Team 55

Case No. 155-CV-2014

IN THE

United States Court of Appeals
For the Twelfth Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellant, and

DEEP QUOD RIVERWATCHER, INC., and DEAN JAMES,

Plaintiffs-Intervenors-Appellants,

v.

MOON MOO FARM, INC.

Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW UNION
THE HONORABLE JUDGE ROMULUS N. REMUS

BRIEF OF
DEFENDANT-APPELLEE, MOON MOO FARM, INC.

Counsel for Defendant-Appellee, Moon Moo Farm, Inc.

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JURISDICTIONAL STATEMENT

Federal question jurisdiction exists under 28 U.S.C. § 1331 (2012) because the EPA's claim arises under the Clean Water Act, 33 U.S.C. §§ 1251-1387 (2012), and Riverwatcher's claim arises under the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992k. This Court has appellate jurisdiction because the district court's June 1, 2014 order granting summary judgment under Fed. R. Civ. P. 56 is a final, appealable order under 28 U.S.C. § 1291 (2012).

STATEMENT OF THE ISSUES

1. Whether the Queechunk Canal, which was built on private property owned by Moon Moo Farm (the "Farm") and marked with "No Trespassing" signs, precludes a public right of access.

2. Whether the Fourth Amendment excludes Riverwatcher and the EPA from using improperly obtained evidence from the Queechunk Canal in a civil enforcement proceeding.

3. Whether the Farm is exempt from classification as a concentrated animal feeding operation and the obligation to obtain a discharge permit under the Clean Water Act, where insufficient evidence exists that a discharge into jurisdictional waters occurred.

4. Whether the Farm is exempt from holding a discharge permit for alleged discharge flowing from its fields after a significant rainstorm because of the agricultural stormwater exemption, appearing in EPA's regulations at 40 C.F.R. § 122.23.

5. Whether soil-conditioning fertilizer, applied by the Farm in compliance with EPA regulations appearing in 40 C.F.R. § 257.1(c)(1), is exempt from "solid waste" regulation under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6945(a) .

6. Whether fertilizer runoff, which allegedly flowed from the Farm's property during a major rainstorm, and had no effect on any Farmville citizens, presents an "imminent and substantial endangerment to health" under RCRA § 7002(a)(1)(B), 42 U.S.C. § 6972 (2012).

STATEMENT OF THE CASE

This matter commenced when Deep Quod Riverwatcher, Inc., ("Riverwatcher") filed a letter of intent to sue Moon Moo Farm (the "Farm") under the citizen suit provisions of the Clean Water Act ("CWA") § 505 and Resource Conservation and Recovery Act ("RCRA") § 7002. 33 U.S.C. § 1365 (2012); 42 U.S.C § 6972 (2012). R. at 7. Shortly thereafter, the EPA filed a CWA civil enforcement action against the Farm, based solely on Riverwatcher's evidence. R. at 7. The EPA sought penalties and injunctive relief under CWA § 309(d) and 309(b), respectively. 33 U.S.C. § 1319(d), (b) (2012); R. at 7. Riverwatcher intervened in EPA's CWA claims, and added a claim alleging open dumping of solid waste under RCRA § 4005, and imminent and substantial endangerment under RCRA § 7002. R. at 7. The Farm counterclaimed, seeking injunctive relief and damages against Riverwatcher and Dean James for trespassing on the Farm's private property without permission or a warrant. R. at 6-7. Both sides moved for summary judgment.

By Order dated April 21, 2014, the District Court for New Union denied all of EPA's and Riverwatcher's motions for summary judgment. R. at 12. On the CWA claims, the court determined that Riverwatcher had trespassed and "EPA and Riverwatcher thus lack[ed] any admissible evidence to establish a discharge of pollutants from the ditch on [the] Farm's fields." R. at 9. The court further denied the CWA claim because it found that any discharge flowing from the Farm is exempt under EPA's agricultural stormwater exemption. R. at 9-10. On the RCRA claims, the court found that the Farm reused manure and whey as soil-conditioning fertilizer, and therefore the material could not be characterized as "solid waste" under RCRA. R. at 11. Regardless of whether or not the material was solid waste, the court found that Riverwatcher's open dumping claim failed since EPA regulations "specifically exclude[d]" agricultural products. R. at 11. The lower court rejected Riverwatcher's "imminent and substantial endangerment" claim, finding no evidence of exposure to humans. R. at 11-12. The

court granted the Farm's motion for summary judgment on all claims, including the trespass counterclaim, awarding the Farm $832,560 in damages. R. at 12.

STATEMENT OF THE FACTS

Moon Moo Farm (the "Farm") is a local dairy farm that owns a plot of land in Farmville, New Union, and supplies milk to another local business, Chokos Greek Yogurt facility ("Chokos"). R. at 4-5. The Farm maintains a milking herd of dairy cows in an indoor barn. R. at 4. In the 1940s, the Farm's previous owner constructed a bypass canal with her own funds through the Farm's property to prevent flooding on the Deep Quod River (the "River"). R. at 5. The canal, which became known as the Queechunk (the "Canal") now diverts much of the River, alleviating future flood events by improving its flow. R. at 5. While private citizens occasionally use the Canal without permission, the Farm makes every attempt to notify the public that the Canal is private property by prominently posting "No Trespassing" signs along its banks. R. at 5.

In 2010, the Farm formed a symbiotic relationship with Chokos to increase yogurt production. R. at 5. The Farm increased its milking herd to 350 cows several years ago to meet Chokos' demand. R. at 5. In 2012, the Farm began accepting whey, free of charge, left over from Chokos' yogurt production to mix into manure and use as fertilizer. This exchange enables the Farm to continue a longstanding historical practice of using whey as a soil conditioner. R. at 5-6. The Farm applies fertilizer in compliance with its state-approved Nutrient Management Plan ("NMP") to condition the soil for growing Bermuda grass, a species known to tolerate wide ranges of soil acidity. R. at 5-6. The Farm uses the grass to produce silage as animal feed. R. at 5.

The Farm is regulated by the state as a "no-discharge" facility. R. at 2-3, 5. Animal manure is channeled via drains and pipes from the cow barn into an outdoor lagoon built to retain wastes up to and including a twenty-five year storm, or five inches of rainfall, without overflowing. R. at 4-5. The whey is mixed with manure in the lagoons and spread onto fields as fertilizer. R. at 5.

The Farm operates under a NMP approved by the New Union Department of Agriculture ("DOA"), which regulates the Farm's fertilizer applications and calculates the expected uptake of nutrients by the Bermuda grass; it does not prohibit the application of fertilizer during storm events. R. at 5. Acknowledging the complex relationship between a farm and its soils, the DOA generally does not review NMPs or require public comment. R. at 5.

On April 11, 2013, the Farmville area experienced a significant storm event of two inches of rain. R. at 6. Shortly afterwards, the River's turbidity reportedly increased and had an unpleasant odor. R. at 6. The Farmville Water Authority issued a nitrate advisory, notifying residents that high levels of nitrates were not hazardous to adults, but that infants should drink bottled water. R. at 6, 11. Five nitrate advisories have occurred in Farmville in the past ten years. R. at 7. Expert testimony suggests it is impossible to prove the cause of the nitrate exceedance. R. at 7.

The day of the storm, Dean James, the head of Deep Quod Riverwatcher ("Riverwatcher"), a non-profit organization, took it upon himself to investigate. R. at 6. James ignored the posted "No Trespassing" signs and navigated up the Canal through the Farm's property, where he photographed discolored runoff from the Farm's fields. R. at 6. James took samples from a drainage ditch, which indicated high levels of nitrates and fecal coliforms. R. at 6. Riverwatcher's expert, Dr. Mae, asserted that the Farm's fertilizer is a weak acid, which lowers the pH of the soil and reduces the nutrient uptake of Bermuda grass. R. at 6. However, Dr. Mae based her argument on samples of fertilizer; the soil from the Farm's fields was never directly sampled. R. at 6. The Farm's expert agronomist, Dr. Green, did not dispute Dr. Mae's findings, but observed that Bermuda grass tolerates a wide range of soil pH conditions.

Riverwatcher's unauthorized actions tipped off the EPA, which commenced suit against the Farm for alleged Clean Water Act violations, without conducting any independent investigation.

