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2015 Bench Memorandum

TWENTY-SEVENTH ANNUAL JEFFREY G. MILLER PACE NATIONAL ENVIRONMENTAL LAW MOOT COURT COMPETITION PACE LAW SCHOOL

2015 Bench Memorandum

I. REGULATORY AND FACTUAL FRAMEWORK

A. PARTIES

Deep Quod Riverwatcher (Riverwatcher) is a not for profit environmental organization under the laws of the State of New Union. Riverwatcher is fully funded through membership dues and charitable contributions. Its mission is to keep the Deep Quod River and its tributaries protected from pollution and to advocate for clean waterways. The Deep Quod River is itself navigable and connects to the Mississippi River, which is used for commercial navigation. Members use the Deep Quod River for navigation, various recreational activities, and aesthetic enjoyment. Dean James is one such member of the Riverwatcher organization that uses the Deep Quod River for recreation and navigation.

The United States Environmental Protection Agency (EPA) is the federal agency responsible for enforcing and administering select environmental laws and regulations. Their mission is to protect human health and the environment from significant risk

of harm. The State of New Union is subject to the administration of environmental laws and regulations by EPA and through their own state agencies. The State of New Union Department of Agriculture (DOA) is one such state agency, and is also the agency that has issued the classification for Moon Moo Farm.

Moon Moo Farm is a dairy farm in the State of New Union, just outside the City of Farmville. The facility has 350 head of milk cows, which are housed in a barn on the property. The cows are not pastured at any time of the year. The DOA has designated Moon Moo Farm as a no discharge animal feeding operation (AFO). The classification means that there is not normally a direct discharge from the facility into waters during a typical 25 year storm cycle. As a no discharge AFO, Moon Moo Farm must submit a nutrient management plan (NMP) to the DOA that describes application rates and expected nutrient uptakes levels.

B. APPLICABLE RULES OF LAW

- Federal Water Pollution Control Act (Clean Water Act) § 301, 33 U.S.C. § 1311 (2012)
- Clean Water Act § 502, 33 U.S.C. § 1362 (2012)
- Clean Water Act § 402, 33 U.S.C. § 1342 (2012)
- Clean Water Act § 505, 33 U.S.C. § 1365 (2012)
- Resource Conservation and Recovery Act § 4005, 42 U.S.C. 6945 (2012)
- Resource Conservation and Recovery Act § 7002, 42 U.S.C. § 6972 (2012)
- Concentrated Animal Feeding Operations, 40 C.F.R. § 122.23 (2014)
- Definition of Solid Waste, 40 C.F.R. § 261.2 (2014)
- Classification of Solid Waste Disposal Facilities and Practices – Scope and Purpose, 40 C.F.R. § 257.1 (2014)
- Criteria for Classification of Solid Waste Disposal Facilities and Practices:
- Floodplains, 40 C.F.R. § 257.3-1 (2014)
- Ground Water, 40 C.F.R. § 257.3-4 (2014)
- Application to Land Used for the Production of Food Chain Crops, 40 C.F.R. § 257.3-5 (2014)

C. SUMMARY OF FACTS

The undisputed facts established by the district court are as follows:

Moon Moo Farm is the operator of a dairy farm located ten miles from the City of Farmville in the State of New Union. The farm consists of 350 milk cows, which are housed in a barn and not pastured. In 2010, Moon Moo Farm expanded to the current 350 cows from its previous 170 cows, due to the need to serve a growing demand for milk by the Chokos Greek Yogurt facility. In 2012, Moon Moo Farm began accepting acid whey produced by the Chokos facility. The manure and other liquid waste from the cows is collected through an interconnected series of drains and pipes that run from the barn to an outdoor lagoon. The acid whey taken from the Chokos facility is added to the lagoon to create a manure mixture, which is stored in the lagoon to be later used as fertilizer. Per the design of the lagoon, the mixture should be fully contained within it during any normal 25 year rainfall event. Periodically, the manure mixture from the lagoon is pumped into tank trailers, then hauled by tractor and spread on the Bermuda grass fields that are also owned by Moon Moo Farm. Each summer the Bermuda grass is dried and harvested as silage.

The Moon Moo Farm property, including its Bermuda grass fields, is located at a bend in the course of the Deep Quod River. Prior to Moon Moo Farm's ownership of the property, a bypass canal, now known as the Queechunk Canal, was excavated in order to alleviate flooding that occurred at the river bend. The Deep Quod River flows year round and runs into the Mississippi River, which is a navigable in fact body of water that has long been used for commercial navigation. However, most of the flow of the Deep Quod River in the area near Moon Moo Farm is diverted into the fifty yard wide and three to four feet deep Queechunk Canal. The Deep Quod River, as well as the Queechunk Canal, can be navigated by a canoe or small boat both upstream and downstream. In addition, the community of Farmville uses the Deep Quod River as a drinking water source downstream of Moon Moo Farm. Moon Moo Farm owns the land on both sides of the Queechunk Canal and has prominently posted "No Trespassing" signs although the canal, which is commonly used as a shortcut for the Deep Quod River.

Moon Moo Farm is currently regulated by the State of New Union as a "no discharge" animal feeding operation (AFO) and therefore does not hold any permit issued pursuant to the National Pollutant Discharge Elimination System (NPDES) program. As a "no discharge" AFO, Moon Moo Farm does not normally have a direct discharge into waters of the State of New Union from its manure lagoon and handling facility during conditions up to and including a 25 year storm event. As a "no-discharge" facility, Moon Moo Farm must submit a nutrient management plan (NMP) to the Farmville Regional Office of the State of New Union Department of Agriculture (DOA). Moon Moo Farm's NMP sets forth all planned seasonal manure application rates and calculations of the expected uptake of nutrients by the Bermuda grass fields. Moon Moo Farm has records stating that at all times it has applied manure to its fields at rates consistent with its NMP. The DOA has the authority to reject an NMP found to be insufficient. However, they do not ordinarily review submitted NMPs, and there is no provision providing for public comment on submitted NMPs.

During the late winter and early spring of 2013, Deep Quod Riverwatcher (Riverwatcher) received complaints of a manure smell and turbid brown color coming from the Deep Quod River. There was also a nitrate advisory issued for the drinking water coming from the Deep Quod River, warning people that the water was unsafe for drinking by infants due to high levels of nitrates. Customers were advised to give bottled water to infants less than two years old but that the nitrates did not pose any health threat to adults or juveniles over the age of two. Nitrate advisories have periodically been issued in Farmville in the past, before the increase in Moon Moo Farm's cows, specifically in 2002, 2006, 2007, 2009 and 2010. On April 12, 2013, in response to the complaints, Dean James, a member of Riverwatcher, made an investigatory patrol of the Deep Quod River on a small metal outboard or "jon boat." James ignored the posted "No Trespassing" signs and proceeded up the Queechunk Canal. He observed and photographed the manure spreading operations on Moon Moo Farm's fields as well as discolored brown water flowing from the fields through a drainage ditch into the Queechunk Canal. James took samples of the water flowing from the ditch

and had them tested. The results showed highly elevated levels of nitrates and fecal coliforms.

Riverwatcher submitted the affidavit of Dr. Ella Mae, an agronomist whose stated opinion is that the lower pH of the liquid manure, a result of adding the acid whey from the Chokos facility, has lowered the pH of the soil in Moon Moo Farm's fields. Through testing of the soil obtained during discovery, Dr. Mae determined that the pH level of the mixture was 6.1, a weak acid. Dr. Mae states that this level of acidity prevented the Bermuda grass from effectively taking in the nutrients from the manure mixture. These unprocessed nutrients were released into the environment, including the Deep Quod River, through leaching groundwater and runoff during rain events. In addition, Dr. Mae states that the application of the manure mixture during a rain event is a poor management practice that will nearly always result in runoff of nutrients from the fields. Moon Moo Farm submitted an affidavit from Dr. Emmet Green, an agronomist who stated that he did not dispute the assertion that the acid whey reduced the pH level of the soil and nutrient uptake by the Bermuda grass. However, Dr. Green stated that Bermuda grass can tolerate a wide range of pH levels and that the application of whey as a soil conditioner was a longstanding practice in the State of New Union. Dr. Green also mentioned that there is nothing in Moon Moo Farm's NMP that prevents it from applying the manure mixture during a rain event. Dr. Susan Generis, Riverwatcher's environmental health expert, conceded at her deposition that although it was her opinion that Moon Moo Farm's discharges contributed to the April 2013 nitrate advisory, it was impossible to state that the discharges were the "but for" cause of the advisory.

