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 FARM, INC.,

Defendant-Appellee

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

Case No. 155-CV-2014

BRIEF FOR MOON MOO FARM, INC.

Defendant-Appellee

Oral Argument Requested

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution:

Statutes:

JURISDICTIONAL STATEMENT

The federal district courts have jurisdiction over citizen suits filed under the Clean Water Act ("CWA") and the Resource Conservation and Recovery Act ("RCRA"), without regard to subject matter jurisdiction. *See* 33 U.S.C. § 1319 (1990); 33 U.S.C. § 1365 (1987); 42 U.S.C. §

6972 (1984). The Environmental Protection Agency ("EPA"), Riverwatcher, and Dean James filed timely notices of appeal. Fed. R. App. P. Rule 4(a)(1)(A). The United States Court of Appeals for the Twelfth Circuit, thus, has jurisdiction on the district court's grant of summary judgment. 28 U.S.C. § 1291 (1982).

STATEMENT OF THE ISSUES

1. Whether the Queenchunck Canal is a privately owned, non-navigable waterway.
2. Whether evidence is admissible in a civil enforcement action that was wrongfully procured without a warrant and by trespass by Plaintiff Dean James.
3. Whether Moon Moo Farms is subject to NPDES permitting under the Clean Water Act, despite being in compliance with its nutrient management plan and not being a CAFO.
4. Whether Moon Moo Farm's routine application of a fertilizer and soil amendment to it silage land subjects Moon Moo Farm to RCRA "solid waste" regulation and poses an imminent and substantial endangerment.

STATEMENT OF THE CASE

This is an appeal from a final order of the District Court for the District of New Union, granting Moon Moo Farm's motions for summary judgment and denying the United States' (on behalf of the United States Environmental Protection Agency) (collectively referred to as EPA) and Deep Quod Riverwatcher's, together with its "Riverwatcher," Dean James (collectively, Riverwatcher) motions for summary judgment. R. at 4.

Initially, the EPA brought action for civil penalties and injunctive relief for claimed violations by Moon Moo Farm of the permitting requirements of the Clean Water Act (CWA), 33 U.S.C. §§1311(a), 1319(c), (d), 1342. *Id.* Subsequently, Riverwatcher, an environmental

organization, intervened and asserted claims under the citizen suit provisions of CWA § 505 and Resource Conservation and Recovery Act (RCRA) § 7002. R. at 4, 7. Accordingly, Riverwatcher alleged (in the alternative) violations of either the CWA or RCRA by Moon Moo Farm in connection with Moon Moo Farm's manure management practices. R. at 4.

Consequently, Moon Moo Farm filed a counterclaim for common trespass, which alleged that Deep Quod Riverwatchers and Dean James (James) illegally entered its property in order to obtain evidence of stormwater runoff from its fields. R. at 4, 7.

The district court denied the EPA's and Riverwatcher's motions for summary judgment, while granting Moon Moo Farm's motions for summary judgment. R. at 1, 4. In so doing, the court held: (1) Moon Moo Farm is not a Concentrated Animal Feeding Operation (CAFO) subject to permitting under the National Pollutant Discharge Elimination System (NPDES) permit program; (2) Discharges from Moon Moo Farm's fields qualify for the agricultural stormwater exemption of the CWA; (3) Evidence of Moon Moo Farm's discharge was obtained by trespass; (4) Use of said evidence is not admissible in a civil enforcement proceeding; (5) Moon Moo Farm's land application of fertilizer and soil amendment does not constitute a solid waste subject to regulation under RCRA Subtitle IV; (6) Moon Moo Farm's land application of its manure mixture is not subject to open dumping claims under RCRA; (7) Moon Moo Farm's landspreading practices do not present an imminent and substantial danger in order to be subject to a RCRA claim; and (8) Moon Moo Farm is entitled to an award of $832,560 of damages pursuant to its trespass claim. R. at 1-2, 12.

Both the EPA and Riverwatcher filed a Notice of Appeal. R. at 1. Riverwatcher and Dean James challenge all holdings of the district court. *Id.* EPA appeals the court's holding that Moon Moo Farm is not a CAFO subject to NPDES permitting, that evidence of Moon Moo Farm's

discharge was obtained by trespass, and that such evidence is not admissible in a civil enforcement proceeding. *Id.*

STATEMENT OF THE FACTS

On April 12, 2013, immediately subsequent to a significant two-day rainstorm event in the Farmville Region of the State of New Union, Dean James, the Deep Quod "Riverwatcher," made an investigatory patrol of the Deep Quod River. R. at 6. While making his way up the Deep Quod River, James reached the privately owned Queechunk Canal in his metal jon boat. *Id.* Ignoring the clearly displayed "No Trespass" signs, James decided to stroll on up the canal through the property of Moon Moo Farm. *Id.* While trespassing on Moon Moo Farm's property, James took it upon himself to take photographs of stormwater runoff and obtain water samples. *Id.*

Moon Moo Farm operates a dairy farm with 350 head of milk cows, ten miles from the City of Farmville in the State of New Union. R. at 4. These cows are housed in a barn and are not pastured. *Id.* Moreover, as is common amongst animal farms, such as Moon Moo Farm, the manure and waste water from the cows are recycled in order to be used as fertilizer. R. at 5.

Accordingly, Moon Moo Farm collects its manure and waste through a series of drains and pipes that carry the waste from the cow barn to an outdoor lagoon, where it is stored for use as fertilizer. *Id.* The lagoon - which is designed to hold all manure produced by the dairy operation without overflowing during a 25-year rainfall event - periodically pumps manure into tank trailers. *Id.* Thereafter, the trailers spread the manure on 150 acres of Moon Moo Farm's Bermuda grass fields. *Id.* Furthermore, in addition to the manure and waste water in Moon Moo Farm's fertilizer, the farm also adds acid whey, which is produced by the nearby Chokos Greek yogurt facility. *Id.*

Moon Moo Farm, together with its 150 acres of fields, is located at a bend in the course of the Deep Quod River. *Id.* In the 1940s, moreover, the previous owner of the farm, in order to mitigate flooding issues, excavated what is today known as the Queechunk Canal. *Id.* The Canal is a mere 50 yards wide, three to four feet deep, and can only be navigated by a canoe or other small boat. *Id.* As such, Moon Moo Farm owns the land on both sides of the Queechunk Canal and has prominently posted the Canal with "No Trespassing" signs. *Id.* Downstream of Moon Moo Farm, the community of Farmville uses the Deep Quod River as a drinking water source. *Id.*

