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# Measuring Brief (United States)

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# TWENTY-SEVENTH ANNUAL JEFFERY G. MILLER PACE NATIONAL ENVIRONMENTAL LAW MOOT COURT COMPEITION

## Measuring Brief*

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C.A. No. 14-1248
UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellant
and
DEEP QUOD RIVERWATCHER, INC., and DEAN JAMES,
Plaintiffs-Intervenors-Appellants
v.
MOON MOO FARM, INC.,
Defendant-Appellee

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

Brief for THE UNITED STATES OF AMERICA

* This brief has been reprinted in its original format. Please note that the Table of Authorities and Table of Contents for the brief have been omitted.

## JURISDICTION

The United States of America ("the Government" or "EPA") filed this enforcement action against Moon Moo Farm ("Moon Moo") for violating the permitting requirements of the Clean Water Act ("CWA"). Deep Quod Riverwatcher and Dean James (collectively "Riverwatcher") joined these CWA claims and asserted additional claims in the alternative under the Resource Conservation and Recovery Act ("RCRA"). On June 1, 2014 the district court, which had federal question jurisdiction pursuant to 28 U.S.C. §1331, denied Plaintiffs' motions for summary judgment and granted Defendant's motion for summary judgment on all claims. A1, A12.[1]* This Court has jurisdiction to review the district court's final order. 28 U.S.C. §1291.

## STATEMENT OF THE ISSUES

I. Whether the Queechunk Canal, a navigable waterway created through diversion of the Deep Quod River and commonly used by the public, is subject to a public right of navigation.

II. Whether, if the Queechunk Canal is not a subject to a public right of navigation, evidence obtained by a private party through trespass is admissible in an EPA civil enforcement proceeding brought to protect drinking water and ensure ongoing CWA compliance.

III. Whether Moon Moo Farm is a Controlled Animal Feeding Operation ("CAFO") subject to National Pollutant Discharge Elimination System ("NPDES") permitting under the CWA. Alternatively, if Moon Moo is not considered a CAFO, whether the farm is subject to NPDES permitting requirements.

1 Citations "A__" refer to pages of the Final Problem, Revised on November 18, 2014.

IV. Whether under the statutory definition of "solid waste" that applies to an endangerment claim—rather than the regulatory definition which applies only to regulatory violations—Riverwatcher has established that Moon Moo's spreading activities constitute an endangerment to health and the environment. And, whether Moon Moo's soil amendment is a "solid waste" for regulatory purposes, and even if it were, whether it is exempt from RCRA's open dumping ban as agricultural waste.

## STATEMENT OF THE CASE

EPA's mission—both overall and as applied to this case—is to safeguard human health and the environment. Under that mission, EPA's capacity to protect clean rivers and clean drinking water fundamentally depends on its ability to bring enforcement actions. Here, EPA brought such an action to halt and correct violations that endanger not only the Queechunk Canal ("Queechunk") and the Deep Quod River ("Deep Quod") but also the Town of Farmville's drinking water. Because Congress understood the importance of enforcement in ensuring compliance with CWA and RCRA standards, it created provisions enabling private citizens to assist EPA with enforcement. The citizen group Riverwatcher has fulfilled that role here.

EPA has adopted regulations that protect human health and the environment while allowing farms and businesses like Moon Moo to continue their operations as long as they comply with these standards. EPA's aim here is to ensure that Moon Moo operates in a manner consistent with these standards, ensuring protection of health and the environment.

The enforcement action EPA brought against Moon Moo is based on evidence collected by Riverwatcher Dean James in a publicly navigable waterway. That evidence shows water with excessive levels of pollutants flowing into Queechunk, the Deep Quod, and then downstream to Farmville. EPA brought this action to remediate Moon Moo's past violations and force its compliance with the applicable statutory and regulatory

standards now and in the future. Ensuring Moon Moo's compliance, in turn, will help protect the area's waterways as well as Farmville's drinking water source, in accordance with EPA's mandate.

## STATEMENT OF THE FACTS

Located in the State of New Union, Moon Moo is a dairy farm situated at a bend in the Deep Quod, which runs year round and flows into the Mississippi River. A5. In the 1940s, the farm's previous owner excavated a 50-yard bypass canal that locals now refer to as Queechunk. A5. Today, most of the flow of the Deep Quod is diverted through this canal, and many community members use it as a shortcut when traveling up and down the river. A5.

The large quantities of liquid waste produced by Moon Moo's cows runs through a series of drains and pipes from the cow barn into an outdoor lagoon, where the liquid waste is stored for use as fertilizer. A5-6. In 2012, Moon Moo Farm began mixing acid whey from the Chokos Greek yogurt processing facility into its liquid manure. A6. When Moon Moo fertilizes its 150 acres of Bermuda grass fields, the liquid solution from the lagoon is pumped into tank trailers that spray it onto the land. A5. The liquid manure flows through a drainage ditch from the fields into Queechunk, and, from there, into the Deep Quod. Downstream of Moon Moo, residents of the City of Farmville rely on the Deep Quod for drinking water. A5.

In late winter and early spring of 2013, the Farmville Water Authority issued a nitrate advisory for the city's drinking water, warning residents that high levels of nitrates in the Deep Quod made its water hazardous if consumed by infants younger than two years of age. A6. During the same time period, several local residents alerted the Deep Quod Riverwatcher, a nonprofit organization committed to protecting local waterways, that the Deep Quod smelled of manure and was an unusually turbid brown color. A6. In response to these complaints, Deep Quod Riverwatcher Dean James patrolled the river in a small boat.

While traveling along Queechunk, James observed and photographed Moon Moo's manure-spreading operations taking place during a significant storm event. A6. James also observed and photographed discolored brown water flowing from Moon Moo's fields through its drainage ditch and into Queechunk. A6. Without entering Moon Moo's property, James took samples of the water flowing from the ditch, which he brought to a laboratory for testing. The test results showed highly elevated levels of nitrates and fecal coliforms. A6.

Knowledge of the spreading operations and resultant elevated levels of nitrates and fecal coliforms drove Riverwatcher to serve a letter of intent to sue. In response, EPA brought this CWA enforcement action against Moon Moo for injunctive relief under 33 U.S.C. §1319(b) and for civil penalties under 33 U.S.C. §1319(d). Riverwatcher subsequently intervened as a plaintiff, under 33 U.S.C. §1365(b)(1)(B), and alleged additional claims under the citizen suit provisions of RCRA. 42 U.S.C. §6972(a)(1). Following discovery, both sides moved for summary judgment. The district court denied Plaintiffs' motions for summary judgment on their CWA and RCRA claims and granted Defendant's motions for summary judgment ruling in its favor on all counts, including a trespass counterclaim against Riverwatcher.

## STANDARD OF REVIEW

Summary judgment is appropriate when there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The Court of Appeals applies a de novo standard of review to a district court's grant of summary judgment and construes the evidence in the light most favorable to the non-moving party. *See, e.g.*, *Pucino v. Verizon Wireless Commc'ns, Inc.*, 618 F.3d 112, 117 (2d Cir. 2010).

## SUMMARY OF ARGUMENT

First, Riverwatcher Dean James was not trespassing when he collected the water sample on April 12, 2013, because the public trust doctrine dictates that navigable-in-fact waterways are subject to a public right of navigation. The navigable-in-fact test includes waterways, like Queechunk, that are navigable only after man-made improvements. This general rule is not altered by more recent cases dealing with man-made waterways designated as private under state law, and there is no indication that New Union law designates Queechunk as private. Thus, Queechunk is navigable in fact and is subject to a right of public navigation as a matter of law, and summary judgment in favor of EPA and Riverwatcher is appropriate.

Even if Queechunk were private under state law, the canal would still be subject to a public right of navigation because longstanding adverse use by the community has created a public prescriptive easement in the canal. Queechunk is also subject to a public right of use because it was originally created through the diversion of a natural navigable-in-fact waterway. Thus, if this Court finds that Queechunk is not a public navigable-in-fact waterway as a matter of law, it should remand for further findings on the question of whether a right of public use has been created through one of these two alternative means.

