10.

A. The Clean Water Act is Limited to Regulating Discharge from Point Sources

The CWA clearly states that "discharge of a pollutant" means the "addition of any pollutant to navigable waters from any point source." 33 U.S.C.A. § 1362(12). Therefore, the prohibition in section CWA § 301 and the requirement to obtain an NPDES permit pursuant to CWA § 402 applies only to discharges from a point source. *Alt v. U.S. E.P.A.*, 979 F.Supp.2d 701, 710 (N.D West V. 2013). Farms, such as Moon Moo, can be point sources and are generally subject to NPDES permit requirements for discharges into navigable waters. However, individual discharges may be exempt from NPDES permitting.

Agricultural stormwater is not a point source and therefore is exempt from NPDES permitting requirements. 40 C.F.R. 122.2. The agricultural stormwater exemption was added by the Water Quality Act of 1987. At the time, Congress mandated comprehensive regulations of certain forms of stormwater run-off under CWA § 402. Importantly, agriculture was not included in this new program. Agricultural stormwater run-off has always been considered nonpoint-source pollution which is exempt from the CWA. *Concerned Area Residents for Env't v. Southview Farm*, 34 F.3d 114, 120 (2d Cir. 1994); see 40 C.F.R. § 122.3(e). In 2003 EPA

expanded "agricultural stormwater" to include land application discharges. The Second Circuit upheld EPA's 2003 rule, and the NPDES exemption for land application discharge. *Waterkeeper Alliance Inc. v. E.P.A.*, 399 F.3d 486, 524 (2d Cir. 2005). EPA has in the past, and will in the future, assume that discharges from the vast majority of agricultural operations are exempted from the NPDES program by this provision of the CWA. United National Strategy for AFO, § 4.4 Land Application of Manure (1999).

For the following reasons, this Court should hold that Moon Moo Farm's land application discharge was agricultural stormwater runoff and therefore no NPDES permit was required for the discharge in question.

B. Moon Moo Farm's Land Application Discharge is Exempt from NPDES Permitting as Agricultural Stormwater Discharge.

Land application is a process by which manure, litter, and other process wastewaters are spread onto fields. *Waterkeeper Alliance*, 399 F.3d at 494. Moon Moo Farm's manure spreading operation is a land application. Land application discharges are considered agricultural stormwater, and thus exempt, where waste is applied in accordance with site-specific Nutrient Management Practices ("NMP") and any subsequent discharge is "precipitation-related." *Id.* at 496 (Citing 40 C.F.R. § 122.23(e); 33 U.S.C. § 1362(14)). Therefore, there are two requirements to utilize the exemption. 1) The land application must be in accordance with an NMP that ensures appropriate agricultural utilization and 2) any subsequent discharge must be precipitation related. *Southview Farm*, 34 F.3d at 120.

1. Moon Moo Farm's Manure Spreading is in Compliance with its NMP

Moon Moo Farm discharged in accordance with their site-specific NMP. ER 6. According to records, Moon Moo Farm has applied manure to its fields at rates consistent with the NMP filed with the Farmville Field Office. ER6. While it is not a practice that should be

encouraged, nothing in the NMP prevented Moon Moo Farm from land applying manure during rain events. ER 7. In addition, the discharge was the result of proper agricultural practices. United National Strategy for AFO, § 4.4 Land Application of Manure (1999). According to Dr. Emmet, the land application of whey is a longstanding practice in New Union. ER 6. Nothing in the facts of this case indicates Moon Moo Farm was in violation of their NMP.

While Moon Moo Farm followed all appropriate steps in obtaining and complying with its NMP, the State of New Union did not. ER 5. Moon Moo Farm, however, cannot be held responsible for the shortcomings of the State agency. The Agency failed to implement appropriate site inspection efforts as well as public comment opportunities. ER 5. Going forward, should a revised NMP be necessary, New Union should allow for public scrutiny and comments. *Waterkeeper Alliance,* 399 F.3d at 503.