R. at 7. It is undisputed that the Farm has complied with its NMP at all relevant times. R. at 6.

STANDARD OF REVIEW

This Court reviews the district court's findings of fact for clear error, and its legal conclusions de novo. *Fishermen Against Destruction of the Env't, Inc. v. Closter Farms, Inc.*, 300 F.3d 1294, 1296 (11th Cir. 2002); *accord Am. Canoe Ass'n v. Murphy Farms, Inc.*, 412 F.3d 536, 538 (4th Cir. 2005) ("We uphold the district court's findings of fact unless they are clearly erroneous, but we review its legal conclusions de novo."); *Cmty. Ass'n for Restoration of Env't v. Henry Bosma Dairy*, 305 F.3d 943, 953 (9th Cir. 2002).

In performing de novo review of summary judgment, this Court applies the same standards as the district court. *See, e.g.*, *Triton Marine Fuels Ltd., S.A. v. M/V Pac. Chukotka*, 575 F.3d 409, 412 (4th Cir. 2009) ("We review the district court's grant of summary judgment de novo, applying the same standards as . . . the district court."); *accord Bufford v. Williams*, 42 Fed. App'x 279 (10th Cir. 2002); *Berry v. Armstrong Rubber Co.*, 989 F.2d 822, 824 (5th Cir. 1993). This Court should affirm summary judgment under Rule 56 when "the movant shows that there is no genuine dispute as to any material fact." Fed. R. Civ. P 56(a). Rule 56(c) enables parties to object when "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). "The plain language of Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

SUMMARY OF THE ARGUMENT

The government and Deep Quod Riverwatcher, Inc. ("Riverwatcher") have been overzealous in bringing this lawsuit under the Clean Water Act ("CWA") and the Resource Conservation and Recovery Act ("RCRA") against Moon Moo Farm (the "Farm"), a small

business operating in the state of New Union. All claims against the Farm are based upon evidence Riverwatcher obtained by intruding upon the Queechunk Canal, the Farm's private property. This evidence is categorically inadmissible because the Canal is a private waterway that does not offer a public right of access; it was built on private land by private money. Furthermore, because EPA is relying upon evidence obtained by trespass, Riverwatcher's intrusion required a warrant, which was never obtained. Evidence gathered by a private citizen via trespass is not admissible in civil enforcement proceedings. The district court correctly excluded this evidence from the record, and without it, the Farm is not subject to regulation under the CWA.

Even if this Court finds the evidence is admissible, the Farm's runoff is clearly exempt as agricultural stormwater under the CWA's § 502(14) based on the plain meaning of the statutory language, legislative history, and purpose behind amendments made to the CWA in 1987. 33 U.S.C. § 1362(14) (2012). Furthermore, the Farm operates in compliance with EPA's own regulations at 40 C.F.R. § 122.23 (2012), because any discharges flowing from the Farm are caused by precipitation, the state has approved the Farm's nutrient management plan ("NMP"), and the Farm's nutrient applications fully comply with its NMP.

Finally, Riverwatcher's attempt to use RCRA to subject the Farm to further regulation must be denied. Congress never intended RCRA to apply to agricultural waste regularly reused from the Farm's herd in a symbiotic relationship with a local yogurt producer according to its NMP. Moreover, Riverwatcher cannot claim that there is imminent and substantial endangerment to human health, because there is no evidence that the only nitrate-susceptible population was ever exposed. Therefore, the district court was correct in denying all of EPA's and Riverwatcher's claims, and in affirming the Farm's counterclaim for damages caused by trespass.

ARGUMENT

I. The EPA Has a Long History of Regulatory Overreach in the Agricultural Sector.

The U.S. Environmental Protection Agency's enforcement action against Moon Moo Farm is misguided and beyond the scope of its regulatory authority under the Clean Water Act ("the Act"). The Act was adopted by Congress in 1972, and grants jurisdiction to the U.S. Environmental Protection Agency ("EPA" and "the Agency") to regulate water quality in the United States. Clean Water Act of 1972, Pub. L. No. 92-500, § 2, 86 Stat. 816 (1972). Specifically, EPA is authorized to manage and mitigate the addition of pollutants via point sources into navigable waters.[1] 33 U.S.C. § 1362(12)(A) (2012). The Agency regulates discharges by granting permits to operators under the National Pollutant Discharge Elimination System ("NPDES"). *See id.* § 1342. However, Congress recognized the important role of industry in the American economy by identifying specific operations for which discharge permits are *not* required, including agricultural facilities. *See* Water Quality Act of 1987, Pub. L. No. 100-4, § 503, 101 Stat. 7, 75 (1987) (exempting agricultural stormwater discharge); S. Rep. No. 95-370, at 35, *reprinted in* 1977 U.S.C.C.A.N. 4326, 4360 (exempting return flows from irrigated agriculture).

EPA has no statutory authority to require discharge permits from exempted operators – even if such discharge would otherwise be considered a point source. *See* NPDES Regulations Addressing Storm Water Discharges, 64 Fed. Reg. 68,722, 68,724-25 (Dec. 8, 1999) (stating in EPA regulations that "[a]lthough water quality problems also can occur from agricultural storm water discharges and return flows from irrigated agriculture, this area of concern is statutorily

[1] Navigable waters are defined in § 502(7) as "waters of the United States, including the territorial seas." 33 U.S.C. § 1362 (2012). Because neither term is significantly at dispute here, this Brief will use the term "jurisdictional waters" to encompass all waters over which EPA has federal jurisdiction under the Clean Water Act.

exempted from regulation as a point source under the Clean Water Act . . . ."). Similarly, EPA has no statutory authority to regulate non-point source pollution; instead, that authority is vested in state governments. See 33 U.S.C. § 1251(g) (2012) ("It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution . . . ."); *id.* § 1329(b) (instructing state governments to take the primary role in regulating non-point sources).

EPA has a long history of overstepping its authority under the Act when regulating the agricultural industry. Since 1999, the Agency has been attempting to craft regulations for large-scale animal agriculture, but it has been repeatedly rebuffed by federal circuit courts. EPA's first attempt at regulating concentrated animal feeding operations ("CAFOs") was proposed in 2001 and finalized in 2003. NPDES Regulation and Guidelines for CAFOs, 68 Fed. Reg. 7176, 7176 (Feb. 12, 2003). The rule was widely criticized and eventually vacated in part in *Waterkeeper Alliance v. U.S. EPA*, 399 F.3d 486 (2d Cir. 2005). The Second Circuit held that "EPA . . . exceeded its statutory jurisdiction by requiring all CAFOs to either apply for NPDES permits or otherwise demonstrate . . . no potential to discharge." *Id.* at 504. After the 2005 *Waterkeeper* decision, EPA recalibrated, finalizing a new rule in 2008. Revised NPDES Regulation and Guidelines for CAFOs in Response to *Waterkeeper*, 73 Fed. Reg. 70,418, 70,418 (Nov. 20, 2008). That rule also overstepped, as another circuit court vacated parts of the rule, holding that the Agency could not require CAFOs to apply for permits in advance of actual discharge. *Nat'l Pork Producers Council v. U.S. EPA*, 635 F.3d 738, 756 (5th Cir. 2011).

Failing to heed these judicial warnings, EPA proposed a new rule in 2011 that would have forced CAFOs across the country to report information about their operations to the federal government – despite that farms were already required to report such information to local

agencies in many states. Thomas Driscoll & Brittany Meyer, *EPA Withdraws CAFO Reporting Rule*, A.B.A. (Water Quality & Wetlands Comm.), Dec. 2012, at 12. EPA withdrew the reporting rule in 2012, indicating recognition of the serious regulatory burden that would fall on agricultural operations if the regulations had gone into effect. NPDES CAFO Reporting Rule Withdrawal, 77 Fed. Reg. 42,679, 42,679 (July 20, 2012); *see* Emily R. Lyons, *EPA's Authority Gone Awry: The Flawed CAFO Reporting Rule*, 15 Vt. J. Envtl. L. 599, 621-24 (2014) (arguing that EPA's reporting rule needlessly duplicated state regulatory efforts). Altogether, EPA's attempts at regulating CAFOs have been vacated or curtailed *three* times in the last fifteen years. This is an unimpressive record for any federal agency, and it has produced a confusing patchwork of regulation and case law that is difficult even for well-meaning agricultural operators like the Farm to follow.