In the late winter and early spring of 2013, the Farmville Water Authority issued a "nitrate" advisory for its drinking water customers. R. at 6. Nevertheless, the warning was merely issued to advise customers of high levels of nitrates in the Deep Quad River, which could be harmful to only infants. *Id.* While the Water Authority recommended that infants drink bottled water due to the higher nitrate level - the nitrate level only posed a threat to those less than two years old - and posed no health threats to adult. *Id.* However, it was in response to customer complaints that James, the "Riverwatcher," took it upon himself to trespass upon Moon Moo Farm's private canal. *Id.*

Moon Moo Farm is regulated by the State of New Union as a "no discharge" animal feeding operation. R. at 5. As such, Moon Moo Farm's operation does not normally have a direct discharge from its manure handling facilities to water of the State. *Id.* As a "no discharge" operation, however, Moon Moo Farm must submit a "Nutrient Management Plan" (NMP) to the Farmville Regional Office of the State of New Union Department of Agriculture (DOA). The NMP sets forth appropriate seasonal manure application rates for the Farmville Area. *Id.*

According to records retained by Moon Moo Farm, it has applied manure to its fields at

rates consistent with the NMP filed with the Farmville Office at all relevant times. R. at 6. Nothing in Moon Moo Farm's NMP prevents it from applying manure during a rain event, and land application of whey as a soil conditioner has been a longstanding practice in New Union since the 1940s. R. at 6-7.

SUMMARY OF THE ARGUMENT

The District Court properly granted summary judgment for Moon Moo Farm on all claims brought by the EPA, Riverwatcher, and Dean James. The plaintiffs raised no issue of material fact, and, as a matter of law, Moon Moo Farm is entitled to summary judgment.

The Queechunk Canal is an artificial waterway on Moon Moo Farm's property, and it was built by Moon Moo Farm. Although the Canal connects with navigable waters of the United States, the public does not have a right of access to the canal because it is a private waterway. Additionally, the public does not have a navigation servitude over the land, even if the Canal is a navigable water, because the Canal is a privately owned, built, and maintained waterway. Moreover, any evidence that Dean James collected by way of trespass and without a warrant on Moon Moo Farm's private waterway is inadmissible because it was illegally obtained.

Since there is no legitimate evidence to support a finding that Moon Moo Farm released pollutants from an artificial ditch, the plaintiffs cannot prove an essential element that Moon Moo Farm operates a confined animal feeding operation. Importantly, even if Moon Moo Farm is a CAFO, any excess nutrient release from Moon Moo Farm's property qualifies as an agricultural stormwater exemption to CWA regulation.

Finally, Moon Moo Farm is not subject to regulation under RCRA because the fertilizer and soil amendment mixture does not constitute a "solid waste." Even if the mixture is a "solid waste," it is exempt from regulation under the agricultural waste exception. Additionally, the

mixture does not pose an imminent and substantial endangerment because it is not the "but for" cause of the nitrate advisories. Moreover, the nitrate advisories pose merely a slight economic burden on families raising infants, not an imminent and substantial endangerment.

ARGUMENT

I. AN ARTIFICIALLY CONSTRUCTED WATERWAY BUILT ON PRIVATE LAND WITH PRIVATE FUNDS CONNECTING WITH NAVIGABLE WATERS OF THE UNITED STATES IS NOT A NAVIGABLE WATERWAY TO WHICH THE PUBLIC HAS A RIGHT OF ACCESS.

The concept of "navigable waters" grew out of the "public common of piscary," i.e., the right of the common people of England to travel upon the waters and to fish them. *United States v. Kaiser Aetna*, 408 F.Supp. 42, 49 (1976). Jurisdiction over bodies of water in the United States was unresolved until 1842 when the Supreme Court in *Martin v. Waddell Lessee*, 41 U.S. (Pet.) 367, 411-13, 10 L.Ed. 997 (1842) declared that all lands underlying navigable waters were held prior to the American Revolution by the Crown as a public trust, and upon the Revolution the people of each state held "the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the right surrendered by the Constitution to the federal government. *Id.* at 410.

Three years after *Martin v. Waddell*, the Supreme Court extended the reach of the public trust doctrine to all states subsequently admitted to the Union in *Pollard's Lessee v. Hagan*. 44 U.S. (3 How.) 212 (1845). The Court reasoned that, during pre-statehood periods when lands were held on a territorial basis, the Federal Government held all lands under navigable waters in trust for the future states. Upon admission, each new state was deemed to have received such trust property from the United States to maintain its equal footing with the original 13 states. *Id.*

Upon ratification of the Constitution, jurisdiction over navigable waters used in interstate commerce passed to the federal government under its authority established in the Commerce Clause. In *Gibbons v. Ogden*, the Supreme Court held that navigation was in the power of the federal government to regulate under the Commerce Clause of the Constitution. 22 U.S. (9 Wheat.) 1 (1824). There, Justice Marshall described the scope of federal authority under the

commerce clause: "It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all other vested in congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitation, other than are prescribed in the constitution." *Id.* at 195.

The term "navigability" or "navigable waters" has many definitions and applications; therefore, any reliance upon judicial precedent must rest upon considerable review of the purpose for which the concept of "navigability" was invoked in a particular case. *See Kaiser Aetna,* 408 F.Supp at 48-49. Accordingly, the Supreme Court held that the definition of navigability turns on its purpose. *Kaiser Aetna v. United* States, 444 U.S. 164, 171 (1979). The extent of navigability arises in three areas of caselaw: To determine title controversies to the beds of lakes and streams[1], the extent of admiralty jurisdiction[2], and the validity of Congressional regulation under the Commerce Clause[3]. *Id.* Because the exercise of federal power for different purposes has been recognized to reach different results, the court must first determine the extent to which navigability will be used and then apply the proper scope of the term.