Second, if this Court were to find that James's visit to Queechunk constituted trespass, the evidence James collected is still admissible in EPA's civil enforcement proceeding against Moon Moo. Most importantly, the exclusionary rule does not apply in EPA civil enforcement proceedings because the public benefit of preventing further drinking water pollution far outweighs the small possibility of deterring Fourth Amendment violations. Moreover, EPA enforcement actions are prospective and remedial—not punitive—unlike criminal cases in which the rule generally applies. Lastly, even in the rare civil proceedings where it might apply, the exclusionary rule does not apply to evidence collected by private parties like James.

Third, Moon Moo meets all of the regulatory requirements for CAFOs. Importantly, Moon Moo qualifies as a CAFO because a

man-made drainage ditch conveys liquid fertilizer from the fields of Bermuda grass into Queechunk. The fertilizer sprayed on the fields that flowed into Queechunk is not agricultural stormwater pollution. EPA regulations and court precedent dictate that discharges from CAFOs are agricultural stormwater discharges only when farms adhere to satisfactory Nutrient Management Plans ("NMPs"). Moon Moo's practices, which are allegedly consistent with its NMP, were clearly the result of an inappropriate plan. The Court should hold that as a CAFO, the farm has a duty to apply for a NPDES permit. If, however, the Court finds insufficient evidence that the drainage ditch was a conveyance and therefore determines that Moon Moo is not a CAFO, the Court should find that Moon Moo does not have a duty to apply for a NPDES permit because it is a nonpoint source. In either circumstance, Plaintiffs-Appellants are entitled to summary judgment as a matter of law on their CWA claims.

Fourth, though EPA did not join Riverwatcher's RCRA claims, the district court mistakenly applied the same regulatory definition of "solid waste" in its rejection of both the endangerment and open dumping claims. For the endangerment claim it should instead have applied the broader statutory definition, which the soil application meets. Accordingly, the district court erred in dismissing that claim and this Court should grant summary judgment for Riverwatcher or, if it deems that the record is inadequate for the fact-intensive endangerment inquiry, this Court should remand for additional fact-finding. However, the district court correctly determined, and this Court should affirm, that according to the regulatory definition of "solid waste," Moon Moo has not violated the open dumping ban.

# ARGUMENT

## I. JAMES DID NOT TRESPASS ON MOON MOO'S PROPERTY BECAUSE QUEECHUNK CANAL IS SUBJECT TO A PUBLIC RIGHT OF NAVIGATION.

James's visit to Queechunk did not constitute trespass because Queechunk is subject to a public right of navigation. The public right of navigation, also sometimes described as a right of public use, at a minimum includes public use for "navigation and commerce." *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 457 (1892). The right of public navigation can arise from a variety of sources; in Queechunk it flows from the public trust doctrine, a public easement, and the fact that Queechunk was established by replacement of a navigable waterway.

### A. Queechunk Canal is Subject to a Public Right of Navigation Because it is a Public Trust Navigable Waterway

Under the public trust doctrine, navigable waterways are "held in trust for the people of the state, that they may enjoy the navigation of the waters." *Ill. Cent. R.R. Co.*, 146 U.S. at 452.[2] While "the public trust doctrine remains a matter of state law," *PPL Mont., LLC v. Montana*, 132 S. Ct. 1215, 1235 (2012), the state's control over navigable waters is "subject . . . to the paramount power of the United States to control such waters for purposes of navigation," *id.* at 1228 (internal quotation marks omitted). The Supreme Court has called this federal navigation servitude "a superior navigation easement." *United States v. Twin City Power Co.*, 350 U.S. 222, 225 (1956). Thus, under public trust doctrine and the related federal navigation servitude, navigable waterways are subject to a public right of navigation.

2. In the United States, the public trust doctrine applies to navigable waters that are nontidal as well as tidal. PPL Mont., LLC v. Montana, 132 S. Ct. 1215, 1226-27 (2012).

The definition of what constitutes a navigable waterway, and is thus subject to the public trust doctrine and the federal navigation servitude, has been recognized for more than a century: "Those rivers must be regarded as public navigable rivers in law which are navigable in fact." *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870). The Supreme Court's four-part test originally held that waterways are navigable in fact if they are:

> used, or are susceptible of being used, [1] in their ordinary condition, [2] as highways for commerce, over which trade and travel are or may be conducted [3] in the customary modes of trade and travel on water . . . [4] when they form . . . by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on.

*Id.* The Supreme Court later eliminated the "ordinary condition" requirement, recognizing that "[t]o appraise the evidence of navigability on the natural condition only of the waterway is erroneous." *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407 (1940).[3] Except for the elimination of this requirement, the basic navigable-in-fact test remains unchanged today. *See PPL Mont.*, 132 S. Ct. at 1228 (citing *The Daniel Ball*'s navigable-in-fact test but noting that the ordinary condition requirement does not apply in all situations).

Queechunk meets these requirements for the modern navigable-in-fact test. First, Queechunk is "commonly used" for travel, A5, thereby satisfying the "trade or travel" prong. Second, the "customary modes" prong has been interpreted to mean that a waterway must be capable of navigation by a small boat or canoe. *See, e.g.*, *FPL Energy Maine Hydro LLC v. FERC*, 287 F.3d 1151, 1157 (D.C. Cir. 2002). Queechunk meets this prong of the test too, as James was able to navigate the canal in his jon boat, A6, which is comparable in size to a canoe, *see United States v. Sasser*, 738

3. While the case eliminating this requirement dealt with the scope of Congress's authority over a waterway, it should be interpreted to apply to the navigable-in-fact test generally, as it was decided before the Supreme Court created the split between Congress's regulatory power and the right of public use. *See Kaiser Aetna v. United States*, 444 U.S. 164, 177-78 (1979); *see also id.* at 185 (Blackmun, J., dissenting) (explaining that, until this case, no case had ever "call[ed] certain waters 'navigable' for some purposes, but 'non-navigable' for purposes of the navigational servitude").

F. Supp. 177, 178 (D.S.C. 1990) (describing the size of a jon boat). Finally, Queechunk originates from and flows back into the Deep Quod, which "runs into the Mississippi River, . . . a navigable-in-fact interstate body of water that has long been used for commercial navigation." A5. Thus, Queechunk meets the "highway [for] commerce" prong, the final prong of the navigable-in-fact test. Queechunk is therefore navigable in fact and must be "regarded as [a] public navigable river[] in law." *The Daniel Ball*, 77 U.S. at 563.

The right of public navigation attaching to Queechunk is unchanged by cases holding that there may not be a public right of use in a man-made body of water that is considered private under state law. In *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), the Supreme Court held that "a body of water that was private property under Hawaiian law" was not subject to a public right of access simply by being "linked to navigable water by a channel dredged by [the owners of the pond]," *id.* at 179-80.

Circuit courts applying *Kaiser Aetna* have consistently read it to mean that there is no public right of navigation where a man-made body of water is designated as private *under state law*. For example, the Ninth Circuit noted that "[t]he [Supreme] Court placed significant weight on the treatment of Kuapa Pond as private property and the reasonable investment-backed expectations of the Pond's owners." *Boone v. United States*, 944 F.2d 1489, 1502 (9th Cir. 1991) (discussing *Kaiser Aetna*, 444 U.S. at 166-67). In applying the *Kaiser Aetna* doctrine to a case factually similar to *Kaiser Aetna*, therefore, the Ninth Circuit found that the water body in question was not subject to a right of public access because it was not navigable in its natural state *and* because "under Hawaiian law . . . [its] private nature [was] beyond dispute." *Boone*, 944 F.2d at 1502. Similarly, where the Fifth Circuit held that a privately dredged canal was not subject to a public right of use, it reached this conclusion only after finding that "the record clearly reflects that all of the remaining waterways at issue are privately owned" under state law. *Dardar v. Lafourche Realty Co.*, 55 F.3d 1082, 1086 (5th Cir. 1995).

Contrary to these circuit court interpretations, the district court here wrongly read *Kaiser Aetna* to stand for the blanket proposition that "there is no public right of navigation in a man-made water body." A9. In fact, *Kaiser Aetna* only applies to the

relatively narrow set of cases in which a man-made body of water is explicitly found to be private under state law. In the absence of such a finding, *Kaiser Aetna* leaves intact the existing framework holding that a waterway that is navigable in fact is subject to a public right of navigation. Here, there is no suggestion that Queechunk—a waterway fed directly from and flowing back into a publicly navigable river—is inherently private under state law.[4] Indeed, the district court found that New Union has not developed any state law on the scope of navigation rights or the public trust doctrine as they apply to man-made or natural waterways.[5] A9. Thus, *Kaiser Aetna* does not alter the conclusion that, as a navigable-in-fact waterway, Queechunk is subject to a public right of navigation.

