No. 14–1248

IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant, and

DEEP QUOD RIVERWATCHER, INC., and DEAN JAMES,

Plaintiffs-Intervenors-Appellants

- v. -

MOON MOO, INC.,

Defendant-Appellee.

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

BRIEF OF APPELLEE MOON MOO, INC.

ORAL ARGUMENT REQUESTED

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STATEMENT OF ISSUES

1. Can the State of New Union impose a public right of navigation on the non-navigable, privately-owed, man-made water body, the Queechunk Canal?
2. When evidence is obtained through trespass and without a warrant, is such evidence inadmissible in a civil enforcement proceeding brought under the Clean Water Act §§ 309(b), (d) and 505?
3. a. May a medium-sized animal feeding operation ("AFO") be defined as a Concentrated Animal Feeding Operation ("CAFO") where there has been inconclusive evidence of discharge into waters of the United States is a CAFO subject to National Pollutant Discharge Elimination System ("NPDES") permitting liability?

   b. Does the application of manure on agricultural land in compliance with a nutrient management plan (NMP) accepted by an authorized state exempt an entity from NPDES permitting requirements as agricultural storm water?
4. a. Does Defendant-Appellee Moon Moo, Inc.'s ("Moon Moo") land application of its soil conditioner constitute a disposal of solid waste subject to Resource Conservation and Recovery Act ("RCRA") Subtitle IV regulation.

   b. Have Deep Quod Riverwatcher, Inc., and Dean James, Plaintiffs-Intervenors-Appellant (collectively, "Riverwatcher") alleged sufficient facts to convince a reasonable trier of fact that Moon Moo's application of fertilizer and soil amendment is subject to redress under RCRA § 7002(a)(1)(B)?

STATEMENT OF THE CASE

This case revolves around the land application of soil conditioner comprised of whey and manure to farm lands. Moon Moo, in compliance with its NMP, has applied soil conditioner to its lands. Plaintiff-Appellant United States of America, on behalf of the United States

Environmental Protection Agency (collectively, "EPA") and Riverwatcher (collectively, "Appellants") allege that Moon Moo's operations have contributed to the nitrate advisory issued in late winter through early spring 2013. The EPA brought this action for civil penalties and injunctive relief against Defendant-Appellee Moon Moo, Inc. ("Moon Moo"), alleging that its land application violates the permitting requirements of the Clean Water Act ("CWA"), 33 U.S.C. §§ 1311(a), 1319(c), (d), and 1342. Riverwatcher intervened as plaintiff, asserting claims under CWA § 505, and RCRA Subtitles IV and VII. Moon Moo counterclaimed against Riverwatcher for common law trespass. On June 1, 2014, The United States District Court for New Union ("District Court") issued its Decision and Order granting summary judgment in favor of Moon Moo. Appellants each filed a Notice of Appeal.

STATEMENT OF FACTS

Moon Moo is a medium-sized AFO located at a bend in the course of the Deep Quod River on either side of the Queechunk Canal ("Canal"). R. at 5. The Deep Quod 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. The River is navigable by small boat both upstream and downstream of the Canal. R. at 5. The canal is surrounded by Moon Moo's property and was built by the previous owner of Moon Moo's property in the 1940s. . R. at 5. The Queechunk Canal is fifty yards wide, three to four feet deep, and can be navigated by a canoe or other small boat. R. at 5.

Moon Moo has operated a dairy farm of 350 dairy cows since 2010. Moon Moo mixes cow manure with whey byproduct (the "Fertilizer") recycled from the Chokos Greek Yogurt processing facility in Farmville and applies this to its fields as soil conditioner. R. at 5-6. New Union, having the delegated authority to issue CWA discharge permits, has determined that

Moon Moo does not require a NPDES discharge permit. R. at 5. Therefore, the State has regulated Moon Moo as a no-discharge AFO. *Id*. As a no-discharge AFO, Moon Moo must submit an NMP to the State, which sets forth planned seasonal manure application rates and a calculation of expected uptake of nutrients by the crops grown on fields where the Fertilizer is spread. *Id*. Appellants have not formally challenged the process by which the NMP was created. The Deep Quod watershed is heavily farmed, and the land application of manure and whey as a soil conditioner has been practiced in New Union since the 1940s. R. at 6-7.

In later winter and early spring of 2013, the Farmville Water Authority issued a nitrate advisory for its customers to give children under two years old bottled water due to high levels of nitrates in the Deep Quod River. R. at 6. The water was considered safe for adults and juveniles. *Id*. The City of Farmville periodically issues nitrate advisories, including six advisories in the past eleven years (2002, 2006, 2007, 2009, 2010, and 2013). R. at 7.

Despite these frequent nitrate advisories, Riverwatcher was determined to place the blame on Moon Moo for this particular event. Riverwatcher's own James Dean, ignoring prominently placed "No Trespassing" signs, entered the Canal in a small boat during a significant storm event. R. at 6. Mr. Dean took photos of Moon Moo's property and samples of the water flowing from a drainage ditch from Moon Moo's land. The samples taken by Mr. Dean exhibited elevated levels of nitrates and fecal coliforms. There is nothing in the record to indicate that Mr. Dean used appropriate testing methods or had a system for his collection methods; nor is there anything on the record to show that Mr. Dean confirmed whether or not the water flowing in the drainage ditch could have had more than one upstream source. Finally, there is nothing on the record to indicate that Mr. Dean bothered to take any background water samples upstream of the Canal in the Deep Quod River or downstream from the drainage ditch to confirm that the

allegedly turbid water was flowing into the Deep Quod River from the Canal.

According to Riverwatcher's expert, Dr. Ella Mae, the pH of the Fertilizer was 6.1, and although Bermuda grass is known to tolerate a wide range of pH levels, particularly between 6.0 and 6.5, Dr. Mae believes that the low pH may cause a lower-than-expected uptake of nutrients by the Bermuda grass, particularly when applied during a rain event. R. at 6. However, Dr. Mae does not dispute that Moon Moo's land application was made in accordance with its NMP. Another one of Riverwatcher's experts, Dr. Susan Generis, opined that Moon Moo has contributed to the April 2013 nitrate advisory, but she does not opine on the degree to which Moon Moo has contributed or could contribute to the nitrate advisory, and she concedes that it would be impossible to pin Moon Moo as the "but-for" cause of the April 2013 nitrate advisory.

SUMMARY OF THE ARGUMENTS

This Court should affirm the decision of the District Court on all issues. Dean James trespassed on the privately-owned waters of the Canal to obtain the photos and water samples on which Riverwatcher and the EPA base their claims. The bed and shore of the Canal are privately-owned, and since the waters of the Canal are non-navigable canal or non-navigable, there is no public right of access. Even if the River were originally subject to State ownership and the public trust, upon the avulsive change that resulted in the Canal, the boundary lines of ownership did not shift and the Canal remains privately-owned. *Philadelphia Co. v. Stimson*, 223 U.S. 605, 624-25 (1912). Man-made water bodies have never been subjected to the federal navigation servitude as it would be akin to a taking of fast land and would require compensation. *Kaiser Aetna v. United States*, 444 U.S. 164, 172 (1979). Alternatively, in order for the waters flowing over a privately-owed stream to be subject to the public trust doctrine, they must be found to be navigable-in-fact or navigable under State law. *See PPL Montana, LLC v. Montana*, 132 S.Ct.

1215, 1234-35 (2012). The Canal is not navigable under either test, and as a result it is not subject to public access. Therefore, Moon Moo has the right to exclude the public from its well-marked private property, and Mr. James's trespassed to obtain the photos and samples Appellants' rely on in bringing this suit.