As stated by the District Court, "[i]t is undisputed that Moon Moo Farm filed an NMP with the State agricultural field office, and applied manure in accordance with its filed plan." ER 9. This Court should uphold the District Court's finding and hold that Moon Moo Farm is in compliance with its NMP and, therefore, the discharge can be classified as agricultural stormwater.

2. Moon Moo Farm's Discharge Was the Direct Result of Precipitation

The Court in *Southview Farm* held that a discharge may be considered agricultural stormwater exemption only if the discharge was the direct result of precipitation. *Southview Farm*, 34 F.3d at 122 (emphasis added). It is clear that there can be no escape from liability for agricultural pollution simply because the pollution occurs on a rainy day. *Id.* at 120. The policy behind this rule is clear. The exemption is not designed to allow polluters a straightforward path for escaping liability by commencing land application processes during rain events. Instead, the

fundamental question, as stated in *Southview Farm*, is whether the discharge was the result of rain, or if it simply occurred on days when it rained. Id at 121. Discharges resulting from rain can occur, for example, when rainwater comes in contact with manure and flows into navigable waters. *Nat'l Pork Producers Council v. U.S. E.P.A.*, 635 F.3d 738, 743 (5th Cir. 2011); See, e.g., *Fishermen Against Destruction of Env't, Inc. v. Closter Farms, Inc.*, 300 F.3d 1294, 1297 (11th Cir. 2002).

Moon Moo Farm's discharge was the direct result of significant rainfall. Two inches of rain fell between April 11th and April 12th, the time period when the alleged discharge occurred. ER 6. Moon Moo Farm is permitted as a non-discharge facility. ER 5. The only discharge identified in this case occurred as a direct result of significant precipitation where rain water came into contact with manure and flowed into navigable water. Therefore, because the discharge was the result of rain, it appropriately falls under the agricultural stormwater exemption. *Southview Farm*, 34 F.3d at 122.

C. This Court should find that Moon Moo Farm's Discharge was in Compliance with the NMP and was the Result of Precipitation and therefore is Agricultural Stormwater.

Moon Moo Farm manure spreading operations are consistent with its NMP and the discharge occurred during and as a result of precipitation. Therefore, this Court should affirm the District Court and hold that the discharge is agricultural stormwater runoff and is exempt as a point source and no NPDES permit is required. 40 C.F.R. § 122.23(e); 33 U.S.C. § 1362(14). While agricultural non-point source pollution is a serious environmental issue, Moon Moo Farm cannot be held responsible under the current laws of the United States.

IV. THIS COURT SHOULD REVERSE THE DISTRICT COURT AND FIND THAT MOON MOO FARMS IS A MEDIUM CONCENTRATED ANIMAL FEED OPERATION.

The identification of Moon Moo Farm as a CAFO is immaterial as to the applicability of the agricultural stormwater exemption. Nonetheless, the Court should find that Moon Moo Farm is a medium CAFO and is subject to NPDES liability for discharges not fitting the definition of agricultural stormwater discharge.

Concentrated Animal Feeding Operations (CAFOs) are point sources under the CWA, subject to NPDES permitting requirements. 40 C.F.R. § 122.23(a). Moon Moo Farm can be properly considered a Medium CAFO because it is 1) an animal feed operation, with 2) the statutorily required number of cattle, and 3) discharges pollutants through a man-made ditch. 40 C.F.R. § 122.2; ER 4, 6.

A. Moon Moo Farm is an Animal Feeding Operation

Moon Moo Farm is an animal feed operation because its milk cows are confined for at least 45 days in a 12 month period and it does not sustain crops, vegetation, forage growth, or post-harvest residues in the normal growing season over any portion of the lot or facility *in which* the animals are confined. 40 C.F.R. § 122.23(b)(1); *Southview Farm*, 34 F.3d at 123, ER 4-6; (emphasis added).

B. Moon Moo Farm is a Medium Concentrated Animal Feeding Operation

Animal feed operates can be broken down further into additional categories called concentrated animal feed operations, of which there are medium and large types. Moon Moo Farm is a Medium CAFO.

