C.A. 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.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR NEW UNION
No. 155-CV-2014

Brief for Moon Moo Farm, Inc.
*Defendant-Appellee*

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## JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction over Plaintiff-Appellants' Clean Water Act and Resource Conservation Recovery Act ("RCRA") claims because those claims arise under federal causes of action. *See* 28 U.S.C. § 1331(a) (2012); *Peabody Coal Co. v. Navajo Nation*, 373 F.3d 945, 949 (9th Cir. 2004) ("For a case to 'arise under' federal law, a plaintiff's well-pleaded complaint must establish either (1) that federal law creates the cause of action or (2) that the plaintiff's asserted right to relief depends on the resolution of a substantial question of federal law."). The district court had supplemental jurisdiction over Moon Moo Farm's trespass counterclaim because its counterclaim arises out of the same nucleus of operative fact as Plaintiff-Appellants' federal claims. *See* 28 U.S.C. § 1367(a) (2012); *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966). The district court granted summary judgment to Moon Moo Farm ("Moon Moo" or "Moon Moo Farm") on all claims. R. at 12. Because the district court finally disposed of all three claims, this court has jurisdiction under 28 U.S.C. § 1291 (2012).

## STATEMENT OF ISSUES

I. Whether Dean James of Riverwatcher committed a trespass when he disregarded Moon Moo Farm's "No Trespassing" signs and entered the canal on Moon Moo's land, a canal that was non-navigable at the time New Union became a state.

II. Whether the EPA—a government agency—can admit the evidence Riverwatcher collected through trespass in an enforcement suit under section 309(b) of the Clean Water Act when Riverwatcher collected the evidence in response to public complaints and with the ultimate goal of using the evidence to enforce the Clean Water Act.

III. Whether Moon Moo Farm is subject to NPDES permitting

   A. When there is no admissible evidence to show that Moon Moo discharged pollutants through a ditch, and therefore, no evidence that Moon Moo is a point source,

   B. And when, even if the trespass evidence were admissible, a heavy rainstorm likely caused the alleged discharge.

IV. Whether Moon Moo is subject to RCRA liability

A. When the fertilizer Moon Moo applies to its fields serves a useful agricultural purpose and is part of a continual production process,

B. And when Moon Moo's manure and whey mixture was a de minimis threat to human health.

## STATEMENT OF THE CASE

### I. BACKGROUND

Moon Moo Farm operates a 350-head dairy farm about ten miles from the City of Farmville, in a heavily farmed area of the State of New Union. R. at 4, 7. Moon Moo Farm sits in a bend of the Deep Quod River, a tributary of the Mississippi. R. at 5.

Moon Moo grows Bermuda grass on much of its 150-acre property. *Id.* A canal connecting two points of the Deep Quod River runs through Moon Moo's grass fields. *Id.* Moon Moo owns the land on either side of the canal (popularly known as the "Queechunk Canal"). *Id.* The Farm's predecessor in title built the Canal in the 1940s in order to alleviate flooding. *Id.* New Union became a state before the Canal was built. R. at 4, 5. Though the Canal is navigable by small boat and is occasionally used as a shortcut down the Deep Quod River, Moon Moo has posted "No Trespassing" signs at both ends of the Canal. R. at 5.

Moon Moo's herd used to be smaller (170-head), but Moon Moo increased its herd in 2010 to meet heightened demand from the nearby Chokos Greek Yogurt factory. R. at 5. Moon Moo does not pasture its cows, but shelters them in a barn and collects the animals' manure and liquid waste to use as fertilizer for its grass crop. R. at 4–5. Moon Moo temporarily stores this manure in outdoor storage lagoons, which are designed to withstand a twenty-five-year rainstorm. R. at 5. Indeed, the State of New Union has certified Moon Moo Farm as a "no-discharge" facility, meaning that Moon Moo's manure treatment systems are designed to

withstand a twenty-five-year rain event. *Id.* Moon Moo ultimately mixes this manure with yogurt whey and spreads this fertilizer mixture using tank trailers and other machinery. *Id.* Under New Union law, Moon Moo Farm must submit a "nutrient management plan"—a written policy regarding fertilizer application—to the New Union Department of Agriculture. *Id.* The nutrient management plan calculates the rate at which Moon Moo's grass crop can absorb nutrients and limits manure application accordingly. *See id.* Moon Moo's nutrient management plan permits Moon Moo to apply its fertilizer mixture on rainy days. *See* R. at 7. Moon Moo has never deviated from its nutrient management plan. R. at 6.

The yogurt whey component of Moon Moo's fertilizer mixture acts as a soil conditioner. *See* R. at 6. Moon Moo gets the yogurt whey free of charge from the Chokos Greek Yogurt factory, and Chokos gets some if its milk from Moon Moo Farm. R. at 5. Though whey reduces soil pH (which can, in turn, reduce Bermuda grass's nitrogen uptake), using yogurt whey as a soil conditioner is a longstanding agricultural practice in New Union. R. at 6.

## II. EVENTS PRECEDING LITIGATION

In the late winter and early spring of 2013, the Deep Quod chapter of Riverwatcher received complaints about the water quality in the Deep Quod River. R. at 6. In response to these complaints and to a water quality advisory from the Farmville Water Authority, Riverwatcher investigated the source of the water contamination. *Id.* On April 12, the second day of a heavy two-day rainstorm, Dean James (Riverwatcher's appointed "Riverwatcher" for the Deep Quod River) conducted an investigatory patrol of the Deep Quod River. *Id.* Ignoring the prominent "No Trespassing" signs, he navigated his small outboard craft (a "jon boat") over the Queechunk Canal. *Id.* James claims to have seen agricultural runoff flowing from Moon Moo's fields into the Canal through a ditch. *Id.* James took photographs of Moon Moo's fertilizer spreading

operations, and took samples of the runoff. *Id.* Riverwatcher tested the water samples, and the results showed elevated nitrates and fecal coliforms. *Id.*

The advisory that prompted Riverwatcher's investigation was by no means uncommon for the region. *See* R. at 7. The Farmville Water Authority issued five nitrate advisories between 2002 and 2010, all of which occurred before Moon Moo doubled its operations to meet increased milk demand from the Chokos factory. *Id.* The advisory in the spring of 2013 recommended that parents give infants bottled water, but deemed Farmville's water safe for all other residents. R. at 6. Riverwatcher's environmental health expert could not definitively say that Moon Moo was a "but for" cause of the nitrate advisory. R. at 7.

