TEAM NUMBER 8

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 New Union,
The Honorable Romulus N. Remus Presiding
Case No. 155-CV-2014

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

ORAL ARGUMENT REQUESTED

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JURISDICTIONAL STATEMENT

Appellant United States, on behalf of the United States Environmental Protection Agency (*hereinafter*, collectively "EPA"), and appellants Deep Quod Riverwatcher, Inc. and "Riverwatcher" Dean James (*hereinafter*, collectively "Riverwatcher") brought claims under the Clean Water Act (*hereinafter*, "CWA") and the Resource Conservation and Recovery Act (*hereinafter*, "RCRA") against Moon Moo Farm, Inc. (*hereinafter*, the "Farm") in the United States District Court for the District of New Union. R. at 4. The District Court had original jurisdiction over this case arising under the laws of the United States pursuant to 28 U.S.C. § 1331. Original jurisdiction over the claims involved in this case is specifically granted to the District Court under 33 U.S.C. § 1319(b), 33 U.S.C. § 1365(a), and 42 U.S.C. § 6972(a). Additionally, the District Court had supplemental jurisdiction over the Farm's counterclaim for trespass under 28 U.S.C. § 1367(a). The District Court granted summary judgment to the Farm on all claims, and therefore that decision is final. R. at 12. This Court has jurisdiction over this appeal from that final decision pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. Whether Dean James was trespassing when he entered the Queechunk Canal because the Canal—which was privately developed, has never been used for commercial purposes, and is posted with "No Trespassing" signs—is private land and not a public trust navigable waterway?

II. If the Queechunk Canal is not subject to the public trust doctrine, whether the exclusionary rule applies to evidence obtained through trespass and without a warrant in a civil enforcement proceeding?

III. Whether the Farm is not a point source, and therefore not subject to NPDES permitting requirements, because:

   A. The Farm is not a CAFO because the Farm grows vegetation on its facility, removing it from the definition of an AFO, and because there is no evidence in the record that the Farm meets the additional statutory requirements of a CAFO?

or

B. The discharge from the Farm, which is related to agriculture and a direct result of precipitation, is exempt from the definition of a point source as agricultural stormwater?

IV. Whether the Farm is not subject to a citizen suit under the RCRA because:

A. The land application of the fertilizer and soil amendment mixture is not solid waste subject to regulation under RCRA § 7002 because the Farm is reusing it in a beneficial way instead of discarding it?

or

B. The higher than normal nitrate levels of the Deep Quod River, allegedly caused by discharge of the fertilizer and soil amendment mixture, is not an imminent and substantial endangerment to human health or the environment subject to redress under RCRA § 7002(a)(1)(B)?

STATEMENT OF THE FACTS

Moon Moo Farm is a dairy farm located at a bend in the Deep Quod River. R. at 4-5. The farm maintains 350 milk cows that are housed in a barn and not pastured, as well as 150 acres of fields used to grow Bermuda grass kept as silage for the cows. *Id.* Liquid waste and manure is collected from the barn area and stored in a lagoon to be later used as fertilizer on the Farm's fields. *Id.* The Farm accepts acid whey produced by a Chokos Greek Yogurt facility to use as an additive to the fertilizer applied to their fields. *Id.* at 5.

The Queechunk Canal (*hereinafter*, the "Canal") is situated entirely on the Farm's property. *Id.* It is a man-made canal that is fifty yards wide, three to four feet deep, and is only accessible by a small boat or canoe. *Id.* "No Trespassing" signs are prominently posted on both sides of the Canal, however some individuals still use it as a shortcut up and down the Deep Quod River. *Id.* Deep Quod River eventually flows into the Mississippi River, which is a navigable-in-fact body of water. *Id.*

The Farm is regulated as a "no-discharge" operation. *Id.* The Farm must, and did, submit a nutrient management plan (*hereinafter*, "NMP") to the Farmville Regional Office of the State of New Union Department of Agriculture (*hereinafter*, "DOA") that outlines its land application and fertilizing practices. *Id.* The Farm does not hold any permit under the National Pollutant Discharge Elimination System statute—a permitting system under the CWA which regulates discharge operations. *Id.* at 5-6.

Deep Quod River began smelling of manure and testing revealed an elevated nitrate level in the drinking water of Farmville, a community located downstream of the Farm that uses the Deep Quod River as a source of drinking water. *Id.* at 6. The Farmville Water Authority issued a nitrate advisory in Farmville, advising parents that infants should drink bottled water, but that the water was still safe for adults to consume despite the elevated nitrate levels. *Id.* at 5-7.

Deep Quod Riverwatcher, an environmental organization, received complaints about the state of the Deep Quod River. *Id.* at 4, 6. In response to the complaints, "Riverwatcher" Dean James, an agent of Deep Quod Riverwatcher, made an investigatory patrol of the Deep Quod River using a small "jon boat." *Id.* at 6. James ignored the prominent "No Trespassing" signs and entered the Canal. *Id.*

James observed and photographed manure spreading operations on the Farm. *Id.* James also observed and photographed a turbid brown liquid flowing out of a drainage ditch on the Farm's property and retrieved a sample of this liquid. *Id.* Testing of this sample later revealed highly elevated levels of fecal coliforms and nitrates. *Id.* James' sample of the discharge from the Farm was obtained on April 12, 2013, immediately following a significant storm event in which two inches of rain fell in the Farmville region over a period of two days. *Id.*

Riverwatcher's expert, Dr. Ella Mae, testified at trial that the addition of acid whey to the manure mixture makes it more difficult for the Bermuda grass to take up the nutrients in the manure. *Id.* However, the Farm's expert, Dr. Emmet Green, testified that the use of whey in manure is a longstanding and traditional practice in New Union and that Bermuda grass tolerates a wide range of soil pH conditions. *Id.* Additionally, the Farm's records demonstrate that it has applied manure to its fields consistent with its NMP at all times relevant to this dispute. *Id.* Nothing in the Farm's NMP prevents it from applying manure during a rain event. *Id.* at 6-7.

The Deep Quod River area is heavily farmed and nitrate advisories have been issued in Farmville on five prior occasions. *Id.* at 7. It is "impossible," according to Riverwatcher's expert Dr. Susan Generis, to show that the Farm was the "but for" cause of the nitrate advisory. *Id.*

STATEMENT OF THE CASE

EPA commenced this action against the Farm pursuant to 33 U.S.C. § 1319(b), alleging violations of 33 U.S.C. § 1311(a). R. at 4. EPA argued that the Farm violated provisions of the CWA by discharging pollutants into the Canal without the required permit under the "National Pollutant Discharge Elimination System" (*hereinafter*, "NPDES") statute, codified as 33 U.S.C. § 1342. R. at 1, 7. Riverwatcher intervened pursuant to 33 U.S.C. § 1365(b)(1)(B), alleging violations of 33 U.S.C. § 1311(a) and 42 U.S.C. § 6945(a) under the citizen suit provisions of 33 U.S.C. § 1365(a) and 42 U.S.C. § 6972(a)(1)(B). R. at 4, 7, 10, and 11. Riverwatcher joined EPA's claims against the Farm for alleged violations of the CWA and stated additional claims for violations of the RCRA. R. at 7. Riverwatcher argued that the Farm violated provisions of the RCRA because the pollutants discharged from the Farm's property were solid waste and constituted an imminent and substantial endangerment to human health. R. at 1, 10-11.

The Farm asserted a counterclaim against Riverwatcher and James for trespassing, arguing that James' retrieval of evidence from the Farm's property amounted to common law trespassing. R. at 4, 7. All parties moved for summary judgment. R. at 7.