Within this context of regulatory disarray, EPA brought the present action against the Farm for failure to obtain discharge permits. R. at 4. However, the Farm is not subject to discharge permitting under the Act for several reasons. First, the record lacks admissible evidence that the Farm discharged into jurisdictional waters, since evidence obtained from private property by a private citizen via trespass is not admissible in civil enforcement proceedings. Second, even if this Court finds that the evidence is admissible or the Farm is discharging, the Farm is exempt from permitting under the Act's agricultural stormwater exemption. *See* 33 U.S.C. § 1362(14) (2012). For these reasons, this Court should affirm the district court's ruling that the Farm is not required to hold a discharge permit.

II. EPA's Enforcement Action Is Unsupported by Admissible Evidence Because the Queechunk Canal Is a Private Waterway that Provides No Public Right of Access.

The Queechunk Canal is not a publicly navigable waterway that allows for unlimited public access. The Canal was created with private funds and constructed through private land, and

although it provides a nexus between two parts of the Deep Quod River, the Canal does not interfere with or obstruct the river, and therefore is not publicly navigable.

A. The Public Right of Access is Not Absolute for Private Waterways.

During the early years of the republic, the Supreme Court followed English common law by granting citizens the public right to use open navigable waters. *Gibbons v. Ogden*, 22 U.S. 1, 1 (1824); *see Gray v. Bartlett*, 37 Mass. 186, 192 (Mass. 1838) (representing a statewide trend to follow the Supreme Court's holding). However, over the past century, both the Supreme Court and state courts have restricted the government's ability to control the public's access to many privately owned navigable waterways. *See, e.g.*, *Kaiser Aetna v. United States,* 444 U.S. 164, 172-73 (1979) (holding that improvements to a privately owned man-made lagoon that connected to a public waterway did not produce a public right to access); *Nat'l Audubon Soc'y v. White,* 302 So.2d 660, 665 (La. Ct. App. 1974) ("We believe that a canal built entirely on private property, with private funds and for private purposes, is a private thing, for the same reasons that a road built on private property for private purposes is a privately owned road."). A navigable canal built on private land with private funds does not allow for public access "simply because it contained running water or because it was . . . navigable." *Nat'l Audubon Soc'y*, 302 So.2d at 665. A waterway is classified as private when the owner owns the bottom of the waterway. *See Steel Creek Dev. Corp. v. James*, 58 N.C. App. 506, 511-12 (N.C. Ct. App. 1982) (noting that an owner of submerged lands owns "to the sky and to the depths"). Here, the Farm owns the land on both sides of the Canal, and therefore owns the submerged land underneath the Canal as well. Thus, the Canal is categorically private, and provides no public right of access.

B. The Queechunk Canal Was Built on Private Land by Private Money, and Does Not Grant a Public Right of Access.

The Canal falls within the category of man-made canals identified by the Supreme Court that

does not allow for a public right of access, as the privately owned Canal neither obstructs nor interferes with the River. A privately owned, man-made canal does not allow a public right of access when that canal is built by private resources on private land and happens to join with a navigable waterway. *Vaughn v. Vermilion Corp.*, 444 U.S. 206, 208-09 (1979); *see also Dardar v. Lafourche Realty Co.*, 985 F.2d 824, 833 (5th Cir. 1993) (denying public right of access to privately constructed canal because it did not interfere with or obstruct pre-existing navigable waterways). In *Vaughn*, the respondents constructed several man-made, navigable canals on their own land with private funds to enjoin an inland navigable waterway with the Gulf of Mexico. *Vaughn*, 444 U.S. at 207. The owners prominently posted "No Trespassing" signs to control access to the waterway and keep uninvited visitors off their property. *Id.* The *Vaughn* Court explored "whether channels built on private property and with private funds . . . [that] ultimately join with other navigable waterways, are similarly open to use by all citizens of the United States." *Id.* at 208. Relying on their earlier reasoning in *Kaiser*, the Court concluded that the owner's construction of the canal created no "general right of use in the public." *Id.* at 208-09.

Similarly, here, the Farm's privately constructed Canal has connected portions of a publicly navigable waterway. Further, the Farm has taken steps to warn the public of the Canal's private ownership by prominently posting "No Trespassing" signs throughout the Canal. R. at 5-6. This Court must follow *Vaughn* in rejecting the argument that the Canal is rendered "public" simply because it is connected to a navigable water.

EPA and Riverwatcher may argue that the Canal loses its claim to private ownership because it diverts the Deep Quod River. However, this argument fails. The Supreme Court first raised the issue of diversion of a pre-existing navigable waterway in *Vaughn*. 444 U.S. at 208. The Court found no previous ruling or reasoning to determine that a public right of access existed, even if

an artificial waterway had been *proven* to divert a preexisting natural navigable waterway. *Id.* at 208-09. The Court simply concluded that the issue of diversion was a matter of first impression, and remanded to the state court for further consideration. *Id.* at 209-10.

This Court should employ the test used by the Fifth Circuit, which denied a public right of access to a private waterway because "the construction of the canal did not *interfere with or obstruct* pre-existing navigable waterways." *Dardar v. Lafourche Realty Co.,* 985 F.2d 824, 833 (5th Cir. 1993) (emphasis added). Without historical, geographical, or topographical data proving that the canal significantly interfered with or obstructed the waterway, the district court held that the private canals did not impose a public right of access. *Dardar v. Lafourche Realty Co.,* 639 F. Supp. 1525, 1531 (E.D. La. 1986) *on reconsid.*, No. Civ. A. 85-1015, 1986 WL 12201, at *2 (E.D. La. Oct. 29, 1986). The Fifth Circuit affirmed based on the lack of technical evidence. *Dardar*, 985 F.2d at 833. Thus, according to *Dardar*– the only circuit to rule on the issue – the question this Court must consider is not whether the Canal diverts the Deep Quod River, but rather whether the Canal interferes with or obstructs it. Because there is no genuine dispute about the facts – and no evidence that the Canal interferes with or obstructs the River – this Court must affirm the district court's decision to deny a public right of access. Without a public right of access, Riverwatcher's unauthorized entry up the Canal constitutes trespass.

III. Evidence Obtained By a Private Citizen Via Trespass is Not Admissible in a Civil Enforcement Proceeding.

Evidence gathered by Riverwatcher, and relied upon by EPA, is inadmissible to enforce civil penalties under the Clean Water Act's 33 U.S.C. § 1319(b) and (d), because the clear costs of permitting evidence obtained without authorization outweigh any social benefits gained by intruding upon the Farm's private property.

A. The History of the Exclusionary Rule Makes Clear that Evidence Obtained Without Authorization is Not Admissible in a Civil Context.

One of the key constitutional rights afforded to all citizens is the right to be free from unreasonable search and seizure. U.S. Const. amend. IV. Historically, the Supreme Court only examined the Fourth Amendment in a criminal law context. *See, e.g.*, *Weeks v. United States*, 232 U.S. 383 (1914) (establishing the "exclusionary rule" that evidence obtained illegally is not admissible in a criminal trial); *Mapp v. Ohio*, 367 U.S. 643, 657 (1961) (expanding the exclusionary rule to the states through the Fourteenth Amendment). The underlying purpose of the Fourth Amendment – to safeguard the privacy and security of individuals against arbitrary and warrantless intrusions by governmental officials – first began to appear in a civil context in the 1960s. *See Camara v. Mun. Court of S.F.*, 387 U.S. 523, 530 (1967) (noting that the Fourth Amendment's protection extends beyond criminal investigations).

In the 1970s, the Supreme Court expanded Fourth Amendment protections further into the civil sphere. In *United States v. Janis*, the Court developed a balancing test to apply the exclusionary rule to federal government proceedings. 428 U.S. 433, 553-54 (1976). Under the *Janis* balancing test, a court calculates "the likely social benefits of excluding unlawfully seized evidence against the likely costs" of suppression. *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 1041 (1984) (citing *Janis*, 428 U.S. at 446). Courts are instructed to consider whether applying the exclusionary rule would deter future unlawful police conduct. *Id.* In determining costs, a court should calculate the loss of "probative evidence and all of the secondary costs that flow from the less accurate or more cumbersome adjudication that therefore occurs." *Id.* Courts have established additional criteria to determine whether the exclusionary rule should be used in administrative proceedings. If the purpose of the government action in a *civil* matter is merely to punish a violator through punitive damages, then the evidence *must* be excluded. *Smith Steel*

Casting Co. v. Brock, 800 F.2d, 1329, 1334 (5th Cir. 1986) (citing *Lopez-Mendoza*, 468 U.S. at 1046-47); *see also United States v. Ward*, 448 U.S. 242, 250-55 (1980) (noting that imposing monetary damages under the Clean Water Act is civil in nature, even if punitive in effect).