Evidence obtained as a result of Mr. James's unlawful trespass, however, is inadmissible. Federal courts have applied the exclusionary rule to keep out unlawfully obtained evidence in civil cases where penalties may be incurred, as is the case here *United States v. Janis*, 428 U.S. 433 (1976). However, even if the evidence obtained by Mr. James were not inadmissible for its unlawful collection, it would be inadmissible for its lack of scientific reliability under the Federal Rules of Evidence. Fed. R. Evid. R. 701, 702(c)(d). Without this evidence, there is no dispute as to any material fact in any of Appellants' CWA claims because without evidence of a pollutant discharge resulting from Moon Moo's operations, Appellants' cannot meet their burden in showing that Moon Moo is a CAFO or point source of pollutant discharges. However, even if the evidence were admissible or could plausibly convince a reasonable trier of fact that Moon Moo's operations resulted in pollutant discharges, Moon Moo would not be subject to NPDES permitting requirements because any discharges from its operations constitute agricultural storm water discharges exempt under 33 U.S.C. § 1362(14). Further, Moon Moo's compliance with its State-approved NMP should exempt it from NPDES permitting requirements because neither individuals nor the EPA should be allowed to circumvent the State's delegated authority to subject an entity requires to NPDES permitting requirements by any means other than those under the CWA, which provides the process by which the EPA may revoke State authority, 33 U.S.C. § 1342(c)(3), and which requires an arbitrary and capricious standard of review of an agency's decisions regarding permitting. 5 U.S.C.S. § 706(2)(A).

Finally, Riverwatcher cannot succeed on its RCRA claims. Both the RCRA Subtitle IV and VII claims must fail because the Fertilizer is not a discarded material and, therefore, is not a solid waste subject to RCRA regulation. *Safe Air v. Meyer*, 373 F.3d 1035, 1041 (9th Cir. 2004). However, even if the Fertilizer were considered a solid waste, Riverwatcher's Subtitle IV claims must fail because the Fertilizer is exempt from open dumping claims as a fertilizer for agricultural operations, and its RCRA Subtitle VII claim must fail because Riverwatcher has not produced sufficient evidence to allege a genuine issue of fact regarding whether Moon Moo's operations have contributed to the nitrate advisory.

Given the arguments detailed below, this Court should affirm the District Court's grant of summary judgment in favor of Moon Moo on all issues in this case.

STANDARD OF REVIEW

A decision to grant summary judgment is reviewed *de novo*. *Board of Mississippi Levee Com'rs v. U.S. E.P.A.*, 674 F.3d 409, 417 (5th Cir. 2012). "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence. Fed. R. Civ. P. 56(c)(2).

ARGUMENT

I. DEAN JAMES TRESPASSED ON THE PRIVATELY-OWNED, MAN-MADE CANAL, WHICH IS NOT SUBJECT TO THE PUBLIC TRUST DOCTRINE.

The District Court appropriately found that the Queechunk Canal is a privately-owned, man-made canal not subject to a public right of access. As a privately-owned, man-made water body, the Canal would only be subject to a public right of access if the waters were navigable but even then access would require compensation since the taking of a man-made water body is akin to

the taking of fast land. The meaning of "navigability" depends on the context in which the term is being applied. *Kaiser Aetna v. United States*, 444 U.S. 164, 170 (1979).

The right to exclude others has been recognized as one of the most important sticks in the bundle of property rights. *See Kaiser Aetna*, 444 U.S. at 176. In spite of this, the government has imposed public rights on navigable water bodies under both federal and state law. Though the federal navigation servitude is sometimes conceptualized as distinct from the public trust, it functions similarly to the state concept of public trust in ensuring the use of navigable waters for purposes of navigation and commerce. *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 375 (1977). The Government has also imposed a public trust on privately-owned navigable waters. *Illinois Cent. R. Co. v. State of Illinois*, 146 U.S. 387, 452 (1892).

Here, however, the waters of the Canal are not navigable under either the federal navigation servitude, nor under the public trust doctrine. Even if the Canal were found to be subject to such a right to public access, moreover, the imposition of this right would be a compensable taking under the Fifth Amendment.

A. The Canal is not subject to the Federal Navigation Servitude.

The Canal is not used for commerce, nor do its features make it susceptible use for commerce; it is therefore not subject to the federal navigation servitude. Navigability under the navigation servitude is defined by the navigability-in-fact test: waters "are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways of commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." *The Daniel Ball*, 77 U.S. 557, 563 (1871). A waterway is suitable for use as a highway for commerce if "(1) it is presently being used or is suitable for use, or (2) it has been used or was used in the past, or (3) it could be made suitable for use in the future by reasonable

improvements." *Pitship Duck Club v. Town of Sequim*, 315 F. Supp. 309, 310 (D. Wash. W.D. 1970) (citations omitted). "A waterway cannot be made suitable for use by 'reasonable improvements' unless it is economically practicable to make the improvements." *Id.*; *see also U.S. v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407 (1940) ("There must be a balance between cost and need at a time when the improvement would be useful").

The navigational servitude is imposed to protect the public's right of way over public navigable water ways: "Congress possesses by virtue of its commerce power a "navigational servitude" with respect to navigable waters." *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 375 (1977). "As implied by its very name and the constitutional provision from which it arises, the federal navigational servitude is concerned with *navigational* rights and *commerce*." *Parm v. Shumate*, 513 F.3d 135, 143 (5th Cir. 2007) (citing *Montana v. United States*, 450 U.S. 544, 551, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981) ("The State's power over the beds of navigable waters remains subject to only one limitation: the paramount power of the United States to ensure that such waters remain free to interstate and foreign commerce.") (other citations omitted).

Uses unrelated to commerce and navigation are generally not protected by the servitude. *See George v. Beavark, Inc.*, 402 F.2d 977, 981 (8th Cir.1968). The Supreme Court has, thus, never applied the navigational servitude to fast lands or non-navigable waters, unless they were essential to a comprehensive navigable waters project. *U.S. v. Cress*, 243 U.S. 316, 326 (1917). *Cf. U.S. v. Grand River Dam Authority*, 363 U.S. 229, 232 (1960); *Kaiser Aetna v. United States*, 444 U.S. 164, 172 (1979). No compensation is necessary when Congress exercises the navigation servitude for purposes of navigation, *U.S. v. Willow River Power Co.*, 324 U.S. 499, 510-11 (1945), but where the servitude is used to require public access the court has required

compensation. *Kaiser Aetna*, 444 U.S. at 172.

Evidence of navigation by small boats has rarely been sufficient to prove navigability. *E.g. Leovy v. United States*, 177 U.S. 621, 633(1900)(small vessels used by fishermen); *Pitship Duck Club v. Sequim*, 315 F. Supp. 309 (W.D. Wash. 1970) (small rowboats used for duck hunting); *North American Dredging Co. of Nevada v. Mintzer*, 245 F. 297 (9th Cir. 1917) ("duck boats or punts for hunting and fishing"); *Toledo Liberal Shooting Co. v. Erie Shooting Club*, 90 F. 680 (6th Cir. 1898) (canoes and flat-bottomed ducking boats). Where water is shallow is has been found non-navigable. *Toledo Liberal Shooting Co. v. Erie Shooting Club*, 90 F. 680 (6th Cir. 1898) (bay with average depth of not more than two feet and rarely more than three not navigable and subject to private ownership).

The Canal is not subject to the navigational servitude. This is no evidence of any historical use or current use for commerce. Simply because small metal outboard crafts, like a "jon boat," R. at 6, and other small boats can navigate the Deep Quod River and the Canal, such use is not sufficient under the navigation servitude to subject the Canal to the federal navigation servitude. The Canal is also too shallow to be used for boats of a commercial nature, and, similar to the non-navigable bay in *Toledo*, the Canal is only three to four feet deep, R. at 5 which is not deep enough to carry anything besides these small boats. To deepen the entire Deep Quod River would require a significant economic investment, and it hence seems unlikely that it would economically practicable to improve the Deep Quod to make it navigable. There is also no indication that the Canal is part of a comprehensive scheme to improve navigation.