Riverwatcher served Moon Moo Farm, the New Union Department of Environmental Quality and EPA with a notice of intent to sue under the citizen suit provisions of the Clean Water Act (CWA) § 505, and the Resource Conservation and Recovery Act (RCRA) § 7002. Prior to the expiration of the waiting period, EPA commenced a civil enforcement action against Moon Moo Farm seeking civil penalties under CWA § 309(d) and injunctive relief under CWA § 309(b). At the conclusion of the ninety-day waiting period, Riverwatcher intervened in the EPA action pursuant to CWA § 505(b)(1)(B) and alleged additional causes of

action under the RCRA § 7002. Moon Moo Farm answered the complaint and asserted a counterclaim against Riverwatcher seeking damages and injunctive relief for trespass. Having completed discovery, both sides moved for summary judgment. On April 21, 2014, the district court denied Riverwatcher's and EPA's motion for summary judgment on their CWA and RCRA claims and granted Moon Moo Farm's motion for summary judgment dismissing the CWA and RCRA claims and granting judgment on its counterclaim for trespass. EPA and Riverwatcher appeal the district court's decision finding that Moon Moo Farm is not a concentrated animal feeding operation (CAFO) subject to permitting under the NPDES program, that evidence was obtained by trespass and is not admissible in a civil proceeding. In addition, Riverwatcher appeals the district court's holding that Moon Moo Farm's discharges fell within the agricultural stormwater exemption of the CWA, the dismissal of the open dumping and imminent and substantial endangerment claims under RCRA, and the award of damages to Moon Moo Farm for trespass.

II. ISSUES

The parties have been ordered to brief the following issues on appeal:

- Whether the Queechunk Canal, a man-made body of water, is a **public trust navigable water** of the State of New Union, allowing for a private right of navigation despite private ownership of the banks on both sides and the bottom of the canal by Moon Moo Farm.
    - On appeal, **EPA** and **Riverwatcher** will argue that the Queechunk Canal is a publicly navigable waterway.
    - On appeal, **Moon Moo Farm** will argue that the Queechunk Canal is not a publicly navigable waterway.
- If the canal is not a public trust navigable water, whether **evidence obtained though trespass** and without a warrant is admissible in a civil enforcement proceeding brought under CWA §§ 309(b), (d) and 505.

  - On appeal, **EPA** and **Riverwatcher** will argue that evidence obtained through trespass is admissible.
  - On appeal, **Moon Moo Farm** will argue that evidence obtained through trespass is not admissible
- Whether Moon Moo Farm requires a permit under the CWA NPDES permitting program because Moon Moo Farm is a **CAFO** subject to NPDES permitting by virtue of a discharge from its manure land application area.
  - On appeal, **EPA** and **Riverwatcher** will argue Moon Moo Farm is a CAFO that is subject to NPDES permitting.
  - On appeal, **Moon Moo Farm** will argue that it is not a CAFO subject to NPDES permitting.
- If Moon Moo Farm is not a CAFO, whether excess nutrient discharges from its manure application fields remove it from the **agricultural stormwater exemption** and subject it to NPDES permitting liability.
  - On appeal, **Riverwatcher** will argue Moon Moo Farm is removed from the agricultural stormwater exemption and is subject to NPDES.
  - On appeal, **EPA** and **Moon Moo Farm** will argue that application of manure in compliance with a nutrient management plan (NMP) exempts it from NPDES permitting under the agricultural stormwater exemption.
- Whether Moon Moo Farm is subject to a citizen suit under RCRA because its land application of fertilizer and soil amendment constitutes a **solid waste** subject to regulation under RCRA Subtitle D.
  - On appeal, **Riverwatcher** will argue that the landspread mixture constitutes a solid waste and Moon Moo Farm is subject to RCRA Subtitle D regulation.
  - On appeal, **EPA** and **Moon Moo Farm** will argue that the landspread mixture does not constitute a solid waste and is not subject to regulation under RCRA Subtitle D.
- If landspread manure and acid whey mixtures constitutes a statutory "solid waste" subject to RCRA regulation,

whether plaintiffs can establish an **imminent and substantial endangerment** to human health subject to redress under RCRA § 7002(a)(1)(B).

- On appeal, **EPA** and **Riverwatcher** will argue that an imminent and substantial endangerment has been established.
- On appeal, **Moon Moo Farm** will argue that an imminent and substantial endangerment has not been established.

III. PUBLIC TRUST DOCTRINE: IS THE QUEECHUNK CANAL, A MAN-MADE WATER BODY, A PUBLIC TRUST NAVIGABLE WATER OF THE STATE OF NEW UNION, ALLOWING FOR A PRIVATE RIGHT OF NAVIGATION DESPITE PRIVATE OWNERSHIP OF THE BANKS ON BOTH SIDES AND THE BOTTOM OF THE CANAL BY MOON MOO FARM?

EPA and **Riverwatcher** contend that the Queechunk Canal is a public trust navigable water of the State of New Union. If the canal is a public trust navigable water, it allows for a public right of navigation despite Moon Moo Farm's private ownership of the banks and bottom of the canal. **Moon Moo Farm** contends that the Queechunk Canal is not a public trust navigable water of the State of New Union that allows for a public right of navigation because the banks and bottom are privately owned.

The public trust doctrine was explicated in *Ill. Cent. R.R. Co. v Illinois*, finding that a state may hold title to the beds of navigable waters "in trust for the people of the state that they may enjoy the navigation of the water . . ." 146 U.S. 387, 452 (1892); *see also Newcomb v. Cnty. of Carteret*, 701 S.E.2d 325, 336-37 (N.C. Ct. App. 2010).[1] Under the public trust doctrine a state may subject a riparian owner to rules and regulations for the protections of public right to the water. *State of Alaska, Dep't. of Natural Res. v. Alaska Riverways, Inc.*, 232 P.3d 1203, 1211 (Alaska 2010). The Montana Supreme Court found that the public

1. In addition, it has been found that public waterways are held by the state for the use and enjoyment by the public. St. Croix Waterway Ass'n v. Meyer, 178 F.3d 515, 518-19 (8th Cir. 1999).

owns an "in stream, non-divisionary right" to the use of a state's navigable surface waters for recreational purposes. *Mont. Trout Unlimited v. Beaverhead Water Co.*, 255 P.3d 179, 184-85 (Mont. 2011).

However, the U.S. Supreme Court has held that privately owned man-made waterways did not become open to all citizens just because they connected to other navigable waterways. *Kaiser-Aetna v. United States*, 444 U.S. 164, 179 (1979). This case looked at navigable water in the context of interstate commerce, not taking into account the public trust doctrine of states. As cases of navigability cannot all be lumped together one must look at the purpose for which navigability was invoked in a particular case in order to determine whether to apply the public trust doctrine. *Id.*; *see also Vaughn v. Vermillion*, 444 U.S. 206, 208 (1979). Historically, determination of navigability in terms of state waterbed title was based on federal law for interstate navigable waters, but state public trust doctrines must also be taken in account.

In this case, the resolution of whether Queechunk Canal is a navigable water subject to the public trust doctrine will turn on whether a man-made canal on privately owned land could be considered to be included within the public trust doctrine allowing for public right of passage under state law. One test used to determine whether a waterway is navigable in fact under federal law asks if the waterway is currently used or is susceptible to being used in its ordinary or natural condition as a highway for commerce. *PPL Mont., LLC v. Montana*, 132 S. Ct. 1215, 1228 (2012). **EPA** and **Riverwatcher** have a persuasive argument that the canal is a public trust navigable water based on a North Carolina Court of Appeals case, *Fish House, Inc. v. Clarke*, a trespass action revolving around the use of a canal on private property. 693 S.E.2d 208 (N.C. Ct. App. 2010). **Moon Moo Farm** will rely on Supreme Court cases including *Kaiser Aetna* and *Vaughn* in its counter arguments. However, it will also need to cite state case law in order to avoid the application of public trust doctrine.

EPA and **Riverwatcher** will argue that Queechunk Canal is a publicly navigable man-made waterway that is subject to private rights of navigation. These parties will draw parallels between this case and *Fish House, Inc.*, a trespass action brought

by one property owner against an adjoining property owner to prohibit the use of a canal that divided the two properties. *Id.* at 210. In that case, the North Carolina court held that a canal, although man-made, was a navigable waterway subject to the public trust doctrine. 693 S.E.2d at 211. They will also rely on *The Daniel Ball* for the proposition that all waterways that are navigable in fact are navigable in law. 77 U.S. 557, 563 (1870); *see also Gwathmey v. State of North Carolina*, 464 S.E.2d. 674, 681-82 (N.C. 1995) (quoting *State of North Carolina v. Baum*, 38 S.E. 900, 901 (N.C. 1901)). Other state court cases will also help EPA and Riverwatcher's argument. For example, one Supreme Court of North Carolina case stated that if a body of water can be navigated in its natural condition it is navigable in fact even if it had not actually been navigated previously. *Gwathmey,* 464 S.E.2d at 681-82. South Carolina's *Hughes* case also bolsters their argument, holding that when a canal is constructed in order to connect with navigable waters – as the Queechunk was – it will be deemed part of the waters. *Hughes v. Nelson*, 399 S.E.2d 24, 25 (S.C. Ct. App. 1990).