There is no dispute of material facts as to the physical status of Queechunk: Queechunk's physical attributes satisfy the modern test for a navigable-in-fact waterway, and Queechunk is thus subject to a right of public navigation. Therefore, this Court should deny Defendant's motion and should grant summary judgment for Riverwatcher on the trespass counterclaim.

### B. Even if Queechunk Canal Were Not a Public Trust Waterway, it is Still Subject to a Public Right Of Navigation

Even if a water body is private under state law, a public right of navigation may be created through other means. Queechunk is subject to a public right of navigation both because public use has created a prescriptive easement, and because the canal was created through the diversion of a naturally navigable waterway, allowing the canal to substitute for that waterway.

4. Though Moon Moo owns the land on the sides and bottom of the canal, A2, streambed ownership has no bearing on the public trust doctrine or on federal powers over the water flowing through the stream, *PPL Montana*, 132 S. Ct. at 1234-35.

5. In fact, some states apply an even more lenient test than the federal test for determining which waters are public. *See, e.g.*, *Tex. River Barges v. City of San Antonio*, 21 S.W.3d 347, 352 (Tex. App. 2000) (holding that the statutory definition "render[s] all streams navigable in law that have an average width of 30 feet, regardless of ownership of the bed . . . and regardless of whether they are actually navigable").

### 1. Longstanding, Continuous, Adverse Use has Created a Public Prescriptive Easement in Queechunk

Prescriptive public easements can create a public right-of-way in a formerly private property. While the modern requirements for a prescriptive easement vary slightly by state, most states require that public use be (1) open and notorious (meaning visible and known to the owner), (2) adverse to the owner, and (3) continuous and uninterrupted for a period typically ranging from ten to twenty years. *See, e.g.*, *Fogerty v. State*, 187 Cal. App. 3d 224, 238 (Ct. App. 1986); *Graham v. Mack*, 699 P.2d 590, 595 (Mont. 1984); *see also* 2 Am. Jur. Proof of Facts 3d 197, § 2 (1988) (cataloguing requirements under state property law). States that have considered easements in private waterways have found that the doctrine of prescriptive easement, which typically pertains to land, "appl[ies] by analogy to rights-of-way over non-navigable streams." *Buffalo River Conservation & Recreation Council v. Nat'l Park Serv.*, 558 F.2d 1342, 1345 (8th Cir. 1977); *see also State ex rel. Meek v. Hays*, 785 P.2d 1356, 1363 (Kan. 1990).

Queechunk meets these standard requirements for a prescriptive public easement. First, "the Canal is commonly used as a shortcut." A5. Because Queechunk is widely used by the public, it is likely that this frequent use is also widely known. Second, it is clear that public use is adverse to the owner, as Moon Moo has posted "No Trespassing" signs along the canal rather than inviting the public to use it freely. A5. Finally, the ongoing and "common" use of the canal, A5, provides no indication that the public usage has been interrupted or inconsistent. Rather, it appears likely that the canal has been publicly used since its creation in the 1940s, A5, thus easily satisfying the requirement of continuous use for ten to twenty years.

Thus, the facts on the record suggest that the public has acquired a prescriptive easement in Queechunk, and this Court should find a public right of use in the canal. At the very least, the record raises a dispute of material fact about the existence of such an easement, in which case this Court should remand the question to the district court for further findings of fact.

### 2. Queechunk Canal was Created Through the Diversion of a Navigable Waterway, Giving the Public a Right of Navigation

Even in the absence of a prescriptive easement, an artificial navigable waterway that would otherwise be considered private may nonetheless be subject to a public right of navigation if it was created "in part by means of diversion or destruction of a pre-existing natural navigable waterway." *Vaughn v. Vermilion Corp.* (*Vaughn I*), 444 U.S. 206, 208 (1979). In *Vaughn I*, the companion case to *Kaiser Aetna*, the Supreme Court created this exception to the *Kaiser Aetna* rule for instances where a "system of artificial waterways was substituted for the pre-existing natural system of navigable waterways." *Id.* at 209. As the Louisiana Supreme Court explained in later proceedings in that case, "The [U.S.] Supreme Court's opinion indicates that defendants would have a right under federal law to use [manmade] canals as a substitute for any natural, navigable waterway substantially impaired or destroyed by construction of the artificial system." *Vermilion Corp. v. Vaughn* (*Vaughn II*), 397 So. 2d 490, 492 (La. 1981).

There is strong evidence that this exception applies to Queechunk. First, Queechunk was "excavated [as] a bypass canal in the Deep Quod," A5, so Queechunk was clearly created "by means of diversion . . . of a pre-existing natural navigable waterway," *Vaughn I*, 444 U.S. at 208. Moreover, "[m]ost of the flow of the Deep Quod River is diverted into the Queechunk Canal," A5, indicating that the Deep Quod was "substantially impaired" by the construction of Queechunk, *Vaughn II*, 397 So. 2d at 492. Thus, the facts on the record indicate that Queechunk serves as "a substitute for [a] natural, navigable waterway," *id.*, and accordingly, this Court should find a public right of navigation in the canal. At a minimum, the record creates a question of material fact regarding the extent to which Queechunk serves as a substitute for the Deep Quod, and the Court should remand for further findings of fact on this issue.

## II. THE EVIDENCE COLLECTED BY JAMES IS ADMISSIBLE IN THE CIVIL ENFORCEMENT PROCEEDING INITIATED BY EPA

The exclusionary rule, where it applies, excludes evidence collected illegally or without a warrant. "[T]he rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment." *United States v. Calandra*, 414 U.S. 338, 347 (1974). Thus, the rule typically applies only in criminal cases: "'[i]n the complex and turbulent history of the rule, the [Supreme] Court never has applied it to exclude evidence from a civil proceeding, federal or state.'" *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1041-42 (1984) (quoting *United States v. Janis*, 428 U.S. 433, 447 (1976)).[6] There is no reason for this Court to diverge from Supreme Court precedent and extend the exclusionary rule to this civil proceeding.

### A. The Exclusionary Rule Does Not Apply in EPA Civil Enforcement Proceedings

The exclusionary rule does not apply in EPA enforcement actions because the costs and benefits of applying the rule weigh strongly against applying it in proceedings to protect public health and the environment, *see Lopez-Mendoza*, 468 U.S. at 1041, and the proceedings aim at prospective relief rather than punishment, *id.* at 1046.

#### 1. The Minimal Benefit of Applying the Exclusionary Rule Does Not Justify the High Cost of Excluding Valuable Evidence in EPA Enforcement Proceedings

In deciding whether to apply the exclusionary rule in a non-criminal context, the Supreme Court applies a balancing test that:

6. The Supreme Court has not addressed this issue since *Lopez-Mendoza* in 1984, so it remains true that the Court has never applied the rule to exclude evidence in a civil proceeding.

> weigh[s] the likely social benefits of excluding unlawfully obtained evidence against the likely costs. On the benefit side of the balance the prime purpose of the exclusionary rule . . . is to deter future unlawful police conduct. On the cost side there is the loss of often probative evidence and . . . secondary costs that flow from the less accurate or more cumbersome adjudication that therefore occurs.

*Lopez-Mendoza*, 468 U.S. at 1041 (internal citations omitted). In the only two cases where the Supreme Court analyzed whether the exclusionary rule should apply in civil proceedings, it decided the cost of applying the rule outweighed the possible deterrence benefits, and thus declined to apply the rule. *Lopez-Mendoza*, 468 U.S. at 1050; *Janis*, 428 U.S. at 454.

In the instant case, applying the exclusionary rule would mean excluding evidence that shows Moon Moo has polluted a waterway that Farmville relies on for drinking water. Such an outcome would deprive EPA of the ability to bring a civil enforcement proceeding to protect Farmville's drinking water and ensure Moon Moo's ongoing CWA compliance. The social costs of applying the exclusionary rule in this case are therefore very high. On the other side of the scale, the possible deterrence benefit of applying the exclusionary rule is likely low. As discussed further below, a private citizen is unlikely to be deterred from collecting evidence by a rule designed to deter unlawful *government* conduct. The low deterrence benefit here is outweighed by the high social costs at stake; thus the Supreme Court's balancing test dictates that the exclusionary rule must not be extended to apply to EPA civil enforcement proceedings.