Since the Canal is a privately-built channel on private property, if the Government subjects it to the servitude, this is more akin to subjecting fast land to the servitude, which has never been done without compensation. Mr. James also was not using the river for navigation,

but rather for investigation. *Id*. Such a use is unrelated to commerce, and is not protected by the navigational servitude.

Finally, the Canal is too shallow to be used for boats of a commercial nature, and, similar to the non-navigable bay in *Toledo*, the Canal is only three to four feet deep, (R. at 5) which is not deep enough to carry anything besides these small boats. Thus, the Canal is not subject to the navigational servitude.

B. The Canal is not navigable under state-law navigability tests.

The Canal is not subject to the public trust under state-law navigability tests because it is a small, private channel. To be subject to the public trust water must be navigable. *See Central R. Co. v. Illinois* 146 U.S. 387, 452 (1892). The definition of "navigability" for the public trust is a matter of state law and therefore varies by state. *PPL Montana, LLC v. Montana*, 132 S.Ct. 1215, 1234-35 (2012) (citations omitted); *Arkansas v. McIlroy*, 595 S.W.2d 659, 663-65 (Ark. 1980).

Building on federal navigability tests, states have not applied the public trust to privately-owned or man-made waters. Kentucky uses the navigability-in-fact test from *The Daniel Ball*, *See United States v. Cress*, 243 U.S. 316, 321 (1917), and there the servitude of privately-owned lands is "confined to such streams as, in their natural and ordinary condition, are navigable-in-fact, and confined to the natural condition of the stream." *Id*. at 325-26. Similarly, the Michigan Supreme Court has enforced private property rights in non-navigable streams and lakes that are entirely on private property. *Bott v. Mich. Dep't of Natural Resources*, 327 N.W.2d 838, 846-47 (Mich. 1982). This included finding creek that varies from 12.5 feet to over 80 feet in width with a depth of between 6 and 15 inches was not navigable under the more generous log-floating test for navigability. Colorado also has held that waters on private land were not subject to public access. *People v. Emmert*, 597 P.2d 1025 (Colo. 1979); *Hartman v. Tresise*, 84 P. 685 (1905);

State ex rel. Meek v. Hays 785 P.2d 1356 (Kan. 1990).

Though various states have adopted broader tests, such as the "recreational-boating test" to determine whether a river is navigable for state law purposes, including the public trust doctrine, *see, e.g.*, *Arkansas v. McIlroy*, 595 S.W.2d 659 (Ark. 1980), such a test fails to comport with riparian owns traditional expectations and no public policy supports is application. *See id*.

Under the states' navigability test, it is unlikely the Deep Quod River is navigable, and the Canal certainly is not. Though under a recreational-boating test, the river and Canal might be found to be navigable, such a test should not be applied because it thwarts expectations of private landowners and is contrary to public policy as the court in *Bott* noted. Moreover, at three to four feet deep, and 50 yards wide, R. at 5, the Canal is more like the non-navigable shallow stream in Michigan and is therefore non-navigable. Similarly, the Queechunk would be non-navigable under Kentucky law where the river must be in its natural condition to warrant a finding of navigability. Because the Queechunk is a man-made water body, it cannot be subject to the public . Hence, even under state law the Queechunk is not navigable.

C. Even if the Canal were subject to a public right of navigation, such a right would take a fundamental element of Moon Moo's property.

Even if the Canal was found to be subject to a public right of navigation, Moon Moo would be entitled to reimbursement for the government's taking of its property.

The Fifth Amendment guarantees: "nor shall private property be taken for public use, without just compensation." U.S. Const. Amend. V. Several factors have been identified by the Supreme Court in determining whether a taking has occurred. "The economic impact of the regulation on the claimant, and particularly, the extent to which the regulation has interfered with distinct investment backed expectations[.]" *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) (citation omitted). In addition, "[a] 'taking' may more readily be found

when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Id*.

Similarly, the Federal navigational servitude does not "create[ ] a blanket exception to the Takings Clause whenever Congress exercises its commerce clause authority to promote navigation." *Kaiser Aetna v. United States,* 444 U.S. 164, 172 (1979). The purpose of the navigational servitude is "to assure that such streams retain their capacity to serve as continuous highways for the purpose of navigation in interstate commerce." *Id*. at 178. Thus, "when the Government acquires fast lands to improve navigation, it is not required under the Eminent Domain Clause to compensate owners for certain elements of damage attributable to riparian location. *Id*; *U.S. v. Twin City Power Co.*, 350 U.S. 222 (1956) (no special value paid for power generating purpose); *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 52, 73-74 (1913) (no compensation for loss of power head). Conversely, when the government seeks to acquire fast lands, it must condemn and pay fair value for those lands. *Kaiser Aetna*, 444 U.S. at 172.

Man-made improvements to streams that the government later takes for public use, is analogous to government takings of fast lands. *Id*. at 179 ("the interest of petitioners in the now dredged marina is strikingly similar to that of the owners of fast land adjacent to navigable water."). This is because when a water body or piece of land in is natural state is "incapable of being used as a continuous highway for the purpose of navigation in interstate commerce" the Government must pay just compensation to use that land. *Id*. at 178 (pond with maximum depth of two feet, impacted by tides, with its primary value limited to fishing was not navigable prior to improvements).

In addition, public access on private water bodies previously unencumbered by public access amounts to physical invasion, *Kaiser Aetna*, 444 U.S. at 180, because "the 'right to exclude' is so universally held to be a fundamental element of the property right, [that it] falls within this category of interests that the Government cannot take without compensation." *Id*. Even the physical invasion of only an easement, such invasion still requires compensation. *See United States v. Causby*, 328 U.S. 256 (1946) (easement for airspace was a taking where it interfered with use); *Portsmouth Co. v. United States*, 260 U.S. 327 (1922) (firing of guns over claimant's land was a taking).

The Takings Clause of the Fifth Amendment, as applied against the States through the Fourteenth Amendment, "applies as fully to the taking of a landowner's riparian rights as it does to the taking of an estate in land. *Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection*, 560 U.S. 702, 713 (2010). In addition, "States effect a taking if they recharacterize as public property what was previously private property." *Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection,* 560 U.S. 702, 713 (2010) (*citing Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163-165 (1980)).

In the present case, allowing a public right of access on Canal under any rationale would constitute an unconstitutional taking of Moon Moo's fundamental property right to exclude others from their privately owned land and the water passing over it. Just as in *Kaiser Aetna*, this taking interferes with Moon Moo's investment-backed expectations as the previous owner who dug the Canal certainly invested private capital into creating the Canal. R. at 5. The Canal also undoubtedly requires maintenance, and the Government here has made no indication that it will take over any necessary maintenance or begin to compensate Moon Moo for any maintenance it performs.

In addition, public access would be a physical invasion as it allows others to enter onto land surrounded by Moon Moo's property and extinguishes Moon Moo's fundamental right to exclude others. This physical invasion increases the likelihood of finding a taking as recognized by *Penn Central* and *Kaiser Aetna*.

Further, had the government itself desired to dig a canal to improve navigation, it would surely have had to condemn Moon Moo's fast lands to do so, and to do so it would have had to pay fair market value for that parcel of land. To allow the government to achieve the same ends by judicial fiat—by claiming, after the private party had dug a canal to prevent flooding, that the waters that now flow in the canal are subject to a right of public access for ease of navigation, as a shortcut—would be a judicial recharacterization as public property what was previously private property. It would allow the government to circumvent the takings clause by acquiescing in or permitting private channeling projects on fast lands that it could then claim were subject to public access without paying just compensation. This result is particularly troubling here, where the original stream bed may yet be navigable. The District Court made no findings as to the continued navigability of the original bed of the Deep Quod River. Since this bed may still be owned by the State, and may yet be navigable, even though the most of the flow of the Deep Quod is diverted into the Queechunk, it hardly seems reasonable to permit the state to assert a right of public access without compensation on private property where alternative means of passage remain.