1. The Ebb-and-Flow of the Tide

Early on, English courts frequently spoke of "tidewaters" or "ebb and flow of the tide" as a measure of the King's ownership of underwater lands and of English admiralty jurisdiction. As explained by the Court in *The Propeller Genessee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443, 454-55 (1851), the English reliance on the "tidewater" concept…was a sound and reasonable

---

[1] *Gilman v. Philadelphia*, 70 U.S. (3 Wall.) 713, 18 L.Ed. 96 (1865). *Shively v. Bowlby*, 152 U.S. 1 (1894). *Utah v. United States*, 403 U.S. 9, 91 S.Ct. 1775, 29 L.Ed.2d 279 (1971).
[2] *The Propeller Genessee Chief v. Fitzhugh*, 53 U.S. (12. How.) 443, 13 L.Ed. 1058 (1851). *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 19 L.Ed. 999 (1870).
[3] *The Daniel Ball*, supra, n.3 (1870). *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 61 S.Ct. 291, 85 L.Ed. 243 (1940)

one, because there was no navigable stream in the country beyond the ebb and flow of the tide. In England, therefore, tidal water and navigable water are synonymous terms, and tidal water means nothing more than public rivers, as distinguished from private streams; and they took the ebb and flow of the tide as the test, because it was a convenient one, and more easily determined the character of the water. *Id.* However, as *Genessee Chief* noted, the "tidewater" description that was often applied to English navigable streams is confusing and "utterly inadmissible" in the United States. 53 U.S. (12 How.) at 457. In this country, we have "thousands of miles of public navigable water, including lakes and rivers in which there is no tide." *Id.* The generic common law term, "navigable waters," is a more accurate description of public waterways in the United States. *Id.* This reasoning was reinforced in *Illinois Central Railroad*, where the Court held that tidal influence alone does not suffice as a reason for applying the public trust doctrine. *Illinois Cent. R. Co. v. State of* Illinois, 146 U.S. 387, 426, 13 S.Ct. 110, 36 L.Ed. 1018 (1892). The Court reasoned that the doctrine "is not founded upon the existence of the tide over the lands, but upon the fact that the waters are navigable." *Id.* at 436. The court reasoned that "[t]he doctrine is founded on the necessity of preserving to the public the use of navigable water from private interference and encroachment, a reason as applicable to navigable fresh waters as to waters moved by the tide." *Id.*

2. Navigable-in-Fact

After declaring the English ebb and flow test as not "any test at all," the Supreme Court, in *The Daniel Ball*, adopted a new definition of "navigable waters:"

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the

> navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.

The Daniel Ball, 77 U.S. 557, 563 (1870).

Three years after its decision in *The Daniel Ball*, the Court expanded the test of navigability in *The Montello,* 87 U.S. (20. Wall.) 430 (1874) where the Court stated:

> The true test of navigability of a stream does not depend on the mode by which commerce is, or may be conducted, nor the difficulties attending navigation…The capability of use by the public for the purpose of transportation and commerce affords the true criteria of the navigability of a river, rather than the extent and manner of that use…It is not every small creek in which a fishing skiff or gunning canoe can be made to float at high water which is navigable, but in order to give it the character of a navigable stream, it must be generally and commonly useful to some purpose of trade and agriculture.

87 U.S. (20 Wall.) at 441-442.

The Queechunk Canal is incapable of use as a continuous highway for the purpose of navigation in interstate commerce. The canal's maximum depth is 4 feet, restricting navigation to shallowdraft canoes or other similar flat-bottomed boats. It benefits only the private landowner, averting water from the contiguous Deep Quod River to alleviate flooding of the defendant's abutting land. Accordingly, because the waterway is man-made and privately owned and no facts in the record indicate that commercial use has ever been permitted, the canal is not a public highway for commerce (a necessary element under the navigable-in-fact test), and thus, does not constitute a navigable water of the United States.

3. United States v. Appalachian Power Co.

Navigability reached its modern day expansive meaning in *United States v. Appalachian Electric Power Co.,* 311 U.S. 377 (1940), when the Supreme Court established that a waterway may be considered "navigable" if reasonable improvement would render it "navigable in fact."

> A waterway otherwise suitable for navigation is not barred from that classification merely because artificial aids must make the highway suitable for use before commercial navigation may be undertaken…there are obvious limits to such improvement as affecting navigability. These limits are necessarily a matter of degree. There must be a balance between cost and need at a time when the improvement would be useful.
> *Appalachian*, 311 U.S. at 407-409.

The Court provides that an inquiry under *Appalachian* turns on the "reasonableness" of potential improvements while balancing the cost and the need of such improvement(s). Here, the mere fact that the defendant's predecessor decided it was reasonable to spend the money necessary to develop his privately-held land into a canal, for the apparent purpose of flood control, does not lead to the conclusion that it was ever financially reasonable to develop the property into a highway for interstate commerce by water. Neither the EPA nor Riverwatcher has presented evidence on the need for or cost to improve the canal in its natural condition. The record is void of any implication that there was ever a reasonable need to improve defendant's private land for navigation purposes.

II. WATERWAYS ARTIFICIALLY CREATED ON PRIVATE LANDS WITH PRIVATE FUNDS FOR PRIVATE USE, ARE PRIVATE PROPERTY NOT SUBJECT TO A PUBLIC NAVIGATION SERVITUDE

Even if Queechunk Canal is found to be a "navigable water of the United States," and as such within the regulatory authority of the federal government, this does not of itself create a right of public access by virtue of the navigation servitude. *Kaiser Aetna*, 444 U.S. at 173. In that case, the Court held that the right of public use did not necessarily follow from the government's right to regulate. *Id.* Concluding that regulatory power is broader than, and not coextensive with navigation servitude, the Supreme Court established that the power of the federal government to regulate waters that are in fact navigable is a separate issue from the imposition of navigational servitude. *Id.* at 178-9. The Court held, while recognizing the right of the public to pass over

"naturally" navigable waters, that no right of public access existed to the private waters of Kuapa Pond in its ordinary and natural condition, and that its transformation into a marina created no such rights. Accordingly, the Court conceded that Kuapa Pond is navigable only for purposes of regulation and not for purposes of navigational servitude because it was, in its natural state, "incapable of being used as a continuous highway for the purpose of navigation in interstate commerce." *Id.* Following the Supreme Court's decision in *Kaiser Aetna*, a definition of navigability, for purposes of navigational servitude, must not include a consideration of the extent of artificial improvement.

This analysis in reinforced in the analogous case of *Vaughn v. Vermilion Corp.*, 444 U.S. 206, 208-210 (1979), when the Court denied a public right of access to a system of navigable canals that had been artificially constructed and maintained with private funds. A lessee of private property on which man-made navigable canals had been built with private funds sought to enjoin persons from trespassing on its lands and making use of the canals. *Id.* The Court of Appeals for the Third Circuit held that a canal on private property constructed and maintained with private funds for private purposes was a private canal, use of which could be restricted by the landowner or his assigns, and consequently, injunctions in favor of landowner's lessee were proper. 356 So.2d 551, writ denied 357 So.2d 558, affirmed. On certiorari, the Supreme Court held that where canals were built on private property with private funds in such a manner that they ultimately joined with other navigable waterways, no general right of use of the public arose by reason of the authority over navigation conferred on Congress by the Commerce Clause. *Vaughn*, 444 U.S. at 206.