B. The Costs of Allowing Evidence Obtained by Trespass in this Proceeding Undoubtedly Outweigh the Minimal Social Benefits.

Riverwatcher's evidence, obtained by unauthorized trespass onto the Farm's property, must not be allowed, because this would encourage federal agencies like EPA to bypass the limits of constitutional searches. The exclusionary rule applies to illegally obtained evidence in a civil context, unless a court determines that the social benefits of applying the rule outweigh the costs of suppression.[2] *Janis*, 428 U.S., at 433. Here, if the EPA were allowed to circumvent the Fourth Amendment by enabling Riverwatcher to collect evidence on the agency's behalf, this Court would establish a dangerous precedent for all federal agencies. Such a rule would transform private citizens into free agent law enforcement officers, against whom constitutional limits would not apply. The Supreme Court expanded the exclusionary rule in *Lopez-Mendoza* specifically to prevent federal actions such as this – where the Court worried about the police power becoming too expansive. The goal of preventing unlawful police conduct applies here because these newly created citizen law enforcement officers should be considered agents of the government. Any value gained by permitting broader enforcement of the Act is substantially outweighed by the social costs of encouraging private citizens to obtain evidence by trespass and

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[2] The only exception that exists for illegally obtained evidence in civil enforcement proceedings is if the agency qualifies for a rare good faith exception. *Trinity Indus., Inc. v. Occupational Safety & Health Review Comm'n*, 16 F.3d 1455, 1462 (6th Cir. 1994). The good faith exception was created for instances where a government agent reasonably relied upon a faulty warrant and believed their actions to be legal. *Trinity Indus.*, 16 F.3d at 1462. Here, by contrast, not only was EPA's Administrator unaware of Riverwatcher's investigation of Deep Quod River – but also, a warrant was never issued to inspect the premises. Because no warrant was created or issued, the EPA and Riverwatcher cannot qualify for a good faith exception.

without a warrant. This Court should apply the *Janis* balancing test to hold that Riverwatcher's evidence obtained by trespass is not admissible.

C. The Evidence is Not Admissible Because It is Part of a Punitive Enforcement Action Undertaken by EPA.

The evidence that Riverwatcher collected is inadmissible because the EPA is seeking monetary penalties against the Farm – notwithstanding the agency's assertion that its civil action is for remedial or injunctive relief. Government agencies are prohibited from using illegally obtained evidence in civil enforcement actions for the purpose of seeking monetary punishment. *Smith Steel,* 800 F.2d at 1334. While no court has applied *Lopez-Mendoza* in the context of EPA civil enforcement proceedings, several circuits have applied the Supreme Court's analysis to OSHA proceedings. *Compare Trinity Indus., Inc. v. Occupational Safety & Health Review Comm'n*, 16 F.3d 1455, 1462 (finding that exclusionary rule would have applied when government merely sought punitive damages if agency did not qualify for good faith exception), *with Smith Steel,* 800 F.2d at 1329 (holding that exclusionary rule does not apply in civil context when agency aims to correct future occupational safety and health standards). In *Lopez-Mendoza*, the Supreme Court noted that the exclusionary rule does not apply to deportation hearings because they are specifically designed to address continual ongoing transgressions, not simply to punish for *past violations*. 468 U.S. at 1046. The circuit courts noticed this distinction and have used it to settle Fourth Amendment civil matters regularly.

For example, in *Smith Steel*, an OSHA compliance officer discovered that the company's foundry had exposed workers to dangerously high levels of noise, silica dust, and copper fumes. 800 F.2d at 1331. However, the government only discovered these violations via an invalid inspection warrant. *Id.* Despite the illegality of the evidence, the Fifth Circuit held that the exclusionary rule did not apply for "purposes of correcting [ongoing] violations of occupational

safety and health standards." *Id.* at 1334.

In *Trinity Industries*, the Sixth Circuit applied the *Smith Steel* test to a case where the government aimed to punish a defendant for alleged past violations. 16 F.3d at 1462. In that case, OSHA sought over $30,000 in damages for violations of both health and safety citations. *Id.* at 1458. However, these citations had no purpose other than collecting penalties for past transgressions. *Id.* at 1462. The Sixth Circuit would have held that the exclusionary rule applied in this case if not for the fact that OSHA's Secretary qualified for the good faith exception because a factually accurate and detailed warrant had been issued and relied upon. *Id.*

The exclusionary rule does not allow the use of impermissibly obtained evidence merely to enforce civil penalties. Therefore, Riverwatcher's and EPA's claims must fail as they lack any admissible evidence about the condition of the Canal. Similarly to OSHA's incentives in *Trinity Industries*, EPA has a strong incentive here to seek civil penalties under the Act's civil penalty provision. *See* 33 U.S.C. § 1319(d) (2012) (authorizing penalties of up to $25,000 per day for civil violations). The EPA is overreaching by using its statutory penalty provisions and illegal evidence to penalize and make an example out of the Farm. As a result, the exclusionary rule should be applied by this Court to exclude Riverwatcher's impermissibly obtained evidence. Without admissible evidence of an alleged discharge, this Court should affirm the District Court's ruling that the Farm did not violate the Clean Water Act.

IV. Moon Moo Farm is Not Subject to Discharge Permitting Under the Clean Water Act.

Because the record lacks admissible evidence that the Farm discharged into jurisdictional waters, EPA cannot compel the Farm to obtain a discharge permit. But even if this Court finds that a discharge occurred, the Farm's agricultural discharges are exempt as stormwater discharge.

A. The Farm Is Not A CAFO Because The Record Lacks Admissible Evidence that the Farm Actually Discharged into Jurisdictional Waters.

For EPA to have authority over the Farm, it must be discharging as a point source, as discussed in Section I, *supra*. The Act defines point sources as "any discernible, confined and discrete conveyance, including . . . any . . . ditch, channel . . . [or] concentrated animal feeding operation . . . from which pollutants are or may be discharged." *Id.* § 1362(14). EPA and Riverwatcher allege the Farm is a CAFO because it discharges into a point source, but this claim is based on insufficient factual evidence and misapplication of the Agency's regulations. EPA regulations define a CAFO on the basis of three characteristics: (1) whether the animals are stabled continuously throughout the year, (2) whether crops are grown on the lot where the animals are raised, and (3) whether the farming operation discharges into waters of the United States. *See* 40 C.F.R. § 122.23(b)(1)(i)-(ii); 122.23(b)(6)(ii) (2014). The Farm does not dispute the first two prongs: its cows are stabled in a barn continuously, and are not pastured. R. at 4.

However, the Farm disputes EPA's classification of the Farm as to the third prong. EPA regulations clearly state that a farm of Moon Moo Farm's size[3] is a CAFO *only if* "[p]ollutants are discharged 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). The Farm is not a CAFO under EPA regulations because there is insufficient evidence to prove that a discharge from the Farm's property actually occurred. The only evidence on the record – photographs and a sample collected by a trespasser – is inadmissible, as discussed in Sections II-III, *supra*.

Further, even if EPA suspects that the Farm discharged or has the potential to discharge into the Canal in the future, it is inappropriate for the Agency to bring an enforcement action at this

[3] EPA regulations in 40 C.F.R. § 122.23 (2014) impose different obligations on farms depending on their size. Moon Moo Farm falls into the "Medium" category in § 122.23(b)(6) because the Farm has 350 dairy cows. The range for a "Medium" farm is between 200 to 699 dairy cows.

time. Without a factual finding of discharge, EPA may not require the Farm to hold – or instruct it preemptively to obtain – a discharge permit. *Nat'l Pork*, 635 F.3d at 751. In *National Pork*, the Fifth Circuit considered EPA's 2008 CAFO rule, and found that EPA had acted outside the scope of its statutory authority in imposing obligations on farms that might someday discharge into jurisdictional waters. *Id.* at 750-51. The Fifth Circuit held that "there must be an *actual discharge* into navigable waters to trigger the [Act's] requirements[,] and the EPA's authority . . . is limited to the regulation of CAFOs that discharge." *Id.* (citing *Serv. Oil, Inc. v. U.S. EPA*, 590 F.3d 545 (8th Cir. 2009); *Natural Res. Def. Council v. U.S. EPA*, 859 F.2d 156 (D.C. Cir. 1988)) (emphasis added). Here, the plaintiffs have presented insufficient factual evidence to prove that the Farm produced any "actual discharge," which means its classification as a CAFO is improper, and the Farm is not required to hold a discharge permit. *See Celotex*, 477 U.S. at 322 ("Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case . . . .").