The District Court granted summary judgment to the Farm on all claims brought by EPA and Riverwatcher and on the Farm's counterclaim, awarding the Farm $832,560 in damages. R. at 1, 12. The District Court held that James was trespassing when he entered the Canal and therefore the only evidence presented against the Farm must be excluded. R. at 9. The District Court also held that even if the evidence obtained by James was admissible, the discharge from the Farm was agricultural stormwater and therefore exempt from the NPDES permitting requirement. R. at 9-10. Finally, the District Court held that Riverwatcher's RCRA claims were unsupported, because the discharge from the Farm, if actually proven, did not constitute solid waste and did not present an imminent and substantial endangerment to human health. R. 11-12.

EPA and Riverwatcher filed timely notices of appeal. R. at 1. This Court ordered briefing on the issues central to the District Court's order. *See supra* Statement of the Issues. The Farm respectfully argues that the District Court properly granted summary judgment as to all claims and that, accordingly, this Court should affirm.

SUMMARY OF THE ARGUMENT

This Court should affirm the District Court and grant summary judgment to the Farm on all claims brought by EPA and Riverwatcher and on the Farm's counterclaim.

James was trespassing when he entered the Canal, therefore this Court should affirm summary judgment for the Farm on its counterclaim. James was trespassing when he entered the Canal because it is not a public trust navigable waterway. The Canal is not a public trust navigable waterway because it is an inland intrastate river that has never been used as a highway

for commerce and could only be used as such after unreasonable improvements. In addition, even if the Canal is a public trust navigable waterway, free access may not be granted without the government invoking its eminent domain power and awarding just compensation to the Farm. This Court should affirm summary judgment for the Farm as to the trespassing claim.

Because James was trespassing, the evidence obtained by James, which is the only evidence in this case, must be excluded. Therefore, summary judgment must be affirmed for the Farm as to all claims. The evidence obtained during James' trespass must be excluded because James, a private citizen, acted as an agent of the government and the Farm had a reasonable expectation of privacy. Because the only evidence offered against the Farm must be excluded, appellants have not generated a genuine issue of material fact and this Court must affirm summary judgment for the Farm as to all claims.

Even if this Court admits the evidence obtained by James, this Court must affirm summary judgment for the Farm because the Farm is not subject to the permitting requirements under the NPDES statute, and therefore committed no violation of the CWA. The Farm is not subject to NPDES permitting requirements because the Farm is not a point source. The Farm is not a point source because the Farm is not a concentrated animal feeding operation (*hereinafter*, "CAFO") and because any discharge from the Farm is agricultural stormwater, and therefore exempt from NPDES permitting requirements. Because the Farm is not subject to NPDES permitting requirements, the Farm did not commit the alleged violations of the CWA, and this Court must accordingly affirm summary judgment for the Farm.

Lastly, this Court must affirm summary judgment for the Farm as to the claims brought by Riverwatcher because the Farm is not subject to a citizen suit under RCRA § 7002. The Farm is not subject to a citizen suit because the discharge from the Farm is not solid waste, and the

elevated level of nitrates do not rise to the level of an imminent and substantial endangerment to human health or the environment. Because the Farm is not subject to a citizen suit under the RCRA, this Court must affirm summary judgment for the Farm.

The only evidence offered against the Farm was obtained by trespassing, and application of the exclusionary rule to the evidence is appropriate. Moreover, the Farm is not a point source and is not subject to NPDES permitting requirements. Finally, the Farm is not subject to a citizen suit under the RCRA. Accordingly, this Court should affirm summary judgment for the Farm as to all claims brought by EPA and Riverwatcher and as to the Farm's counterclaim.

STANDARD OF REVIEW

This case involves an appeal from the District Court's order of summary judgment in favor of the Farm on the CWA claims, the RCRA claims, and the trespass counterclaim. Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). Therefore, the issues before this Court should be reviewed *de novo*. *Lefevers v. GAF Fiberglass Corp.*, 667 F.3d 721, 723 (6th Cir. 2012). "In deciding a motion for summary judgment, the court must view the factual evidence and draw all reasonable inferences in favor of the nonmoving party." *Id.* (quoting *Banks v. Wolfe Cnty. Bd. of Educ.*, 330 F.3d 888, 892 (6th Cir. 2003)).

ARGUMENT

I. THIS COURT SHOULD AFFIRM THE DISTRICT COURT'S RULING THAT JAMES WAS TRESPASSING WHEN HE ENTERED THE QUEECHUNK CANAL BECAUSE THE CANAL IS PRIVATE PROPERTY AND IS NOT SUBJECT TO THE PUBLIC TRUST DOCTRINE.

This Court should reject EPA and Riverwatcher's contention that a man-made three foot deep canal is a public trust navigable water and instead should affirm the District Court's ruling that James was trespassing. The public trust doctrine only applies if the land in question: (1) is

presently used as highway for commerce; (2) has been used for commerce in the past; or (3) could be made suitable for such use by reasonable improvements. There is no evidence in the record of past or present commercial use of the Canal and the Canal could not be made suitable for commercial use through reasonable improvements. Therefore, the Canal is not a navigable body of water and cannot be subject to the public trust doctrine. Furthermore, even if the Canal is navigable, the Supreme Court has previously stated that a taking of a manmade waterway like the one in this case would require the invocation of eminent domain and the payment of just compensation. As a result, the public trust doctrine cannot be used in this case because the eminent domain power has not been invoked and appellants have not made a claim for it in this case. Because the Canal is not subject to the public trust doctrine, the only evidence offered by EPA and Riverwatcher in support of their claims was obtained by means of trespassing on the Farm's property. Therefore, the evidence must be excluded and this Court should affirm summary judgment for the Farm both as to the appellants' claims and as to the Farm's counterclaim.

A. This Court should affirm the District Court's ruling that the Queechunk Canal is not a public trust navigable water because it is an inland intrastate river that has never been used for commerce and could not be made suitable for commerce through reasonable improvements.

The Canal is not navigable because it has never been used for commerce and cannot be made suitable for commerce through reasonable improvements, and therefore the Canal is not subject to the public trust doctrine. The public trust doctrine "concerns public access to the waters above [the riverbed] for purposes of navigation." *PPL Mont., L.L.C. v. Montana,* 132 S. Ct. 1215, 1234 (2012). Navigability is the predominant test applied by the courts to determine if the public trust doctrine applies to waterways. Under the navigability test, the Canal can only be subject to the public trust doctrine if: (1) it is presently used for commerce; (2) it has been used

for commerce in the past; or (3) it could be made suitable for commercial use by reasonable improvements. There is no evidence in the record that the Canal has ever been used for commerce. Additionally, the only way the Canal could be made suitable for commercial use is if the entire Canal was re-dredged at a greater depth in order to support the larger vessels used for commerce. Therefore, the Canal is not navigable and is not subject to the public trust doctrine. Accordingly, this Court should affirm summary judgment for the Farm on its counterclaim for trespass.

In determining whether the Canal is subject to the public trust doctrine, this Court must apply the navigability test. The Supreme Court has applied two tests to determine whether a river is considered a public trust navigable water: navigability[1] and tidal influence.[2] However, the public trust doctrine "remains a matter of state law," and so the tidal influence test has only been applied when state law shows a clear use of the test. *PPL Mont.*, 132 S. Ct. at 1234; *see supra* note 2. Because the case law on the public trust doctrine in New Union is nonexistent, this Court must apply the navigability test. R. at 9.

Under the navigability test, the Canal can only be subject to the public trust doctrine if (1) it is presently being used for commerce; (2) it has been used for commerce in the past; or (3) it could be made suitable for commerce by reasonable improvements. *See The Daniel Ball*, 77 U.S. 557, 563 (1871); *See also United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407

[1] *Solid Waste Agency of N. Cook Cnty. v. Army Corps of Eng'r*s, 531 U.S. 159, 172 (2001) (*hereinafter*, "SWANCC"); *Utah Div. of State Lands v. United States*, 482 U.S. 193, 197 (1987); *Montana v. United States*, 450 U.S. 544, 551 (1981); *Utah v. United States*, 403 U.S. 9, 10 (1971).

