Team 20

NO. 14-1248

IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant, and

DEEP QUOD RIVERWATCHER, INC., and DEAN JAMES

Plaintiffs-Intervenors-Appellants

v.

MOON MOO FARM, INC.

Defendant-Appellee.

D.C. No. 155-CV-2012

On Appeal from the United States District Court for New Union in No. 155-CV-2014, Judge Romulus N. Remus

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BRIEF FOR MOON MOO FARM, INC.

Defendant-Appellant, Cross-Appellee

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JURISDICTIONAL STATEMENT

Appellant United States Environmental Protection Agency (EPA) filed a complaint in the United States District Court for New Union under 28 U.S.C. § 1331; (R. 1). On June 1, 2014, the District Court granted Moon Moo Farm's motion for summary judgment on all counts and denied the Deep Quod Riverwatcher's and EPA's summary judgment motions. (R. 12). This Court has jurisdiction over the decision of the District Court based on 28 U.S.C. § 1291. The District Court also has supplemental jurisdiction over the trespass claim pursuant to 28 U.S.C. § 1367(a).

STATEMENT OF THE ISSUES

1. Whether, despite Moon Moo Farm's private ownership of the Canal's bank and bottom, the Queechunk Canal is as a public trust navigable water of the State of New Union.

2. If the Queechunk Canal is not a public trust navigable water, whether evidence obtained through trespass and without a warrant is admissible in a Clean Water Act (CWA) civil enforcement proceeding under CWA §§ 309(b), (d) and 505.

3. Whether Moon Moo Farm requires a CWA National Pollutant Discharge Elimination System permit because it is a concentrated animal feeding operation by virtue of a discharge from its manure land application area.

4. If Moon Moo Farm is not a concentrated animal feeding operation, whether excess nutrient discharge from its manure application fields remove Moon Moo Farm from the CWA agricultural stormwater exemption and thus require Moon Moo Farm to have a National Pollutant Elimination Discharge System permit.

5. Whether Moon Moo Farm is subject to a Resource Conservation and Recovery Act (RCRA) citizen suit because its land application of acid whey and manure mixture constitutes a solid waste that is subject to regulation under RCRA Subtitle D.

6. Whether Moon Moo Farm is subject to a RCRA citizen suit because the acid whey and manure mixture constitutes an imminent and substantial endangerment to human health and the environment. 42 U.S.C. § 6972(a)(1)(B).

STATEMENT OF THE CASE

This is an appeal from a June 1, 2014 final order of the United States District Court for the District of New Union granting Moon Moo Farm's (MMF) motion for summary judgment on all counts and denying the United States Environmental Protection Agency's (EPA) and Deep Quod Riverwatcher's motions for summary judgment on all counts. (R. 12). The Deep Quod Riverwatcher and Dean James (collectively Riverwatcher) properly sent to the New Union Department of Environmental Quality (DEQ), EPA, and MMF a notice of intent to sue MMF under the citizen suit provisions of CWA § 505 and RCRA § 7002. (R. 7). Subsequently, EPA filed an action under CWA § 1319(c), (d) against MMF for discharging without a permit in violation of CWA §§ 1311(a), 1342. (R. 4). Joining the action as plaintiff-intervenors, Riverwatcher and Dean James asserted claims against MMF under CWA § 505 and RCRA § 7002 for violations in connection with MMF's manure application practices. (R. 4). MMF filed a common law trespass counter claim against Dean James, alleging he trespassed in the Queechunck Canal (Canal). (R. 4).

EPA filed a motion for summary judgment, asserting that MMF violated the CWA when it discharged pollutants into navigable waters as a concentrated animal feeding operation (CAFO) without a CWA §402 permit. (R. 2). Riverwatcher and Dean James joined EPA's motion, and filed its own summary judgment motion, asserting that MMF's land application practices violate either the CWA or RCRA, alternatively. (R. 2). MMF cross-filed a motion for summary judgment, arguing: 1) MMF does not require a CWA § 402 permit and 2) its land application practices comply with both the CWA and RCRA. (R. 12).

In its April 21, 2014 decision, the District Court granted MMF's motion for summary judgment and dismissed plaintiffs' motions for summary judgment. (R. 12). Specifically, it held that: 1) Dean James had trespassed, 2) the evidence obtained during the trespass was inadmissible, 3) MMF's land application practices do not violate the CWA, and 4) MMF's

mixture did not constitute a solid waste governed by RCRA so it did not violate RCRA. (R. 12). Subsequently, EPA, Riverwatcher, and Dean James timely filed a notice of appeal. (R. 1).

STATEMENT OF THE FACTS

Moon Moo Farm (MMF) is a dairy farm operation with 350 head of milk cows located 10 miles from the City of Farmville in the State of New Union. (R. 4). New Union has approved MMF's nutrient management plan (NMP) which "sets forth planned seasonal manure application rates, together with a calculation of expected uptake of nutrients by the crops grown on the fields where the manure is spread." (R. 5). MMF collects the cows' manure and liquid waste in a lagoon. (R. 4-5). MMF adds acid whey, a yogurt processing milk by-product, to the lagoon with the cow waste. (R. 5). Periodically, MMF transports the acid whey and manure mixture to MMF's 150 acre Bermuda grass crop fields, where it sprays the mixture on the crops in accordance with its NMP. (R. 5, 9). The acid whey comes from Chokos, a Greek yogurt production plant in Farmville. (R. 5).

MMF is located within the bend of the Deep Quod River. (R. 5). In the 1940's, a previous owner of MMF's land excavated a 50-yard wide, three to four foot deep bypass canal, the Queechunk Canal (Canal), to help alleviate flooding of the Deep Quod River. (R. 5). The Deep Quod River is navigable in fact and connects to the Mississippi River, which is also navigable in fact and interstate. (R. 5). The Canal connects to the Deep Quod River at both ends and is navigable by canoe or small boat. (R. 5). There are "No Trespassing" signs posted prominently at each end of the Canal since it, and the land on either side of it, is owned exclusively by MMF. (R. 5).

The Deep Quod Riverwatcher (Riverwatcher) received complaints that the Deep Quod River smelled like manure, was turbid, and unusually brown. (R. 6). Farmville Water Authority issued a nitrate advisory, warning that infants under two years old should be fed bottled water due to the nitrate level in the Deep Quod River which fed into the Farmville municipal water supply. (R. 6). The nitrate level did not pose a threat to anyone else in any way. (R. 6). After these complaints were received, a member of the Riverwatcher, Dean James, took a metal boat

into the Canal, ignoring the posted "No Trespassing signs," where he observed MMF's manure spreading operation. (R. 6). James observed "brown water" flowing from the fields through a drainage ditch and into the Canal. (R. 6). James took samples from the Canal, which tested positive for nitrate and fecal coliforms. (R. 6).

Riverwatcher's agronomist opined that the mixture was a weak acid so it may have reduced the Bermuda grass's ability to effectively uptake nutrients, which may have then been released into the environment "by leaching into groundwater and through runoff during rain events." (R. 6). MMF's expert agronomist opined that Bermuda grass could tolerate a variety of soil acidity levels, using acid whey as a soil conditioner was a longstanding practice in New Union, and that MMF's NMP did not prevent MMF from land applying manure during a rain event. (R. 6-7). Riverwatcher's environmental health expert testified that MMF was not the "but-for" cause of the nitrate advisory. (R. 7). MMF is, and has been, in compliance with its state-approved NMP. (R. 6). Nitrate advisories have been issued for Farmville five times since 2002. (R. 7).

STANDARD OF REVIEW

The District Court for the Twelfth District granted Moon Moo Farm's Motion for Summary Judgment. The Supreme Court's standard of review on a motion for summary judgment is de novo. *Bose Corp. v. Consumers Union of U.S., Inc*. 466 U.S. 485 (1984). On a motion for summary judgment, disputed issues of fact are resolved against the moving party. *General Elec. Co. v. Joiner*, 522 U.S. 136 (1997).

SUMMARY OF THE ARGUMENT

This is a case of environmental vigilantes attempting to villainize a hard-working, law-abiding dairy farm. Dean James and the Deep Quod Riverwatcher (collectively Riverwatcher) and the U.S. Environmental Protection Agency (EPA) contend alternatively that runoff from Moon Moo Farm's (MMF) fields require a National Pollutant Discharge Elimination System (NPDES) permit under the Clean Water Act (CWA) and if not, MMF's whey and manure mixture application to its crops violates the Resource Conservation and Recovery Act (RCRA).