EPA and **Riverwatcher** will also seek to reframe the legal inquiry used to determine navigability, arguing that whether a waterway is artificial is not controlling. *Id.* The question is not whether the waterway itself is natural or artificial but rather whether the water flows without dwindling or obstruction. *State of North Carolina v. Twiford*, 48 S.E. 586, 587 (N.C. 1904). The true test to be applied is whether a waterway is "inherently and by its nature" capable of being used for navigation, whether or not that is its actual use or the extent of the use. *Id.*; *see also State ex. rel Medlock v. S.C. Coastal Council*, 346 S.E.2d. 716, 719 (S.C. 1986).

Moon Moo Farm will counter that Queechunk Canal is not a publicly navigable man-made waterway subject to private rights of navigation due to the fact that the farm privately owns the banks and bottom of the canal. It may cite a Louisiana Court of Appeals case stating that navigability of a waterway is not presumed and that the burden of proof lies with the party asserting the navigability (here, EPA and Riverwatcher). *Shell Oil Co. v. Pitman*, 476 So.2d. 1031, 1035 (La. Ct. App. 1985). Although *Kaiser Aetna* and *Vaughn* will be helpful to Moon Moo Farm's argument, it must also rely on state cases. For example,

the Court of Appeals for Louisiana held that a privately owned waterway, although navigable in fact, might not be subject to public use. *Nat'l Audubon Soc'y v. White*, 302 So.2d. 660, 668 (La. Ct. App. 1974). As the canal was constructed with private funds and on private property, the court was not willing to allow the canal title to be "vested in a whole nation" solely because it was originally constructed to be deep enough to be navigable and allow for flowing water. *Id.* at 665. The court likened the canal to a private road: although used by commercial traffic it may not be subject to public use. *Id. Nat'l Audubon Soc'y,* similar in facts to this case, is a trespass action brought by private landowners against persons using a canal on their property. Additionally, the Fifth Circuit has held that waterways made navigable through private dredging were not subject to navigational servitude. *Dardar v. Lafourche Realty Co., Inc*., 55 F.3d 1082, 1085-86 (5th Cir. 1995). Even if a waterway was navigable, a navigational servitude could not be imposed. *Id*. In addition, a Louisiana appellate case held that private canals were not navigable waters subject to public use. *Buckskin Hunting Club v. Bayard*, 868 So.2d 266, 271-72 (La. Ct. App. 2004). Although their facts are not directly on point with the case here, these cases will be important to Moon Moo Farm because the Queechunk Canal was created on private land. If it is not subject to a navigational servitude, then there is no public right of access and Riverwatcher agent James was trespassing.

Moon Moo Farm may also argue that the public trust status of a particular water must be determined at the time of a State's admission into the United States under the "Equal Footing Doctrine," citing *United States v. Oregon*, 295 U.S. 1, 6 (1935). Since the Queechunk Canal had not been constructed at the time of New Union's entry into the Union, imposition of a navigational servitude would constitute a taking[2] of private property requiring compensation under the Fifth Amendment.

2. There is another possible taking claim that Moon Moo Farm could make but should not be a main argument. A Florida Supreme Court case held that there was no unconstitutional deprivation of an owner's littoral right without just compensation as land seaward of the high water line is subject to the public trust doctrine. Walton Cnty. v. Stop Beach Renourishment, Inc., 998 So.2d 1102 (Fla. 2008). The Walton case looked at waters that are subject to public trust doctrine, which cannot be unconstitutionally taken even if no compensation is given.

See Kaiser Aetna, 444 U.S. 164. **EPA** and **Riverwatcher** may counter that *Oregon* applies only to the question of title to lands as between the State and the United States, that the question of a public trust navigational servitude is a question of State law, and that no taking would occur based on consistent application of state law public trust principles. *Cf. Stop the Beach Renourishment v. Florida,* 560 U.S. 702 (2010).

IV. EXCLUSIONARY RULE: IF THE CANAL IS NOT A PUBLIC TRUST NAVIGABLE WATER, IS EVIDENCE OBTAINED THROUGH TRESPASS AND WITHOUT A WARRANT ADMISSIBLE IN A CIVIL ENFORCEMENT PROCEEDING BROUGHT UNDER CWA §§ 309(B), (D) AND 505?

The exclusionary rule is ordinarily applied in criminal law to prevent the introduction of evidence that was illegally obtained in violation of the Fourth Amendment Search and Seizure right. *Illinois v. Krull*, 480 U.S. 340, 347 (1987). **Moon Moo Farm** contends that since the Queechunk Canal is not a public trust navigable water of the State of New Union, evidence obtained through trespass and without a warrant is not admissible in a civil proceeding and is subject to the exclusionary rule. **EPA** and **Riverwatcher** contend that, even if the Queechunk Canal is not a public trust navigable water of the State of New Union and therefore James was committing a trespass, evidence obtained without a warrant is admissible in a civil enforcement proceeding and not subject to the exclusionary rule.

In this case, the district court followed the cases of *Trinity Indus., Inc. v. OSHRC* and *Smith Steel Casting Co. v. Brock*, which stated that even in civil enforcement cases the Fourth Amendment exclusionary rule applies. 16 F.3d 1455, 1461-62 (6th Cir. 1994); 800 F.2d 1329, 1334 (5th Cir. 1986). Therefore, it held that the evidence obtained by James on April 12, 2013 is not admissible. It further stated that EPA should not be allowed to violate Fourth Amendment rights just because a third party organization obtains the evidence it decides to use.

EPA and **Riverwatcher** will point out that, in civil litigation, whether illegally obtained evidence is admissible is usually left up to the district court as there is not a standard exclusionary rule in civil cases. *Borges v. Our Lady of the Sea*

Corp., 935 F.2d 436, 440 (1st Cir. 1991); *Park v. El Paso Bd. of Realtors*, 764 F.2d 1053, 1066 (5th Cir 1985); *Trans-Cold Exp., Inc. v. Arrow Motor Transit, Inc.*, 440 F.2d 1216, 1218 (7th Cir. 1971).[3] The Supreme Court has never applied the exclusionary rule to civil proceedings even though it has applied the rule in criminal proceedings. *Id.* at 447 (1976) (holding IRS was not prohibited from using evidence obtained by the LAPD); *see also I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 1033 (1984) (holding that exclusionary rule should not apply in deportation case). These parties will rely on the balancing test developed by the Supreme Court in *United States v. Janis* and cite instances where the exclusionary rule has not been applied in civil cases. 428 U.S. 433 (1976). For criminal cases, *Janis* established a balancing test that examines whether the deterrent benefit from applying the exclusionary rule would outweigh the detriment to the public interest. 428 U.S. at 447. For civil cases, *Janis* established a balancing test that weighs the deterrent effect of applying the exclusionary rule against the societal costs of excluding the evidence in question but also takes into account the integrity of the judicial process. *Id.*; *see also* Marjorie A. Shields, *Admissibility, in Civil Proceedings, of Evidence Obtained Through Unlawful Search and Seizure*, 105 A.L.R. 5th 1 (2003). Using *Janis*'s civil balancing test, EPA and Riverwatcher can show that the public interest benefit of uncovering Moon Moo Farm's discharging into the Queechunk Canal outweighs the effect that excluding the evidence has on deterring other trespassers. They may also point out that the Ninth Circuit stated that the inadmissibility of evidence obtained illegally is not applicable where it is not a matter of criminal procedure or sanctions imposed. *N.L.R.B. v. South Bay Daily Breeze*, 415 F.2d 360, 364 (9th Cir. 1969).

Finally, even if this court finds that the exclusionary rule should apply, **EPA** and **Riverwatcher** may rely on a good faith exception to the rule by arguing that James acted in good faith as he thought the Queechunk Canal was a publicly navigable water body. Using the same cases cited here by the district court, *Smith Steel Castings Co*. determined that the exclusionary rule applies

3. The case of Trans-Cold Exp., Inc. v. Arrow Motor Transit, Inc. cites to F.R.C.P. 43(a) as a "rule of admissibility, not exclusion."

when penalties are assessed unless the good faith exception can be applied. 800 F.2d at 1330 (citing *United States v. Leon*, 468 U.S. 897, 905 (1984) (evidence obtained by police who acted in good faith reliance on a warrant later found to lack probable cause was admissible)). These parties can liken James' actions to those of the police officer who believed he possessed a valid warrant.