The fundamental purpose of the navigation servitude is to preserve public navigable waters for public use and access. *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S.

53, 67-70 (1913). Public navigable waters for purposes of the servitude, as established by *The Daniel Ball*, and elaborated by *United States v. Appalachian Electric Power Co.*, are those waters, which in their original condition, or with reasonable improvements, are susceptible to use in interstate commerce.

The canal herein at issue was not constructed as, and does not form, a highway of commerce. It was built on private property owned and controlled by Moon Moo Farm for the single purpose of reducing flooding of the Deep Quod River onto Defendant's abutting private land.

After *Kaiser Aetna*, the power of Congress to regulate waters that are navigable in fact is a separate issue from the imposition of navigational servitude. For the purpose of invoking navigational servitude, the term "navigable" applies only to a body of water navigable in fact in its natural state. Public navigational rights do not automatically arise when water becomes navigable by improved artificial means. Additionally, the servitude applies upon the existence of a reasonable expectation that the canal is susceptible to commercial needs.

For the matter in the present dispute, even if Queechunk Canal is deemed navigable, it is navigable only for purposes of regulation and not within the reach of navigational servitude because, it was, in its natural state, "incapable of being used as a continuous highway for the purpose of navigation in interstate commerce." *Kaiser Aetna*, 444 U.S. at 178. To open Moon Moo Farm's waterway to exploitation by the plaintiffs under the interpretation of the navigational servitude would be a physical intrusion of defendant's privately-owned man-made canal. It is submitted that, for the foregoing reasons, that the judgment of the trial court should be affirmed.

III. EVIDENCE OBTAINED THROUGH A TRESPASS AND WITHOUT A WARRANT IS INADMISSIBLE IN A CIVIL ENFORCEMENT PROCEEDING BROUGHT UNDER CWA §§ 309(B), (D) AND 505.

In *Smith Steel Casting Co. v. Brock*, 800 F.2d 1329 (1986), the United States Court of Appeals for the Fifth Circuit determined whether the Occupational Safety and Health Review Commission (OSHRC) correctly applied the exclusionary rule and its good faith exception in proceedings held before the Commission. Relying on legislative history of the Occupational Safety and Health Act, the Fifth Circuit recognized that Congress has authorized the OSHRC "to make such rules as are necessary for the orderly transaction of its proceedings." *Smith Steel*, 800 F.2d at 1333 (citing 29 U.S.C. § 661(g)(1982)). Accordingly, "[h]earings before the Commission and its judges shall be governed by the rules of evidence applicable in the United States District Courts. *Id.* (citing 29 C.F.R. § 2200.72 (1985)). Affirming the Commission's decision to apply the exclusionary rule and its good faith exception, the court held that "illegally obtained evidence must be excluded for purposes of punishing the crime, i.e. the exclusionary rule should be applied for purposes of assessing penalties against an employer…unless, under the reasoning articulated in *Leon*[4], the good faith exception can be applied to the actions implemented in obtaining the tainted evidence." *Id.* at 1334.

In *Trinity Industries v. OSHRC*, 16 F.3d 1455 (1994), the United States Court of Appeals for the Sixth Circuit held that the good faith exception to the exclusionary rule applied based on a finding that the Occupational Safety and Health Administration (OSHA) executed its full-scope inspection in a manner that the agency believed in "objectively reasonable good faith" to be

[4] "Evidence need not be suppressed when obtained by police who act in good faith reliance on a facially valid warrant that is later found to lack probable cause because suppression in this situation would not further the deterrent function of the exclusionary rule." *United States v. Leon*, 468 U.S. 897,918-920, 104 S.Ct. 3405, 3418-19, 82 L.Ed.2d 677 (1984).

authorized by the facially valid warrant it had obtained. The court relied on its findings that OSHA's warrant application was detailed and factually accurate; and, the agency obtained decisions from both the magistrate and the district court upholding the warrant before conducting a full-scope inspection. *Id.* at 1462.

The exclusionary rule barring admission of the evidence obtained by James while trespassing onto defendant's private property in violation of the Fourth Amendment[5], applies in this case. There are no facts in the present dispute that support a finding of "good faith" on the part of either EPA or Riverwatcher for the indisputable physical invasion of defendant's privately-owned canal. EPA and Riverwatcher lack any admissible evidence to establish a discharge of pollutants from the ditch on defendant's fields.

IV. THE TRIAL COURT DID NOT ERR IN HOLDING THAT MOON MOO FARM, INC. IS NOT REQUIRED TO OBTAIN A PERMIT UNDER THE CLEAN WATER ACT NPDES PERMITTING PROGRAM.

A. The trial court did not err in holding that there is no genuine dispute that Moon Moo Farm, Inc. is not a concentrated animal feeding operation as there was no evidence to establish a discharge of pollutants from the ditch on Moon Moo Farm's fields.

Summary judgment under Federal Rule of Civil Procedure Rule 56(c) is proper if the pleadings, depositions, answers to interrogatories, and admissions on filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Accordingly, Rule 56(c) mandates the entry of summary judgment against a party who

[5]The Fourth Amendment of the United Sates Constitution states that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated… [A]nd no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. Amend. IV.

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. *Id*.

Of course, a party seeking summary judgment always bears the initial burden of showing that there is no genuine issue as to any material fact, however, there is no requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials negating the opponent's claim. *Id*. at 323. In fact, the initial burden on the moving party will be discharged by merely "showing" that there is an absence of evidence to support the nonmoving party's case. *Id*. at 325. Additionally, district courts are widely acknowledged to possess the power to enter summary judgment, so long as the losing party was on notice that he had to come forward with all of his evidence. *Id*. at 326.

After a moving party bears its' initial burden, courts are mandated to grant the party's motion for summary judgment where the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to that party's case. For example, the Supreme of the United States granted an asbestos manufacturer's motion for summary judgment where the plaintiff had failed to show evidence of causation - an essential element of the plaintiff's claim. *Id*. at 319. In that case, the plaintiff offered three documents as evidence to show her husband's death had been caused by his exposure to defendant's asbestos. *Id*. at 320. However, after finding the evidence inadmissible on the grounds of hearsay, the Supreme Court of the United States granted the defendant's motion for summary judgment, stating that there was no requirement that the moving party further support its motion with evidence negating the nonmoving party's claim. *Id*. at 322. Consequently, once a moving party shows that there is no genuine issue as to any material fact in the nonmoving party's claim, courts are mandated to grant the party's motion for summary judgment where the nonmoving party fails to make a showing sufficient to establish

the existence of an element essential to that party's case.

