Team 61

No. 14-1248

IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

UNITED STATES OF AMERICA, ENVIRONMENTAL PROTECTION AGENCY
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,
THE HONORABLE ROMULUS REMUS PRESIDING

Case No. 155-CV-2014

BRIEF OF APPELLANT UNITED STATES OF AMERICA, ENVIRONMENTAL PROTECTION AGENCY

ORAL ARGUMENT REQUESTED

Team 61
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Appellant alleged below addition of pollutants to the navigable waters of the United States in violation of sections 309(b) and (d) of the Clean Water Act (CWA) 33 U.S.C. §§ 1319(b), (d). Appellants-Interveners Deep Quod Riverwatcher, Inc., (Riverwatcher) and Dean James intervened as plaintiffs and asserted claims under CWA § 505 and alleged in the alternative violation of Resource Conservation and Recovery Act (RCRA) § 7002. The CWA grants district courts federal question jurisdiction without regard to amount in controversy or diversity, 33 U.S.C. § 1365(a), as does RCRA § 6972. 42 U.S.C. § 6972. The lower court's final order dismissed the case and Appellant United States Environmental Protection Agency (EPA) appealed. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. Was James Dean's search in the Queechunk Canal a trespass where the canal was itself navigable and diverted most of the water of Deep Quod River, a publically navigable waterway?

II. Does the exclusionary rule require evidence of pollution in violation of federal law where that evidence was obtained in violation of the Fourth Amendment and where suppression will impose significant harms on society?

III. Is Moon Moo Farm (the Farm) a concentrated animal feeding operation in violation of the CWA where it discharged manure and whey acid into navigable waters though a ditch on its property and not from the farmland under its control?

IV. Assuming the Farm is not a CAFO, did it violate the CWA by discharging manure it spread in compliance with a nutrient management plan (NMP), not required by federal law, designed to safely return the manure to nature safe reabsorption of the manure?

V. Is the Farm's manure and whey acid mixture a solid waste subject to citizen suit under Subtitle D of RCRA, where applicable regulation narrows the general definition of solid waste in that Subtitle?

VI. Is the Farm's manure and whey acid mixture subject to citizen suit under RCRA's imminent and substantial endangerment provision which is not subject to the same specificity requirements as RCRA Subtitle D?

STATEMENT OF THE CASE

This case is about animal waste and dairy byproducts infiltrating the waters of our nation, and whether evidence obtained by concerned citizens can be used to hold polluters responsible under federal law. The pollutants in this case originate on land owned and operated by the Farm; they are discharged into the nearby Deep Quod River when it rains through a drainage ditch. From there, the pollutants travel downstream and contaminate the drinking water supply of Farmville.

EPA, the plaintiff below, commenced this enforcement action under the CWA in an effort to clean up the Deep Quod River and protect the people of Farmville. EPA relied on evidence obtained by Dean James in a private search of a canal owned by the Farm to demonstrate that the Farm had violated the CWA. Mr. James and Riverwatcher intervened, agreeing with EPA's position and arguing in the alternative that the Farm was in violation of RCRA.

At the close of discovery, all parties moved for summary judgment. The district court granted the Farms' motion for summary judgment, ruling that Mr. James' search was a trespass and suppressed the evidence Mr. James' obtained, applying the Fourth Amendment's exclusionary rule. On the merits of the CWA claims, the district court ruled that the Farm was not a CAFO and, even if it was, its discharge was excepted from CWA liability. Likewise, the district court ruled that the mixture of manure and whey acid discharged by the farm was not solid waste and therefore it found that the Farm was not liable under RCRA.

EPA appeals from the district court's order because the district court misinterpreted the public trust doctrine, the exclusionary rule, the CAFO regulations and exceptions of the CWA, and the definition of solid waste under RCRA.

STATEMENT OF THE FACTS

The Farm is a dairy with 350 cows as of 2010, located in the state of New Union. *R* at 4. Prior to 2010, the Farm operated with only 170 cows. *Id.* at 5. The Farm is located on 150 acres of land at a bend in the Deep Quod River. *Id.* Prior owners of the property excavated a canal in order to alleviate flooding at the river bend. *Id.* Now most of the Deep Quod River is diverted into the Queechunk Canal, which later joins the Mississippi River, a navigable-in-fact body of water that has long been used in commercial operations. *Id.* Downstream from the Canal the town of Farmville uses the Deep Quod River as a drinking water source. *Id*

The Farm is regulated in the State of New Union as a "no-discharge animal feeding operation," which means that it is not allowed to directly discharge pollutants from its handing into nearby water. *Id.* It also must supply a Nutrient Management Plan due to its "no-discharge" status. *Id.*

The Farm also produces Bermuda grass to feed its cows. *Id.* The Farm typically fertilizes the Bermuda grass with manure from its own operations, but in 2012 it began adding acid whey from a nearby yogurt plant to its manure fertilizer. *Id.*

In late winter and early spring of 2013 (shortly after The Farm increased its number of cows to 350 and began incorporating the acid whey into the manure it spreads on its fields) the Deep Quod River became contaminated. It began smelling of manure and turned turbid brown. *Id.* at 6. The nearby town of Farmville issued a nitrate advisory for the River, warning its citizens that it was unsafe for infants to drink. *Id.* Nitrate advisories had previously been issued in 2002, 2006, 2007, 2009, and 2010. *Id.* at 7.

Dean James, a citizen of New Union and member of the private corporation Riverwatcher, conducted an operation to find the source of the Deep Quod River's

contamination. *Id.* He observed the manure mixture leaching off the fields and into the Queechunk Canal by navigating a boat from the Deep Quod River into the Queechunk Canal. *Id.* He ignored "No Trespassing" signs located near the Canal. *Id.* He took photographs of the leaching and water samples, which confirmed highly elevated levels of nitrates from the Farm's drainage ditch. *Id.*

Plaintiff Riverwatcher consulted an agronomist about the acid concentration in the fields. Agronomist Dr. Ella Mae stated that the decreased pH (higher acidity) from the manure and acid whey mixture inhibited the Bermuda grass from effectively taking up nutrients in the manure. *Id.* at 6. She also called Moon Moo's application of manure during rain events is "a very poor management practice" and will almost always result in excess runoff, in this case into the Queechunk Canal and subsequently the Deep Quod River. *Id.*

Moon Moo's agronomist Dr. Emmet Green did not disagree with Dr. Mae that the lower pH resulted in the decreased nutrient uptake by the Bermuda grass. *Id.* He did, however, state that whey application is a longstanding practice and that nothing in the Farm's Nutrient Management Plan prevents the application of whey. *Id.*

SUMMARY OF THE ARGUMENT

The district court's ruling encourages those putrefying our national waters to continue polluting, even after concerned citizens have gathered credible evidence of the polluter's crimes. The district court improperly excluded evidence of the Farm's pollution obtained during a search that was not a trespass or Fourth Amendment violation, expanding the exclusionary rule beyond its intended purpose. When considering two exceptions to CWA liability, the district court additionally erred in applying the two agricultural stormwater runoff (ASR) exceptions too

broadly. Yet when it turned to the RCRA claims, the court overemphasized the specific nature of the definition of solid waste at issue. Accordingly, the district court's order should be reversed by this court.