[2] *Phillips Petrol Co. v. Mississippi*, 484 U.S. 469, 482 (1988) (applying longstanding Mississippi law to determine tidal influence was used as the primary test for the public trust doctrine); *Kaiser Aetna v. United States*, 444 U.S. 164, 170 (1979) (applying the Corps of Engineers' definition of navigable waters because the Hawaii Kai Marina obtained approval by the Corps beforehand). Note that under the tidal influence test, the Canal would not be subject to the public trust doctrine. *See Phillips Petrol Co.*, 484 U.S. at 489 ("[I]t appears that Congress understood 'tidal waters' as referring to the boundaries of the navigable ocean.").

(1940). There is no evidence in the record of past or present commercial use "in the customary modes of trade and travel on water." *Id.* Additionally, the only way the Canal could be made suitable for commerce is if the entire Canal was re-dredged at a greater depth in order to support larger vessels that could be used for commerce. EPA and Riverwatcher essentially contend that the recreational use that has taken place on the Canal constitutes commercial use. The Supreme Court has never included recreational uses in the same category as commercial uses, and furthermore the Supreme Court has referred to the uses as separate and distinct in non-public trust doctrine cases. *See Kelo v. City of New London*, 545 U.S. 469, 470 (2005); *Ray v. Atl. Richfield Co.*, 435 U.S. 151, 154 (1978). Additionally, at least three state courts agree that commercial use is limited and does not include recreational use. *See Steel Creek Dev. Corp. v. James*, 58 S.E.2d 506, 511 (N.C. Ct. App. 1982); *Mtn. Props. v. Tyler Hill Realty Corp.*, 767 A.2d 1096, 1100 (Pa. Super. Ct. 2001); *Orr v. Mortvedt*, 735 N.W.2d 610, 616 (Iowa 2007).

In addition, EPA and Riverwatcher contend that *United States v. Riverside Bayview Homes, Inc.* stands for the notion that non-navigable bodies of water can still be navigable if they have a "nexus" connection to navigable bodies of water. 474 U.S. 121, 139 (1985). However, *Riverside* only stands for the notion that wetlands, a naturally occurring body of water, can be considered under the public trust doctrine. *Id*. In fact, no cases have applied this "nexus" connection test to man-made bodies of water, and there is no evidence of Congressional intent to cover man-made bodies of water. *SWANCC*, 531 U.S. at 172 (citing *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)). Moreover, the Supreme Court has protected "the States' traditional and primary power over land and water use." *Id*. at 174. "Rather than expressing a desire to readjust the federal-state balance in this manner, Congress chose to 'recognize, preserve, and protect the primary responsibilities and

rights of States . . . to plan the development and use . . . of land and water resources . . . .”’ *Id.* (quoting Federal Water Pollution Control Act, 33 U.S.C. § 1251(b) (1994)). In this case, the land that the canal now occupies has always been considered private property according to the state of New Union, and granting public access through the public trust doctrine would disrupt the federal-state balance that the Supreme Court has previously protected. Therefore, the evidence must be excluded, and this Court should affirm summary judgment for the Farm both as to the appellant’s claims and as to the Farm’s counterclaim.

B. This Court should affirm the District Court’s ruling because, even if the Queechunk Canal is a navigable body of water, the government may not grant free access to the privately dredged canal without invoking its eminent domain power and paying just compensation.

Even if the Canal is navigable, the Supreme Court previously held it does not necessarily follow it is subject to the public trust doctrine and free access is granted. This is not a case where the land has always been subservient to the public trust doctrine as the canal was not dredged by the owner of the land until after New Union became a state. R. at 4-5. When the use of the public trust doctrine results in an actual physical invasion of privately owned property, the government must use the eminent domain power and must make the land owner whole through just compensation. *Kaiser*, 444 U.S. at 179. The use of the navigational servitude in this case effectively takes land, which has always been considered private property, from a rightful owner because substantial improvements were made to alleviate the flooding. R. at 5. On analogous facts, the Supreme Court held in *Kaiser* that the public trust doctrine could not be applied without the use of eminent domain and payment of just compensation. *Id.*

If the Canal is subject to the public trust doctrine, then the government’s “taking” of the Canal under the Fifth Amendment is unlawful because just compensation has not been provided. The “takings clause” of the Fifth Amendment to the United States Constitution states: “No

person shall be … deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation." U.S. Const. amend. V. In *Kaiser*, the Supreme Court held that "the 'right to exclude,' so universally held to be a fundamental element of the property right, [fell] within [the] category of interests that the government cannot take without compensation." *Kaiser*, 444 U.S. at 179-80. *See also*, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982). Furthermore, "[*Kaiser* was] not a case in which the government is exercising its regulatory power in a manner that will cause an *insubstantial devaluation* of petitioners' private property; rather, the imposition of the navigational servitude in this context will result in an *actual physical invasion* of the privately owned [property]." *Id*. (emphasis added).

A permanent physical occupation will occur in this case if this Court subjects the Canal to the public trust doctrine. The Supreme Court explained "[A] 'permanent physical occupation' has occurred . . . where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises." *Nollan v. Cal. Coastal Comm'n,* 483 U.S. 825, 831-32 (1987) (citing *Loretto*, 458 U.S. at 432-33 n.9). Furthermore, the Supreme Court has stated that where "governmental action results in '[a] permanent physical occupation' of the property, by the government itself or by others, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." *Id.*

The facts in *Kaiser* are analogous to the case at hand, and therefore this Court should find that the public trust doctrine cannot be used without invoking eminent domain and payment of just compensation. The Canal is a body of water that "was incapable of being used" as a highway

for interstate commerce prior to substantial improvements. *Kaiser*, 444 U.S. at 178-9. Even though the Canal was made navigable by substantial improvements, it is "not the sort of 'great navigable stream' that . . . has previously [been] recognized as being 'incapable of private ownership.'" *Id. See, e. g., United States v. Chandler-Dunbar Co.*, 229 U.S. 53, 69 (1913); *United States v. Twin City Power Co.*, 350 U.S. 222, 228 (1956). In *Kaiser*, the Supreme Court ruled that the public trust doctrine could not grant public access to the marina without the Government invoking the eminent domain power and paying just compensation. *Kaiser*, 444 U.S. at 179. Therefore, this Court should rule that the Canal is not subject to the public trust doctrine because the invocation of eminent domain and the payment of just compensation is required.

Because the Government has not invoked eminent domain in this case, the Canal is not subject to the public trust doctrine, and this Court must rule that a trespass occurred when James proceeded past prominently displayed "No Trespassing" signs. Accordingly, this Court should affirm summary judgment for the Farm.

II. THIS COURT SHOULD AFFIRM THE DISTRICT COURT'S RULING THAT THE EVIDENCE OBTAINED BY JAMES IS INADMISSIBLE BECAUSE THE EXCLUSIONARY RULE APPLIES IN CIVIL ENFORCEMENT PROCEEDINGS AND THE EVIDENCE WAS OBTAINED BY UNLAWFUL GOVERNMENTAL ACTION.

This Court must apply the exclusionary rule and should find the evidence obtained by James inadmissible because James' conduct constituted unlawful governmental action. The exclusionary rule must apply because this is a civil enforcement proceeding involving claims for civil penalties. The exclusionary rule also must apply in order to deter unlawful governmental conduct. James was acting as an agent of the government because he was performing a governmental task and his intent was to further governmental interests. Moreover, James' conduct constituted unlawful governmental action because his trespass onto the Farm's property

was an unreasonable invasion of a fundamentally held property interest. Therefore, this Court should affirm the District Court's decision to apply the exclusionary rule.

