

Docket. No. 14-1248

**IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT**

UNITED STATES OF AMERICA,
Plaintiff-Appellant, and

DEEP QUOD RIVERWATCHER, INC., and DEAN JAMES,
Plaintiffs-Intervenors-Appellants

v.

MOON MOO FARM, INC.,
Defendant-Appellee.

On Appeal from the United States District Court
for the District of Progress
No. 155-CV-2014

**DEEP QUOD RIVERWATCHER, INC., and DEAN JAMES,
Plaintiffs-Intervenors-Appellants**

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF JURISDICTION 1

ISSUES PRESENTED FOR REVIEW 1

STATEMENT OF THE CASE..... 1

STATEMENT OF FACTS 2

STANDARD OF REVIEW 4

SUMMARY OF THE ARGUMENT 5

ARGUMENT 6

I. The district court erred in ruling that Riverwatcher committed a trespass because the Canal is a “navigable water” under both federal and state public trust doctrine despite private ownership of the Canal’s bed and banks. 6

A. Regardless of its man-made status, the Canal is a public trust navigable water under federal common law because it is navigable-in-fact. 7

B. Even if this Court applies state public trust law on whether man-made water bodies can be publicly navigable, the Canal is navigable under the law of the majority of states. . 10

C. Even if this Court finds that the Canal is not a public trust navigable water, Riverwatcher’s intrusion was not trespass because Moon Moo gave implicit consent. 12

II. Even if the Court finds that the evidence was obtained through trespass, it is still admissible under the CWA. 13

A. The district court erroneously relied on two OSHA cases to apply the Fourth Amendment exclusionary rule in CWA civil enforcement cases..... 13

B. When applying the test for use of the exclusionary rule in civil enforcement proceedings to this case, the deterrent effect of the rule does not outweigh the value of the evidence in question. 15

III. Moon Moo requires a permit under CWA § 402 permitting program 16

A. Moon Moo is subject to NPDES permitting because pollutants originating from its manure application area are discharged from a “point source” into the Deep Quod River, a “water of the United States.” 17

B. The district court erred in holding that excess nutrient discharges from Moon Moo’s manure application are exempted from NPDES permitting as agricultural stormwater runoff. 19

IV. The district court erred in concluding that Moon Moo was not subject to a citizen suit under RCRA because Moon Moo’s mixture is a “solid waste” under the statute and the plaintiffs have established that the mixture constitutes an “imminent and substantial endangerment” to human health. 23

A. Moon Moo’s manure–whey mixture is a “solid waste” because the mixture falls within the plain meaning of the definition and is not covered by any regulatory or case law exemption. 24

B. The district court erred in dismissing the imminent and substantial endangerment claim for “insufficient evidence” because it misread the liability standards of RCRA.....	31
PRAYER.....	35
CERTIFICATION.....	Error! Bookmark not defined.

TABLE OF AUTHORITIES

Cases

<i>Ace Equip. Sales, Inc. v. Buccino</i> , 869 A.2d 626 (Conn. 2005).....	11
<i>Alt v. U.S. E.P.A.</i> , 979 F.Supp. 2d 701 (N.D. W. Va. 2013).....	19, 20, 22
<i>Am. Mining Cong. v. EPA (“AMC IP”)</i> , 907 F.2d 1179 (D.C. Cir. 1990).....	30
<i>Bear Dredging L.L.C. v. Alabama Dept. of Rev.</i> , 855 So.2d 513 (Ala. 2003).....	11
<i>Brazerol v. Hudson</i> , 262 Md. 269 (1971).....	12
<i>Burlington N. & Santa Fe Ry. Co. v. Grant</i> , 505 F.3d 1013 (10th Cir. 2007).....	24, 33, 34
<i>Ca. Dep’t of Toxic Substances Control v. Interstate Non-Ferrous Corp.</i> , 298 F. Supp. 2d 930 (E.D. Cal. 2003).....	34
<i>Campbell Brown & Co. v. Elkins</i> , 93 S.E.2d 248 (1956).....	11
<i>Cnty. Ass’n for Restoration of the Env’t, Inc. v. George & Margaret LLC (CARE)</i> , 954 F. Supp. 2d 1151 (E.D. Wash. 2013).....	27
<i>Cnty. Ass’n for the Restoration of the Env’t v. Nelson Faria Dairy, Inc.</i> , CV-04-3060-LRS, 2011 WL 6934707 (E.D. Wash. Dec. 30, 2011).....	23
<i>Concerned Area Residents for Env’t v. Southview Farm</i> , 34 F.3d 114 (2d Cir. 1994).....	18, 22, 23
<i>Conn. Coastal Fishermen’s Ass’n v. Remington Arms Co.</i> , 989 F.2d 1305 (2d Cir. 1993).....	24
<i>Cox v. City of Dall., Tex.</i> , 256 F.3d 281 (5th Cir. 2001).....	32
<i>Crandall v. City & Cnty. of Denver, Colo.</i> , 594 F.3d 1231 (10th Cir. 2010).....	33
<i>Floyd County v. Allen</i> , 227 S.W. 994 (Ky. 1921).....	11
<i>Idaho v. United States</i> , 533 U.S. 262 (2001).....	7
<i>INS v. Lopez-Mendoza</i> , 468 U.S. 1032 (1984).....	15
<i>Kaiser Aetna v. United States</i> , 444 U.S. 164 (1979).....	9
<i>Maine People’s Alliance v. Mallinckrodt, Inc.</i> , 471 F.3d 277 (1st Cir. 2006).....	32
<i>McKee v. Gratz</i> , 260 U.S. 127 (1922).....	12
<i>Meghrig v. KFC W., Inc.</i> , 516 U.S. 479 (1996).....	24
<i>Nat’l Pork Producers Council v. EPA</i> , 635 F.3d 738 (5th Cir. 2011).....	21
<i>Oklahoma v. Tyson Foods, Inc.</i> , No. 05-CV-0329-GKF-PJC, 2010 WL 653032 (N.D. Okla. Feb. 17, 2010).....	27
<i>Peconic Baykeeper, Inc. v. Suffolk Cnty.</i> , 600 F.3d 180 (2d Cir. 2010).....	19
<i>PPL Montana, LLC v. Montana</i> , 132 S. Ct. 1215 (2012).....	7
<i>Rapanos v. United States</i> , 547 U.S. 715 (2006).....	7, 18
<i>S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians</i> , 541 U.S. 95 (2004).....	19
<i>Safe Air for Everyone v. Meyer</i> , 373 F.3d 1035 (9th Cir. 2004).....	26
<i>Shively v. Bowlby</i> , 152 U.S. 1 (1894).....	7
<i>Smith Steel Casting Co. v. Brock</i> , 800 F.2d 1329 (5th Cir. 1986).....	14, 15
<i>The Daniel Ball</i> , 77 U.S. 557 (1870).....	7

<i>The Montello</i> , 87 U.S. 430 (1874)	7, 8
<i>Trinity Indus., Inc. v. OSHRC</i> , 16 F. 3d 1455 (6th Cir. 1994).....	13
<i>United States v. Aceto Agr. Chem. Corp.</i> , 872 F.2d 1373 (8th Cir. 1989).....	28, 33
<i>United States v. Appalachian Elec. Power Co.</i> , 311 U.S. 377 (1940)	8, 10
<i>United States v. Janis</i> , 428 U.S. 433 (1976)	15
<i>Utah v. United States</i> , 403 U.S. 9 (1971).....	10
<i>Water Keeper Alliance, Inc. v. Smithfield Foods, Inc.</i> , No. 4:01-CV-27-H(3), 2001 WL 1715730 (E.D.N.C. Sept. 20, 2001).....	27
<i>Waterkeeper Alliance, Inc. v. EPA</i> , 399 F.3d 486, 507 (2d Cir. 2005).....	19, 21, 32, 34
<i>White’s Mill Colony Inc. v. Williams</i> , 363 S.C. 117 (Ct. App. 2005)	11

Statutes

28 U.S.C. § 1291	1
28 U.S.C. § 1331	1
33 U.S.C. § 1251(a).....	17
33 U.S.C. § 1311(a).....	17
33 U.S.C. § 1319(a).....	14
33 U.S.C. § 1362(14).....	17, 18, 19, 21
42 U.S.C. § 6903(27).....	29
42 U.S.C. § 6903(5)	24
42 U.S.C. § 6972.....	1, 31