If this Court disagrees, and instead holds that the Farm is a CAFO, then the Farm is by definition a "point source." *See* 33 U.S.C. § 1362(14) (2012). But even if so, any discharge that flows from the Farm's fields is categorically exempted as agriculture stormwater.

B. Even if this Court Finds that the Farm is a CAFO, Its Discharges Are Exempt Under the Agricultural Stormwater Exemption Appearing in the Clean Water Act and in EPA's Own Regulations.

Any discharges allegedly flowing from the Farm qualify for the agricultural stormwater exemption based on the plain meaning of the statutory text, the legislative history, and the purpose behind the Act and relevant amendments. Further, even EPA concedes that careful application of manure in conformity with an existing nutrient management plan ("NMP") – as the Farm is already doing – exempts it from being required to hold a discharge permit. R. at 2, 9.

1. The Farm is Exempt from Regulation Based on the Plain Meaning of the Statutory Text, its Legislative History, and the Purpose Behind Amendments to the Clean Water Act.

The Farm is entitled to an exemption from discharge permitting based on the plain meaning of the text of the Clean Water Act. As discussed above, point sources were defined in the original 1972 legislation as "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged," and included a long string of examples, including pipes, ditches, and CAFOs, which convey pollutants to jurisdictional waters. 33 U.S.C. § 1362(14) (2012); *see* Pub. L. No. 92-500, § 2, 86 Stat. 816 (1972). In 1987, Congress appended the original definition of point sources with the following sentence: "[The definition of point source] *does not include agricultural stormwater discharges* and return flows from irrigated agriculture." Water Quality Act of 1987, Pub. L. No. 100-4, § 503, 101 Stat. 7, 75 (1987) (emphasis added). Congress left the task of defining these discharges to EPA.

The text could not be written more plainly: Section 1362(14) exempts any stormwater-related discharge that flows from the Farm. "Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004) (citation omitted). This Court should follow other courts which have found that farms that discharge stormwater do not need to hold permits. *See, e.g.*, *Fishermen Against Destruction of the Env't, Inc., v. Closter Farms, Inc.*, 300 F.3d 1294, 1297 (11th Cir. 2002) (holding that rainwater flowing over cultivated farmland into jurisdictional waters was exempt as agricultural flow); *Alt v. U.S. EPA*, 979 F. Supp. 2d 701, 711 (N.D.W.Va. 2013) ("Common sense and plain English lead to the inescapable conclusion that [the defendant's farm] . . . is 'agricultural' in nature and that the precipitation-caused runoff . . . is 'stormwater.'").

A brief analysis of the legislative history and purpose of the amendment further drives the

point home: the Farm is precisely the type of agricultural operator that Congress intended to exempt from discharge permitting regulations in 1987. "[T]he words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007) (citation omitted). When Congress amended the Act in 1987, it unequivocally introduced an exemption for the agricultural industry from new federal stormwater regulations. *See* Water Quality Act of 1987, Pub. L. No. 100-4, § 503, 101 Stat. 7, 75 (1987). Senator Mitchell, who played an influential role in passing the 1987 amendments to the Act, emphasized on the Senate floor while introducing the bill that states – *not* the federal government – were to retain authority to regulate agricultural discharges. 133 Cong. Rec. S18-01 (daily ed. Jan. 6, 1987) (statement of Sen. Mitchell). *See* 133 Cong. Rec. H519 (daily ed. Feb. 3, 1987) (statement of Rep. Stangeland) ("[This bill was] never intended to and – as long as I have a say – will never result in unnecessary federal intrusions on local decisionmaking about . . . agricultural practices."). The purpose behind the 1987 amendments was therefore very clear: to improve the nation's waters, but not to impede traditional agrarian uses of the land. *See* Env't & Natural Res. Policy Div. of Cong. Research Serv., 100th Cong., Legislative History of the Water Quality Act of 1987, 1797-98 (Comm. Print 1987) (statement of Rep. Daub) ("[W]e need to keep in mind that [f]ederal nonpoint source pollution action of a regulatory nature could have dire consequences on those in agriculture . . . [W]e must proceed cautiously in our approach to nonpoint source pollution . . . .").

Together, the plain meaning of the statutory text, its legislative history, and the underlying purpose of amendments made to the Act all demonstrate that the Farm was precisely the type of agricultural operator that Congress intended to exempt from discharge permitting. Even EPA concedes that as long as the Farm is complying with its NMP, it is not subject to discharge

permitting liability. *See* R. at 2.

2. The Farm Follows EPA's Regulations and Therefore Qualifies for the Agricultural Stormwater Discharge Exemption.

EPA's regulations clearly state – and the record below indicates it agrees – that agricultural stormwater is exempt from federal regulation. This interpretation is subject to administrative deference. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). "[C]onsiderable weight should be accorded to [the EPA's] construction of a statutory scheme it is entrusted to administer." *Id.* at 844 (citations omitted). Section 122.23(e) of Title 40 of the Code of Federal Regulations provides:

> where the manure, litter or process wastewater has been applied in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter or process wastewater, . . . *a precipitation-related discharge of manure*, litter or process wastewater from land areas under the control of a CAFO *is an agricultural stormwater discharge*.

(2014); *see also Waterkeeper*, 399 F.3d at 507-08 (affirming EPA's authority to exempt agricultural stormwater as a "permissible construction" of the Act). Here, the Farm fulfills all of the criteria outlined in EPA's § 122.23 regulations above, because (a) the Farm's alleged discharges are precipitation-related, (b) the Farm has a current NMP in place, and (c) the Farm's nutrient applications are producing appropriate agricultural utilization of nutrients. Based on EPA's regulations, any discharges flowing from the Farm's property are exempt.

a. The Farm's Alleged Discharges are Caused by Precipitation.

Any discharge allegedly flowing from the Farm's property is plainly caused by precipitation. Courts in all circuits that have addressed the issue – including the Second, Fourth, and Eleventh – have phrased this test as one of causal connection: as long as the agricultural discharge occurred as a result of precipitation, the defendant farm qualifies for the permit exemption. *See, e.g.*, *Closter Farms*, 300 F.3d at 1297; *Concerned Area Residents For Env't v. Southview Farm*,

34 F.3d 114, 120-21 (2d Cir. 1994). ("[A]gricultural stormwater run-off has always been considered nonpoint-source pollution exempt from the Act . . . . [T]he real issue is whether the discharges were *the result of* precipitation.") (emphasis added); *Alt*, 979 F. Supp. 2d at 711. In *Alt*, a poultry farmer brought suit against the EPA for forcing the farm to obtain a discharge permit for alleged discharges into a nearby creek. 979 F. Supp. 2d at 704-05. The *Alt* court rejected the agency's attempts to impose discharge permitting liability on the farm, observing that the plain meaning of the statute's agricultural stormwater discharge exemption led to the "common sense" finding that the "precipitation-caused runoff from her farmyard is 'stormwater.'" *Id.* at 711. The court concluded that "a discharge of . . . manure *caused by* precipitation [is] exempt." *Id.* at 711-12 (citing *Southview Farm*, 34 F.3d at 120).

EPA and Riverwatcher may argue that this case is analogous to *Community Association for Restoration of the Environment v. Henry Bosma Dairy*. 305 F.3d 943 (9th Cir. 2002). However, the defendant farm in *Henry Bosma* had a long history of violations spanning a five-year period that had been meticulously logged by the plaintiffs. *See id.*, 305 F.3d at 951-52 (listing more than forty CWA violations on specific dates). Here, by contrast, the evidence supporting EPA's and Riverwatcher's enforcement action against the Farm is extremely thin, resting on only a single day's allegation of discharge (which, furthermore, was obtained without permission) occurring after just one significant storm event. *See* R. at 6. Because this litigation is based on alleged discharge occurring from a single day of significant rainfall, this Court should find that any discharge that occurred was causally linked to the precipitation event.

b. The Farm Maintains A Current Nutrient Management Plan, Fulfilling the Procedural Requirements to Earn the Stormwater Exemption.