The exclusionary rule should apply in this case because the benefit of protecting reasonable expectations of privacy from government intrusion far outweighs the cost of not being able to admit evidence in one case. The exclusionary rule originated in the criminal setting, and "[t]he general rule in a criminal proceeding is that statements and other evidence obtained as a result of an unlawful, warrantless arrest are suppressible if the link between the evidence and the unlawful conduct is not too attenuated." *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1040-41 (1984). Until *Lopez-Mendoza*, the applicability of the exclusionary rule outside of the criminal context was unclear, so the Supreme Court laid out an appropriate test for further guidance: "there is no choice but to weigh the likely social benefits of excluding unlawfully seized evidence against the likely costs." *Id*. at 1041. Furthermore, the Supreme Court explained, "[o]n the benefit side of the balance, the primary purpose of the exclusionary rule, if not the sole one, is to deter future unlawful police conduct." *Id*. (citing *United States v. Calandra*, 414 U.S. 338, 347 (1974)). "On the cost side there is the loss of often probative evidence and all of the secondary costs that flow from the less accurate or more cumbersome adjudication that therefore occurs." *Id*. However, in a later case, the Supreme Court stated "the value of the evidence at issue is not considered when weighing whether [the governmental conduct] was reasonable." *Stone v. Powell*, 428 U.S. 465, 490 (1976).

The EPA and Riverwatcher have filed suit under §§ 1319(b), (d), and 1365. R. at 4. The use of the exclusionary rule is appropriate because each claim may subject the Farm to civil penalties. *See Trinity Indus., Inc. v. Occupational Safety & Health Review Comm'n*, 16 F.3d

1455, 1461-62 (6th Cir. 1994); *see also Smith Steel Casting Co. v. Brock*, 800 F.2d 1329, 1334 (5th Cir. 1986).

A. This Court should affirm the District Court's ruling that the exclusionary rule applies and the evidence is inadmissible because Riverwatcher acted as an agent of the government.

Riverwatcher acted as an agent of the government when James searched the Farm's property because even if the record does not indicate that Riverwatcher was directed to search the property by the government, the government at the least acquiesced to James' search of the Farm. The exclusionary rule proscribes "governmental action," including searches and seizures effected by private parties "acting as an agent of the government or with the participation or knowledge of any governmental official." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984) (quoting *Walter v. United States*, 447 U.S. 649, 662 (1980)). The Farm concedes that the facts in the record do not support the contention that Riverwatcher was acting with participation of the government or with the knowledge of any governmental official; however, Riverwatcher's actions were so akin to police conduct that the only logical conclusion is that they work as an agent of the government in monitoring and reporting on the Deep Quod River.

Riverwatcher was acting as an agent of the government because the government acquiesced in the search of the Farm and because Riverwatcher's intent in performing the search was specifically to assist the investigation and prosecution of the Farm. *See United States v. Smith*, 210 F. Supp. 2d 1096, 1102-03 (D. Neb. 2001) *aff'd*, 383 F.3d 700 (8th Cir. 2004) (holding that the two primary factors in determining agency are the "(1) the government's knowledge of and acquiescence in the search and (2) the intent of the party performing the search."); *see also United States v. Pervaz*, 118 F.3d 1, 6 (1st Cir. 1997); *United States v. Sheridan*, No. CR07-4010-MWB, 2007 WL 2684467, at *6-7 (N.D. Iowa Sept. 7, 2007); *United*

States v. Burgos Montes, No. CRIM. 06-009 JAG, 2011 WL 1743420, at *10 (D.P.R. May 2, 2011).

In order to determine the government's knowledge and acquiescence in the search, this Court must consider "whether the individual who performed the search did so at the request of the government and whether the government offered a reward." *Smith*, 210 F. Supp. 2d at 1102-03. There is no evidence in the record that Riverwatcher was ever directly requested by the government to perform the search. However, the court must consider all of the circumstances and base their decision on a case-by-case basis. *See United States v. Feffer*, 831 F.2d 734, 739 (7th Cir. 1987). The facts are clear that the Farmville Water Authority issued a nitrate advisory for the water of Farmville. R. at 6. It can be reasonably assumed that an investigatory patrol of the water leading into Farmville would be conducted. It is also clear from the facts that Riverwatcher's search of the Farm was the only search conducted in this case, and the EPA effectively relied on Riverwatcher's evidence to bring this suit. R. at 6. At the very least, this Court should be concerned that the only investigatory patrol was performed by a private organization, because that evidence amounts to the EPA effectively outsourcing its duties to uphold the CWA. If they did not directly request Riverwatcher to do the search, it is logical to assume that they at least knew that Riverwatcher was going to do a search for them. Otherwise, they would be abandoning their duty to the government as set out by Congress.

In order to determine the intent of the party performing the search, this "court must determine whether the party did so for the purpose of assisting law enforcement officials or, in the alternative, to further its own ends." *Smith*, 210 F. Supp. 2d at 1102-03. It is clear from the record that Riverwatcher's purpose was to assist the authorities given the power to regulate waterways under the CWA, namely the EPA. *SWANCC*, 531 U.S. at 175. By conducting a

search of the Canal, Riverwatcher acted as the EPA, the Corps of Engineers, or the State would have acted if those organizations actually fulfilled their duties in this case. Thus, it is clear that Riverwatcher performed the search for the purpose of assisting law enforcement officials.

Because the government acquiesced in the search of the Farm and because Riverwatcher acted with the intent to assist the investigation and prosecution of the Farm, Riverwatcher acted as an agent of the government. Riverwatcher's conduct in photographing the Farm's property, gathering evidence, and processing the evidence was so akin to police conduct that even if evidence of governmental acquiescence is tenuous, this Court should heavily weigh Riverwatcher's intent—clearly one aligned with police conduct—and rule that Riverwatcher was an agent of the government for the purposes of the exclusionary rule analysis. R. at 6. Because Riverwatcher acted as an agent of the government, the exclusionary rule should apply and this Court should affirm.

B. This Court should affirm the District Court's ruling that the exclusionary rules applies because James' conduct as a government agent invaded on the Farm's reasonable expectation of privacy.

James' warrantless search of private property with prominently displayed "No Trespassing" signs invaded on the Farm's reasonable expectation of privacy and thus was unlawful. The Fourth Amendment protects "against unreasonable searches and seizures." U.S. Const. amend. IV. "[A]s a general matter, warrantless searches 'are per se unreasonable under the Fourth Amendment.'" *City of Ontario v. Quon*, 560 U.S. 746, 760 (2010) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)). Additionally, a search is unreasonable if it "violates a subjective expectation of privacy" and that expectation is "reasonable." *Kyllo v. United States*, 533 U.S. 27, 33 (2001) (citing *California v. Ciraolo*, 476 U.S. 207, 211 (1986)). Whether an expectation of privacy is reasonable is based on three factors: (1) "whether the expectation at issue is rooted in entitlements defined by positive law"; (2) the "nature of the uses to which

spaces of the sort in question can be put"; and (3) "whether the person claiming a privacy interest manifested that interest to the public in a way that most people would understand and respect." *Oliver v. United States*, 466 U.S. 170, 189 (1984). In this case, there is an attack on a long-standing expectation of privacy, and the owners of the private property prominently displayed "No Trespassing" signs manifesting their interest to the public. R. at 5. Therefore, this Court should uphold the District Court's ruling that the search by a government agent is unlawful because it invaded on a reasonable expectation of privacy, and thus the evidence was rightfully excluded.

The Canal is not a public trust navigable water, and therefore it is private property. *See supra* Part I(A). Because the Canal is private property, the Farm has the "right to exclude others" from the Canal. *Loretto*, 458 U.S. at 433 ("[T]he right to exclude others is 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'") (quoting *Kaiser*, 444 U.S. at 176). The Farm exercised its right to exclude others by prominently displaying "No Trespassing" signs. R. at 5. Because the Farm's right to exclude is inherent in ownership of property, and therefore reasonable, James' trespassing was an unreasonable violation of the Farm's expectation of privacy. Accordingly, this Court should affirm summary judgment for the Farm.