### 2. The Primary Purpose of the Proceeding is Prospective Relief, Not Punishment

Furthermore, the Supreme Court has recognized that the cost of applying the exclusionary rule in proceedings intended to prevent ongoing violations—where courts would be "closing their eyes to ongoing violations of the law"—is so great as to be unacceptable. *Lopez-Mendoza*, 468 U.S. at 1046. Presenting a hypothetical example strikingly similar to the case at bar, the Court stated:

> Presumably 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 . . . . On the rare occasions that it has considered costs of this type the Court has firmly indicated that the exclusionary rule does not extend this far.

*Id.* Interpreting that case, some circuit courts have focused on whether the relief sought is prospective or punitive in nature. *E.g.*, *Trinity Indus., Inc.* v. OSHRC, 16 F.3d 1455, 1461-62 (6th Cir. 1994); *Smith Steel Casting Co. v. Brock*, 800 F.2d 1329 (5th Cir. 1986); *Garrett v. Lehman*, 751 F.2d 997, 1002 (9th Cir. 1985). In all of these cases, the court found that the exclusionary rule does not apply when the relief sought is prospective, but it may apply when the relief sought is punitive, as punitive sanctions tend to be more analogous to the criminal context. *Compare Garrett*, 751 F.2d at 1002 (exclusionary rule did not apply in military discharge hearings because they were prospective), *with Trinity Indus.*, 16 F.3d at 1462 (exclusionary rule may apply in OSHA proceeding seeking punitive monetary penalties).

EPA's enforcement action against Moon Moo seeks to halt current CWA violations and prospectively ensure Moon Moo's ongoing and future compliance with the CWA.[7] Analogizing from the hazardous waste violation hypothesized in *Lopez-Mendoza*, an injunction to stop CWA violations is clearly a form of prospective relief. Thus, the exclusionary rule does not apply to James's evidence for purposes of the injunctive relief sought under 33 U.S.C. §1319(b).[8]

Nor does the exclusionary rule apply to the civil penalties sought under 33 U.S.C. §1319(d), because "monetary penalties

7. Riverwatcher's RCRA claims are also grounded in this evidence. The Government has found no case law to suggest that the exclusionary rule would apply differently to those claims.

8. Contrary to the district court's broad statements, A9, this conclusion is not questioned by any of the cases analyzing the exclusionary rule in the civil context. Indeed, even courts that used the exclusionary rule to bar evidence in OSHA actions for civil penalties nonetheless reiterated that "we do not believe that the exclusionary rule should be invoked to prevent the Secretary of Labor from ordering *correction* of OSHA violations . . . , even though the evidence . . . was improperly obtained." *Smith Steel Casting*, 800 F.2d at 1334 (emphasis in original).

[have not] historically been viewed as punishment." *Hudson v. United States*, 522 U.S. 93, 104 (1997). Rather, monetary penalties are civil as long as they are not "so punitive in form and effect as to render them criminal despite Congress' intent." *Id.* Here, the primary purpose of the civil penalties sought by EPA is not to punish but rather to help EPA recover its costs of enforcement (thus ensuring future compliance), to fund remediation for past damages, and to deter future violations. The Supreme Court has specifically explained that a civil penalty "may be remedial in character if it merely reimburses the government for its actual costs arising from the defendant's . . . conduct." *Dep't of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 777 (1994). Under this standard, as well as under the broader rule interpreting monetary penalties as civil, the exclusionary rule is inapplicable to EPA's action for civil penalties, which is remedial rather than punitive.

### B. The Exclusionary Rule Does Not Apply to James' Evidence, Because the Evidence Was Collected by a Private Party

Even if the exclusionary rule applied in EPA enforcement proceedings, "[i]t is well established . . . that the exclusionary rule, as a deterrent sanction, is not applicable where a private party . . . commits the offending act," *United States v. Janis*, 428 U.S. 433, 455 n.31 (1976). This is because the rule would not "have a sufficient likelihood of deterring the conduct" of a private party (or a sovereign other than the one prosecuting the case). *Id.* at 454.

The Supreme Court has created a narrow exception recognizing that "where a private party acts as an 'instrument or agent' of the state in effecting a search or seizure, fourth amendment interests are implicated" and the exclusionary rule may apply. *United States v. Walther*, 652 F.2d 788, 791 (9th Cir. 1981) (citing *Coolidge v. New Hampshire*, 403 U.S. 443, 487 (1971)). The two primary factors for determining whether a private party acted as an instrument or agent of the state are: "(1) the government's knowledge and acquiescence, and (2) the intent of the party performing the search." *Walther*, 652 F.2d at 792. "If both factors are present, a private party will be considered to have acted as a government agent." *United States v.*

*Harrison*, 168 F.3d 483, 1999 U.S. App. LEXIS 910, at *2 (4th Cir. Jan. 25, 1999). If either factor is not satisfied, the private party acted independently and the evidence is admissible.

James clearly acted independently in collecting the water sample from Queechunk Canal. The record strongly suggests that James was alone when he visited Queechunk and collected the sample, thus no EPA officers were present. A6. And no party has suggested that EPA had any knowledge of or influence on James's decision to collect the sample. Instead, because he acted without the government's "knowledge or acquiescence," *Walther*, 652 F.2d at 792, James cannot be considered an "instrument or agent" of the government for purposes of the exclusionary rule. Because the exclusionary rule does not apply to evidence collected by private parties except under the narrow "instrument or agent" carve-out, *id.*, the water-quality evidence James collected is admissible in this civil enforcement proceeding.

## III. MOON MOO IS A CAFO SUBJECT TO NPDES PERMITTING REQUIREMENTS UNDER THE CWA

Congress enacted the CWA with the ultimate goal of "eliminat[ing] the discharge of pollutants into the navigable waters." 33 U.S.C. §§ 1251(a)(6), (a)(1). It proscribes the "discharge of pollutants" from "point sources," which are defined as "any discernible, confined and discrete conveyance." 33 U.S.C. § 1311(a); 33 U.S.C. § 1362(14). To further this goal, the EPA created the CAFO classification to designate as point sources operations that congregate animals and concentrate manure and other waste. Moon Moo's discharges meet all of EPA's criteria for CAFO classification and, because the discharge was not *caused by* rain, its discharges are subject to NPDES permitting requirements.

### A. Moon Moo Qualifies as a CAFO and Should be Subject to NPDES Permitting Because it Discharges Manure From its Land Application Area

#### 1. Moon Moo Fulfills All of the Regulatory Requirements for a CAFO

As the district court opinion states, Moon Moo fits squarely into the regulatory definition of a CAFO. A8; 40 C.F.R. §122.23. Moon Moo firstly qualifies as an animal feeding operation ("AFO") because the facility confines milk cows throughout the year. The regulation states:

> Animal feeding operation . . . means a lot or facility . . . where the following conditions are met: (i) Animals . . . have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period, and (ii) Crops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility.

40 C.F.R. §122.23(b)(1). Moon Moo's practice of confining cows all year without pasturing them clearly fits the first prong of the AFO test. A4. The farm's 150 acres of fields do not violate the test's second prong because the Bermuda grass is not grown within the animal confinement area. *See* 40 C.F.R. §122.23(b)(3) (defining "land application area"); *Concerned Area Residents for the Env't v. Southview Farm*, 34 F.3d 114, 123 (2d Cir. 1994) ("[t]he [CAFO] vegetation criterion applies to the lot or facility *in which* the animals are confined"); Office of Wastewater Mgmt., *NPDES Permit Writers' Manual for Concentrated Animal Feeding Operations*, U.S. Envtl. Prot. Agency 2-3, (Feb. 2012) [hereinafter *NPDES Manual*] (stating that the second AFO prong "relates to the portion of the facility where animals are confined").