Mr. James did not trespass against the Farm; the photos and water samples he collected from the Queechunk Canal are admissible as evidence under the Public Trust Doctrine. Most of the Deep Quod River is diverted into the Queechunk Canal, which in turn flows off of the Farm's property. The Canal is therefore a publicly navigable waterway, subject to a navigational servitude. Because the Queechunk Canal is subject to a navigational servitude, Mr. James had unrestricted access to the canal and was not trespassing when he took photos and water samples.

Even if Mr. James was trespassing, the exclusionary rule should not bar the evidence he gathered. Mr. James performed his search as a private individual without any direction or incentive offered by the government and, therefore, he did not violate the Fourth Amendment. Without a violation of the Fourth Amendment, the exclusionary rule cannot apply. Alternatively, if there was Fourth Amendment violation, the costs of applying the exclusionary rule outweigh its deterrent effect and, as a result, the evidence should not be suppressed in any event.

Assuming that Mr. James' evidence is admitted, the Farm is a CAFO subject to permitting requirements under the CWA. The Farm meets each requirement for being a CAFO and, as a result, is liable under the CWA for its discharge of pollutants. Neither the CAFO-specific nor the general agricultural stormwater runoff (ASR) exception exempts the Farm from liability. The CAFO-specific ASR is not applicable since the farm discharged pollutants from a ditch, not land under its control. The general ASR is not applicable because the discharge was caused by the collection of pollutants in the ditch and not rainfall. Only if the Farm were not a CAFO could the general ASR apply, and only then as an incentive for non-CAFO polluters to

develop and implement nutrient management plans to limit the environmental damage of their pollution.

Finally, while the district court was correct in emphasizing the specificity of solid waste under RCRA Subtitle D, it erred in reading that same narrowness into the definition of imminent and substantial endangerment in RCRA's Miscellaneous Subtitle. The two definitions serve different purposes, and because the district court's interpretation ignores this fact, its ruling should be reversed; Riverwatcher and Mr. James are entitled to redress under RCRA's Imminent and Substantial Endangerment claim.

For the reasons above, EPA asks this court to reverse the holding of the district court and hold that Mr. James was not trespassing, that the evidence he provided should not be suppressed by the exclusionary rule, that the Farm is a CAFO, liable under the CWA for its discharge and, in the alternative, the manure and whey acid mixture posed an imminent and substantial endangerment under RCRA.

STANDARD OF REVIEW

The lower court's grant of summary judgment is reviewed *de novo*, as are its interpretations of the CWA and RCRA. *See Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 204 (2d Cir. 2009). Likewise, the application of the public trust doctrine and the exclusionary rule, both matters of law, are reviewed *de novo*. *See, e.g.*, *Boone v. United States*, 944 F.2d 1489 (9th Cir. 1991) (public trust); *Grimes v. Commissioner*, 82 F.3d 286, 288 (9th Cir. 1996) (exclusionary rule).

ARGUMENT

I. THE PUBLIC TRUST DOCTRINE PROVIDES A NAVIGABLE SERVITUDE FOR QUEECHUNK CANAL AND THEREFORE MR. JAMES WAS NOT TRESPASSING.

Mr. James' photos and water samples are permissible evidence because he was not trespassing when he entered the Queechunk Canal. He was not trespassing because the canal is subject to a navigable servitude. A navigational servitude grants the public free access to a waterway. Under firmly established case law, the Queechunk Canal in the Deep Quod River is a publicly navigable waterway and therefore subject to a navigable servitude. *Kaiser Aetna v. United States* creates a small carve out under specific circumstances to the firmly established case law governing publicly navigable waterways. The *Kaiser* carve out does not apply in this case due to *Kaiser's* narrow, fact-specific application.

A. Under the Public Trust Doctrine Mr. James' entry into the Queechunk Canal is not a Trespass.

It is firmly established in case law that rivers flowing off of private property are not subject to private ownership. *See, e.g., United States v. Chandler-Dunbar Co.*, 229 U.S. 53, 57 (1913), *United States v. Twin City Power Co.*, 350 U.S. 222 (1956). In *Chandler-Dunbar* a private company installed a power project in St. Mary's River under a permit granted by the government. Congress revoked the permit and appropriated the river for navigational purposes. Because the river was not entirely contained on the company's property, the riparian owner had no financial interest of which he had been deprived. *See Chandler-Dunbar Co.*, 229 U.S. at 69.

Here too the Queechunk Canal not only connects to the Deep Quod River, most of the flow of the Deep Quod River is diverted into the Queechunk Canal. *See* R. at 5. As most of the flow of the river is in the canal is effectively part of the river. The River flows off the Farm's

property and connects to the Mississippi River. Since the Mississippi River is used for commercial navigation. *See* R. at 5. Therefore the Queechunk Canal flows off the Farm's property and is therefore not subject to private control.

B. Use of the River does not Trigger the same Problems that *Kaiser Aetna* and its Successors do.

Kaiser Aenta v. United States carves out an exception on the traditional public trust doctrine in which a body of water can be a publicly navigable waterway without a navigational servitude. *See Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979). Firmly established case law on the public trust doctrine set forth above did not apply to *Kaiser* because the facts were "so different from typical ones involved in riparian condemnation cases." *Id.* at 176. The *Kaiser* exception only applies, first, when the owner has created the waterway for which a navigational servitude would deprive the owner of revenue from that waterway and, second, the waterway is not a "great navigable stream." *See id.* at 180; 179.

In *Kaiser* the owners of a lagoon dredged a marina, which connected the lagoon to an adjacent bay. The owners dredged the marina with the intent to charge an annual fee for private access to the marina for which boat owners would pay. The Army Corps of Engineers then said that the new marina was subject to a navigable servitude as a publicly navigable waterway. The Supreme Court held that even though the marina became a publicly navigable waterway when the owners connected it to the bay the marina was not subject to a navigational servitude, carving out an exception to the law of publicly navigable waterways. *Kaiser* was different from prior cases involving publicly navigable waterways because a navigable servitude would limit the marina owners' ability to charge a fee for entry to the marina. Therefore the navigable servitude would deprive the landowner of income for which it had invested substantially. *See id.* at 176.

In the present case, Mr. James' access to the Queechunk Canal does not deprive the Farm of revenue like the government's use of the marina did in *Kaiser*. The Farm excavated the Queechunk Canal "in order to alleviate flooding at the river bend." *See* R. at 5. They do not derive income from excluding citizens or the government from the canal nor did they intend to derive income from the canal unlike the marina owners *Kaiser*. Therefore, since the Farm has not been deprived of revenue from the canal, Kaiser does not apply.