In order to be a Medium CAFOs Moon Moo Farm must have (1) 200 to 699 mature dairy cows, and either (2A) the pollutants are discharged into waters of the United States through a man-made ditch, flushing system, or other similar man-made device; or (2B) the

pollutants are discharged directly into waters of the United States which originate outside of and pass over, across, or through the facility or otherwise come into contact with the animals confined in the operation. 40 C.F.R. § 122.23(b)(6).

Moon Moo Farm operates with 350 head of dairy cows. This satisfies the first statutory requirement for a medium CAFO. ER 4, 40 C.F.R. § 122.23(b)(6). The remaining question then is whether the conditions in either 40 C.F.R. § 122.23(b)(6)(ii) A or B are met.

Part 2A is met because the drainage ditch from the land application field satisfies the criteria of discharging pollutants "through a man-made ditch." When the substantial rain event caused the discharge in question, the water and waste it carried ran off the fields through a ditch and into the canal. ER 6. In order to satisfy Part 2(A) this discharge must have occurred "through a man-made ditch, flushing system, or other similar man-made device." 40 C.F.R. § 122.23(6)(ii)(A). Here, the ditch was caused by either runoff erosion from man-made activities on the fields or purposefully built to handle flow. Therefore Part 2A is satisfied.

Because Moon Moo Farm operated with the necessary number of cattle and the discharge in question occurred through a man-made ditch, this Court should reverse the District Court and hold that Moon Moo Farm is a Medium CAFO.

C. Moon Moo Farm Meets both Requirements for a Medium Concentrated Animal Feeding Operation.

This Court should reverse the District Court and find that Moon Moo Farm is a Medium CAFO under the CWA. As a Medium CAFO, Moon Moo Farm requires a NPDES permit to discharge, unless the discharge is subject to an exception. *Alt*, 979 F.Supp.2d at 710 (2013). As the alleged discharge was subject to an exemption, NPDES liability is inappropriate, irrespective of Moon Moo Farm's Medium CAFO status. Because Moon Moo Farm is not subject to NPDES

liability, it is, therefore, relevant to address Moon Moo Farm's liability under the Resource Conservation and Recovery Act.

RESOURCE CONSERVATION AND RECOVERY ACT

The Resource Conservation and Recovery Act ("RCRA") is a comprehensive environmental statute adopted "to promote the protection of health and the environment and to conserve valuable material and energy resources." 42 U.S.C. § 6902. Specifically, Congress found that the U.S. growth has resulted in a "rising tide of scrap, discarded, and waste materials" and that federal action is necessary to "reduce the amount of waste and unsalvageable materials and to provide for proper and economical solid waste disposal practices." 42 U.S.C. §§ 6901(a)(2) and (a)(4).

Utilizing RCRA's citizen suit provision, Riverwatcher asserted two claims against Moon Moo Farm. It first asserts, in error, that Moon Moo Farm is "open dumping" in violation of RCRA § 4005. This claim fails for two reasons. First, the fertilizer and soil conditioner mixture does not constitute a "solid waste" and is thus beyond the scope of EPA's jurisdiction under RCRA. Second, pursuant to 40 C.F.R. § 257(c)(1), the land application of agricultural products, such as the fertilizer and soil conditioner, is excluded from regulation as an open dump. Riverwatcher's second claim against Moon Moo Farm, on the other hand, sufficiently establishes that Moon Moo Farm violated RCRA § 7002 by presenting an imminent and substantial endangerment to health through its contribution to the high nitrate level in the Farmville community's drinking water.