In this case, the district court did not abuse its discretion in granting Moon Moo Farm's motion for summary judgment, as the EPA and Riverwatcher lacked evidence to establish that Moon Moo Farm discharged pollutants from a man-made ditch - an essential element in proving that the farm is a CAFO. Similar to *Celotex*, EPA and Riverwatcher attempted to use inadmissible evidence, which was obtained by trespass, in order to establish an essential element of their claim. Accordingly, Moon Moo Farm moved for summary judgment on plaintiffs' claims that the farm was a concentrated animal feeding operation (CAFO) and, therefore, was in violation of the CWA by discharging pollutants without an NPDES permit. As such, Moon Moo Farm sufficiently showed that the EPA and Riverwatcher failed to introduce any evidence that Moon Moo Farm discharged pollutants through a man-made ditch. In accordance with the court's holding in *Celotex*, Moon Moo Farm is not required to further support its motion with evidence negating plaintiffs' claim. As a result, plaintiffs failed to establish an essential element of their claim; therefore, the district court did not err in granting Moon Moo Farm's motion for summary judgment.

B. The trial court did not err in holding that Moon Moo Farm's excess nutrient discharge from its manure application falls under the agricultural stormwater exemption of the Clean Water Act.

The CWA requires a permit, known as a NPDES permit, for any addition of a pollutant from a point source to waters of the United States. 33 U.S.C. § 1311 (1995). As such, the CWA defines a "point source" to include a "ditch" and a "concentrated animal feeding operation" ("CAFO"); however, the CWA specifically carves out an exception where the discharge in question is "an agricultural stormwater discharge," - a category of discharge that the Act exempts

from regulation via the statutory definition of "point source." *See* 33 U.S.C. § 1362(14) (2014).

Accordingly, the "agricultural stormwater discharge" exemption applies to any discharges that were the result of precipitation. *See e.g., Fishermen Against the Destruction of the Env't, Inc. v. Closter Farms, Inc.*, 300 F.3d 1294, 1297 (11th Cir. 2002); *Concerned Area Residents for the Env't v. Southview Farm*, 34 F.3d 114, 121 (2d Cir. 1994). The definition of "agricultural stormwater discharge" has also been expanded to include land application discharge, if the land application comported with appropriate site-specific nutrient management practices. *National Pork Producers Council v. USEPA*, 635 F.3d 738, 742 (5th Cir. 2011). Furthermore, the exemption applies to precipitation-caused runoff of litter and manure from a farmyard outside of the production operation area of a CAFO. *Alt v. EPA*, 979 F. Supp.2d 701 (N.D. W.Va. 2013).

An animal feeding operation ("AFO") will be shielded from NPDES permit liability in accordance with the legislative intent of the "agricultural stormwater discharge" exemption, when the AFO's runoff is agriculture-related discharge triggered not by negligence or malfeasance, but by the weather - even when those discharges came from what would otherwise be point sources. For example, a farming operation was not held liable to obtain an NPDES permit when the farm's drainage system discharge was the result of precipitation. *Closter Farms, Inc.*, 300 F.3d at 1297. The Eleventh Circuit court in *Closter Farms* held that a farming operation's runoff is exempt from the term "point source" pursuant to the "agricultural stormwater discharge" exception even when the farm's stormwater is pumped into the nearby Lake Okeechobee. *Id*. The *Closter Farms* court further noted that regardless of the fact that the stormwater is pumped into Lake Okeechobee, rather than naturally flowing into the Lake, does not remove it from the exemption. *Id*.

Contrastingly, the Second Circuit court in *Southview Farm* held that a farming operation's discharges were not exempt under the "agricultural stormwater exception," as the farm's manure application severely over saturated the fields to the point that manure was "literally running off everywhere up and down the fields" … and at one point had pooled in a corner of a field. *Southview Farm*, 34 F.3d at 122. In *Southview*, the court stated that, "we think the real issue is not whether the discharges occurred during rainfall or were mixed with rain water run-off, but rather, whether the discharges were the result of precipitation." *Id*. at 121-22.

In addition to precipitation-related runoff, the court in *USEPA* held that "[t]he 2003 EPA regulations *expanded* the preexisting definition of exempt 'agricultural stormwater discharge' to include land application discharge, if the land application comported with appropriate site-specific nutrient management practices." *USEPA*, 635 F.3d at 744 (emphasis added). As such, the scope of the "agricultural stormwater discharge" exemption was broadened yet again in a West Virginia federal district court case, which dealt with precipitation-related runoff of manure, litter and wastewater from a CAFO's farmyard. In *Alt v. EPA*, the plaintiff ran a CAFO in which all her poultry operations were housed under roof. *Alt*, 979 F. Supp.2d at 704. Nevertheless, litter and dander was tracked into an adjacent farmyard, whereby rain collected the particles and ultimately discharged into a nearby stream. *Id*. The court in *Alt* ultimately held that a CAFO should not be held liable under NPDES permitting for precipitation-caused runoff of litter and manure from a farmyard outside of the farm's production area. *Id*. at 701. As a result, an AFO who has adopted sufficient measures to ensure appropriate agricultural utilization of its manure, litter and wastewater, will not be improperly subjected to NPDES permitting liability due to agriculture-related discharge triggered not by negligence or malfeasance, but by the weather.

With that said, however, some may argue that simply abiding by appropriate site-specific

nutrient management practices is not enough to ensure appropriate agricultural utilization of manure and litter which is applied to farmland for fertilization purposes. For example, in *Waterkeeper Alliance, Inc. v. U.S. E.P.A.*, the Second Circuit court held that the permitting authority issuing NPDES permits are required to review and make available to the public, by the CAFO, site-specific nutrient management plans for land application of large CAFOs. *Waterkeeper Alliance, Inc. v. U.S. E.P.A.*, 399 F.3d 486, 499, 503 (2d Cir. 2005). The court in *Waterkeeper* stated that by not requiring permitting authority review, the CAFO rule does nothing to ensure that each large CAFO has, in fact, developed a nutrient management plan that complies with the appropriate effluent limitations guidelines for land application. *Id*. at 499. Moreover, the *Waterkeeper* court noted that Congress clearly intended to guarantee the public a meaningful role in the implementation of the CWA, therefore, requiring large CAFOs to make NMPs publicly available is a must. *Id*. at 503.