In order to qualify as a CAFO, an AFO must meet two additional requirements: first, it must house between 200 and 699 mature dairy cows, whether milked or dry, 40 C.F.R. 122.23(b)(6)(i)(A); and second, it must meet one of the following conditions: "(A) Pollutants are discharged into waters of the United States through a man-made ditch . . . or other similar

man-made device; or (B) Pollutants are discharged directly into waters of the United States . . . ."
40 C.F.R. §122.23(b)(6)(ii).[9] For the last two years, Moon Moo has housed 350 dairy cows, well within the range of 200 to 699 mature dairy cows necessary for qualification as a Medium CAFO. 40 C.F.R. §122.23(b)(6)(i)(A). The farm also directly fulfills the discharge requirements as defined under part (A). 40 C.F.R. §122.23(b)(6)(ii)(A). The drainage ditch acts to funnel liquid waste sprayed onto the fields into Queechunk. The ditch's role as a conveyance for pollutants qualifies the Farm as a CAFO because (1) the liquid fertilizer mixture sprayed on the grass is a pollutant under the CWA, (2) the body of water into which the pollutants are drained is a water of the United States, and (3) the man-made drainage ditch was the mechanism through which the pollutants applied onto the land were conveyed into the waters.

First, the manure-whey mixture Moon Moo applied to the farm's land application area is a pollutant. The CWA defines "pollutant" as "agricultural waste discharged into water," 33 U.S.C. § 1362(6), and "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source," 33 U.S.C. 1362(12)(A). The flow of the fertilizer solution from Moon Moo's fields, through the drainage ditch and into Queechunk is properly considered the discharge of a pollutant because the solution, a pollutant, originated from a CAFO, which is, by statutory definition, a point source. 40 C.F.R. §122.23(a) (CAFOs "are point sources, subject to NPDES permitting requirements as provided in this section").

Second, it is undisputed that Queechunk runs directly into the Deep Quod, which runs year-round and flows into the Mississippi River, a navigable interstate waterway. A5. Provisions prohibiting the discharge of pollutants into waters of the United States extend to water bodies that do not flow across state borders if they are part of a larger system connecting them to a navigable river. *Rapanos v. United States*, 547 U.S. 715, 717 (2006) ("[A] water or wetland constitutes 'navigable waters' under the [CWA] if it possesses a 'significant nexus' to waters that are navigable in fact or that could reasonably be so made."); *N. River*

9. These requirements apply to Medium CAFOs. Different criteria and responsibilities apply to Small and Large CAFOs. 40 C.F.R. §§ 122.23(b)(4); (b)(9).

*Watch v. City of Healdsburg*, 496 F.3d 993, 1000 (9th Cir. 2007) (finding a water-filled quarry is a "navigable water" under the CWA because it is "part of a larger wetland that is 'adjacent' to the River" and there exists a "substantial nexus" as required by *Rapanos*).[10] Most of the Deep Quod's water is diverted through Queechunk, and Queechunk flows directly back into the Deep Quod. A5. Thus, there is clearly a sufficient nexus between Queechunk, the Deep Quod, and the Mississippi to consider the canal a water of the United States.

Third, the drainage ditch played an important role in conveying the fertilizer solution into the canal. The district court described the undisputed fact that "discolored brown water flow[ed] from the fields through a drainage ditch into the Queechunk Canal." A6. The drainage ditch's role in the architecture of the farm—to drain excess manure flowing from the fields—comfortably meets the common law definition of a discharge: to "add pollutants from the outside world to navigable water." *Comm. to Save Mokelumne River v. East Bay Mun. Util. Dist.*, 13 F.3d 305, 308 (9th Cir. 1993) (quoting *Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 584 (6th Cir. 1988)) (internal quotation marks omitted).

Moon Moo may argue that the drainage ditch was created to convey stormwater from the farm's property into Queechunk, rather than conveying pollutants into U.S. waters. However, as EPA has indicated in guidance documents, a conveyance that transports waste is considered to serve this purpose whether it was *intended* for that purpose or not. *NPDES Manual*, at 2-9 (noting that "[a] man-made channel or ditch that was not created specifically to carry animal wastes but nonetheless does so is considered a man-made device" for the purposes of the statute's requirement that pollutants are discharged into the waters through a man-made ditch or other man-made device). Because Moon Moo meets all of the requirements for an AFO and a CAFO, the farm is a CAFO under the CWA. Moon Moo's qualification as a CAFO makes it a point source. 40 C.F.R. §122.23(a).

10. Because it flows from the interpretation of specific statutory language, the definition of "waters of the United States" under the CWA does not affect the analysis of navigable waters discussed in Part I. *Rapanos*, 547 U.S. at 723-24 (discussing the divergence of the common law and statutory definitions of "navigable waters of the United States").

### 2. Precedent Dictates that Moon Moo is a CAFO

No binding case law, to the Government's knowledge, disputes the finding that Moon Moo's discharges come from a point source due to the farm's classification as a CAFO. The lower court's reliance on *Alt v. EPA*, 979 F. Supp. 2d 701 (N.D.W. Va. 2013), to assert that the discharge in the instant case is agricultural stormwater runoff, and not a CAFO discharge, represents a misapplication of that relatively narrow holding to the instant case. While *Alt*, a Northern District of West Virginia case, indicates that some CAFO discharges are considered agricultural stormwater discharges despite CAFOs' status as point sources, *id.* at 715, the facts of *Alt* are materially different from those of the instant case. In *Alt*, dry particles of manure and litter from the farm's eight poultry confinement houses were tracked and spilled in the farmyard surrounding the CAFO. Additionally, the ventilation systems in the enclosed houses blew "some dust composed of manure, litter and dander, and some feathers" onto the farmyard, where the pollutants "settled on the ground." *Id.* at 704. In *Alt*, rainfall was required in this case to move the dry dust particles from the farmyard into the nearby waterway. *Id.* (stating that precipitation "contacted the particles" and "carried" them into a water of the United States). That situation is substantially different from the instant case, where liquid manure sprayed onto the fields flowed directly into the canal. A6.

The *Alt* court indicated the steps that Lois Alt used to prevent manure and litter from exposure to precipitation. Among these was "[e]xercise of reasonable care in cleaning up manure or litter that might spill during transfer operations" *Alt*, 979 F. Supp 2d at 705. This level of care differs drastically from the practices exercised by Moon Moo's operators. Far from cleaning up spilled manure that might be exposed to precipitation, Moon Moo sprayed large amounts of manure onto its fields during a significant rain event in which two inches of rain fell in just two days. A6. Dr. Ella Mae indicated that the application of manure during any rain event is an extremely poor management practice, and that it will nearly always result in nutrient loss. In addition, Dr. Mae tested the fertilizer used by Moon Moo—a combination of liquid manure from the farm's cows and acid whey from the Chokos plant—and found that the mixture had a pH of 6.1,

making it a weak acid. Dr. Mae stated that the acidity of the liquid prevented the Bermuda grass crop from effectively taking up the nutrients in the mixture. Dr. Emmet Green, Moon Moo's expert, did not dispute that the acid whey reduced the soil pH and reduced nitrogen uptake by the grass. A6. Moon Moo's choice to fertilize soil already saturated with rainwater and spray a solution that would severely limit the crop's ability to take up its nutrients does not constitute "reasonable care." *Compare* A6 (describing Moon Moo's practices), *with Alt*, 979 F. Supp. 2d at 705 (describing significant efforts to contain even small amounts of pollutants).

It is also important to note that the pollutant discharge in the instant case was not caused by water precipitation causing fertilizer runoff, the test *Southview Farm* sets out for identifying agricultural stormwater discharges. 34 F.3d at 120-121 ("[A]ll discharges eventually mix with precipitation run-off in ditches or streams or navigable waters so the fact that the discharge might have been mixed with run-off cannot be determinative.") The *Southview* court instead looks to whether the discharge is a "result of the precipitation." *Id.* at 121. As in *Southview*, Moon Moo's discharges "were not the result of rain, but rather simply occurred on days when it rained." *Id.* at 121. The liquid manure was capable of flowing into the water on its own, and the significant rain event that occurred over a two-day period only ensured that the soils were saturated and less likely to absorb the manure solution. *See id.* (crediting testimony that "after a rain[ ] and manure had been applied on the field, [the manure] was literally running off everywhere up and down those field[s]").

### 3. As a CAFO that Discharges Pollutants into a Navigable Water, Moon Moo is Subject to NPDES Permitting Requirements

EPA regulations require CAFOs including Moon Moo to apply for a NPDES permit:

> The discharge of manure, litter or process wastewater to waters of the United States from a CAFO as a result of the application of that manure, litter or process wastewater by the CAFO to land areas under its control is a discharge from that CAFO subject to

> NPDES permit requirements, except where it is an agricultural storm water discharge as provided in 33 U.S.C. [§] 1362(14).