This Court should reject EPA and Riverwatcher's contention that the open field doctrine should apply and that James' trespass on private property was not unreasonable because the open field doctrine, coupled with the idea of curtilage, is completely unworkable in practice. *See State v. Dixson*, 307 P.2d 195, 199 (Or. 1988); *State v. Kirchoff*, 156 A.2d 1, 10 (Vt. 1991); *People v. Scott*, 79 N.E. 474, 518 (N.Y. 1992); *People v. Reilly*, 195 N.Y.S. 95, 100 (N.Y. App. Div. 1994); *State v. Johnson*, 75 P.2d 692, 706 (Wash. App. 1994); *See also Pearl Meadows*

Mushroom Farm, Inc. v. Nelson, 723 F. Supp. 432, 442-3 (N.D. Cal. 1989). Even the Supreme Court has recognized the limitations of the open field doctrine: "Police officers, making warrantless entries upon private land, will be obliged in the future to make on-the-spot judgments as to how far the curtilage extends, and to stay outside that zone." *Oliver*, 466 U.S. at 196 (Marshall, J., dissenting).There is no bright line rule or method that would let the officer know whether the area is curtilage or an open field. Furthermore, even if there was a distance that set forth a bright line rule, the officer would have to be able to measure the distance through an eyeball test, which is unreliable and impractical.

Therefore, this Court should adopt the more applicable and practical test that Justices Marshall, Brennan and Stevens set forth in their dissent: "Private land marked in a fashion sufficient to render entry thereon a criminal trespass under the law of the State in which the land lies is protected by the Fourth Amendment's proscription of unreasonable searches and seizures." *Id.* at 195. Adopting that standard would not go against Supreme Court case law as it would be reverting back to the long-standing rationale behind Fourth Amendment searches. "It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is *the invasion of the indefeasible right of personal security, personal liberty and private property*, where that right has never been forfeited." *Boyd v. United States*, 116 U.S. 616, 630 (1886) (emphasis added). Under this test, James' search was unreasonable because the land was prominently marked with "No Trespassing" signs. R. at 5. Therefore, this Court should affirm the District Court's decision to apply the exclusionary rule in this case.

III. THIS COURT SHOULD AFFIRM THE DISTRICT COURT'S RULING THAT THE FARM IS NOT SUBJECT TO NPDES PERMITTING REQUIREMENTS BECAUSE THE FARM IS NOT A CAFO AND, EVEN ASSUMING IT IS A CAFO, ANY DISCHARGE IS EXEMPT AS AGRICULTURAL STORMWATER.

Regardless of whether the evidence obtained by Riverwatcher is admissible, the Farm has not violated any provision of the CWA, and therefore this Court must affirm summary judgment for the Farm. The Farm has not committed the alleged violations of the NPDES permitting statute because the Farm is not a "point source" as defined by 33 U.S.C. § 1362(14) (2008), and is therefore not subject to NPDES permitting requirements. The Farm does not qualify as a point source for two reasons: (1) the Farm is not a CAFO under 40 C.F.R. § 122.23(b) (2012); and (2) regardless of whether the Farm is a CAFO, the discharge of pollutants from the Farm's property is exempt from NPDES permitting requirements as "agricultural stormwater" under § 1362(14) and § 122.23(e). The Farm is not a point source and, accordingly, this Court should affirm summary judgment for the Farm.

Because the Farm does not qualify as a point source, it is not subject to NPDES permitting and has not violated any provision of the CWA. The NPDES statute establishes a permit requirement to engage in the "discharge of pollutants." § 1342(a). The "discharge of pollutants" is defined to include "any addition of any pollutant to navigable waters from any point source." § 1362(12). The question of whether the Farm discharged pollutants into a "navigable water" need not be answered for this Court to affirm summary judgment for the Farm, because the Farm is not a point source. *See* § 1362(14). "*'[P]oint source' means any* discernible, confined and discrete conveyance, including but not limited to any pipe, ditch . . . [or] *concentrated animal feeding operation* . . . from which pollutants are or may be discharged. This term *[point source] does not include agricultural stormwater discharges* and return flows from irrigated agriculture." *Id.* (emphasis added). EPA and Riverwatcher have argued that the

Farm qualifies as a point source under two theories: (1) appellants argue that the Farm is a point source because it is a CAFO as defined by § 122.23(b); and (2) appellants argue that regardless of whether the Farm is a CAFO, the ditch on the Farm's property discharging pollutants into the Canal is a point source. However, the Farm does not meet the statutory definition of a CAFO, and regardless of whether the Farm is a CAFO, the discharge from the Farm's property is agricultural stormwater and exempt from the NPDES permitting statute. § 122.23(b), (e); § 1362(14).

A. This Court should affirm the District Court's ruling that the Farm does not qualify as a point source because the Farm is not a CAFO.

The Farm is not a CAFO, and therefore not a point source, because the Farm: (1) is not an Animal Feeding Operation (*hereinafter*, "AFO"); and (2) is not a CAFO. § 122.23(b). The Farm is not an AFO because it sustains crops on its property during the normal growing season, removing it from the statutory definition of an AFO. Because the Farm is not an AFO, and because the record contains no other evidence that the Farm meets the statutory requirements of a CAFO, the Farm is not a CAFO. Therefore, the Farm does not qualify as a point source and this Court should affirm summary judgment for the Farm.

The Farm is not an AFO because the Bermuda grass grown on the Farm's property removes the Farm from the definition of an AFO. "Animal Feeding Operation means a lot or facility . . . where the following conditions are met: (i) [a]nimals . . . have been, are, or will be stabled or confined and fed for a total of 45 days or more in any 12-month period, and (ii) [c]rops [or] vegetation . . . are *not* sustained in the normal growing season over any portion of the lot or facility." § 122.23(b)(1) (emphasis added). Because the Farm grows Bermuda grass on its property, it does not meet the second requirement and therefore the Farm is not an AFO. R. at 5.

The Farm does not meet the definition of an AFO because the statute specifically excludes those lots or facilities that would otherwise qualify as AFOs when "[c]rops [or] vegetation" are "sustained in the normal growing season over any portion of the lot or facility." § 122.23(b)(1). The Farm meets the first part of this vegetation exclusion because it sustains "[c]rops [or] vegetation," in the form of Bermuda grass grown as silage for the livestock. *Id.*; R. at 5. The crops are "dried and harvested each summer," suggesting that they are "sustained" during the spring and summer months. R. at 5; § 122.23(b)(1). Because the "normal growing season" for the Farm—located in the Northern Hemisphere—is during the spring and summer months, the Farm meets the second part of the vegetation exclusion.

Finally, because the crops are sustained "over any portion of the lot or facility," the Farm is specifically excluded from the definition of an AFO. § 122.23(b)(1); R. at 5. Although some courts have construed the word "facility" in § 122.23(b)(1) fairly narrowly, the definition of "facility" supplied in 40 C.F.R. § 122.2 (2000) suggests a broader reading of "facility" is appropriate—a reading under which "facility" would encompass not only the stabling area at the Farm, but the fields where the Bermuda grass is grown as well. *Compare Concerned Area Residents for the Env't v. Southview Farm*, 34 F.3d 114, 123 (2d Cir. 1994) ("The vegetation criterion applies to the lot or facility *in which* the animals are confined.") (emphasis in original); *and* § 122.2 ("Facility . . . means any NPDES 'point source' or any other facility or activity (including land or appurtenances thereto) that is subject to regulation under the NPDES program."). In fact, "facility" has been defined in two distinct ways. In situations where the court is asked to decide what land constitutes the "facility" of the CAFO, courts have used a broad definition of "facility" and included the "land and appurtenances thereto." *Alt v. U.S. EPA*, 979 F. Supp. 2d 701, 713 (N.D.W. Va. 2013) ("Plaintiffs' interpretation of the term 'facility' to

exclude the land adjacent to the confinement houses contravenes the plain language of the regulatory definition."); § 122.2. In situations where the court is asked to decide whether particular land constitutes part of the "lot or facility" under § 122.23(b)(1)(ii), courts have applied a narrow definition of "facility," including only the area "in which the animals are confined." *Southview Farm*, 34 F.3d at 123.