V. MOON MOO FARM IS NOT SUBJECT TO A CITIZEN SUIT UNDER RCRA FOR THE OPEN DUMPING OF SOLID WASTE.

RCRA grants the Environmental Protection Agency ("EPA") authority to regulate solid wastes and limits its jurisdiction to only those materials that constitute "solid waste", as defined

by RCRA § 1004(27). *American Mining Congress v. EPA (AMC I)*, 824 F.2d 1177, 1178-79 (D.C. Cir. 1987). The materials that do constitute a "solid waste" must be "utilized for resource recovery" or "disposed of in [a] sanitary landfill". 42 U.S.C. §§ 6943(a)(2) 9(b); 6945(a). Where solid waste is disposed of anywhere other than a sanitary landfill, the disposal constitutes the prohibited practice of "open dumping". 42 U.S.C. §§ 6903(14); 6945(a). The prohibition against open dumping is enforceable, by way of citizen suit, against any person engaged in the prohibited act. 42 U.S.C. § 9645(a); *see also* 42 U.S.C. § 6972.

Pursuant to Congressional direction in RCRA § 4004(a), EPA promulgated guidelines to adequately determine whether "solid waste" is disposed of in a sanitary landfill or by way of open dumping. 42 U.S.C. §§ 6907(a)(3); 6912(a)(1); 6944(a). In doing so, EPA exempted the land application of agricultural waste from "open dumping" regulations. 40 C.F.R. § 257.1(c)(1).

The District Court properly dismissed Riverwatcher's citizen suit alleging that Moon Moo Farm violated RCRA's prohibition against the open dumping of solid waste. ER11. The Court was skeptical whether the soil conditioning mixture, comprised of manure and whey, actually constitutes a solid waste, a necessary component of subjection to RCRA regulation. ER 11. Nonetheless, the Court properly determined that the land application of the manure and whey mixture is specifically excluded from regulation as an open dump, under 40 C.F.R. § 257.1(c)(1).

A. The soil conditioning mixture is not subject to regulation as a "solid waste" under RCRA § 4004.

Though the District Court dismissed the "open dumping" claim on other grounds, the Court was, nonetheless, unconvinced that the mixture constituted a "solid waste". RCRA § 1004(27) defines "solid waste" as "any garbage, refuse, sludge . . . and other discarded material, including solid, liquid, semisolid . . . material resulting from industrial, commercial and

agricultural operations." 42 U.S.C. § 6903(27). The soil conditioning mixture is not "garbage," "refuse" or "sludge", as the terms are commonly understood, so the question becomes whether the mixture falls within the catch-all term, "other discarded material."

The D.C. Circuit has determined that "the term 'discarded' cannot encompass materials that are 'destined for beneficial reuse or recycling in a continuous process by the generating industry itself.'" *Safe Food and Fertilizer v. E.P.A.*, 350 F.3d 1263, 1268 (D.C. Cir. 2003) (citing *American Mining Congress v. EPA (AMC I)*, 824 F.2d 1177, 1186 (D.C. Cir. 1987)). Even where a material is destined for recycling in another industry, the material is not necessarily "discarded", as "firm-to-firm transfers are hardly good indicia of a 'discard' as the term is ordinarily understood." *Id.*

Retaining manure and acid whey for use as a fertilizer and soil conditioner on their own crops does not invoke imagery of discarded material, in the term's ordinary meaning. Because the mixture is actively reused in a beneficial way as part of a continuous process within a broad generating industry, the mixture is not "discarded". The mixture is, therefore, not subject to RCRA regulation as a "solid waste" because it is neither "garbage, refuse, sludge" nor a "discarded material".

1. <u>The soil conditioning mixture is not "discarded" within the plain meaning of the word.</u>

As noted above, the term "discarded material" is not defined within RCRA. Without a statutory definition to rely upon, "words will be interpreted as taking their ordinary, contemporary, common meaning." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1041 (9th Cir. 2004) (quoting *The Wilderness Soc'y v. United States Fish & Wildlife Serv.*, 353 F.3d 1051, 1060 (9th Cir. 2003). Furthermore, "in construing a statute, courts generally give words not defined in a statute their 'ordinary or natural meaning.'" *Id.* (quoting *Bonnichsen v. United States*,