Treatises

Restatement (Third) of Property (Servitudes) § 1.1 (2000)	6
---	---

Regulations

40 C.F.R. § 122.23.....	17, 18, 20, 21
40 C.F.R. § 257.1(c)(1).....	25, 26
40 C.F.R. § 261.2.....	29

Other Authorities

A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972 (Comm. Print 1973).....	21
EPA, AG 101: NITRATE, http://www.epa.gov/oecaagct/ag101/impactnitrate.html (last visited Nov. 23, 2014)	34
EPA, GUIDANCE ON THE USE OF SECTION 7003 OF RCRA (1997).....	33
EPA, <i>Nitrates and Nitrites TEACH Chemical Summary, available at</i> http://www.epa.gov/teach/chem_summ/Nitrates_summary.pdf (last revised May 22, 2007)..	34
H.R. REP. NO. 94-1491 (1976), <i>reprinted in</i> 1976 U.S.C.C.A.N. 6238.....	28
Jan G. Laitos & Heidi Ruckriegle, <i>The Clean Water Act and the Challenge of Agricultural Pollution</i> , 37 VT. L. REV. 1033 (2013).....	22
Michael Somers, <i>RCRA’s New Causation Question: Linking Ubiquitous Wastes to Specific Defendants</i> , 38 B.C. ENVTL. AFF. L. REV. 193 (2011)	32
Richard J. Lazarus, <i>Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine</i> , 71 IOWA L. REV. 631 (1986).....	10
Robin Kundis Craig, <i>A Comparative Guide to the Eastern Public Trust Doctrines: Classifications of States, Property Rights, and State Summaries</i> , 16 PENN ST. ENVTL. L. REV. 1	

(2007)	11
Tarah Heizen & Abel Russ, <i>Using Emerging Pollution Tracking Methods to Address the Downstream Impacts of Factory Farm Animal Welfare Abuse</i> , 31 PACE ENVTL. L. REV. 475	
(2014)	21

STATEMENT OF JURISDICTION

The case in controversy arises under the Federal Water Pollution Control Act, 33 U.S.C. § 1251 et. seq. (2013), commonly referred to as the Clean Water Act (CWA), which is a federal statute. Congress granted the federal courts statutory authority to hear federal question cases, including questions that arise under federal statutes. 28 U.S.C. § 1331 (2013). This is an appeal of right taken from a final judgment by a federal district court. Therefore, this Court has jurisdiction. 28 U.S.C. § 1291 (2013).

ISSUES PRESENTED FOR REVIEW

- I. Whether Queechunk Canal (the Canal), a man-made water body, is a public trust navigable water of the State of New Union (New Union) allowing for a public right of navigation.
- II. Whether evidence obtained through trespass and without a warrant is admissible in a civil enforcement proceeding under CWA §§ 309 (b), (d), and 505. 33 U.S.C. §§ 1319, 1365.
- III. Whether Moon Moo Farm (Moon Moo) requires a permit under § 402 of the CWA, the National Pollutant Discharge Elimination System (NPDES) permitting program. 33 U.S.C. § 1342.
- IV. Whether Moon Moo is subject to a citizen suit under § 7002 of the Resource Conservation and Recovery Act (RCRA). 42 U.S.C. § 6972(a)(1)(B) (2013).

STATEMENT OF THE CASE

After proper notice, the United States (on behalf of the United States Environmental Protection Agency) (EPA) brought an action for civil penalties and injunctive relief against Moon Moo for violating the permitting requirements of the CWA, 33 U.S.C. §§ 1311(a),

1319(c), (d), 1342. Plaintiffs-Intervenors, Deep Quod Riverwatcher, together with Dean James (collectively, “Riverwatcher”), intervened, alleging that Moon Moo violated § 505 of the CWA and § 7002 of the RCRA by applying a manure–whey mixture to their fields in amounts exceeding agronomic need. Riverwatcher alleges that Moon Moo’s actions have caused runoff from the fields to enter “waters of the United States” and have caused high nitrate levels in drinking water supplies downstream, resulting in a substantial endangerment to public health.

Moon Moo subsequently filed a counterclaim for common law trespass alleging that Riverwatcher illegally entered its property to obtain evidence of stormwater runoff from its fields. Both parties filed motions for summary judgment. The district court granted Moon Moo’s motion, concluding Riverwatcher’s entry was a trespass because the Canal was private property, not a public trust navigable water. Consequently, the court found that the evidence presented by plaintiffs was inadmissible under the Fourth Amendment exclusionary rule. The district court further denied plaintiffs’ motion for summary judgment, concluding that plaintiffs had not presented any evidence demonstrating that Moon Moo is a Concentrated Animal Feeding Operation (CAFO) subject to regulation under the NPDES permitting program or that there had been any discharge from the farm’s operations. The court also concluded that Moon Moos’ manure–whey mixture is not “solid waste” under RCRA and that Moon Moo’s landspreading practices did not present an imminent and substantial endangerment to human health.

STATEMENT OF FACTS

Dean James is a “Riverwatcher” for a nonprofit environmental organization in New Union called Deep Quod Riverwatcher. R. at 4, 6. In 2013, Riverwatcher received complaints that the Deep Quod River, which provides drinking water to the City of Farmville, “smelled of manure and was an unusually turbid brown color.” R. at 5–6. The Farmville Water Authority

subsequently issued a nitrate advisory—advising customers to give infants bottled water because, although not threatening to adults, nitrate levels were high enough to pose a threat to infants. R. at 6. James investigated these concerns, navigating up the Canal into the Moon Moo property, where he observed and photographed manure spreading operations and discolored brown water flowing from the fields through a drainage ditch into the Canal. R. at 6. When tested, the water samples from the ditch revealed highly elevated levels of nitrates, chemical waste, and fecal coliforms, as well as suspended solids. R. at 6, 7.

Moon Moo operates a dairy farm with 350 head of milk cows in New Union, 10 miles upstream from Farmville on the Deep Quod River. R. at 4–5. The river, a “water of the United States,” flows year round, emptying into the Mississippi River, a “navigable-in-fact” interstate body of water. R. at 5. As the river flows by the farm, the majority of its flow is diverted into the Canal, a fifty yard wide, three to four feet deep bypass canal excavated by a previous owner of the farm. R. at 5. Moon Moo owns land on either side of the canal and has posted “No Trespassing” signs on the banks. R. at 5. Because the canal is navigable by canoe or small boat and provides a shortcut to the river, the public often uses it. R. at 5.

Moon Moo uses the fields abutting the river to grow Bermuda grass for feed. R. at 5. To this end, the cows’ effluent is collected by a series of drains and piped to an outdoor surface lagoon where it is stored. R. at 5. Recently, Moon Moo began adding an acid whey byproduct, which it receives free of charge from a yogurt processing facility, to its manure lagoons. R. at 5. Moon Moo periodically pumps the manure–whey mixture from these lagoons and sprays it onto the fields as fertilizer. R. at 5, 6.

All parties agree that runoff from Moon Moo’s land application fields contained pollutants. R. at 7. Furthermore, Moon Moo does not have a NPDES permit. R. at 5. Instead, the

farm is regulated by New Union as a “no-discharge” animal feeding operation. R. at 5. While Moon Moo does have a state-approved Nutrient Management Plan (NMP), New Union does not usually review NMPs, nor is there a process for public notice and comment. R. at 5. Moreover, there is no indication that Moon Moo’s NMP was reviewed to ensure its continued validity with the terms of a “no-discharge” feeding operation when the addition of 80 cows increased manure effluent output, or when the farm began adding the acid whey to the manure. *See* R. at 5.

Riverwatcher’s expert, Dr. Ella Mae (Mae), testified that the addition of whey to the manure lowered the pH of the mixture, which in turn lowered the pH of the soil. R. at 6. The resulting soil acidity prevented the Bermuda grass from effectively taking up the nutrients in the manure, thereby releasing unprocessed nutrients into the environment by leaching into groundwater and flowing into surface water bodies during rain events. R. at 6. Mae also noted that applying manure to fields during a rain event is a poor management practice and will nearly always result in excess nutrient runoff. R. at 6. Moon Moo’s expert did not dispute Mae’s conclusions but noted that their NMP does not prevent this practice. R. at 7.

STANDARD OF REVIEW

This Court reviews an order granting or denying summary judgment *de novo* under Federal Rule of Civil Procedure 56. *See, e.g., Mass. Museum, Contemp. Art Foun. v. Buchel*, 593 F. 3d 38, 52 (1st Cir. 2010). Viewing the evidence in the light most favorable to the nonmovant, this Court must determine “whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law.” *Am. Civil Liberties Union of Nevada v. City of Las Vegas*, 333 F.3d 1092, 1097 (9th Cir. 2003). In reviewing the District Court’s ruling on the parties’ cross-motions for summary judgment, this Court “evaluate[s] each motion separately, giving the nonmoving party . . . the benefit of all reasonable inferences.” *Id.*

SUMMARY OF THE ARGUMENT

Queechunk Canal is a public trust navigable water of New Union.

Because the Canal is navigable-in-fact, it is a public trust navigable water under the federal common-law test and the majority of state tests, which do not bar a water from being a public trust water merely because it is man-made. Furthermore, Moon Moo gave implicit consent for the public to enter the Canal. Therefore, there is a public right of access to the Canal and Riverwatcher did not commit a trespass when collecting the evidence at issue in this case.

Evidence obtained through trespass is admissible in a CWA civil enforcement action.

The exclusionary rule is not typically used in civil enforcement cases and, even when the courts have found that it is applicable, the rule is not applied to bar evidence from a case brought to estop a party from violating statute or agency regulation. Thus, even if the Court finds that the Canal is not a public trust navigable water, and even if it finds that Riverwatcher obtained the evidence presented in this case through trespass, the evidence is still admissible in this case.

Moon Moo Requires a permit under the NPDES permitting program.