Despite their contentions, MMF does not require a NPDES permit, nor has it violated RCRA, as will be demonstrated through this appeal. This Court should affirm the District Court on all counts.

The public trust doctrine does not permit the Queechunk Canal (Canal) to be considered a public trust water. While the Canal is navigable by small boat, this does not establish the Canal as a public trust water. The requirements of public trust waterways include that they must be navigable for commerce and meet the navigational servitude standard, which the Canal does not.

The evidence obtained by Dean James should not be admitted in MMF's proceedings with the EPA because the evidence was obtained illegally, through trespass, in violation of the Fourth Amendment. The exclusionary rule employs a balancing test weighing the potential harms of admitting the evidence with the potential harms of excluding the evidence. Under the balancing test of the exclusionary rule, this evidence should not be admitted.

Under the CWA, the EPA has lawfully delegated CWA permit issuing authority to the State of New Union Department Of Agriculture (DOA). Consequently, the DOA has authority to determine the amount of allowable discharges within New Union. DOA has authority to certify an animal feeding operation (AFO), like MMF's, as a "no discharge" operation. However, in order to obtain such certification, MMF must submit for DOA's approval a site-specific nutrient management plan (NMP) detailing the specifics of MMF's intended manure land application practice. The DOA currently regulates MMF has a "no discharge" AFO and approved MMF's site-specific NMP.

MMF does not require a NDPES permit because it has always land applied its manure in accordance with its DOA approved NMP. The NMP sets forth manure application rates and expected uptake of nutrients by the crops to which it is applied. Assessing the rate of application and the rate of nutrient uptake allows both MMF and the DOA to know the impact MMF's land application practice will have on the nutrient composition of New Union's jurisdictional waters.

The CWA treats any discharges in compliance with a NMP as exempted from NPDES permitting requirements because the NMP is site-specific and must be state-approved. The CWA

regards compliant discharges as agricultural stormwater discharges which are exempt from requiring a NPDES permit since point source discharge is necessary to require a NPDES permit.

MMF is not subject to RCRA because its acid whey and manure mixture is not a solid waste and even if it was, the mixture still does not violate RCRA. First, the mixture that MMF is applying to its crops is not "discarded," and therefore cannot be considered a solid waste. Only solid wastes are regulated under RCRA. Second, MMF's land application practices are not contrary to national sanitary landfill guidelines and are not considered the disposal of non-hazardous solid waste. Third, MMF's land spreading application practices do not constitute an imminent and substantial endangerment to human health or the environment.

The mixture is not a solid waste because it is not "discarded" since it is reused agricultural waste. The mixture is destined for beneficial reuse, and actively reused, in a continuous process by the generating industry itself. Even if the mixture is a solid waste, MMF's land application of the mixture is not contrary to sanitary landfill guidelines, nor does it present an imminent and substantial threat to human health or the environment. Acid whey and manure are agricultural wastes so application of them to MMF's crops is not open dumping nor does it violate landfill guidelines. MMF's land application does not present an imminent and substantial endangerment to human health or the environment because there is no evidence that MMF is responsible for the nitrate advisories issued downstream from MMF.

ARGUMENT

I. THE QUEECHUNK CANAL IS NOT A PUBLIC TRUST NAVIGABLE WATER OF THE UNITED STATES BECAUSE IT IS A PRIVATELY OWNED, MAN-MADE WATER BODY THAT FAILS TO SERVE THE FUNCTIONS OF PUBLIC TRUST WATERWAYS .

The theory of public trust waterways has existed since the early establishment of the United States. "Navigable rivers, where the tide ebbs and flows, the ports, bays, coasts of the sea, including both the waters and the land under the waters…are common to all the people of New Jersey." *Arnold v. Mundy,* 6 N.J.L. 1 (1821). This principle is not unique to New Jersey. Original establishments of public trust waterways held that states hold title to the land under waterways that, regardless of navigability, were influenced by tides from the Gulf of Mexico. This principle is an extension of the title holding rights of states under common law. "States, upon entry into the Union, received ownership of all lands under waters subject to the ebb and flow of the tide." *Phillips Petroleum Company v. Mississippi,* 108 S. Ct. 791, 795 (1988).

This public trust concept includes water subject to the ebb and flow of the tides and includes tests of navigability for commerce. The test of *Ramsey River* establishes "whether a water body may be used in its ordinary condition as a highway for commerce over which trade and travel may be conducted in the customary modes of trade and travel on water given the means of navigation at that time." *Darder v. Lafourche Realty Co., Inc.*, 985 F.2d 824, 828 (5th Cir. 1993); *See Ramsey River Road Property Owners Ass'n, Inc. v. Reeves*, 396 So.2d 873 (La.1981). Furthermore, even a finding of navigability is not *per se* establishment of public trust. The Supreme Court in *Kaiser Aetna v. United States* established the concept of navigational servitude under the Commerce Clause. *See* 100 S. Ct. 383 (1979). Under the theory of navigational servitude, even navigable waters of the United States can remain in private ownership.

Navigational servitude hinges heavily on the commercial use of a particular navigable waterway. *See Landry v. Columbia Gulf Transmission Company, Et Al.* 2010 A.M.C. 369 (2009). "A waterway is 'navigable' for the purposes of establishing federal admiralty or

maritime jurisdiction when it is actually used, or is susceptible of being used, in its ordinary condition, as a highway for commerce with another state of foreign country. *Id.* at 370.

Courts have recognized exceptions to the public trust doctrine. The first exception arose in *Kaiser Aetna*, where the court examined the public interest in a privately built marina attached to a pond that the owners had dredged to a depth that would permit navigability. 100 S. Ct. at 385-387. The Supreme Court, in determining the status of the pond and marina, acknowledged the two as navigable in fact but carved out a distinction for the pond to prevent public ownership of the private property for three reasons. *Id.* at 387-388. First, the pond in its natural state was not navigable under any standard. *Id.* at 387. Second, the pond was on private property. *Id.* And finally, the pond had been converted to a navigable water body by private funds under private ownership. *Id.* at 388.

In *Darder,* another exception existed where Lafourche Realty possessed thousands of acres of land underneath swampland which was confined by fences, gates and levees. *Darder,* 985 F. 2d at 826. The realty company built the aforementioned structures. *Id*. The State of Louisiana intervened on behalf of fishermen who sued for the right to use the swampland, claiming public trust ownership of the property. *Id.* at 827. In its holding, the Fifth Circuit examined that status of the navigability of the waterway at the time when the state would have claimed title to the land, specifically when Louisiana gained statehood in 1812. *Id.* The court determined the waterway in question would not have been navigable in 1812 and then went on to test alternative theories of navigability. *Id.* at 828. However, in *Landry* the court held that a privately owned pipeline canal was still subject to the admiralty jurisdiction because of its connection to navigable waterways and the fact that commercial vessels regularly navigated the canal for the purposes of connecting to these waterways. 2010 A.M.C. at 369-371.

Moon Moo Farm (MMF) and the Queechunk Canal (Canal) fall into all three of these exceptions to applying navigational servitude. *See generally Darder,* 985 F.2d 824; *Kaiser Aetna,* 100 S. Ct. 383. The Canal was built in the 1940's and, in its natural state, does not exist as a body of water and therefore could not have been navigated in its natural state. (R. 5). The

Canal exists exclusively within the private confines of MMF's private property and, like the waterway in *Kaiser Aetna*, was converted from grassland to a navigable body of water through private industry's efforts and funding. *See generally* 100 S. Ct. 383; (R. 5).

Under the holding of *Darder*, the Canal is a private waterway that is not subject to the public trust doctrine. 985 F. 2d at 828. The court in *Darder* does not examine the ebb and flow of the tide argument, however, in applying this standard to the Canal, the Canal remains outside of the public trust doctrine. *Id.* The Canal's connection to the tidelands is far too attenuated to establish navigability under the standard established in *Darder*. *Id.* The Canal, as a recently created waterway, would not have been navigable in fact when New Union obtained statehood, and, while navigable for small boats, the Canal does not accommodate methods of commerce. (R. 5).