The Farm is regulated by the State of New Union as a no-discharge facility, which requires the Farm to submit a NMP to the state Department of Agriculture. R. at 5. The Farm has

complied with this procedural requirement at all times relevant to this litigation. R. at 6, 9. Further, even EPA concedes that as long as the Farm is operating in compliance with the terms of its NMP, the Farm cannot be subject to discharge permitting liability. R. at 2, 9.

Riverwatcher might argue that the Farm's NMP is insufficient, either because the state agency tasked with reviewing NMPs within New Union "does not ordinarily review" the plans for compliance, or because the NMP approval process provides no opportunity for public comment. R. at 5. Their argument finds facial support in *Waterkeeper*. 399 F.3d at 498-503 (holding that the public has the right to provide meaningful comments on NMPs before they are issued). However, the *Waterkeeper* holding does not apply here for several reasons. First, with respect to the review process in place, the *Waterkeeper* court's holding that there must be "[permitting] authority review of the [NMPs]," is expressly confined to *large* CAFOs – i.e., dairy farms containing more than 700 dairy cows. *Id.* at 495-99. Therefore, it does not apply to the Farm, which keeps only 350 cows. R. at 4; *supra*, Section IV.A n.3.

Second, even if the public comment process for the Farm's NMPs would have been found insufficient under *Waterkeeper*, it does not follow that the Farm may be penalized for a state agency's mistake embedded within its own regulations. *See, e.g.*, *White v. Dall. Indep. Sch. Dist.*, 581 F.2d 556, 562 (5th Cir. 1978) ("[The agency's] failure to follow its own regulations sufficiently misled [the party] and their mistakes should not redound to her detriment."); *Roberts v. Ariz. Bd. of Regents*, 661 F.2d 796, 800 (9th Cir. 1981) (citing *White* favorably). Here, the state Department of Agriculture required that a NMP be lodged with the regional office, and the Farm complied. R. at 5, 9. If the state agency should have included public comment provisions, that was the agency's mistake, not the Farm's. Therefore, any challenge to the absence of public comment on the Farm's NMP must be brought directly against the state agency, and the Farm

may not be penalized for the government's mistake.

c. The Farm Has a Site-Specific NMP and its Fields Appropriately Absorb Nutrients, So It Has Earned the Stormwater Exemption.

Under EPA regulations, the Farm's NMP must meet four substantive requirements appearing in 40 C.F.R. § 122.42(e): (1) site-specific conservation practices must be place; (2) protocols for the appropriate testing of nutrients in the manure and soil must be identified; (3) fertilizer applications must produce the appropriate agricultural use of applied nutrients; and (4) records of compliance with the NMP must be maintained. (2014).

The first prong of this test can be clearly demonstrated on the lower court's findings: all of the cows' waste is "collected through a series of drains and pipes from the cow barn," which runs to a lagoon "designed to contain all manure produced by the dairy operation without overflowing during a twenty-five year rainfall event." R. at 4-5. Thus, the Farm is capable of capturing up to five inches of rain – a statistical twenty-five year storm – in one twenty-four hour period. R. at 5-6. The second prong can also be met: the Farm has identified protocols to ensure the appropriate testing of nutrients in the manure and soil, as indicated by the Farm's retention of an expert agronomist, Dr. Green. R. at 6. Dr. Green stated that the Farm's crop of Bermuda grass "tolerates a wide range of soil pH conditions," and that the Farm's application of nutrients, and specifically its mixture of manure and whey, has been a traditional practice since the 1940s. R. at 6. Dr. Green's testimony also confirms the third prong – namely that fertilizer is being applied appropriately to ensure adequate uptake of nutrients. The Farm uses Bermuda grass for silage, and therefore has an inherent incentive to ensure that the crop receives appropriate nutrients for optimal growth. R. at 5. Finally, the fourth prong is easily fulfilled: the Farm has retained records of ongoing compliance with the NMP "at all relevant times" to this litigation. R. at 6.

Because all four prongs are easily met, any discharge flowing from the Farm's fields as a

result of precipitation is subject to the agricultural stormwater exemption. Therefore, this Court should reject EPA's overzealous attempts to regulate the Farm by upholding the lower court's finding that the Farm does not need to hold a discharge permit.

V. Moon Moo Farm Is Not Subject to Regulation Under the Resource Conservation and Recovery Act.

Riverwatcher's claims against the Farm represent a fundamental misunderstanding of the Resource Conservation and Recovery Act ("RCRA"). Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2795 (1976), 42 U.S.C. §§ 6901-6992k (2012); R. at 4. First, the claim that the Farm's traditional use of whey in fertilizer constitutes a prohibited "disposal of a non-hazardous solid waste" under RCRA § 4005 must fail because it is reused in a continuous process of manufacturing yogurt, applied to its fields regularly, and serves its intended use as a soil conditioner. R. at 10. Moreover, since the Farm's use of fertilizer is in compliance with its NMP and there is no evidence that the fertilizer has leaked or otherwise applied to the ground, it is exempted from EPA's regulation under RCRA as an agricultural product. 40 C.F.R. § 257.1(c)(1) (2003). Finally, the Farm's fertilizer applications present no imminent and substantial endangerment to human health because the fertilizer is not a solid waste and there is no evidence of human exposure to nitrates. Therefore, this Court should uphold the trial court's ruling and dismiss Riverwatcher's claims under RCRA §§ 4005 and 7002(a)(1)(B). 42 U.S.C. § 6945(a), 6972(a)(1)(B).

A. The Farm's Fertilizer is Not Discarded Material for Four Discrete Reasons.

While the Supreme Court has yet to create a test, several circuit courts have used different factors for determining whether a material is discarded under RCRA. Combining their tests reveals four salient factors, which this Court should consider, including whether the material: (1) is used in an ongoing industrial process; (2) has value in a separate industry; (3) is actively used;

and (4) serves its intended purpose. Circuit courts often analyze these factors holistically; however, courts may rely on just one factor to determine if a material is discarded. *See, e.g.*, *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1045 (9th Cir. 2004) (emphasizing the first factor, use in a continuous farming process, while discussing other factors). Here, the Farm's manure-whey mixture is not discarded because it is used in the creation of yogurt, supplants the use of other soil-conditioners, and is regularly applied, according to the NMP. Thus, since the Farm meets all four factors, the Court should hold that the mixture was not discarded.

1. Fertilizer on the Farm is Reused in an Ongoing Soil Conditioning Practice.

The Farm's fertilizer, a combination of manure and whey, is not a discarded material under RCRA § 4005(a) because it is applied according to longstanding regional practices in a continuous process of the dairy industry. Section 4005(a) of RCRA prohibits the discarding of "solid waste" into an "open dump" defined as "any . . . site where solid waste is disposed of which is not a sanitary landfill" or hazardous waste facility. 42 U.S.C. § 6945(a); 6903(14) (2012). For the Farm to be considered an open dump under RCRA § 4005, it must be disposing of (1) solid waste, (2) on its property, and must (3) not qualify as a sanitary landfill or hazardous waste facility. *Parker v. Scrap Metal Processors Inc.*, 386 F.3d 993, 1012 (11th Cir. 2004). Since it is clear the Farm spreads its fertilizer on its own property and is not a disposal facility, the pertinent inquiry is whether the fertilizer is considered "solid waste" under RCRA. R. at 4-5. RCRA defines "solid waste" as "sludge" from several specific types of facilities along with "*discarded material* . . . resulting from . . . agricultural operations."[4] 42 U.S.C. § 6903(27) (2012); *see Safe Air*, 373 F.3d at 1042 (noting that the definition of solid waste depends on whether it constitutes "discarded material" under the meaning of the statute).

[4] "Agricultural operations" are one of several industries mentioned in the statute, among other "industrial, commercial, [and] mining" operations. 42 U.S.C. § 6903(27) (2012).

