Team No. 21

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

VS.

MOON MOO FARM, INC.,
Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR NEW UNION

THE HONORABLE ROMULUS N. REMUS, DISTRICT JUDGE

NO. 155-CV-2014

BRIEF FOR MOON MOO FARM, INC.

Defendant-Appellee

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STATEMENT OF JURISDICTION

The parties below dispute whether there are pollutant additions into navigable waters of the United States in violation of section 505 of the Clean Water Act ("CWA"). 33. U.S.C. § 1365 (2006). The parties also dispute whether there is disposal of solid waste into the Deep Quod River in violation of section 7002 of the Resource Conservation Recovery Act ("RCRA"). 42 U.S.C. § 6972 (a)(1) (2006). These Acts grant district courts federal jurisdiction without regard to the amount in controversy or citizenship of the parties. 42 U.S.C. § 6972; 33 U.S.C. § 1365. The district court had federal question jurisdiction pursuant to 28 U.S.C. § 1331 (2006). The lower court granted the dismissal of appellant's motion for summary judgment and Appellants Riverwatcher and EPA timely appealed pursuant to FED. R. APP. P. 4(a)(1)(A). This Court has appellate jurisdiction under 28 U.S.C. § 1291 (2006). This appeal is from a final order or judgment that disposes of all parties' claims.

STATEMENT OF THE ISSUES

I. Whether the Queechunk Canal, a man-made water body, is a public trust navigable water of the State of New Union allowing for a public right of navigation despite private ownership of the banks on both sides and the bottom of the canal by Moon Moo Farm.

II. If the canal is not a public trust navigable water, whether evidence obtained through trespass and without a warrant is admissible in a civil enforcement proceeding brought under CWA sections 309(b), 309(d), and 505.

III. Whether Moon Moo Farm requires a permit under the Clean Water Act NPDES permitting program because either: (a) it is a CAFO subject to NPDES permitting by virtue of a discharge form its manure land application area,; or (b) if it is not a CAFO, excess nutrient discharges from its manure application fields remove it from the agricultural stormwater exemption and subject it to NPDES permitting liability.

IV. Whether Moon Moo is subject to a citizen suit under RCRA section 7002 because its fertilizer could constitute as a solid waste and pose an imminent and substantial threat to Farmville's citizens and environment.

STATEMENT OF THE CASE

Moon Moo Farm, Inc. ("Moon Moo") operates a dairy farm in the State of New Union. (R. at 4). Moon Moo's cows are housed and milked in a barn, and are not pastured. *Id.* Manure and liquid waste from the cows is collected in an outdoor lagoon designed to contain all of the manure produced without overflowing during a 25-year rainfall event. (R. at 4–5). Moon Moo mixes the manure with whey from a neighboring yogurt plant and spreads the mixture on approximately 150 acres of fields, separate from the milk production area, where Bermuda grass is grown for winter feed. (R. at 5).

Moon Moo is classified as a "no-discharge" animal feeding operation by the State of New Union. *Id.* As such, it must submit a "Nutrient Management Plan" (NMP) to a State Administrative office that is charged with reviewing the permits. *Id.* The NMP sets forth planned reasonable manure application rates, together with a calculation of expected uptake of nutrients by the crops grown on the fields. *Id.* Moon Moo does not hold a permit pursuant to the National Pollutant Discharge Elimination System (NPDES) permitting system administered under the CWA. (R. at 5–6). Moon Moo has applied manure to its fields at rates consistent with its NMP at all relevant times. (R. at 6).

The Queechunk Canal is an artificial body of water, created in the 1940s by a previous owner in an effort to alleviate flooding issues at the river bend. (R. at 5). While most of the Deep Quod River is diverted into the Canal, the Canal is a mere fifty feet wide, three to four feet deep, and can only be navigated by a canoe or other similarly small boat. *Id.* Moon Moo owns the land on either side of the Canal, and, due to the common use of the Canal as a shortcut up and down the Deep Quod River, has prominently displayed "No Trespassing" signs at the Canal. *Id.* On a rainy day in April 2013, Dean James, a member of the nonprofit, Deep Quod Riverwatcher,

ignored these prominently displayed signs, and made his way onto Moon Moo's property *Id.* While trespassing in the canal, James observed land application operations taking place on Moon Moo's grass fields. James took a sample of the precipitation runoff from the fields, which tested positive for nitrates and fecal coliforms. (R. at 6). EPA commenced a civil enforcement action against Moon Moo pursuant to CWA sections 309(b) and (d), and Riverwatcher intervened as a plaintiff pursuant to CWA section 505(b)(1)(B). *Id.*