Additionally, as set forth above, the Queechunk Canal *does* fall into the "great navigable stream" category, so *Kaiser's* carve out is not applicable. *See Kaiser*, 444 U.S. at 179. In *Kaiser* the lagoon that was converted into a marina was formerly a lagoon, which was categorized as a shallow pond. *See id.* at 178. Therefore the lagoon could not be used as a continuous highway for purposes of navigation. *See id.* at 179. In the present case "most of the flow of the Deep Quod River is diverted into the Queechunk Canal." *See* R. at 5. Since the Deep Quod is navigable by boat and connects to the Mississippi, it can be used as a continuous highway unlike the lagoon in *Kaiser*. Therefore because the canal is a closer to a great navigable stream than a pond, the *Kaiser* carve out does not apply to the present case.

C. The Pictures and Water Samples Should be Admitted under the Public Trust Doctrine

Mr. James's photos and water samples are permissible evidence under the Public Trust Doctrine. The Public Trust Doctrine applies because the Farm's canal in the Deep Quod River is a publicly navigable waterway. As a publicly navigable waterway, the canal is subject to a navigable servitude. The *Kaiser Aetna* carve out does not apply because the Farm does not need to exclude people in order to derive utility from their canal. Therefore, when Mr. James collected

the samples he was not trespassing and the samples should be admitted into evidence; the district court's ruling to the contrary should be reversed.

II. THE EXCLUSIONARY RULE SHOULD NOT APPLY IN THIS CASE BECAUSE NO FOURTH AMENDMENT VIOLATION OCCURRED AND THE SOCIAL COSTS OF EXCLUDING EVIDENCE OF CWA VIOLATIONS FAR OUTWEIGH ANY DETERRENT EFFECT.

In addition to its erroneous finding that Mr. James trespassed against the Farm, the district court suppressed the evidence Mr. James obtained, invoking the Fourth Amendment's exclusionary rule. The district court erred by invoking the exclusionary rule for two reasons. First, in its entire 100 year history, the exclusionary rule has never once been applied to a case where no Fourth Amendment violation occurred. Neither Mr. James nor EPA violated the Fourth Amendment in this case; therefore, the exclusionary rule is simply not relevant. Second, and assuming *arguendo* the Fourth Amendment was violated, it would still be incorrect to suppress Mr. James' evidence because the exclusionary rule applies only when its deterrent effect outweighs its social costs. Here, applying the rule achieves minimal deterrence and imposes substantial costs upon communities threatened by illegal pollution. The district court improperly suppressed evidence of the Farm's CWA violations, and that portion of its ruling should be reversed.

A. The Exclusionary Rule Should not Apply in this Case Because the Fourth Amendment was not Violated.

The exclusionary rule applies only to evidence obtained in violation of the Fourth Amendment. This is a result of the rule's only purpose: deterring Fourth Amendment violations. *Davis v. United States*, 131 S. Ct. 2419, 2426 (U.S. 2011) ("The rule's sole purpose, [the

Supreme Court] ha[s] repeatedly held, is to deter future Fourth Amendment violations."); *see also Herring v. United States*, 555 U.S. 135, 141 (2009); *United States v. Calandra*, 414 U.S. 338, 348 (1974). Thus, the propriety of the district court's ruling turns first and foremost on whether the Mr. James violated the Fourth Amendment.

The Fourth Amendment guarantees citizens the right to free from unreasonable searches and seizures. U.S. CONST., amend. IV. This guarantee covers searches and seizures performed by the state; it does not cover searches and seizures performed by non-state actors pursuing their own interests. *United States v. Jacobsen*, 466 U.S. 109, 114 (1984) ("[The Fourth Amendment] is wholly inapplicable to a search or seizure, even an unreasonable one, effected by a private individual [without connection to the government.]") (internal quotation marks omitted); *Burdeau v. McDowell*, 256 U.S. 465, 470 (U.S. 1921) ("[T]he Fourth Amendment protects only against searches and seizures which are made under governmental authority . . . or under color of such authority."). Thus, a private individual cannot violate the Fourth Amendment unless the individual acts as an "instrument or agent of the state." *Coolidge v. New Hampshire*, 403 U.S. 443, 487 (1971) (internal quotation marks omitted). A private citizen is an agent or instrument of the state only if the government knew of and supported the private citizen's conduct and the citizen's intended to assist the state. *See, e.g.*, *United States v. Benoit*, 713 F.3d 1, 9 (10th Cir. 2013) (noting both factors must be met for a citizen to be a government agent); *United States v. Jarrett*, 338 F.3d 339, 344–45 (4th Cir. 2003); *United States v. Steiger*, 318 F.3d 1039, 1045 (11th Cir. 2003); *United States v. Grimes*, 244 F.3d 375, 383 (5th Cir. 2001); *United States v. Feffer*, 831 F.2d 734, 739 (7th Cir. 1987); *United States v. Walther*, 652 F.2d 788, 791-92 (9th Cir. 1981). The party alleging that a private citizen was a government agent—here, the Farm—bears the burden of proof. *United States v. Aldridge*, 642 F.3d 537 (7th Cir. 2011). Because Mr.

James performed his search without government sanction or knowledge, and because he was acting in his own interest, Mr. James was not a government agent. Therefore, he did not violate the Fourth Amendment, and this Court should reverse the district court's suppression of the evidence. *See United States v. Janis*, 428 U.S. 433, 445 n. 31 (1976). ("[T]he exclusionary rule, as a deterrent sanction, is not applicable where a private party . . . commits the offending act.").

i. Mr. James Acted Without the Government's Knowledge or Sanction.

A private citizen cannot be an agent of the government unless the government knows and supports the citizen's actions. *United States v. Benoit*, 713 F.3d 1 at 9. In order to support a citizen's action, the government must do more than "passively acquiesce[.]" *United States v. Jarrett*, 338 F.3d at 345. Instead, the government must "active[ly] participat[e] or encourage[]" the citizen before the citizen may be deemed a government agent. *United States v. Walther*, 652 F.2d at 792; *see also United States v. Koenig*, 856 F.2d 843, 850 (7th Cir. 1988 ("Mere knowledge of another's independent action does not produce [agency] absent some manifestation of consent and the ability to control.").

Here, there is no evidence that EPA was aware of Mr. James' existence, much less his intention to gather evidence regarding the Farm's CWA violations. As in *Koenig*, where a private Federal Express (FedEx) employee opened a suspicious package without talking to any government official, Mr. James gathered evidence without consulting at all with EPA. *See* 856 F.2d at 845; R. at 6. And just as the FedEx employee in *Koenig* approached government officials only after finding illegal drugs, Mr. James' first contact with EPA was after he discovered that the Farm was illegally discharging pollutants. *See* 856 F.2d at 845; R. at 7. There was no evidence that the government influenced the employee *Koenig* to perform his search and, therefore, he was not an agent of the government; likewise, Mr. James cannot be a government

agent since there is no evidence that EPA or any other governmental actor influence his actions at all. *See* 856 F.2d at 847.