367 F.3d 864, 875 (9th Cir. 2004); *United States v. Alvarez-Sanchez*, 511 U.S. 350, 357, 114 S.Ct. 1599 (1994)).

Material is considered "discarded" based on the plain meaning of the term, which includes materials that are "disposed of, abandoned, or thrown away". *American Petroleum Institute v. U.S. E.P.A.*, 216 F.3d 50, 55-56 (D.C. Cir. 2000) (citation omitted). Moon Moo Farm's mixture of manure and whey is maintained in a lagoon and is periodically applied to Bermuda grass fields as a fertilizer and soil conditioner, which has been a common practice in the area for more than sixty years. ER 5, 6. Using a material to improve the soil for a farm's primary crop is a stark contrast from what one would imagine as a material being thrown away or abandoned. Therefore, the mixture is not "discarded" within the plain meaning of the word.

2. The manure and acid whey are not "discarded" as they are destined for immediate and beneficial reuse.

The sole purpose for retaining the manure and acid whey mixture is for reuse as a beneficial fertilizer and soil conditioner on Moo Moon's Farm's Bermuda grass fields. As the D.C. Circuit noted in *American Mining Congress*, "[e]ncompassing materials retained for immediate reuse within the scope of 'discarded materials' strains, to say the least, the everyday usage of the term." *American Mining Congress*, 824 F.2d at 1184. Furthermore, the same court determined that "the term 'discarded' cannot encompass materials that are 'destined for beneficial reuse or recycling in a continuous process by the generating industry itself.'" *Safe Food and Fertilizer v. E.P.A.*, 350 F.3d 1263, 1268 (D.C. Cir. 2003) (citing *American Mining Congress v. EPA ("AMC I")*, 824 F.2d 1177, 1186 (D.C. Cir. 1987)). Of course, Moon Moo Farm should not need to perform the land applications of the mixture in real time of its creation and collection to avoid being classified as "discarded." Consistent with common practice, Moon Moo Farm does

apply the mixture to the Bermuda fields at the appropriate time in the growing process to best benefit the soil it conditions.

The Ninth Circuit similarly found that grass residue remaining after the harvest of Kentucky bluegrass is not "discarded" where it is used to fuel an "open burn" of the fields following their harvest. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1045 (9th Cir. 2004). There, the court found that the bluegrass growers realize benefits from the grass residue because through burning it offers nutrients, creates a fertilizer, reduces insect infestation and contribute the creation of optimal creations for the next harvest. *Id.* at 1044-45. Like the grass residue, the fertilization and soil conditioning mixture helps create optimal growing conditions.

It is undisputed that manure fertilizes the Bermuda grass field's soil. Perhaps a less known fact is that acid whey also acts a soil in conditioner. In New Union, for example, the land application of whey as a soil conditioner is a longstanding practice, having been utilized since the 1940s. ER 6. Instead of throwing away the manure and the acid whey and purchasing commercial soil conditioner, Moon Moo Farm treats the mixture as a commodity with economic value and beneficial use. Because the manure and whey mixture is beneficial to Moon Moo Farm's crop production, it is not "discarded" and is not a "solid waste" subject to RCRA regulation. Not only is the mixture used for its intended beneficial purpose, it prevents Moon Moo from acquiring commercial soil conditioners, preventing a needless waste of resources.

3. <u>The mixture is reused in a continuous process within the generating industry.</u>

There is no doubt that the manure produced by Moon Moo Farm's dairy cows and then applied to Moon Moo Farm's 150 acres of Bermuda grass fields is reused in a continuous process within the generating industry. The connection between the farm and the yogurt processing facility is slightly more strained, but not fatally so.

The soil conditioning acid whey is created within the yogurt processing industry and is thereafter used to benefit that same industry. Therefore, it is reused in a continuous process within the generating industry. To be certain, courts have held that materials "reclaimed" from a disposer are subject to regulation as a "solid waste" because the material was "discarded" by someone. *United States v. ILCO*, 996 F.2d 1126, 1131 (11th Cir. 1993). In *ILCO*, the court considered whether spent batteries that were abandoned by their original owner but reclaimed by lead smelters were within the scope of RCRA's jurisdiction as a "solid waste". *Id.* at 1130. The court determined that because spent batteries are part of the "waste problem" RCRA was enacted to control, that the fact the material was discarded once was enough to bring it into regulation. *Id.* at 1132. Significantly, however, the material in *ILCO*, lead, was a hazardous waste. *Id.* at 1128.