While the Canal is navigated by small boats, this does not rise to the commercial standard set forth in *Landry*. 2010 A.M.C. at 371. Unlike in *Landry*, where small commercial vessels on the Canal navigated the waterway with the express knowledge of Columbia Gulf Transmission Company, the boats navigating the Canal were doing so in violation of the posted "No Trespassing" signs and in direct violation of the will of the property owners. *Id*. at 376; (R. 5). In addition, the Canal is not "sufficiently large to allow at least certain types of commercial vessels." (R. 5).

The Canal does not fall under the description of public trust navigable water of the United States because it is a private waterway created in recent years that does not fit the standards for navigational servitude. Therefore this court should affirm the lower court's finding and hold that the Canal is not a public trust navigable waterway.

II. EVIDENCE OBTAINED THROUGH TRESPASS AND WITHOUT A WARRANT SHOULD NOT BE ADMISSIBLE IN A CIVIL PROCEEDING AS IT FAILS THE EXCLUSIONARY RULE BALANCING TEST.

The Fourth Amendment affords all U.S. Citizens the right against unreasonable searches and seizures. *U.S. Const. amend. IV*. The United States Environmental Protection Agency (EPA) and intervening appellants Deep Quod Riverwatcher, Inc., brought this action against MMF under the Clean Water Act. (R. 4). These sections of the CWA provide for harsh civil penalties including up to $25,000 per day for each day the violation continues. 33 U.S.C. § 1319(c).

The exclusionary rule permits the exclusion of relevant evidence in a trial where the evidence was obtained illegally in violation of the Fourth Amendment.

> "The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land."

Weeks v. United States, 34 S. Ct. 341, 393 (1914). This principle is applicable in all state and federal proceedings. "All evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court." *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

The exclusionary rule principles are applicable to civil proceedings as well as criminal. "The rule is calculated to prevent, not to repair. Its purpose is to deter -- to compel respect for the constitutional guaranty in the only effectively available way -- by removing the incentive to disregard it." *United States v. Calandra*, 414 U.S. 338, 348 (1973). The rule is not necessary in cases where the purpose cannot be served. *United States v. Janis*, 428 U.S. 433, 454 (1976). "Where the exclusionary rule does not result in appreciable deterrence, then, clearly, its use is unwarranted." *Id*. Determination of applicability of the exclusionary rule to the case at hand is based upon a balancing test of the effectiveness of application of the rule. *See generally I.N.S. v.*

Lopez-Mendoza, 468 U.S. 1032 (1984). “We must balance the likely benefits of excluding unlawfully seized evidence against the likely costs.” *Id.* at 1041. "The Supreme Court has restricted application of the exclusionary rule to those circumstances where its deterrent effect would most likely be 'substantial and efficient.'" *Tirado v. C.I.R.*, 689 F.2d 307, 310 (2d Cir. 1982).

Although the Supreme Court has not applied the exclusionary rule to previous civil proceedings, it is not in violation of the principles of the rule to do so.

> “As with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served. In the complex and turbulent history of the rule, the Court never has applied it to exclude evidence from a civil proceeding, federal or state.”

Calandra, 414 U.S. at 349.

However, lower courts have sought to apply exclusionary rule principles to civil proceedings using the appropriate balancing of Fourth Amendment rights and the potential harms of exclusion. *Tirado,* 689 F. 2d at 312-314. “A test for the exclusionary rule that turns on the civil or criminal character of the proceeding does not comport with an objective of achieving substantial deterrence.” *Id.* at 313-314.

Janis was the Supreme Court’s first encounter with the potential applicability of the exclusionary rule to a civil proceeding. 428 U.S. at 438-441. While the Court chose not to apply the exclusionary rule to the proceedings at issue, it still applied a balancing test in order to reach this decision. *Id*. at 440-445. *Janis* concerned evidence obtained through defective means by state police that was later used by the International Revenue Service (IRS) in a civil action against the defendants. *Id.* at 438-440. The Court, in determining the effectiveness of the exclusionary rule, rejected the argument that deterrence was served by excluding the use of the evidence by the IRS. *Id*. at 447-448. The evidence had already been barred in the state and federal criminal court, and therefore the purpose of deterrence had already been met. *Id.* at 448. Further punishing of the state

officials, through excluding the evidence from the IRS, was not deemed necessary by the Court as it did not serve public policy behind the rule. *Id.*

I.N.S. v. Lopez-Mendoza saw the Supreme Court applying the balancing test to a deportation hearing and again opting not to apply the exclusionary rule, however, the instant case is also distinct. *I.N.S,* 468 U.S. at 1033. Unlike the CWA proceeding, in a deportation hearing the government agency need only establish the identity and alien status of an individual before the burden shifts to the respondent to prove legal entry into the country, making the illegally obtained evidence in the case relatively unimportant, and thus reducing the deterrence effect of excluding said evidence. *Id*. at 1047-1048. In a hearing on a CWA violation, the burden remains, for the most part, with the EPA to prove the actions of the defendant, therefore a greater deterrence factor exists in the instant proceeding than did in *I.N.S. v. Lopez-Menendez. Id.*

The Court in *Calandra* did not extend the exclusionary rule to grand jury proceedings, but continued to uphold the idea that the rule could be applied wherever its purposes are effectively served. 414 U.S. at 349-351. The grand jury does not determine the culpability of a party, and indeed even the Federal Rules of Evidence are waived in part during grand jury proceedings, allowing for the most evidence possible to be heard by a Grand Jury. *Id.* at 344-345. In a balance between the Grand Jury's historical role and purpose and the need for deterrence, the Court comes down on the side of the Grand Jury. *Id.* at 344.

The United States Court of Appeals for the Second Circuit acknowledged the potential for the exclusionary rule's balancing test to come out in favor of excluding evidence in civil proceedings, and established a "zone of primary interest" principle in determining the effectiveness of deterrence. *Tirado,* 689 F.2d at 310. The zone of primary interest in *Tirado,* the illegal seizure of narcotics by narcotics agents, was considered too remote from the civil Tax Court where the illegally seized evidence was eventually used, and therefore the evidence was admissible in the civil Tax Court but not in the narcotics criminal trial. *Id*. at 312-314.

In the instant case, Dean James knowingly passed a "No Trespassing" sign for the sole purpose of obtaining samples of the canal for use by the EPA to determine the potential violations

of the CWA. (R. 6). This instant case is distinguishable from *Janis* in that no deterrent effect exists if this evidence were to be admissible. *See generally* 428 U.S. 433; (R. 6). The actions of James were a direct violation of MMF's rights, and the balancing of this violation weighs heavily in favor of exclusion. Admission of this evidence would permit vigilante organizations to bypass the law and collect evidence for use in federal proceedings. No prior action has been taken to punish the EPA's use of third party trespass in its enforcement proceedings and no good faith exception can exist for a trespasser who passed by obvious "No Trespassing" signs, as James did in this case. (R. 6, 8-9).

Unlike a grand jury proceeding in *Calandra,* determination of the CWA violations will not only impose culpability on a party, it can lead to fines up to $25,000 a day for the culpable party, tipping the scale towards exclusion of the evidence. *See generally* 414 U.S. 338; 33 U.S.C. § 1319(c). The punishments are even labeled as "criminal penalties" in the statute. 33 U.S.C. § 1319(c). The evidence used by EPA falls directly within the zone of primary interest in which it was obtained. The evidence consisted of photographs and water samples obtained through James's trespass and later used in a CWA enforcement action. (R. 6-7).

The goal of balancing deterrence with the social benefits of admitting the evidence weighs heavily in MMF's favor. Failure to deter federal agencies from using evidence obtained illegally by third parties for the enforcement purposes will result in a greater infringement of individual Fourth Amendment rights by the federal government. Society as a whole benefits from the protection of Fourth Amendment Rights, especially in cases like the instant case where the desired evidence can be obtained through legal means. The EPA had a number of alternatives for obtaining this evidence, including obtaining a warrant, which would have resulted in the same societal benefit. Therefore, this Court should affirms the lower court's holding and find that the evidence obtained against MMF through illegal trespass should be considered inadmissible.