Because Moon Moo meets the definition of a CAFO under the CWA, it is a “point source” and must comply with NPDES permitting requirements under the Act. Moon Moo fails to meet the requirements for the agricultural stormwater discharge exemption because its discharges of manure into the Deep Quod River are triggered by over-application, not by precipitation. Even if Moon Moo did not meet the definition of a CAFO, the drainage ditch on Moon Moo’s property itself is a “point source,” thus triggering NPDES permitting requirements.

Moon Moo is subject to a citizen suit under RCRA

Because Moon Moo is discarding the excess manure–whey mixture, the runoff mixture falls under the plain language of the definition of a RCRA “solid waste” and is therefore covered

under the Act. The runoff mixture does not satisfy the exemption made for wastes applied to the soil as fertilizer because the runoff itself is not returned to the soil, but left to contaminate ground and surface water. This practice has contaminated Farmville's water supply, creating an imminent and substantial endangerment to infants, leaving Moon Moo subject to a citizen suit for violating RCRA.

ARGUMENT

I. The district court erred in ruling that Riverwatcher committed a trespass because the Canal is a “navigable water” under both federal and state public trust doctrine despite private ownership of the Canal’s bed and banks.

The district court erred in ruling that the Canal is property of Moo Moon and not a publicly navigable waterway based on the erroneous assertion that there is no public right of navigation in a man-made water body. *See R.* at 9. Because the Canal is a public trust navigable waterway under the federal common-law test and the majority of state tests, Riverwatcher did not commit a trespass when navigating the Canal to collect the evidence at issue in this case. Furthermore, even if the Court finds that the Canal is not a publicly navigable water, there was no trespass because Moon Moo gave implicit consent.

Modern federal and state common law are extensions of the common-law public trust doctrine. Under this doctrine “the state holds title to land flowed by tidal waters in trust for the people who have the right to use the land and water for navigation, fishing, and recreational uses.” Restatement (Third) of Property (Servitudes) § 1.1 (2000). The doctrine has been extended to include navigable rivers in the United States. *See, e.g., Arnold v. Mundy*, 6 N.J.L. 1, 11–12 (1821) (summarizing the rule as “the navigable rivers, where the tide ebbs and flows, the ports, the bays, the coasts of the sea, including both the water and the land under the water [. . .] are common to all the people . . .”). Thus, the Canal is properly considered a public trust navigable water under the jurisprudence of either state or federal law.

A. Regardless of its man-made status, the Canal is a public trust navigable water under federal common law because it is navigable-in-fact.

The Canal is a publicly navigable water under federal public trust doctrine because it is “navigable-in-fact.” There is a strong presumption that “navigable-in-fact” water, including the bed and banks, are owned by the state or federal sovereign. *See, e.g., Shively v. Bowlby*, 152 U.S. 1, 26–50 (1894); *Idaho v. United States*, 533 U.S. 262, 272–73 (2001). There are two variations of the federal public trust navigable water test, both of which hold that a waterway is a public trust navigable water if it is navigable-in-fact. *See, e.g., United States v. Cress*, 243 U.S. 316, 323, 332 (1917) (applying the tests articulated in *The Daniel Ball* and *The Montello* to find that the federal government had authority to construct and maintain locks and dams upon two “navigable-in-fact” rivers); *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215, 1219, (2012) (applying *The Daniel Ball* and *The Montello* to find two riverbeds were not public trust navigable waters).¹

Under the more restrictive test, waterways are public trust navigable waters if they are “used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.” *The Daniel Ball*, 77 U.S. 557, 563 (1870). Because the Canal is fifty yards wide, three to four feet deep, diverts most of the river’s flow, and is navigable by small boats, the Canal is a public trust navigable waterway under this test as well. R. at 5. Because it is commonly used as a shortcut by boaters to travel up and down the Deep Quod River, *See id.*, the Canal is a “highway

¹ This definition of “navigable waters” for common-law public trust purposes is not overruled by *Rapanos*. *Rapanos* is specific to “waters of the United States” under the CWA, while the Court’s test for public trust navigable waters in *The Daniel Ball* and *The Montello* are still good law for the purposes of determining a public trust navigable water. *See Rapanos v. United States*, 547 U.S. 715, 730, (2006) (finding that the term “navigable waters” in the CWA is broader than the traditional definition used in public trust jurisprudence).

of commerce, over which trade and travel are or may be conducted.” *The Daniel Ball*, 77 U.S. at 563. Under the Supreme Court’s most restrictive test, then, the Canal is a publicly navigable waterway.

The Canal also passes the test articulated in *The Montello*. In that case, the Supreme Court clarified that the amount or type of use of the waterway is not relevant to its status as public trust navigable water: “If it be capable in its natural state of being used for purposes of commerce . . . it is navigable-in-fact, and becomes in law a public river or highway.” *The Montello*, 87 U.S. 430, 441–42 (1874) (finding that the river was used in commerce and therefore was a public navigable waterway even though it had been improved to remove obstructions to navigation). This test does not include all waters which can be floated on by any vessel, “but, in order to give it the character of a navigable stream, it must be generally and commonly useful to some purpose of trade or agriculture.” *Id.* Like the waterway in *The Montello*, the Canal is commonly used by small boats, namely as a shortcut to the Deep Quod River. R. at 5. It is also “generally and commonly useful to some purpose of trade or agriculture,” not only for its use in transportation, but also because of its use in agriculture, since it serves as a drainage canal for Moon Moo’s fields, which are connected to the Canal via a drainage ditch. R. at 6. Therefore, the Canal likewise falls into the category of a public trust navigable water under *The Montello*.

The district court erred in holding that the Canal cannot be a public trust navigable water because it was artificially constructed. *See* R. at 8–9. Under federal public trust law, all “navigable-in-fact” waters are public trust navigable waters regardless of whether they are completely natural or man-made. *See, e.g., United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407–08 (1940). Despite the early rule’s mention of a water’s “ordinary condition” and

“natural state,” the Supreme Court has ruled that artificial improvements to a waterway can support a finding of navigability. *Id.* at 407–08. Because *The Daniel Ball*’s holding as modified by *Appalachian* illustrates that the determination turns on the water’s “availability for navigation,” and not merely its “natural condition,” *see id.* at 407, the Canal is a public trust navigable water. That the Canal is commonly used by boaters and has a continuous surface connection to the Deep Quod and Mississippi Rivers, R. at 5, illustrates its availability as a highway for commerce. Therefore, regardless of its “natural” condition, the Canal is a public trust navigable water under federal common law.

In finding that the Canal is not a public trust navigable water, the district court erroneously relied on *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), for the faulty proposition that “there is no public right of navigation in a man-made water body.” *See* R. at 9. However, the district court conflated two separate issues raised in that case. In *Kaiser*, the owners of a pond connected to the ocean by canal dredged the pond to make it a navigable marina. *Kaiser*, 444 U.S. at 167–68. According to the Supreme Court, the case presented two issues: first, whether the federal government could require a free right of access to the now-navigable marina, and second, whether such access would amount to a taking. *Id.* at 174. The Court found that, although the marina was artificially constructed, “there is no question but that Congress could assure the public a free right of access to the . . . [m]arina.” *Id.* However, because the marina was not navigable prior to the plaintiff’s investment, and the pre-existing pond had always been private property, “the Government’s attempt to create a public right of access to the improved pond goes so far beyond ordinary regulation or improvement . . . as to amount to a taking.” *Id.* at 178–79. Thus, while the marina itself fell within the federal government’s definition of a public trust navigable waterway, the government would have to reimburse the

owners for their investment-backed expectation in the marina in order to allow public access. *Id.* at 175–79.

Like the marina in *Kaiser*, the Canal is a manmade body of water that is nonetheless “navigable” according to federal common law. Furthermore, unlike the marina in *Kaiser*, because the public has been using the Canal freely, the government is not creating a new public right of navigation. *See R.* at 5. Nor is there a taking question at issue in the present case.² Consequently, unlike in *Kaiser*, there are no other legal considerations that would prevent this Court from applying the public trust doctrine.

B. Even if this Court applies state public trust law on whether man-made water bodies can be publicly navigable, the Canal is navigable under the law of the majority of states.

Federal public trust doctrine, often termed “navigational servitude,” provides a baseline for states’ interpretation of the word “navigable,” while state common law on the issue has focused on sovereign ownership of the beds and banks of these waters. *See* Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 647 (1986). Because neither Riverwatcher nor the EPA challenge Moon Moo’s private ownership of the bed and banks of, the present case deals solely with the right of public navigation of the canal.³ *See R.* at 2. Thus, federal common law on navigational servitude should apply. *See supra* Part I.A.

However, should this Court find that state public trust law applies, the Canal is still a

² Even assuming Moon Moo has a property interest in the Canal, they invested no money to make the Canal navigable, have not excluded the public from using the Canal, and have not presented any argument suggesting that the Canal is private property. *See R.* at 5.