Even if EPA had known about Mr. James' search plans, he would still not be an agent because there is no evidence EPA actively participated in Mr. James' plans. EPA did not provide any incentive or reward to Mr. James for his activities. This case is therefore distinct from *U.S. v. Walther,* where the DEA paid an airline employee nearly $900 for providing tips about illegal drugs. *See* 652 F.2d 788, 790. The DEA in *Walther* encouraged the employee by rewarding him and, as a result, the court held that employee was a government agent; here, EPA has not rewarded or offered Mr. James any kind of reward. *See id.* at 792. Because EPA was not aware of Mr. James' plans, and because it did not encourage him in any way, he was not a government agent.

ii. Mr. James Acted to Further his own Interests, not to aid the Government.

Even when the government knows about and encourages a private citizen's search, the citizen still must act with the intent to further government interests above or to the exclusion of his or her personal interests. *See United States v. Benoit*, 713 F.3d at 9. Under this standard, a citizen intending to discover illegal drugs intends to assist the government, *United States v. Walther,* 652 F.2d at 792; citizens intending to protect themselves or others from danger does not. *United States v. Symthe,* 84 F.3d 1240, 1243 (10th Cir. 1996) (search to protect passengers on bus). A citizen acting out of self-interest is not a government agent, even if the citizen's actions further government objectives. *See United States v. Koenig*, 856 F.2d at 850

Mr. James' search of the Farm was most likely motivated by his private interest in his own health and the health his fellow citizens of New Union. Like the bus station manager in *U.S. v. Smythe,* who searched a package out of fear for the passengers on the bus, Mr. James

investigated the Farm's pollution after hearing that the nitrate level in the Deep Quod River posed a threat to infants. *See* 84 F.3d at 1241; R. at 6. The manager's fear in *Smythe* was a private interest and, therefore, so too was Mr. James' fear a private interest in this case. *See* 84 F.3d at 1243.

Admittedly, Mr. James' interest in healthy, safe drinking water coincides with EPA's interest in enforcing the CWA. This overlap alone, however, does not support holding that Mr. James' was pursuing a government interest. Just like the private citizen in *U.S. v. Aldridge*, who wanted to exonerate herself and her son and therefore aided an SEC investigation into a corporation they owned, Mr. James likely desired a clean environment and safe water, and therefore he gathered evidence which ultimately helped build EPA's case against the Farm. *See* 642 F.3d at 539, 542; R. at 6–8. Because she wanted to protect herself and her family, the citizen in *Aldridge* was not a government agent even though she assisted the government; because Mr. James wanted to protect himself and his community, he is not a government agent even though the evidence he uncovered assists the EPA in its case.

Mr. James was not asked or incentivized by any government body to perform the search of the Farm, nor did he do so to further government interests. He acted as a private citizen, outside the scope of the Fourth Amendment and, as a consequence, the evidence he gathered is beyond the reach of the exclusionary rule. *See United States v. Janis v. Janis*, 428 U.S. at 445 n. 31.

B. Even if the Fourth Amendment had been Violated in this case, the Social Costs of Imposing the Exclusionary Rule Would far Outweigh its Deterrent Effect.

Even when the Fourth Amendment is violated, the exclusionary rule does not necessarily apply. *United States v. Leon*, 468 U.S. 897, 907 (1984). The exclusionary rule is a prudential

doctrine, not a constitutional right, *Davis v. United States*, 131 S. Ct. at 2426, and only applies in cases where its deterrent effect outweighs its significant social costs. *United States v. Leon*, 468 U.S. at 907; *United States v. Calandra*, 414 U.S. at 348. Applying the exclusionary rule in this case would not effectively deter future Fourth Amendment violations and the social costs of doing so are particularly high; therefore, this court should reverse the district court and admit Mr. James' evidence.

i. Applying the Exclusionary Rule Here Would Have Minimal Deterrent Effect

Assuming *arguendo* that Mr. James' violated the Fourth Amendment by gathering evidence, applying the exclusionary rule would not deter him from doing so the next time the Farm pollutes Deep Quod River. This is because participating in a CWA enforcement action is just one of many possible uses for evidence of the Farm's pollution. Aside from suing in federal court, Riverwatcher could have given the evidence to a newspaper or published it online and focused media attention on the Farm's actions. Riverwatcher could have organized a boycott, urging mothers of young infants not to buy milk from farms that make water poisonous to their children. Suppressing the evidence obtained in this case does nothing to limit the effectiveness of any of these tactics, and therefore suppression would not significantly deter Mr. James and Riverwatcher from further alleged violations of the Fourth Amendment.

In support of its decision, the district court relied *Trinity Industry, Inc. v. OSHRC*, 16 F.3d 1455, 1462 (6th Cir. 1994) and *Smith Steel Casting Co. v. Brock*, 800 F.2d 1329, 1334 (5th Cir. 1986), both cases where evidence was excluded from Occupational Safety and Health Administration (OSHA) proceedings. Both may be distinguished, however, by virtue of the increased deterrent effect the exclusionary rule had in each case. In *Trinity* and *Smith*, OSHA conducted searches of businesses based on warrants it obtained. *See* 16 F.3d at 1458–59; 800

F.2d at 1331. In both cases, OSHA's authority was limited to using the evidence in some kind of government hearing or adversarial proceeding; here, Riverwatcher is a private corporation, separate from EPA, and could still use the evidence in any number of ways outside a government adjudication or hearing. *See generally* 29 U.S.C. § 651 *et. seq* (OSHA's organic statute); R. at 6; *see also Arizona v. Evans*, 514 U.S. 1, 14 (1995) (refusing to apply exclusionary rule to deter court clerks because they were not "adjuncts to the law enforcement team" that violated the Fourth Amendment and therefore would not deterred from future errors). Suppressing the evidence in this case does not reduce the incentives on groups like Riverwatcher to perform private searches of polluters like the Farm; therefore, the exclusionary rule should not apply.

ii. Applying the Exclusionary Rule Here Would Cause Significant Social Harm

Even if application of the exclusionary rule would deter Riverwatcher, this Court should nevertheless not apply the rule because the social costs of doing so are severe. Nitrate advisories have been issued for Deep Quod River five times in the last decade; it is essential that those illegally adding nitrates and other pollutants to the River be held accountable. R. at 7. Suppressing evidence demonstrating federal or state law has been violated insulates polluters from liability and effectively encourages them to continue to damage the environment.

Because the danger posed by suppressing the evidence in this case is environmental, the social costs of the exclusionary rule are higher than usual. In the typical criminal case, the costs of the exclusionary rule are twofold: a limitation on the court's truthfinding ability and the potential that guilty, dangerous criminals will go free. *See, e.g., Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 364–65 (1998) (noting "the rule's costly toll upon truth-seeking and law enforcement objectives"). Suppressing Riverwatcher's evidence would limit the court's

truthfinding ability just as much in this case as in a criminal case. Second, suppressing relevant evidence frustrates enforcement of federal and state civil environmental statutes just as it frustrates criminal law enforcement. *See, e.g.*, *United States v. Janis*, 428 U.S. at 454 (refusing to apply exclusionary rule in civil tax proceeding and noting doing otherwise would limit enforcement of the tax code). Third, and most importantly, polluters have a greater chance of injuring more people than the typical criminal through widespread and systematic harm to the environment. The Supreme Court recognized this in *INS v. Lopez-Mendoza*, writing that "no one would argue that the exclusionary rule should be invoked to prevent an agency from ordering corrective action at a leaking hazardous waste dump if the evidence had been improperly obtained." 468 U.S. 1032, 1046 (1984). Applying the exclusionary rule in this case would prevent EPA from stopping the ongoing pollution at the Farm suggested by Riverwatcher's evidence and therefore it should not be done.