While, on the one hand, requirement of permitting authority to review and public availability of NMPs for land application of large CAFOs may seem to coincide with Congress' intent under the CWA. On the other hand, it was never Congress' intent to impose such burdensome review measures upon medium sized CAFOs, let alone AFOs. According to EPA regulations, for an animal feeding operation to constitute a large concentrated animal feeding operation, the CAFO must, at a minimum, confine 700 mature dairy cows. However, to qualify as just a medium CAFO, the animal feeding operation must confine only 200 mature dairy cows. As such, the sheer numbers alone illustrate how large CAFOs can potentially emit substantially larger amounts of water pollution than medium sized CAFO, and, therefore, should be subject to more stringent review.

In regard to the NMP public availability requirement, simply requiring that a medium

sized CAFO, or AFO, make their NMPs available to the public does not ensure that the public will in fact read such plans. Furthermore, such a requirement does not guarantee that the public will have a "meaningful role" in the implementation of the CWA. As such, to impose such requirements on smaller animal feeding operations, whose potential pollution emissions into the navigable waters of the United States are substantially smaller than that of large CAFOs, would impose costs to the farm operators which would outweigh any potential benefits to the public.

If Congress had wanted to require the permitting authority to review and ensure public availability of NMPs for land application of medium sized CAFO, or AFOs, it would have said so. Accordingly, as far as Congress' intent is concern, medium sized CAFOs, or AFOs, will not be held liable for "precipitation-related discharge[s]" where "manure, litter or process wastewater has been applied in accordance with site-specific nutrient management plans." 40 C.F.R. § 122.23(e) (1983).

In this case, the trial court did not abuse its discretion in holding that Moon Moo Farm is not a CAFO subject to permitting under the NPDES permit program; however, even if Moon Moo Farm's animal feeding operation qualified as a medium CAFO, it's excess nutrient discharge from its manure application falls under the "agricultural stormwater discharge" exemption to the CWA. Similar to *Closter Farms*, after heavy rain on April 11 and April 12, 2013, the stormwater discharge from Moon Moo Farm's land application area was directly related to precipitation. In fact, Moon Moo farm has a stronger claim for agricultural stormwater exemption in comparison to Closter Farms, as Closter Farms actually used a pump to discharge stormwater into a navigable body of water. Moreover, Moon Moo farm's discharge was directly related to precipitation as the two inches of rainfall, which took place over a two-day period, was considered a "significant storm event" for the Farmville Region.

Furthermore, unlike the case in *Southview Farm*, Moon Moo Farm did not overly saturate its fields with manure. While at best, opposing counsel may assert that with the addition of acid whey, Moon Moo Farm's manure mixture affected the Bermuda Grass' ability to effectively absorb nutrients, such an argument, however, is weak for several reasons. First, the application of whey as a soil conditioner has been a longstanding practice that has been a tradition in New Union since the 1940s. Moreover, unlike in *Southview Farm*, Moon Moo Farm's manure application never raised to the extent of causing pools of manure to gather in their fields. Consequently, Moon Moo Farm's excess nutrient discharge was precipitation-related runoff.

Even more assuring of the fact that Moon Moo farm's nutrient discharge is exempt under the "agricultural stormwater discharge" exemption is that Moon Moo Farm's land application methods comport with the appropriate site-specific nutrient management plan, which was submitted to the Farmville Regional Office of the State of New Union Department of Agriculture (DOA). Therefore, according to EPA's own regulations, which were promulgated in 2003, Moon Moo Farm's land application discharge is exempt from NPDES permitting pursuant to the "agricultural stormwater discharge" exemption.

Finally, even if particles of litter and manure from Moon Moo Farm's operation where in fact not from the farm's application area, but were actually collected on a farmyard by the precipitation which took place on April the 11th and 12th - such precipitation-related runoff would still qualify as "agricultural stormwater discharge." Similar to the animal feeding operation in *Alt*, all of Moon Moo Farm's cattle are housed under roof. As such, Moon Moo Farm has taken appropriate efforts to limit its manure and wastewater discharge by applying such manure in accordance with a site-specific nutrient management plan and by maintain its production operation area under cover. Thus, in accordance with Congress' intent when it added

the "agricultural stormwater discharge" exemption, Moon Moo Farm should not be improperly held liable for agriculture-related discharge triggered not by negligence or malfeasance, but by the weather.

Therefore, the trial court did not abuse its discretion in holding that Moon Moo Farm is not a CAFO subject to permitting under the NPDES permit program, and that the farm's excess nutrient discharge from its manure application falls under the "agricultural stormwater discharge" exemption to the CWA.

V. THE COURT SHOULD UPHOLD THE DISTRICT COURT'S GRANTING OF SUMMARY JUDGMENT THAT A CITIZEN SUIT CANNOT BE PROPERLY BROUGHT AGAINST MOON MOO FARM UNDER THE RESOURCE CONSERVATION AND RECOVERY ACT

The District Court granted Moon Moo Farm's motion for summary judgment because the Court found no basis for RCRA citizen suit causes of action. Riverwatcher failed to raise a genuine issue of material fact on its open dumping cause of action because the fertilizer and soil amendment mixture does not constitute a solid waste. Moon Moo Farm's land application of the fertilizer and soil amendment mixture, therefore, is not subject to the EPA's sanitary landfill guidelines. In addition, Riverwatcher failed to raise a genuine issue of material fact on their imminent and substantial endangerment cause of action because the fertilizer and soil amendment mixture to do pose a meaningful danger to human health.

The court should affirm the District Court's finding that the Riverwatcher's RCRA citizen suit causes of action have no basis, and, thus, that Moon Moo Farm's motion for summary judgment was proper.

A. The fertilizer and soil amendment mixture does not constitute a "solid waste" under RCRA because it falls under the agricultural waste exception

Although Riverwatcher claims that Moon Moo Farm's storage of the fertilizer and soil amendment mixture constitutes an "open dump" subject to RCRA prohibition and, thus, subject to solid waste facility regulation, Riverwatcher fails to prove that the stored mixture is a "solid waste" within the "open dump" definition. 42 U.S.C. § 6903(14) (1992); 42 U.S.C. § 6903(27).

The definition for "open dump" is "any facility or site where solid waste is disposed of which is not a sanitary landfill which meets the criteria promulgated under section 6944 of this title and which is not a facility for disposal of hazardous waste." 42 U.S.C. § 6903(14). Therefore, the fertilizer and soil amendment must constitute a "solid waste" for the solid waste facility regulations to have affect. The definition for "solid waste" is "any garbage, refuse, sludge . . . and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from . . . agricultural operations . . . ." 42 U.S.C. § 6903(27). At first glance, these definitions might imply that Moon Moo Farm is subject to regulation.