The Canal is a privately-owed, non-navigable water body. However, even if the waters are navigable they are only navigable after improvements to fast lands made by the owner of the land, and the government should be required to pay just compensation to Moon Moo for the taking of its right to exclude. Since the Canal not navigable and because no Government had

purchased that right of compensation from Moon Moo at the time Mr. James entered the Canal, there is no genuine dispute of material fact as to Mr. James's trespass. Thus, this Court should affirm the District Court's summary judgment on the question of Mr. James's trespass.

II. EVIDENCE OBTAINED ILLEGALLY BY DEAN JAMES IS INADMISSIBLE AGAINST MOON MOO.

Summary judgment in favor of Moon Moo was appropriate because there is no admissible evidence to dispute in the present case. When showing that there is no genuine dispute to a material fact and that summary judgment is therefore appropriate "[a] party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence. Fed. R. Civ. P. 56(2). The moving party also need not produce evidence showing the absence of a genuine issue of material fact, it need only show that there is an absence of evidence to support the nonmoving party's case. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The evidence in this case is inadmissible because it was both (1) unlawfully obtained via trespass and will be used here to seek a punitive penalty, and (2) not sufficiently reliable to be admitted under the Federal Rules of Evidence.

A. Evidence obtained by Mr. James's illegal search and seizure should be excluded in this civil action seeking to impose a penalty.

The Fourth Amendment requires the government have probable cause before invading a citizen's privacy. U.S. Const. amend. IV. The primary goal of the exclusionary rule is to deter government conduct that violates citizen's fourth amendment rights. *Ahart v. Colorado Dept. of Corrections, Div. of Adult Services, Buena Vista Correctional Facility*, 964 P.2d 517, 520 (Colo. 1998). A secondary goal of the rule is to prevent the court from condoning unconstitutional action by government investigators. *Id.* Where these same purposes are fulfilled in excluding illegal evidence in civil cases, courts have applied the exclusionary rule. *E.g. United States v.*

Janis, 428 U.S. 433 (1976); *Tirado v. C.I.R.*, 689 F.2d 307, 314 (2d. Cir. 1982); *Adamson v. C.I.R.*, 745 F.2d 541, 545 (9th Cir. 1984).

The exclusionary rule has been extended to application in some civil cases, but is especially likely to do so where the penalty in the civil case is quasi-criminal or where there is a penalty. "These cases show that the Fourth Amendment exclusionary rule is applicable to civil proceeding brought by the violating sovereign where the objective of those proceedings is to impose what appears to be a penalty." *U.S. v. Modes*, 787 F.Supp. 1466, 1471 (Ct. Int'l Trade 1992)(citations omitted). Courts have also held, however, that the exclusionary rule is inapplicable to civil actions between private parties. *Honeycutt v. Aetna Ins. Co.*, 510 F.2d 340 (7th Cir. 1975).

The exclusionary rule is also applicable where the object of the proceeding is to punish a regulated entity for past violations of the agency's regulations. *Smith Steel Casting Co. v. Brock*, 800 F.2d 1329, 1331 (BNA) (5th Cir. 1986); *Trinity Industries, Inc. v. Occupational Safety and Health Review Com'n*, 16 F.3d 1455, 1461 (6th Cir. 1994). But the rule does not apply to administrative proceeding conducted for the purpose of correcting violations of an agency's standards. *Trinity*, 16 F.3d at 1461. In both *Smith Steel* and *Trinity Industries*, the courts held that though the exclusionary rule would function to exclude evidence from unlawful seizures by OSHA inspectors, the good faith rule made the evidence admissible. In both cases, the agency relied in good faith on warrants that were later found to be insufficient.

Under CWA § 309(d) a person who makes a false statement is "convicted" and shall "be punished by a fine of not more than $10,000, or by imprisonment for not more than 2 years, or by both." 33 U.S.C. § 1319(d) (2014).

Here, the unlawful evidence collected by Mr. James is being used in a suit wherein civil

punitive penalties are sought under CWA § 309(d), (b), and 505. 33 U.S.C. §§ 1319(d),(b), (2014). Particularly under CWA 309(d), the civil suit at hand may carry the same significant penalties as a criminal proceeding, wherein the exclusionary rule always applies. In additional, the purpose of this proceeding is to punish Moon Moo for alleged past violations, so the exclusionary rule should apply under *Trinity* and *Smith Steel*. Though the illegal action here was performed by a private individual, the government here benefits from Mr. James' trespass in establishing the violation for which penalties are sought. Both Mr. James and the EPA needed Moon Moo's permission to enter the Canal, which was clearly posted with "No Trespassing" signs. Unlike Mr. James, however, the EPA could have entered the property with a valid search warrant if Moon Moo refused to allow an inspection. *Marshall v. Barlow's, Inc.,* 436 U.S. 307, 320-321 (1978). Though Mr. James is not a government agent, his illegally obtained evidence is being used by the governmental agency in an action brought by the Government. The EPA thereby benefits from Mr. James illegal action and by the agency using this evidence and the court condoning its use, the government is placing its imprimatur of approval on illegal behavior. There would a deterrent impact on the EPA should the exclusionary rule be applied here, because it would require the EPA to obtain evidence lawfully and not circumvent citizens Fourth Amendment rights by allowing private citizens to trespass with impunity to provide evidence in civil proceedings such as the one in this case.

This court should, therefore, exclude the unlawfully obtaining photographs of Moon Moo and the water collected by Mr. James to deter the EPA from relying on private illegal actions to obtain evidence and to prevent the appearance of this Court condoning trespass.

B. The samples obtained by Mr. James are alternatively inadmissible due to the unreliable nature of his sampling methods.

Even if this Court determines that the District Court erred in refusing to admit the

evidence for illegality, it must review the effects of such a determination for harmless error. If the evidence were inadmissible for some reason other than the illegality of its collection, or if this Court determines that the evidence would not be sufficient to create a genuine dispute of material fact, then the District Court made a harmless error, and its determination that Moon Moo is not a CAFO should be affirmed. *Drumm-Flato Com. Co. v. Edmisson*, 208 U.S. 534, 539 (1908); *see also Monks v. General Electric Co.*, 919 F.2d 1189, 1192 (6th Cir. 1990) (holding that refusal to admit expert affidavit into evidence was harmless error because summary judgment would have been appropriate whether or not the affidavit was admitted).

Even if such evidence were not inadmissible due to the illegality of its collection, the District Court's refusal to admit the evidence was harmless error, for the evidence is inadmissible due to its unreliability in accordance with existing scientific principles. Under the Federal Rules of Evidence, a layperson may not offer opinion testimony based on scientific, technical, or other specialized knowledge, and before an expert may offer opinion testimony, the party introducing the expert must show, among other things, that the testimony is the product of reliable principles and methods and that the expert has reliably applied the principles and methods to the facts of the case. Fed. R. Evid. R. 701, 702(c)(d).