³ For states to own title to the beds and banks of navigable waters, the water must have been navigable at the time of the state’s entry into the union. *See Utah v. United States*, 403 U.S. 9, 10 (1971). However, this rule does not affect Queechunk Canal’s status because navigability may arise later. *Appalachian*, 311 U.S. at 408.

public trust navigable waterway in most jurisdictions, all of which include a broader range of waterways than does federal jurisprudence.⁴ States' tests for public trust navigable waters most commonly focus on whether the water is "navigable-in-fact," adopting a standard that is either equivalent to or less stringent than that in *The Daniel Ball*.⁵ Of the states that have reached the issue of whether man-made waterways can be considered "navigable" for the purpose of a public right of navigation and vary from the federal test, only West Virginia strictly excludes man-made waterways from the public trust. *See, e.g., Campbell Brown & Co. v. Elkins*, 93 S.E.2d 248, 262 (1956) (limiting the term navigable to waterways "unaided by artificial means or devices.") (citations omitted).

The majority of states that have directly addressed the issue of man-made and artificial navigable waterways have found that they are still public trust navigable waterways, so long as they are "navigable-in-fact." *See, e.g., Ace Equip. Sales, Inc. v. Buccino*, 869 A.2d 626, 631 n.7 (Conn. 2005) (upholding a lower court's ruling that the man-made status of a waterway doesn't matter for purposes of the public trust doctrine); *White's Mill Colony Inc. v. Williams*, 363 S.C. 117, 125–26, (Ct. App. 2005) (finding that "considerations such as whether the waterway is natural or man-made . . . have been found to have no bearing on the question of navigability.").

As a matter of first impression, this Court should adopt the rule of the majority and find that a man-made waterway may still be considered a public trust navigable water. Because the majority approach is less restrictive, it is more likely to protect the public's significant interest in

⁴ Application of the public trust doctrine has shifted to include navigable waters that satisfy the lesser state law standard of navigability instead of the more stringent federal standard. Robin Kundis Craig, *A Comparative Guide to the Eastern Public Trust Doctrines: Classifications of States, Property Rights, and State Summaries*, 16 PENN ST. ENVTL. L. REV. 1, 11–14 (2007).

⁵ *See e.g., Bear Dredging L.L.C. v. Alabama Dept. of Rev.*, 855 So.2d 513, 519 (Ala. 2003) (adopting the federal test); *Floyd County v. Allen*, 227 S.W. 994, 995 (Ky. 1921) (holding that public rights exist in any waterway that can float a log).

commerce, environmental health, and fairness, values that the public trust doctrine was intended to protect. In practice, the Canal is already used as a public trust navigable waterway, as a shortcut to the Deep Quod River. *See* R. at 5. To hold otherwise would not only reject the approach adopted by most states and federal law, but it would essentially create a private property right where none previously existed, denying the public use of a navigable waterway that it has used for decades. To best protect the interests of the public in recreation, commerce and transportation, New Union should follow the majority of states that have addressed the issue, and find that the Canal is a public trust navigable water.

C. Even if this Court finds that the Canal is not a public trust navigable water, Riverwatcher's intrusion was not trespass because Moon Moo gave implicit consent.

Even if this Court finds that the Canal is Moon Moo's private property rather than a public trust navigable waterway, Riverwatcher's entrance into the canal was not a trespass because Moon Moo gave implicit consent to Riverwatcher's entry. It is a complete defense to trespass if the possessor of land gives consent to the actor's presence, so long as the scope of that consent is not exceeded. *See, e.g., Brazerol v. Hudson*, 262 Md. 269, 273 (1971). Moreover, consent may be implied to the public by the habits of the country. *McKee v. Gratz*, 260 U.S. 127, 136 (1922) (finding that individuals who collected mussels on defendant's land did not trespass, given the common practice to freely "wander, fish and hunt" on the land in question). Because Moon Moo has allowed the Canal to be commonly used as a shortcut to Deep Quod River, the farm gave implied consent for Riverwatcher's presence in the Canal as a member of the boating public. The public's use of the Canal persisted in spite of the "No Trespassing" signs the farm had posted. *See* R. at 5. Because public use continued without further interference from Moon Moo, it can be inferred that the farm consented to the use.

Riverwatcher's collection of photographs and water samples did not exceed the terms of

Moon Moo's implied consent. By allowing the public to use the Canal as a shortcut for the Deep Quod River, Moon Moo consented to the public's use of the water. James did not exceed this consent by merely collecting photographs and water samples from the Canal. Moreover, nothing in the record suggests that he set foot on the Canal's bed or banks. *See R.* at 6.

Furthermore, the public interest in monitoring water pollution weighs against a finding of trespass in this case. To find that Riverwatcher committed a trespass by entering a commonly used canal to take photographs and collect water samples documenting ongoing pollution would hold those who defend the health of our waterways to a higher legal standard than the average recreational user. Because Riverwatcher did not engage in any activity that exceeded the terms of Moon Moo's implied consent to enter the canal, there was no trespass and the evidence collected by Riverwatcher is admissible.

II. Even if the Court finds that the evidence was obtained through trespass, it is still admissible under the CWA.

The district court erred in its holding that, because the evidence obtained by Riverwatcher was obtained through trespass, it is not admissible in a civil enforcement action under 33 U.S.C. §§ 1319 and 1365. *See R.* at 9. In holding that the evidence was inadmissible, the district court misapplied two cases relating to the application of the exclusionary rule in Occupational Safety and Health Act (OSHA) adjudications. These cases do not apply to the CWA. Furthermore, because the exclusionary rule does not typically apply in civil suits, and because no part of the CWA's statutory text or regulations require its application, the rule should not act to prevent the admission of evidence acquired through trespass in a CWA civil enforcement action.

A. The district court erroneously relied on two OSHA cases to apply the Fourth Amendment exclusionary rule in CWA civil enforcement cases.

The district court cites *Trinity Indus., Inc. v. OSHRC*, 16 F. 3d 1455 (6th Cir. 1994) and

Smith Steel Casting Co. v. Brock, 800 F.2d 1329 (5th Cir. 1986) to support the proposition that “at least two circuits have held that the Fourth Amendment exclusionary rule applies even though the enforcement action is nominally a ‘civil’ action.” R. at 6. However, the rulings in these cases were actually much narrower. Both courts ruled that the exclusionary rule *does not* apply to administrative enforcements, even when evidence was obtained illegally; rather, it only applies to OSHA enforcement actions when assessing penalties for past violations. *Trinity*, 16 F.3d at 1461–62 (citing *Smith Steel*, 800 F.2d at 1334) (emphasis added) (“*we do not believe that the exclusionary rule should be invoked to prevent . . . correction of OSHA violations involving unsafe or unhealthy working conditions, even though the evidence supporting the order was improperly obtained.*”).

Moreover, the Supreme Court’s rulings in *Trinity* and *Smith Steel* were specific to cases involving: 1) an OSHA enforcement proceeding 2) whose object is to assess penalties against the employer for past OSHA violations. *See id.*; *Smith Steel*, 800 F.2d at 1334. Neither of these aspects apply to the present case. These decisions were specific to OSHA—they cannot be extended to civil enforcements arising under other statutes. The exclusionary rule only applies in OSHA proceedings because the Occupational Safety and Health Review Commission invoked the exclusionary rule in their own regulations. *Trinity*, 16 F.3d at 1461. By comparison, no such regulation promulgated by the EPA, nor any text within the CWA itself, implies that the exclusionary rule should apply to civil enforcement actions or citizen suits under the Act. In fact, the CWA specifically allows enforcement of a violation “on the basis of *any* information available” 33 U.S.C. § 1319(a) (emphasis added).

Finally, if the Court does find that the decisions in *Trinity* and *Smith Steel* apply here, those cases only allowed for the use of the exclusionary rule to prevent the admission of illegally

acquired evidence in actions to assess penalties after a violation has been found. *Trinity*, 16 F.3d at 1461–62 ; *Smith Steel*, 800 F.2d at 1334. Even if this Court were to find that the rule applies here, the reasoning of those decisions would only bar illegally acquired evidence for the purposes of assessing criminal and civil penalties against Moon Moo under 33 U.S.C. § 1319 (c), (d), and (g). Thus, following the logic in *Trinity* and *Smith Steel*, the exclusionary rule does not apply in determining if there has been a violation and in issuing an injunction to stop such a violation according to the Administrator’s powers under §§ 1319 (a) and (b).

B. When applying the test for use of the exclusionary rule in civil enforcement proceedings to this case, the deterrent effect of the rule does not outweigh the value of the evidence in question.

Contrary to the district court’s holding that the exclusionary rule applies in all civil enforcement actions, R. at 9, the Supreme Court has set forth a well-established framework for deciding the types of proceedings in which application of the rule is appropriate. *See generally United States v. Janis*, 428 U.S. 433, 446 (1976). The proper inquiry is made by weighing the “likely social benefits of excluding unlawfully seized evidence against the likely costs.” *Id.* “On the benefit side of the balance . . . is . . . deter[ing] future unlawful police conduct.” *Id.* On the cost side is “the loss of often probative evidence and all of the secondary costs that flow from the less accurate or more cumbersome adjudication” *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1041 (1984).