40 C.F.R. §122.23(e); *see also Nat'l Pork Producers Council v. EPA*, 635 F.3d 738, 749-51 (5th Cir. 2011) (holding that there is no duty to apply for a NPDES permit for *possible* discharges, but such a duty exists for CAFOs that *actually* discharge); *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 504-06 (2d Cir. 2005). The EPA regulations state that a CAFO is subject to NPDES permitting if its land application of manure discharges "to waters of the United States" unless "it is an agricultural storm water discharge as provided in 33 U.S.C. 1362(14)." 40 C.F.R. §122.23(e). This rule further states that a precipitation-related discharge of manure from land areas under the control of a CAFO is considered an agricultural stormwater discharge *only when* manure has been applied in accordance with site-specific nutrient management practices *and* the practices "ensure appropriate agricultural utilization of the nutrients in the manure, litter or process wastewater, as specified in §122.42(e)(1)(vi)-(ix)." 40 C.F.R. §122.23(e); *see also Waterkeeper*, 399 F.3d at 496, 507 (defining "point source" as "generally authorizing the regulation of CAFO discharges, but exempting such discharges from regulation to the extent that they constitute agricultural stormwater").

First, the events that occurred at Moon Moo cannot be considered agricultural stormwater discharge because of the way that courts have interpreted this phrase. Relying on a strong body of appellate case law, in a case consolidated from petitions filed in several different circuits, the *National Pork Producers* court stated that such discharges occur "when rainwater comes in contact with manure and flows into navigable waters." *Nat'l Pork Producers*, 635 F.3d at 743 (citing *Fishermen Against Destruction of Env't, Inc. v. Closter Farms, Inc.*, 300 F.3d 1294, 1297 (11th Cir. 2002); *Southview Farm*, 34 F.3d at 121). However, rainwater contacting manure is not the issue in the instant case. Here, the farm operators sprayed the liquid fertilizer onto already-saturated fields, causing the fertilizer to flow through the drainage ditch and into a river. A6.

Second, the regulation requires that NMPs "[e]stablish protocols to land apply manure, litter or process wastewater in accordance with site specific nutrient management practices that

ensure appropriate agricultural utilization of the nutrients in the manure, litter or process wastewater." 40 C.F.R. §122.42(e)(1)(viii). Moon Moo explicitly failed to implement site-specific practices to ensure that the crops on its land were able to absorb and utilize the nutrients in the soil amendment. Moon Moo added liquid whey to its manure before applying the mixture to the farm's fields, which both Dr. Mae and Dr. Green indicated would limit the ability of the Bermuda grass to uptake nutrients from the liquid fertilizer sprayed on the fields. *See* A6. In addition, the farm applied the liquid waste mixture to the land during a period of heavy rain. As Dr. Mae indicated, this is a very poor nutrient management practice. A6.[11]

Even if it is true that Moon Moo's NMP did not prevent it from spraying manure on its fields during a rain event, A6-7, the test set forward in *Waterkeeper* does not simply seek a determination of whether the CAFO adhered to its NMP. Instead, the rule specifies that the practices farm operators engage in must be site-specific and designed to ensure appropriate agricultural utilization of the nutrients applied to the site. *Waterkeeper*, 399 F.3d at 509.

Updates to the CAFO regulations in light of recent cases do not alleviate Moon Moo's duty to apply for a NPDES permit as a CAFO. In *National Pork Producers*, the Fifth Circuit upheld the "duty to apply" for a NPDES permit imposed on CAFOs that are discharging. 635 F.3d at 756. The updates to the regulation following *National Pork Producers* eliminated the obligation of CAFOs to "propose to discharge." *Compare* 40 C.F.R. 122.23(d) (2011), *with* 40 C.F.R. 122.23(d) (2012). The new regulation also removed the option for CAFOs to become "no discharge" CAFOs by certifying that they will "not be in violation of the requirement that CAFOs that propose to discharge seek permit coverage." 40 C.F.R. 122.23(i) (2011) (repealed 2012); *see* 77 Fed. Reg. 44,497 (Jul. 30, 2012). These adjustments challenge Moon Moo's status as a "no discharge" operation, A5, but do not remove its duty to

11. Additionally, the New Union Department of Agriculture does not generally review NMPs. A5. However, the Second Circuit found in *Waterkeeper* that "by failing to provide for EPA review of the NMPs, the 2003 Rule violated the statutory commandments that the permitting agency must assure compliance with applicable effluent or discharge limitations." *Nat'l Pork Producers*, 635 F.3d at 745 (summarizing *Waterkeeper*, 399 F.3d 486).

apply for a NPDES permit in light of the evidence of discharge collected by James.

### B. If Moon Moo is not a CAFO, it is Exempt from NPDES Permitting Because it Complied with its NMP and was Deemed Not to be a Point Source

Because Moon Moo meets all the other criteria for a CAFO, the only way this Court could find Moon Moo is not a CAFO is if it finds that Moon Moo did not discharge pollutants through a man-made drainage ditch. As described in the previous section, Moon Moo Farm very easily meets most of the regulatory requirements for qualification as a CAFO because the cows are confined for many more than 45 days out of the year and the grass grown on Moon Moo's property does not interfere with its classification as a CAFO. 40 C.F.R. §122.23(b). The only element of the determination of whether the Moon Moo is a CAFO that can be disputed is whether pollutants from the farm are discharged into waters of the United States through a man-made ditch. 40 C.F.R. §122.23(b)(6)(ii)(A). It is clear that discharge from the farm flows into waters of the United States. As a result, the dispute over whether Moon Moo Farm is a CAFO hinges on whether the man-made ditch on the farm's land facilitates the discharge of pollutants. This exact same inquiry would need to be made in a determination of whether Moon Moo Farm was a point source outside of the CAFO context.

This Court would only reach the conclusion that Moon Moo is not a CAFO if it rejected the Government's arguments that the inadequacy of the Farm's NMP precludes the permit from shielding the farm operators from liability for their discharges. This determination would very likely preclude the Court from finding that the farm is a point source of any kind, since a point source is defined by the CWA as "any discernible, confined and discrete conveyance, including but not limited to any . . . ditch." 33 U.S.C. §1362(14). In the absence of confidence that the ditch served as a conveyance, the farm would not be considered a point source, and would, instead be a nonpoint source. *See Or. Natural Desert Ass'n v. Dombeck*, 172 F.3d 1092, 1095 (9th Cir. 1998) (The CWA defines point sources and clarifies that "[o]ther pollution sources, such as runoff from agriculture . . . are nonpoint sources."). In fact, it is likely that without a drainage ditch

collecting and concentrating liquid manure, and perhaps due to a misreading of the details of the instant case, the court would find that the discharge from Moon Moo constitutes agricultural runoff. Courts have a longstanding history of considering agricultural runoff nonpoint source pollution. *See, e.g.*, *Natural Res. Def. Council, Inc. v. Muszynski*, 268 F.3d 91, 94 (2d Cir. 2001); Frank P. Grad, *Treatise on Environmental Law* §3.03 (2009) ("Nonpoint sources include pollution from diffuse land use activities such as agriculture. . ."). If Moon Moo is a nonpoint source, it is not subject to NPDES permitting requirements because agricultural runoff is not subject to NPDES permitting. 33 U.S.C. §1342(f) (indicating that the EPA Administrator can only promulgate regulations to restrict point sources).

In sum, this Court should find that Moon Moo is a CAFO subject to NPDES permitting, or, alternatively, that it is not a CAFO and does not have an obligation to apply for a NPDES permit. Because there is no dispute regarding the facts necessary for this inquiry, summary judgment in favor of Appellants is appropriate.

## IV. UNDER RCRA, MOON MOO'S ACTIVITIES PRESENT AN ENDANGERMENT BUT THEY DO NOT CONSTITUTE ILLEGAL OPEN DUMPING

Riverwatcher makes two claims in the alternative against Moon Moo pursuant to the citizen suit provisions of RCRA, a "comprehensive environmental statute that governs the treatment, storage, and disposal of solid and hazardous waste," *Meghrig v. KFC W.*, 516 U.S. 479, 483 (1996).[12] First, Riverwatcher contends that Moon Moo's manure-spreading operations "present an imminent and substantial endangerment to health or the environment." *See* 42 U.S.C. §6972(a)(1)(B). Second, Riverwatcher alleges that Moon Moo's manure-spreading operations violate RCRA's open dumping ban. *See* 42 U.S.C.