Moon Moo has complied with its NMP by applying manure in accordance with the rates set out in the NMP. (R. at 6). Riverwatcher's agronomist, Dr. Mae, argues even though she has no basis to dispute these records, she believes that the increased acidity of the acid whey in the manure has lowed the pH of the soil. *Id.* Dr. Mae contends that the low pH has prevented the Bermuda grass crop from soaking up the nutrients in the manure, which has resulted in runoff into the groundwater and Deep Quod River, specifically during rain events. *Id.* Moon Moo is not prohibited from applying land manure during a rain event, as the NMP has no restrictions regarding land application. (R. at 6–7). In addition, application of whey as part of manure has been a longstanding practice and farming custom in New Union since the 1940s, as Bermuda grass tolerates a wide range of pH conditions. (R. at 6). Because the Deep Quod is surrounded by heavily farmed areas, nitrate advisories have been in effect in previous years. (R. at 7). Petitioners allege that Moon Moo is the cause of the 2013 nitrate advisory, although its environmental health expert has conceded that it is impossible to state Moon Moo was the "but for" cause of that nitrate advisory. *Id.*

The District Court found for Moon Moo on summary judgment on all issues, after which appellants appealed to this Court, seeking review of all issues determined by the court. (R. at 1).

SUMMARY OF ARGUMENT

The district court properly concluded that the public trust doctrine is not applicable to artificial bodies of water. Several courts have held that the doctrine is inapplicable in such cases, and the underlying rationale of the doctrine does not support the imposition of a public right of way through private, artificially constructed waterways on the landowners who construct them for purposes of preserving their own land from flooding. Even if this Court were to overturn the ruling of the district court and hold that the doctrine does apply to artificial bodies of water, a finding of the applicability of the doctrine is precluded in this case by the requirement that the doctrine only extend to navigable waters. The Queechunk Canal, the artificial body of water at issue, is not a navigable waterway subject to federal regulation under the Commerce Clause. The district court was also correct in concluding that the Fourth Amendment Exclusionary Rule extends to civil enforcement proceedings. The rule has been held to apply to similar proceedings in the context of employment law, and is particularly appropriate where, as here, penalties are being assessed against a party for a statutory violation. Dean James did not act in good faith in trespassing on Moon Moo Farm's property, and, therefore, the exclusionary rule applies to forestall the introduction of evidence unlawfully seized.

The district court was correct in granting summary judgment that Moon Moo's land application is not subject to the Clean Water Act NPDES permitting program. To be subject to NPDES permitting, a person must discharge pollutants from a "point source" into waters of the United States. The discharge at issue is not from a "point source" for two reasons. First, Moon Moo does not meet the regulatory definition of a concentrated animal feeding operation (CAFO), and therefore does not meet the definition of "point source" through its classification as a CAFO. Moon Moo has not discharged pollutants through a manmade ditch as required by the regulatory

definition, and has not been designated a CAFO by an administrator, and can therefore not be considered one under the statute. Second, even if the discharge could otherwise be considered to be from a "point source," it is an "agricultural stormwater discharge" according to the plain meaning of the phrase, the relevant case law, and administrative guidance. Because agricultural stormwater discharges are by definition not from a "point source," they cannot be subject to NPDES permitting requirements.

Moon Moo's fertilizer is not in violation of RCRA because it is not solid waste and poses no imminent and substantial threat to Farmville's citizens and environment. Using the plain meaning of the word "discarded material" in the definition of solid waste, courts have stated that "discarded" means "to abandon or throw away." Moon Moo accepted the acid whey because it valued its nutrients. Even though Moon Moo did not pay for the acid whey, Moon Moo was not accepting the acid whey as a means to dispose of it, but accepting it as a way to fertilize its fields. Furthermore, the fertilizer does not pose an imminent and substantial threat because there is not a probable risk of serious harm. The agronomists cannot state with any certainty that Moon Moo is the cause of the elevated level or nitrates and there is not a serious harm because the nitrate advisories have been in effect for many years, not as a direct result of Moon Moo's farming operations.

ARGUMENT

I. THE QUEECHUNK CANAL IS NOT A PUBLIC TRUST NAVIGABLE WATERWAY OF THE STATE OF NEW UNION.

A. James's actions constituted a trespass because the public trust doctrine does not extend to man-made navigable bodies of water.