Moon Moo Farm will counter that since the Queechunk Canal is not a public trust navigable water, James was trespassing and any evidence obtained by him during that trespass should not be admissible in this case. It will rely on the cases cited by the district court and liken this case to a criminal case where the exclusionary rule applies. Courts have applied the exclusionary rule to civil cases that are "quasi-criminal" or similar to criminal cases in nature. Christine L. Andreoli, *Admissibility of Illegally Seized Evidence in Subsequent Civil Proceedings: Focusing on Motive to Determine Deterrence*, 51 Fordham L. Rev. 1019, 1021 (1983). For example, forfeiture proceedings have been deemed quasi-criminal in nature and therefore the exclusionary rule applies. *One 1958 Plymouth Sedan,* 380 U.S. 693, 702 (1965) (evidence obtained during a car search without a warrant could not be used in proceeding for forfeiture of the car); *see also One 1976 Cadillac Seville*, 477 F. Supp. 879, 883 (E.D. Mich. 1979).

Additionally, **Moon Moo Farm** can point to one of the primary purposes of the exclusionary rule – the deterrence of future 4th Amendment violations – to bolster its argument for application of the exclusionary rule. It might use the balancing test from *Janis* to argue that the deterrent benefit of excluding the evidence outweighs the detriment to the public interest. 428 U.S. at 447. Moon Moo Farm could also point to James' motive as a trespasser and argue for weighing the motive of the person collecting the evidence against the deterrent effects of the exclusionary rule instead of weighing the benefits to society against the deterrent effects. *See Tirado v. Comm'r*, 689 F.2d 307, 310 (2d Cir. 1982) (finding that the likelihood of deterrence requires an assessment of motive and an inquiry into a person's motivation is fundamental in order to translate the idea of deterrence into a decision). It might also make an argument for excluding the evidence to deter future illegal conduct based on

the heightened deterrence effect in an intrasovereign case (which we have here) versus an intersovereign case (which *Janis* was).[4] However, this is not Moon Moo Farm's strongest argument on this issue as it requires them to liken James to an agent of EPA and may best be avoided.

V. CLEAN WATER ACT VIOLATIONS: DOES MOON MOO FARM NEED A PERMIT UNDER THE CWA NPDES PERMITTING PROGRAM?

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

The National Pollutant Discharge Elimination System (NPDES) program under the Clean Water Act (CWA) seeks to regulate discharges of a pollutant from a point source into navigable waters of the United States. 33 U.S.C. § 1342 (2012). **EPA** and **Riverwatcher** contend that Moon Moo Farm is a concentrated animal feeding operation (CAFO) subject to NPDES permitting because of discharge from its manure land application area. **Moon Moo Farm** contends that the State of New Union has deemed it a "no-discharge" animal feeding operation (AFO), and that it is not a CAFO subject to NPDES permitting based on discharges from its land application area.

4. Because the exclusionary rule applies in cases where a sovereign entity uses evidence obtained by a third party and the sovereign participated in obtaining the evidence, Moon Moo Farm might also argue (albeit weakly) that James acted in conjunction with and is similar to an agent of EPA and the government. In response, EPA and Riverwatcher would argue that James is not an agent of either organization. Pike v. Gallagher, 829 F. Supp. 1254, 1264 (D.N.M. 1993). After likening James to an "agent," Moon Moo Farm could then argue that, because this is an intrasovereign litigation (all occurring within New Union), the deterrent effect of excluding the evidence would be more significant than it might be in an intersovereign case. See Vander Linden v. United States, 502 F. Supp. 693, 697 (S.D. Iowa 1980) (holding that the government could not use evidence obtained illegally). Applying the exclusionary rule in intrasovereign cases would accomplish that purpose because the sovereign government can restrain its agents from future 4th Amendment violations. Conversely, application in intersovereign cases would not have a deterrent effect because one sovereign has no power to restrain another's agents from future 4th Amendment violations. See Id.

Generally, an animal agricultural facility needs to first meet a definition of an AFO as stated by EPA before it can be classified as a CAFO subject to NPDES permitting. All parties agree that Moon Moo Farm is considered an AFO as the State of New Union designates it as a "no-discharge" AFO. Concentrated Animal Feeding Operations, 40 C.F.R. § 122.23(b)(1) (2014). If a facility meets the definition of an AFO, one must then determine whether it meets the definitions of a CAFO and can be regulated under the NPDES program. A CAFO can be regulated under the NPDES program because CAFOs are point sources as defined by the CWA. 33 U.S.C. § 1362(14). The parties dispute whether Moon Moo Farm is a Medium CAFO subject to NPDES permitting. To be a Medium CAFO for a dairy cattle operation, the facility must have 200 – 699 cattle, which is not at issue in this case as Moon Moo Farm has 350 cattle. § 122.23(b)(6)(i)(A). However, the facility must also have a man-made ditch or pipe that carries manure or wastewater to area surface waters – a key determination for this issue in this case. § 122.23(b)(6)(ii).

EPA and **Riverwatcher** will argue that Moon Moo Farm is a Medium CAFO and should be subject to NPDES permitting as a result of discharges from its manure land application area into the Queechunk Canal through a man-made drainage ditch on the property. An important case for EPA and Riverwatcher is *Nat'l Pork Producers Council v. E.P.A.*, which held that EPA had authority to impose a duty to apply for a NPDES permit on CAFOs that were discharging. 635 F.3d 738, 751 (5th Cir. 2011). The primary purpose of the CWA is to control pollution through regulation of discharges into navigable waters. If a CAFO is discharging it must therefore have a permit. *Id.* It would be counter to congressional intent to find that requiring a discharging CAFO to have a permit is unreasonable under the CWA. *Id.* EPA and Riverwatcher may also rely on language in the regulations stating that the appropriate authority[5] may designate any AFO as a CAFO if it determines that it is a significant contributor of pollutants. 40 C.F.R. § 122.23(c). There are a number of factors that can be considered in determining whether to designate an AFO as a CAFO for the purpose of requiring a

5. Specifically referring to the State Director or Regional Administrator of an EPA approved NPDES program.

NPDES permit: the size of the operation and amount of waste reaching water; the location of the operation relative to water; the means of conveyance of animal waste and waste water; other factors affecting the likelihood and frequency of discharges into water; or any other relevant factor. § 122.23(c)(2)(i)-(v). This authority is bolstered by a Washington case where the district court was unwilling to use the narrow definition of CAFO just because confined animals and fields were not adjacent. *Cmty. Ass'n for Restoration of Env't v. Sid Koopman Dairy*, 54 F. Supp. 2d 976 (E.D. Wash. 1999). It ultimately deemed a dairy farm a CAFO because it generated significant waste. *Id.* EPA and Riverwatcher can make many factual arguments for regulating Moon Mood Farm as a Medium CAFO based on the factors listed in 122.23(c)(2)(i)-(v) (e.g., its location at the bend of the river, its landspreading operations before rainfall, the pattern of nitrate advisories over the past decade, etc.)

Moon Moo Farm will argue that it does not meet the definition of a CAFO as it is not discharging into navigable water from its manure land application area through a man-made ditch. An important case for Moon Moo Farm will be *Waterkeeper Alliance, Inc. v. E.P.A.*, which found that EPA exceeded its statutory authority by requiring that CAFOs either apply for a NPDES permit or affirmatively demonstrate that there is no potential for a discharge now or in the future. 399 F.3d 486, 505 (2d Cir. 2005). In order for a facility to be deemed a CAFO, a discharge must be demonstrated; the discharge cannot be assumed. *Id*. The CWA gives EPA the authority to regulate only actual discharges from a point source, not just a potential discharge or a point source generally. *Id*. Therefore, without an actual a discharge of a pollutant from the point source there is no violation. *NRDC v. E.P.A.*, 859 F.2d 156, 179 (D.C. Cir. 1988); *see also Service Oil, Inc. v. EPA*, 590 F.3d 545, 550 (8th Cir. 2009). The 2003 CAFO Rule violated this statutory scheme by imposing permitting requirements on all CAFOs regardless of whether they have discharged. The *Waterkeeper* decision required EPA to revise the CAFO rule, prompting the release of the 2006 and 2008 rules. *See also* 40 C.F.R. § 122.23 (d)-(f).