The Court applied this weighing test in *Janis*, in the context of a federal civil tax assessment preceding following the unlawful seizure of evidence by federal officials. 428 U.S. at 447. After first noting that “[i]n the complex and turbulent history of the rule, the Court never has applied it to exclude evidence from a civil proceeding, federal or state,” *Id.*, the Court determined that the deterrence value of the exclusionary rule in the civil context was slight

because application of the rule would contribute little to the deterrence of unlawful conduct by state officials. *Id.* Thus, the Court concluded that, the loss of “concededly relevant and reliable evidence” outweighed the likely social benefits of applying the rule in the civil proceeding. *Id.*

As in *Janis*, applying the exclusionary rule in this case will have almost no effect as an active deterrent of future agency misconduct. This is because, as in *Janis*, the agency would not be able to later use the same evidence to charge Moon Moo (or any other party who violates the Act) with criminal penalties under § 1319(d). Furthermore, the probative value of the relevant evidence in this case is very high, because it clearly connects Moon Moo’s operations to the high levels of nitrates measured in Farmville’s water supply. The public benefit to allowing the evidence in this case is even greater than in *Janis*, because Moon Moo’s pollution has put the health and safety of the entire community of Farmville—and an unknown number of downstream communities—at risk. Because the public health and welfare concerns at issue and the highly probative evidence in question far outweigh the benefits of applying the exclusionary rule in this case, the exclusionary rule should not be applied to bar the evidence collected by Riverwatcher.

III. Moon Moo requires a permit under CWA § 402 permitting program

Because Moon Moo meets the definition of a CAFO and fails to meet the requirements for the agricultural stormwater discharge exemption, it is a “point source” and must comply with NPDES permitting requirements under the CWA. The exemption does not apply because the discharges of manure into the Deep Quod River are triggered by malfeasance, not by precipitation. However, even if Moon Moo did not meet the definition of a CAFO, the drainage ditch on Moon Moo’s property itself is a “point source,” thus triggering NPDES permitting requirements.

A. Moon Moo is subject to NPDES permitting because pollutants originating from its manure application area are discharged from a “point source” into the Deep Quod River, a “water of the United States.”

Congress’s objective in enacting the CWA is expansive: “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). To help achieve this goal, the CWA prohibits the unlicensed discharge of any pollutant. 33 U.S.C. § 1311(a). The statute requires a NPDES permit for any addition of (1) pollutant from a (2) “point source” to (3) “waters of the United States.” 33 U.S.C. § 1342, 1362(12)(A); *EPA v. California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 205, (1976).

It is undisputed that runoff from Moon Moo’s application of a manure–whey mixture to their fields contained pollutants in the form of nitrates and fecal coliforms, as well as suspended solids. R. at 7. It is also undisputed that Deep Quod River is a “water of the United States.” R. at 7. Because it is beyond argument that Moon Moo has, without a NPDES permit, discharged pollutants in United States waters, R. at 5–7, the only factual dispute is whether the runoff described above was from a “point source.”

1. Moon Moo is a “point source” because, as a dairy farm with 350 head of milk cows discharging pollutants into the Deep Quod River, it fits squarely within the regulatory definition of a “Medium CAFO.”

Under the plain language of the CWA, a “Medium CAFO” such as Moon Moo is a “point source.” A “point source” is defined as “any discernible, confined and discrete conveyance, including . . . concentrated animal feeding operation[s] . . . from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14). EPA regulations define both Animal Feeding Operations (AFOs) and its subset, CAFOs. 40 C.F.R. § 122.23. A “Medium CAFO” is an AFO⁶ with “200

⁶ An AFO is “a lot or facility . . . where . . . animals . . . are . . . confined and fed or maintained . . . and . . . [c]rops . . . are not sustained in the normal growing season over any portion of the lot or facility.” 40 C.F.R. § 122.23(b)(1). There is no dispute Moon Moo is an AFO. R. at 8.

to 699 mature dairy cows, whether milked or dry,” which also meets one of two additional conditions: “(A) [p]ollutants are discharged into waters of the United States through a man-made ditch . . . (B) [p]ollutants are discharged directly into waters of the United States which originate outside of and . . . come into direct contact with the animals confined in the operation.” *Id.* § 122.23(b)(6)(i)(A)–(ii)(B).

Moon Moo has 350 dairy cows, which undisputedly satisfies the first part of the definition of a “Medium CAFO.” *Id.* § 122.23(b)(6)(i)(A); R. at 8. In addition, because test results showed elevated levels of pollutants in water flowing from a drainage ditch into the the Canal, R. at 6, Moon Moo is discharging pollutants “which originate outside of and pass over, across, or through the facility,” directly into the Deep Quod River, a “water of the United States,” thereby satisfying the second prong of the “Medium CAFO” definition. *See* 33 U.S.C. § 1362(14); R. at 5. Thus, as a “Medium CAFO,” Moon Moo requires a NPDES permit because excluding Moon Moo from “point source” controls would be contrary to the plain language of the Act, and inconsistent with the Act’s goal.

2. Both the Canal and the drainage ditch which flows into the Canal are “point sources” from which pollutants flow into the Deep Quod River.

Even if the Court finds that Moon Moo is not a CAFO, the farm is still subject to NPDES permitting because the drainage ditch and the Canal are “point sources.” The statutory definition of “point source” specifically includes ditches. 33 U.S.C. § 1362(14). It is also well established in federal case law interpreting the CWA that a ditch is a “point source.” *See Rapanos*, 547 U.S. at 735–36 (arguing that “by including [ditches] in the definition of ‘point source’” the CWA classifies them as “point sources”); *Concerned Area Residents for Env’t v. Southview Farm*, 34 F.3d 114, 118 (2d Cir. 1994) (finding that a swale that collected excess liquid manure from field operations and piped it into ditch, which discharged to a nearby stream, was a “point source”).

In the alternative, the Canal is a “point source” because it conveys pollutants from the ditch into the Deep Quod River. The essence of a “point source” discharge is that it be from a “discernible, confined, and discrete conveyance.” 33 U.S.C. § 1362(14); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004) (“a point source need not be the original source of the pollutant; it need only convey the pollutant to ‘navigable waters.’”). The definition of a “point source” embraces the broadest possible definition of any identifiable conveyance from which pollutants might enter “waters of the United States.” 33 U.S.C. § 1362(14); *Peconic Baykeeper, Inc. v. Suffolk Cnty.*, 600 F.3d 180, 187 (2d Cir. 2010) (collecting cases which classify a broad variety of identifiable conveyances as “point sources”). At fifty yards wide, the Canal is both discernable and confined. R. at 5. It also flows into the Deep Quod River, thereby conveying pollutants from the ditch into the River. Because Moon Moo’s drainage ditch and the Canal are “point sources” from which pollutants are discharged into the Deep Quod River, Moon Moo is subject to NPDES permitting.

B. The district court erred in holding that excess nutrient discharges from Moon Moo’s manure application are exempted from NPDES permitting as agricultural stormwater runoff.

A discharge from an area under the control of a CAFO “can be considered *either* a CAFO discharge that is subject to regulation *or* an agricultural stormwater discharge that is not subject to regulation.” *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 507 (2d Cir. 2005). Because the the origin of the pollutants is not at issue and CAFO land application discharges, such as Moon Moo’s, fall within the scope of regulation, the district court erroneously relied on *Alt v. EPA*, 979 F.Supp. 2d 701, 715 (N.D. W. Va. 2013), when it held that any discharge from the ditch is exempted from NPDES permitting. R. at 10. Furthermore, the agricultural stormwater exemption does not apply to Moon Moo because the discharge is the result of malfeasance not precipitation.

1. The court erroneously applied *Alt v. EPA* to the case at bar because the origin of the pollutants is deliberate and because CAFO land application discharges squarely fall under existing EPA regulations.

Because the discharges in question originate from Moon Moo's landspreading operation and because Moon Moo is a "Medium CAFO," the discharges are within the scope of the EPA's CAFO regulations. In *Alt*, litter and manure washed from a CAFO to navigable waters by precipitation was an "agricultural stormwater discharge." 979 F.Supp. 2d at 706. Because the litter had been unintentionally tracked or spilled on the farmyard and was then washed into navigable waters by the rain, the issue presented to the court was whether incidental manure and litter discharges from outside the production area were within the intended scope of the CAFO regulations. *Id.* The court held that because the manure and litter in the farmyard would not have become discharges of a pollutant unless and until stormwater conveyed the particles, the runoff was "agricultural stormwater discharge." *Id.*

Given that the discharges in this case were not incidental but originated from Moon Moo's landspreading practices, an activity included in the EPA regulations, there is no such ambiguity as was the case in *Alt*. 40 C.F.R. § 122.23(e) ("[I]and application discharges from a CAFO are subject to NPDES requirements."). Furthermore, because CAFOs most frequently discharge from land application areas due to wet weather events following manure spreading or over-application of waste, such an interpretation goes against the spirit of the CWA and would likely cripple CAFO regulation nationwide. Tarah Heinzen & Abel Russ, *Using Emerging Pollution Tracking Methods to Address the Downstream Impacts of Factory Farm Animal Welfare Abuse*, 31 PACE ENVTL. L. REV. 475, 483 (2014). The district court's broad reading of *Alt* cripples the CWA by holding that all runoff from a CAFO during a rain event is exempt from regulation under the NPDES permit program. Therefore, this Court should reverse.

2. The runoff from Moon Moo does not fall under the agricultural stormwater exemption because it is not a precipitation-related discharge as required by the EPA regulations.