Because § 122.2 defines "facility" broadly, and because Courts have interpreted "facility" under this statute broadly, this Court must give "facility" the same broad definition when analyzing § 122.23(b)(1). Under a broad definition of "facility," the fields where the Farm grows its Bermuda grass would be part of the same "facility," and therefore the Farm would qualify as sustaining crops or vegetation "over any part of the lot or facility." *Id.* Because the Farm sustains Bermuda grass over part of its facility during the normal growing season, the Farm is removed from the categorical definition of an AFO, and therefore is not a point source and is not subject to the NPDES permitting statute. Accordingly, this Court should affirm summary judgment for the Farm.

Even if the Farm qualifies as an AFO, the Farm is not a CAFO because it does not meet the additional statutory requirements under § 122.23(b)(6). Among the additional requirements to be considered a CAFO is the requirement that either: "(A) [p]ollutants are discharged into waters of the United States through a man-made ditch, flushing system, or other similar man-made device; or (B) [p]ollutants are discharged directly into waters of the United States which . . . come into direct contact with the animals confined in the operation." § 122.23(b)(6)(ii). Because neither of these elements is met, the Farm is not a CAFO and is therefore not subject to NPDES permitting. Accordingly, this Court should affirm summary judgment for the Farm.

The Farm is not a CAFO because there is no evidence that either of the additional statutory requirements of a CAFO are met. As to § 122.23(b)(6)(ii)(B), the District Court noted, "there is no claim [nor is there any evidence] that waters of the United States pass over, across, or through [the] Farm's production area." R. at 8. Thus, the only argument that the Farm meets the definition of a CAFO is that pollutants were discharged into a water of the United States "through a man-made ditch." § 122.23(b)(6)(ii)(A).

Because the only evidence that pollutants were discharged from the Farm's property was obtained by trespassing and must be excluded, and because the record does not indicate that the drainage ditch was man-made, there is no evidence that pollutants were discharged from the Farm through a man-made ditch. *See supra* Part (I)(A). Firstly, for the reasons argued above, the only evidence that the Farm discharged pollutants into the Canal must be excluded. *Id.* For this reason alone, summary judgment for the Farm as to all claims must be affirmed because there is no evidence that the Farm is a CAFO or is subject to NPDES permitting. Secondly, the record does not indicate that the ditch at issue is a "man-made ditch, flushing system, or other similar man-made device." § 122.23(b)(6)(ii)(A); R. at 6 (ditch described by District Court as a "drainage ditch"). Even if the evidence obtained by James while he was trespassing is admitted, the evidence would only support the contention that pollutants were discharged and would not support the contention that the ditch is "man-made." R. at 6. Neither requirement under § 122.23(b)(6)(ii) is supported by the record, and therefore the Farm does not meet the statutory requirements of a CAFO.

The record demonstrates that the Farm does not meet the statutory requirements of a CAFO and is not subject to NPDES permitting. § 122.23(a). Accordingly, this Court should affirm summary judgment for the Farm.

B. This Court should affirm the District Court's ruling that the Farm does not qualify as a point source because the discharge from the Farm is agricultural stormwater.

Whether or not the Farm is a CAFO, the Farm nonetheless is not a point source because the discharge from the Farm is exempt from NPDES permitting requirements as "agricultural stormwater." *See* § 1362(14); § 122.23(e). The so-called "agricultural stormwater" exemption to NPDES permitting can be successfully implicated in two ways. First, § 122.23(e) dictates that NPDES permits are required for CAFO discharges "except where it is an agricultural storm water discharge as provided in 33 U.S.C. § 1362(14)." Second, § 122.23(e) specifically dictates that where manure "has been applied in accordance with specific site nutrient management practices . . . a precipitation-related discharge . . . is an agricultural stormwater discharge." The discharge from the Farm's property qualifies as agricultural stormwater for two reasons: (1) the discharge is "agricultural stormwater" as the term has been interpreted by the courts; and (2) the discharge is precipitation-related and a result of the Farm's land application of manure conducted pursuant to a NMP. § 1362(14); § 122.23(e). Because the discharge from the Farm's property is agricultural stormwater, the Farm does not qualify as a point source under § 1362(14). Therefore, the Farm is not subject to the NPDES permitting statute, and this Court should affirm summary judgment for the Farm.

The discharge of pollutants from the Farm is agricultural stormwater because the discharge is related to agriculture and a result of precipitation. Therefore, the discharge falls under the plain meaning of "agricultural stormwater" as interpreted by the courts. *See, e.g., Alt*, 979 F. Supp. 2d at 710. The term "agricultural stormwater" is not defined explicitly in § 1362 or in the NPDES permitting statute. §§ 1342, 1362. Therefore, the courts have interpreted "agricultural stormwater" in accordance with its plain meaning. *See, e.g., Alt*, 979 F. Supp. 2d at 710-11 (citing *BP v. Burton*, 549 U.S. 84, 91 (2006) and *Perrin v. United States*, 444 U.S. 37, 42

(1979)); *see also Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995) ("When terms used in a statute are undefined, we give them their ordinary meaning."). While the Supreme Court has not had occasion to pass judgment on the definition of "agricultural stormwater," lower federal courts have overwhelmingly upheld a "plain meaning" definition of "agricultural stormwater"—i.e. discharge that is related to agriculture and a result of precipitation. *E.g.*, *Alt*, 979 F. Supp. 2d at 711-14; *Waterkeeper Alliance, Inc. v. U.S. EPA*, 399 F.3d 486, 509 (2d Cir. 2005); *Fishermen Against Destruction of Env't, Inc. v. Closter Farms, Inc.*, 300 F.3d 1294, 1297 (11th Cir. 2002); *Nat'l Pork Producers Council v. U.S. EPA*, 635 F.3d 738, 743 (5th Cir. 2011).

The discharge from the Farm is related to agriculture, and therefore meets the first element of the agricultural stormwater exemption. "Agricultural" is defined as "the science or art of cultivating soil, harvesting crops, and raising livestock." *Black's Law Dictionary* 80 (9th ed. 2009). Courts have upheld this interpretation of "agricultural," noting specifically that the discharge need not be for an agricultural purpose. *Alt*, 979 F. Supp. 2d at 714 ("The only requirement is that the exempt discharges be agriculture related."). The discharge from the Farm relates to agriculture because the Farm engages in the raising of livestock and the cultivating of soil through the addition of manure so that crops may grow effectively to be used as silage for the livestock. R. at 4-5. Therefore, the discharge from the Farm has met the first element of the agricultural stormwater exemption.

The discharge from the Farm is also precipitation-related and, therefore, meets the second element of the agricultural stormwater exemption. "Stormwater" is defined as "storm water runoff, snow melt runoff, and surface runoff and drainage." 40 CFR § 122.26(13) (2013). Moreover, "stormwater" has been interpreted to describe discharge that is "the result of precipitation." *Southview Farm*, 34 F.3d at 121. The discharge from the Farm and the drainage

ditch is "stormwater" because the discharge occurred immediately after a "significant storm event" and, therefore, the discharge from the Farm has met the second element of the agricultural stormwater exemption. R. at 6.