Moon Moo Farm may also argue that even if there is a drainage ditch that flows from the fields where the manure is landspread into the Queechunk Canal, it is still not enough for

classification as a Medium CAFO. There is no man-made ditch or flushing system on the property that carries the manure mixture from the production or processing area to the navigable water. The runoff that is draining from the fields and through the drainage ditch into the Queechunk Canal is precipitation based and not purposely discharged into the water. *Alt. v. EPA*, 979 F. Supp. 2d 701, 711 (N.D. W.Va. 2013). Furthermore, production and processing areas as well as the animal confinement area are separated from the Bermuda grass fields where any direct runoff from the AFO would occur. *Id.* at 714. Moon Moo Farm may also cite *Nat'l Pork Producers Council* for its holding that EPA lacked authority to issue regulation stating that CAFOs should be liable for failing to apply for a NPDES permit. 635 F.3d at 752 (CWA clearly states when EPA can issue compliance orders through § 309 and does not mention failing to apply for a permit). Finally, it may bolster its argument by pointing to a Kentucky case holding that CAFOs were not required to have state PDES permits when landspreading manure as Moon Moo does here. *Commonwealth of Kentucky, Energy and Env't v. Sharp*, Nos. 2009-CA-002283-MR, 2009-CA-002326-MR, 2012 WL 1889307 (May 25, 2012) (hog famers not required to obtain KPDES permits even though land applying manure).

B. If Moon Moo Farm is not a CAFO, do excess nutrient discharges from its manure application fields remove it from the agricultural stormwater exemption and subject it to NPDES permitting liability?

Riverwatcher contends that Moon Moo Farm is a CAFO and therefore subject to NPDES permitting. Riverwatcher further contends that, even if Moon Moo Farm does not meet the definition of a Medium CAFO, the runoff from the landspreading fields constitutes a point source discharge subject to NPDES permitting. There is an agricultural stormwater exemption to the NPDES requirement that allows for a precipitation related discharge. **EPA** and **Moon Moo Farm** contend that, because Moon Moo Farm is not a CAFO, the farm's land application of manure in accordance with a nutrient management plan (NMP) is exempt from NPDES permitting under the agricultural stormwater exemption.

EPA's land application rule states that, generally, discharges of manure into waters of the United States from a CAFO due to the application of manure to facility owned areas of land is a discharge subject to NPDES permitting. 40 C.F.R. § 122.23(e). The exception to this is the agricultural stormwater discharge exemption, which allows manure application in accordance with an NMP and precipitation related discharges to occur without the facility becoming subject to NPDES permitting. *Id*. An agricultural stormwater discharge or return flow from an irrigated agriculture exemption to a point source is specifically carved out of the definition under the CWA. 33 U.S.C. § 1362(14). When manure is spread in accordance with a site specific NMP that "ensure[s] appropriate agricultural utilization of the nutrients in the manure," any precipitation related discharge from the land area is considered an exempt agricultural stormwater discharge. § 122.23(e)(1). The NMP must identify site specific appropriate buffers or equivalent practices to control runoff of pollutants and establish land application protocols for manure that ensure appropriate agricultural utilization of the nutrients. § 122.42(e)(1)(vi)-(ix).

The district court followed the ruling in *Alt v. EPA*, which held that runoff of litter and manure from a field outside the animal production area did not constitute a CAFO discharge and was instead agricultural stormwater discharge exempt from NPDES permitting requirements. 979 F. Supp. 2d at 711.

Riverwatcher argues that, even if Moon Moo Farm is not a CAFO, its excess application of wastes to its fields using manure spreaders, which are discrete and confined conveyances, constitutes a point source discharge requiring a NPDES permit. A case that will be particularly important for this argument is *Concerned Area Residents for Env't v. Southview Farm*, which found that manure spreading vehicles were point sources. 34 F.3d 114, 119 (2d Cir. 1994). The Second Circuit therefore held that the dairy operation could not avail itself of the agricultural stormwater exemption even though crops were grown in an area outside where animals were kept. *Id*.; *see also Cmty. Ass'n for Restoration of Env't v. Sid Koopman Dairy*, 54 F. Supp. 2d at 981 (instruments used to apply animal waste will be considered point sources themselves). Additional cases have found that manure spreading vehicles and fields or ditches used to store or transfer

waste are included in defining a CAFO as a point source in order to serve the purposes of the CWA. *See United States v. Weisman*, 489 F. Supp. 1331, 1337 (M.D. Fla. 1980); *Avoyelles Sportsmen's League, Inc. v. Alexander*, 473 F. Supp. 525, 532 (W.D. La. 1979).[6]

Relying on *Sid Koopman Dairy*, **Riverwatcher** will also argue that Moon Moo Farm's land application is not in best practices and its NMP cannot shield it from permitting liability through the agricultural stormwater exemption. 54 F. Supp. 2d at 981 (stating that a CAFO cannot avoid responsibility for over application or misapplication of waste to fields through the agricultural stormwater exemption). It will also show that the Ninth Circuit has found that a facility that over applies – and therefore misapplies – manure wastewater to its field is subject to NPDES permitting. *Cmty. Ass'n for Restoration of the Env't v. Henry Bosma Dairy,* 305 F.3d 943, 954 (9th Cir. 2002) (relying on testimony of residents who had seen manure wastewater applied to the fields located on the property and then spillage occurring into a nearby canal).

Finally, **Riverwatcher** will also argue that Moon Moo Farm cannot claim the agricultural stormwater discharge exemption because its use of the mixture of manure and acid whey was really waste disposal rather than application of fertilizer. *See infra* Riverwatcher argument at 19-20. It will point out that Moon Moo Farm's NMP was procedurally defective since there was no review of the NMP by the public or the New Union Department of Agriculture (DOA). *Waterkeeper Alliance, Inc.*, 399 F.3d at 498. The final 2008 EPA CAFO rule requires that when an NMP is submitted for the purpose of NPDES permitting requirements, permitting authorities must conduct a review of the NMP and provide for public review and comment. Revised National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines for Concentrated Animal Feeding Operations in Response to the Waterkeeper Decision, 73 Fed. Reg. 70,418 (November 20, 2008). Making the determination that Moon Moo Farm is a "no discharge" AFO not subject to NPDES permitting without review would be arbitrary and capricious.

6. The case of Sierra Club v. Abston Constr. Co., Inc. speaks to the possibility that if normally unchanneled surface waters or rainfall runoff is purposely channeled in connection with business activities it can be considered point source pollution. 620 F.2d 41, 47 (5th Cir. 1980).

Waterkeeper Alliance, Inc., 399 F.3d at 498. Furthermore, Moon Moo Farm did not comply with the NMP since the acid whey interfered with the nutrient uptake assumptions outlined.[7]

In response, **EPA** and **Moon Moo Farm** will argue that, if Moon Moo Farm is not a CAFO, application of manure in compliance with an NMP exempts it from NPDES permitting liability through the agricultural stormwater exemption. EPA and Moon Moo Farm, like the district court, will rely on *Alt v. EPA,* which stated runoff caused by precipitation fell within agricultural stormwater exemption and was not subject to NPDES permitting. 979 F. Supp. 2d at 711-12. The CWA specifically exempts agricultural stormwater discharges from its NPDES permitting requirements. 33 U.S.C. § 1362(14). Regulations expand on the agricultural stormwater exemption to state that when manure has been applied in accordance with a site specific NMP that ensures proper utilization of the nutrients, any precipitation related discharge is an agricultural stormwater discharge within the exemption. 40 C.F.R. § 122.23(e). Agricultural stormwater discharges occur when precipitation comes in contact with the land area and causes runoff into navigable waters. *Fisherman Against Destruction of Env't v. Closter Farms, Inc.*, 300 F.3d 1294, 1297 (11th Cir. 2002) (held discharge of rainwater was agricultural stormwater discharge); *see Southview Farm*, 34 F.3d at 121. EPA's 2003 CAFO rule expanded the exemptions under the agricultural stormwater exemption to include discharges from land application if it was according to a site specific NMP. *Nat'l Pork Producers Council,* 635 F.3d. at 744. Moon Moo Farm is currently a "no-discharge" AFO but has also submitted an NMP that sets forth manure application rates along with expected uptake of nutrients by the crops grown. They will argue that in the case of a "no-discharge" AFO without a NPDES permit, there is no requirement that an NMP go through public review and comments to be effective. 73 Fed. Reg. at 70,418. A facility operator must certify that there is

7. Some states have specific Nutrient Management Acts, which pertain to agricultural facilities and require that the operator of a CAFO shall develop and implement an NMP that must be submitted for review. See 3 Pa. Cons. Stat. Ann. § 506(b) (West 2014); see also Syngaro –WWT, Inc. v. Rush Tp., Pa., 299 F. Supp. 2d 410, 417 (M.D. Pa. 2003); Wash. Dep't of Ecology v. Douma, 193 P.3d 1102, 1107 (Wash. Ct. App. 2008).

no current discharge and no potential for discharge, taking into account practices and procedures of the NMP. *Id*. As Moon Moo Farm is deemed by the State of New Union DOA to be a "no-discharge" AFO, there is no need to apply for a NPDES permit, as there must be an actual discharge into navigable water to trigger the permit requirement. *Nat'l Pork Producers Council*, 635 F.3d at 750.