Soil sampling should be precise and requires training. See, e.g., United States Environmental Protection Agency, Office of Water, *NPDES Storm Water Sampling Guidance Document*, EPA 833-8-92-001, p. 35 (July 1992) ("The applicant should carefully plan his/her sampling strategy prior to the actual sampling event, e.g., walk the site to determine appropriate sampling locations, become familiarized with local rainfall patterns, train sampling staff in procedures and safety…"). There is nothing on the record to show that Mr. James has been trained to collect discharge samples, and neither Riverwatcher nor the EPA have presented

experts to testify as to the validity or reliability of the methods used by Mr. James to collect the discharge sample; therefore, the samples and any expert opinions based on them are inadmissible. *See, e.g.*, *Reeves v. Commonwealth Edison Co.*, 2008 U.S. Dist. LEXIS 6340 at 16-17 (N.D. Ill. Jan. 28, 2008) (refusing to admit expert opinion on groundwater samples because the expert failed to take a sufficient number of background samples); *Allgood v. GMC*, 2006 U.S. Dist. LEXIS 70764, 2006 WL 2669337 at 35 (S.D. Ind. Sept. 18, 2006) (refusing to admit expert testimony because the expert failed to offer any scientific justification for his sampling methodology). In the case at bar, there is no evidence that Mr. James took samples upstream of the drainage ditch to ensure that the samples he took were unique to the alleged discharge from the drainage ditch, and it is not clear how many samples he took, nor how often he sampled. The fact that Mr. James' sampling results were not reproducible by either Riverwatcher, the EPA, or Moon Moo during discovery further calls into question the reliability of Mr. James' evidence. Because the evidence is so scientifically unreliable, it would have been an abuse of discretion to admit such evidence even it were not inadmissible due to the illegality of the collection of the materials. Therefore, this Court should affirm the District Court's conclusions anyway because even if the District Court erred in its determination that the samples were inadmissible due to the illegality of their collection, its error was harmless because it would have been an abuse of discretion to admit the evidence due to its scientific unreliability.

III. MOON MOO IS NOT SUBJECT TO NPDES PERMITTING REQUIREMENTS BECAUSE IT IS NOT A CAFO UNDER 40 C.F.R. § 122.23(B)(6) AND BECAUSE ANY DISCHARGE OF THE FERTILIZER IS AGRICULTURAL STORMWATER RUNOFF EXEMPT FROM NPDES PERMITTING REQUIREMENTS UNDER 33 U.S.C. § 1362(14).

Riverwatcher attempts to define Moon Moo as a medium-sized CAFO by asserting that pollutant discharges through the drainage ditch from Moon Moo's land constitute pollutant

discharges into waters of the United States through a man-made ditch under 40 C.F.R. § 122.23(b)(6)(ii)(A). However, the only evidence Riverwatcher has to support this contention was collected by a layman trespassing on private lands and is inadmissible. Without this evidence, Riverwatcher cannot allege any fact to show that Moon Moo has discharged pollutants into waters of the United States Even if this evidence were admissible, it would not be enough to raise a genuine issue of material fact that Moon Moo is a CAFO, for no reasonable trier of fact could find that Riverwatcher has presented sufficient evidence of a discharge of pollutants into waters of the United States because the evidence was collected by a layman and was not reproducible during discovery. Second, the sample was collected during a single rain event, and there is no evidence that such discharges have occurred in the past or will occur in the future. In order to allege liability under the CWA, a plaintiff must allege continuous or intermittent violations. *Gwaltney of Smithfield v. Chesapeake Bay Found.*, 484 U.S. 49, 57 (1987). Therefore, Riverwatcher's CAFO assertions cannot survive a motion for summary judgment.

Even if Riverwatcher's assertions that Moon Moo is a CAFO, or, in the alternative, that it is a point source of pollutant discharges, any discharges from Moon Moo's land application of the Fertilizer is exempt from NPDES permitting requirements as agricultural storm water discharge pursuant to 40 C.F.R. 122.23(e). 33 U.S.C. § 1362(14). Moon Moo's land application of the Fertilizer is performed pursuant to its NMP. Appellants have not formally challenged New Union's permitting process or its determination that Moon Moo is a "no-discharge" entity. Appellants seek to have the Court decide that Moon Moo, in complying with its NMP, is subject to NPDES permitting requirements over the State's determination to the contrary. However, the State's determination must be reviewed under the arbitrary and capricious standard. 5 U.S.C.S. § 706(2)(A). Otherwise, Moon Moo's land application practices in compliance with its NMP are

exempt from NPDES permitting requirements as agricultural storm water discharge

A. Moon Moo cannot be defined as a CAFO because there is no conclusive evidence of pollutant discharges into waters of the United States.

A CAFO is defined by the EPA under 40 C.F.R. § 122.23 as "an AFO that is defined as a Large CAFO or as a Medium CAFO by the terms of this paragraph, or that is designated as a CAFO in accordance with paragraph (c) of this section." 40 C.F.R. § 122.23(b)(2). Discharges from CAFOs as a result of the application of manure, litter, or process wastewater by the CAFO are subject to NPDES permitting requirements, except where the discharge is an agricultural storm water discharge. The only evidence of pollutant discharge from the drainage ditch was determined to be inadmissible by the trial court due to the illegality of its collection, and, as discussed above, even if the evidence were not inadmissible for its illegality, it should be considered inadmissible for its lack of scientific reliability.

Neither Riverwatcher nor the EPA assert that Moon Moo has been designated as a CAFO by the State or by the Regional Administrator of the EPA in accordance with 40 C.F.R. § 122.23(c). Therefore, in order for Moon Moo to be considered a CAFO, it must be defined as such under the regulations. *Id*. For the purposes of this appeal, Appellants must show that Moon Moo contains between 200 to 699 mature dairy cows, 40 C.F.R. § 122.23(b)(6)(i)(A), and discharges pollutants "into waters of the United States through a man-made ditch, flushing system, or other similar man-made device," 40 C.F.R. § 122.23(b)(6)(ii)(A)[1], in order to show that Moon Moo is a CAFO. Moon Moo is regulated by the State of New Union as a "no-discharge" AFO, i.e., an operation which does not normally have discharge from its facilities to

[1] Appellants have not claimed that Moon Moo discharges pollutants directly into waters of the United States under 40 C.F.R. § 122.23(b)(6)(ii)(B) and). Because they have had ample opportunity to raise such a claim and because it would prejudice Moon Moo to be forced to rebut such a claim for the first time on appeal, they should not be allowed to raise this issue on appeal. *See Singleton v. Wulff*, 428 U.S. 106, 120-21 (1976).

waters of the State in conditions up to and including a 25-year storm event, and it submits an NMP to this effect to the State of New Union. The NMP sets forth planned application rates and a calculation of expected uptake of nutrients by crops on which the Fertilizer is spread.

Riverwatcher and the EPA assert that pollutants are discharged through the drainage ditch from the land application field. As explained above, the only evidence that Riverwatcher and the EPA have presented to show pollutant discharges through the drainage ditch is either inadmissible or tied to inadmissible evidence. Because neither Riverwatcher nor the EPA have presented any admissible evidence of pollutant discharge from the drainage ditch, they have not raised any genuine issue of material fact as to the second requirement needed to define an entity as a CAFO.

Even if this Court were to determine that the evidence is admissible, however, the CWA claims at bar cannot pass summary judgment because the evidence is of a single discrete event, and a plaintiff to a CWA claim must allege a state of either continuous or intermittent violation. *Gwaltney of Smithfield*, 484 U.S. at 57. In the case at bar, Appellants rely on evidence from one isolated event, and they have not shown that the application of the Fertilizer on the fields will result in continuous or intermittent discharge. Rather, Dr. Mae has opined that the land application could cause the unprocessed nutrients to leach into the Deep Quod River and the groundwater during rain events. However, Appellants cannot cite any other occasion on which such a discharge has occurred, nor have they provided any groundwater samples or surface water samples from Deep Quod River upstream or downstream of the Canal to confirm their speculations. Moon Moo has not had any previous issues with its land application of the Fertilizer. Further, the only evidence that Appellants have to support their arguments, if it is admissible, is from April 2013, but the nitrate increases began in late winter. R. at 6. Without

evidence that the land application of the Fertilizer could result in future discharges or has resulted in the past discharges, the CWA claims must fail. *See, e.g., George v. Reisdorf Bros.*, 410 Fed. Appx. 382, 384 (2d Cir. 2011) (holding that plaintiffs' evidence which involved a discrete spill or predictions that another spill could occur was too speculative to support a CWA claim past summary judgment). Without further evidence of discharges during rain events, the expert's opinion that discharges could occur during rain events is too speculative to convince a reasonable trier of fact that Moon Moo is liable under the CWA.

