Brief on the Merits
No. 14-1248

IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

November Term, 2014

UNITED STATES OF AMERICA,

Plaintiff-Appellant, and

DEEP QUOD RIVERWATCHER, INC., & DEAN JAMES,

Plaintiffs-Intervenors-Appellants,

v.

MOON MOO FARM, INC.,

Respondent.

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

BRIEF FOR DEEP QUOD RIVERWATCHER, INC., & DEAN JAMES

Plaintiffs-Intervenors-Appellants

Team 9

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JURISDICTION

The Plaintiffs below alleged violations by Respondent of permitting requirements under the Clean Water Act, 33 U.S.C. §§ 1311(a), 1319(b), (d), and 1342. Petitioners, Dean James (James) and the Deep Quod Riverwatcher (Riverwatcher), asserted claims under the citizen suit provisions of the Clean Water Act (CWA) and the Resource Conservation & Recovery Act (RCRA). 33 U.S.C. § 1365(a); 42 U.S.C. § 6972(a). The CWA and RCRA grant district courts federal question jurisdiction without regard to amount in controversy or diversity. *Id*. The lower court's final order dismissed the case and granted Respondent damages on its civil trespass counterclaim. Petitioners filed a timely notice of appeal. Fed. R. App. P. 4(a)(1)(A). This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. Is the Queechunk Canal, a public trust navigable waterway allowing for a public right of navigation?

II. If the canal is not a public trust navigable water, is evidence Dean James unlawfully obtained admissible in a civil environmental enforcement action?

III. Is Moon Moo Farm a CAFO subject to NPDES permitting by virtue of a discharge from its manure application area?

IV. If the Farm is not a CAFO, do excess nutrient discharges from its manure application fields subject it to NPDES permitting liability as a point source?

V. Is the Farm subject to RCRA's prohibition of "open dumping" because the manure-acid whey mixture over-applied to its field is solid waste?

VI. Does the Farm's land application of solid waste contribute to creating an imminent and substantial endangerment to human health and the environment?

STATEMENT OF THE CASE

This case turns on questions of statutory interpretation and admissibility of evidence to determine if Moon Moo Farm is in violation of two environmental laws aimed at protecting the waters of the United States and ensuring the responsible handling of solid wastes. The Farm keeps milk cows in a barn, and then spreads the cows' manure, as well as acid whey from a nearby yogurt plant, on its silage field. The field abuts a river, the closest town's drinking water source. During a rain event, unabsorbed nutrients were channelized and then discharged into the river.

Dean James, through Riverwatcher, the plaintiff-intervenor below, filed this citizen suit in an effort to clean up the nitrate-polluted river that his community uses as drinking water. Riverwatcher wants the Farm to control the pollution at its source by complying with requirements of CWA, or in the alternative, regulations under RCRA. The United States filed suit first under CWA, followed by Riverwatcher. The Farm filed a counterclaim for damages and injunctive relief against Riverwatcher for James's alleged trespass during his investigation of river water quality and farm operations.

The district court disposed of the case by granting the Farm's summary judgment motions on both CWA and RCRA claims, holding that the Farm is not a CAFO because the Farm's discharges fell under the agricultural stormwater exemption, and therefore not subject to CWA's NPDES permit program. The court also held that the Farm's manure-acid whey mixture does not fall within RCRA's definition of "solid waste" and the pollutants in the water did not pose a threat to human health. The court granted damages to the Farm for James's "trespass" because it held that there was no public right of navigation, and that any evidence obtained during his investigation was inadmissible.

Riverwatcher appeals from the granted summary judgment motions and civil trespass claim because James's evidence of pollution was admissible, which precludes summary judgment for the Farm for both the CWA and RCRA claims. This Court ordered additional briefing on the substantive merits of the case.

STATEMENT OF THE FACTS

Moon Moo Farm and Farmville. Moon Moo Farm (the Farm) is a dairy with 350 head of milk cows, ten miles away from the City of Farmville in the State of New Union. (R. 4). The Farm lies at a bend in the Deep Quod River (the River), which flows year round and runs into the Mississippi River. (R. 5). In the 1940s, a previous owner of the Farm excavated a bypass canal (the Canal) in the Deep Quod River. (R. 5). Most of the River's flow is diverted into the Canal, which is fifty yards wide and three to four feet deep. (R. 5). Despite prominently posted "No Trespassing" signs and the fact that the Farm owns the land on both sides of the Canal, the Canal is commonly used as a shortcut up and down the River. (R. 5). The town of Farmville lies downriver from the Farm and uses the River as a drinking water source. (R. 5).

Fertilizer Storage and Spreading on Fields. The Farm collects manure waste from the cows through a series of drains and pipes running from the cows' barn to an outdoor lagoon. (R. 4-5). The waste is stored there until it is periodically pumped into tank trailers and hauled to the Farm's fields to fertilize Bermuda grass grown for silage. (R. 5). In 2009, the Chokos Greek Yogurt Plant (the Plant) opened in Farmville, and since 2012, the Farm has been receiving acid whey for free from the Plant to add to the manure lagoon. (R. 5). The Farm sprays the mixture of acid whey and manure onto its fields as fertilizer. (R. 5).

Additionally, the Farm is regulated by New Union as a "no-discharge" facility because it does not usually have a direct discharge into waters of the State. (R. 5). Although the Farm had submitted a Nutrient Management Plan (NMP) with the Farmville Regional Office of New Union's Department of Agriculture, the DOA rarely reviews the submitted NMPs nor is there a provision for public comment on the NMPs. (R. 5). The Farm's NMP included the planned manure application rates as well as a calculation of the expected nutrient uptake. (R. 5).

Nitrate Advisory and Deep Quod Riverwatcher. In early 2013, Riverwatcher received complaints about the River smelling of manure and appearing unusually brown in color. (R. 6). The Farmville Water Authority also issued a nitrate advisory from drinking water customers, warning that drinking water supplies were unsafe for infants but safe for adults. (R. 6). Because the area is heavily farmed, nitrate advisories have been issued five times in the past 12 years, before the Farm's increase in operations. (R. 7). On April 12, 2013, Dean James (James) responded to complaints by traveling up the Canal in a small boat to observe the Farm's manure spreading operations. (R. 6). Between April 11th and the 12th, two inches of rain fell. (R. 6). James observed discolored water flowing from the fields through a drainage ditch into the Canal and took samples of that water flowing from the ditch. (R. 6). The sample's results tested positive for elevated nitrate and fecal coliform levels. (R. 6).

Expert Witness Testimony. Riverwatcher's expert agronomist, Dr. Mae, opined that the lower pH (6.1) of the liquid manure resulted from adding whey to it. (R. 6). This acidity, in Dr. Mae's opinion, prevented the grass from effectively taking up nutrients, resulting in excess fertilizer runoff and leaching into groundwater. (R. 6). Dr. Mae also

opined that applying the fertilizer during a rain event is poor management and almost always results in excess runoff. (R. 6). The Farm's expert agronomist, Dr. Green, did not dispute that the whey lowered the soil pH and reduced nitrogen uptake by the grass; however, he did say that adding whey to manure as a soil conditioner has been a traditional practice in New Union since the 1940s. (R. 6). Dr. Green opined that the grass tolerates a range of acidities and pointed out that nothing in the Farm's NMP prevents spreading fertilizer during a rain event. (R. 6-7). Riverwatcher's environmental health expert, Dr. Generis, could not say the Farm's discharges were the "but for" cause of the nitrate advisory; however, she opined that the Farm's discharges contributed to the April 2013 advisory. (R. 7).