Because discharges related to a landspreading operation covered by a NMP are only exempt under the stormwater exemption if they are precipitation related, *Nat'l Pork Producers Council v. EPA*, 635 F.3d 738, 748 (5th Cir. 2011), the district court erred in finding that Moon Moo was exempt simply by virtue of having an NMP. R. at 10. In 1987, Congress amended the CWA to mandate comprehensive regulation of certain forms of stormwater discharges, including those associated with industrial activity. 33 U.S.C. § 1342(p). At the same time, Congress amended the definition of “point source” to exclude agricultural stormwater discharges. *Id.* § 1362(14). Nevertheless, Congress intended the exemption to be very limited given the underlying urgency that prompted including CAFOs in the original legislation.⁷

Congress provided no definition for the term “agricultural stormwater” in the CWA. However, EPA regulations state that within the context of land application discharges, an agricultural stormwater discharge is “a *precipitation-related discharge* of manure, litter or process wastewater from land areas under the control of a CAFO,” where the manure “has been applied in accordance with site specific nutrient management practices that ensure *appropriate agricultural utilization* of the nutrients.” 40 C.F.R. § 122.23(e) (emphases added); *Waterkeeper*, 399 F.3d at 507 (stating that the EPA’s interpretation is entitled to *Chevron* deference because the statute is “self-evidently ambiguous as to whether CAFO discharges can ever constitute agricultural stormwater.”). Thus, whether “the discharge is regulable turns on the primary cause

⁷ Senator Dole of Kansas noted in floor debate on the legislation that “[u]ntil recently animal and poultry waste has not been considered a major pollutant. . . . however, as development of intensive livestock and poultry production on feedlots and in modern buildings has created massive concentrations of manure in small areas. The capacity of the soil and plant cover to recycle has been greatly surpassed.” A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972 (Comm. Print 1973), vol. 2 at 1295.

of the discharge.” *Waterkeeper*, 399 F.3d at 508.

The agricultural stormwater exemption “affirms the impropriety of imposing on ‘any person,’ liability for agriculture-related discharges triggered not by negligence or malfeasance, but by the weather.” *Id.* Like the CWA itself, the CAFO rule seeks to remove liability for agricultural discharges “primarily caused by nature.” *Id.* “A discharge of liquid manure would not be exempt just because it happened to be raining at the time, but a discharge of such manure caused by precipitation would be exempt.” *Alt*, 979 F.Supp.2d at 701 (citing *Southview Farm*, 34 F.3d at 121). However, the discharges from Moon Moo are triggered not by weather, but by malfeasance—specifically land application during rain events. The record is clear that over-application of the manure–whey mixture during rain events resulted in excess runoff of nutrients from the fields. R. at 6; see also Jan G. Laitos & Heidi Ruckriegle, *The Clean Water Act and the Challenge of Agricultural Pollution*, 37 VT. L. REV. 1033, 1038 (2013) (“If applied incorrectly or in excessive amounts . . . animal waste byproducts . . . impact[] groundwater, or . . . adversely affect[] surrounding downstream surface water bodies and the environment.”). Consequently, it was Moon Moo’s improper application, not precipitation that caused the runoff.

The EPA further clarified that the agricultural stormwater exemption for discharges from CAFOs only applies in the context of proper land application. See *NPDES Permit Regulation and Effluent Limitation Guidelines and Standards for CAFOs*, 66 Fed. Reg. 3031 (Feb. 12, 2003) (“the land application areas under the operational control of the CAFO, where CAFO manure or wastewater is *appropriately* used as a fertilizer for crop production, appear to have the kind of agricultural activity that Congress intended to exempt.”) (emphasis added). The Second Circuit underscored the need for appropriate application when it found that discharge could be regulated where “run-off was primarily caused by the over-saturation of the fields rather than the rain and

that sufficient quantities of manure were present so that the runoff could not be classified as ‘stormwater.’” *Southview Farm*, 34 F.3d at 121. As in *Southview*, Moon Moo’s application of manure was improper—it oversaturated the field and allowed runoff to penetrate the groundwater. R. at 6. Moreover, merely having a NMP does not guarantee exemption from regulation. *See Cmty. Ass’n for the Restoration of the Env’t v. Nelson Faria Dairy, Inc.*, CV-04-3060-LRS, 2011 WL 6934707, at *5 (E.D. Wash. Dec. 30, 2011) (noting NMP prohibits the application of liquid manure under conditions that allow contaminated waters to run off fields and into surface waters, or to be allowed to infiltrate to groundwater). While Moon Moo has applied the manure mix “in accordance with” its NMP, testing revealed pollutants from the landspreading had penetrated the groundwater and flowed into the Deep Quod River. R. at 6. Moreover, there is no indication that Moon Moo’s NMP was reviewed to ensure its continued validity with the terms of a “no-discharge” feeding operation when manure effluent output increased with the addition of 80 cows, or when the farm began adding the acid whey to the land application mixture. As a result, even if the discharges were precipitation related, the agricultural stormwater exemption does not apply, and Moon Moo is subject to liability under the CWA.

IV. The district court erred in concluding that Moon Moo was not subject to a citizen suit under RCRA because Moon Moo’s mixture is a “solid waste” under the statute and the plaintiffs have established that the mixture constitutes an “imminent and substantial endangerment” to human health.

“Discarded” agricultural wastes fall squarely within RCRA’s definition of “solid waste.” Furthermore, neither the regulatory exemption for agricultural wastes nor the case law exemptions for materials that are beneficially reused, apply to the over-application of manure to fields as fertilizer. Moreover, courts have construed the imminent and substantial endangerment provision broadly to effectuate Congress’s intent to protect human health and the environment. Because this practice often leads to excess runoff of contaminants into drinking water supplies,

when no other environmental statute regulates the activity, asserting RCRA jurisdiction over such waste is in line with Congress' goals in enacting the statute. Therefore, this Court should find that Moon Moo's manure-whey mixture is a RCRA "solid waste" and over-application has created an imminent and substantial endangerment.

A. Moon Moo's manure-whey mixture is a "solid waste" because the mixture falls within the plain meaning of the definition and is not covered by any regulatory or case law exemption.

RCRA "is a comprehensive environmental statute that governs the treatment, storage and disposal of solid and hazardous waste . . . 'so as to minimize the present and future threat to human health and the environment.'" *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 483 (1996) (quoting 42 U.S.C. § 6902(b)); *Burlington N. & Santa Fe Ry. Co. v. Grant*, 505 F.3d 1013, 1019 (10th Cir. 2007) (citing 42 U.S.C. § 6902(a)). To achieve this goal, Congress created a bifurcated statutory regime where a waste's regulatory treatment is dependent upon its classification as either a "hazardous" or non-hazardous "solid waste." *See Conn. Coastal Fishermen's Ass'n v. Remington Arms Co.*, 989 F.2d 1305, 1313 (2d Cir. 1993) (citing 42 U.S.C. § 6903(5)) (clarifying that "[h]azardous wastes" are defined as a subset of "solid wastes"). Consequently, whether material is a "solid waste" as defined by the statute is a threshold question in RCRA. *See Remington*, 989 F.2d at 1313 ("[f]or a waste to be classified as hazardous, it must first qualify as a solid waste under RCRA"); *see also* 42 U.S.C. § 6903(5). The statute defines "solid waste" 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,*

42 U.S.C. § 6903 (emphasis added).

Because Moon Moo's mixture is "discarded material . . . resulting from . . . agricultural operations," *see id.*, the plain language of the definition encompasses the type of waste at issue in

this case. Although the EPA has promulgated regulations exempting “agricultural wastes, including manures and crop residues, returned to the soil as fertilizers or soil conditioners,” 40 C.F.R. § 257.1(c)(1), the runoff from Moon Moo’s over-application of the manure–whey mixture does not “return to the soil as fertilizer” and therefore does not satisfy the requirement of the exemption. Moreover, the exemptions that the courts of appeal have developed for recycled and beneficially reused materials apply only to the narrower definition of “solid waste” contained within the regulatory regime for hazardous wastes. However, even applying those considerations to this case, Moon Moo’s waste fails to escape classification as a “solid waste.” Finally, Congress demonstrated a clear intent that RCRA would close the last remaining loophole in environmental law by regulating the land disposal of solid and hazardous wastes that pollute air and water but escape regulation under the CWA and Clean Air Act. Because allowing Moon Moo to escape liability under RCRA by reading the definition of “solid waste” to exclude the mixture applied to their fields would violate the goals of RCRA, this Court should reverse.

1. Under a plain language reading of the statute, Moon Moo’s manure–whey mixture is a RCRA “solid waste.”

A plain reading of the statute supports a finding that Moon Moo’s manure–whey mixture is “other discarded material . . . resulting from . . . agricultural operations.” When Moon Moo applies manure to its fields in excess of agronomic need, allowing some of the mixture to runoff into the Deep Quod River, this excess agricultural material has been “discarded” under the ordinary meaning of the term. Moreover, regardless of the mixture’s intended purpose as a fertilizer and soil amendment, the excess material is not returned to the soil and is not used; it therefore does not fall within the exemption for agricultural wastes.

a. The plain meaning of the term “discard” encompasses the runoff from Moon Moo’s over-application of manure–whey mixture to its fields.