The district court below properly concluded that the public trust doctrine does not extend to artificial bodies of water, even if they happen to be navigable. (R. at 8–9). Reversal by this Court would be inappropriate, as the Supreme Court has indeed held that the doctrine does not extend to such bodies of water. *Kaiser Aetna v. United States*, 444 U.S. 164, 172–73 (1979); *id.* at 180–81 ("The Court holds today that, absent compensation, the public may be denied a right of access to 'navigable waters of the United States' that have been created or enhanced by private means") (Blackmun, J., dissenting).

1. The Queechunk Canal is an artificial waterbody that is not subject to the public trust doctrine.

The Court in *Kaiser Aetna* considered the situation of Kuapa Pond, an inland body of water contiguous to a navigable waterway of the United States, but separated from that waterway by a barrier beach. *Id.* at 166. Kaiser Aetna dredged and filled parts of the privately owned pond after it was advised by the Army Corps of Engineers that it was not required to obtain permits for such operations. *Id.* at 167. The Corps later asserted that Kaiser Aetna was precluded from denying the public access to the improved pond because it had become a navigable water of the United States. *Id.* at 168. In its decision, the Court noted that the pond may indeed fall within the definition of "navigability," but emphasized that "it does not follow that the pond is also subject to a public right of access." *Id.* at 172–73.

The situation underlying the Court's decision in *Kaiser Aetna* is analogous to the situation involving the Queechunk Canal. Like the body of water involved in *Kaiser Aetna*, the

Queechunk Canal is connected to a navigable waterway of the United States by virtue of improvements made, in this case, to alleviate flooding problems. (R. at 5). A mere connection to navigable bodies of water does not necessitate a finding that the Canal should be subject to the public trust doctrine. As the Fifth Circuit has noted, the United States "cannot create a public right of access to a privately constructed and maintained waterway simply because [it] joins with other navigable waterways open to use by all citizens of the United States." *United States v. Lamastus & Assocs., Inc.*, 785 F.2d 1349, 1352 (5th Cir. 1986) (citing *Kaiser Aetna*, 444 U.S. 164).

2. The policy rationale underlying the public trust doctrine does not support imposing upon the Queechunk Canal a public right of access.

The Queechunk Canal should not be subject to a public right of access, because the underlying purpose of its construction was to alleviate flooding, rather than to improve commerce. Supreme Court precedent supports the proposition that the public trust doctrine's fundamental purpose is to preserve navigable waterways in the interests of protecting commerce. *See Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 487–88 (1988) (O'Connor, J., dissenting) (citing *Packer v. Bird*, 137 U.S. 661, 667 (1891)). While it is true that the Canal is commonly used as a shortcut by canoes and other small boats traveling the Deep Quod River, this use is not sufficient to impose upon the Canal a right of public access pursuant to the public trust doctrine.

The contours of the public trust doctrine are a matter of state law. *PPL Mont., LLC v. Montana*, 132 S. Ct. 1215, 1235 (2012). While the doctrine remains susceptible to federal power to regulate navigation pursuant to the Commerce Clause, "the States retain residual power to determine the scope of the public trust over waters within their borders." *Id.* The State of New Union has not addressed the issue of whether the public trust doctrine extends to artificial bodies

of water, such as the Queechunk Canal. (R. at 9). In recognition of this fact, the district court properly applied the principles espoused in the Supreme Court's decision in *Kaiser Aetna* to reach a proper resolution of the issue. *Id.*

The district court's reliance on the Court's opinion in *Kaiser Aetna* was proper, despite the fact that the public trust doctrine is an issue of state law. While the doctrine is an issue of state law, a given state's right to hold title to waters in trust for the public is dependent upon the authority of Congress to control navigation in furtherance of regulating commerce. *See, e.g.*, *Alec L. v. Jackson*, 863 F. Supp. 2d 11, 13 (D. D.C. 2012) (quoting *Ill. Cent. R. Co. v. Illinois*, 146 U.S. 387, 435 (1892)). Assuming, *arguendo*, that the Canal is a navigable waterway, then it is subject to congressional jurisdiction, and the use of federal precedent in the absence of state authority is warranted.

B. Even if the public trust doctrine applies to man-made navigable bodies of water, James's actions still constitute a trespass because the Queechunk Canal is not a navigable waterway.