12. RCRA's "anti-duplication" provision proscribes application of RCRA to the same activities and substances regulated by other environmental statutes, including, as is the case here, the CWA. 42 U.S.C. § 6905(a); *see e.g.*, *Coon ex rel. Coon v. Willet Dairy, LP*, 536 F.3d 171, 174 (2d Cir. 2008) (RCRA did not apply to activities of a dairy farm for which it had CWA permit); *Greenpeace, Inc. v. Waste Techs. Indus.*, 9 F.3d 1174, 1178 (6th Cir.1993) (dismissing endangerment claim against operator operating within limits of valid RCRA permit).

§6972(a)(1)(A) (authorizing citizen enforcement of violations of the open dumping ban).

The first step in reviewing a RCRA claim is to confirm that a solid waste is involved. "EPA distinguishes between RCRA's regulatory and remedial purposes and offers a different definition of solid waste depending upon the statutory context in which the term appears." *Conn. Coastal Fishermen's Ass'n v. Remington Arms Co.*, 989 F.2d 1305, 1314 (2d Cir. 1993). Notably, "a different definition applies to permitting violation claims than to claims of 'imminent and substantial endangerment.'" *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 205 (2d Cir. 2009).

The statute broadly defines solid waste as "any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and *other discarded material*, including solid, liquid, semisolid, or contained gaseous material . . . ." 42 U.S.C. §6903(27) (emphasis added). While the statute does not define "discarded," courts have defined the term according to the dictionary and common usage as "'cast aside; reject; abandon; give up,'" *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1041 (9th Cir. 2004) (citing 1 The New Shorter Oxford English Dictionary 684 (4th ed.1993)), and have further explained that "material is not discarded until after it has served its intended purpose." *No Spray Coal., Inc. v. New York*, 252 F.3d 148, 150 (2d Cir. 2001). Accordingly, once a product is "indisputably discarded" it has become part of the waste disposal stream and may be regulated under RCRA. *Am. Petroleum Inst. v. EPA*, 906 F.2d 729, 741 (D.C. Cir.1990); *see also Conn. Coastal*, 989 F.2d at 1314-15 (determining, "[w]ithout deciding how long materials must accumulate before they become discarded," that shot and targets released into the environment, and left long after serving their intended purpose, had been "discarded"). For example, pesticides sprayed in order to reach and kill mosquitoes were not discarded because "material is not discarded until after it has served its intended purpose." *No Spray Coal.*, 252 F.3d at 150.[13] Additionally, "the fact that discarded materials are 'solid

13. This doctrine is distorted by the Ninth Circuit's pronouncement that materials are not discarded if "dispersal to the environment is an expected consequence of [their] use." *Ecological Rights Found. v. Pac. Gas & Elec.*, 713 F.3d 502, 515-16 (9th Cir. 2013). Without defining "expected consequences," the Ninth Circuit's holding has the potential to exclude from the definition of

waste' under RCRA does not change 'just because a reclaimer has purchased or finds value in the components.'" *Safe Air*, 373 F.3d at 1043 n.8 (citing *United States v. ILCO*, 996 F.2d 1126, 1131 (11th Cir. 1993)).

The regulatory definition at 40 C.F.R.§261.2 narrows the definition of "solid waste" by explaining that "discarded material" is "abandoned", "recycled", "inherently waste-like" or a "military munition" as those terms are further defined in RCRA Subtitle C, which governs the treatment, transportation, storage and disposal of regulated hazardous waste. The regulations also exempt a number of materials from qualification as, and therefore disposal requirements of, solid waste. *See, e.g.*, 40 C.F.R. § 257.1(c)(1) (excluding from the open dumping criteria "agricultural wastes, including manures and crop residues, returned to the soil as fertilizers or soil conditioners"). A regulated solid waste is always a solid waste under the statute but the reverse is not always true.

The district court mistakenly applied the same statutory definition of "solid waste" in its rejection of both the endangerment and open dumping claims. Accordingly, the district court erred in dismissing Riverwatcher's endangerment claim. However, Moon Moo has not violated the open dumping ban, which the district court correctly dismissed.

### A. The District Court's Singular Reliance on the Regulatory Definition of "Solid Waste" Defies Congressional Intent to Protect Health and the Environment

RCRA's primary and overriding objective is "to promote the protection of health and the environment 42 U.S.C. § 6902. To that end, Congress authorized both citizens and the Government to bring suit "against any person . . . who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous

"discarded" any materials for which spills, leaks, and oversaturation could be construed as "expected consequences" of use. Such a gross expansion of the Second Circuit's holding in *No Spray Coal.*, 252 F.3d at 150, upon which the Ninth Circuit purports to rely, will likely encourage and indemnify use of countless high-risk products simply because the risks they pose may be expected. Surely this was not Congress's intent.

waste which may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. §6972(a)(1)(B) (authorizing citizen suits); *id* §6973. (authorizing such suits by the EPA Administrator). "[T]he statute itself still provides the relevant definition for purposes of Subtitle G, which authorizes the Administrator—or, indeed, 'any person'—to bring suit in order to force such action as may be necessary to abate 'an imminent and substantial endangerment to health or the environment' caused by solid waste." *Military Toxics Project v. EPA*, 146 F.3d 948, 951 (D.C. Cir. 1998) (internal citations omitted).

### 1. Congress Intended the Endangerment Standard to Be Broad

To provide the most protection for public health and the environment, the standard for RCRA endangerment claims permits "any person" to bring suit against:

> *any person*, including the United States and any other governmental instrumentality or agency . . . *who has contributed or who is contributing to* the past or present handling, storage, treatment, transportation, or *disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment.*

42 U.S.C. §6972(a)(1)(B) (emphasis added). Courts have interpreted this endangerment standard broadly. First, endangerment requires "threatened or potential harm and does not require proof of actual harm." *Davis v. Sun Oil Co.*, 148 F.3d 606, 610 (6th Cir. 1998); *see also Price v. U.S. Navy*, 39 F.3d 1011, 1019 (9th Cir. 1994). An emergency is not required. *See, e.g.*, *Maine People's Alliance v. Mallinckrodt, Inc.*, 471 F.3d 277, 296 (1st Cir. 2006). Second, "imminence" "implies that there must be a threat which is present now, although the impact of the threat may not be felt until later." *Meghrig*, 516 U.S. at 486. Third, an endangerment is "substantial" if there is "some reasonable cause for concern that someone or something may be exposed to a risk of harm by a release or a threatened release of a hazardous substance if remedial action is not taken." *Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 399 F.3d 248, 259 (3d Cir. 2005) (internal quotation marks and citations omitted). Quantification of the

endangerment, such as proof that a certain number of persons will be exposed or that a water supply will be contaminated to a specific degree, is not required. *Id*. And, fourth, endangerment claims are not contingent on other violations of law. *See, e.g.*, *Cox v. City of Dallas*, 256 F.3d 281, 291-92 (5th Cir. 2001) (the endangerment provisions are "essentially a codification of common law nuisance remedies").[14] For the foregoing reasons, the standards for establishing endangerment are generous in order to most comprehensively protect human health and the environment.

### 2. Riverwatcher's Endangerment Claim Was Improperly Dismissed

Dismissal was improper because the district court applied the wrong standard and Riverwatcher has established an endangerment under the proper standard. As a threshold matter, the district court erred by using in its endangerment analysis the regulatory definition of "solid waste," which applies only to the open dumping claim. The statutory definition includes the term "discarded material," 42 U.S.C. §6903(27), but it does not contain the concepts "abandoned" or "disposed of" required by the regulatory definition, 40 C.F.R. §§261.2(a)(2), (b)(1); *Conn. Coastal*, 989 F.2d at 1316. The soil amendment is discarded because there is no evidence that the acid whey from Chokos beneficially conditions or fertilizes the soil, and the fact that Moon Moo has received it for free, A5, suggests that it has no market value and should be considered part of the waste stream. *See Safe Food & Fertilizer v. EPA*, 350 F.3d 1263, 1268 (D.C. Cir. 2003), *reh'g on other grounds*, 365 F.3d 46 (D.C. Cir. 2004) (stating that RCRA's statutory definition covers materials beneficially reused in another industrial process "if they can reasonably be considered part of the waste disposal problem"). By simply incorporating the regulatory analysis, the district court overlooked the fact that both the acid whey, which Moon Moo has "accepted (without paying for)" from the Chokos plant, A5, and

14. In fact, endangerment claims are often precluded by violations of law. For example, endangerment claims do not apply to permit violations under the CWA. *Supra* note 12.

the manure are discarded within the ordinary meaning required by the statute.