The social costs of applying the exclusionary rule in this case are remarkably high, and the deterrence gained is low by comparison. Therefore, suppression of Riverwatcher's evidence is not justified. Moreover, the exclusionary rule should not apply as a threshold matter because there was no Fourth Amendment violation in this case. Without a violation to deter, precedent establishes that the exclusionary rule is plainly inappropriate. For both these reasons the district court erred in suppressing Riverwatcher's evidence and, therefore, this court should reverse that ruling.

III. MOON MOO FARMS IS A CAFO AND IS THEREFORE LIABLE UNDER THE CWA

Liability under the CWA is triggered by a discharge of a pollutant from a point source into navigable waters of the United States without a National Pollutant Discharge Elimination

System (NPDES) permit. 33 U.S.C. §1311(a); *Decker v. Northwest Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1331 (2011). Here, the parties agree that manure is a pollutant, and that it was discharged from the Farm into Deep Quod River without a NPDES permit. R. at 5, 7. Thus, the only question is whether the pollutants were discharged from a point source as defined by the CWA. *See* 33 U.S.C. §1362(14) (defining point source as "any discernable, confined and discrete conveyance, including . . . any . . . ditch [or CAFO]").

The district court made two key errors in its CWA analysis. First, it incorrectly held that the Farm was not a CAFO as defined by properly promulgated EPA regulations. R. at 8. Its only basis for this holding was the lack of evidence, a consequence of its own improper application of the exclusionary rule, discussed above. Since the evidence was improperly suppressed, this court should admit the evidence and hold that the Farm is a CAFO. Second, the district court held that even if the Farm was a CAFO, its discharge was ASR, which does not trigger CWA liability. *Id.* at 9. This ruling was premised on inapposite caselaw and a misapplication of the CAFO-specific ASR exception. *See id.* In other words, the Farm benefits from an ASR exception only is if it is not a CAFO, contrary to the ruling of the district court. This court should find that the Farm is a CAFO and that it is therefore liable under the CWA for its discharge.

A. The Farm is a CAFO According to the Relevant and Unchallenged EPA Regulations.

EPA regulations at 40 C.F.R. § 122.23(a)–(b) list a variety of ways a farm such as the one in this case qualifies as a CAFO. Specifically, the regulations state that a farm is a Medium CAFO if it is an Animal Feeding Operation (AFO) with 200 to 699 mature dairy cows and if it discharges pollutants into waters of the United States "through a man-made ditch . . . or other similar man-made device." 40 C.F.R. § 122.23(b)(6), (b)(6)(ii)(A). The parties agree that the

Farm, which houses 350 head of cattle, is an AFO. R. at 8. As mentioned above, the parties further agree that the Farm's manure is pollution, and—assuming that Mr. James' evidence is admissible—that the manure was discharged into Deep Quod River, a water of the United States. *Id.* Thus, provided that this court corrects the district court's error and admits Riverwatcher's evidence of the Farm's discharge, the Farm is a CAFO if its drainage ditch was "man-made." 40 C.F.R. § 122.23(b)(6)(ii)(A).

At the risk of arguing a tautology, the drainage ditch is clearly be a "man-made ditch." *See id.* In this case, the plain meaning of the regulation is clear and, as a result, this court should be guided by that meaning. *Exportal Ltd. v. United States*, 902 F.2d 45, 50–51 (D.C. Cir. 1990) (noting that when agency regulation is "expressed . . . in language that has a plain meaning, [the court need] look no further than the text"); *see also Singh v. U.S. Dep't of Justice*, 461 F.3d 290, 296–97 (2d Cir. 2006) (rejecting agency interpretation of regulation where the rule was "plainly state[d]"); *Union of Concerned Scientists v. Nuclear Regulatory Comm'n*, 711 F.2d 370, 381 (D.C. Cir. 1983) (rejecting interpretation of rule that would "do[] violence to the language of the rule"). Because the Farm's drainage ditch squarely falls within the plain meaning of the applicable regulations, this court should find that the Farm has satisfied 40 C.F.R. § 122.23(b)(6)(ii)(A). As a result, the Farm is a Medium CAFO which is a point source under 33 U.S.C. § 1362(14). Because the Farm discharged pollutants from a point source without a NPDES permit, it is liable under the CWA. *See* R. at 5. The District court's ruling to the contrary should therefore be reversed.

B. The Farm's Discharge is not Covered by the CAFO-specific ASR Exception

The Farm argues that, even if it is a CAFO, its discharge fits within the ASR exception and therefore does not trigger CWA liability. Discharges from CAFOs are ASR as defined in 40 C.F.R. § 122.23(e) only when three elements are met. [1] First, the pollutant discharged must have been applied in compliance with a nutrient management plan (NMP). *Id.* Second, the discharge must have been caused by precipitation. *Id.* (limiting ASR application to "precipitation-related discharges"). Finally, the discharge must come from "land areas under the control of a CAFO." In this case, EPA concedes that the Farm spread the manure in accordance with an NMP. R. at 5. Additionally, the record demonstrates that the Farm's discharge was caused by precipitation. However, the discharge was not ASR because it came from the CAFO itself as opposed to "land areas under its control," 40 C.F.R. § 122.23(e), and because it was caused by the collection of pollutants in the ditch and not rainfall alone. Therefore, the Farm's discharge of pollutants violated the CWA and the district court's ruling should be reversed.

The phrase "land areas under [the CAFO's] control" in 40 C.F.R. § 122.23(e) has not been interpreted by any court or EPA. Consequently, this court should rely upon the plain text of the regulation, as well as the purposes of the statutory scheme to determine what "land use areas under [the CAFO's] control" means. *See, e.g., Pfizer, Inc. v. Heckler*, 735 F.2d 1502, 1507 (D.C. Cir. 1984) ("[C]onstruction of [an agency] regulation must begin with the words in the regulation and their plain meaning."); *Robinson v. Central Loan & Fin. Corp*, 609 F.2d 170, 174–75 (5th Cir. 1980) (interpreting Truth and Lending Act regulation in light of its purposes and the purpose of the underlying statute). Under the plain meaning of the words in the regulation, the Farm's

[1] The ASR exception invoked by the Farm is a CAFO-specific version of the general ASR exception created by Congress. *See* 33 U.S.C. 1362(14); *Nat'l Pork Producers Council v. EPA*, 635 F.3d 738, 744 (5th Cir. 2011) (noting expansion of general ASR exception to cover CAFOs in 2003).

drainage ditch is not a "land area." 40 C.F.R. § 122.23(e). This reading of the regulation is fully in line with the CWA's purpose of directly regulating point source pollution.