Clean Water Act Claims

III. MOON MOO FARMS DOES NOT REQUIRE A CLEAN WATER ACT NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PERMIT BECAUSE ITS FACILITY IS NOT A "POINT SOURCE" AND ANY DISCHARGE FROM THE FACILITY QUALIFIES AS AN "AGRICULTURAL STORMWATER DISCHARGE" AND IS THEREFORE EXEMPT FROM THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PERMITTING PROGRAM.

Congress enacted the Clean Water Act (CWA) to "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The CWA prohibits the discharge of pollutants from a point source into waters of the United States, except in compliance with a National Pollution Discharge Elimination System (NPDES) permit. 33 U.S.C. §§ 1311(a), 1342(a)(1). When the EPA issues a NPDES permit, it includes technology-based effluent limitations specifying the conditions under which the permittee may discharge pollutants without liability. 33 U.S.C. § 1311(a).

When it enacted the CWA, Congress delegated primary responsibility of administering the CWA to the EPA, while authorizing the EPA Administrator to delegate some of the responsibility to approved State agencies. 33 U.S.C. §§ 1251(d), 1252(c), 1342(b). The CWA requires "point sources" to obtain NPDES permits before they can discharge without liability. 33 U.S.C. § 1342(a). Discharges that are not regulated by a NPDES permit are classified as nonpoint source discharges and their regulation is left to States' discretion, guided by the federal requirement that States establish water quality standards. 33 U.S.C. §§ 1311(a), 1313, 1342(a)-(b).

When defining "point sources," Congress chose to expressly include "concentrated animal feeding operations" (CAFOs) within the point source definition, but left the specifics of the CAFO regulation up to EPA as the agency charged with the CWA's administration. 33 U.S.C. §1362(14). In 1976, EPA promulgated its first set of regulations specifically concerning the NPDES permitting process for CAFOs. *See Concentrated Animal Feeding Operations* 41 Fed. Reg. 11458 (March 18 1976). This rulemaking defined CAFOs as animal feeding

operations (AFOs) that met or exceeded a numerical animal threshold. 41 Fed. Reg. 11458. However, EPA intended that only discharging CAFOs require a permit, so the rulemaking explicitly excepted from regulation as a point source CAFOs designed so that "the only time a discharge of pollutants into navigable waters occurs is during a 25 year, 24-hour rainfall event." 41 Fed. Reg. 11458, 11458 (reasoning facilities so designed did not present a threat sufficient to require regulation); *see also Concerned Area Residents for the Environment v. Southview Farm,* 34 F.3d 114, 122 (1994).

In 1987, Congress exempted agricultural stormwater discharges from the point source definition, finding it improper to hold agricultural facilities liable for discharges caused "not by negligence and malfeasance, but by weather- even when those discharges came from what would otherwise be point sources." *Waterkeeper Alliance, Inc. v. U.S. E.P.A.,* 399 F.3d 486, 508 (2005). Just seven years later, the Second Circuit, following the lead of Congress and the EPA, held "a discharge from an area under the control of a CAFO can be considered *either* a CAFO discharge that is subject to regulation *or* an agricultural stormwater discharge that is not subject to regulation. *Waterkeeper Alliance Inc.,* 399 F.3d at 508, *citing Concerned Area Residents,* 34 F.3d at 121.

In 2003, the EPA promulgated a rulemaking intending to clarify the CWA's application to CAFOs. *National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations (CAFOs)* 68 Fed .Reg. 7176 (Feb. 12 2003). The rulemaking expanded the scope of the point source agricultural stormwater discharge exemption (ASE) to include a CAFO's land application of manure if the land application complied with a site-specific nutrient management plan (NMP). *See* 68 Fed. Reg. 7176, 7197 (Feb. 12 2003). This rulemaking, continuing the original intent of the ASE, classifies any "precipitation related discharge of manure . . . from land areas under the control of the CAFO" where the "manure . . . has been applied in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization" as agricultural stormwater. 40 C.F.R. § 122.23(e); *Waterkeeper Alliance Inc.,* 399 F.3d at 496; *Concerned Area*

Residents, 34 F.3d at 120 ("we agree that agricultural stormwater has always been considered nonpoint-source pollution exempt from the [Clean Water] Act.").

Realizing the ambiguity inherent in a point source definition- specifically including CAFO but specifically excluding a CAFO's agricultural stormwater discharges- the EPA expanded the ASE to cover CAFO land application in order to bring clarity and consistency to the point source definition. *See* 68 Fed. Reg. 7176, 7197 (Feb. 12 2003), *Waterkeeper Alliance Inc.,* 399 F.3d at 507 (illustrating the ambiguity*).* The agency reasoned that compliance with a site-specific plan would sufficiently reduce the nutrient composition of the runoff so that "the remaining runoff [of nutrients] can reasonably be considered an agricultural storm water discharge" and exempt from NPDES requirements. 68 Fed. Reg. 7176, 7198 (Feb. 12 2003). Consequently, a discharge from a CAFO's land application area qualifies as a point source discharge and requires a NPDES permit, unless the CAFO practices land application in compliance with an NMP so that its only discharges are caused by rain. 68 Fed. Reg. 7176, 7198 (Feb. 12 2003) (noting "dry weather discharge of manure . . . resulting from its application to land area under the control of a CAFO would not be considered an agricultural stormwater discharge*."*)*; Waterkeeper Alliance Inc.,* 399 F.3d at 507 (approving this agency interpretation as permissible given congressional silence on the issue).

Moon Moo Farms (MMF) does not require a NPDES permit because its facility is not a "point source." 33 U.S.C. § 1362(14); 40 C.F.R. § 122.2. Congress defined "point source" to include, *inter alia*, "ditch" and "concentrated animal feeding operation," but specifically excluded "agricultural stormwater discharges" from the definition. 33 U.S.C. § 1362(14). Under this regulatory program, MMF's facility would require a NPDES permit if it discharges through a ditch or, alternatively discharges as a CAFO, because in both circumstances the discharge qualifies as a point source discharge. 33 U.S.C. § 1362(14). However, in either circumstance, MMF would be exempt from NPDES permitting requirements if the discharge qualifies as an "agricultural stormwater discharge." *See Waterkeeper Alliance Inc.,* 399 F.3d at 508. Additionally, according to EPA, a "discharge of a pollutant," a fundamental element of NPDES

liability, must come from a "point source." *See* 40 C.F.R. § 122.2 *(*defining discharge as necessarily from a "point source"). Accordingly, this Court should uphold the lower court's decision that MMF does not require a NPDES permit because it is not a point source and any discharge from MMF's facility is exempt from NPDES liability because any discharge is an agricultural stormwater discharge.

1. Moon Moo Farms does not qualify as a "concentrated animal feeding operation."

MMF does not require a NPDES permit because it does not meet the regulatory definition of CAFO. *See* 40 C.F.R. § 122.23, (R. 10). EPA's 2003 rulemaking defined CAFOs according to a three-tier system, designating an operation as small, medium, or large based on the number of animals contained in the facility. 68 Fed. Reg. at 7189. The definition for "Medium CAFO," pertinent here, also includes a second prong, requiring that pollutants be discharged from the facility either "through a man-made ditch" or through waters of the United States after coming into direct contact with the confined animals. 40 C.F.R. § 122.23(b)(6)(ii)(A), (B). No party to this action claims MMF's animals come into direct contact with waters of the United States, therefore the only way MMF can be considered a CAFO is for it to 1) meet the "Medium CAFO" numerical animal threshold and 2) discharge pollutants "through a man-made ditch." (R. 8); *See* 40 C.F.R. § 122.23(b)(6).

MMF does not qualify as a CAFO under 40 C.F.R. § 122.23. MMF's facility houses 350 dairy cattle, meeting the numerical animal threshold for "Medium CAFO." 40 C.F.R. § 122.23(b)(6)(i). However, MMF does not satisfy the second prong of the definition so it is not a CAFO. *See* (R. 8), 68 Fed. Reg. 7176, 7201 (Feb. 12 2003) (*"*an actual discharge is a required criterion for a small or medium operation to be considered a CAFO"). As the Fifth Circuit held in *National Pork Producers Council*, "the EPA's authority is limited to the regulation of CAFOs that discharge." *National Pork Producer's Council v. U.S. E.P.A.,* 635 F.3d 738, 751 (2011). Without proof of a discharge from MMF's facility, MMF is not required to obtain a NPDES permit. 33 U.S.C. §1311(a), 1342(a) (subjecting discharges of pollutants to NPDES permitting

requirements). This Court should uphold the district court's holding that MMF does not qualify as a CAFO because there is not admissible evidence of a discharge from MMF's facility.