## III. PROCEDURAL HISTORY

Riverwatcher served Moon Moo Farm, the United States Environmental Protection Agency ("EPA"), and the New Union Department of Environmental Quality with a notice of intent to sue under the citizen suit provisions of the Clean Water Act and RCRA. R. at 7; *see* Clean Water Act § 505, 33 U.S.C. § 1365 (2012); Resource Conservation and Recovery Act ("RCRA") § 7002, 42 U.S.C. § 6973 (2012). In response to this notice, the EPA filed a civil enforcement suit under section 309(b) of the Clean Water Act in the New Union federal district court. R. at 7; *see* 33 U.S.C. § 1319(b). Riverwatcher intervened as a plaintiff in the EPA's civil enforcement suit under the Clean Water Act's citizen suit provision. R. at 7; *see* 33 U.S.C. § 1365(b)(1)(B). Riverwatcher also added RCRA citizen suit claims under sections 7002(a)(1)(A) and (B) of RCRA. R. at 7; 42 U.S.C. § 6973(a)(1)(A), (B). Moon Moo Farm filed a counterclaim for trespass against Riverwatcher, seeking damages and injunctive relief. *Id.*

After discovery, both sides moved for summary judgment. R. at 7. The district court granted summary judgment to Moon Moo Farm on all claims. R. at 9, 11–12. The district court

reasoned that Queechunk Canal was not subject to a public trust right of navigation, and that Riverwatcher therefore trespassed on Moon Moo's property when it used the Canal to collect evidence. R. at 9. Reasoning that the government could not circumvent the Fourth Amendment by using a non-profit to "do its dirty work," the district court applied the Fourth Amendment's exclusionary rule to the photographs, water samples, and testimonial evidence Riverwatcher obtained through trespass ("trespass evidence"). R. at 9. The court also rejected Riverwatcher's Clean Water Act citizen suit on an independent basis, holding that, even if Riverwatcher could use the trespass evidence to prove Moon Moo discharged from a "point source," its discharge was "agricultural stormwater runoff" and therefore exempt from National Pollutant Discharge Elimination System ("NPDES") permitting under the Act. R. at 10; *see* 33 U.S.C. § 1362(14).

Further, the district court rejected Riverwatcher's RCRA open dumping claim because Moon Moo's whey and manure fertilizer mixture did not constitute "solid waste" under RCRA. R. at 11; *see* 42 U.S.C. § 6973(27).The court also held that Riverwatcher had not presented enough evidence to establish an imminent and substantial threat to human health under section 7002(a)(1)(B) of RCRA, and therefore dismissed Riverwatcher's second RCRA claim. R. at 11. Both Plaintiffs timely appealed the district court's decision to this court. R. at 1.

## SUMMARY OF THE ARGUMENT

At its heart, this case is about proof. The Plaintiffs base their claims on evidence obtained through trespass. This evidence is inadmissible in quasi-criminal enforcement actions such as these. Without this evidence, Plaintiffs have utterly failed to make a prima facie showing in any of their claims, and Moon Moo is therefore entitled to summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). Though this court has ample grounds to reject Plaintiffs

claims on substance, Moon Moo Farm urges this court to reject Plaintiffs' claims on evidentiary grounds, and vindicate rights of privacy and property.

Moon Moo Farm owns the land under the Queechunk Canal. The presumption in American property law is that the owner of land owns the column from the center of the earth to the heavens. Therefore, unless Moon Moo holds title to the bed of the Queechunk Canal subject to some other public right of entry, Riverwatcher trespassed on Moon Moo's private property when it entered the Canal to investigate alleged environmental violations.

Plaintiffs argue that Moon Moo holds title to the bed of the Queechunk Canal subject to a public trust right of navigation. Under the federal public trust doctrine—the only doctrine applicable to this case—the public only enjoys a right to traverse waters that are "navigable for title," *i.e.*, waters that were navigable at the time of statehood. When New Union became a state, the Queechunk Canal was not merely not navigable—it did not exist. Therefore the federal public trust cannot attach to the Canal, and Riverwatcher trespassed on Moon Moo's private property when it entered the Canal.

Conducting a search by trespassing on private property presumptively violates the Fourth Amendment's proscription on unwarranted search and seizure. Because evidence obtained in violation of the Fourth Amendment is not admissible in quasi-criminal suits such as these, the trespass evidence is inadmissible. Without this evidence, Plaintiffs are left with nothing more than the bare assertions in their pleadings; they will have failed to make out a prima facie case on claims on which they bear the burden of proof at trial. Moon Moo is therefore entitled to summary judgment on all issues.

Even if this court admits the trespass evidence, Plaintiffs' Clean Water Act and RCRA claims must still fail on substantive grounds. As to the Clean Water Act claims, the trespass

evidence establishes that Moon Moo Farm is a medium CAFO, a point source under the Clean Water Act. However, the record shows that rain—not carelessness—caused manure to flow into the Deep Quod River. Based on these undisputed facts, the alleged discharges are therefore "agricultural stormwater discharges" under the Clean Water Act, and are definitionally exempt from the NPDES permitting requirement and Clean Water Act jurisdiction. *See* Clean Water Act § 502(14), 33 U.S.C. § 1362(14) (2012).

As to Riverwatcher's RCRA claims, the district court properly dismissed these citizen suits. As a matter of law, Moon Moo did not improperly dispose of "solid waste," *see* § 7002(a)(1)(A), because the EPA's RCRA regulations explicitly exempt agricultural wastes used at fertilizers. *See* 40 C.F.R. § 261.4(b)(2). Even if agricultural waste were not exempted under the RCRA regulations, Moon Moo's fertilizer is not "solid waste" because Moon Moo reused the manure and whey as part of a continuous production process: the manure and whey are neither "discarded" nor "waste" under applicable RCRA case law. *See Am. Mining Cong. v. EPA*, 824 F.2d 1177 (D.C. Cir. 1987). Furthermore, Riverwatcher cannot show that Moon Moo handled its fertilizer so as to pose an "imminent and substantial endangerment to human health" (which is necessary to maintain a citizen suit under section 7002(a)(1)(B)) because the risks of the spring 2013 nitrate advisory were de minimis.

Riverwatcher and the EPA have utterly failed to make out a prima facie case on any of their claims because the evidence on which those claims are based is inadmissible. And, even if their evidence were admissible, Moon Moo Farm is entitled to judgment as a matter of law because its alleged discharge is exempt from Clean Water Act jurisdiction as agricultural stormwater discharge, and Moon Moo's fertilizer is exempt from RCRA jurisdiction because it is

not "solid waste" under the Act. Accordingly, Moon Moo asks this court to affirm the district court's grant of summary judgment on all claims.

## STANDARD OF REVIEW

Appellate courts review an entry of summary judgment *de novo*. *E.g.*, *Smith v. Clark Cnty. School Dist.*, 727 F.3d 950, 958 (9th Cir. 2013); *see also Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 465 n.10 (1992). The appellate court thus applies the summary judgment standard afresh, and overrules an entry of summary judgment only if a reasonable juror could have found in the nonmovant's favor. *Smith*, 727 F.3d at 958.

## ARGUMENT

### I. RIVERWATCHER TRESPASSED ON MOON MOO'S PRIVATE PROPERTY WHEN IT INVESTIGATED ALLEGED CLEAN WATER ACT VIOLATIONS BECAUSE MOON MOO OWNS THE QUEECHUNK CANAL BED, AND THERE IS NO PUBLIC TRUST RIGHT OF NAVIGATION OVER THE CANAL.

Riverwatcher and the EPA have based their entire case on evidence Riverwatcher obtained when it navigated the Queechunk Canal in search of evidence of Clean Water Act violations. Because Moon Moo owns the land underlying the Queechunk Canal, and because the Queechunk Canal is not subject to any public trust right of navigation, Riverwatcher committed a trespass when it conducted its investigatory patrol.