Substances that are beneficially reused in an ongoing process within the same industry are not "discarded" under § 4005 of RCRA. *See Am. Mining Cong. v. U.S. EPA*, 824 F.2d 1177, 1186 (D.C. Cir. 1987) (*AMC I*) (holding petroleum and mining by-products were not discarded when collected to form new products in an industrial process); *see also Safe Air*, 373 F.3d at 1045 (holding grass residue was not discarded when beneficially used in continuous farming practice). In *AMC I*, the D.C. Circuit explored whether RCRA could be applied to by-products created by the petroleum refinement process, which are then mixed into different materials such as lubricating oils. 824 F.2d at 1181. The court considered whether these by-products were "discarded material" under RCRA, and concluded that since the by-products were "neither disposed of nor abandoned, but passing in a continuous stream . . . from one production process to another," they were not discarded. *Id.* at 1186, 1190.

Similarly, in *Safe Air*, the Ninth Circuit held that grass residue from open burning was not a discarded material, since it was used in an ongoing agricultural practice. 373 F.3d at 1045. Relying on evidence that grass residue left on the fields helped accelerate burning, which in turn helped produce subsequent harvests, the court held the material was not abandoned and did not qualify as solid waste. *Id.*

Here, the Farm also beneficially reuses manure and whey as a part of an ongoing process, therefore the fertilizer cannot be considered discarded. Like the petroleum products in *AMC I*, the Farm's fertilizer is a by-product of material it also produces itself – namely, manure. R. at 5. Just as crude oil is distilled by a refinery within the larger umbrella of the petroleum industry, the Farm's milk is processed within the dairy industry by the Chokos Greek Yogurt processing facility ("Chokos"). R. at 5. Like the petroleum refinery process, the by-product of whey becomes a useful product for soil conditioning, which cycles back into the production of yogurt

when the Bermuda grass is stored for silage. R. at 5. The use of whey and manure for soil conditioning is an ongoing agricultural process that beneficially reuses both products. The Farm's fertilizer is a crucial link in the continuous process of milk and yogurt production, and therefore is not discarded.

2. Even if the Farm's Fertilizer is Reused Outside of the Industry Where It Was Generated, It is Not a Discarded Material.

Riverwatcher might contend that the farm's operations are distinct from Chokos' production of yogurt, and that they are separate industries. But even if this Court finds that the Farm and Chokos are separate industries, the Farm's fertilizer is not discarded material under RCRA. When a substance is reused in another industry, it is not discarded as long as it is treated like a valued product and is analogous to commercial products that have the same use. *Safe Food & Fertilizer v. U.S. EPA*, 350 F.3d 1263, 1265 (D.C. Cir. 2003). In *Safe Food*, an EPA rule was challenged that exempted certain recycled fertilizers from regulation under RCRA if the materials met several standards, including contaminant levels. *Id.* at 1266. The plaintiffs claimed that by-products reused to create fertilizer were discarded since they came from a different industry. *Id.* at 1265. The *Safe Food* court rejected this argument, holding that nothing "compel[led] the conclusion that material destined for recycling in another industry is necessarily 'discarded.'" *Id.* Notably, the court accepted EPA's reasoning, concluding the materials were not discarded since they were "valuable product[s]," used in accordance with "EPA-required management practices," and "chemically indistinguishable from analogous commercial products made from virgin materials." *Id.* at 1269.

Here, whey – the only component from outside the farm – is a valuable product, similar to traditional soil conditioner used for the same purpose. Like the materials in *Safe Food*, the soil conditioning properties of the Farm's fertilizer is valuable, as indicated by its long history of use

by farmers throughout New Union. R. at 6. Applying fertilizer in accordance with an NMP, similarly to the EPA's management practices for the by-products in *Safe Food*, ensures the whey is used safely. The recycled material in *Safe Food* would have otherwise been procured as a "virgin material," but for the recycling. Here, if the Farm were not reusing whey, the Farm would have to purchase fertilizer elsewhere. Because whey in the Farm's fertilizer is valuable, applied in accordance with its NMP, and analogous to traditional soil conditioners used in New Union, it must not be considered "discarded."

3. The Fertilizer Mixture Used by the Farm is Not Discarded Because It Is Regularly Reused After a Brief Period in A Holding Pond.

Riverwatcher might argue that the Farm's storage of whey in a holding pond constitutes disposal under RCRA, but this argument ignores the statute's guiding purpose. The purpose of RCRA is to address the stream of waste entering landfills, not to capture or impose regulations upon agricultural products that condition the soil. *See* H.R. Rep. 94-1491(I), at 2 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6240 ("Much industrial and agricultural waste is reclaimed or put to new use and is therefore *not a part of the discarded materials disposal problem*."). Because the Farm reuses the whey-manure mixture as soil conditioner after being mixed briefly in a holding pond, it is not subject to RCRA regulation.

Materials should only be considered discarded when they are not being reused, and have entered the waste stream. 42 U.S.C. § 6903(27) (2012) ; *Am. Mining Cong. v. U.S. EPA*, 907 F.2d 1179, 1186 (D.C. Cir. 1990) (*AMC II*). Materials are discarded if they are not reused, but rather are "speculatively accumulated" or "merely have the potential of being reused." *Parker*, 386 F.3d at 1012. A material is discarded if it is held in a containment area that is part of a wastewater treatment system, and only has the potential for reuse. In *AMC II*, a metal smelting operation challenged an EPA rule relisting smelting by-products as hazardous wastes. 907 F.2d

at 1181-82. The smelting operation believed that sludge sitting in containment areas of a wastewater treatment system were not discarded because they could have been potentially reused in "mineral processing operations." *Id.* at 1185-86. The court decided that this interpretation was too broad, holding that the sludge was discarded because it was not "destined for *immediate reuse* in another phase of the industry's ongoing production process," nor had it "become part of the waste disposal problem." *Id.* (citation omitted).

However, materials are not discarded if they are reused in an ongoing agricultural process. *Safe Air,* 373 F.3d at 1047. In *Safe Air*, the court held that since grass residue was reused in a "continuous process of growing and harvesting Kentucky bluegrass seeds" instead of being kept in storage for mere *potential* reuse, it was distinguishable from *AMC II*. *Id.* at 1045. Therefore, the court held that the residue was not discarded. *Id.* at 1047.

Here, the fertilizer used by the Farm as a soil conditioner for growing Bermuda grass is not discarded because it is used in an ongoing process that occurs throughout the year. Unlike the stored material that had "potential" future use in *AMC II*, the Farm immediately adds whey to the manure, which it regularly applies to its fields. R. at 5. Thus, unlike the sludge in *AMC II*, which sat in a wastewater treatment system indefinitely with only the *potential* for reuse, the fertilizer has an actual, regular use when sprayed on the fields. Like the grass residue in *Safe Air*, which is constantly burned and then reabsorbed into crop fields, the spraying of manure is a continuous agricultural process which optimizes soil conditions for growing Bermuda grass. Since the Farm actively reuses its fertilizer for soil conditioning, this Court should affirm District Court's decision that the whey mixture is not discarded.

4. <u>The Farm's Whey-Manure Mixture Is Not Discarded Because It Serves the Intended Purpose of Lowering Soil pH and Thus Is Beneficially Reused.</u>

Since whey is traditionally used in New Union as a soil conditioner, continuously applied by

the Farm, mixed with manure for that purpose, and the record contains no evidence the fertilizer actually acidified the soil, it cannot be considered a discarded material. A material is not discarded, even when it has a perceived negative consequence, if it is performing its intended function. *Ecological Rights Found. v. Pac. Gas & Elec. Co.*, 713 F.3d, 502, 515 (9th Cir. 2013). In *Ecological Rights*, environmentalists alleged a company violated RCRA because of the harm caused by preservatives seeping out of its utility poles. *Id.* at 504. The Ninth Circuit decided that the material was not discarded because the seepage was an "expected consequence of the preservative's intended use," rather than a manufacturing waste intended for disposal. *Id*. at 515-516. However, materials that have served their intended purpose and no longer have the same use are discarded. *Conn. Coastal Fishermen's Ass'n v. Remington Arms Co.*, 989 F.2d 1305, 1316 (2d Cir. 1993). In *Connecticut Coastal*, the Second Circuit considered whether lead shot and clay targets in a gun range were discarded material because they were "left to accumulate long after they served their intended purpose." *Id.* at 1316. Without determining how long materials must sit in the environment to become discarded, the court held that the materials were abandoned long enough to be considered "solid waste." *Id.*

Here, the Farm's fertilizer is not discarded when applied to the fields because it serves the intended and ongoing purpose of conditioning the soil. Like the material used in utility poles in *Ecological Rights*, the Farm's fertilizer is actively serving its initial purpose – whey has been land applied in New Union for many years as a soil conditioner. R. at 6. Riverwatcher may argue that, since the fertilizer has a pH that allegedly inhibits the uptake of nutrients in the Bermuda grass, it is not serving its intended purpose – to create soil conditions for optimum growth. R. at 6. The Farm does not contest that the fertilizer itself is acidic; however, no evidence exists to suggest the fertilizer is not properly conditioning the soil. Riverwatcher's expert asserted that the

fertilizer would inhibit nutrient uptake based only on tests of the fertilizer, but never actually tested the soil.[5] Since acid whey has been used traditionally as soil conditioner, regional soil conditions may be such that its use has a beneficial impact on the soil. Additionally, the NMP demonstrates that the state explicitly approved of the use of the whey-manure mixture despite its acidity, lending credence to the notion that it fulfills its intended purpose.