Riverwatcher, however, relies on the statutory definition of "solid waste" for its argument. Pursuant to RCRA, the EPA must set guidelines for solid waste management, including guideline definitions. 42 U.S.C. § 6907 (1994). The regulations specifically exclude Moon Moo Farm's storage of the fertilizer and soil amendment practice. The EPA's solid waste facilities regulations provide that "[t]he criteria [for solid waste disposal facilities] do not apply to agricultural wastes, including manures and crop residues, returned to the soil as fertilizers or soil conditioners." 40 C.F.R. § 257.1(c)(1) (2003).

Riverwatcher claims that Moon Moo Farm's application of the fertilizer and soil amendment violates the requirements for food-chain crops produced for animal feed, which requires that "[t]he pH of the solid waste and soil mixture is 6.5 or greater at the time of solid waste application or at the time the crop is planted, whichever occurs later, and this pH level is

maintained whenever food-chain crops are grown." 40 C.F.R. § 257.3-5 (2003). Riverwatcher's expert agronomist found that liquid manure and whey mixture had a pH of 6.1 at the time of discovery. The testimony, however, fails to consider the regulation requirement that the soil with the fertilizer and soil amendment mixture must be greater than or equal to a pH of 6.5. The testimony, therefore, provide adequate evidence to determine this issue. Importantly, Moon Moo Farm has consistently used the fertilizer and soil amendment mixture in compliance with the NMP. *United States v. Moon Moo Farm, Inc.*, No. 155-CV-2014 at *6 (D.N.U. June 1, 2014) (order granting motion for summary judgment). In addition, Moon Moo Farm's expert agronomist took no issue with any of Moon Moo Farm's land application practices. *Id*.

In *Community Ass'n for Restoration of the Environment, Inc. v. George & Margaret LLC*, the United States District Court for the Eastern District of Washington held that manure that is "over-applied to the fields and when it has leaked away from the lagoons" constitutes "solid waste." *Cmty. Ass'n for Restoration of the Env't, Inc. v. George & Margaret LLC*, 954 F. Supp. 2d 1151, 1158 (E.D. Wash. 2013) (The plaintiffs in this case argued that the dairy cow manure, which is applied to the land as a fertilizer, may become solid waste "after it has ceased to be 'beneficial' or 'useful.'" In fact, the plaintiffs conceded that the dairy farm's manure practice did constitute a compost use.). Although Riverwatcher's expert witness recognized this distinction, the District Court did not find that Riverwatcher's claim encompassed this differentiation. Riverwatcher, instead, argues that the very practice of applying the fertilizer and soil amendment to the land constitutes an "open dump" of "solid waste." 42 U.S.C. § 6903(14); 42 U.S.C. § 6903(27). Again, this argument ignores the exception for agricultural wastes. 40 C.F.R. § 257.1(c)(1).

There is an interesting potential argument from Riverwatcher that while the fertilizer may

not constitute a "solid waste," the whey soil amendment may fall within the definition. The "agricultural waste" exception for solid waste presents a list of qualifying agricultural wastes. 40 C.F.R. § 257.1(c)(1) ("including manures and crop residues"). The list does not appear to be an exhaustive list of "agricultural waste" because of the term "including." The term "agriculture" encompasses "farming activities such as preparing soil, planting seeds, and raising and harvesting crops, it also includes gardening, horticulture, viticulture, dairying, poultry, bee raising, ranching, riding stables, firewood operations, and landscape operations." 3 Am. Jur. 2d Agriculture § 1 (citing 26 U.S.C. § 3121(g) (2008) (which includes "processing" in the definition of "agricultural labor"). Whey may not fall under the definition of manure or crop residue, but Moon Moo Farm believes that whey does constitute an agricultural waste because it is a by-product of dairy processing.

Moon Moo Farm's practice of applying the mixture to the land as a fertilizer and soil amendment falls squarely within the EPA's exclusion for agricultural wastes. The court should upload the trial court's findings of fact and conclusions of law on the issue of "solid waste."

B. Even if the fertilizer and soil amendment mixture does not fall under the agricultural waste exception, the mixture is not "discarded" under the "solid waste" definition

The definition for "solid waste" includes "any garbage, refuse, sludge . . . and other discarded material." 42 U.S.C. § 6903(27). Presumably, Riverwatcher does not contend that the fertilizer and soil amendment is garbage, refuse, or sludge, but rather a "discarded material." The mixture is not "discarded" because the mixture serves a necessary fertilizer and soil amendment to the land for purposes of nourishing the Bermuda grass crop. The District Court noted that "it is far from clear that these materials are being 'discarded' . . . ." *United States v. Moon Moo Farm, Inc.*, No. 155-CV-2014 at *11 (D.N.U. June 1, 2014).

Unfortunately, RCRA does not provide a definition for "discarded material." The plain meaning of the word "discard" is "to 'cast aside; reject; abandon; give up.'" *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1041 (9th Cir. 2004) (citing 1 The New Shorter Oxford English Dictionary 684 (4th ed.1993)) (the court held that open burning of grass residue did not constitute discarding because of the beneficial use of the practice, and, thus, the residue was not discarded). In *Safe Air*, the court noted that Congress was not concerned with regulating "agricultural products that could be recycled or reused as fertilizers," when passing RCRA. *Id.* at 1045. Importantly, the court highlighted a House Report on RCRA stated that "'[a]gricultural wastes which are returned to the soil as fertilizers or soil conditioners are not considered discarded materials in the sense of this legislation.'" *Id.* at 1045-46 (citing H.R.Rep. No. 94–1491, at 3 (1976), reprinted in 1976 U.S.C.C.A.N. 6238, 6239–41. Arguably, the *Safe Air* court may misapply persuasive case law and particular regulations to reach its ultimate holding, *see*, Calder, Michael L., *Safe Air For Everyone Except The Citizens Of Idaho: Why The Ninth Circuit's Narrow Reading Of RCRA Should Be Overturned*, 1 SETON HALL CIR. REV. 237 (2005), but Moon Moo Farm does not use *Safe Air* as an illustration, merely as a source of statutory interpretation.

In *Water Keeper Alliance, Inc. v. Smithfield Foods, Inc.*, a citizens group bought a similar suit against a farm that uses manure as a fertilizer on its land. *See Water Keeper Alliance, Inc. v. Smithfield Foods, Inc.*, 2001 WL 1715730 (E.D. N.C. Sept. 20, 2001). The District Court held that the farm's motion to dismiss could not stand because there was a question of fact relating to the RCRA claim brought by the citizen's group. *Id.* at *5. The case differs, however, because the factual dispute was "defendants return animal waste to the soil for fertilization purposes or instead apply waste in such large quantities that its usefulness as organic fertilizer is eliminated."