Moon Moo owns the land underlying the Queechunk Canal—Moon Moo's predecessor in titled owned the entire property, then created the Canal in the 1940s to alleviate flooding. R. at 5. The default presumption in American property law is that title to property extends from the center of the earth to the heavens. 63 Am. Jur. 2d Property § 12 (2014). Under this principle, ownership of the land underlying a water body extends to the waters above. *See, e.g.*, *O'Connor v. Smith*, 427 Fed. Appx. 359, 365 (5th Cir. 2011) (holding boater liable for trespass for entering

the land surrounding and underlying a body of water that was not his without permission). With this ownership comes the right to exclude others, a "fundamental element of the property right." *Kaiser Aetna v. United States*, 44 U.S. 164, 179–180 (1979). When someone violates this fundamental property right by intentionally entering another's land without the owner's permission, that person is liable to the owner for trespass. Restatement (Second) of Torts § 163 (1965). Therefore, unless Moon Moo owns the bed of the Queechunk Canal subject to some other public right of entry, Dean James committed a trespass when he navigated the Canal without permission.

The Plaintiffs argued below that Moon Moo Farm holds title to the Canal bed subject to a public trust right of navigation. R. at 8. Neither the plaintiffs nor the district court identified any New Union case law on the public trust, R. at 9, and the public trust is a state law matter. *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215, 1235 (2012) (citing *Idaho v. Coer d'Alene Tribe of Idaho*, 521 U.S. 261, 284–86 (1997)). Resorting to federal law, the district court (perhaps unwittingly) grounded its trespass holding on the federal navigational servitude, *see* R. at 9 (citing *Kaiser Aetna v. United States*, 444 U.S. 164, 178–79 (1979)) a separate doctrine. *Zack's, Inc. v. City of Sausalito*, 165 Cal.App.4th 1163, 1193 (Cal. Ct. App. 2008). Appellate courts do not consider arguments improperly briefed or preserved below. *E.g.*, *McKenzie v. U.S. Citizenship and Immigration Servs.*, 761 F.3d 1149, 1154 (10th Cir. 2014). Appellants did not argue under the navigational servitude doctrine below, and this court must therefore confine its analysis to the public trust doctrine.[1]

[1] The federal navigational servitude is also of no help to Appellants. Under this doctrine, title to land underlying "navigable-in-fact" bodies of water is subject to the federal government's superior rights to regulate navigation. *Owen v. United States*, 851 U.S. 1404, 1409 (1988). The navigational servitude is thus unhelpful to Appellants for two reasons. First, the servitude does not, in and of itself, authorize public use of a water body—rather, it gives the government power

The public trust doctrine provides the public with the right to use water bodies burdened with the trust for navigation, commerce, and fishing, and limits the sovereign's power to transfer title to lands in violation of these rights. *Shively v. Bowlby*, 152 U.S. 1, 10–11, 13 (1894). This right is derived from English common law, where the King held title to all land submerged under tidal waters in trust for the public. *Martin v. Waddell's Lessee*, 41 U.S. 367, 410 (1842). Where the King conveyed or chartered land to private parties, that conveyance (the "jus privatum") was subject to these superior public trust rights (the "jus publicum"), and a conveyance was void to the extent it was incompatible with this public trust. *Id.* at 422. When the colonies declared independence, the colonial governments displaced the King as the public trustee and acquired title to the land beneath navigable bodies of water. *Id.* at 14–15. As subsequent states joined the Union, each state was put on "equal footing" with the original thirteen states and "gain[ed] title within its borders to the beds of waters then *navigable*." *PPL Montana, LLC*, 132 S. Ct. at 1228 (citing *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 476 (1988)).

The public trust, therefore, is properly thought of as a limitation on title: if the state held lands subject to the public trust, the public trust also burdens all subsequent conveyances to private parties. *See Shively*, 152 U.S. *passim*. The starting point for determining whether the public trust doctrine applies to a particular water body under federal common law is to ascertain whether it was navigable at statehood, giving the state title to the bed and banks of the water. *E.g., Utah v. United States*, 403 U.S. 9, 10 (1971) (citing *Shively v. Bowlby*, 152 U.S. 1, 26–28

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to authorize public use if it so chooses without incurring takings liability. *See Kaiser Aetna v. United States*, 444 U.S. 164, 173–74 (1979). But here, there is no indication that the federal government has opened the Queechunk Canal to public navigation—there is no statute or regulatory program authorizing public entry on the Queechunk Canal. Second, joining a privately owned man made water body, such as the Canal, with a navigable water body subject to a navigational servitude does not create a public right of access. *Id.* at 178–80; *see also Vaughn v. Vermilion*, 444 U.S. 206, 207–09 (1979). A federal navigational servitude therefore places no limit on Moon Moo's right to exclude the public.

(1894)). A body of water is "navigable" when at the time of statehood, "they [were] used, or [were] susceptible of being used, in their ordinary condition, as highways for commerce." *PPL Montana*, 132 S. Ct. at 1228. That a water body becomes navigable after statehood is not relevant—the "navigable for title" test is retroactive, and only considers navigability at the time of statehood. *United States v. Utah*, 283 U.S. 64, 76 (1931) (quoting *United States v. Holt State Bank*, 270 U.S. 49, 56 (1926)); *Brewer-Elliot Oil & Gas v. United States*, 260 U.S. 77, 88 (1922).

Because the public trust right is really a limit on title, it can have no bearing in this case. Moon Moo's predecessor in title owned the strip of dry land under the Queechunk Canal in fee simple. Because dry land is plainly not navigable, there can be no possibility of encumbrance from the public trust. *See Utah*, 283 U.S. at 76 (1931). When Moon Moo's predecessor created the Canal, it did not suddenly subtract a "stick" from its bundle and transfer it to the public. This necessarily means that Moon Moo acquired title to the land under the Queechunk Canal free of the public trust. Some states have extended the public trust doctrine to include water bodies created after the state transferred title to a private party. *See, e.g.*, Joseph J. Kalo, "*It's Navigable in Fact So I Can Fish in It:" The Public Right to Use Man-Made, Navigable-in-Fact Waters of Coastal North Carolina*, 89 N.C. L. Rev. 2095, 2108–11 (2011) (summarizing North Carolina public trust law on man-made water bodies). But New Union is not one of these states: neither the EPA nor Riverwatcher nor the District Court were able to discover any New Union law on the public trust, let alone any law extending the public trust to man-made water bodies. R. at 9. Riverwatcher and the EPA have put their trust in the wrong doctrine. Riverwatcher trespassed when it entered the Queechunk Canal to investigate Moon Moo's operations.

## II. THE WATER SAMPLE EVIDENCE OBTAINED THROUGH TRESPASS IN VIOLATION OF THE FOURTH AMENDMENT IS NOT ADMISSIBLE IN THIS PROCEEDING.

The Fourth Amendment protects individuals against unreasonable searches and seizures. U.S. Const. amend. IV. There is no question that, had the EPA trespassed on Moon Moo's land to investigate its operations, that search would have violated the Fourth Amendment. *See United States v. Jones*, 132 S. Ct. 945, 949 (2012) (holding that an illegal "search" occurs when the government trespasses on private property without a warrant in order to collect information). But this does not let Riverwatcher off the hook, for all evidence stemming from Riverwatcher's investigation is inadmissible in the EPA's enforcement suit if (1) Riverwatcher was acting as an agent of the EPA and (2) the exclusionary rule applies to the EPA's enforcement suit.