STANDARD OF REVIEW

The district court granted Moon Moo Farm's motions for summary judgment. This Court reviews a district court's grant of summary judgment de novo. *Blue Circle Cement, Inc. v. Board of County Com'rs of County of Rogers*, 27 F.3d 1499, 1503 (10th Cir. 1994).

SUMMARY OF THE ARGUMENT

This Court should reverse the lower court's order because Riverwatcher and Dean James were merely acting in furtherance of the objectives of the Clean Water Act, which empowers private citizens to protect the nation's waters. In collecting the evidence from the Canal, Dean James was not trespassing because there is a public right of navigation to access the Canal. The Canal falls within federal authority under the Commerce Clause as a navigable water, and despite being man-made the federal navigational servitude applies because the Farm has not reinforced any expectation of privacy. Even if there is no public

right of navigation under federal authority, the state public trust doctrine is an inseverable restraint on New Union that ensures public access to waters of the state.

Even if this Court finds that there is no public right of navigation, this Court should reverse the lower court's order excluding evidence because there was no Fourth Amendment violation to warrant invoking the exclusionary rule. Dean James's evidence-gathering was not a search triggering Fourth Amendment protection, because there was no state action to trigger protection. Additionally, the Farm does not have a reasonable expectation of privacy in polluted runoff irretrievably flowing from its field into the river destined for public consumption. Furthermore, the Farm's landspread activities are subject to the "open fields" exception, therefore, the Farm does not have a reasonable expectation of privacy in its activities conducted in its silage field.

Furthermore, the Farm's discharge of excess nutrients into the Canal was a violation of the CWA because it occurred without a NPDES permit. The Farm is a medium CAFO because it has the necessary livestock and it discharged pollutants from a man-made ditch into a navigable water. As a medium CAFO, the Farm is required to have a NPDES permit for any discharge of pollutants, unless it is an agricultural stormwater discharge. The lower court erred in applying a dictionary definition because the EPA has promulgated regulations for discharges from CAFO land application areas. Because the Farm was spreading the manure-whey mixture on its silage fields, the EPA definition applies. Therefore, because the Farm's NMP did not ensure the appropriate agricultural uptake of nutrients, the Farm does not fall within the agricultural stormwater discharge exemption. Even if the NMP did ensure the appropriate uptake of land applied

nutrients, the states "no discharge" program is not in compliance with the CWA because it does not allow for public comment.

Additionally, even if this Court should find that the Farm is not a CAFO, the Farm is subject to NPDES permitting liability because the discharge of excess pollutants through a ditch is a point source. If the source of a pollutant is agricultural in nature, it is not dispositive to whether it is a point source or a non-point source. The language of the CWA specifically enumerates that any confined, discernible conveyance is a point source, and thus encompasses the Farm's discharge from a ditch as a point source.

Alternatively, this Court should reverse the lower court's order because the Farm is subject to regulation under RCRA. The Farm is violating RCRA's prohibition against "open dumping" when it disposes of solid waste by spreading its manure-acid whey mixture over its silage field. The lower court erred when it held that the mixture is not a solid waste. The mixture is a solid waste because it is made up of reclaimed material that is not immediately recycled in the generating industry. The acidity of the whey and the spreading operations during rain events prevent the grass from effectively taking up nutrients resulting in over-application. The over-applied mixture is "discarded material" within RCRA's definition of "solid waste."

The Farm's unlawful "open dumping" also contributes to creating a reasonable threat of serious harm to human health and the environment. The lower court erred when it applied a higher standard than Congress envisioned for RCRA in its "imminent and substantial endangerment" citizen suit provision. For these reasons, this Court should reverse the lower court's order for summary judgment on the Farm's counterclaims.

ARGUMENT

I. There Is a Public Right of Navigation for the Queechunk Canal Because It Falls Within the Scope of Federal Authority Under the Commerce Clause.

Federal authority over navigable waters arises as an implicit concern of the Commerce Clause of the Constitution. *Gibbons v. Ogden,* 22 U.S. 1, 90 (1824); U.S. Const. art. I, § 8, cl. 3. Because commerce necessarily includes navigation, all navigable waters of the United States are "public property of the nation." *Gilman v. Philadelphia*, 3 Wall. 713, 724-25 (1866). The historical test for whether a waterway was "navigable," originated from *The Daniel Ball*, 77 U.S. 557 (1870), which stated that waters "must be regarded as public navigable rivers in law which are navigable in fact." *Id.* at 563. Waters are deemed to be navigable in fact "when they are used, or are susceptible of being used . . . as highways for commerce." *Id*. A waterway may form a continuous highway for commerce either by itself, or by uniting with other waters that are navigable in fact. *Id.* However, the Supreme Court has established that the concept of navigability has no single formula that can be applied to every stream, every time, and under all conditions. *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 404 (1940).

Waters do not have to be in their "ordinary condition" in order to be navigable in fact. *Id.* at 406. In *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), the owners of the Kuapa Pond made significant improvements to the pond to make it accessible from the adjacent navigable bay. *Id.* at 167. Despite the tremendous improvements that were necessary, the Court recognized that there was "no question" as to whether the federal government's expansive Commerce Clause authority covered the Kuapa Pond as a navigable in fact waterway. *Id.* at 174. This conclusion originates from the Court's holding in *Appalachian Elec. Power Co.,* which stated that improvements to a waterway

that make it suitable for navigation do not preclude the waterway from being navigable in fact. *Appalachian Elec. Power Co.*, 311 U.S. at 407.

In this case, the Canal is a navigable in fact waterway despite it being in a non-natural condition. Similar to the pond in *Kaiser*, the Canal is a man-made improvement to an existing waterway. The Canal was originally built as a flood management tool for the Deep Quod River, and therefore is an improvement to an existing navigable in fact waterway. (R. 5). The fact that the Canal is not in its original condition, and was built as an improvement to the navigable Deep Quod River, does not preclude it from being characterized as navigable in fact.

Furthermore, waters are considered navigable if they have a "potential" for commercial use. 33 C.F.R § 329.6(a). Because navigability is established by the "waterbody's capability of use by the public . . . not the time, extent, or manner of that use," the mere presence of recreational craft is sufficient to indicate the waterbody's potential for commercial use in the future. *Id.* In *United States v. Holt State Bank*, 270 U.S. 49 (1926), the Court looked to evidence of early settlers using small boats to traverse the waterway, despite points in time where drought made it nearly impossible to use. *Id.* at 56. The Court subsequently held that navigability might be based on the capacity of the waterway to support relatively small craft. *Id.*

The Canal is a navigable waterway because of its potential for commercial use, as evidenced by the small craft that regularly use the Canal. Any number of small craft can utilize the Queechunk Canal because it is fifty yards wide, three to four feet deep, and most of the flow of the Deep Quod is re-directed through the Canal. (R. 5). Furthermore, the Canal flows year round. As in *Holt Bank*, where the waterway was used by small

craft, the Canal has experienced regular use by the public since it was built in 1940, and is therefore navigable in fact because of its potential for commercial use. (R. 5) Lastly, the Canal serves as a "sufficient link" for interstate commerce because the Deep Quod River flows directly into the Mississippi River, which is a navigable in fact interstate waterway. (R. 5). So long as the Canal unites with a body of water in order to form a continuous highway for commerce between states, there is a sufficient link to show navigability.