Under the public trust doctrine, States take title to navigable waters and their beds in trust for the public. *See PPL Mont., LLC*, 132 S. Ct. at 1235. Thus, a finding that a body of water is subject to the public trust doctrine first requires a finding of navigability. The Clean Water Act ("CWA") defines navigable waters as "waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7) (2006). Pursuant to the Act, the Army Corps of Engineers ("Corps") has promulgated regulations expanding upon this definition of navigability. *See generally* 33 C.F.R. pt. 329 (2014). The regulations define navigable waters as those that are presently used, have been used, or may be susceptible for use to transport interstate commerce. 33 C.F.R. § 329.4. The regulations provide that the test for navigability of artificial channels is the same, but also provide that canals used for commerce that connect two navigable waters of the United States, or

canals open to navigable waters on one end and support commerce, are navigable. *Id.* § 329.8(a)(1). The Deep Quod River is a navigable water of the United States, and the Queechunk Canal is connected to that River on both ends. (R. at 5). Thus, the Canal does not connect two navigable waters of the United States, nor is it only open to navigable waters of the United States on only one end.

The regulatory definition above incorporates the common law "navigability in fact" test. According to at least one Circuit Court, artificially constructed and privately owned waterways, including canals, are subject to federal regulatory authority only if those waterways are navigable in fact—that is, if the waterways are capable of commercial use. *United States v. Lamastus and Associates, Inc.*, 785 F.2d 1349, 1353 (5th Cir. 1986). There is no evidence that the Queechunk Canal is capable of commercial use and is thus navigable in fact. Federal regulations provide that "it is sufficient *to establish* the potential for commercial use at any past, present, or future time" in order to sustain a finding of navigability. 33 C.F.R. § 329.6 (2014) (emphasis added). The only facts in the record that could be considered to be relevant to this question merely establish the width and depth of the canal, and provide that it is navigable by a canoe or other small boat. (R. at 5). These facts in themselves cannot be sufficient to support a finding of a potential for commercial use.[1]

II. EVIDENCE OBTAINED THROUGH TRESPASS AND WITHOUT A WARRANT IS NOT ADMISSIBLE IN A CIVIL ENFORCEMENT PROCEEDING, AND IS THEREFORE NOT ADMISSIBLE IN THIS CASE.

[1] Consider, for instance, a man-made "canal" completely located within the boundaries of one's property. The canal is wide enough and deep enough to support navigation via a canal or other small boat, but merely extends in a circle and connects only to itself. The width and depth of the canal, and the fact that it may be navigated with a canoe or small boat, would surely not be sufficient to support a finding of capability of commercial use in this instance. These facts in themselves thus are not dispositive.

A. The Fourth Amendment exclusionary rule applies to civil enforcement proceedings.

The District Court correctly concluded that the Fourth Amendment exclusionary rule applies to civil enforcement proceedings, and correctly excluded the evidence obtained by James' private act of trespass. The exclusionary rule operates as a procedure for preventing unlawfully obtained evidence from being used against a party, and has typically been applied within the context of criminal investigations as a tool for deterring future Fourth Amendment violations by law enforcement authorities. *See, e.g.*, *Davis v. United States*, 131 S. Ct. 2419, 2426 (2011). The basic purpose of the Fourth Amendment "is to safeguard the privacy and security of individuals against arbitrary invasions by government officials." *Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523, 528 (1967).

The Court in *Camara* considered whether a warrantless, administrative search violated the Fourth Amendment, ultimately finding that such a search does constitute such a violation. *Id.* at 527–28, 540. In its analysis, the Court made several remarks regarding the Fourth Amendment, including that it would be "anomalous to say that the individual and his private property are fully protected by the [Amendment] only when the individual is suspected of criminal behavior." *Id.* at 530. The Court held that administrative searches are significant intrusions upon the interests protected by the Fourth Amendment, and that when those searches are conducted without a warrant, they "lack the traditional safeguards which the [Amendment] guarantees to the individual." *Id.* at 534.

James conducted a search of private property on behalf of an organization, and did so without obtaining a warrant. (R. at 6). Thus, under the Court's rationale outlined in *Camara*, Moon Moo Farm has been deprived of the safeguards afforded to it by the Fourth Amendment. The prohibition against unlawfully obtaining evidence imposed by the Fourth Amendment

demands not merely that such evidence not be used before a court, but rather that it not be used at all. *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920) (Holmes, J.).