### A. *The Fourth Amendment applies to Riverwatcher's actions because it acted as a government agent when it collected water samples from Moon Moo's property.*

While the Fourth Amendment only applies to government action, this does not mean that the Fourth Amendment cannot apply when a private actor carries out a search. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). A court must impute a private actor's actions to the government if "the private party acted as an instrument or agent of the Government" in conducting the search. *Skinner v. Ry. Labor Execs. Ass'n*, 489 U.S. 602, 614 (1989). Private actors become agents of the government when "there is such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself." *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001) (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974)) (internal quotation marks omitted). The reasoning for this rule is simple: the state may not avoid the strictures of the Fourth Amendment by recruiting a private party to do its bidding. *Norwood v. Harrison*, 413 U.S. 455, 465 (1973).

There is a sufficient nexus between a state and a private party's actions when the private action results from the government's exercise of "coercive power" or when the government provides "significant encouragement, either overt or covert." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (citing *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 165 (1978) & *Jackson*, 419 U.S. at 356). For instance, if a statute encourages a private party to conduct a search, and the search is not "primarily the result of private initiative," the Fourth Amendment applies. *Skinner*, 489 U.S. at 614–615. Additionally, private actions may become government action when the government delegates a public function to a private actor. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 627–28 (1991).

Congress included the "citizen suit provision" in the Clean Water Act to persuade private actors to supplement the government's enforcement ability. 33 U.S.C. § 1365; *see also Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60 (1987). The citizen suit provision encourages non-governmental actors act as "private attorney general[s]." *Sierra Club v. Morton*, 405 U.S. 727, 737 (1972). The citizen suit provision also has the effect of delegating the government's enforcement power to private actors, as it pushes citizens to fill in gaps in the government's enforcement. *See, e.g.*, *West v. Atkins*, 487 U.S. 42, 42–43 (1988). This legislative structure raises an inherent risk that the government will seek to evade investigatory limitations by outsourcing its enforcement functions to private individuals. *See Norwood*, 413 U.S. at 465 (noting the government should not be able to use private individuals to take actions the government is constitutionally forbidden to take).

Riverwatcher acted as an agent of the government when it trespassed on Moon Moo's private property to collect water samples because Riverwatcher was attempting to aid the government in enforcing the Clean Water Act. R. at 6–7; *see Skinner*, 498 U.S. at 614. The only

reason Riverwatcher conducted an investigation was because it received complaints about water quality in the Deep Quod River and a water quality advisory from the Farmville Water Authority. R. at 6. James was not merely a citizen who stumbled upon potentially incriminating evidence and provided it to the government; he conducted the investigation on behalf of Riverwatcher with the sole purpose of obtaining evidence that Moon Moo was impairing water quality. *See* R. at 6. Since Riverwatcher is a private organization with no independent enforcement ability, the only reason it would have for collecting evidence of Moon Moo's alleged wrongdoing is that it intended to bring a citizen suit and provide what James collected to the EPA. *See* R. at 6.

If the Fourth Amendment did not to apply to Riverwatcher's actions, the government would have an incentive to circumvent the Fourth Amendment by having private actors conduct searches that the government is not constitutionally allowed to perform. *See Norwood,* 413 U.S. at 465. Allowing the government to benefit from an unlawful act would be tantamount to the government giving private parties permission to break the law. *See Olmstead v. United States,* 277 U.S. 438, 480 (1928) (Brandeis, J., dissenting) ("Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."). Since the government encouraged Riverwatcher to trespass on Moo Moon's private canal, Riverwatcher's actions impute to the government, and the Fourth Amendment applies.

### B. *The exclusionary rule applies to this suit and bars all evidence Riverwatcher obtained through trespass.*

The text of the Fourth Amendment does not explicitly bar evidence obtained through illegal search and seizure. *See* U.S. Const. amend. IV. But the judicially created "exclusionary

rule" stems from the Fourth Amendment, and bars the products of illegal searches and seizures as a deterrent to police misconduct. *United States v. Leon*, 468 U.S. 897, 906 (1984). As a prophylactic rule, deterrence is the exclusionary rule's "prime purpose." *United States v. Calandra*, 414 U.S. 338, 347 (1974). The rule does not apply to all cases: it applies in "those instances where its remedial objectives are thought most efficaciously served." *Arizona v. Evans*, 514 U.S. 1, 11 (1995) (citing *Leon*, 468 U.S. at 908). The rule is not limited to criminal proceedings, *see INS v. Lopez-Mendoza*, 468 U.S. 1032, 1048–50 (1984) (analyzing whether Fourth Amendment rule should apply in civil deportation case), nor does it apply automatically in criminal cases, *see Leon*, 468 U.S. at 909, though classifying a proceeding as "criminal" or "quasi-criminal" tends to carry great weight. *See id.*; *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 701 (1965) (finding civil forfeiture proceeding's "quasi-criminal" nature determinative in whether exclusionary rule applied). The overarching principle is that the exclusionary rule will apply when the societal benefits of deterring Fourth Amendment violations exceed the social costs of excluding valuable, probative evidence. *United States v. Janis*, 468 U.S. 433, 446 (1984).

In *Lopez-Mendoza*, the Supreme Court analyzed the applicability of the exclusionary rule in a civil proceeding, weighing many factors on either side of the *Janis* cost/benefit balancing. 468 U.S. at 1041–50. Factors tending to increase the likelihood of deterrence included whether the investigation is "intra-sovereign," that is, whether the same agency investigating the defendant also brings suit. *Id.* at 1043. Factors that tended to decrease the likelihood of deterrence included that the agency had strong internal programs to control Fourth Amendment violations. *Id*. On the costs side, the Court gave significant weight to the fact that an INS proceeding is intended to stop continuing violations of the law, rather than penalize past

violations: "This Court has never before accepted costs of this character in applying the exclusionary rule." *Id.* at 1047. The Court also considered the high-volume, streamlined nature of deportation proceedings. *Id.* at 1048. It noted that Fourth Amendment violations were likely the most sophisticated factual and legal issues an immigration court would be likely to hear, and would add significant burden to the court's administration. *Id.*

In the present case, all of the above-noted factors show that the deterrent effect of excluding the evidence obtained as a result of Riverwatcher's trespass outweighs the benefit to society of admitting the illegally obtained evidence. First, this is an "intra-sovereign" proceeding in the sense that the EPA is both investigating and suing alleged violators of the Clean Water Act. Second, unlike the INS, there is no evidence that the EPA has strong internal policies and guidelines to help prevent Fourth Amendment violations. Indeed, the opposite is true, in the sense that the Clean Water Act is designed to decentralize Clean Water Act enforcement by recruiting "citizen attorneys general" to investigate and pursue environmental violations. This is the opposite of the INS's a "'comprehensive scheme' . . . for deterring Fourth Amendment violations." *Id.* at 1054. Third, though the EPA only has jurisdiction over continuing violations of the Clean Water Act, *see Gwaltney*, 484 U.S. at 56–57, the *penalties* the EPA seeks in civil enforcement suits are designed to punish past violations, not remedy continuing ones. *See* 33 U.S.C. § 1319(d). And finally, Clean Water Act cases could not present a more stark contrast to simple, streamlined, high-volume deportation cases. Unlike a deportation case, where often the only proof required is to introduce a defendant's name and nationality, *see Lopez-Mendoza*, 468 U.S. at 1057–58, Clean Water Act cases often involve complicated standing issues, reams of disputed scientific expert testimony, and subtle and complex statutory interpretation issues.

Fourth Amendment issues are unlikely to be the most complex or time-consuming matters in a Clean Water Act case.