The discharge from the Farm falls under the agricultural stormwater exemption to NPDES permitting because the discharge is related to agriculture and a result of precipitation. "Common sense and plain English lead to the inescapable conclusion that [the discharge] is 'agricultural' in nature and that the precipitation-caused runoff . . . is 'stormwater.'" *Alt*, 979 F. Supp. 2d at 711. Therefore, the discharge from the Farm falls under the "agricultural stormwater" exemption to NPDES permitting requirements, and this Court should affirm summary judgment for the Farm.

The discharge from the Farm is a "precipitation-related discharge of manure . . . from land areas under the control of [the Farm]" and, therefore, is an agricultural stormwater discharge and exempt from NPDES permitting requirements. § 122.23(e). Even if this court does not find that the discharge from the Farm falls under the plain meaning of "agricultural stormwater," the discharge is nonetheless exempt from the NPDES permitting requirements because the discharge is a result of the land application of manure conducted in accordance with an NMP. *Id.*

The discharge from the Farm is agricultural stormwater, and thus exempt from NPDES permitting, because the discharge falls squarely under the scope of § 122.23(e). "[W]here the manure . . . has been applied in accordance with specific site nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure . . . a precipitation-related discharge of manure . . . from land areas under the control of a CAFO is an agricultural stormwater discharge." § 122.23(e). For the reasons argued above, the discharge from the Farm is "precipitation-related" and the fields where the discharge occurred are "land areas under the

control of a CAFO." *See supra* Part III(A)(1). Lastly, the discharge is a result of the Farm's land application of manure in accordance with the NMP on file with the DOA. R. at 9 ("It is *undisputed* that [the] Farm filed an NMP with [DOA] and applied manure in accordance with its field plan.") (emphasis added).

The discharge from the Farm was precipitation-related, and the Farm applied manure to its fields consistent with its NMP. R. at 5-6, 9. Under § 122.23(e), the discharge from the Farm therefore qualifies as "agricultural stormwater" and the Farm is exempt from NPDES permitting requirements. Accordingly, this Court should affirm summary judgment for the Farm.

IV. THIS COURT SHOULD AFFIRM THE DISTRICT COURT'S RULING THAT THE FARM IS NOT SUBJECT TO A CITIZEN SUIT UNDER RCRA.

The Farm is not subject to a citizen suit under RCRA because the fertilizer and soil amendment mixture does not constitute solid waste and does not constitute an imminent and substantial endangerment to human health or the environment.

A. This Court should affirm the District Court's ruling that the Farm is not subject to a citizen suit under RCRA because the fertilizer and soil amendment mixture does not constitute solid waste.

The mixture of manure and acid whey from a Greek yogurt processing facility does not constitute solid waste subject to regulation under RCRA § 7002, and therefore, the Farm is not subject to a citizen suit. RCRA § 7002, codified as 42 U.S.C. § 6972. Consequently, this Court must affirm the District Court's order granting the Farm's motion for summary judgment as to the RCRA claim. The RCRA states, "[a]ny person may commence a civil action … against any person . . . who has contributed or 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(a)(1)(B). To prevail, the Farm must prove that its fertilizer and soil amendment operation

does not include "disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." *Id.*

RCRA defines solid waste as "any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant...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(27). However, the verb "discard" is defined by dictionary as to "cast aside; reject; abandon; give up." The New Shorter Oxford English Dictionary 684 (4th ed. 1993). The meaning of "discard" is important in determining whether the manure and acid whey mixture is a solid waste. Accordingly, when a material is discarded, it is consistently held to be "solid waste;" conversely, when a material is used in a way that benefits the operation, it is consistently held not to be "solid waste."[3] Even if manure and acid whey were considered "solid waste," Riverwatcher's open dumping claim must fail because the EPA regulations specifically exclude land application of agricultural products from regulation as an open dump. 40 C.F.R. § 257.1(c)(1). The Farm's operation is just that: returning the manure and acid whey mixture to the soil as fertilizer and a soil amendment. R. at 4-5.

Courts have considered the scope of RCRA's definition of "solid waste" and their guidance is persuasive here. One such court found "material is considered to be 'discarded' where it is disposed of, thrown away or abandoned." *Tyson Foods,* 2010 WL 653032, at *10 (quoting *Am. Petroleum Inst. v. EPA*, 216 F.3d 50, 55-56 (D.C. Cir. 2000)). In other words, the term "discarded" cannot "encompass materials that are 'destined for beneficial reuse or recycling in a continuous process.'" *Id.* Here, the Farm uses a "continuous process" with the manure and

[3] *See Oklahoma v. Tyson Foods, Inc.*, No. 05–CV–0329–GKF–PJC, 2010 WL 653032, at *10 (N.D. Okla. Feb. 17, 2010) (holding poultry litter is not a RCRA solid waste); *See Safe Air for Everyone v. Meyer*, 373 F.3d 1035 (9th Cir. 2004) (holding grass residue is not RCRA solid waste).

acid whey mixture, and it is certainly destined for beneficial use as the fertilizer helps grow Bermuda grass for the cows. R. at 5. "In determining whether a material is a 'beneficial' product for 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*, 2010 WL 653032, at *10. *See Safe Food & Fertilizer v. EPA*, 350 F.3d 1263, 1269 (D.C. Cir. 2003). Thus, if the material is destined for beneficial reuse, it is not "solid waste" within the purview of the RCRA.

The Ninth Circuit used congressional intent to determine whether grass residue is a "solid waste" within RCRA. Most importantly, "[i]n enacting RCRA, Congress…declared that agricultural products that could be recycled or reused as fertilizers were not its concern." *Safe Air*, 373 F.3d at 1045. The Court reasoned there is "clear congressional intent to extend EPA's authority only to materials that are truly discarded, disposed of, thrown away, or abandoned." *Id.* at 1042. In this case, the manure and acid whey are agricultural wastes being recycled as fertilizer and soil conditioners. The Farm never intentionally discharged the manure and acid whey mixture into the Canal. Therefore, the material is not being discarded, and is instead being reused.

The Court in *Safe Air* held "the bluegrass residue is not discarded, abandoned, or given up, and it does not qualify as 'solid waste' under RCRA." *Id.* at 1045. Furthermore, the Ninth Circuit held, "[g]iven the uncontroverted evidence that the Growers reuse the grass residue in a continuous process…and do so in accord with farming practices that are beneficial in increasing crop yields, Safe Air has not demonstrated a genuine issue of material fact on the issue whether grass residue is a 'solid waste' under RCRA." *Id.* at 1046. The Farm collects, stores, and distributes manure from the cows, mixing it with acid whey, in a continuous process. R. at 4-5.

Moreover, Dr. Emmet Green, the Farm's expert agronomist, opined that land application of whey as a soil conditioner was a longstanding practice that has been traditional in New Union since the 1940s. R. at 6.

More recently, the Ninth Circuit analyzed the legislative history of "solid waste" within the RCRA in which utility poles discharged wood preservatives into the environment through normal wear and tear. The Court held the wood preservatives were not "solid waste," concluding that "[t]he key to whether a manufactured product is a 'solid waste,' then, is whether that product 'has served its intended purpose and is no longer wanted by the consumer.'" *Ecological Rights Found. v. Pac. Gas and Elec. Co.*, 713 F.3d 502, 515 (9th Cir. 2013). In the Farm's case, the record is silent in showing that it intentionally forced the manure and acid whey mixture to go into the Canal. In addition, the record fails to show the Farm abandoned or threw away these fertilizer and soil conditioners. Thus, because the manure and acid whey mixture has not yet served its purpose and is still wanted by the Farm, the mixture cannot be a "solid waste" within the RCRA. Therefore, this Court must affirm the District Court's order granting the Farm's motion for summary judgment as to the RCRA claim.

B. This Court should affirm the District Court's ruling that the Farm is not subject to a citizen suit under RCRA because the fertilizer and soil amendment does not constitute an imminent and substantial endangerment.