Appellants' CAFO claims must fail summary judgment. First, they have not alleged any admissible evidence of pollutant discharges from Moon Moo's nutrient management practices. Second, even if the evidence were admissible, it is of a discrete event, and any arguments based on this evidence are too speculative to support a CWA claim.

B. Moon Moo's application of the Fertilizer in compliance with its NMP is exempt from NPDES permitting requirements as agricultural stormwater discharge.

Even if Moon Moo could be considered a CAFO, or even if the drainage ditch beyond Moon Moo could be considered a point source under the CWA, its application of the Fertilizer is exempt because (1) any alleged discharge is exempt from NPDES permitting requirements as agricultural storm water discharge, and (2) the application was in compliance with a State-approved NMP pursuant to the State's authorized permitting program.

1. Any alleged discharge from Moon Moo's application of the Fertilizer is exempt from NPDES permitting requirements as agricultural storm water discharge.

Under 33 U.S.C. § 1362(14), the term "point source" does not include any agricultural storm water discharges. Therefore, even if an entity is considered a CAFO or point source, if its alleged discharges are agricultural storm water discharges, then they are exempt from NPDES permitting requirements. For example,

> [W]here the manure…has been applied in accordance with site specified operations that ensure appropriate agricultural utilization of the nutrients in the manure…as specified in § 122.42(e)(1)(vi)-(ix), a precipitation-related discharge of manure…from land areas under the control of a CAFO is an agricultural storm water discharge.

40 C.F.R. 122.23(e). The Second Circuit has attempted to distinguish between what constitutes a CAFO discharge subject to NPDES permitting requirements and what constitutes exempt agricultural storm water discharges from a CAFO:

> [A]ny discharge of manure, litter, or process wastewater that results from the land application of these materials by a CAFO is a discharge that is regulable and subject to NPDES permit requirements. 40 C.F.R. § 122.23(e). Where, however, CAFOs land-apply waste in accordance with site-specific operations that ensure appropriate agricultural utilization of the nutrients in that waste, any subsequent "precipitation-related" discharge is considered to be an "agricultural storm water discharge" that is, under the Act, exempt from regulation. 33 U.S.C. § 1362(14).

Waterkeeper Alliance, Inc. v. United States EPA, 399 F.3d 486, 496 (2d Cir. 2005). If the discharges are simply the result of rain, then they are exempt from NPDES permitting requirements as agricultural storm water runoff; however, if the discharges from a CAFO simply happen to occur on rainy days, then the discharge may be subject to NPDES permitting requirements. *Concerned Area Residents for the Env't v. Southview Farm*, 34 F.3d 114, 121 (2d Cir. 1994) (holding that a reasonable jury could determine from eyewitness testimony that the discharges from the CAFO were a result of excess application of manure). This Court is not bound by its sister circuit, and it may determine that the Second Circuit's interpretation of what constitutes precipitation-related discharge under 40 C.F.R. § 122.23(e) is too confusing. For example, is a discharge that occurs only on rainy days not a result of rain? One way to interpret the Second Circuit's reasoning would be to require a plaintiff to provide evidence of discharges on non-rainy days, indicating that discharge on rainy days would not necessarily be the result of rain. Appellants have not shown evidence of pollutant discharges on non-rainy days.

This Court need not answer this question, however, because Appellants have presented inadmissible or, in the alternative, wholly unpersuasive, evidence. The only evidence of contamination Appellants allege is from the drainage ditch from April 2013. Even if the evidence were admissible and plausibly persuasive, pursuant to 40 C.F.R. 122.42(e)(1)(vi)-(ix), Moon Moo's NMP sets forth planned application rates and a calculation of the expected uptake of nutrients. Because Moon Moo is a no-discharge entity, however, there has not been reason to test the Fertilizer or retain documentation specific to an NPDES permit. Because Moon Moo applies the Fertilizer in accordance with its site-specific operations under its NMP filed with the State, any discharge from its land application of the Fertilizer is an agricultural storm water discharge exempt from NPDES permitting requirements under 40 C.F.R. § 122.23(e).

2. Moo Farm applies the Fertilizer in compliance with the State's permitting program; therefore, a suit to require Moon Moo to obtain an NPDES discharge permit is inappropriate.

Under 33 U.S.C. § 1342(b), a State may obtain authorization from the EPA to administer its own permit programs for discharges into navigable waters within its jurisdiction. The EPA is required to approve permit programs that meet certain requirements. Although the EPA retains oversight over the program, until it exercises its authority to withdraw approval of the State program, the State has the primary responsibility over its program. *See Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 650-51 (2007) ("If authority is transferred, then state officials--not the federal EPA--have the primary responsibility for reviewing and approving NPDES discharge permits, albeit with continuing EPA oversight"); *see also, District of Columbia v. Schramm*, 631 F.2d 854, 860 (D.C. Cir. 1980) ("Once the EPA approves a state program for issuing NPDES permits, Congress envisioned the EPA's role as largely a supervisory one."). It would logically follow that the State also has the primary responsibility in

determining whether a permit would be required in the first place. However, EPA approval of a State permitting program is not a "blank check" – "the…program is subject to continuing EPA oversight, and the EPA may withdraw its approval of the program should the EPA determine at any point that the …program does not meet the standards mandated in the CWA." *Akiak Native Cmty. v. United States EPA*, 625 F.3d 1162, 1171 (9th Cir. 2010).

In the case at bar, if the EPA believes that New Union is not administering its program in accordance with the CWA, then it should take steps to withdraw the State's authority under 33 U.S.C. § 1342(c)(3). Interested persons may petition the EPA to commence proceedings to determine whether withdrawal of approval of a State program is appropriate. 40 C.F.R. § 123.64(b)(1). Nothing in the record to show that Appellants have taken these opportunities.

An authorized State agency's determination as to whether it should, should not, or need not grant a permit may only be overturned if it is arbitrary and capricious. 5 U.S.C.S. § 706(2)(A). Under this standard, a court should not vacate an agency's decision unless the agency

> "'has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 658 (2007) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

Id. New Union has the delegated authority to operate its own permit program pursuant to 33 U.S.C. § 1342(b). Once New Union determined that Moon Moo was a no-discharge AFO, it did not have jurisdiction to require an NPDES permit until further review was required under the NMP or the permitting program, and, therefore, neither did Appellants. *See Ctr. for Food Safety v. Vilsack*, 718 F.3d 829, 832-33 (9th Cir. Cal.2013) (holding that once the applicable agency determined that an entity was not a "plant pest," it no longer had jurisdiction to continue

regulating the plant under the Plant Pest Act).