Congress' power to ensure the public a free right of access under the Commerce Clause is not boundless. *Kaiser Aetna*, 444 U.S. at 170. Therefore, even where a waterway is deemed to be navigable under federal authority, the United States cannot ensure public access without a navigational servitude. *Id*. Therefore, the lower court erred in its analysis of *Kaiser* because the holding did not in fact address whether man-made water bodies cannot be public trust navigable waterways. *Id.*; *Fish House, Inc. v. Clarke*, 693 S.E.2d 208, 211 (N.C. Ct. App. 2010). In *Kaiser*, the Court held that the expansive authority of the Commerce Clause would assure the public a free right of access to the pond, a distinct issue from whether the landowner deserved compensation for allowing public access to the constructed waterway. *Kaiser Aetna*, 444 U.S. at 170.

A. *The "Federal Navigable Servitude" Is a Federal Proprietary Interest that Encompasses the Queechunk Canal, and Therefore the Canal Has a Public Right of Navigation.*

Traditionally, the federal navigational servitude "gives rise to an authority in the Government to assure that such streams retain their capacity to serve as a continuous highway for the purpose of navigation in interstate commerce." *Kaiser Aetna*, 444 U.S. at 177. In *Kaiser*, the Court explained that the navigational servitude is "an expression of the notion that the determination [of] whether a taking has occurred must take into

consideration the important public interest in the flow of interstate waters." *Id.* at 175. Additionally, the Court recognized that "compensation [to a private owner] may not be required as a result of the federal navigational servitude." *Id*.

Where private owners fail to reinforce an expectation of privacy, the navigational servitude applies, providing a public right of access to that waterway. *Loving v. Alexander*, 548 F. Supp. 1079, 1091 (W.D. Va. 1982). In *Loving*, although the bed of the river was considered private property and the owners of the riverbed paid property taxes, the owners had done nothing to support an expectation of privacy. *Id.* The court held that the navigational servitude applied to the river, and therefore required the owners to allow for a public right of access. *Id*. The court distinguished these facts from those in *Kaiser*, where the owners had bolstered an expectation of privacy by spending millions of dollars making non-navigable waters, navigable. *Id*.

The Queechunk Canal has a public right of navigation under federal law because it is not exempted from the navigational servitude. Although the Canal is man-made, the navigational servitude can apply because the Farm did not invest in building the canal nor has it reinforced any expectation of privacy. (R. 5). Unlike the property owners in *Kaiser*, who spent millions of dollars renovating their pond, the Farm acquired the canal in its current state. (R. 5). Furthermore, while trespass signs were in place, the Canal has continuously been used for public navigation without any prior complaint from the Farm. (R. 5). As in *Loving*, the private owner has not reinforced any expectation of privacy and thus the navigational servitude may apply.

B. *The Canal Is a Public Trust Navigable Waterway Because as the Sovereign Trustee of the Public Trust Doctrine, New Union Cannot Divest Its Interest in the Canal in Favor of a Private Party.*

The public trust doctrine is not stagnant, in fact, it is a "constantly evolving legal tool capable of expanding to meet changing public needs." *Marks v. Whitney*, 491 P.2d 374, 380 (1971). The historical case that established the public trust doctrine was *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387 (1892), in which the Court concluded that submerged lands are held in trust by the state in order to preserve the public's right to use the water for navigation, commerce, and fishing. *Id.* at 452. As the administrator of the trust in navigable waters, states are not able to abdicate their role as trustee. *Id*. at 453; *see also*, *Lawrence v. Clark Cnty.*, 254 P.3d 606, 613 (Nev. 2011) (the public trust doctrine is an "inseverable restraint" on the state's sovereign power). Furthermore, the Court has made it clear that the public trust doctrine is a matter of state law, leaving the scope of the public trust doctrine free to be prescribed by the individual states. *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77, 89 (1922).

Even where a state has not formally adopted the public trust doctrine in its laws, the state cannot divest itself of the waters held in the public trust. *Lawrence*, 254 P.3d at 613. In *Lawrence*, the state of Nevada wanted to divest its interest in a navigable waterway. *Id.* at 607. Although the state had never expressly adopted the public trust doctrine, the court looked to public trust principles in their state constitution and statutes, as well as the inherent limitations the trust places on state sovereign power, in order to prevent the conveyance of the waterway. *Id.* Therefore, to ensure that the state did not breach their duty as a sovereign trustee, the court formally adopted the doctrine. *Id*.

Although New Union has not formally adopted the public trust doctrine, the state has an inherent duty to protect waters in the public trust. In this case, the record does not reflect whether New Union has principles of the public trust imbedded in the state

constitution or statutes, as Nebraska did in *Lawrence*. However, it remains the state's duty to formally adopt the public trust doctrine in order to not breach its duty as a sovereign trustee of the state's navigable waters.

Furthermore, states have embraced the public trust doctrine and have expanded it beyond what is traditionally considered "navigable." *Marks*, 491 P.2d at 380; *Nelson v. De Long*, 27 N.W.2d 342, 346 (1942). Historically, the public trust doctrine applied to only three uses: commerce, fishing, and navigation. *Illinois Cent. R.R.*, 146 U.S. at 452. States have since expanded the doctrine to encompass waters that are used recreationally or that provide environmental services. *Marks*, 491 P.2d at 380.

Therefore, even if the Canal is not a public trust navigable waterway under federal law, the Canal falls within New Union's public trust doctrine because it is used for navigation and recreational purposes. The Canal is traditionally "navigable" because it is commonly used as a shortcut up and down the Deep Quod River. (R. 5). Furthermore, most of the flow of the Deep Quod River is diverted into the Canal, making the Canal necessary for navigation. (R. 5). Even if this does not fall under the traditional test, the Canal's continuous use by the public for recreation falls within the expanded public trust doctrine. (R. 5).

Additionally, a number of states have expanded the public trust doctrine to include waters that are artificially constructed. *Hughes v. Nelson*, 399 S.E.2d 24, 26 (S.C. 1990); *State ex. Rel. Medlock v. S.C. Coastal Council*, 289 S.C. 445, 448 (1986); *Fish House, Inc.*, 693 S.E.2d at 211. In *Hughes*, a canal that was privately constructed to connect with a navigable river, had the capacity for navigation, and had been navigated without exclusion, was a public trust navigable waterway. *Hughes*, 309 S.E.2d at 26. The

court held that the artificial nature of the canal was not controlling, so long as it was constructed to connect to a navigable river, the man-made canal could be considered a part of the river. *Id.*; *State ex. Rel. Medlock*, 289 S.C. at 448 (1986) (holding that canals, dug by rice planters for water control but used by the public as natural waterways, "have become the functional equivalent of natural streams").

Although New Union has not yet formally expanded the public trust doctrine to encompass man-made waterbodies, the court may look to the state's intent. *Fish House, Inc.*, 693 S.E.2d at 211. New Union regulates Moon Moo Farm as a no-discharge operation because it discharges into the "waters of the State." (R. 5). By characterizing the Canal as a water of the State under its regulatory scheme, this implies that New Union sees the Canal as more than just a privately owned, man-made waterway. Therefore, in determining the extent of the state's public trust doctrine, because New Union has classified the Canal as "waters of the State" the Canal is encompassed by the state's public trust doctrine.