VI. RCRA VIOLATIONS: IS MOON MOO FARM SUBJECT TO A CITIZEN SUIT UNDER THE RESOURCE CONSERVATION AND RECOVERY ACT?

A. When applied to the soil as fertilizer and soil amendment, does a mixture of manure and acid whey from a yogurt processing facility constitute a solid waste subject to regulation under RCRA Subtitle D?

Riverwatcher contends, in the alternative to its CWA claims, *see infra* note 8, that the landspread mixture of manure and acid whey from Moon Moo Farm constitutes a solid waste and is subject to regulation under the Resource Conservation and Recovery Act (RCRA) Subchapter IV open dumping provision. The purpose of RCRA is to establish federal guidelines for the management and disposal of solid waste from both industrial and non-industrial sources and to prohibit the open dumping of solid waste. **EPA** and **Moon Moo Farm** contend that the landspread mixture of manure and acid whey does not constitute a solid waste under RCRA and is therefore not subject to regulation under Subtitle D.

The policy and purpose behind RCRA was to reduce or eliminate the generation of solid waste and ensure that any solid waste that is generated is treated and disposed of in way that minimizes the threat to human health and the environment. 42 U.S.C. § 6902(b). Under RCRA, a solid waste is considered to be any discarded material that is a solid, liquid or semisolid material that results from an industrial, commercial, or agricultural operation. 42 U.S.C. § 6903(27). This does not include solid waste

from industrial discharges as point source that are subject to permitting under the NPDES program of the CWA.[8] *Id*. Also under RCRA Subchapter IV, any solid waste management practice or disposal considered to be open dumping is prohibited. 42 U.S.C. § 6945(a). RCRA further defines open dumping to include any facility where solid waste is disposed of that is not considered a sanitary landfill. 42 U.S.C. § 6903(14). However, EPA regulations specifically exclude land application of agricultural waste used for fertilizer or soil conditioner from the open dumping provision. 40 C.F.R. § 257.1(c)(1).

Is the landspread mixture a solid waste?

The court must first determine whether the manure and acid whey mixture that Moon Moo Farm applies to its Bermuda grass fields constitutes a solid waste. Both sides will look at whether the landspread mixture was discarded under the definition of solid waste. 40 C.F.R. § 261.2(a)(2)(i)(A)-(D). **Riverwatcher** will argue that the mixture is actually being discarded by Chokos and falls under the regulation of RCRA. It will rely on the Ninth Circuit cases of *Safe Air for Everyone v. Meyer* and *Ecological Rights Found. v. Pac. Gas & Elec. Co.* to argue that the mixture falls within the definition of solid waste. 373 F.3d 1035 (9th Cir. 2004); 713 F.3d 502 (9th Cir. 2013). **EPA** and **Moon Moo Farm** will argue that the landspread mixture is not discarded and therefore does not fall under the definition of solid waste. EPA and Moon Moo Farm will rely on the congressional intent of RCRA and current regulations under RCRA that exempt certain agricultural waste. They will also point to the benefits of the landspreading application to show that it is not a waste. *See Oklahoma v. Tyson Foods, Inc.*, No. 05-CV-0329-GKF-PJC, 2010 WL 653032 (N.D. Okla. Feb. 17, 2010); *Safe Food & Fertilizer v. EPA*, 350 F.3d 1263 (D.C. Cir. 2003).

Riverwatcher's argument that the landspread mixture constitutes a solid waste turns on whether it can show that Moon

8. Therefore, Riverwatcher can only bring this RCRA claim if Moon Moo Farm is found not to be a CAFO subject to NPDES permitting or its discharges are exempt from NPDES permitting under the agricultural stormwater exemption. Accordingly, this issue will be argued in the alternative to the CAFO issue.

Moo Farm contributes to the "handling, storage, treatment, transportation or disposal" of any solid waste. 42 U.S.C § 6972(a)(1)(B). The Ninth Circuit adopted the ordinary, plain meaning of discarded: "to cast aside, reject, abandon, or give up." *Safe Air for Everyone v. Meyer,* 373 F.3d at 1041; *see also Ecological Rights Found. v. Pac. Gas & Elec. Co.*, 713 F.3d at 515; *Cmty. Ass'n for Restoration of Env't, Inc. v. George & Margaret LLC,* 954 F. Supp. 2d 1151, 1156 (E.D. Wash. 2013). In *Safe Air*, the Ninth Circuit also laid out three approaches to help determine whether a material qualifies as a discarded solid waste. 373 F.3d at 1043.

- Whether the material is destined for a beneficial use through a continuous process by the generating industry. *Id*. (citing *Am. Mining Congress v. U.S. EPA*, 824 F.2d 1177, 1186 (D.C. Cir. 1987)).
- Whether the material is being actively reused, or whether there is only potential for reuse. *Id*. (citing *Am. Mining Congress v. U.S. EPA*, 907 F.2d 1179, 1186 (D.C. Cir. 1990)).
- Whether its original owner is using the material. *Id*. (citing *United States v. ILCO*, 996 F.2d 1126, 1131 (11th Cir. 1993)).

Riverwatcher will contend that, although the manure and acid whey mixture is being actively reused, it is not being put to beneficial use nor is its original owner, Chokos Greek Yogurt, using it. Instead, Moon Moo Farm is adding the acid whey from the Chokos plant to its manure and landspreading the mixture in an effort to get rid of it on behalf of Chokos.

Riverwatcher may also point to several other definitions of discarded. For example, the Second Circuit has found a product to be a discarded waste when it has served its intended purpose and is no longer wanted. *No Spray Coal, Inc. v. N.Y.C.,* 252 F.3d 148, 150 (2d Cir. 2001). A mixture could also be found to be a discarded solid waste if it is applied beyond what was necessary to serve as fertilizer and therefore no longer serves its intended purpose. *George & Margaret LLC,* 954 F. Supp. 2d at 1156-58. Riverwatcher will argue that the addition of the acid whey to the manure has no real intended purpose or benefit and is no longer wanted by Chokos or Moon Moo Farm when it is applied to the Bermuda grass fields.

EPA and **Moon Moo Farm** will counter that the mixture of manure and acid whey is not considered a solid waste and therefore is not subject to regulation under RCRA. Congressional intent was that agricultural waste returned to the soil for use as fertilizer and conditioner is not to be considered discarded material under RCRA. H.R. Rep. No. 94-1491(I), at 2 (1976). A major objective of RCRA is to increase the reclamation and reuse practices of agriculture, reducing the volume of the discarded material disposal problem under RCRA. *Id.*; *see also Safe Air for Everyone*, 373 F.3d at 1045 (holding that grass residue was not solid waste). EPA and Moon Moo Farm will assert that the land application of the manure and acid whey mixture is of beneficial use to the fields and therefore cannot be considered discarded material under the definition of solid waste. 40 C.F.R. § 261.2(a)(2)(i)(A)-(D). When the mixture is applied for a normal, beneficial and intended use, even if it is not fully utilized as such, it is not considered a solid waste subject to regulation under RCRA. *Tyson Foods, Inc*., 2010 WL 653032, at *10-11. Application of the agricultural waste mixtures to fields is a normal use for the product and it was the intended use of Moon Moo Farm. In determining whether the mixture has a beneficial use, courts have considered whether it has market value or is being put to good use. *Safe Food and Fertilizer v. E.P.A.*, 350 F.3d at 1269. Moon Moo Farm will state that, although the mixture may not necessarily have a market value outside its property, it is being put to good use in the fields as it enhances the growth of the Bermuda grass that is dried and harvested as silage during the summer.

Is the application of the landspread mixture considered open dumping?

Next, the court must determine whether Moon Moo Farm's application of the landspread mixture to its Bermuda grass fields is considered open dumping under RCRA. This issue turns on whether Moon Moo Farm uses its manure and acid whey mixture as a fertilizer or soil conditioner and therefore falls under the exemption for agricultural waste. The district court in this case relied on a specific exemption in the solid waste disposal regulations for agricultural waste, including manure, which is

returned to the soil for fertilizer or conditioner. 40 C.F.R. § 257.1(c)(1).