The Farm's ditch is not a "land area under its control" in light of the plain meaning of those words for at least two reasons. *Id.* First, the ditch is a discrete and identifiable structure that runs through the area that the Farm covers with manure. R. at 6. If, instead of a ditch, the Farm had laid pipe, no one would argue that the pipe was a land area under the Farm's control; the mere fact that the ditch is presumably made of earth does not make it a land area. Second, the Farm's ditch and its land areas serve different purposes. The ditch channels excess water and waste into the canal, whereas the land area that it drains safely returns the manure produced at the Farm to nature. *Id.* Thus, to the extent that "the meaning of a word is its use . . ." the meaning of ditch is distinct from the meaning of land area. L. Wittgenstein, PHILOSOPHICAL INVESTIGATIONS, 20e (G. Anscombe trans. 1953) (cited in *PSI Energy, Inc., v. United States*, 59 Fed. Cl. 590, 601 n. 20 (Fed. Cl. 2004) and *Travelers Cas. & Sur. Co. of Am. v. United States*, 75 Fed. Cl. 696, 708 (Fed. Cl. 2007)). Because a ditch is not a land area under any reasonable definition, the Farm's discharge from its drainage ditch does not qualify as ASR under 40 C.F.R. § 122.23(e).

The purpose of the CWA and the way it achieves its objectives support the plain meaning of 40 C.F.R. § 122.23(e) offered above. Realizing that direct regulation of water quality had failed, Congress drafted the CWA with the intent to stop water pollution its source. *See* S. Rep. No. 92-414 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3742 ("[I]t is essential that discharge of pollutants be controlled at the source"). This intent has been codified in the distinction between point and non-point sources, reinforced by the EPA regulations applicable to this case. Under the reading of 40 C.F.R. § 122.23(e) offered above, only pollutants discharged from a

CAFO's land area can be exempted as ASR; when a CAFO discharges directly from a man-made ditch—a discrete, easily regulated point source—the CWA's NPDES permitting requirements apply as usual. In this case, the Farm (a Medium CAFO) discharged manure from its drainage ditch into waters of the United States. There is no reason to treat this discharge as excepted ASR, as both the plain meaning of 40 C.F.R. § 122.23(e) and the purposes of the CWA establish. Therefore, this court should reverse the ruling of the district court.

Attempting to escape the plain meaning of the EPA's regulations, the Farm may argue that the discharge in this case is ASR under the general exception at 33 U.S.C. § 1362(14), regardless of whether it was ASR as defined for CAFOs at 40 C.F.R. § 122.23(e). The EPA readily concedes that 33 U.S.C. § 1362(14) provides an independent ASR exception that applies to all point sources, CAFO or no. *See Nat'l Pork Producers Council v. EPA*, 635 F.3d 738, 744 (5th Cir. 2011) (noting modification of general ASR exception to cover CAFOs in 2003). Yet application of the general ASR exception in this case would contradict the only precedent relied upon by the district court: *Alt v. United States*, 979 F. Supp. 2d 701, 711 (N.D. W. Va. 2013). True, the poultry farm in *Alt* and the Farm in this case both operated under a NMP. *See id.* at 704–05; R. at 5. And both the *Alt* farm and the farm in this case are CAFOs. *See* 979 F. Supp. 2d. at 705; *supra* Section III. A. Yet the discharge in *Alt* occurred after pollution collected in ditches overflowed with rain, carrying the pollution into waters of the United States "via sheet flow" across farmland[2]; here, the Farm's ditch collected and directly channeled pollution into waters of the United States. *See* 979 F. Supp. 2d. at 705; R. at 6. While application of the general ASR made sense in *Alt* because the rainwater carried the pollution over farmland, in this case the ditch

[2] "Sheet flow," a technical term in the science of hydrology, is defined as "[a]n overland flow or downslope movement of water taking the form of a thin, continuous film over relatively smooth soil or rock surfaces and not concentrated into . . . channels[.]" MCGRAW-HILL DICTIONARY OF SCIENTIFIC & TECHNICAL TERMS, 6TH ED. (2003) (available at http://encyclopedia2.thefreedictionary.com/sheet+flow). Based on this definition the ditches in *Alt* did not empty directly into waters of the United States.

itself is the cause of the discharge. *See* 979 F. Supp. 2d. at 705; R. at 6. Because the discharge in *Alt* was caused by rainfall it was excepted ASR; here, the ditch collected the rain and pollution and carried it to navigable waters and, therefore, the Farm's discharge was not ASR. *See* 979 F. Supp. 2d. at 705; R. at 6; *see also Concerned Area Residents for the Environment v. Southview Farm*, 34 F.3d 114, 121 (2d Cir. 1994) (holding that only discharges caused by rainfall can be ASR). The Farm should not be allowed to escape CWA liability after directly discharging pollutants into the national waters based on an out-of-circuit district court case developed on different facts. Therefore, this Court should hold that the Farm is a CAFO and that its discharge was not excepted as either general or CAFO-specific ASR.

C. The Only way the Farm Escapes CWA Liability is if this Court Holds that the Farm is not a CAFO.

This court has also asked the parties whether the Farm would still be liable under the CWA in the event the Farm is not a CAFO in light of its NMP. Logically, the only way this court could conclude the Farm is not a CAFO (assuming Mr. James' evidence is admitted) is to hold, as a matter of law, that the Farm's ditch was not "man-made." *See* 40 C.F.R. § 122.23(b)(6)(ii)(A). Putting the prudence of such a ruling to one side, the Farm would still be discharging pollutants from a point source—its ditch—in violation of the CWA. The question, therefore, is whether discharge by an AFO which has an NMP but is not a CAFO should be excepted as general ASR. Such discharges should be excepted because doing so would greatly incentivize implementation of NMPs by AFOs, with significant benefit to the environment.

As a matter of federal law, only CAFOs are required to create and adhere to NMPs. *See* 40 C.F.R. § 122.42(e)(1) (requiring any NPDES permit issued to a CAFO to include a NMP). Assuming that the Farm is not a CAFO, its obligation to implement a NMP stems entirely from

the authority delegated to the State of New Union by EPA. *See generally* 33 U.S.C. § 1342(b); R. at 5 (noting the Farm "is regulated by the State of New Union within its authority under the CWA"). While no party before this court challenges the propriety of New Union's exercise of this authority, its requirement that non-CAFOs follow NMPs would go above and beyond the minimum regulation strictly required by the CWA.