All told, Clean Water Act cases are precisely the kinds of cases where the exclusionary rule's deterrent benefit could do the most good in protecting privacy and property rights. As this case shows, Clean Water Act enforcement is decentralized and often haphazard, and Fourth Amendment violations are likely common. And the social cost of excluding evidence is low, since Clean Water Act evidence is easily obtained, at least in states that have more developed public trust doctrines than New Union has. And, most importantly, Fourth Amendment issues are not likely to be the most cumbersome issues in a Clean Water Act case. This court should therefore apply the exclusionary rule to this proceeding, and hold Riverwatcher's illegally obtained evidence inadmissible.

## III. THE APPELLANTS' CLEAN WATER ACT CLAIMS MUST FAIL BECAUSE THEY ARE BASED ON INADMISSIBLE EVIDENCE, AND, EVEN IF THE EVIDENCE WERE ADMISSIBLE, MOON MOO'S ALLEGED DISCHARGES CONSTITUTE EXEMPT AGRICULTURAL STORMWATER DISCHARGES UNDER THE ACT.

The Plaintiffs claim that Moon Moo Farm violated the Clean Water Act by discharging manure into the Queechunk Canal without a permit. R. at 1. The Clean Water Act requires all parties who discharge pollutants from a "point source" into waters of the United States to first obtain a NPDES permit. *See* 33 U.S.C. §§ 1311, 1362(12), 1362(14), 1342 (2012). Discharges from a nonpoint source, however, are outside the scope of the Act. *League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181, 1184 (9th Cir. 2002). The Act defines "point source" as "any discernible, confined and discrete conveyance, including . . . concentrated animal feeding operation." 33 U.S.C. § 1362(14). The definition specifically notes, "This term does not include agricultural stormwater discharges and return flows from irrigated agriculture." *Id.*

The EPA's Clean Water Act regulations define a "concentrated animal feeding operation" as a lot or facility that confines a specified number of animals in an area without any vegetation or forage cover. 40 C.F.R. § 122.23(b)(1)–(2) (2014). Animal feeding operations over a certain size are considered CAFOs simply by virtue of their head-counts; animal feeding operations below a certain size must be specially designated as CAFOs by the EPA; and operations in between these thresholds are only considered CAFOs if they discharge pollutants through a "man-made ditch, flushing system, or other similar man-made device." § 122.23(b)(2), (4), (6). The same rule also clarifies the statutory exception for "agricultural stormwater discharges" in the CAFO context: discharges from a CAFO's land application area (the area on which the operation spreads its manure, *see* § 122.23(b)(3)), are only agricultural stormwater discharges if they were made in accordance with a "site-specific nutrient management plan." § 122.23(e).

Plaintiffs claim that Moon Moo Farm is a medium CAFO under the EPA's regulations, but Plaintiffs cannot show that Moon Moo fits the definition of a medium CAFO because they offer no admissible proof that Moon Moo discharged from a "man-made ditch, flushing system, or other similar man-made device." Even if the trespass evidence is admissible, the discharges are still not subject to the NPDES permitting requirement because they are plainly "agricultural stormwater discharges" under the EPAs rule.

### A. *Appellants' Clean Water Act claims must fail because the evidence on which they are based is inadmissible.*

The Plaintiffs allege that Moon Moo Farm discharged manure into the Queechunk Canal without a permit, in violation of the Clean Water Act. R. at 1. Though there are ample substantive grounds on which to reject these claims, this court should reject this claims on a simple evidentiary basis because, as shown above, plaintiffs cannot introduce any evidence to

show that Moon Moo discharged pollutants at all, let alone that they did so through a "man-made ditch, flushing system, or other similar man-made device." *See* 40 C.F.R. § 122.23(b)(2).

On summary judgment, Clean Water Act plaintiffs bear the burden of making out a prima facie case on each element of the Clean Water Act case. *United States v. Huseby*, 862 F.Supp.2d 951, 959 (D. Minn. 2012). A Clean Water Act plaintiff may not simply rest on its complaint: they must introduce evidence that raises more than "some metaphysical doubt as to the material facts." *Conn. Coastal Fishermen's Ass'n v. Remington Arms*, 989 F.2d 1305, 1312 (2d Cir. 1993) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)). The party defending summary judgment must support its claim that disputes of material fact exist with specific citations to the record, and it must show that these parts of the record would be admissible as evidence at trial. Fed. R. Civ. P. 56(c), advisory committee's note.

As shown above, the evidence Riverwatcher obtained through trespass is not admissible in this case. *See supra* Part II. This exclusion applies to all types of evidence stemming from the trespass: to the water samples, to the photographs, and James's testimony. Without the trespass evidence, Plaintiffs clearly cannot meet its burden of proof on at least two elements of their claims. First, without the trespass evidence, Plaintiffs cannot show that Moon Moo discharged pollutants into the Queechunk Canal, because, without James's photographs and testimony, Plaintiffs have no evidence whatsoever of the particulars of Moon Moo's land application—they are left with vague statements from unidentified Farmville residents that the river smelled and was discolored, and these fall far short of a prima facie case. *See, e.g., Waterkeeper Alliance, Inc. v. Hudson*, No. WMN–10–487, 2012 WL 6651930, at *16 (D. Md. Dec. 20, 2012) (holding that plaintiff's proof, which only showed alleged point source was a *possible* source of pollution, was

insufficient to withstand summary judgment, and noting that all cases holding CAFOs liable for Clean Water Act violations involved "observed discharges").

Second, even if this meager evidence of a discharge were enough to survive summary judgment on that element, the EPA's enforcement claim would still fail because, without the trespass evidence, the EPA cannot prove the "point source" element of the its claim. The Clean Water Act only imposes liability for unpermitted "point source" discharges. *See* 33 U.S.C. §§ 1311, 1362(12), 1362(14). The Act defines "point source" as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, . . . rolling stock, concentrated animal feeding operation." 33 U.S.C. § 1362(14). The EPA's regulations refine the meaning of "CAFO" under the Act: for an operation with 200 to 699 dairy cows to qualify as a CAFO under the EPA's rule, it must discharge pollutants through a "man-made ditch, flushing system, or other similar man-made device" to qualify as a CAFO. 40 C.F.R. § 122.23(b)(6)(ii)(A). The only evidence that Moon Moo Farm discharges through a "man-made ditch, flushing system, or other similar man-made device" comes from the observations James made while trespassing in the Queechunk Canal. R. at 6. Because the party seeking to withstand summary judgment must show that its evidence would be admissible at trial (and because Plaintiffs' evidence is not admissible), Moon Moo asks this court to uphold the district court's finding and enter judgment in Moon Moo's favor on Plaintiffs' Clean Water Act claims.

### B. *Even if the trespass evidence were admissible, the discharge from Moon Moo's fields was agricultural stormwater runoff, which is not a point source discharge under the Act.*

Even if the evidence obtained through trespass was admissible, Plaintiff's claims still must still because Moon Moo's alleged discharge was agricultural stormwater runoff, and therefore exempt from the NPDES permitting under the Act. 33 U.S.C. §§ 1311, 1362(14), 1342.

This is so even though the discharge flowed through a ditch—an archetypal "point source" under the Act—in its path to the Queechunk Canal.