Riverwatcher will argue that Moon Moo Farm is not using the landspread mixture as a fertilizer or soil conditioner because the addition of the acid whey to the mixture is not for the benefit of the soil. Rather, the addition of the acid whey to the mixture is a method of waste disposal on behalf of Chokos. This violates the RCRA open dumping provision and does not fall under the exemption of agricultural waste used for fertilizer or soil conditioner. 40 C.F.R. § 257.1(c)(1).

Riverwatcher will also argue that the application of the landspread mixture violates certain EPA guidelines prohibiting practices of solid waste disposal (including open dumping onto fields in certain situations) that have a reasonable probability of adverse effects. 40 C.F.R § 257.3. It will argue that there is a reasonable probability of adverse effects here as the landspread mixture discharges to the canal and contributes to the nitrate advisories. First, Riverwatcher will assert that Moon Moo Farm is located in a floodplain due to its proximity to the Deep Quod River and that the application of the mixture results in a washout of solid waste. 40 C.F.R. § 257.3-1. Riverwatcher will point out that the mixture is applied to an area used for the production of food-chain crops that is not at a pH level above 6.5. 40 C.F.R § 257.3-5. This claim is based on the testimony of Dr. Ella Mae, who stated that the addition of the acid whey to the manure mixture increased the acidity of the mixture and lowered the pH of the soil to 6.1 when applied to the Bermuda grass fields. The lowered pH level then prevents the soil from properly absorbing the nutrients in the mixture. Finally, Riverwatcher will assert that the application of the manure and acid whey mixture is done in such a way that may contaminate groundwater and underground drinking water. 40 C.F.R. § 257.3-4. According to Dr. Mae, since the soil was prevented from properly absorbing the nutrients from the mixture, the nutrients not absorbed by the soil then leach into the groundwater.

EPA and **Moon Moo Farm** will counter that the land application of the manure and acid whey mixture is exempt from the open dumping provision because it falls within the agricultural waste exemption. 40 C.F.R. § 257.1(c)(1). Moon Moo Farm uses the mixture as a fertilizer and soil conditioner for its

Bermuda grass fields. The addition of the acid whey is not just performed as a means of disposal. They will assert that there is insufficient evidence to show that addition of the acid whey to the manure is not done for fertilizing or soil conditioning purposes. *Hackensack Riverkeeper, Inc. v. Del. Ostego Corp*., 450 F. Supp. 2d at 487. There must be sufficient evidence for Riverwatcher to substantiate specific claims under the regulations for open dumping. *Id*. They will point to the testimony of Moon Moo Farm's expert, Dr. Emmet Green, who did not dispute the fact that the acid whey reduced the pH level of the soil and the nutrient uptake. However, he stated that the addition of whey to manure to be used as soil conditioner is a recognized agricultural practice of the State of New Union. Dr. Green also testified that although the pH level of the soil is reduced, Bermuda grass has a wide range of acceptable pH levels that still allow for the absorption of nutrients. The reduction in the pH level would therefore not violate 40 C.F.R. § 257.3-5. Additionally, they will argue that Riverwatcher has not provided enough evidence to assert that the application of the landspread mixture contaminated ground water and contributed to the recent nitrate advisories in the State of New Union. 40 C.F.R. § 257.3-4. Without sufficient evidence, the claims that Moon Moo Farm has violated the open dumping provision cannot stand. *Dague v. City of Burlington*, 732 F. Supp. 458, 467 (D. Vt. 1989).

B. Do Moon Moo Farm's landspreading practices present an imminent and substantial endangerment to human health or the environment subject to citizen suit redress under RCRA?

Under RCRA, a citizen suit action is permitted against any person who contributes to a situation that may present an imminent and substantial endangerment to human health or the environment. **EPA** and **Riverwatcher** contend that Riverwatcher has established an imminent and substantial endangerment to human health claim for Moon Moo Farm's application of the landspread mixture. **Moon Moo Farm** contends that Riverwatcher has not established sufficient evidence to bring an imminent and substantial endangerment claim.

Under § 7002(a)(1)(B) of RCRA, a citizen suit civil action can be brought against any person, including any past or present owner or operator of a facility, who is contributing or has in the past contributed to the disposal of a solid waste which may present and imminent and substantial endangerment to health or the environment. 42 U.S.C. § 6972(a)(1)(B). After establishing that the landspread mixture is a solid waste, **Riverwatcher** will need to establish three elements in order to bring such a RCRA claim against Moon Moo Farm:

- the application of the landspread mixture may present an imminent and substantial endangerment to the health of residents in the area around Moon Moo Farm;
- the potential endangerment stems from past or present disposal of the manure and acid whey mixture; and
- Moon Moo Farm is currently contributing or has contributed in the past to the disposal of the manure and acid whey mixture through landspreading.

Here, the district court dismissed Riverwatcher's RCRA claim because the manure and acid whey mixture do not constitute a solid waste as defined by RCRA. 42 U.S.C. § 6903(27). (However, **EPA and Riverwatcher** can point to *Conn. Coastal Fishermen's Ass'n v. Remington Arms*, in which the Second Circuit held that a material could still be a statutory solid waste for a § 7002(a)(1)(B) imminent and substantial endangerment action even though it was excluded from an EPA regulatory program. 989 F.2d 1305, 1314-15 (2d Cir. 1993).) The district court went on to hold that, even if the mixture was considered to be a solid waste, Riverwatcher did not present sufficient evidence to bring a claim under § 7002(a)(1)(B) of RCRA for imminent and substantial endangerment to human health or the environment. This determination was based on testimony provided by Riverwatcher's expert regarding the lack of a clear causal link to the nitrate advisories in Farmville. In addition, the nitrate levels posed no health risks to adults and juveniles, except infants who were given bottled water and not harmed. The district court cited the case of *Davies v. Nat'l Co-op Refinery Ass'n* for the principle that, in order to be a health risk, exposure to the risk would need to be present. 963 F. Supp. 990, 999 (D. Kan. 1997). Since, due to the nitrate advisory, no one was exposed to the elevated nitrate levels, there could not be a risk of imminent

and substantial endangerment to human health from Moon Moo Farm's landspreading activities.

Thus, the resolution of this RCRA citizen suit issue will turn on whether Riverwatcher has sufficient evidence that Moon Moo Farm is contributing or has contributed to the disposal of a solid waste which may present an imminent and substantial endangerment to the health of the people of Farmville. **EPA** and **Riverwatcher** will argue that Moon Moo Farm's application of the landspread mixture, which is a solid waste under RCRA, presents an imminent and substantial endangerment to the health of the people of Farmville as evidenced by the multiple nitrate advisories. They will rely on *Dague v. City of Burlington* as well as *U.S. v. Conservation Chem. Co.* to establish the level of endangerment needed. 935 F.2d 1343 (2d Cir. 1991); 619 F. Supp. 162 (W.D. Mo. 1985). They will also rely on two Missouri cases to help define the terms imminent and substantial as well as the standard for being a contributor to the endangerment. In response, **Moon Moo Farm** will rely on *Meghrig v. KFC W., Inc.* and *Price v. United States Navy* to show that the danger here was neither imminent nor substantial. 516 U.S. 479 (1996); 39 F.3d 1011 (9th Cir. 1994). Moon Moo Farm will also argue that there is no causal link between its activities and the elevated nitrate levels in the river, and so it cannot be held liable as a contributor.

EPA and **Riverwatcher** will argue that there is sufficient evidence to establish that Moon Moo Farm's application of the manure and acid whey mixture to its Bermuda grass fields presents an imminent and substantial endangerment actionable under RCRA § 7002. To establish a claim of endangerment, they need only demonstrate a significant risk of harm, not actual harm. *Dague*, 935 F.2d at 1356. Endangerment may be declared at any point in the chain of events that may produce harm to the public; it does not have to be at the exact point the harm occurred. *Envtl. Def. Fund, Inc. v. E.P.A.*, 465 F.2d 528, 535 (D.C. Cir. 1972). Riverwatcher claims that the elevated nitrate levels in Farmville's water supply (as evidenced by the nitrate advisories) present an imminent and substantial endangerment to the health of the people of Farmville. To show that the harm is imminent, Riverwatcher does not need to prove that the harm will occur tomorrow, just that threat of harm exists now. *United States v. Conservation Chem. Co.*, 619 F. Supp. at 194. Imminence is

satisfied if the factors leading to harm are present, even if the harm itself does not occur until years in the future. *Id.* Imminence refers to the nature of the threat rather than the time frame. *Dague,* 935 F.2d at 1356. Courts have been reluctant to narrowly define the term substantial. *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 210-11 (2d Cir. 2009). To show that the endangerment is substantial, Riverwatcher must show that the facts imply a serious harm. *Id.* Courts have considered an endangerment to be substantial when there is reasonable cause for concern of harm. *Conservation Chem. Co.*, 619 F. Supp. at 194. EPA and Riverwatcher will argue that the numerous nitrate advisories issued in Farmville suggest that there is a potential and recurring serious harm that exist now and might endanger the public in the future.