Although individual citizens may have standing to sue Moon Moo if it has violated its NMP, they do not have standing to sue Moon Moo for not having an NPDES discharge permit unless they show that New Union's decision not to regulate Moon Moo's application of the fertilizer was made arbitrarily and capriciously. *See, e.g. Ark. v. Okla.*, 503 U.S. 91, 113-14 (U.S.1992) (holding that the it was not arbitrary and capricious for the EPA to conclude that discharge into the Illinois River was permissible); *contra Waterkeeper Alliance, Inc.*, 399 F.3d at 498 (holding that provisions of 40 C.F.R. § 122.23 that did not provide for permitting authority review of nutrient management plans were arbitrary and capricious). Because Appellants have not challenged New Union's permitting program despite having the opportunity to do so, and because such an issue raised on appeal would prejudice Moon Moo, it may not do so on appeal. *Singleton*, 428 U.S. at 120-21. However, even if appellants could raise such an issue and succeed, the appropriate action for a court to take if it would be to remand the issue to the State agency for a review of Moon Moo's application practices and its Nutrient Management Plan to determine (a) whether Moon Moo requires a NPDES permit pursuant to the CWA and (b) whether Moon Moo's Nutrient Management Plan adequately limits any discharge of pollutants pursuant to its "no-discharge" status. *INS v. Ventura*, 537 U.S. 12, 16 (2002) ("Generally speaking, a court of appeals should remand a case to an agency for decision of a matter that statutes place primarily in agency hands."); *see also, Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 657-58 (2007) (stating that the Ninth Circuit erroneously deprived the EPA of its administrative authority by declining to remand the issue of whether transferring permitting authority under the CWA was appropriate).

It would be improper for this Court to determine that Moon Moo requires a NPDES

discharge permit under the CWA. First, in enacting the Clean Water Act, Congress emphasized giving responsibility to the states. *Schramm*, 631 F.2d at 860. States are closest to the pollution, and they have the greatest interest in protecting their natural resources. Second, the process of obtaining permits and "no-discharge" statuses can be expensive and timely. If any agency decision not to regulate could be supplanted by a court's opinion, regulated entities would be forced to go through not only the regulatory process, but also through courts to obtain declaratory judgments of compliance. Such a process would supplant the agency's purpose in the first place. *INS*, 537 U.S. at 16-17 ("The agency can bring its expertise to bear upon the matter; it can evaluate the evidence; it can make an initial determination; and, in doing so, it can, through informed discussion and analysis, help a court later determine whether its decision exceeds the leeway that the law provides."). Finally, if Moon Moo does require a permit, it should have the opportunity to work with the State to determine what steps it could take to maintain its no-discharge status.

Because there is no genuine dispute of material fact on record disputing that any discharge of the Fertilizer from Moon Moo constitutes agricultural storm water discharge pursuant to its State-approved NMP, and because Moon Moo has been designated by New Union as a no-discharge entity, Moon Moo does not require an NPDES discharge permit.

IV. MOON MOO MAY NOT BE LIABLE TO CITIZEN SUIT UNDER RCRA BECAUSE THE FERTILIZER DOES NOT CONSTITUTE A SOLID WASTE SUBJECT TO RCRA LIABILITY AND BECAUSE THE FERTILIZER DOES NOT CONSTITUTE AN IMMINENT AND SUBSTANTIAL ENDANGERMENT TO HUMAN HEALTH.

Riverwatcher has raised actions under RCRA, asserting open dump violations under 40 C.F.R. §§ 257.3-1 (application of solid wastes to floodplains), 257.3-4 (application of solid

wastes in a manner that may contaminate groundwater), and 257.3-5 (application of solid waste with a pH below 6.5 to food chain crop areas). Riverwatcher has also asserted that Moon Moo's operations constitute an imminent and substantial endangerment to human health in violation of 42 US Code § 6972, RCRA § 7002(a)(1)(B). This Court should affirm the District Court's granting of summary judgment against all of Riverwatcher's RCRA claims. The Fertilizer is a non-hazardous waste used for a specific purpose and, therefore, not discarded material, a requirement for a material to be considered a solid waste. Because the Fertilizer is a non-hazardous waste, the recycling of the whey product does not establish that it is discarded. 40 C.F.R. § 261.1(b)(1). Because Moon Moo is not a solid waste, it is not subject to regulation under Subtitle IV or VII of RCRA.

Even if the Fertilizer were considered a solid waste, however, Moon Moo's application of the Fertilizer is agricultural waste returned to the soil as fertilizer, which makes it exempt from guidelines for open dumping. 40 C.F.R. § 257.1.

Riverwatcher's Subtitle VII claim must also fail even if the Fertilizer could be considered a solid waste, for Riverwatcher has not provided anything more than conclusory allegations that Moon Moo has contributed to nitrate advisory levels in Farmville. A plaintiff must allege more than just speculative facts that would indicate that an imminent and substantial harm would have resulted from a defendant's practices. *Me. People's Alliance v. Holtrachem Mfg. Co., L.L.C.*, 211 F. Supp. 2d 237, 247 (D. Me. 2002) (citing *United States v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100, 1109 (D. Minn. 1982)). Riverwatcher has not alleged the degree or probability of harm it expects from the alleged contribution to the nitrate advisory. Instead of determining the numerous possible sources of nitrate pollution, Riverwatcher merely seeks to pin Moon Moo as a scapegoat without clearly defining its level of culpability. Riverwatcher's conclusory assertions

of contribution are not enough to survive summary judgment.

For the above reasons, which are detailed in the subsequent sections, this Court should affirm the District Court's grant of summary judgment against Riverwatcher's RCRA claims.

A. The Fertilizer as used by Moon Moo does not constitute solid waste subject to regulation under 42 U.S.C. § 6945(c)(1)(C) because it is used for a specific purpose and, therefore, not discarded material within the meaning of the statute.

Riverwatcher seeks to classify the application of the Fertilizer to agricultural fields as an open dumping subject to a 42 U.S.C. 6945(c)(1)(C), RCRA § 4005(a), citizen suit. Under RCRA, an "open dump" is defined as "any facility or site where solid waste is disposed of which is not a sanitary landfill, and which is not a facility for disposal of hazardous waste." 42 U.S.C. § 6903(14). Agricultural wastes returned to the soil as fertilizers or soil conditioner are exempt from guidelines for open dumps. 40 C.F.R. § 257.1. Whether or not agricultural waste is used as a fertilizer or soil conditioner is a question of fact. *Cmty. Ass'n for Restoration of the Env't, Inc. v. Cow Palace, LLC*, 2013 U.S. Dist. LEXIS 87720, 2013 WL 3179575, *16 (E.D. Wash. June 21, 2013). Solid waste includes

> any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility **and other discarded material**, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under section 1342 of title 33, or source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954, as amended (68 Stat. 923) [42 U.S.C. 2011 et seq.].

42 U.S.C. § 6903(27) (emphasis added). The term discard is not defined in the statute. Where a statute does not define a term, a court should interpret the statute using the term's ordinary meaning. *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. ___, 134 S. Ct. 1749, 1756 (2014). To "discard" is to "cast aside; reject; abandon; give up." *Safe Air v. Meyer*, 373

F.3d 1035, 1041 (9th Cir. 2004) (quotations omitted); *see also, American Mining Congress v. United States EPA*, 824 F.2d 1177, 1184 n.7 (D.C. Cir. 1987) ("The dictionary definition of "discard" is to drop, dismiss, let go, or get rid of as no longer useful, valuable, or pleasurable.") (quotations omitted) "The key to whether a manufactured product is a "solid waste," then, is whether that product has served its intended purpose and is no longer wanted by the consumer." *Ecological Rights Found. v. Pac. Gas & Elec. Co.*, 713 F.3d 502, 515 (9th Cir. 2012) (quotations omitted) (holding that wood preservative that leaked or otherwise escaped from utility poles through normal wear and tear was not a solid waste under RCRA because washing away was an expected consequence of the preservatives intended use); *see also, Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 209 (2d Cir. 2009) (deferring to the EPA's determination that lead shot discharged at a shooting range is not discarded under RCRA). There are currently three factors bearing on whether material is truly "discarded" as a 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 (active reuse indicates the material is not discarded), and (3) whether the materials are being reused by the original owner. *Safe Air,* 373 F.3d at 1043 (citing cases). However, the Ninth Circuit in *Safe Air* misunderstood the D.C. Circuit's holding in *American Mining Congress* - in that case, the court simply held that the EPA could interpret the term "discard" to include materials that are recycled between different owners, not that the term necessarily includes materials recycled between different owners. *American Mining Congress v. United States EPA*, 907 F.2d 1179, 1186-87 (D.C. Cir. 1990). The EPA does not classify all material recycled between owners as solid waste only hazardous wastes may be considered solid wastes if recycled. 40 C.F.R. § 261.1(b)(1) ("The definition of solid waste in this part…does not

apply to materials…that are not otherwise hazardous wastes and that are recycled); *see also*, *Howmet Corp. v. EPA*, 614 F.3d 544 (D.C. Circuit 2010) (holding that a corrosive potassium hydroxide solution was subject to RCRA jurisdiction as a solid waste because the defendant recycled the hazardous cleaning agent as fertilizer).