The Clean Water Act specifically exempts agricultural stormwater discharges from the NPDES permit requirement. 33 U.S.C § 1362(14) ("The term 'point source' . . . does not include agricultural stormwater discharges and return flows from irrigated agriculture."). In the CAFO context, this provision of the Act is "self-evidently ambiguous" because CAFOs are both definitional point sources and, as agricultural enterprises, potentially eligible for the agricultural stormwater runoff exception. *Waterkeeper Alliance Inc., v. EPA*, 399 F.3d 486, 508 (2d Cir. 2005). The EPA has chosen to resolve this ambiguity, as is its prerogative, through regulation. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842–43 (1984) (1984). The EPA regulates all "precipitation-related" discharges of manure from land application areas as nonpoint source agricultural stormwater discharges, provided the CAFO applies the manure in accordance with adequate nutrient management practices. 40 C.F.R. § 122.23(e). Circuit courts have upheld the rule, and Moon Moo does not challenge it here. *See Waterkeeper*, 399 F.3d at 507.

Under this rule, Moon Moo's alleged discharge of manure into the Queechunk Canal is an exempt "agricultural stormwater discharge" if (1) the discharge was "precipitation-related" and (2) Moon Moo applies its manure in compliance with an adequate nutrient management plan.

1. The discharge Riverkeeper observed flowing from Moon Moo's fields after a two-day rainstorm was plainly "precipitation-related."

Under the EPA's regulations, discharges must be "precipitation-related" in order to qualify as agricultural stormwater runoff. 40 C.F.R. § 122.23(e). The reasoning for this rule is "a matter of common sense," for, as the EPA explained when it announced the final rule, "only

storm water can be agricultural storm water." National Pollutant Elimination System Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations, 68 Fed. Reg. 7176–01, 7196 (Feb. 12, 2003) (codified at 40 C.F.R. §§ 9, 122, 123, 412) [hereinafter 2003 Final Rule]. "Precipitation-related" under the EPA's land application rule means that precipitation is the primary cause of the discharge. *Waterkeeper*, 399 F.3d at 507 (citing *Concerned Area Residents for the Envt. v. Southview Farm*, 34 F.3d 114, 121 (2d Cir. 1994)).

This causal inquiry is inherently factual, *see Southview Farm*, 34 F.3d at 121 (reviewing the evidence of a causal link between precipitation and a manure discharge), and the party claiming an exception under the Clean Water Act bears the burden of proof. *Huseby*, 862 F.Supp.2d at 959. In *Southview Farm*, the seminal case interpreting the agricultural stormwater discharge exception, the court overturned a lower court's directed verdict overturning a jury's finding that a discharge fell within the agricultural stormwater exception. *Southview Farm*, 34 F.3d at 121. The court emphasized the testimony on the record below that the "[f]ields ha[d] been saturated with liquid manure and farm continue[d] to spread in same area," that manure had been pooling in unusually large pools in the fields before the rain began, and that the rain was "drizzle." *Id.* The court held that this testimony was sufficient to support a finding that the rain did not cause the discharge, but merely coincided with it. *Id.*

The alleged discharge from Moon Moo's fields is almost certainly "precipitation-related." Riverwatcher observed the discharge on the second day of a two-day, unusually heavy rainstorm. R. at 6. In compliance with its nutrient management plan, Moon Moo applied manure to its fields on the second day of this storm, after two inches of rain had fallen. *Id.* As Riverwatcher's own expert testified, applying manure to fields in the rain almost always causes

excess runoff from the crop fields. *Id*. The quantities in which Moon Moo applies manure to its fields are designed to match the natural nutrient uptake of its crop, and, presumably, to avoid discharges under normal conditions. *Cf.* R. at 5. That this particular application *did* cause runoff is almost certainly because of the two-day rainstorm that preceded the application. R. at 6.

These facts strongly suggest that Moon Moo Farm's nutrients would not have run off its fields but for the heavy precipitation leading up to the application. Unlike the plaintiffs in *Southview Farm*, who introduced evidence about Southview Farm's excessive spreading practices and evidence that the fields were saturated before the rain began, neither Plaintiff has introduced any evidence to suggest that rain was not the cause of this discharge. On summary judgment, the nonmovant must identify particular parts of the record that indicate a material factual dispute, Fed. R. Civ. P. 56(c), and Plaintiffs cannot do so here.

2. Moon Moo's nutrient management plan ensures adequate nutrient uptake, and is consistent with longstanding agricultural practices.

To qualify as an agricultural stormwater discharge, discharged manure must have been spread "in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure." 40 C.F.R. § 122.23(e). The rationale for this requirement is that excessive manure application is not "agricultural" because it is not done in response to "true agricultural needs." 2003 Final Rule, 68 Fed. Reg. 7176–01, 7196 (Feb. 12, 2003) (codified at 40 C.F.R. §§ 9, 122, 123, 412). The requirement is meant to separate true agricultural land application from waste disposal disguised as agriculture. *See id.*

Though this requirement is based on sound principles, it must not be interpreted too broadly. The Clean Water Act gives the EPA authority to regulate point source discharges of pollutants; it does not give EPA the power to regulate point sources themselves, let alone nonpoint sources. *Nat'l Pork Producers Council v. EPA*, 635 F.3d 738, 750–51 (5th Cir. 2011)

(citing *Waterkeeper*, 399 F.3d at 504; *Nat. Res. Def. Council v. EPA*, 859 F.2d 156, 170 (D.C. Cir. 1988)). Though the EPA has the power to define what discharges fall within the agricultural stormwater exception, it is without power to regulate these nonpoint source discharges, once defined. *See id.* Just as the EPA could not require non-discharging CAFOs to file paperwork with the EPA showing they had "no potential to discharge," *Waterkeeper*, 399 F.3d at 505, the EPA could not, for instance, require Moon Moo to submit nutrient management plans[2] or prescribe nutrient management practices in excessive detail, for this would amount to regulating CAFOs rather than regulating point source discharges from CAFOs. The EPA's choice of language in section 122.23 shows it is aware of its jurisdictional limits: rather than requiring CAFOs to prepare and submit "nutrient management *plans*" (which the EPA requires when a CAFO applies for a NPDES permit, *see* 40 C.F.R. § 122.42(e)(1)), the EPA merely requires nonpoint source CAFOs to implement equivalent "nutrient management *practices*." § 122.23(e).

The State of New Union regulates Moon Moo as a "no-discharge" operation, and requires Moon Moo to file a nutrient management plan with the Farmville regional office. R. at 5. Moon Moo calculated the quantity of nutrients Bermuda grass can absorb, and crafted nutrient management practices that conformed to those levels. *See* R. at 5. Moon Moo has never violated its nutrient management plan. R. at 6. That Moon Moo's nutrient management plan is not subject to public or administrative review is not legally significant, since public and administrative review is only required for nutrient management plans adopted as part of a formal NPDES permit. *See Waterkeeper*, 399 F.3d at 503–04. All that the EPA requires is that Moon Moo's "practices" ensure adequate nutrient uptake, and Moon Moo's practices do.

[2] Presumably, these are state law regulations, since the twenty-five-year storm event has not had legal significance under the EPA's regulations since 2003. *See* 2003 Final Rule, 68 Fed. Reg. 7176–01 (Feb. 12, 2003)).