II. Evidence Obtained by Dean James Should Be Admitted Because He Was Acting as a Private Actor While Investigating the Farm, and the Farm Has No Reasonable Expectation of Privacy in Its Polluted Water Runoff or Activities Conducted in Open Fields.

Fourth Amendment protection against unreasonable searches and seizures generally requires law enforcement and other governmental agents to obtain a warrant founded on probable cause to search. U.S. Const. amend. IV. However, the warrant requirement is subject to a number of exceptions. *Riley v. California*, 134 S.Ct. 2473 (2014) (discussing search incident to arrest exception); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) (discussing search incident, automobile, and plain view exceptions). When a party seeks to introduce the fruit of an illegal search against the victim of that

search, the exclusion of evidence effectuates this Fourth Amendment right by providing a remedy to the constitutional violation's harm. *United States v. Calandra*, 414 U.S. 338, 347 (1974). The exclusionary rule's primary purpose is to deter future illegal police conduct; it is a "judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect." *Id.* at 347-48.

Despite its broad purpose of deterrence, the exclusionary rule "has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons." *Calandra*, 414 U.S. at 348. Courts weigh certain considerations before invoking the rule, particularly whether its application will result in appreciable deterrence of future police misconduct, and whether the benefits of deterrence outweigh the substantial social costs of excluding probative evidence. *Herring v. United States*, 555 U.S. 135, 141-42 (2009). For example, in the civil context, the Court has declined to invoke the rule for evidence used in a federal civil tax proceeding when a state law enforcement officer unlawfully obtained the evidence, because the societal costs of the exclusion outweighed the likelihood of deterrence. *United States v. Janis*, 428 U.S. 433, 454 (1976). However, before courts may begin to weigh the costs and benefits of excluding evidence, there must first be a Fourth Amendment violation. In this case, the exclusion of evidence is inappropriate because there was no Fourth Amendment violation to begin with. Even if Fourth Amendment protection had been triggered, the societal cost of excluding evidence in environmental enforcement actions substantially outweighs the deterrence effect of the rule.

A. *There Was No State Action to Trigger Fourth Amendment Protection, Because Dean James Was Acting as a Private Citizen when He Took Water Samples of the Farm's Polluted Runoff in the Canal.*

Dean James was acting on his own, private, initiative when he obtained evidence, which precludes exclusion in this case. The Eighth Circuit has recently reiterated the principle that the Fourth Amendment does not protect against searches by private citizens, unless the citizen was acting as a government agent at the time of the search. *United States v. Sigillito*, 759 F.3d 913, 926 (8th Cir. 2014) (citing *United States v. Muhlenbruch*, 634 F.3d 987, 998 (8th Cir. 2011)). Factors that courts should consider when deciding if a citizen acted as the government's agent while conducting a search include: "(1) whether the government had knowledge of and acquiesced in the search; (2) whether the citizen intended to assist law enforcement agents or to further his own purposes; and (3) whether the citizen acted at the government's request." *Id.* (quoting *Muhlenbruch*, 643 F.3d at 998).

In this case, the record indicates only that James was prompted to investigate by complaints about the river water from Farmville citizens. (R. 6). The record does not reveal whether the government had knowledge or acquiesced in James's search. The record is also devoid of facts pertaining to any government request for investigation. Presumably, James would have anticipated using any evidence of the Farm's illegal activities in a future claim for enforcement within the scope of a citizen suit; however, it is not clear whether he intended to assist law enforcement agents as well. Since the polluted water samples were not obtained through a governmental authority's violation of Fourth Amendment rights, the evidence should be admitted. *See Burdeau v. McDowell*, 256 U.S. 465, 476 (1921) (evidence which the government came to possess without violating individual's rights should not be barred because a private individual unconnected with the government wrongfully seized the evidence).

B. *Even if There Had Been State Action to Trigger Fourth Amendment Protection, the Farm Has No Reasonable Expectation of Privacy in the Polluted Water Flowing into the Canal.*

Even if James had been acting as the government's agent, his actions would not amount to an unreasonable search or seizure subject to the exclusionary rule because the Farm does not have a reasonable expectation of privacy in its polluted runoff. *See Katz v. United States*, 389 U.S. 347 (1967). The *Katz* Court created a two-prong test for defining a search: (1) whether there was an actual subjective expectation of privacy and (2) whether society deems that subjective expectation to be objectively reasonable. *Id.* at 360-63. For example, in the environmental enforcement context, the First Circuit held that when a mill's wastewater was irretrievably flowing into a public sewer, the mill had no reasonable expectation of privacy, even when EPA inspectors impermissibly took samples of that water on the mill's private property. *Riverdale Mills Corp. v. Pimpare*, 392 F.3d 55, 64-65 (1st Cir. 2004).

There is no societal interest in protecting the privacy of activities that occur in open fields, like the cultivation of crops. *Oliver v. United States*, 466 U.S. 170, 179 (1984). Courts have applied the "open fields" doctrine to find that warrantless EPA inspections conducted on private land or from aerial observation were not unreasonable, because individuals "may not legitimately demand privacy for activities out of doors in fields, except in the area immediately surrounding the home." *Dow Chemical Co. v. United States*, 476 U.S. 227, 235-36 (1986) (quoting *Oliver*, 466 U.S. at 178-80); *see also Air Pollution Variance Board of Colorado v. Western Alfalfa Corp.*, 416 U.S. 861, 865 (1974).

In this case, it is reasonable to conclude that the Farm's polluted runoff was irretrievably flowing into the Canal water destined for public consumption; therefore, the Farm has no reasonable expectation of privacy in its runoff. While the Farm may have a subjective expectation of privacy in its polluted runoff and its Canal marked with "No Trespassing" signs, society is not ready to view that expectation as objectively reasonable, especially when the Canal is commonly used by the community's residents. (R. 5). The open fields exception fits this case, because the Farm does not have any reasonable expectation in the activities it conducts, including spreading a solid waste on its silage field. Both of these conclusions stay true even if James was in fact trespassing or if he was acting as an agent of the government. *See Oliver*, 466 U.S. at 179 ("It is not generally true that fences or 'No Trespassing' signs effectively bar the public from viewing open fields in rural areas."). The Farm has no reasonable expectation of privacy in its open fields; therefore, state action or not, James's activities did not constitute a violation of the Farm's Fourth Amendment rights. Because there was no Fourth Amendment violation, the evidence James collected should have been admitted.

C. *Public Policy Concerns for Protecting Human Health and the Environment, Along with the Weak Deterrent Effect in this Case, Does Not Warrant Invoking the Exclusionary Rule.*

While the exclusionary rule is generally not invoked in civil proceedings, courts have extended its application to cases characterized as "quasi-criminal" due to the punitive nature of the liabilities involved. *One 1958 Plymouth Sedan v. Com. of Pa.*, 380 U.S. 693, 702 (1965) (exclusionary rule applicable in forfeiture proceeding). Courts have split on applying the exclusionary rule in civil tax proceedings. *See Suarez v. Commissioner of Internal Revenue*, 58 T.C. 792, 1972 WL 2560 (1972) (evidence

inadmissible); *but see Janis*, 428 U.S. 433 (1976) (evidence admissible). Courts have held warrantless searches under direction of the Occupational Safety and Health Act to be unconstitutional, and this reasoning has been extended to invoke the exclusionary rule within a number of OSHA cases. *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978); (R. 9) (citing *Trinity Indus., Inc. v. OSHRC*, 16 F.3d 1455, 1462 (6th Cir.1994); *Smith Steel Casting Co. v. Brock*, 800 F.2d 1329, 1334 (5th Cir.1986)).