States should be incentivized to protect the environment as New Union would in this case, provided the Farm is not a CAFO. Exempting an AFO's discharge when it has an NMP achieves this goal which is in harmony with the purpose and objectives of the CWA. Manure discharged from AFOs contains hazardous chemicals, including nitrogen, phosphorus, and hydrogen sulfide. *See Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 494 (2d Cir. 2005). Stemming the flow of these chemicals into the nation's waters was the chief purpose of the NMP requirement. *See, e.g.*, Press Release, EPA, New Requirements for Controlling Manure, Wastewater from Large Animal Feeding Operations, 2008 WL 4757285 (Oct. 31, 2008) (noting that NMP regulations will "prevent 56 million pounds of phosphorus, 110 million pounds of nitrogen, and 2 billion pounds of sediment" from polluting the national waters annually). Thus, the more AFOs with NMPs, the better. Excusing AFO discharges that would normally trigger liability incentivizes states and AFOs to develop NMPs. Even if an AFO fails to comply with other permitting requirements—such as the Farm's no discharge permit in this case—the environment is still better off on the whole; AFOs with occasionally deficient NMPs are less harmful than AFOs left totally unregulated.

Only if this court finds that the Farm is not a CAFO would exempting its discharge as ASR be justified. The evidence in this case demonstrates, however, that the Farm is a CAFO because it discharged pollutants through a man-made ditch. Furthermore, its discharge of

pollutants from a ditch is not excepted CAFO-specific ASR because, put simply, a ditch is not land. Finally, the general ASR exception does not apply in the event this court finds that the Farm is a CAFO because it discharged directly into navigable waters and excepting this discharge would frustrate the purposes of the CWA.

IV. WHILE THE FARM'S POLLUTION IS NOT SOLID WASTE UNDER RCRA SUBTITLE D, IS NEVERTHELESS POSES A SUBSTANTIAL AND IMMINENT HARM UNDER SUBTITLE C; THE FARM IS THEREFORE LIABLE UNDER RCRA.

In addition to joining EPA's CWA enforcement action against the Farm, Riverwatcher brings two citizen suits under RCRA: one under Subtitle D, 42 U.S.C. § 6945(a), and one alleging liability under the imminent and substantial harm provisions codified at 42 U.S.C. § 6972(a)(1)(B). Solid waste is defined in different ways within RCRA and differently within the two claims Riverwatcher brings. The Farm's manure and whey mixture is not solid waste under Subtitle D's definition of solid waste, which narrowly defines of solid waste. The Farm's mixture is, however, solid waste under the imminent and substantial suit in which the definition comes from RCRA's broader general provisions. As the interpreters of RCRA, the EPA is entitled to deference with regard to its interpretation of the statute.

B. The Farm's Fertilizer is not a Solid Waste under RCRA Subtitle D

RCRA Subtitle D has a different definition of solid waste than the general provisions of the statute. This alternative definition of solid waste is explicitly provided for in RCRA Subtitle and it also applies to Subtitle D. Under this more refined definition the Farm's mixture of manure and whey does not constitute a solid waste.

i. Subtitle C 's Alternative Definition of Solid Waste Extends to Subtitle D

RCRA Subtitle C's definition of solid waste is different than RCRA's general provision's definition of solid waste in 42 U.S.C. § 6903(27). *See Connecticut Coastal Fisherman's Ass'n v. Remington Arms Co.*, 989 F.2d 1305, 1314 (2d Cir. 1993).

Subtitle C's definition of solid waste is material that has been abandoned. *See id.* (citing 40 C.F.R. § 261.2(a)). Abandoned materials are "materials that have been disposed of." *See id.* (citing 40 C.F.R. § 261.2(b)). The general provisions of RCRA use the concept of "discarded material" to define solid waste, but the definition does not describe solid waste as being "abandoned" or "disposed of" like the regulatory definition does. *See id.* at 1315 (citing 42 U.S.C. § 6903(27)). Solid waste under Subtitle C's definition of solid waste is narrower than the general provisions' definition of solid waste because it has more specifications.

Because Subtitle C's definition of solid waste is narrower, a material can be solid waste under RCRA general provisions, but not be solid waste under the regulatory definition of Subtitle C. In *Connecticut Coastal* ammunition from a shooting range was not solid waste under Subtitle C using the strict, regulatory definition of solid waste. *See id.* at 1315. The ammunition shells were, however, solid waste under the broader statutory definition of the citizen suit under 42 U.S.C. § 6972(a)(1)(B). *See id.* at 1314. Similarly in *Comite* sewage was not solid waste under Subtitle C, but it was under the general statutory provisions. *See Comite Pro Rescate de La Salud v. Puerto Rico Aqueduct & Sewer Authority*, 888 F.2d 180, 186 (2d Cir. 1989).

The EPA defined the general provisions of the statute and Subtitle C differently due to their statutory and regulatory aims respectively. *See Connecticut Coastal*, 989 F.2d at 1314. The regulatory aims required a more refined definition. Like Subtitle C, Subtitle D also covers a specific regulatory goal of the EPA. In Subtitle D the regulatory goal is to prohibit open dumping of solid waste. Also like Subtitle C, Subtitle D grants the EPA the ability to promulgate

guidelines specific to identifying areas with solid waste management problems. 42 U.S.C. § 6942(a). Due to Subtitle D's specific regulatory aims like Subtitle C and the grant to adopt guidelines similar to the grant in Subtitle C, Subtitle D's definition of solid waste is material that has been abandoned. 40 C.F.R. § 261.2(b).

Though the Statement of Purpose in 40 C.F.R.§ 261.1(b)(1) applies § 261.1(b)'s definition only to hazardous waste in Subtitle C, the plain language of 40 C.F.R. § 261.2(b) does not discriminate between the provisions to which it applies. As the reigning canon of statutory interpretation, the plain language refining the definition must apply to the provisions the EPA is enforcing, unless the agency has explicitly specified § 261.2(b)'s definition does not apply. *See The Wilderness Soc'y v. United States Fish & Wildlife Serv.*, 353 F.3d 1051, 1060 (9th Cir. 2003) (specifying to begin statutory construction with the language of the statute).

ii. The Farm's manure and whey mixture does not fit RCRA Subtitle D's definition of solid waste

As explained in detail above the definition of solid waste under RCRA Subtitle D defines solid waste as material that has been abandoned. 40 C.F.R. § 261.2(b). Manure mixtures used for fertilization purposes do not fit the regulatory definition of abandonment because of its utility and value. *See, e.g., Oklahoma v. Tyson Foods, Inc.*, 2010 WL 653032 at *10 (N.D. Okla. Feb. 17, 2010), *Safe Air v. Meyer*, 373 F.3d 1035, 1044 (9th Cir. 2004).

In *Oklahoma v. Tyson*, Tyson had sprinkled poultry litter on its fields, which was contaminating a nearby water source. Because Tyson derived utility from the poultry litter in putting it on its fields and it had value on the market, the poultry litter did not qualify as a solid waste. The Farm, like Tyson, is spreading the fertilizer mixture on their fields to fertilize the ground. The Farm's plan was authorized because depositing the fertilizer mixture on the field is

expected to nourish the fields. Therefore the Farm's use of the fertilizer is useful to the soil nutrients like the chicken manure in Oklahoma and will not qualify as a solid waste under RCRA Subtitle D.