Riverwatcher asserts that Moon Moo's Fertilizer is solid waste and that Moon Moo's land application of the Fertilizer violates 40 C.F.R. §§ 257.3-1 (application of solid wastes to floodplains), 257.3-4 (application of solid wastes in a manner that may contaminate groundwater), and 257.3-5 (application of solid waste with a pH below 6.5 to food chain crop areas). There is no genuine dispute that Moon Moo uses the manure-whey mixture as fertilizer for its fields. Therefore, this Court does not need to reach the question as to whether or not the Fertilizer application is solid waste, because the EPA has expressly exempt agricultural wastes from its regulations under 40 C.F.R. §§ 257.1 through 257.4. By obtaining a "no-discharge" permit from New Union, Moon Moo has established that its land application of the Fertilizer is for soil fertilizing purposes. Unlike in *Cmty. Ass'n for Restoration of the Env't, Inc.*, Riverwatcher has not alleged that the Fertilizer has been over-applied or that it does not serve a useful purpose; rather, Riverwatcher simply questions Moon Moo's application practices under its NMP in general. Therefore, they have presented no genuine issue of material fact to contest the agricultural waste exemption from open dumping criteria.

Even if this Court were to determine that there is a genuine issue of fact as to whether the agricultural waste is exempt from the open dump guidelines, the Fertilizer used by Moon Moo would not be liable under §§ 257.3 because it is not a solid waste. The Fertilizer is created and used by Moon Moo on a regular and continuous basis. Its main ingredients, acid whey and manure, are products derived from dairy cows. The cows produce milk and manure. The milk is

used to produce yogurt, of which whey is a natural byproduct. Whey consists of water, lactic acid, lactose, and amino acids. Edgar Spreer, *Milk and Dairy Product Technology*, 407 (1995).

The whey recycled from the yogurt industry is not solid waste because it is not hazardous waste. C.F.R. § 261.1(b)(1); R. at 10. Therefore, because neither the Fertilizer nor the recycled acid whey is a hazardous waste, and because Moon Moo does not discard the material, but uses it for soil fertilization, the Fertilizer and its components are not liable for regulation under RCRA.

B. Riverwatcher cannot succeed under 42 U.S. Code § 6972(a)(1)(B) because by providing no more than conclusory allegations of contribution to pollution, Riverwatcher has failed to provide a genuine issue of material fact that the Fertilizer constitutes an imminent and substantial endangerment to human health.

42 U.S. Code § 6972(a)(1)(B), or RCRA § 7002(a)(1)(B), provides for a citizen suit

> (B) against any person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment.

42 U.S.C. § 6972(a)(1)(B). In order to succeed under this provision, a plaintiff must prove that the defendant's use of a solid or hazardous waste poses "a reasonable prospect of a near-term threat of serious potential harm." *Maine People's Alliance v. Mallinckrodt, Inc.*, 471 F.3d 277, 286 (1st Cir. 2006). An endangerment is "imminent" if it threatens to occur immediately, even if the impact from the threat may not be felt until later. *Meghrig v. Kfc W.*, 516 U.S. 479, 485-86 (1996). Courts have generally agreed that an endangerment is "substantial" if it is serious." *Cordiano*, 575 F.3d. at 210 (citing cases). Courts are reluctant to quantify what level of harm constitutes a "serious" harm; rather, a trier of fact must weigh the risk and degree of the harm that may arise from the endangerment. *Id*. at 211; *Me. People's Alliance* 211 F. Supp. At 247

"Courts will not find that an imminent and substantial endangerment exists 'if the risk of harm is remote in time, completely speculative in nature, or de minimis in degree.'" *Id*. (citing *United States v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100, 1109 (D. Minn. 1982)).

Riverwatcher has failed to present sufficient evidence that there is an imminent and substantial endangerment from Moon Moo's application of the Fertilizer on its fields. First, as shown in the previous section, the Fertilizer is neither hazardous nor solid waste; therefore, Moon Moo's application of the manure to its fields is not subject to liability under RCRA § 7002(a)(1)(B). Second, Riverwatcher has only provided speculation about the possible effects of Moon Moo's operations. Riverwatcher has not provided evidence of groundwater contamination or admissible/convincing evidence of surface water contamination. Riverwatcher's speculation regarding what may happen in the future if it rains during land application is insufficient to pass summary judgment without evidence of contamination. *Covington v. Jefferson County, 358 F.3d 626*, 645-46 (9th Cir. 2004) (holding that while the risk of groundwater contamination was adequate to survive a challenge to standing, evidence of actual contamination would be necessary to survive summary judgment). Even if the evidence of the alleged surface water contamination is admissible, Riverwatcher's own expert, Dr. Susan Generis, has conceded that Moon Moo's land application of the Fertilizer was not a but-for cause of the April 2013 nitrate advisory, and although she offers a conclusory opinion that Moon Moo's operations have contributed to the nitrate advisories, Riverwatcher cannot support its allegations with specific facts regarding the probability or degree of harm from Moon Moo's practices. *See Murtaugh v. New York*, 810 F. Supp. 2d 446, 475 (N.D.N.Y 2011) (dismissing the plaintiff's RCRA claim for failure to allege facts to show that the Defendants have contributed to the handling, storage, treatment, transportation, or disposal of solid or hazardous waste). The nitrate advisory began in

late winter 2013, and Riverwatcher has presented no evidence that Moon Moo's land application practices have resulted in discharges at that time. R. at 6. Also, it is not disputed that such nitrate advisories were also issued in five out of the ten years prior to the 2013 nitrate advisory. R. at 7. Riverwatcher's expert has not explained the degree to which Moon Moo's practices have contributed to this problem when compared to the contributions of other Farmers or sources – if Moon Moo's practices contribute to the nitrate problem negligibly or would not pose a risk absent the contributions of the other entities, Moon Moo should not be held liable. *Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 399 F.3d 248, 254 (3d Cir. 2005) ("[A] plaintiff must show the 'substantial likelihood that the requested relief will remedy the alleged injury in fact.'") (quoting *McConnell v. FEC*, 540 U.S. 93, 225-26 (2003)).

Riverwatcher cannot succeed on its RCRA § 7002(a)(1)(B) claim because the Fertilizer not a solid or hazardous waste. Further, even if the Fertilizer could be considered a solid waste, the citizen suit still should not pass summary judgment because Riverwatcher has failed to present any facts which would convince a reasonable trier of fact that the land application of the Fertilizer poses an imminent and substantial endangerment to human health.

CONCLUSION

For the above reasons, Moon Moo requests that the Court affirm the District Court grant of summary judgment in favor of Moon Moo. Appellants have not provided any genuine issues of material fact regarding their claims under the CWA and RCRA. Riverwatcher has failed to produce sufficient evidence of pollutant discharges from Moon Moo's operations, and Riverwatcher cannot adequately measure the level of harm, if any, from Moon Moo's operations.