## IV. MOON MOO IS NOT SUBJECT TO RCRA BECAUSE ITS WHEY AND MANURE FERTILIZER IS NOT "SOLID WASTE."

### A. *In order to be liable under RCRA's open dumping claim provision, a party must dispose of a "solid waste" in violation of RCRA, and Moon Moo did not.*

#### 1. Moon Moo Farm is not subject to an open dumping citizen suit under section 7002(a)(1)(A) of RCRA because reused cow manure and yogurt whey are not "solid waste" under the regulatory definition of that term.

Riverwatcher claims that Moon Moo's land application of cow manure and yogurt whey fertilizer violates RCRA's prohibitions against open dumping. R at 1. This claim is without merit: agricultural wastes are explicitly exempted from RCRA.

In order to maintain a citizen suit under section 7002(a)(1)(A) of RCRA, Riverwatcher must demonstrate that Moon Moo is illegally disposing of a non-exempt solid waste. 42 U.S.C. § 6973(a)(1)(A). RCRA's definition of "solid waste" includes "materials . . . resulting from agricultural operations." *Id.* § 6903(27). However, the EPA's regulations interpret "materials" to exempt "animal manures" that are "returned to the soils as fertilizers." 40 C.F.R. § 261.4(b)(2). RCRA's legislative history supports this reading, for it reveals that agricultural waste was not the statute's target:

> much . . . agricultural waste is reclaimed or put to new use and is therefore not a part of the discarded materials disposal problem . . . agricultural wastes which are returned to the soil as fertilizers or soil conditioners are not considered discarded materials in the sense of this legislation.

H.R. Rep. No. 94-1491, at 2–3 (1976).

Pertinent case law supports the EPA's interpretation. In *Community Association for the Restoration of the Environment, Inc. v. George & Margaret LLC*, the court recognized that applying manure as fertilizer falls within the agricultural exemption unless a defendant applies "waste in such large quantities that its usefulness as organic fertilizer is eliminated." 954 F. Supp. 2d 1151, 1158 (E.D. Wash. 2013). In that case, there was a material question as to whether

the agricultural exemption applied to defendants' overzealous spreading of manure "at above-agronomic levels." *Id.* at 1154. So long as farmers apply agricultural waste as fertilizer at agronomic levels—rather than as an avenue for disposal—the agricultural exemption applies. *See id*. at1158; *accord Water Keeper Alliance, Inc. v. Smithfield Foods, Inc.*, No. 4:01-CV-27, 2001 WL 1715730, at *4 (E.D.N.C. Sept. 20, 2001) ("[W]hether defendants return animal waste to the soil as organic fertilizer . . . focus[es] on defendants' use of the animal waste products."); *Oklahoma v. Tyson Foods, Inc.*, No. 05-CV-0329, 2010 WL 653032, at *10 (N.D. Okla. Feb. 17, 2010) (finding chicken waste to not be a solid waste within the meaning of RCRA when farmers were "using the litter as a fertilizer and soil amendment to support their agricultural enterprises").

Moon Moo Farm's fertilize falls squarely within the agricultural waste exemption. 40 C.F.R. § 261.4(b). Unlike in *Community Association* or *Smithfield Foods*, Moon Moo is not spreading manure as a covert method of disposal. *See Smithfield Foods*, 2001 WL 1715730, at *4–5. Rather, Moon Moo uses its manure to nourish its Bermuda grass crop, which it feeds its cows. R. at 5. This method of fertilizing is a long-standing agricultural practice in New Union. R. at 6. Additionally, Moon Moo's manure application complies with its nutrient management plan—a plan designed to limit fertilizer to levels that Bermuda grass can absorb. R. at 7. Moon Moo thus uses its manure as a soil fertilizer in a manner that is not "above-agronomic levels." *See Cmty. Ass'n*, 954 F. Supp. 2d at 1154. Accordingly, section 261.4(b) exempts Moon Moo's activity, and Riverwatcher cannot maintain its open dumping claim.

2. Moon Moo reuses manure and yogurt whey as fertilizer in a continual production process; the whey is therefore not a "discarded material" within the meaning of RCRA.

Riverwatcher's open dumping claim is fated to fail because cow manure and yogurt whey are not "discarded materials" within the meaning of RCRA. *See Am. Mining Cong. v. EPA*, 824 F.2d 1177, 1184 (D.C. Cir. 1987). It is well-settled that "under RCRA, material must be thrown away or abandoned before EPA may consider it to be a waste." *Ass'n of Battery Recyclers, Inc. v. EPA*, 208 F.3d 1047, 1053 (D.C. Cir. 2000). Materials that are "destined for beneficial reuse . . . in a continuous process by the generating industry" are not "discarded materials" subject to RCRA. *Am. Mining Cong.*, 824 F.2d at 1186; *see also Zands v. Nelson*, 779 F. Supp. 1254, 1262 (S.D. Iowa 1997) ("[A]s broad as this definition [discarded materials] may be, clearly it would not include materials that are still useful products."). The industry that generates the material need not be the same industry that beneficially reuses it. *Safe Food and Fertilizer v. EPA*, 350 F.3d 1263, 1268 (D.C. Cir. 2003). Reviewing courts have recognized that "firm-to-firm transfers are hardly good indicia of a discard." *Id.*

In *American Mining Congress*, industry petitioners challenged the EPA's attempt to regulate industrial byproducts reused in the production process as solid waste. 824 F.2d at 1180. The EPA's proposed regulations would have subjected mineral ore that is processed multiple times to the mandates of RCRA. *Id.* at 1181. In rejecting the EPA's arguments, the D.C. Circuit noted that the byproducts had "not yet become part of the waste disposal problem" because they were "spent materials that are recycled and reused in an ongoing manufacturing or industrial process." *Id.* at 1186. Likewise, in *Safe Food and Fertilizer*, petitioners challenged the EPA's determination that industrial byproducts reused as fertilizers were not discarded materials under RCRA. 350 F.3d at 1265. In that case, the generating industries transferred their byproduct materials to other firms specializing in fertilizer manufacture. *Id.* at 1266. However, the court held that even though the generating industry did not reuse the materials in its own "ongoing

industrial process," transferring the materials to another firm with a use for them was not a "discard" within the meaning of the statute. *Id.* at 1268.

Moon Moo is beyond regulation under RCRA because its use of manure and whey as a soil conditioner is part of an ongoing production process. Because Moon Moo reuses these materials, they are not "discarded" under RCRA. Moon Moo collects the manure its herd generates and stores it in a lagoon in order to later reuse the manure as fertilizer. R. at 4–5. Moon Moo then transports the manure to its 150 acres of fields and spreads it on the soil. R. at 5. Moon Moo uses its fields to grow Bermuda grass, which Moon Moo uses as silage for the dairy cattle. R. at 5. Thus, Moon Moo's reuse of the manure is part of an ongoing production process, as it contributes the continuing productivity of Moon Moo's dairy production.

In addition to fertilizing its fields with manure, Moon Moo also accepts yogurt whey from the neighboring Chokos Greek Yogurt factory. R. at 5. The use of whey as a soil conditioner is a longstanding agricultural practice in New Union. R. at 6. Though Chokos—the generating industry—does not reuse the whey, it is still not "discarded material" under RCRA. As the D.C. Circuit noted in *Safe Food and Fertilizer*, firm-to-firm transfers of materials are not good indicia of whether or not an entity has discarded a material. 350 F.3d at 1268. Though Chokos does not reuse its own whey, Moon Moo reuses the whey as part of its ongoing dairy production. R. at 5. On a macro scale, Moon Moo's reuse of the whey eventually contributes to Chokos' yogurt production, as Chokos buys the milk that Moon Moo produces. R. at 5. However, the fact that Chokos is removing the yogurt whey from its own production cycle and transferring it to another industry's production cycle does not make the whey a "discarded material." Accordingly, Moon Moo's manure and yogurt whey fertilizer mixture is not a "discarded material" under RCRA and Riverwatcher's open dumping claim must fail.