2. Any discharge from Moon Moo Farms facility qualifies as an "agricultural stormwater discharge" and is exempt from NPDES permitting requirements.

Even if it is proven that MMF discharged, thereby qualifying as a CAFO, MMF still would not require a NPDES permit because any discharge would have been in compliance with MMF's NMP. *See Waterkeeper Alliance Inc.,* 399 F.3d at 508. In the event that MMF has discharged pollutants without complying with its NMP, the discharge would qualify as a CAFO land application area discharge from a point source. *In the Matter of: Mayer Farms, Inc. Lee Mayer # 1 Newberry, S. Carolina, Respondent.,* 2011 WL 5331584, at *4 (Sept. 22, 2011) *(*finding the stormwater discharge from a land application field to constitute a point source discharge because facility operator "did not comply with its WMP to ensure appropriate agricultural utilization of nutrients.") In that scenario, MMF would require a NPDES permit. However, according to 40 C.F.R. § 122.23(e), any CAFO land application area discharge that complies with its site-specific NMP does not require a NPDES permit. This is because the EPA considers discharges in compliance with an NMP an agricultural stormwater discharge, which is specifically exempted from the point source definition, and consequently exempt from NPDES permitting requirements. *See* 33 U.S.C. § 1362(14); 40 C.F.R. § 122.23(e); 68 Fed. Reg. 7176, 7197 (Feb. 12 2003); *but see In the Matter of: Mayer Farms,* 2011 WL 5331584, at *4 (Sept. 22, 2011).

The NMP is not a NPDES permit, but an effluent limitation under 33 U.S.C. § 1311(a)-(b). *Waterkeeper Alliance, Inc.,* 399 F.3d at 502. In pertinent part, 33 U.S.C. § 1362(11) defines an effluent limitation as "a *restriction* established by the State on rates of discharges from point sources" (emphasis added). The Second Circuit was the first to address how to classify a NMP within the CWA's regulatory program. *Waterkeeper Alliance, Inc.,* 399 F.3d at 502. The court classified NMPs as effluent limitations because it found "the only *restrictions* actually imposed on land application discharges are those *restrictions* imposed by the various terms of the nutrient management plan." *Waterkeeper Alliance, Inc.,* 399 F.3d at 502 (emphasis added).

The restriction in the NMP, referred to by the *Waterkeeper* court, is 40 C.F.R. § 412's requirement that facilities' NMPs must implement best management practices (BMPs) in their land application procedures. *Waterkeeper Alliance, Inc.*, 399 F.3d at 502. While 40 C.F.R. § 412.4 enumerates the BMP requirements applicable to NMPs, 40 C.F.R. § 122.23(e), it applies part 412 to CAFOs and makes clear that the essence of the BMP requirements is to "ensure appropriate agricultural utilization of nutrients in the manure." *See Waterkeeper Alliance, Inc.*, 399 F.3d at 510. As the lower court found, it is undisputed that MMF land-applied manure in accordance with its NMP. (R. 9). Because any discharge from MMF's land application area has been in compliance with its NMP, it is considered agricultural stormwater, which is exempt from point source classification and therefore is exempt from NPDES permitting requirements. *See* 33 U.S.C. § 1362(14); 40 C.F.R. § 122.23(e).

3. Moon Moo Farm obtained a valid nutrient management plan from the State of New Union Department of Agriculture.

EPA has delegated authority to New Union that is sufficient to ensure compliance with any CWA effluent limitations. (R. 5). Congress, in line with is policy of cooperative governance to achieve a comprehensive regulatory program, requires the EPA Administrator to approve State programs "unless he determines adequate authority does not exist" to comply with 33 U.S.C. § 1342(b)(1)-(9). 33 U.S.C. § 1342(b). As the record indicates that New Union possesses CWA permitting authority and has the authority to "reject an NMP it finds to be insufficient," the State Department of Agriculture (DOA) possessed and exercised valid authority in approving MMF's NMP. (R. 5)

New Union is not required to review MMF's NMP or provide for public comment on its approval because notice and comment requirements apply to NPDES permits and not to NMPs issued without a NPDES permit. *National Pollution Discharge Elimination System Permit Regulations and Effluent Limitations Guidelines for Concentrated Animal Feeding Operations in Response to the Waterkeeper Decision* 73 Fed. Reg. 70418, 70426 (Nov. 20 2008). In promulgating the 2008 rule, the EPA stated the NMPs of facilities voluntarily certifying as "no

discharge" operations would not be subject to the review and public comment requirements imposed on NPDES permits. 73 Fed. Reg. at 70426, 33 U.S.C. § 1342(b). New Union's DOA certified MMF as a "no discharge" animal feeding operation and therefore was not required to review MMF's NMP nor submit MMF's NMP for public notice and comment. (R. 5).

Additionally, the DOA was not required to submit the NMP for public comment because those procedures apply only to CWA permits which is the NMP is not. In *Texas Independent Producers and Royalty Owners Association (TIP)*, the Seventh Circuit analyzed a State CWA program, which required a regulated facility to submit a notice of intent (NOI) and create and implement a site-specific stormwater management plan in order to discharge without liability. 410 F.3d 964, 969 (7th Cir. 2005). Petitioner challenged the validity of the NOIs and management plans, alleging they were invalid for failure to comply with 33 U.S.C. §§ 1342(a)(1), (j), which summarily state the public participation requirements that must be met to issue a valid *permit* under the CWA. 33 U.S.C. §§ 1342(a)(1), (b)(3), (j) (emphasis added). The court analyzed the two statutory provisions analysis to determine whether those statutory sections applied to the NOIs and the plans. *TIP*, 410 F.3d at 978. Aligning itself with the EPA's position, the Seventh Circuit held that the NOIs and plans were valid and not subject to 33 U.S.C. §§ 1342(a)(1), (j). The court found that those statutory sections apply only to "permits" and "permit applications" and further found that neither the NOIs nor the plans fit within either of those terms. *TIP*, 410 F.3d at 978. Similar to the validity of the NOIs and plans upheld by the Seventh Circuit, the validity of MMF's NMP is not affected by their lack of opportunity for public comment as the NMP is not a "permit" or a "permit application." *See id.; Waterkeeper Alliance Inc.,* 399 F.3d at 502.

Because MMF obtained and complied with a valid and effective NMP, this Court should uphold the lower court's determination that any discharge from MMF's facility is exempt from the NPDES permitting requirement by the agricultural stormwater exemption.

Resource Conservation and Recovery Act Claims

IV. MOON MOO FARM IS NOT SUBJECT TO A CITIZEN SUIT UNDER RCRA BECAUSE ITS MIXTURE OF MANURE AND ACID WHEY DOES NOT CONSTITUTE A "DISCARDED" MATERIAL AND IS THEREFORE NOT SOLID WASTE. EVEN IF THE MIXTURE IS A SOLID WASTE, MOON MOO FARM IS EXEMPT FROM RCRA BECAUSE ITS MIXTURE IS AN AGRICULTURAL WASTE USED IN LAND APPLICATION TO AGRICULTURAL CROPS, AND THE MIXTURE DOES NOT PRESENT AN IMMINENT AND SUBSTANTIAL ENDANGERMENT TO HUMAN HEALTH OR THE ENVIRONMENT.

The Resource Conservation and Recovery Act (RCRA) "is a comprehensive environmental statute that governs the treatment, storage, and disposal of solid and hazardous waste." *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 483 (1996). The U.S. Environmental Protection Agency (EPA) governs RCRA's implementation and enforcement but any citizen may also enforce RCRA under the citizen suit provision. 42 U.S.C. § 6972(a)(1)(B). For a private plaintiff to bring a successful civil action against a party, the plaintiff must first prove that the defendant: (1) is a person, "including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility" (2) who is or has been contributing to "the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste" (3) that may present an "imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a)(1)(B); *see also Cox v. City of Dallas, Tex*., 256 F.3d 281, 293 (5th Cir. 2001); *United States v. Aceto Agric. Chems. Corp*., 872 F.2d 1373, 1382 n. 9 (8th Cir.1989); *Zands v. Nelson,* 797 F.Supp. 805, 809 (S.D.Cal.1992). The ability to bring successful citizen suit hinges on proving these three threshold elements. *United States v. Valentine*, 885 F.Supp. 1506, 1511 (D. Wyo. 1995).