It is well established that when a material has been “indisputably discarded” it is subject to regulation as a “solid waste” under RCRA. *API*, 906 F.2d at 741. Courts look to the plain meaning of the term “solid waste” to determine whether a material falls within the purview of the statute, routinely stating that items that are “disposed of, abandoned or thrown away” are “discarded.” *See, e.g., Am. Mining Cong. v. EPA (“AMC I”)*, 824 F.2d 1177, 1193 (D.C. Cir. 1987). In the case of agricultural materials, the question is whether the grower or farmer has “drop[ped], dismiss[ed], let go, or g[o]t[ten] rid of as no longer useful, valuable or pleasurable” the material. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1048 (9th Cir. 2004) (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 644 (1993)). In this case, once Moon Moo applies the manure–whey mixture to its fields in amounts exceeding agronomic need, the excess flows into the river and is “let go . . . of as no longer useful.” Because the mixture overflow is “disposed of,” it clearly falls within the term “solid waste” as defined in 42 U.S.C. § 6903.

b. Because excess agricultural waste applied in quantities exceeding agronomic need is not “returned to the soil,” RCRA’s regulatory exemption for fertilizers and soil conditioners does not apply to Moon Moo’s manure–whey mixture.

While RCRA does contain an exemption for certain agricultural wastes, the exemption is narrowly framed: “The criteria do not apply to agricultural wastes, including manures and crop residues, *returned to the soil as fertilizers or soil conditioners.*” 40 C.F.R. § 257.1(c)(1) (emphasis added); *see also, id.* § 261.4(b)(1) (excluding “solid waste” 1) generated by “raising of animals, including animal manures” . . . 2) “*and which are returned to the soils as fertilizers.*” (emphasis added)). As a result, “the determination of whether defendants return animal waste to the soil as organic fertilizer is a functional inquiry focusing on defendants’ use of the animal waste products rather than the agriculture waste definition.” *Water Keeper Alliance, Inc. v.*

Smithfield Foods, Inc., No. 4:01-CV-27-H(3), 2001 WL 1715730, at *4–5 (E.D.N.C. Sept. 20, 2001). As a question of fact, the court must ask whether an agricultural operation returns animal waste to the soil for fertilization or applies it in such large quantities that its usefulness as organic fertilizer is eliminated. *Id.* at *5.

Applying this factual inquiry in a similar case, at least one district court found that manure that has leaked into groundwater in part as a result of over-application to fields is “discarded” because it has been abandoned and no longer serves a useful purpose. *Cnty. Ass’n for Restoration of the Env’t, Inc. v. George & Margaret LLC (CARE)*, 954 F. Supp. 2d 1151, 1157 (E.D. Wash. 2013). In *CARE*, defendant dairies managed their manure in various ways, including applying it to agricultural fields as fertilizer. *Id.* at 1154. The Court found that over-application brought the manure within the definition of “solid waste” in spite of the regulatory exemption, reasoning that “it is . . . untenable that the over-application or leaking of manure that was initially intended to be used as fertilizer can *never* become ‘discarded’ merely because it is ‘unintentionally’ leaked or over-applied.” *Id.* at 1158. *But see, Oklahoma v. Tyson Foods, Inc.*, No. 05-CV-0329-GKF-PJC, 2010 WL 653032, at *10 (N.D. Okla. Feb. 17, 2010) (finding that, because defendant farmers did not intend to throw the litter away and that they “pay a market value to obtain it,” over-application of poultry litter was not “discarded”).

In this case, over-application of the manure–whey mixture as a fertilizer has contaminated the Farmville water supply, R. at 6, just as similar application practices polluted groundwater in *CARE*. Moreover, unlike the poultry litter at issue in *Tyson Foods*, which had an established market value, Moon Moo obtains the whey for free. R. at 5. Additionally, there is no other evidence in the record to suggest that the whey or manure, either used alone or in combination, have any commercial value. Because Moon Moo’s manure–whey mixture is not

returned to the soil as a fertilizer and has no market value, this Court should find that over-applied quantities of the manure–whey mixture do not fall within the regulatory exemption.

c. RCRA legislative history demonstrates that Congress intended to close “the last remaining loophole” in environmental law by regulating any waste that contributes to pollution within the definition of “solid waste.”

As a remedial statute enacted to protect the public health, Congress’s purposes are most likely to be satisfied by construing RCRA broadly. *See e.g., United States v. Aceto Agr. Chem. Corp.*, 872 F.2d 1373, 1383 (8th Cir. 1989). The courts have thus recognized that Congress purposefully defined “solid waste” to include “discarded materials” in order to give RCRA a broader reach. *Id.* Moreover, the legislative history is replete with statements illustrating Congress’s intent that RCRA apply to disposal practices that result in water pollution. *See, e.g.,* H.R. REP. NO. 94-1491, at 35 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6311 (“Decreasing the degree of subsurface leachate, surface runoff and air pollution from discarded materials disposal sites will lessen the degree of air and water pollution.”); *id.* at 6273 (“In promulgating the minimum requirements the Administrator is required to consider . . . the protection of the quality of ground and surface waters from leachate and runoff . . .”). These statutory provisions indicate that Congress intended RCRA to address threats to human health and the environment caused by “solid waste” disposal and simultaneous recognition that “solid waste” disposal has the potential to contribute to air and water pollution yet may fall outside the statutory purview of other acts. The legislative history further illustrates that Congress recognized the interrelationship between land disposal of waste and air and water pollution and intended to close “the last remaining loophole in environmental law” with the RCRA. H.R. REP. NO. 94-1491, *supra*, at 4. (“[T]he Committee believes that this legislation is necessary if other environmental laws are to be both cost and environmentally effective. . . . The existing methods of land disposal

often result in air pollution, subsurface leachate and surface run-off, which affect air and water quality. This legislation will eliminate this problem and permit the environmental laws to function in a coordinated and effective way.”).

Exempting Moon Moo from regulation under both the CWA and the RCRA would allow the farm to continue its unregulated disposal of manure wastes that contribute to water pollution and create a threat to human health and the environment. Such a holding would violate the clearly expressed legislative intent of Congress to close loopholes in the pre-existing statutes that resulted in the creation of more solid-waste pollution. Accordingly, this Court should reverse.

2. The district court erred in applying the narrower regulatory definition of “solid waste” rather than the broader statutory definition, and even under the narrow reading, the manure–whey mixture is “discarded.”

“Solid waste” is defined at both the statutory and regulatory level in RCRA. 42 U.S.C. § 6903(27); 40 C.F.R. § 261.2. However, while the statutory definition applies to both hazardous and non-hazardous “solid waste,” the regulatory definition appears in the regulations dealing exclusively with hazardous wastes. *Compare* 42 U.S.C. § 6903(27), *with* 40 C.F.R. § 261.2. Because Moon Moo’s waste is not hazardous, the broader definition of “solid waste” contained in the statute and case law interpreting that provision should control. However, even if this Court applies the courts of appeals’ tests for determining what constitutes a “solid waste” under the narrower definition, Moon Moo’s manure–whey mixture remains subject to RCRA as a “solid waste.” Accordingly, this Court should reverse.

In interpreting the narrower regulatory definition of “solid waste” applicable to hazardous waste, the District of Columbia, Second and Eleventh Circuits have identified three relevant considerations for determining whether a recycled material is “discarded” under the definition of “solid waste” in RCRA: (1) whether the material is “destined for beneficial reuse or recycling in

a continuous process by the generating industry itself; (2) whether the materials are being actively reused, or whether they merely have the potential of being reused; and (3) whether the materials are being reused by the original owner, as opposed to a salvager or reclaimer.” *Meyer*, 373 F.3d at 1043 (citations omitted).

Importantly, the potential reuse of a material does not prevent it from being classified as “discarded.” *Am. Mining Cong. v. EPA* (“*AMC II*”), 907 F.2d 1179, 1186 (D.C. Cir. 1990). “Previously discarded solid waste, although it may at some point be recycled, nonetheless remains ‘solid waste.’” *United States v. ILCO, Inc.*, 996 F.2d 1126, 1132 (11th Cir. 1993). Thus, a material’s secondary character as recyclable material is irrelevant to the determination of whether it was “discarded.” *Id.* Materials that are “discarded” by one industry and delivered to another for use may still be considered a “solid waste,” particularly if they have “become part of the solid waste disposal problem” RCRA is meant to address. *API*, 906 F.2d at 740–41.

Further, in evaluating the immediacy of reuse and reasonableness of intervening storage times in *AMC II*, the court upheld EPA’s determination that material placed in wastewater treatment surface impoundments where it is “*capable of posing a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported or disposed of, or otherwise managed, by leaching into the ground*,” is “discarded material,” and hence a “solid waste.” *AMC II*, 907 F.2d at 1187 (citing 40 C.F.R. § 261.11(a)(3)) (emphasis added). Finally, in determining whether a material is a “beneficial” product or a RCRA “solid waste,” courts have examined whether the material has market value, and whether the party intended to throw the material away or put it to a beneficial use. *Tyson Foods*, No. 05-CV-0329-GKF-PJC, 2010 WL 653032, at *11.