By relying on the analysis in the context of OSHA proceedings, the district court erred in extending the exclusionary rule to environmental enforcement actions. The court should have heeded Justice O'Connor's presumption, cited in *Smith Steel*, 800 F.2d at 1334, that "no one would argue that the exclusionary rule should be invoked to prevent an agency from ordering corrective action at a leaking hazardous waste dump if the evidence underlying the order had been improperly obtained . . . ." 800 F.2d at 1334 (quoting *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 1046-47 (1984)). The societal costs of excluding evidence in the environmental enforcement context are much greater than in the OSHA context and greatly outweigh the deterrent effect on private citizens. Excluding evidence in this case would frustrate the goals of CWA and RCRA, especially when the Farm has no reasonable privacy interest in its open fields.

III. Moon Moo Farm Is a Point Source Subject to the NPDES Permitting Requirements of the Clean Water Act Because It Is a Concentrated Animal Feeding Operation that Discharged Pollutants into Waters of the United States Through a Man-Made Ditch.

The objective of the Clean Water Act (CWA) is to ensure the "restoration and maintenance of [the] chemical, physical and biological integrity of [the] Nation's waters." 33 U.S.C. § 1251(a). In order to accomplish that ambitious goal, Congress made it clear that no one has the right to pollute. *Id.*; *see also id.* at § 1311(a) ("[T]he discharge of any

pollutant by any person shall be unlawful"). However, the CWA provides an exemption if the discharge is in compliance with a National Pollutant Discharge Elimination System (NPDES) permit issued pursuant to § 402 of CWA. 33 U.S.C. § 1342.

A discharge of a pollutant occurs when there is: (1) an addition, (2) of a pollutant, (3) from a point source, (4) into navigable waters. 33 U.S.C. § 1362(12). The Act further defines "point source" as "any discernible, confined, and discrete conveyance, including but not limited to any . . . concentrated animal feeding operation[s]" (CAFO). 33 U.S.C. § 1362(14). However, "agricultural stormwater discharges," while not defined, are specifically exempted as a point source. *Id*.

CAFOs are defined as "large-scale industrial" animal feeding operations (AFOs), or "agriculture enterprises where animals are kept and raised in confinement." *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 492 (2d Cir. 2005); 40 C.F.R. § 122.23(b)(1). More specifically, dairy AFOs are considered "Medium CAFOs" when they confine between 200 and 699 mature cows. 40 C.F.R. § 122.23(b)(6)(i)(A). Furthermore, a Medium CAFO must meet one of two conditions; however, at issue in this case is only whether "pollutants [were] discharged into waters of the United States through a man-made ditch, flushing system, or other similar man-made device." 40 C.F.R. § 122.23(b)(6)(ii).

Moon Moo Form is a medium CAFO because it satisfies both conditions of § 122.23(b)(6). First, the Farm operates a dairy farm with 350 head of milk cows; therefore, it meets the minimum criteria for the number and type of animals required for a medium CAFO. (R. 4). Furthermore, as discussed in Section II of this brief, the lower court erred in excluding the evidence of the discharge from the Farm. Therefore, the Farm met the

second condition because the evidence acquired by Riverwatcher establishes that the discharge of pollutants occurred through a man-made, drainage ditch into the Queechunk Canal. (R. 6).

A. *Moon Moo Farm Is a CAFO that Is Subject to the EPA Adopted Definition of Agricultural Stormwater Discharge for Land Application Areas.*

All CAFOs are characterized as point source discharges under the CWA, and are therefore required to have a NPDES permit *unless* that discharge is an agricultural stormwater discharge. *Alt v. EPA*, 979 F. Supp. 2d 701, 710 (N.D. W. Va. 2013) (emphasis added). In 2003, the Environmental Protection Agency (EPA) promulgated rules establishing guidelines and standards for CAFOs, in which it adopted a definition for agricultural stormwater discharge from land application areas. 40 C.F.R. 122.23(e). EPA defines agricultural stormwater discharge to include "a[ny] precipitation-related discharge of manure . . . from land areas under the control of a CAFO." *Id*. However, the exemption only extends to CAFOs that have applied manure "in accordance with *site specific* nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure." *Id.* (emphasize added).

The EPA adopted definition of agricultural stormwater discharge applies to Moon Moo Farm because it is a CAFO that utilizes a land application area for its manure-whey mixture. *Id.* In *Alt*, the plaintiff's poultry production facility was a CAFO that operated without a NPDES permit, yet discharged pollutants into navigable waters during a rain event. *Alt v. EPA*, 979 F. Supp. 2d 701, 703 (N.W. Dist. W. Vir. 2013). The Second Circuit held that the litter manure that had been washed away by a precipitation event was an agricultural stormwater discharge. *Id.* at 714. However, the facility in *Alt* did not apply manure, litter, or wastewater to lands under their control. *Id.* at 704. Therefore, the

Second Circuit did not apply the definition of "agricultural stormwater discharge" adopted in rule §122.42(e) for CAFOs that land apply nutrients, but instead applied the dictionary definition of agricultural stormwater discharge. *Id.* at 711. Unlike the facility in *Alt*, Moon Moo Farm spreads its manure and whey mixture onto land application areas; so that its discharge must be examined under the EPA adopted definition of agricultural stormwater discharge rather than a dictionary definition. (R. 5).

B. *Moon Moo Farm Is a CAFO that Is Not Exempted from the NPDES Permit Requirement as an Agricultural Stormwater Discharge Because Its NMP Does Not Ensure the Appropriate Utilization of Nutrients.*

The EPA adopted definition of agricultural stormwater discharge requires that CAFOs be in compliance with a Nutrient Management Plan (NMP) that ensures the appropriate agricultural utilization of nutrients. Although Moon Moo Farm is in compliance with their NMP, the Farm is not exempted as an agricultural stormwater discharge because its NMP does not ensure the adequate agricultural utilization of nutrients as required in § 122.42(e)(1)(viii). The terms of the Farm's NMP failed to include: (1) any timing limitations concerning land application, and (2) properly developed field-specific rates of application. 40 C.F.R. § 122.42(e)(5).

Time limitations are essential for NMPs to ensure the adequate uptake of nutrients because CAFO land application areas are more likely to experience runoff under certain conditions. U.S. Envtl. Protection Agency, NPDES Permit Writers' Manual for Concentrated Animal Feeding Operations, 6-15 (February 2012), *available at* http://www.epa.gov/nscep/index.html (search NPDES Permit Writers' Manual 2012). As opined by Dr. Mae, the land application of manure during rainfall events is a very poor management practice that will likely result in the runoff of nutrients. R.6; *see also* U.S. Envtl. Protection Agency, Literature Review of Contaminants in Livestock and Poultry

Manure and Implication for Water Quality, 8 (July 2013), *available at* http://water.epa.gov/scitech/cec/upload/Literature-Review-of-Contaminants-in- Livestock -and-Poultry-Manure-and-Implications-for-Water-Quality.pdf (improper application of manure to saturated ground can result in discharge to surface waters). In fact, this opinion is widely supported by state standards for NMPs. *Id*. The state of Michigan explicitly prohibits the application of manure under certain circumstances in its NMPs, including during rainfall events. *Id.*; *see also Best Management Practices for Animal Feeding Operations*, Alabama Cooperative Extension System 6 (2000), http://www.aces.edu /waterquality/articles/0202009/0202009.pdf (manure may not be applied during a rain event or when there is a forecast for rain).