Here, the issue is whether MMF is subject to liability under RCRA's citizen suit provision. 42 U.S.C. § 6903(15). This Court should uphold the lower court's finding that MMF did not violate RCRA because: 1) it was not engaged in open dumping since the mixture was not a solid waste because it was not discarded, 2) even if it was a solid waste, the mixture is an agricultural waste used for land application and as such is exempted from regulation as an open dump, and 3)

there is insufficient evidence to establish that the mixture may present an imminent and substantial endangerment to human health or the environment.

1. Moon Moo Farm is not subject to RCRA's citizen suit provision because Moon Moo Farm's land applied manure and acid whey mixture is not "discarded" and therefore not solid waste.

Solid waste is "any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility *and other discarded material*, . . . resulting from . . . agricultural operations." 42 U.S.C. § 6903(27) (emphasis added). For a material that is not explicitly listed in the definition to qualify as a solid waste, that material must be considered "discarded." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1045 (9th Cir. 2004).

RCRA does not define "discarded," therefore, the court is allowed to interpret the term and give it its ordinary meaning. *Green Tree Fin. Corp v. Randolph*, 531 U.S. 79, 121 (2000). The court may also look to EPA regulations that reasonably interpret RCRA where Congress has been silent. *Chevron U.S.A. v. NRDC*, 467 U.S. 837, 842–843 (1984). EPA's only definition of "discarded" applies exclusively to solid wastes that are also hazardous. 40 C.F.R. § 260.2. This definition does not apply in the instant case since the EPA and Riverwatcher only contend that the manure and whey mixture is a solid waste, not a hazardous waste. MMF's mixture is not discarded because it is used to fertilize Bermuda grass crops and condition the soil. Therefore, this Court should uphold the lower court's finding that the mixture is not a solid waste because it is not discarded.

Reused agricultural waste is not discarded and therefore not solid waste if it meets three factors. *Safe Air for Everyone*, 373 F.3d at 1045; *see also Oklahoma v. Tyson Foods, Inc.*, 2010 WL 653032 at *10 (N.D. Okla. Feb. 17, 2010) (poultry litter applied to fields is not "solid waste."). *In Safe Air*, the court examined whether Kentucky bluegrass residue left over after harvest constituted "solid waste" under RCRA. 373 F.3d at 1041. After looking at the dictionary definition, circuit court interpretations, and legislative history surrounding "solid waste," the *Safe Air* court established a three-factor test for determining whether a material is a solid waste:

> (1) whether the material is "destined for beneficial reuse or recycling in a continuous process by the generating industry itself," *American Mining*

> C*ongress v. U.S. EPA*, 824 F.2d 1177, 1186 (D.C.Cir.1987); *Safe Food & Fertilizer v. E.P.A.*, 350 F.3d 1263, 1268 (D.C. Cir. 2003); (2) whether the materials are being actively reused, or whether they merely have the potential of being reused, *Am. Min. Cong. v. U.S. E.P.A.*, 907 F.2d 1179, 1186 (D.C. Cir. 1990); (3) whether the materials are being reused by its original owner, as opposed to use by a salvager or reclaimer, *United States v. ILCO*, 996 F.2d 1126, 1131 (11th Cir.1993).

Id. at 1044. The court ultimately determined that the Kentucky bluegrass residue was not a solid waste because burning the residue had benefits for the farmers and the residue was reused "in a continuous farming process effectively designed" to grow bluegrass. *Id.* at 1045. The court also supported its holding with legislative history establishing that Congress was concerned with reducing waste going to landfills, not reused materials since "an increase in reclamation and reuse practices is a major objective" of RCRA. *Id.* (quoting 1976 U.S.C.C.A.N. at 6239–41).

If a product is still in use and not thrown away or disposed of, then it is not a discarded material. *Ecological Rights Foundation v. Pacific Gas & Electric Co.*, 713 F.3d 502, 516 (9th Cir. 2013). Conversely, if a product has served its intended purpose, then that material may be considered discarded. *No Spray Coalition, Inc. v. City of New York*, 252 F.3d 148, 150 (2d Cir. 2001). The EPA considers materials that have been "left to accumulate long after they have served their intended purpose" to qualify as discarded. *Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co.*, 989 F.2d 1305, 1316 (2d Cir. 1993).

MMF can establish that the whey is not a solid waste, and if it is, the whey should be conditionally exempt from classification as a solid waste. Whey is a byproduct produced from milk and MMF raises dairy cows for milk, so by transferring the whey from Chokos to MMF, the whey is returned to its original process as an agricultural product without being reclaimed or disposed. There is a known market for whey since it has historically been used as a soil fertilizer and conditioner in the State of New Union for over 70 years. (R. 6) This also shows whey's usefulness as a customary, recognized farming method. Although the record is silent as to whether MMF buys whey from Chokos, it does accept whey from Chokos which likely establishes a presumption of usefulness. (R. 4).

MMF's mixture passes the three-factor test set forth in *Safe Air* so it should not be considered a solid waste. 373 F.3d at 1044. First, the mixture is "destined for beneficial reuse or recycling in a continuous process by the generating industry itself." *Id.; see also American Mining Congress v. U.S. EPA*, 824 F.2d 1177, 1186 (D.C. Cir. 1987); *Safe Food & Fertilizer v. E.P.A.*, 350 F.3d 1263, 1268 (D.C. Cir. 2003). The manure and liquid waste is used in a continuous process: From the cow barn where it is in generated, collected, and sent through a series of drains to an outdoor lagoon where it awaits reuse as a fertilizer and soil conditioner for the Bermuda grass crops. (R. 4). The acid whey comes from Chokos Greek Yogurt Processing facility in Farmville, 10 miles from MMF. (R. 4-5). MMF substantially increased its herd of milking cows to accommodate the heightened demand for milk from Chokos. (R. 5). Therefore, it stands to reason that MMF is the generating industry of the whey used on the Bermuda grass crops. (R. 5). Both the whey and manure are cycling in a continuous process so they pass the first factor in the *Safe Air* test. 373 F.3d at 1044.

The mixture also passes the second factor of the *Safe Air* test because MMF actively reuses the mixture; the mixture does not just have the potential to be reused. 373 F.3d at 1044; *see also Am. Min. Cong. v. U.S. E.P.A.*, 907 F.2d 1179, 1186 (D.C. Cir. 1990). MMF collects the mixture in the lagoon and periodically applies it to the fields at rates consistent with those required by MMF's Nutrient Management Plan (NMP). (R. 5, 6). No party to this action contests that MMF has done anything but actively applied the mixture to the land as appropriate. The mixture has a demonstrated reuse purpose since land application of whey as a soil fertilizer and conditioner has been a long-standing, traditional practice in New Union for 70 years. (R. 6).

Lastly, the mixture passes the third prong of the *Safe Air* test. 373 F.3d at 1044; *see also United States v. ILCO*, 996 F.2d 1126, 1131 (11th Cir. 1993). Both the manure and acid whey are "being reused by its original owner, as opposed to a salvager or reclaimer." *Id.*; 40 C.F.R. § 261.2(3)(e). MMF owned the milk that later became acid whey after processing at Chokos. (R. 4-5). Therefore, the milk byproduct accepted by MMF is essentially being returned to its original owner. Since the *Safe Air* and *ILCO* courts are both silent as to whether an intervening owner

affects the material's status as discarded, this Court should accept as true that an intervening owner is irrelevant. *See* 373 F.3d at 1044; 996 F.2d at 1131.

In *Ecological Rights Foundation*, the "crux of the case turn[ed] on the issue of whether [a preservative was] solid waste within the meaning of RCRA." 713 F.3d at 514 (internal quotations omitted). To determine whether the wood preservative was considered as a solid waste, the court looked to whether the product had served its intended purpose and was no longer wanted by the consumer. *Id.* at 515. Because the "preservative [was] neither a manufacturing waste by-product nor a material that the consumer—in this case, [the defendant]—no longer want[ed] and [had] disposed of or thrown away," the preservative did not constitute a solid waste since it was still in use on utility poles. *Id.* at 516; *See also Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 207 (2d Cir. 2009) (noting that in amicus briefs, the EPA took the position in *Long Island Soundkeeper Fund, Inc. v. N.Y. Athletic Club*, No. 94 Civ. 0436(RPP), 1996 WL 131863 (S.D.N.Y. Mar.22, 1996) holding that the "ordinary use of lead shot on a shooting range does not fall within the regulatory definition of solid waste because . . . they have not been 'abandoned,' . . . [but] come to rest on land ... as a result of their proper and expected use.)