B. *Moon Moo is not subject to Riverwatcher's imminent and substantial endangerment claim because Riverwatcher has failed to meet even the low standard of proof required.*

Riverwatcher and the EPA assert that Moon Moo's management of its manure and whey fertilizer presents an "imminent and substantial endangerment" to human health, thereby exposing Moon Moo to liability under RCRA's citizen suit provision. 42 U.S.C. § 6973(a)(1)(B). In order to maintain a citizen suit under section 7002(a)(1)(B), a party must prove that the defendant is handling solid waste in a manner that "may present an imminent and substantial endangerment to health or the environment." *Id.* The "imminent" factor requires a current "risk of threatened harm." *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 210 (2d Cir. 2009); *see also Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 486 (1996) ("[T]here must be a threat which is present now."). Likewise, the "substantial" factor "implies serious harm." *Me. People's Alliance v. Mallinckrodt, Inc.*, 471 F.3d 277, 288 (1st Cir. 2006). So long as the "threat is near-term and involves potentially serious harm" section 7002(a)(1)(B) is satisfied. *Id.* at 296. However, a party cannot satisfy section 7002(a)(1)(B) if the threatened harm is "de minimis in degree." *Id.* at 289 (quoting *United States v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100, 1109 (D. Minn. 1982)).

The federal courts have consistently found that only extraordinarily serious threats to health satisfy the "imminent and substantial" standard. In *Parker v. Scrap Metal Processors, Inc.* the Eleventh Circuit found that petitioners met the imminent and substantial threshold where improperly disposed PCBs, lead, and leaking barrels of chemical waste posed immediate human health threats to motor skills, the central nervous system, and regular respiratory function. 386 F.3d 993, 1015 (11th Cir. 2004). Similarly, the Third Circuit found an imminent and substantial endangerment where a stream of toxic chromium waste leaching out of a landfill posed health threats to nearby residents. *Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 399 F.3d 248, 249 (3d

Cir. 2005). Likewise, the contamination of a city's entire water supply due to leachate from an improperly maintained chemical landfill has met the threshold of section 7002(a)(1)(B). *United States v. Price*, 688 F.3d 204, 209 (3d Cir. 1982). Extensive petroleum pollution in soil and groundwater below a major residential area has also satisfied the threshold. *Aurora Nat'l Bank v. Tri Star Mktg., Inc.*, 990 F. Supp. 1020, 1024 (N.D. Ill. 1998). However, in *Cordiano v. Metacon Gun Club*, the Second Circuit determined that petitioner could not establish that a major concentration of lead pollution in a public waterway posed an imminent and substantial endangerment to human health. 575 F.3d at 209. Even though the lead concentration levels were far above the state's lead standards, the court found that petitioner was unable to point to any serious harm to human health that would result from the lead contamination. *Id.* at 211–12.

Ultimately, Riverwatcher's vague assertion of speculative risk cannot satisfy the imminent and substantial threshold necessary to maintain a citizen suit under section 7002(a)(1)(B). Riverwatcher alleges that Moon Moo's practice of spreading its manure and whey fertilizer mixture rises to the level of an imminent and substantial risk to human health due to the Farmville Water Authority's spring 2013 nitrate advisory. R. at 11. Riverwatcher's claim is immediately without merit since Moon Moo's fertilizer is not a "discarded material" under RCRA. *See supra* Part IV.A. Evening assuming that the fertilizer mixture is a "discarded material," Riverwatcher's claim under section 7002(a)(1)(B) is still fatally deficient. The issuance of one nitrate advisory does not amount to the level of human endangerment that the federal courts have consistently found to satisfy section 7002(a)(1)(B). For example, the temporary inconvenience of a nitrate advisory is in no way comparable to the threats that the river of chromium in *Honeywell International* or the severe neurological health risks in *Parker* posed to human health.

Furthermore, Riverwatcher points to no specifics that would cause the elevated nitrate levels in the Deep Quod watershed to amount to an imminent and substantial endangerment. In fact, Riverwatcher is unable to link the spring 2013 nitrate advisory to Moon Moo's agricultural practices. Riverwatcher's own expert witness was unable to establish that Moon Moo was the "but for" cause of the 2013 nitrate advisory. R. at 7. The Deep Quod watershed is home to numerous farms and agricultural areas. R. at 7. As a result, the Farmville Water Authority frequently issues nitrate advisories. R. at 7. Given the number of farms in the area and the frequency with which nitrate advisories occur, Riverwatcher cannot say that Moon Moo's fertilizing practices were the exact cause of the most recent nitrate advisory.

Additionally, Riverwatcher has failed to establish the substantiality of any supposed health risks. The spring 2013 nitrate advisory only applied to infants younger than two years of age. R. at 6. According to the Farmville Water Authority, drinking water from the Deep Quod River was still safe for adult consumption. R. at 6. Even then, the Water Authority only advised parents to give infants bottled water, which is presumably readily available in Farmville. R. at 6. This is a minor inconvenience at best and hardly rises to the level of a substantial threat to human health. For example, Farmville's temporary nitrate advisory is nothing like the permanent chemical impairment of groundwater supplies present in *Price* and *Aurora National Bank*.

Furthermore, Riverwatcher cannot seriously contend that Moon Moo's fertilizing presents an imminent endangerment to the health of Farmville's residents. As the record states, nitrate advisories are commonplace in the Deep Quod watershed. R. at 7. Presumably, these nitrate advisories are not perpetual in their duration, but exist only so long as the water body has elevated nitrate levels. Thus, Riverwatcher attempts to litigate a purported threat to human health that no longer even exists and cannot possibly be considered imminent. Even assuming that the

Farmville Water Authority will issue a future nitrate advisory, Riverwatcher's own experts have already established that due to the high level of agricultural activity within the Deep Quod watershed, it would be nigh impossible to establish Moon Moo as the sole party responsible for any imminent endangerment to human health. Because Riverwatcher has failed to show that Moon Moo's fertilizing methods pose an imminent and substantial threat to human health, its section 7002(a)(1)(B) citizen suit must fail.

## CONCLUSION

Because the public trust doctrine does not apply to the Queechunk Canal, Riverwatcher trespassed on Moon Moo's private property when it entered the Canal to investigate alleged Clean Water Act violations. This trespass violates the Fourth Amendment's proscription on search and seizure. The exclusionary rule should apply to Clean Water Act cases such as these to bar admission of such illegally obtained evidence. Without this evidence, Appellants' claims must fail, for they have not made a prima facie showing in support of their claims. And, even if the evidence is admissible, their claims must fail on substance. The alleged discharge is exempt from NPDES permitting as agricultural stormwater discharge, and is not subject to RCRA because Moon Moo's fertilizer is not "solid waste" within the meaning of the act, and its effects are de minimis. Appellee Moon Moo Farm therefore respectfully requests that this Court affirm the decision of the United States District Court for the District of New Union on all claims.

Respectfully submitted,

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