Therefore, the Farm cannot fall within the agricultural stormwater discharge exemption because the Farm's NMP did not include a time limitation for land application during precipitation events. (R. 5). Because runoff of nutrients from land application is more likely to occur during a rainfall event, an NMP that does not account for this runoff has not ensured the appropriate agricultural uptake of nutrients. Although the Farm's expert opined that the Farm was in compliance with its NMP because the NMP did not require any time limitations, this evidence fails to address the lack of a timing limitation that is necessary to ensure the adequate uptake of nutrients. (R. 6).

Furthermore, the Farm's NMP is not "site-specific," and therefore does not ensure the appropriate utilization of nutrients. Land application rates in NMPs must be *uniquely developed* for each site in order to reflect site-specific nutrient needs. 40 C.F.R. § 122.42(e)(5) (emphasis added). As stated by Dr. Mae, the manure-whey mixture would increase the acidity of the soil, and therefore decrease its capacity to absorb nutrients. (R.

6). Because the Farm's state-approved NMP only included application rates for manure, not the manure-whey mixture, the Farm's NMP does not include rates of application specific to its land application areas. (R. 5). Despite Dr. Green's affidavit in support of the Farm's NMP, Dr. Green merely established a historical record of the use of whey in New Union, and that generally Bermuda grass can tolerate a wide range of pH conditions. (R. 6). Because his testimony does not reflect a uniquely developed NMP for the Farm's application of manure-whey mixture to its fields, the NMP did not ensure the appropriate utilization of nutrients.

C. *Even if the Farm's NMP Adequately Ensures the Uptake of Nutrients, New Union's "No Discharge" Program Is in Violation of the Clean Water Act Because It Does Not Provide for Public Comment, and Therefore the Farm's NMP Does Not Exempt It from the NPDES Permit Requirement.*

In adopting the Clean Water Act, it was unambiguous that Congress intended for the public to have an impactful role in its implementation. *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 503 (2d Cir. 2005). The CWA explicitly requires that any program adopted by the EPA or the States must provide public participation in "the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program." 33 U.S.C. § 1251(e). In *Waterkeeper Alliance*, the EPA had adopted a rule for CAFOs that denied the public an opportunity to participate in the development and acceptance of NMPs for the federal NPDES program. *Waterkeeper Alliance, Inc.*, 399 F.3d at 503. NMPs were reasoned to be an integral part of the "regulation, standard, plan, or program" used by the EPA to regulate land application discharges. *Id.* at 504. Therefore, the court held that the rule violated the CWA because it did not make NMPs readily available to the public for participation. *Id.*

The Farm's NMP did not undergo public comment, and therefore the state's "no-discharge" program is not in compliance with the Clean Water Act. Although the issue in *Waterkeeper* concerned NMPs for the federal NPDES permitting program, the court relied on the language of the CWA to conclude that the EPA's CAFO rule violated the CWA. New Union does not provide for any public participation in the adoption of NMPs in its "no-discharge" program. (R. 5). Because the CWA requires that *all* state programs provide for public participation, New Union's "no-discharge" program is in violation of the CWA. Therefore, the Farm is not in compliance with a federally approved NMP, and so it falls outside the agricultural stormwater discharge exemption.

IV. Even if Moon Moo Farm Is Not a CAFO, the Farm Is Subject to NPDES Permitting Liability Because the Discharge of Excess Nutrients Through the Ditch Is a Point Source that Falls Outside of the Agricultural Stormwater Exemption.

The objective of the Clean Water Act was to halt all discharges of pollution by regulating to the fullest extent possible those polluting the nation's waters. *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1978). In order to accomplish that goal, Congress adopted the broadest definition of a point source as possible. *Id.* However, in light of the complexities in identifying and regulating agricultural discharges, Congress later added an exemption for agricultural stormwater discharge in 1987. Water Quality Act of 1987, Pub.L. No. 100-4 § 503, 101 Stat. 7, 75 (1987). By doing so, Congress was not creating a general exemption for point sources, but merely clarifying that agricultural stormwater discharges are not required to have a NPDES permit because they are non-point sources of pollution. *Concerned Area Residents for the Env't v. Southview Farm*, 34 F.3d 114, 120 (2d Cir. 1994).

Therefore, runoff from agriculture is not "inherently a non-point or point source of pollution." *Northwest Envtl. Def. Ctr. v. Brown*, 640 F.3d 1063, 1071 (9th Cir. 2008). Whether runoff is a non-point source or point source depends on whether it flows off the land naturally in an unimpeded manner (a nonpoint source), or if it is collected and discharged through a system of conveyances (a point source). *Id.*; *see Earth Sciences, Inc.*, 599 F.2d at 373 (sources are not distinguishable by the kind of pollution created or by the activity causing the pollution). The mere fact that the runoff originates from agriculture is therefore not determinative in whether a discharge is a point source or a non-point source. *Id*.

Runoff from agriculture that is collected and then discharged from a ditch into navigable waters is a point source. *Id.* at 1087. In *Trustees for Alaska v. Envtl. Protection Agency*, 749 F.26 549 (9th Cir. 1984), the Ninth Circuit held that when an activity releases a pollutant through a discernible conveyance, it is a point source that requires a NPDES permit, regardless of the source of the pollutant. *Id.* at 558. Furthermore, in *Northwest Envtl. Def. Ctr.*, the Tenth Circuit held that stormwater runoff from silviculture operations that was channelized into a system of ditches, and then discharged into streams and rivers constituted a point source. *Northwest Envtl. Def. Ctr.*, 640 F.3d at 1085. In light of EPA promulgated exemptions for silvicultural operations, the court recognized that only Congress can provide statutory exemptions from the definition of a point source. *Id.* at 1086.

Comparatively, the court in *Alt* looked to the "[c]ommon sense and plain English" meaning of agricultural stormwater discharge to exempt all discharges that occur from any operation that is "agricultural in nature" and that results from precipitation. *Alt*, 979

F. Supp. 2d at 711. However, this interpretation of the agricultural stormwater discharge exemption contradicts the language of the CWA. The plain text of the CWA includes an enumerated list of items used to define a point source, which together "evoke images of physical structures and instrumentalities that systematically act as a means of conveying pollutants . . . ." *United States v. Plaza Health Lab*, 3 F.3d 643, 646 (2nd Cir. 1993). Therefore, the mere fact a source of a pollutant is "agricultural in nature" does not override the plain text of the CWA; Congress has not provided a blanket exemption for agricultural point sources. *Id*.