Outside of the manure context and to directly apply 40 C.F.R. § 261.2(b), solid waste has not been abandoned when the material came to be there as part of its proper and expected use. *See Cordiano v. Metacon Gun Club*, 575 F.3d 199, 206 (2d Cir. 2009). In *Cordiano*, spent rounds at a shooting range were not considered abandoned because shooting ranges always have spent rounds on the ground as part of their normal business operations. *See id.* at 209. Here too the Farm placed manure and whey on its fields as part of its normal business operations to nourish the Farm's fields. Because it is proper and expected for a farm to use manure mixture in its daily operations, the Farm's manure and whey mixture has not been abandoned and is therefore not solid waste under 40 C.F.R. § 261.2(b).

B. The Manure and Whey Acid Mixture is a Solid Waste under RCRA's Imminent and Substantial Endangerment Provisions.

Under 42 U.S.C. § 6972(a)(1)(B), RCRA's imminent and substantial endangerment citizen suit, Riverwatcher is able to prove the elements necessary to prevail. The manure and whey mixture is a solid waste under 42 U.S.C. § 6903(27), in contrast to Subtitle D above. The mixture's effect on the drinking water presents imminent and substantial endangerment. Therefore Riverwatcher has a valid citizen suit.

i. The Farm's mixture is solid waste under RCRA's citizen suit provision

> Solid waste under RCRA's general provisions defined as:
> Any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities.

42 U.S.C. § 6903(27). Manure, even if intentionally placed on the ground for nutritional purposes, can be discarded if it is over-applied. *See Cmty. Ass'n for Restoration of the Env't., Inc. v. Cow Palace, LLC*, 2013 WL 3179575, *11 (E.D. Wash. June 21, 2013). In *Cow Palace*, the Farm had distributed manure for fertilization purposes saying the manure was not discarded. Since the manure had exceeded its benefit, the manure was plausibly solid waste under 42 U.S.C. § 6903(27). Currently the Farm is also distributing manure and whey in excess to the extent that it has leached into the Deep Quod River. Because the leached manure is no longer of value or use to the Farm it is solid waste under 42 U.S.C. § 6903(27).

Other cases that find soil fertilizers of benefit and value do not mention over-application issues like those in the present case and *Cow Palace*. *See, e.g.*, *Tyson*, 2010 WL 653032 at *10, *Safe Air*, 373 F.3d 1035. Therefore defining manure mixtures as solid waste when it is over-applied does not conflict with other case precedent.

ii. The Manure and Whey Acid Mixture Presents an Imminent and Substantial Endangerment

A solid waste presents imminent and substantial endangerment when the solid waste presents "a reasonable prospect of future harm." *Maine People's Alliance v. Mallinckrodt*, 471 F.3d 277, 295 (1st Cir. 2006). In *Mallinckrodt* imminent and substantial endangerment was fulfilled when Mallinckrodt released methylmercury, a highly dangerous substance, into a river, but no one had reported ill effects from the methylmurcury. *See id.* at 282. The presence of the methylmercury alone as a highly toxic substance easily surpassed the imminent and substantial requirement in the citizen suit provision. *See id.* at 295.

Here too the Farm's alleged deposition of the manure and whey mixture into the Deep Quod River has resulted in an elevated nitrate concentration. *See* R. at 6. Due to the increase in nitrates, the Farmville Water Authority issued a nitrate advisory warning that the water is unsafe for infants to drink. *See* R. at 6. Because the nitrates are actually "unsafe" for infants, Mallinckrodt's low bar is far surpassed by the endangerment that the Farm's manure and whey mixture presents to the population.

C. The EPA's interpretation of Solid Waste in RCRA is Entitled to Deference

Under *Chevron* the EPA is entitled to deference on its interpretation of RCRA if, when Congress's meaning is ambiguous, the agency's interpretation is based on a permissible interpretation of the statute. *See Connecticut Coastal*, 989 F.2d at 1313 (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984)).

In *Connecticut Coastal* the EPA permissibly interpreted RCRA to give dual definitions to solid waste under Subtitle C and the citizen suit provision respectively. The dual definitions were permissible based on the structure and language of Subtitle C. *See Connecticut Coastal*, 989 F.2d at 1314. Subtitle C's structure suggests dual definitions because it isolates hazardous wastes for specific treatment. *See id.* Subtitle D is also a separates state management plans for subtitle within the statute. This separate structure and nature of state management plans suggests that Congress intended for similar distinction with regard to the definition of solid waste in Subtitle D.

Additionally Congress directed the EPA to develop specific criteria for the identification of hazardous wastes. *See id.* For Subtitle D Congress again directed the EPA to publish guidelines for the identification of problem solid waste for waste management plan purposes. *See id.* Even though *Connecticut Coastal* suggests that Congress's delegation to define waste is

broader in Subtitle C than Subtitle D, Congress explicitly gave the EPA to further define waste under both subtitles. *See* 42 U.S.C. § 6942(a) (granting the EPA the ability to refine provisions to regulate solid waste in an open dumping context). Congress defined solid waste generally under the General Provisions and delegated specificity of solid waste to the EPA under Subtitle C and likely under Subtitle D as well. Unlike Subtitle C ("Hazardous Waste") and Subtitle D ("State and Regional Plans") the imminent and substantial claim under RCRA § 7002(a)(1)(B) is a "Miscellaneous Provision." As such, the General Provisions are sufficient to define RCRA § 7002(a)(1)(B)'s terms. Subtitle D is governs a specific portion of RCRA like Subtitle C for which EPA further defined solid waste. Subtitle D's specificity is more similar to Subtitle C than RCRA § 7002. Therefore EPA's choice to define solid waste as discarded material for the main statute and as abandoned under 40 C.F.R. § 261.2(b) warrants deference.

D. Though the Farm's Fertilizer is not a Solid Waste under RCRA Subtitle D, it is a Solid Waste under the Imminent and Substantial Harm Provision of the Citizen Suit Section.

Under the narrow definition of solid waste under 40 C.F.R. § 261.2(b), the Farm's manure and whey mixture is not a solid waste. The mixture is not a solid waste under § 261.2(b) because it has not been abandoned. But, however, under RCRA's imminent and substantial provision the manure and whey mixture is a solid waste. The mixture is a solid waste under imminent and substantial provision due to the Farm's over-application. Therefore the mixture is no longer providing utility to the Farm and is a solid waste.

CONCLUSION

For the reasons stated above, EPA respectfully asks this court to reverse the order of the district court below, and to grant EPA's motion for summary judgment. EPA asks this court to hold, as a matter of law, that Mr. James did not trespass under the Public Trust Doctrine, that the evidence he obtained should not be suppressed by application of the exclusionary rule, that the Farm was a CAFO and discharged pollutants in violation of the CWA. If this court does not hold that the Farm violated the CWA, EPA respectfully requests that the court reverse the district court and hold that the Farm's manure and whey acid mixture is a solid waste posing a imminent and substantial harm under 42 U.S.C. § 6972(a), while affirming the district court's ruling that the mixture is not solid waste as defined by 42 U.S.C. § 6945(a).