The case at hand is distinguishable from *ILCO* in a number of ways. First, the manure and whey mixture does not constitute a "hazardous material" under RCRA. Second, it is not entirely discarded by its original user, as batteries are by vehicle owners. When vehicle owners replace their battery, they dispose of their battery and it is essentially gone to them forever. In contrast here, the acid whey continues to benefit its original generator, the yogurt processing facility, by strengthening the crop that feeds the cows, which produce its dairy, a primary ingredient of its yogurt. The process continues in a perpetual loop.

Of course, as noted in *Safe Food and Fertilizer v. E.P.A.*, material destined for recycling in another industry is not necessarily "discarded". 350 F.3d 1263, 1268 (D.C. Cir. 2003). Therefore, even if this Court determines that the mixture is not reused in a continuous process *within the generating industry*, the distinction between the industries is so *de minimis* that it could be disregarded without creating a material issue.

Because the mixture is reused within a continuous process by the generating industry, the yogurt processing facility and the farm that supplies its dairy, the mixture is not "discarded" and is thus not a "solid waste" subject to regulation under RCRA.

4. By reusing the manure and acid whey mixture, Moon Moo Farm prevents the mixture from contributing to the waste disposal problem RCRA is meant to control.

As the D.C. Circuit noted, "RCRA was enacted . . . in an effort to help States deal with the ever-increasing problem of solid waste *disposal*" and as a measure to protect the "health and the environment by regulating hazardous waste." *American Mining Congress*, 824 at 1185-86 (emphasis in original). If the mixture were not available as a fertilizer and soil conditioner, the farm would likely have to purchase a commercial product as a replacement. Instead of abandoning or disposing of the mixture, it is clear that the mixture is beneficially reused and is not "discarded".

To regulate every output from the large farming industry in the United States would be excessively burdensome for the already resource-challenged EPA. In this case, regulation of the material as a "solid waste" would be especially absurd because the materials are being reused in a beneficial way. Moreover, the alternative would have Moon Moo Farm purchasing commercial versions to achieve the same results. Because the mixture is reused in a beneficial way within the generating industry itself, it would be an impermissible overreach of EPA authority to regulate the mixture as a "discarded" material and "solid waste" under RCRA.

5. Lastly, a material that may cause pollution is not necessarily a "solid waste."

The Ninth Circuit, in a similar case, was unable to find that "grass residue" constitutes "solid waste." *Safe Air for Everyone v. Meyer*. 373 F.3d 1035 (9th Cir. 2004). There, a common practice among farmers was to burn remaining "grass residue" to fertilize the fields and increase crop production, which remained on fields after harvest. Plaintiffs argued that the open burning

constituted the disposal of "solid waste" which released pollutants and toxins in the process. Nevertheless, the court found that even though the burning of the residue creates smoke and airborne particulate matter, it does not constitute solid waste because the material is actively reused by the generator and is destined for beneficial reuse in a continuous process by the generating industry. *Id.* at 1043-45. Here, the mixture does not create airborne pollutants but even to the degree that it does contribute pollutants, it is still not a "solid waste" subject to regulation under RCRA.

B. Even if the mixture is a "solid waste", its land application as a soil conditioner exempts the practice from "open dumping" regulations under RCRA.

Subchapter IV of RCRA governs solid waste disposal. Specifically, solid waste must be disposed of in "sanitary landfills" and "open dumping" of solid waste is prohibited. Congress declared its goal of disposing of solid waste in an environmentally sound manner that maximizes the utilization and conservation of resources. 42 U.S.C. § 6941. To achieve this goal, RCRA § 4003(a)(2) requires that all solid waste be "utilized for resource recovery" or be "disposed of in sanitary landfills", as opposed to an open dump. 42 U.S.C. § 6943(a)(2).