To hold Moon Moo Farm liable for disposal of the solid waste, **EPA** and **Riverwatcher** must also argue that Moon Moo Farm's landspreading of the manure and acid whey mixture is a contributing factor to the threat of endangerment. *United States v. Bliss,* 667 F. Supp. 1298, 1313 (E.D. Mo. 1987); 42 U.S.C. § 6972(a)(1)(B) (a citizen suit claim can be brought against anyone who has contributed or is contributing). Although, the definition of contribute is not explicitly stated within RCRA, the nature of RCRA and the citizen suit provision suggests a liberal construction that errs on the side of protecting human health and the environment. *Aiello v. Town of Brookhaven*, 136 F. Supp. 2d 81, 112 (E.D.N.Y. 2001). Importantly, the plain meaning of contribute is to "have a share in" or in other instances "help to cause." *Id*. at 111-12; *see also United States v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1384 (8th Cir. 1989); *Zands v. Nelson*, 779 F. Supp. 1254, 1264 (S.D. Cal. 1991). Therefore, EPA and Riverwatcher will argue that even if Moon Moo Farm is not the sole cause of the nitrate advisories and subsequent endangerment to Farmville, it can still be held liable as a contributor because it has helped to cause the elevated nitrate levels in the river.

Moon Moo Farm will respond that Riverwatcher has not established sufficient evidence to bring an imminent and substantial endangerment claim against it for its application of the landspread mixture to the Bermuda grass fields. The Supreme Court has stated that endangerment can only be considered imminent if the harm threatens to occur immediately.

Meghrig v. KFC W., Inc., 516 U.S. at 485-86. This excludes waste that no longer presents a danger. *Id.* In addition, a threat must be present now even if the actual harm or impact is not apparent until later in time. *Price*, 39 F.3d at 1019. Endangerment is substantial if it is serious and indicates a necessity for action. *Id.* Moon Moo Farm will argue that the harm in this case is not imminent because it is not currently present. The last nitrate advisory was issued over a year ago. In addition, as the district court stated, there is no serious harm when the nitrate advisories for water are only issued with regard to infants who were not harmed because they drank bottled water.

Moon Moo Farm will also argue that it cannot be a contributor as defined by the statute because one must act as a determining factor in order to contribute. *Murtaugh v. New York*, 810 F. Supp. 2d 446, 474 (N.D.N.Y. 2011); *see also Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 263 F. Supp. 2d 796, 844 (D.N.J. 2003). There must be more than just mere ownership of a property; a level of causation must exist between the actions of the owner and the alleged endangerment. *Delaney v. Town of Carmel*, 55 F. Supp. 2d 237, 256 (S.D.N.Y. 1999). Thus, the necessary interpretation of a person who has contributed or is contributing was only intended to impose liability on those shown to have affirmatively acted as a determining, causal factor in the endangerment. *Id.* Relying on Riverwatcher's expert testimony that it was impossible to state that Moon Moo Farm was the "but for" cause of the 2013 nitrate advisory, Moon Moo Farm will argue that the necessary causal link between the landspreading and the nitrate advisories cannot be made.

This is not intended to be an exhaustive analysis of the problem, merely an indicative list of issues to be addressed by teams. One should appreciate reasoned and reasonable creativity and ideas beyond those in this limited analysis.

VII. SAMPLE JUDGES QUESTIONS

These questions are suggested as a starting point. Please feel free to develop your own questions.

Issue 1: Public Trust Doctrine

- EPA and Riverwatcher
    - The Queechunk Canal is a man-made body of water located on private land. What makes it subject to the public trust doctrine?
    - Wouldn't subjecting the Queechunk Canal to the public trust doctrine weaken the integrity of private property rights?
    - If a waterway is made navigable at the hands of a private party, why should it automatically be subject to public use?
- Moon Moo Farm
    - Isn't the purpose of the public trust doctrine to safeguard navigable waters for use in commerce or the enjoyment of the public?
    - If the canal was constructed to be deep enough for a small boat to navigate it and connects at both ends to a navigable waterway, shouldn't it be subject to public use?
    - Why should a natural waterway and a man-made waterway be treated differently in relation to the public trust doctrine?

Issue 2: Exclusionary Rule

- EPA and Riverwatcher
    - If this court determines that James was trespassing at the time he collected the evidence, why should we admit that evidence?
    - Wouldn't admitting the evidence collected by James be a violation of Moon Moo Farm's Fourth Amendment rights?

  - Does the deterrent effect of discouraging trespass to obtain evidence outweigh the public benefit of knowing of Moon Moo Farm activity?
- Moon Moo Farm
  - Why should this court apply the exclusionary rule when historically it is applied to criminal cases and not civil cases?
  - How is James an agent of Riverwatcher or of EPA?
  - How does the deterrent effect of discouraging trespass by private citizens outweigh the public benefit of knowing of Moon Moo Farm's discharging into the Queechunk Canal?

Issue 3: CAFO

- EPA and Riverwatcher
  - Does Moon Moo Farm have an actual discharge from its production area or manure collection facilities?
  - Don't the regulations prevent classification of Moon Moo Farm as a CAFO as long as there is no discharge from the production area and manure lagoon?
  - Why should this court consider evidence of a discharge from Moon Moo Farm that was obtained illegally, since this is the only evidence EPA and Riverwatcher have of a discharge?
- Moon Moo Farm
  - If Moon Moo Farm fits into the requirements of a Medium CAFO and is discharging manure from its lagoon via its landspreading operations, shouldn't it be required to obtain a NPDES permit?
  - If Moon Moo Farm is contributing to pollution of the Queechunk Canal, doesn't the government have a responsibility to regulate it?
  - Regardless of how the evidence was collected, doesn't this court have an obligation to consider it in matters of upholding the CWA?

Issue 4: Agricultural Stormwater Exemption

- Riverwatcher
    - Wouldn't determining that the landspreadng vehicles are point sources undermine EPA's regulation regarding discharging CAFOs?
    - What criteria should this court use in determining what is best management practices for procedures carried out according to an NMP?
    - Does the regulation specifically state that public review and comment must be completed for the State of New Union to classify Moon Moo Farm as a "no-discharge" AFO?
- EPA and Moon Moo Farm
    - If Moon Moo Farm is discharging excess nutrients, shouldn't it be regulated, regardless of whether it has an NMP?
    - If Moon Moo Farm is not landspreading in accordance with its NMP, wouldn't that remove it from protection under the agricultural stormwater exemption?
    - How is landspreading beneficial if it is being over applied or misapplied?

Issue 5: Solid Waste under RCRA Subtitle D

- Riverwatcher
    - Why would this court not follow the legislative intent of RCRA drafters, which states that agricultural waste being used as soil fertilizers or conditioners is exempt from regulation?
    - How does a manure and acid whey mixture that is purposefully being applied to Moon Moo Farm's fields fit into being "discarded" under the definition of solid waste?
    - Doesn't the manure and acid whey mixture have a beneficial use to the fields of Bermuda grass?

- EPA and Moon Moo Farm

- The general definition of solid waste includes any solid, liquid or semisolid resulting from an agricultural operation that is not subject to NPDES permitting. Why would this not apply to Moon Moo Farm's manure and acid whey mixture?
- How is the land application of the manure and acid whey mixture not considered discarded, abandoned or recycled?
- Does the addition of acid whey to the manure mixture have a beneficial use as a fertilizer or soil conditioner for the Bermuda grass?

Issue 6: Imminent and Substantial Endangerment

- EPA and Riverwatcher
  - If there is no harm done to the people of Farmville, how can there be an imminent a substantial endangerment?
  - What evidence suggests that there is an endangerment present now?
  - Is Moon Moo Farm a "but for" cause of the nitrate advisory? If not, how can they be held liable?
- Moon Moo Farm
  - Doesn't the issuance of nitrate advisories suggest that there is the possible presence of harm?
  - Even if Moon Moo Farm is not the "but for" cause of the advisories, aren't they still liable as a contributor?
  - Shouldn't this court interpret the language of RCRA liberally to ensure the best remedy for the people of Farmville?