Moon Moo is not asking this Court to pioneer into a new area of law, nor does it request the type of blanket exclusion envisioned by Justice Holmes. On the contrary, Moon Moo is merely advancing the argument that the rule should apply to civil enforcement actions. Notably, the exclusionary rule has already been applied to civil enforcement proceedings by other Circuit Courts. *See Trinity Indus., Inc. v. Occupational Safety & Health Review Comm'n*, 16 F.3d 1455, 1461–62 (6th Cir. 1994) (applying the exclusionary rule to OSHA proceedings relating to punishing employers); *Smith Steel Casting Co. v. Brock*, 800 F.2d 1329, 1334 (5th Cir. 1986) (finding the exclusionary rule applicable to OSHA enforcement proceedings to the extent that illegally obtained evidence is offered to assess penalties against an employer for OSHA violations, unless the good faith exception applies).[2]

Riverwatcher may attempt to rely on the Supreme Court's ruling in *INS. v. Lopez-Mendoza*, 468 U.S. 1032 (1984) to assert that the exclusionary rule does not extend to civil enforcement proceedings. Such an attempt, however, would amount to a misunderstanding of the Court's holding. In *Lopez-Mendoza*, the Court considered whether a defendant's admission of his unlawful presence in the United States made following an allegedly unlawful arrest should be excluded in a civil deportation hearing. *Id.* at 1034. The Court held that the exclusionary rule does not apply to such proceedings. *Id.* As part of its analysis, the Court noted that

[2] From a policy standpoint, exclusion of the evidence in this case is intuitively prudent. EPA commenced a civil enforcement action against Moon Moo, so it is correct to assert that the U.S. Government seeks to admit certain evidence against it. As one Supreme Court Justice has noted, however, "[t]he Government of the United States bears an obligation to obey the Fourth Amendment," and that obligation cannot be discarded merely because evidence obtained is to be used in a civil proceeding. *INS. v. Lopez-Mendoza*, 468 U.S. 1032, 1052 (1984) (Brennan, J., dissenting).

"[p]resumably 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." *Id.* at 1046.

Perhaps at first glance, this language appears overwhelmingly to support the contention that the exclusionary rule should not be applied under the circumstances of this case. However, the Fifth Circuit has opined on the effect of *Lopez-Mendoza* within the context of civil enforcement proceedings, and addressed the quoted language in the process. *See Brock*, 800 F.2d at 1334 ("Based on Justice O'Conner's reasoning [in *Lopez-Mendoza*] . . . the exclusionary rule should be applied *for purposes of assessing penalties* against an employer after the fact for OSHA violations") (emphasis added).

EPA has sought civil penalties against Moon Moo, pursuant to section 309(d) of the Clean Water Act. (R. at 7). Thus, just as the Fifth Circuit applied the exclusionary rule to civil enforcement proceedings designed to assess penalties against an employer for an OSHA violation, this Court should apply the rule to the civil enforcement action by EPA against Moon Moo Farm for its alleged CWA violations.

B. The good faith exception does not apply.

As noted by the Fifth and Sixth Circuits in *Brock* and *Trinity*, respectively, the exclusionary rule applies to civil enforcement actions for purposes of assessing penalties, unless the good faith exception established in *United States v. Leon*, 468 U.S. 897 (1984) applies. *Brock*, 800 F.2d at 1334; *Trinity*, 16 F.3d at 1462. James did not act in good faith in unlawfully obtaining the evidence, and, thus, EPA is not entitled to use the evidence against Moon Moo in a civil enforcement proceeding.

In *Leon*, the Supreme Court evaluated the costs and benefits of suppressing reliable evidence seized by officers who reasonably rely on a warrant issued by a magistrate, ultimately concluding that such evidence should be admissible in a prosecutor's case in chief on the basis of the officers' good faith. 468 U.S. at 913. In its analysis, the Court strongly emphasized deterrence of wrongful conduct as the underlying rationale of the exclusionary rule, and explained that application of the rule where officers were indeed acting in good faith would not serve the deterrence purposes of the rule. *Id.* at 918–21.

The good faith exception to the exclusionary rule does not apply to James's conduct on Moon Moo's property. Even assuming that the exception applies to a private party outside of the context of law enforcement, the exception only applies to instances in which a search is conducted in reliance on a warrant or a statute. *See, e.g.*, *United States v. Scales*, 903 F.2d 765, 768 (10th Cir. 1990) (limiting the exception to instances in which officers act in reliance on a search warrant); *United States v. Winsor*, 846 F.2d 1569, 1579 (9th Cir. 1988) (en banc) (noting that the Supreme Court has only applied the exception to searched conducted in good faith reliance on a warrant or a statute later declared unconstitutional). James did not act pursuant to a warrant or statutory authority, but merely embarked on his "investigatory patrol" in response to complaints received by Deep Quod Riverwatcher. (R. at 6). The good faith exception delineated in *Leon* is thus inapplicable to the facts of this case.