In addition to the *Safe Air* test, the mixture is not discarded because it is serving its intended purpose as a soil fertilizer and conditioner. *Ecological Rights Foundation*, 713 F.3d at 516; *No Spray Coalition, Inc.*, 252 F.3d at 150. The manure has traditionally been collected and used to fertilize MMF's crops. (R. 5). MMF has increased its milk production to satisfy Chokos' milk demand and has accepted the acid whey from Chokos to use on its Bermuda grass crops, therefore MMF continuously anticipates and expects to use the whey. (R. 5).

Therefore, the mixture is serving its intended purpose and judicial interpretation persuasively indicates that the mixture should not qualify as a solid waste. *Safe Air*, 373 F.3d at 1044; *Ecological Rights Foundation*, 713 F.3d at 516; *No Spray Coalition, Inc.*, 252 F.3d at 150. Since the manure and whey mixture passes the three-factor test set forth in *Safe Air* and the mixture is still serving its intended purpose, this Court should affirm the lower court's holding and find that the mixture is not discarded and therefore not a solid waste under RCRA. *Id.*

2. Even if the manure and acid whey mixture is solid waste, Moon Moo Farm has not violated RCRA because the mixture is exempted from regulation as an open dump and the mixture may not present and imminent and substantial endangerment to human health or the environment.

A. Moon Moo Farm's mixture does not violate RCRA because land application of agricultural waste is exempt from regulation as an open dump.

RCRA prohibits the disposal of solid waste that constitutes open dumping. 42 U.S.C. § 6945(a). RCRA's citizen suit provision allows enforcement of open dumping violations. *Id.* An *"*open dump" is any site where solid waste is disposed of that is not a legal sanitary landfill, 42 U.S.C. § 6903(14), and does not comply with EPA regulations concerning solid waste disposal facilities and practices. 40 C.F.R. §§ 257.1-2. However, the criteria governing open dumping does not apply to "agricultural wastes, including manures and crop residues, returned to the soil as fertilizers or soil conditioners." 40 C.F.R. § 257.1(c)(1). This regulation codifies Congressional intent to reduce the amount of waste going into landfills while promoting reuse and reclamation of materials whenever possible. 1976 U.S.C.C.A.N. at 6239–41. Since MMF's manure and whey mixture is an agricultural waste that is returned to MMF's Bermuda grass crops as fertilizers and soil conditioners, MMF is exempt from classification as an open dump. Consequently, this Court should uphold the lower court's finding that MMF has not violated RCRA because the land application of agricultural waste does not constitute open dumping.

Agricultural waste is not defined under RCRA, however EPA exempts "agricultural waste, including manures and crop residues, returned to the soil as fertilizers or soil conditioners" from regulation as an open dump. 40 C.F.R. § 257.1. EPA's regulation, which gives examples of agricultural waste such as "manures and crop residues," is instructive in determining the meaning of "agricultural waste." *See Chevron*, 467 U.S. at 842–843.

In the instant case, since manure is explicitly listed as an agricultural waste, the issue is whether acid whey is an agricultural product for purposes of exempting the mixture from RCRA open dumping regulations. 40 C.F.R. § 257.1. Acid whey is a milk-based food processing byproduct created during the manufacture of Greek yogurt. (R. 5). Raising livestock for milk

production is an agricultural activity so the milk produced is likely an agricultural product. Greek yogurt processing uses milk and leaves acid whey as its byproduct, therefore its byproduct is also agricultural in nature. Since milk is an agricultural product and processing milk leaves whey, the whey constitutes an agricultural waste. Although whey is no longer useful to Chokos, it has customary use and value in New Union where farmers use it as a soil conditioner.

Even if acid whey is not considered an agricultural waste, EPA and Riverwatcher's contention that MMF is violating sanitary landfill guidelines fails because the definition of "landfill" excludes "land application units." 40 C.F.R. § 257.2. "Land application units" means "an area where wastes are applied onto or incorporated into the soil surface (excluding manure spreading operations) for agricultural purposes." *Id.* Since MMF applies and incorporates acid whey into the Bermuda grass crop soil, the land application of whey is explicitly exempt from qualifying as a "landfill."

The open dumping claim also fails because New Union is delegated the power to create a state plan which prohibits the establishment of open dumps and contains a requirement that disposal of solid waste will be in compliance with RCRA. 42 U.S.C. § 6944(b). This Court should defer to state laws regarding acid whey usage since there are no federal statutes or regulations governing its use. *See* N.Y. State Law, part 360: Solid Waste Management Facilities. New Union has indicated that MMF is in compliance with all state guidelines for landfills and acid whey by approving MMF's NMP and MMF being in compliance with its NMP. (R. 5, 6).

Solid waste disposal facilities or practices such as the application of solid wastes to floodplains, 40 C.F.R. § 257.3-1, application of solid wastes in a manner that may contaminate groundwater, 40 C.F.R. § 257.3-4, and application of solid waste with a pH below 6.5 to food chain crop areas, 40 C.F.R. § 257.3-5, may "pose a reasonable probability of adverse effects on health or the environment." 40 C.F.R. § 257.3. For any of these guidelines to apply, the material must first be a solid waste. Pursuant to Section IV(1), the mixture is not discarded so it is not a solid waste. Even if the mixture is a solid waste, MMF still has not violated EPA's regulations.

First, MMF does not violate the prohibition on applying solid waste to floodplains because there is no resultant "hazard to human life, wildlife, or land or water resources" from MMF's activities. 40 C.F.R. § 257.3-1. Second, if there is "insufficient evidence to find that the [operation] is the sole or primary source of [the pollutant] occurring" then the "plaintiffs have not met their burden of proof on their claim of open dumping in violation of 40 C.F.R. § 257.3–4(a)." *Dague v. City of Burlington*, 732 F. Supp. 458, 468 (D. Vt. 1989). Here, the Plaintiffs have failed to establish that MMF has been the cause of any groundwater contamination because there is no admissible, scientifically sound evidence that measures how much, if any, nitrates have entered groundwater as a result of MMF's activities. 40 C.F.R. § 237.3-4. Lastly, MMF did not violate 40 C.F.R. § 257.3-5 because the regulation requires that "[t]he pH of the solid waste and soil mixture is 6.5 or greater at the time of each solid waste application" and there is no evidence in the record of the soil's pH before application of the mixture. 40 C.F.R. § 257.3-5.

If an open dump is complying with state requirements, then it is has a valid defense to a citizen suit under RCRA. *O'Leary v. Moyer's Landfill, Inc.*, 523 F. Supp. 642, 649 (E.D. Pa. 1981). If a site that would otherwise be considered an open dump is complying with a state plan for elimination or amelioration of the conditions which make the site an open dump, then this compliance acts as a proper defense to a RCRA citizen suit. *Id.* In *O'Leary*, the court looked to what RCRA § 4005(c) meant and whether it provided a defense to prohibited open dumping under § 4005(a). *Id.* at 650. The court looked at the statutory language and EPA's regulations and determined that § 4005(c) means "that there is a prohibition [on open dumping], but the prohibition is obviated under the circumstance of a showing of compliance with a state plan." *Id.* So, even if this Court finds that MMF is engaged in open dumping, MMF has a valid defense to a citizen suit because it is complying with the NMP that New Union approved regarding MMF's land application rates of the mixture. (R. 5).

Therefore, this Court should affirm the lower court's finding that MMF is not violating RCRA because MMF is not engaged in open dumping since: 1) its manure and whey mixture is not a solid waste; 2) land application of the mixture is exempt from regulation as an open dump

because the mixture is an agricultural waste; and 3) New Union's approval of MMF's land application practices through its NMP establishes that by complying with its NMP, MMF is in compliance with state law and is not violating RCRA.