RCRA requires EPA to promulgate guidelines for solid waste management. 42 U.S.C. § 6907(a). In particular, EPA must "provide a minimum criteria . . . to define those solid waste management practices which constitute open dumping of solid wastes". *Id. at* 6907(a)(3); *see also* §§ 6944(a), 6912(a)(1). In establishing the criteria, however, the EPA created an explicit exception, from sanitary landfill requirements, for "agricultural wastes, including manures and crop residues, returned to the soil as fertilizers or soil conditioners." 42 C.F.R. § 257.1(c)(1).

A determination that the mixture is not discarded, and, thus, not a "solid waste" is consistent with Congress's purpose and intent in passing RCRA. Specifically, Congress intended to exclude manures and industrial "waste" that can be reclaimed or put to new use in a beneficial

way: "[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." H.R. Rep. No. 9401491, 94th Cong., 2d Sess. at 2, *reprinted in* 976 U.S.C.C.A.N. 6238, 6240 (emphasis added). Moon Moo Farm uses the fertilizing and soil conditioning mix in an exact way that Congress intended to exempt from regulation as a "solid waste." If Moon Moo Farm simply farmed dairy cows and did not grow crops, the manure would require waste disposal to properly discard of it. Similarly, if the Farm only grew crops and did not raise dairy cows, the Farm would likely have to purchase soil conditioner or some other type of fertilizer.

Because the manure and whey mixture is beneficially reused in a continuous process within the same industry, it is not "discarded" as required to find that it is a "solid waste" subject to RCRA regulation. Moreover, even if the mixture did constitute a "solid waste" it would, nevertheless, be exempt from RCRA's "open dumping" regulation because it is exempt under EPA regulation, in accordance with Congressional intent. This Court should, therefore, affirm the District Court's holding and find that Moon Moo Farm's land application practice does not constitute "open dumping" in violation of RCRA § 4005 because its manure and whey mixture does not constitute a "solid waste" and the mixture is exempt under 40 C.F.R. § 257.1.

While the mixture is not subject to "open dumping" regulation, it should still be subject to a citizen suit under RCRA's imminent and substantial endangerment provision for its contribution to the heightened nitrate levels in the Farmville community's drinking water.

VI. MOON MOO FARM'S FIELD APPLICATION OF ITS MANURE MIXTURE ESTABLISHES AN IMMINENT AND SUBSTANTIAL ENDANGERMENT TO HEALTH.

Due to its limited financial resources, EPA is incapable of discovering for itself every violation under RCRA. To maximize enforcement, citizens do not have to rely on government action to ameliorate the harm caused by possible violations. Rather, RCRA § 7002 authorizes

citizens to force harmful disposers to abate disposal practices that may cause imminent and substantial endangerment to health or the environment. 42 U.S.C. § 6972(a)(1)(B). Specifically, "any person may commence a civil action on his own behalf ... against any person ... who has contributed … to the … disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or environment." *Id.*

Plaintiff, Riverwatcher, appropriately recognized that Moon Moo Farm's agricultural practices might contribute to the imminent and substantial endangerment to the health of Farmville citizens by adding nitrates to community's drinking water supply. The District Court, however, dismissed Plaintiff's claim on the issue. ER 12. The Court properly concluded that the claim suffered the same defect as the open dumping claim, in that the mixture does not constitute a "solid waste" subject to any type of RCRA enforcement action. ER 11. In addition, however, the Court found that Plaintiff failed present sufficient evidence to establish a genuine issue that "Moon Moo Farm's landspreading practices present an imminent and substantial endangerment to human health." ER 11. In its determination, the Court found it significant that Plaintiff could not establish that Moon Moo Farm is the but-for cause of the nitrate advisory. *Id.*

Although the mixture does not constitute a "solid waste," it, nonetheless, creates an imminent and substantial endangerment to health and should be within EPA's scope to regulate under RCRA. Because Moon Moo Farm contributed waste that may present an imminent and substantial endangerment the action should fall within EPA's scope of regulation under RCRA to ameliorate the harm caused.