Consequently, the discharge from the Farm's ditch into the Queechunk Canal is a point source that must be regulated by a NPDES permit. The Farm has a system in place that channelizes the runoff from its land application areas into a discrete conveyance that then discharges directly into a navigable water. (R. 6). If this channelized runoff were to be classified as an "agricultural stormwater discharge," it would be directly contrary to the language of the Clean Water Act. The exemption for agricultural stormwater discharges is intended for facilities that are non-point sources, where runoff flows naturally and unimpeded from the land.

V. Moon Moo Farm's Manure and Acid Whey Mixture Is a Solid Waste Under RCRA Because It Is a Mixture of Discarded Material and Animal Waste that Is Not Fully Absorbed when Over-Applied, Which Subjects the Farm to Liability for Violating RCRA's Prohibition of "Open Dumping."

The Farm's practice of spreading a mixture of manure and acid whey on its silage field is unlawful "open dumping" under RCRA, an environmental statute governing the treatment, storage, and disposal of solid and hazardous waste. *Mehrig v. KFC Western, Inc.*, 516 U.S. 479, 483 (1996). A threshold inquiry under RCRA is whether the material is a "solid waste," which is a question of statutory construction and legislative intent. One

of RCRA's primary purposes is to ensure that solid waste is properly disposed of to "minimize the present and future threat to human health and the environment." *Id. See also* 42 U.S.C. § 6902(b). One strategy for ensuring proper disposal of solid waste is RCRA's plan for closing open dumps. 42 U.S.C. § 6945(a) (prohibiting disposal of solid waste via "open dumping").

RCRA permits private citizens, like James and Riverwatcher, to enforce its provisions under § 6972. *Mehrig*, 516 U.S. at 483-84. Section 6972(a)(1)(A) allows for citizen suits to enforce any of RCRA's prohibitions, including the prohibition of "open dumping." Any facility where solid waste is disposed of which is not a sanitary landfill is an "open dump." 42 U.S.C. § 6903(14). RCRA defines "disposal" as the "placing of any solid waste…on any land or water so that such solid waste…may enter the environment…or be discharged into any waters, including ground waters." 42 U.S.C. § 6903(3). The Farm's over-application of the manure and acid whey mixture is unlawful open dumping because the mixture is a solid waste, the Farm is effectively disposing of the waste when it places the mixture on the land during spreading operations, and the Farm is not a "sanitary landfill."

A. *The Manure-Acid Whey Mixture Is a Solid Waste Because It Is Recycled Material Not Destined for Immediate or Beneficial Reuse Within the Generating Industry.*

The mixture spread on the Farm's field is not destined for immediate reuse, and therefore should be characterized as discarded material under RCRA's definition of "solid waste." RCRA defines "solid waste" as "any garbage, refuse. . . and other *discarded material*, including solid, liquid, semisolid or contained gaseous material resulting from . . . agricultural operations . . . ." 42 U.S.C. § 6903(27) (emphasis added). RCRA does not define "discarded material" but courts have assigned the term its

ordinary meaning. *See Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1042 (9th Cir. 2004) (defining "discard" as "to cast aside; reject; abandon; give up"). The Code of Federal Regulations defines "discarded" to mean "abandoned." 40 C.F.R. § 261.2(a)(2). Furthermore, the Code of Federal Regulations defines solid wastes as "abandoned materials" that have been "disposed of." 40 C.F.R. § 261.2(b). The statutory definition of "disposal" encompasses the the meanings of "discarded" and "abandoned," and includes the "discharging . . . or placing of any solid or hazardous waste into or on any land . . . [so that it may] enter the environment . . . ." 42 U.S.C. § 6903(3).

The Ninth Circuit in *Meyer* was persuaded by the D.C. Circuit and the Eleventh Circuit when defining the scope of RCRA's definition of "solid waste" and "discarded material." Particularly, the court looked at three factors to decide whether grass residue was solid waste: 1) whether materials are destined for beneficial reuse in a continuous process by the generating industry; 2) whether materials are actively reused or only have potential for reuse; and 3) whether materials are reused by their original owner rather than a reclaimer. 373 F.3d at 1043 (citing *American Mining Congress v. EPA*, 824 F.2d 1177 (D.C. Cir. 1987); *American Mining Congress v. EPA*, 907 F.2d 1179 (D.C. Cir. 1990); *United States v. ILCO*, 996 F.2d 1126 (11th Cir. 1993)).

In this case, the lower court failed to correctly apply the law to the facts. The Farm is a reclaimer of acid whey, and the record indicates that the Farm does not assign a monetary value to the whey it receives from the Plant. (R. 5). The Farm mixes manure with acid whey waste and lets it sit for a period of time before applying the mixture to its silage field. (R. 5). The acid whey, therefore, is not destined for beneficial reuse within the generating industry of yogurt production. While the mixture of manure and acid whey

remain in the outdoor lagoon, they only have a potential for reuse by one of the generating industries. Additionally, the whey is reused by a reclaimer rather than the generating industry. Essentially, the Plant derives little to no value from its yogurt waste, so it gives the waste to the Farm and lets the Farm abandon the whey by disposing of it on its field during landspread operations. The Federal Regulations and the *Meyer* factors applied to the characteristics of the reclaimed whey-manure mixture indicates the mixture fits within the definition of "solid waste."

B. *The Manure-Acid Whey Mixture Is a Solid Waste Because It Becomes Discarded Material when the Farm Over-Applies the Mixture to Its Silage Field; Both the Acidity of the Mixture and the Application During Rain Events Contributes to Its Over-Application.*

EPA regulations classifying solid waste disposal practices exclude agricultural wastes, like manure, which are "returned to the soil as fertilizers and soil conditioners." 40 C.F.R. §257.1. This means agricultural wastes functioning as fertilizers are not solid wastes. However, while agricultural exceptions may apply in certain circumstances, there is "no blanket animal waste exemption exclud[ing] animal waste from the solid waste definition." *Water Keeper Alliance, Inc. v. Smithfield Foods, Inc.*, 2001 WL 1715730 at *4–5 (E.D.N.C.2001). It is also plausible for manure to be solid waste once it ceases to be beneficial or useful when it is over-applied to fields. *Cmty. Ass'n for Restoration of the Env't, Inc. v. Cow Palace, LLC*, No. 13-CV-3016-TOR, 2013 WL 3179575, at *4 (E.D. Wash. June 21, 2013).

Spreading the mixture on the silage fields, especially during the observed rainy period in April, resulted in its over-application. (R. 6). The Farm and the Riverkeeper both presented expert testimony suggesting the acid whey increased the soil's acidity, which may have prevented the silage crop from effectively absorbing the nutrients in the

manure spread over the field. (R. 6). This over-application caused the nutrient and pollutant runoff, effectively constituting "discarded material" that no longer served a beneficial purpose for the "generating industry" of dairy production. Therefore, the manure-whey mixture itself is a "discarded material" under RCRA's definition of "solid waste."

Because this material is reclaimed, non-beneficial, over-applied, discarded material, it falls within the scope of RCRA's very broad "solid waste" definition. The Farm's placing of waste on land so that it "may enter the environment" or discharge into water or groundwater is the "disposal" of solid waste. 42 U.S.C. § 6903(3). Additionally, the Farm has not pretended to be anything other than a farm, and has argued against defining its mixture as "solid waste," therefore excluding it from the "sanitary landfill" definition. *See* 40 C.F.R. § 257.2 ("Sanitary landfill means a facility for the disposal of solid waste which complies with this part."). Therefore, the Farm's disposal of solid waste is "open dumping" in violation of 42 U.S.C. § 6945.