In this case, Moon Moo’s manure–whey mixture fails to warrant an exemption from

being classified as “discarded.” As discussed in Part IV.A.1.a. above, Moon Moo’s mixture and its component parts have no market value. Further, the management practice at issue in this case is the over-application of the mixture to fields, resulting in runoff to the river, not the use of the material as a fertilizer returned to the soil. Moreover, both the manure and whey that comprise the mixture are themselves waste products. As such, the market value, management practice, and identity prongs of the beneficial use determination weigh against Moon Moo.

Second, Moon Moo’s manure–whey mixture is not used in a continuous process by the generating industry itself. The whey is transferred from one industry (yogurt production) to another (crop and raw dairy production) and sits in an outdoor surface storage lagoon for a period of time before use. As with the surface-storage of material in *AMC II*, the manure–whey mixture’s storage and management is a focus of RCRA regime. Moreover, unlike the waste in *AMC II*, which was simply “capable of posing a substantial present or potential hazard to human health or the environment,” Moon Moo’s waste has in fact run off the fields and into the river, resulting in an imminent threat to human health and the environment. Accordingly, this Court should reverse the district court’s finding that the mixture is not a RCRA “solid waste” because it is not “discarded.”

B. The district court erred in dismissing the imminent and substantial endangerment claim for “insufficient evidence” because it misread the liability standards of RCRA.

RCRA’s citizen suit provision provides that any person may commence a civil action:

(B) against any person . . . including any past or present generator, . . . who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment

42 U.S.C. § 6972. In applying this language, courts have looked to case law interpreting the related government enforcement provision, § 7003, as well as the legislative history of § 7002, to

conclude that Congress intended the citizen-suit provision to be read broadly. *See, e.g., Maine People's Alliance v. Mallinckrodt, Inc.*, 471 F.3d 277, 287 (1st Cir. 2006) (noting that Congress loosened the standard for liability under § 7003 and then tracked the § 7003 language in the citizen-suit provision).

Congress indicated that while “[RCRA] is essentially a codification of common law public nuisance remedies, . . . [s]ome terms and concepts . . . are meant to be more liberal than their common law counterparts.” *Cox v. City of Dall., Tex.*, 256 F.3d 281, 291–92 (5th Cir. 2001) (quoting S. REP. NO. 96–172, at 5 (1979), *reprinted in* 1980 U.S.C.C.A.N. 5019, 5023). As a result, § 7002 requires plaintiffs to prove four separate causation elements with lower proximate cause requirements than otherwise required under the common law. Michael Somers, *RCRA's New Causation Question: Linking Ubiquitous Wastes to Specific Defendants*, 38 B.C. ENVTL. AFF. L. REV. 193, 200 (2011). First, plaintiffs must prove that a defendant “contributed to” the handling of the waste in question. *Id.* Second, under the “may present an imminent and substantial harm” standard, plaintiffs must establish: (1) the endangerment is “imminent,” (2) the level of risk is sufficient to justify court action, and (3) the potential degree of harm is “substantial.” *Id.* (citing *Meghrig*, 516 U.S. at 485–86 (1996); *Dague v. City of Burlington*, 935 F.2d 1343, 1356 (2d Cir. 1991) *rev'd in part on different grounds*, 505 U.S. 557 (1992); *Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 399 F.3d 248, 259 (3d Cir. 2005)); S. REP. NO. 98–284, at 59 (1983)). The district court erred in applying a heightened causal standard to the elements of an imminent and substantial endangerment claim under RCRA. Because the evidence establishes Moon Moo’s landspreading practices have contributed to increased nitrates in the Deep Quod River, a condition that causes a substantial risk of harm to infants, plaintiffs have established the elements of their claim. As a result, this Court should reverse.

1. Moon Moo’s manure landspreading practices have contributed to increased nitrates in the Deep Quod River.

RCRA does not define the term “contribute” or any variation thereof. Consequently, courts have interpreted the word to mean “[to] have a share in any act or effect.” *Cox*, 256 F.3d at 294 (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 496 (1963)). Moreover, Congress intended the phrase “has contributed to or is contributing to” to be broadly construed. *Aceto*, 872 F.2d at 1383. Section 7002 therefore imposes strict liability upon persons who have contributed to or are contributing to activities that may present an endangerment, regardless of fault or negligence.⁸ Riverwatcher has presented evidence that the over-application of the manure–whey mixture is running off the fields and entering the Deep Quod River. Plaintiffs have thus established that Moon Moo’s landspreading practices contribute to, or “have a share in” the contamination of the watershed.

2. The harm from Moon Moo’s landspreading is an imminent endangerment because there is a demonstrated harm caused by increased nitrates in the watershed.

The term “endangerment” has been interpreted by courts to mean a threatened or potential harm. *Burlington*, 505 F.3d at 1020. *Id.* Injunctive relief is authorized when there *may* be a risk of harm—it is not necessary that Riverwatcher show proof of actual harm to health or the environment. *Id.* However, although the harm may be well in the future, the *endangerment* must be imminent. *Crandall v. City & Cnty. of Denver, Colo.*, 594 F.3d 1231, 1238 (10th Cir. 2010). The Supreme Court has stated that an endangerment can only be “imminent” if there is “a threat which is present *now*, although the impact of the threat may not be felt until later.” *Meghrig*, 516 U.S. at 486. Thus, a finding of “imminency” does not require a showing that actual

⁸ See EPA, GUIDANCE ON THE USE OF SECTION 7003 OF RCRA 17 (1997) [hereinafter EPA RCRA GUIDANCE], available at <http://www2.epa.gov/sites/production/files/2013-10/documents/use-sec7003-mem.pdf>.

harm will occur immediately, as long as the risk of threatened harm is present. *Burlington*, 505 F.3d at 1020 (citing *Meghrig*, 516 U.S. at 485).

Exposure to nitrates at levels above health-based risk values has been reported to have adverse health effects in a variety of situations, most notably in infants and animals. EPA, AG 101: NITRATE, <http://www.epa.gov/oecaagct/ag101/impactnitrate.html> (last visited Nov. 23, 2014). The most common and concerning health effect for children is “blue baby syndrome.” EPA, *Nitrates and Nitrites TEACH Chemical Summary 1*, available at http://www.epa.gov/teach/chem_summ/Nitrates_summary.pdf (last revised May 22, 2007). Infants less than four months old are the most sensitive population for blue baby syndrome, but it does occur in older age groups and can have numerous adverse effects, including coma and death. *Id.* at 3. Exposure to high levels of nitrates has also been associated with a range of other serious health issues from cancer to nervous system defects and diabetes. *Id.* The scientific evidence thus establishes that increased nitrates in the drinking water supply present a threat which is present *now*, although the severe health impacts may not be felt until later.

3. Because increased nitrates can lead to coma and death in infants, Riverwatcher has established that the potential degree of harm is substantial and that the level of risk is sufficient to justify court action.

Courts have consistently held that harm is substantial “where there is reasonable cause for concern that someone or something may be exposed to risk of harm.” *Burlington*, 505 F.3d at 1021 (citations omitted). Moreover, harm need not be quantifiable in order to be substantial. *Interfaith*, 399 F.3d at 259–60. Thus, plaintiffs need not prove “that a certain number of persons will be exposed, that ‘excess deaths’ will occur, or that a water supply will be contaminated to a specific degree.” *Ca. Dep’t of Toxic Substances Control v. Interstate Non-Ferrous Corp.*, 298 F. Supp. 2d 930, 980 (E.D. Cal. 2003). Furthermore, in light of RCRA’s language and purpose, the

courts have stated “if an error is to be made in applying the endangerment standard, the error must be made in favor of protecting public health, welfare and the environment.” *Burlington*, 505 F.3d at 1021 (quoting *Interfaith*, 399 F.3d at 259).

These considerations illustrate that the district court erred in finding that Riverwatcher presented insufficient evidence to establish an imminent and substantial endangerment claim. The record establishes that nitrate advisories were in effect precisely because excess nitrates present health risks to infants. R. at 6. Additionally, excess manure–whey mixture containing high levels of nitrates flowed from Moon Moo’s fields into the Canal and from there into the river. R. at 6. This evidence was sufficient under the relaxed causation standards of the imminent and substantial endangerment provision. Accordingly, this Court should reverse.

PRAYER

For the foregoing reasons, Plaintiff-Appellant Riverwatcher respectfully requests that this Court REVERSE the district court’s finding that Queechunk Canal is not a public trust navigable water, REVERSE the district court’s finding that the evidence presented by Riverwatcher is inadmissible, REVERSE the district court’s finding that the agricultural stormwater exemption applies to Moon Moo’s discharges, REVERSE the district court’s finding that Moon Moo’s manure–whey mixture is not a “solid waste” under RCRA, and REVERSE the district court’s grant of summary judgment to Moon Moo on the ground that Riverwater presented insufficient evidence to establish a genuine issue that Moon Moo’s landspreading practices present an imminent and substantial endangerment to human health or the environment.

Dated: December 2, 2014

Respectfully submitted,

ATTORNEYS FOR APPELLANT, RIVERWATCHER