A. Moon Moo Farm's land application of its soil conditioning mixture contributes to the heightened nitrate level in Farmville's drinking water.

A citizen suit may be commenced against any person who *contributes* to a disposal that may present an imminent and substantial endangerment. 42 U.S.C. § 6972(a)(1)(B). Congress

did not define "contribute" within the statute but courts have interpreted the term expansively, relying on the dictionary definition. *Hinds Investments, L.P. v. Angioli*, 654 F.3d 846, 850 (9th Cir. 2011) ("'Contribute' commonly means to . . . 'have a share in any act or effect.' . . . [i]t is also defined as 'to be an important factor in; help to cause.'") (internal citations omitted); *see also Cox v. City of Dallas,* 256 F.3d 281, 294 (5th Cir.2001); *United States v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1384 (8th Cir.1989). During James' "investigatory patrol," he observed Moon Moo Farm's manure spreading operating taking place on its fields and also observed discolored brown water flowing from the fields through a ditch that ultimately emptied into the Deep Quod River. ER 6. Farmville is downstream from Moon Moo Farms and uses Deep Quod River as a drinking water source. ER 5.

Though the District Court was persuaded by lack of evidence to determine that Moon Moo Farm was the but-for cause of the nitrate advisory, that determination is insufficient to expel liability. Importantly, as is the case with most environmental violations, liability under RCRA is joint and several. *Maine People's Alliance and Natural Resource Defense Council v. Mallinckrodt, Inc.*, 471 F.3d 277, 298 (1st Cir. 2006). Therefore, a single polluter, such as Moon Moo Farm, could be held responsible for the "totality of the damage where the harm is indivisible." *Id.* So long as it is determined that Moon Moo Farm was one of the farms that contributed to the increased nitrate levels, the farm may be considered a contributor.

B. Moon Moo Farm's land application of its soil conditioning mixture constitutes a "disposal" under RCRA.

When nitrate levels in drinking water are high, the water supply becomes unsafe for infants. ER 6. Harm should not need to threaten all people before it is found substantial. Importantly, RCRA § 7002's "imminent and substantial endangerment" regulation is not limited to "emergency situations." *U.S. v. Waste Industries, Inc.*, 734 F.2d 159, 165 (4th

Cir. 1984). As noted by the Third Circuit, RCRA has authorizes "the issuance of injunctions when there is but a risk of harm, a more lenient standard than the traditional requirement of threatened irreparable harm." *United States v. Price*, 688 F.2d 204, 211 (3d Cir. 1982). Because all infants in a town are threatened by the heightened nitrate levels in their town's drinking water, the discharge of nitrates creates an imminent and substantial endangerment to health.

This Court should reverse the District Court's holding that Riverwatcher has not established that Moon Moo Farm contributed to the disposal of harmful material which may present an imminent and substantial endangerment to health. To be certain, the manure and acid whey mixture does not constitute a "solid waste" under RCRA § 1004(27). Nevertheless, its discharge into a nearby community's drinking water supply does contribute to imminent and substantial endangerment of health and EPA should have the limited authority to ameliorate the harm caused.

VII. CONCLUSION

For the foregoing reasons this Court should reverse in part and affirm in part. This Court should reverse the District Court and find that the Queechunk Canal assumed the public navigation servitude when it diverted most of the Deep Quod's flow. This Court should reverse the District Court and find that the exclusionary rule does not apply to the evidence gathered here. This Court should affirm the District Court and find that the discharge in question was agricultural stormwater but reverse the District Court and find that Moon Moo is a Medium CAFO. Finally, this Court should affirm the District Court's holding and find that Moon Moo Farm's land application practice does not constitute "open dumping" in violation of RCRA and reverse the District Court's holding and find that Moon Moo Farm contributed to the disposal of harmful material which may present an imminent and substantial endangerment to health.