VI. Moon Moo Farm Is Subject to RCRA's Expansive Standard to Eliminate *Any* Risk to Human Health and the Environment, Because There Is a Causal Link Between the Farm's Landspread Operations and the 2013 Nitrate Advisory, and the Contribution of Pollutants to the Environment Threatens Both Infants and the Aquatic Ecosystem of the Queechunk River.

RCRA seeks to ensure the handling of solid waste in a way that minimizes any threat to health or the environment. Section 6972(a)(1)(B) allows for citizen suits against responsible parties who are contributing to present disposal of any solid waste "which may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a)(1)(B). RCRA's language and purpose represents Congress's intent that if any error is made in applying the endangerment standard, it must be made in favor of protecting public health, welfare, and the environment. *Interfaith Community*

Organization v. Honeywell Intern., Inc., 399 F.3d 248, 259 (3d Cir. 2005) (rejecting district court's higher, more narrow endangerment standard). To prevail under § 6972(a)(1)(B) requires showing (1) that the defendant is a person who was or is a generator of solid waste; (2) the defendant contributed to, or is contributing to, the disposal of solid waste; and (3) the waste may present an imminent and substantial endangerment to health or the environment. *Burlington Northern and Santa Fe Ry. Co. v. Grant*, 505 F.3d 1013, 1020 (10th Cir. 2007). In this case, the district court erred in applying the "imminent and substantial endangerment" standard to the facts of the case. As the "solid waste" analysis has already been set forth above, this Court should find that the polluted runoff from the Farm's open dumping created an "imminent and substantial threat" to human health and the environment.

Along with the Tenth Circuit in its *Burlington Northern* opinion, the First, Second, Eleventh, Fifth, and Third Circuits, have all "emphasized the preeminence of the word 'may' in defining the degree of risk needed to support [RCRA § 6972(a)(1)(B)]'s liability standard." *Maine People's Alliance and Natural Resources Defense Council v. Mallinckrodt, Inc.*, 471 F.3d 277, 288 (1st Cir. 2006). These Circuits have all been guided by a Third Circuit opinion interpreting the word "may" in § 6973(a), the statutory provision authorizing the EPA Administrator to file endangerment claims. *United States v. Price*, 688 F.2d 204, 213 (3d Cir. 1982) (use of the word "may" was intended to make the provision "expansive"). When Congress amended RCRA with the additional citizen suit provision under § 6972(a)(1)(B), the Senate Report accompanying the amendments cited and quoted to *Price* on many occasions and "specifically endors[ed] the court's conclusion that [§ 6973(a)] is intended to give courts the tools to 'eliminate *any risks*

posed by toxic waste.'" *Mallinckrodt*, 471 F.3d at 287 (citing S. Rep. No. 98-284, at 59 (1983)) (emphasis in original).

"Imminency" does not require showing that actual harm will occur immediately, as long as the risk of threatened harm exists. *Burlington Northern*, 505 F.3d at 1021. The word "substantial" is not defined by statute or legislative history; however, case law suggests harm is "substantial" under RCRA when it is "serious." *Id.* at 1021. Finding endangerment to be substantial "does not necessitate quantification of endangerment, as [it] is substantial where there is reasonable cause for concern that someone or something may be exposed to risk of harm." *Id.*

When there are multiple potential causes contributing to elevated pollutant levels, as in this case, the courts have not required "but-for" causation to establish liability. Endangerment claims have failed when the party bringing the claim does not account for alternative contributors of pollution and fails to establish that the defendant was one of those contributing sources. *Attorney General of Oklahoma v. Tyson Foods, Inc.*, 565 F.3d 769, 779 (10th Cir. 2009) (citing *Okla. ex rel. Edmondson Tyson Foods, Inc.*, No. 05–CV–329–GKF–SAJ, 2008 WL 4453098, at *1, *3 (N.D.Okla. Sept.29, 2008)) ("Nowhere does the district court say that poultry litter must be the *only* contributing source.") (emphasis in original).

In this case, the lower court required a higher standard than the statute contemplated for eliminating present or future harm from exposure to solid wastes. *See Honeywell*, 399 F.3d at 260. This Court should consider the expansive interpretation that courts have applied to § 6972(a)(1)(B) claims as it applies to potential harm to human health and the environment. While the lower court in this case considered harm to human

health, it erred in failing to consider harm to the environment as well. *See Burlington Northern*, 505 F.3d at 1021. ("[T]he district court erred by limiting its consideration to only injury to persons when [RCRA] also requires consideration of imminent and substantial endangerment to the environment.").

In this case, elevated nitrate levels pose a substantial threat to infants with the potential to cause methemoglobinemia or "blue baby syndrome." *Q&A: Nitrate in Drinking Water*, Washington Department of Health, http://www.doh.wa.gov/CommunityandEnvironment/DrinkingWater/Contaminants/Nitrate (last visited November 26, 2014). Infants may develop "blue baby syndrome" if they drink water with elevated nitrate levels or eat foods made with nitrate-contaminated water. *Id.* "Blue baby syndrome" may cause brownish-blue skin tone due to lack of oxygen, or in milder cases, may cause signs similar to a cold or infection. *Id.* Furthermore, while elevated nitrate levels pose a threat to infants, the potential for elevated acidity in the river due to acid whey runoff also poses a risk to the environment. *See* Justin Elliott, *Whey Too Much: Greek Yogurt's Dark Side*, Modern Farmer (May 22, 2013), http://modernfarmer.com/2013/05/whey-too-much-greek-yogurts-dark-side/ ("[W]hey decomposition is toxic to the natural environment, robbing oxygen from streams and rivers . . . which can destroy[ ] aquatic life over potentially large areas.").

A key parameter characterizing dairy waste by-products, like acid whey, is their relatively high organic loads, monitored by biological oxygen demand and chemical oxygen demand. A. R. Prazeres, F. Fatima and J. Rivas, *Cheese Whey Management: A review*, J. Envtl. Mgmt., Nov. 2013, at 48-68 (high BOD and COD levels can divert oxygen from aquatic environments and result in eutrophication or excessive plant

growth). Researchers have observed some benefits from applying whey to crops; however, researchers have also observed negative effects to crop yields and water quality as a result of the over-application of whey. *Id*. States with a booming yogurt industry, like New York, have recognized the threat that over-application of acid whey may pose to the environment and have provided for its regulation. *See Whey Management for Agriculture*, Dept. of Envtl. Conservation, http://www.dec.ny.gov/chemical/94164.html (last visited November 26, 2014).

Finally, Dr. Generis's opinion that the Farm's discharges contributed to the April 2013 nitrate advisory establishes the causal link between the Farm's contribution to the alleged endangerment. (R. 7). This link creates a reasonable concern that infants may be exposed to polluted drinking water in the future, which presents a threat of potentially serious harm as a result of the Farm's "open dumping." This link also establishes a reasonable threat of serious harm to the environment due to possible oxygen depletion in the aquatic environment. The purpose of § 6972(a)(1)(B) is to eliminate *any risk* of harm from toxic wastes, therefore this Court should hold that the Farm's disposal of solid waste creates an imminent and substantial risk to human health and the environment.

CONCLUSION

For the foregoing reasons Petitioners respectfully request this Court to reverse the decision of the United States District Court for the District of New Union.