Id. Riverwatcher does not contend that the amount of manure applied subjects Moon Moo Farm to liability, rather merely that the manure is a "discarded" "solid waste." Importantly, Riverwatcher's expert witness did not dispute Moon Moo Farm's records that it "applied manure to its fields at rates consistent with the NMP filed with the Farmville Field Office at all relevant times." *United States v. Moon Moo Farm, Inc.*, No. 155-CV-2014 at *6 (D.N.U. June 1, 2014).

The court should uphold the trial court's granting of summary judgment because Moon Moo Farm returns the manure and whey back to the land as a fertilizer and soil amendment, and, thus, the mixture is not "discarded"

C. Even if the fertilizer and soil amendment mixture constitute a "discarded" "solid waste," the land application of this mixture does not pose an imminent and substantial danger to human health

RCRA allows citizens to bring suit against anyone that discards solid waste that "may present an imminent and substantial danger to human health or the environment." 42 U.S.C. § 6972(a)(1)(B) (1984). Riverwatcher, however, failed to present sufficient evidence on this cause of action. *United States v. Moon Moo Farm, Inc.*, No. 155-CV-2014 at *11 (D.N.U. June 1, 2014). Riverwatcher's expert could not identify Moon Moo Farm as the "'but-for' cause of [the April 2013] nitrate advisory" for the Farmville water supply. *Id.* at *7. Importantly, the nitrate advisories do not pose a health risk to adults or juveniles, only "infants less than two years old." *Id.* at *6.

For a citizen suit to prevail on an "imminent and substantial endangerment" claim, three elements must be met:

(1) the defendant has been or is a generator or transporter of solid or hazardous waste, or is or has been an operator of a solid or hazardous waste treatment, storage or disposal facility; (2) the defendant has "contributed" or "is contributing to" the handling, storage,

> treatment, transportation, or disposal of solid or hazardous waste; and, (3) the solid or hazardous waste in question may present an imminent and substantial endangerment to health or the environment.

Ecological Rights Found. v. Pac. Gas & Elec. Co., 713 F.3d 502, 514 (9th Cir. 2013) (citing 42 U.S.C. § 6972(a)(1)(B); *Prisco v. A & D Carting Corp.*, 168 F.3d 593, 608 (2d Cir.1999)). If the Court considered the fertilizer and soil amendment mixture a "discarded" "solid waste," then the first two elements from *Ecological Rights* would be satisfied because Moon Moo Farm stores and handles the mixture. *Id.* Even if this were true, however, the mixture does not constitute an imminent and substantial endangerment because the evidence does not support a finding that it is the "but-for" cause and the burden is slight.

The United States Court of Appeals for the Tenth Circuit held that failure "to link land-applied [substance] to the [contaminate] . . . precludes a finding that such [substance] may present an imminent and substantial endangerment, as required under RCRA's liability standard." *Attorney Gen. of Oklahoma v. Tyson Foods, Inc.*, 565 F.3d 769, 778 (10th Cir. 2009) (the State could not provide sufficient evidence that the bacteria in the land-applied poultry litter was contributing source to the contaminated watershed). Similarly, Riverwatcher's expert witness could not identify potential nitrate releases from Moon Moo Farms as a "but-for" cause of the nitrate advisory. *United States v. Moon Moo Farm, Inc.*, No. 155-CV-2014 at *7 (D.N.U. June 1, 2014).

Additionally, the record shows that "the Deep Quod watershed is heavily farmed," and that the Farmville Water Authority has issued many nitrate advisories, prior to "the increase in Moon Moo Farm's operations." *Id.* The United States Court of Appeals for the First Circuit found liability for a RCRA imminent and substantial endangerment claim because the plaintiffs

were able to show that the defendant was "a dominant source" of the contaminant. *Maine People's Alliance And Natural Res. Def. Council v. Mallinckrodt, Inc.*, 471 F.3d 277, 285 (1st Cir. 2006). Although Riverwatcher has shown that Moon Moo Farm is a source of nitrate contamination, they have not shown that it is a "dominant source," and the evidence shows that there are other potential reasons for the advisories. *United States v. Moon Moo Farm, Inc.*, No. 155-CV-2014 at *7 (D.N.U. June 1, 2014).

Although Moon Moo Farm sympathizes with infants affected by the nitrate advisories, without claiming any culpability, persuasive case law does not even consider such a risk to be an "imminent and substantial endangerment." *See Davies v. Nat'l Co-op. Refinery Ass'n*, 963 F. Supp. 990, 999 (D. Kan. 1997) (citing *Morris v. Primetime Stores of Kansas, Inc.*, 1996 WL 563845 (D.Kan. Sept. 5, 1996) (an imminent and substantial endanger was present because the house had *explosive* vapors)) (although the *Davies* plaintiffs were forced to use water from an outside source because their water supply was contaminated, the court held that this was not an imminent and substantial endangerment, merely an "economic burden"). Importantly, the burden incurred by Farmville residents only applies to families with infants less than two years of age, *all* of the *Davies* plaintiffs, however, could not drink from the water supply. *Id.*

The court should uphold the trial court's summary judgment in favor of Moon Moo Farm. The manure and whey mixture does not constitute a discarded solid waste because it is an agricultural waste that is returned to the soil as a useful fertilizer and soil amendment. Even if the mixture is a "solid waste," it does not pose a "but-for" cause of the nitrate advisories, and merely constitutes a slight economic burden, not an imminent and substantial endangerment.

CONCLUSION

For the foregoing reasons, Moon Moo Farm respectfully requests that the Court affirm summary judgment on all claims brought by EPA, Riverwatcher, and Dean James. The plaintiffs-appellants failed to raise any issue of material, thus, as a matter of law, summary judgment is proper. First, the evidence Dean James collected by way of illegal trespass onto Moon Moo Farm's private property is barred by the exclusionary rule because the Queechunk Canal is not a public trust navigable water. Second, since there is no evidence to support a finding that Moon Moo Farm released pollutants from an artificial ditch, the plaintiff-appellants fail to prove that Moon Moo Farm operates a confined animal feeding operation (CAFO). Finally, the fertilizer and soil amendment is not a solid waste and does not require RCRA regulation, and the mixture does not pose an imminent and substantial danger to the citizens of Farmville.