Unlike in *Connecticut Coastal*, where the clay and lead shot had been fired from guns so long ago that their intended purpose had already been fulfilled, the whey-manure mixture is continuously applied to fields. R. at 5. Most importantly, there is no evidence in the record about the actual acidity of the soil. Therefore, nothing in the record indicates any nutrient uptake by the Bermuda grass was, in fact, inhibited by the use of whey to condition the soil. Since the fertilizer applied by the Farm serves its intended purpose of decreasing soil acidity, it is not a solid waste.

B. Even if the Farm's Whey is a Discarded Material, It is Exempt from Regulation under RCRA Because It Is an Agricultural Product.

EPA's regulations clearly exclude "agricultural wastes, including manures and crop residues, returned to the soil as fertilizers or soil conditioners" from being characterized as solid waste under RCRA § 4005(a). 40 C.F.R. § 257.1(c)(1). This exemption reflects Congress' intent to limit RCRA from extending to traditional agricultural processes of re-using manure for fertilizer. *See* H.R. Rep. 94-1491(I), at 2 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6240 (finding the word "[w]aste itself . . . a misleading word" since [m]uch . . . agricultural waste is reclaimed"). Manure used in fertilizer is not considered solid waste unless it is over-applied to a farm field. *Cmty. Ass'n for Restoration of Env't, Inc. v. George & Margaret LLC*, 954 F. Supp.2d 1151, 1157-58 (E.D. Wash. 2013). The court's inquiry should be into the effect of the application of

[5] In *Community Association for Restoration of the Environment v. Nelson Faria Dairy, Inc.*, a court based findings of excessive applications of manure to crop fields on actual soil samples from the property. No. CV-04-3060-LRS, 2011 WL 6934707, at *6 (E.D. Wash. Dec. 30, 2011).

animal waste to a field: whether it serves its purpose of fertilizing the soil, or is applied "in such large quantities that its usefulness as organic fertilizer is eliminated." *Water Keeper Alliance, Inc. v. Smithfield Foods, Inc., et al.*, Nos. 4:01-CV-27-H(3), 4:01-CV-30-H(3), 2001 WL 1715730 at *4-5 (E.D.N.C. Sept. 20, 2001).

The land application of manure to farm fields may not be exempt from regulation where it has been over applied and leaked to a field. In *George & Margaret*, an action was brought against a dairy operation, alleging that the fertilizer applied to the fields was solid waste in violation of RCRA. 954 F.Supp.2d at 1156. The farm was alleged to have applied fertilizer excessively and fail to prevent leaking from containment ponds, such that it became discarded material and was subject to regulation. *Id.* at 1154. The court agreed that if over-applied or leaking from holding ponds, fertilizer could be discarded material. *Id.* at 1158.

Here, by contrast, the Farm's application of fertilizer is exempted from regulation because all of its fertilizer applications have been in accordance with its NMP as discussed in Section IV. Unlike in *George & Margaret,* the record contains no admissible evidence that any fertilizer has leaked from the containment ponds holding the Farm's fertilizer. Further, the Farm has always applied its fertilizer according to the relevant guidelines. As a result, the application of fertilizer to the Farm's fields of Bermuda grass falls within the agricultural waste exemption under 40 C.F.R. § 257.1(c)(1), and is not subject to solid waste regulation.

C. The Farm's Land Applications Do Not Present an Imminent or Substantial Harm.

Even if this Court finds the Farm's fertilizer mixture is a solid waste, its application does not present imminent or substantial endangerment to the health of those living nearby. To succeed in a RCRA claim, a plaintiff must prove that the solid waste presents an imminent and substantial endangerment to human health. *Albany Bank v. Exxon*, 310 F.3d 969, 972 (7th Cir. 2002). To be

imminent, a threat may present either an existing or future harm to the public. *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 210 (2d Cir. 2009) (holding "'imminency' requires a showing that a 'risk of threatened harm is present' . . . or a 'prospect of future harm'") (citation omitted). A solid waste does not present an imminent and substantial risk if it is "'remote in time, completely speculative in nature, or de minimis in degree.'" *Me. People's Alliance v. Holtrachem Mfg. Co.*, 211 F.Supp.2d 237, 247 (D. Me. 2002) (citation omitted).

When there is insufficient evidence that contamination will result in harm to humans or the environment, then "imminent and substantial" harm has not been proven. 42 U.S.C. § 6972(a)(1)(B) (2012); *Cordiano*, 575 F.3d at 211-212. In *Cordiano*, a RCRA action was brought against a gun club for the presence of lead shot allegedly disposed of on its property. 575 F.3d at 205. In an effort to demonstrate that this material may have presented an imminent and substantial threat to human health, the claimant presented expert testimony that the lead shot "represent[ed] a *potential exposure risk* to both humans and wildlife," and that it was substantial because it was found at levels which exceeded state standards. *Id.* at 211-12 (emphasis added). The *Cordiano* court ruled that no imminent or substantial harm existed, because there was insufficient evidence to support the claim. First, the court found that the record was insufficient because the actual – rather than the potential – risk of exposure had never been assessed. *Id.* at 212. As a result, there was no evidence that the contamination posed "a reasonable prospect of future harm," and thus no evidence of imminence. *Id.* Second, the plaintiff failed to show the harm was substantial, because they only relied on state standards, and failed to undertake an assessment of exposure to "evaluat[e] . . . the degree of such risk." *Id.* Thus, without evidence of actual exposure, the presence of contaminants at levels exceeding state standards was insufficient to show a potentially "serious" harm to human health or the environment. *Id.*

Similarly to *Cordiano*, the record before this Court presents no evidence that elevated nitrates present an imminent or substantial risk of harm to human health or the environment in New Union. Just as the expert report in *Cordiano* identified only "potential exposure risk[s]," there is no evidence here showing any concrete degree of risk to affected populations – or even linking the Farm to the nitrate exceedances. While the record indicates there were above-standard levels of nitrates in the water, there was no assessment of the degree of risk that was presented to the only population group that could have been impacted. R. at 6. The lower court found only that households with infants used bottled water at all relevant times during the nitrate advisory. R. at 11-12. Moreover, if any nitrate advisories were to occur in the future, it is likely infants will be administered bottled water again; therefore, no future harm exists. The district court's factual finding that infants were not exposed to nitrates must be upheld on appeal unless it is clearly erroneous. *Am. Canoe Ass'n v. Murphy Farms*, 412 F.3d 536, 538 (4th Cir. 2005). As a result, the record does not support a finding that the Farm's possible contribution of nitrates to the River caused an imminent or substantial harm. Thus, Riverwatcher's RCRA claims must be rejected.

CONCLUSION

For all of the foregoing reasons, Moon Moo Farm respectfully requests this Court to uphold the district court's grant of summary judgment on all counts. Specifically, this Court should hold that Dean James was trespassing when he took samples from the Farm's property and, thus, affirm the district court's exclusion of evidence obtained by trespass. Further, this Court should hold that the Farm is not subject to discharge permitting under the Clean Water Act, and reject Riverwatcher's claims under the Resource Conservation and Recovery Act.

Respectfully submitted,

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Counsel for Moon Moo Farm, Inc