B. Moon Moo Farm's mixture does not subject Moon Moo Farm to RCRA's citizen suit provision because the mixture does not present an imminent and substantial endangerment to human health or the environment.

The third and final element that a plaintiff must establish to bring a RCRA citizen suit is proving that the waste may "present an imminent and substantial endangerment to human health or the environment." 42 U.S.C. § 6972(a)(1)(B). The establishment of imminent and substantial endangerment (ISE) need only be examined in two circumstances: Either a plaintiff must establish that the waste may create an ISE to satisfy a citizen suit action, or the government can bring an action if a waste may present an ISE. 42 U.S.C. §§ 6972(a)(1)(B), 6973(a). Although the EPA and Riverwatcher are bringing this suit under § 7002, looking to judicial and legislative interpretation of § 7003 is helpful to discern the meaning of "imminent and substantial endangerment" generally. *See* Kenneth Kilbert, *Re-Exploring Contribution Under RCRA's Imminent Hazard Provisions*, 87 Neb. L. Rev. 420, 435 (2008). "Imminent and substantial endangerment" is not defined in RCRA so the court is allowed to interpret the terms and give them their ordinary meaning. *Green Tree Fin. Corp*, 531 U.S. at 121 (2000).

Generally, courts have analyzed ISE as having two aspects: 1) a temporal requirement that the endangerment be ongoing, threatened or potential, even if the action which created the endangerment is wholly in the past, and 2) a quality requirement that the endangerment may result in serious harm. *See Cox*, 256 F.3d at 299-300; *Cordiano*, 575 F.3d at 210.

"Substantial" Requirement

Many courts have parsed the ISE requirement and examined the individual words. First, "an endangerment is 'substantial' if it is 'serious.' " *Id.* at 300; *Cordiano*, 575 F.3d at 210 (citing *Burlington N. & Santa Fe Ry. Co. v. Grant*, 505 F.3d 1013, 1021 (10th Cir. 2007) ("[A]n endangerment is substantial under RCRA when it is serious." (internal quotation marks

omitted)); *Parker v. Scrap Metal Processors, Inc.,* 386 F.3d 993, 1015 (11th Cir. 2004) ("Because the operative word [in 42 U.S.C. § 6972(a)(1)(B)] is 'may,'... the plaintiffs must show that there is a potential for an imminent threat of a serious harm."); *Interfaith Cmty. Org. v. Honeywell Int'l, Inc.,* 399 F.3d 248, 259 (3d Cir. 2005) (stating that *Parker*'s "approach ... is most faithful to the statutory language, especially as to the word 'substantial' "); *Cox,* 256 F.3d at 300 ("[A]n endangerment is 'substantial' if it is 'serious.' "); *Price,* 39 F.3d at 1019 ("[The] endangerment must be substantial or serious.")).

Even if resulting exposure to a threat is substantial, there needs to be a likelihood that someone would actually be exposed to the threat. *Davies v. Nat'l Co-op. Refinery Ass'n,* 963 F. Supp. 990, 999 (D. Kan. 1997). In *Davies*, the court in dicta considered whether the plaintiff's evidence would survive summary judgment on the question of whether the defendants may have created an ISE. *Id.* The "plaintiffs [had] been warned of the danger and [were] able to occupy [their] property without serious risk to their health by using an alternative water supply." *Id.* The court opined that "[t]he fact that [the plaintiffs] must use bottled water instead of groundwater is undoubtedly an inconvenience and an economic burden, but it is not the type of injury for which an action at law provides an adequate remedy." *Id.* The court concluded that the plaintiff's risk of exposure was insignificant and thus could not establish an ISE to human health or the environment. *Id.*

"Imminent" Requirement

An "endangerment can only be 'imminent' if it 'threaten[s] to occur immediately.' " *Cox,* 256 F.3d at 299 (quoting *Meghrig*, 516 U.S. at 485). "'[T]he endangerment must be ongoing, but the conduct that created the endangerment need not be.' " *Id.* at 299 (citing *Conn. Coastal Fishermen's Ass'n v. Remington Arms Co., Inc.,* 989 F.2d 1305, 1316 (2d Cir. 1993)). An imminent event continues "to present a threat to the public health or the environment." *Cox,* 256 F.3d at 300 *citing* h.R. Comm. Print No. 96–IFC 31, at 32 (1979). "It is not necessary that the final anticipated injury actually have occurred prior to a determination that an 'imminent hazard' exists." *Zands,* 797 F. Supp. at 809 (quoting *United States v. Ottati & Goss, Inc.,* 630 F.Supp.

1361, 1394 (D.N.H.1985) (quoting *Environmental Defense Fund v. E.P.A.*, 465 F.2d 528, 535 (D.C.Cir.1972))).

Imminent and Substantial Endangerment Analysis

Overall, the endangerment language allows that the "prospect of future harm is adequate to engage the gears of [§ 6972(a)(1)(B)] so long as the threat is near-term and involves potentially serious harm." *Cordiano*, 575 F.3d at 211 (quoting *Me. People's Alliance*, 471 F.3d at 296 (internal quotations omitted)); *see Cox*, 256 F.3d at 299-300.

In *Cox*, people living near open garbage dumps brought suit against the city. 256 F.3d at 281. When examining the issue of whether the city had contributed to the dumping, the Court reasoned that an ISE was one that threatens to occur immediately and cause serious harm to the public. *Id.* at 288, 299-300. In deciding whether the open dumps created an ISE, the Court concluded that the dumps may present an ISE because the dumps had a history of massive illegal dumping, prior pollution, and the Plaintiff City's own admission that one of the dumps was a hazard to the public health. *Id.*

In the instant case, to bring a citizen suit claim, the EPA and Riverwatcher need to establish, *inter alia*, that MMF's land application of the manure and whey mixture may create an imminent and substantial endangerment to human health and the environment. 42 U.S.C. § 6792(a)(1)(B). This claim fails because there is no evidence to support the proposition that MMF was the "but for" cause of the nitrate advisory in Farmville, as acknowledged by the Riverwatcher's environmental health expert. (R. 7). There is no conclusive evidence that nitrates were coming from MMF since there was no scientifically sound nitrate testing done upstream and downstream of MMF's operation. (R. 1-7). Even if some small portion of nitrates were coming from MMF, "it is impossible to state that [MMF] was the 'but for' cause of that nitrate advisory." (R. 7).

Although the word "may" allows a broad reading of the statute, "imminency" requires a showing that a "risk of threatened harm is present." *Cordiano*, 575 F.3d at 210 (quoting *Dague*, 935 F.2d at 1356 (internal quotations omitted)). Since there is no "but-for" relationship showing

that the threatened harm of nitrates stems from MMF's operation, the requirement of establishing an ISE cannot be met. Even though nitrates pose a risk to the health of human infants, (R. 6), the nitrate threat must stem from MMF's actions for MMF to be subject to a RCRA citizen suit. 42 U.S.C. § 6972(a)(1)(B). Since EPA and Riverwatcher cannot establish that MMF may have created an ISE by emitting nitrates, the Court cannot provide a remedy to stop the nitrates in this action.

Additionally, the EPA and Riverwatcher are aware of the nitrate advisory in Farmville, Farmville itself has experience with multiple nitrate advisories over the past ten years, only infants are affected by the advisories, and the problem is remedied by giving infants bottled water. (R. 7). For these reasons, exposure to the nitrates is very low, does not create a serious risk, and the threshold requirement of a "substantial endangerment" is not met. Therefore, this Court should uphold the finding of the lower court and hold that MMF is not subject to the citizen suit provision of RCRA because the mixture does not present an imminent and substantial endangerment.

CONCLUSION

This Court should hold that the Queechunk Canal is not a public trust waterway because it is not navigable in commerce or a navigational servitude. The evidence obtained through trespass by James is inadmissible under the exclusionary rule's balancing test. MMF does not require a NPDES permit because it is not a CAFO, and even if it is, MMF is does not require a NPDES permit since it is exempt under the agricultural stormwater exemption. MMF is not subject to RCRA because the acid whey and manure mixture that it applies to its crops is not a solid waste, and even if it is, the mixture does not present an imminent and substantial endangerment. Therefore, this Court should affirm the District Court's decision to grant summary judgment on all issues in favor of MMF.

Respectfully submitted,

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Counsel for Moon Moo Farm, Inc.