Next, Moon Moo "is contributing to or has contributed to" the handling of this waste. Moon Moo has contributed to the endangerment by mixing acid whey and manure and spreading this substance on its fields. *See* A5. The district court improperly considered the fact that Moon Moo's operation may not have been the "but for" cause of the elevated nitrate levels. A11. Endangerment claims require that a defendant "contribute to"—not be the "but for cause" of—the endangerment. *E.g.*, *Cox*, 256 F.3d at 295 (defining "contribute to" to mean "have a part or share in producing an effect"). Additionally, Moon Moo is not absolved by the contention that "land application of whey as a soil conditioner was a longstanding practice . . . in New Union since the 1940s," A6, because RCRA's endangerment provisions extend to "any person . . . who has contributed or who is contributing to," 42 U.S.C. §6972(a)(1)(B), "regardless of fault or negligence," H.R. Rep. No. 98-1133, at 119 (1984) (Conf. Rep.).

Finally, Moon Moo's spreading activities have contributed to the elevated nitrate levels, as illustrated by the April 2013 advisory, and constitute an endangerment. The district court fundamentally misunderstood the purpose of RCRA when it ruled that despite health risks to children, no endangerment exists because "it appears that nitrates pose no health risks to adults and juveniles, and that households with infants administer bottled water to their infants, avoiding any potential health risk." A11-12.[15] For this proposition, the court below relies on a non-binding lower court decision, which disregarded the Congressional intent of RCRA. In *Davies v. Nat'l Co-op. Refinery Ass'n*, 963 F. Supp. 990, 999 (D. Kan. 1997), the district court's solution to what it conceded to be serious pollution of drinking water was that "the threat of exposure can always be avoided by evacuating property where hazardous waste is found or by taking other extraordinary measures." *Davies*, 963 F. Supp. at 999. The

15. Government studies confirm that nitrates ingested through drinking water can impair oxygen delivery to tissues and result in adverse effects including coma and death. While infants under 3 months are at highest risk, ingestion of nitrates poses risks to older children and adults at higher levels. *See* U.S. Envtl. Prot. Agency, *Nitrates and Nitrites: TEACH Chemical Summary* 1 (2007).

*Davies* court further stated that requiring the Plaintiffs to use bottled rather than groundwater is "an inconvenience and an economic burden," but is still appropriately settled in an action at law. *Id.* This explanation is in direct conflict with the legislative intent of prevention and protection, as noted in RCRA and other environmental legislation. *See, e.g.*, *Furrer v. Brown*, 62 F.3d 1092, 1098 (8th Cir. 1995) ("RCRA's goal is to *prevent the creation* of hazardous waste sites.") (emphasis added).

Because Riverwatcher has established as a matter of law that Moon Moo's spreading activities may present an endangerment to health or the environment, the Court should grant summary judgment in its favor. If, however, the Court determines that the record is inadequate to apply the fact-sensitive endangerment standard, the Court should remand the endangerment claim for additional fact-finding.[16]

### B. Moon Moo Farm's Spreading Activities Do Not Constitute Illegal Open Dumping

Moon Moo's manure-spreading activities do not constitute open dumping under RCRA because the soil amendment is serving its intended purpose and therefore not "discarded" within the definition of RCRA and, even if it were, agricultural wastes returned to the soil as fertilizer or conditioner are exempt from the open dumping ban. RCRA specifically proscribes "open dumping of solid waste." 42 U.S.C. §6945(a). To prevent over-regulation and conserve government resources, EPA has delineated materials and activities that are not of regulatory

16. For cases highlighting the fact-sensitive nature of similar endangerment claims, see *Citizens George & Margaret, LLC*, 954 F. Supp. 2d 1151, 1160 (E.D. Wash. 2013) (dismissal of endangerment claim against dairies for alleged contamination of drinking water would be premature "without any argument or evidence as to whether the manure was put to its intended use and/or used for beneficial purposes by Defendants under the circumstances unique to this case"); *Waterkeeper Alliance, Inc. v. Smithfield Foods, Inc.*, No. 4:01-CV-27–H(3), 2001 WL 1715730, at *4 (E.D.N.C. Sept. 20, 2001) ("[W]hether defendants return animal waste to the soil for fertilization purposes or instead apply waste in such large quantities that its usefulness as organic fertilizer is eliminated is a question of fact."). *See also Oklahoma v. Tyson Foods, Inc.*, No. 05-CV-0329-GKF-PJC, 2010 WL 653032 at *11-12 (N.D. Okla. Feb 17, 2010) (determining, after extensive inquiry into the material's market value and a finding on the benefit of its soil application, that poultry litter applied to the soil did not constitute "solid waste").

concern, and are therefore exempt from the open dumping ban. *See* 40 C.F.R. §257.1(c).

Courts have distinguished between "recycling" and "discarding": materials destined for immediate reuse as part of an ongoing production process are not subject to RCRA because they are not discarded. *Am. Mining Cong. v. EPA*, 824 F.2d 1177, 1193 (D.C. Cir. 1987) ("Congress clearly and unambiguously expressed its intent that 'solid waste' (and therefore EPA's regulatory authority) be limited to materials that are 'discarded' by virtue of being disposed of, abandoned, or thrown away.").

Congress has explicitly exempted from the open dumping ban "agricultural wastes, including manures and crop residues, returned to the soil as fertilizers or soil conditioners." 40 C.F.R. §257.1(c)(1); *see also* 40 C.F.R. § 246.101(a) (defining agricultural solid waste as "solid waste that is generated by the rearing of animals, and the producing and harvesting of crops or trees"). Animal waste, per se, is not automatically exempt. Rather, such agricultural waste, including manure, is exempt if it is "*returned* to the soil as fertilizers or soil conditioners." *Id.* §257.1(c)(1) (emphasis added).

The district court properly recognized that Moon Moo's soil amendment is likely not a "solid waste" under the regulatory framework. A11. The liquid manure is in-process secondary material outside the reach of RCRA because it is beneficially reused within the yogurt production process, which includes both the dairy and the activities at the Chokos plant. *See, e.g.*, *Am. Mining Cong.*, 824 F.2d at 1193 (in-process secondary materials are not within RCRA).

Moreover, even if the Court were to find that the soil amendment is properly considered "solid waste" for regulatory purposes, the open dumping claim necessarily fails because agricultural waste returned to the soil as conditioner or fertilizer is specifically exempt from the open dumping ban. A5; 40 C.F.R. §257.1(c)(1)*; see, e.g.*, *Safe Air*, 373 F.3d at 1041 (RCRA's solid waste regulations do not cover grass residue burned as soil amendment). Riverwatcher did not challenge the utility of applying manure and whey as soil conditioner. Without a factual dispute, this Court should assume, as the district court did, that the soil amendment is conditioning the soil and is therefore exempt from the open dumping ban.

The district court correctly dismissed Riverwatcher's open dumping claims. A decision to the contrary would require EPA to overregulate substances and activities it has determined generally do not present a hazard to human health or the environment and would proscribe beneficial reuse of materials. To the extent that activities exempt from both permitting and the open dumping ban threaten human health and the environment, the imminent and substantial endangerment mechanism provides the Government and citizens alike a sufficient backstop.

## CONCLUSION

For the foregoing reasons, the Government respectfully asks the Court to reverse the district court's determinations on the following points and instead find that: (1) Queechunk is a publicly navigable waterway; (2) even if it were not, evidence obtained by a private party (even through trespass) is admissible in a civil enforcement proceeding under the CWA; (3) Moon Moo is a CAFO whose discharge from its manure land application area subjects it to NPDES permitting; and (4) Moon Moo's spreading activities present an imminent and substantial endangerment. The Government further petitions the Court to affirm the district court's rulings that (1) if Moon Moo is not a CAFO, application of manure in compliance with an NMP exempts it from NPDES permitting requirements as agricultural stormwater and (2) Moon Moo has not violated the open dumping provisions of RCRA.