EPA and Riverwatcher have failed to make out a claim under the RCRA because they have not established that the elevated nitrate level of the Canal constitutes an "imminent and substantial endangerment." § 6972. Unlike "solid waste," the RCRA fails to define "imminent and substantial endangerment." However, several courts have consistently interpreted "imminent and substantial endangerment" to mean a considerably serious risk to human health or the

environment. In several water contamination cases, courts have regularly held there is not an "imminent and substantial endangerment to human health."[4]

In *Davies v. Nat'l Co-op. Refinery Ass'n*, where neighboring landowners brought action under RCRA seeking remediation of groundwater contamination, the Court held there was no "imminent and substantial endangerment to human health." 963 F. Supp. 990, 999 (D. Kan. 1997). The *Davies* Court explained that even though "the resulting threat from exposure to [the] groundwater would be substantial," it did not rise to the level of "imminent and substantial endangerment." *Id.* Specifically, those at risk "[had] been warned of the danger and [were] able to occupy the property without serious risk to their health by using an alternative water supply." *Id.* In the case at hand, the water was only found to be dangerous for infants, forcing one very small group of people to utilize an alternative water supply. There is also no evidence in this case pointing to a significant future threat of damage to health or the environment as a result of the elevated nitrate levels. The decision in *Davies* shows that even when everyone is forced to drink bottled water, it still does not rise to the level of being an "imminent and substantial endangerment to human health" regardless of how long the threat exists. Thus, in this case there cannot be an "imminent and substantial endangerment" because only one small class of people are forced to drink bottled water. R. at 6.

In another case, soil arsenic levels in the area around a pesticide formulations facility exceeded state standards, and the Court held there was not an "imminent and substantial

[4] *Lewis v. FMC Corp.*, 786 F. Supp. 2d 690 (W.D.N.Y. 2011) (holding that where soil arsenic levels in an area around a pesticide facility exceeded state standards, it is not an "imminent and substantial endangerment"); *Board of Cnty. Com'rs of Cnty. of La Plata, Colo. v. Brown Grp. Retail, Inc.*, 768 F. Supp. 2d 1092 (D. Col. 2011) (holding that solvents in groundwater and soil that exceeded applicable government standards was not an "imminent and substantial endangerment to human health or the environment"); and *Interfaith Cmty. Org. v. Honeywell Intern, Inc.*, 263 F. Supp. 2d 796, 839-40 (D.N.J. 2003) (holding that a chromium disposal site with "substantially" elevated levels compared to normal is an "imminent and substantial endangerment").

endangerment" to surrounding residents under the RCRA. Therefore, a claim could not be made under the RCRA's citizen suit provision because there was no evidence linking cited standards to potential imminent and substantial risks to human health or wildlife. *Lewis*, 786 F. Supp. 2d at 709-11. This case is just another example showing that courts hold "imminent and substantial endangerment" to an extraordinary level, and the risk of harm to human health or the environment must be exceptionally high. In the case at hand, the water in Farmville, in addition to the testing at issue now, had nitrate advisories posted in 2002, 2006, 2007, 2009, and 2010. R. at 7. The record does not state that the nitrate level substantially exceeded state standards. *Id.* at 6. Courts have consistently held that there is not an "imminent and substantial endangerment" when testing simply exceeds state standards. Therefore, there is no reason that this Court should find any "imminent and substantial endangerment to human health" in the water of the Canal.

The Federal District Court of Colorado in another soil and groundwater contamination case held that simply exceeding acceptable standards did not present an "imminent and substantial endangerment to human health," and thus was not actionable under RCRA's citizen suit provision. *Brown Grp.*, 768 F. Supp. 2d at 1092. In *Brown Grp.*, there were levels of solvents in the groundwater and soil that exceeded applicable governmental standards. *Id.* But, as the Court in *Interfaith* found, pollutants must "*substantially* exceed[] acceptable normal levels" to support a finding of "imminent and substantial endangerment." 263 F. Supp. 2d at 839-40 (emphasis added). The Court held the "[d]isposal site for chromium waste presented risk of imminent danger to public health and safety and imminent and severe damage to the environment." *Id.* The case at hand is distinguishable from *Brown Grp.* and *Interfaith*, because the nitrate levels in the water did not "substantially exceed" acceptable standards, they barely

exceeded them, making it unsafe for infants to drink. R. at 6. Accordingly, this Court must find that no "imminent and substantial endangerment to human health or environment" exists.

Recently, a Federal District Court in Wisconsin defined "imminent" and "substantial" in the context of a RCRA citizen suit. "The imminence standard does not require an existing harm, but the threat of harm must be present and ongoing." *Tilot Oil, LLC v. BP Prods. N. Am., Inc.*, 907 F. Supp. 2d 955, 963 (E.D.Wis. 2012). "As to substantial danger, the threat must be serious and 'there must be some necessity for action.'" *Id.* (quoting *Price v. U.S. Navy*, 39 F.3d 1011, 1019 (9th Cir. 1994). The high nitrate level of the Deep Quod River did not require immediate action since it was a "normal" occurrence for it to test high due to its close proximity to a large farm. R. at 7. It was a "mere inconvenience" to have infants drink bottled water, and the high nitrate levels of the water did not prevent anyone from living in the area. *Davies*, 963 F. Supp. at 999; R. at 6. Therefore, this Court must affirm the District Court's order granting the Farm's motion for summary judgment as to the RCRA claim.

The Congressional purpose of the RCRA citizen suit provision also suggests the Farm is not subject to an RCRA citizen suit because the Farm did not intentionally discharge the pollutants. *See Ecological Rights Found. v. Pac. Gas & Elec. Co.*, 803 F. Supp. 2d 1056, 1063 (N.D. Cal. 2011) (holding that defendants were not subject to an RCRA citizen suit because the Congressional purpose of the RCRA is to hold parties liable only for intentional discharges). The record is clear that the Farm did not intentionally contaminate the Canal and Deep Quod River. R. at 6. The Farm cannot control natural forces (e.g. stormwater runoff) and Congress never intended for parties to be sued under the RCRA citizen suit provision for things out of their control.

The manure and acid whey mixture is not a "solid waste" under the RCRA definition because it is not "discarded material" from an agricultural operation. Instead, the mixture is being reused as a benefit to the Farm and land application of this kind of fertilizer is a "longstanding" and "traditional" practice. R. at 5-6. In addition, an "imminent and substantial endangerment" is not evident here because the nitrates in the water do not prevent people from living in the area, nor do they prevent adults and children from drinking the water. R. at 6. Rather, the nitrate level simply prevents infants from drinking the water—a mere inconvenience. *Id.* Therefore, this Court must affirm the District Court's order granting the Farm's motion for summary judgment as to the RCRA claim.

CONCLUSION

This Court must affirm the District Court's ruling and grant summary judgment to the Farm on all claims. The only evidence offered against the Farm was obtained by trespassing, and application of the exclusionary rule to remove this evidence from consideration is appropriate. Moreover, the Farm is not a point source and is not subject to CWA permitting requirements. Finally, the Farm is not subject to a citizen suit under the RCRA because the fertilizer and soil amendment mixture does not constitute solid waste and is not an imminent and substantial endangerment. Accordingly, this Court must affirm summary judgment for the Farm as to all claims brought by EPA and Riverwatcher and as to the Farm's counterclaim.

CERTIFICATE OF SERVICE

We, Team 8, attorneys for Moon Moo Farm, Inc., Defendant, Appellee, certify that we have served upon the Appellant a complete and accurate copy of this BRIEF FOR THE DEFENDANT, APPELLEE, by placing a copy in the United States Mail, sufficient postage affixed and addressed as follows:

Pace University School of Law
National Environmental Law Moot Court Competition
78 North Broadway, Preston 212
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DATED: November 26, 2014

_____
Team 8
Counsel for Defendant, Appellee