III. STORMWATER RUNOFF FROM MOON MOO'S LAND APPLICATION IS NOT SUBJECT TO THE CLEAN WATER ACT NPDES PERMITTING PROGRAM.

The Clean Water Act ("CWA") prohibits the "addition of any pollutant" into "navigable waters" from a "point source" without a permit. 33 U.S.C. §§ 1311(a), 1342(a), 1362(12) (2006). Included in the definition of "point source" are Concentrated Animal Feeding Operations

("CAFOs"). 33 U.S.C. § 1362(14). Specifically excluded from the definition of "point source" are "agricultural stormwater discharges." *Id.*

Stormwater runoff from Moon Moo's land application is not from a "point source" and therefore is not subject to permitting. First, Moon Moo does not qualify as a CAFO subject to NPDES permitting under the relevant regulations both because it neither meets the regulatory definition, nor has been designated as such by an authorized administrator. 40 C.F.R. §§ 122.23(b)(6)(B), (e). Second, if Moon Moo is not a CAFO, the discharge runoff is an exempted stormwater discharge under CWA section 502(14) not subject to NPDES permitting.

A. Moon Moo is not a CAFO subject to NPDES permitting for land application runoff.

Appellants contend that Moon Moo is a CAFO subject to NPDES permitting for land applications under CWA section 502(14) and the relevant regulation. (R. at 2). In order to be classified as a CAFO, a facility must either meet the regulatory definition of a CAFO or be designated as such by an appropriate administrator. 40 C.F.R. § 122.23(b)(2).

Because no appropriate administrator has designated Moon Moo a CAFO, Moon Moo must meet the regulatory definition of a CAFO in order to be classified as such. To meet the regulatory definition of a CAFO, a facility must meet the definition of an Animal Feeding Operation ("AFO") and it must meet one of two extra requirements under Section 122.23(b)(6)(ii). 40 C.F.R. § 122.23(b)(6). Moon Moo does not meet the regulatory definition of an AFO and it does not meet either of the two extra regulatory requirements in (b)(6)(ii) therefore, it is not a CAFO under the Act.

1. Moon Moo does not meet the definition of an AFO.

The regulatory definition of an AFO excludes those operations on which "crops," "vegetation," or "forage growth" are "sustained in the normal growing season over any part of

the lot or facility." § 122.23(b)(1). If a rule is unambiguous, a court must apply the plain meaning of the regulatory text. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 at 414 (1945) (the Court's first tool for regulatory interpretation is the meaning of "the plain words of the regulation"); *see also Auer v. Robins*, 519 U.S. 452 (1997) (relying on dictionary definitions for regulatory terms). In the instant case, crops and vegetation in the form of silage is grown on vast swaths of the lot owned by Moon Moo. "Lot" is defined in Black's Law Dictionary "a tract of land, esp. one having specific boundaries or being used for a given purpose." BLACK'S LAW DICTIONARY (9th ed. 2009).

In *Southview*, the Second Circuit held that the term "lot or facility" included only the area on which animals are confined. *Concerned Area Residents for the Env't v. Southview Farm*, 34 F.3d 114 (2d Cir. 1994); *see Alt v. EPA*, 979 F.2d 701, 713 (N.D. W. Va. 2013) (refusing to accept EPA's contention that an area on which no livestock was kept was not "part of the CAFO"). The court in that case analogizes the terms "lot" and "facility" with the defined term "production area." *Southview*, 34 F.3d at 122–23. The term "production area" is defined in the regulation to mean the part of the facility "that includes the animal confinement area, the manure storage area, the raw materials storage area, and the waste containment area". 40 C.F.R. § 122.23(b)(8). Under the interpretive canon of meaningful variation, the court must assume that by writing a different phrase, the authors intended a different reading. In the present case, vegetation in the form of silage is grown on Moon Moo's defined tract or "lot," thus excluding the facility from the definitions of both "Animal Feeding Operation" and "Concentrated Animal Feeding Operation."

2. Runoff from Moon Moo's land application does not constitute a discharge of pollutants through a manmade ditch.

Additionally, the property also must meet one of two requirements in 40 C.F.R. § 122.23(b)(6)(ii). Specifically, pollutants must either be discharged into (1) waters of the United States through a manmade ditch, flushing system, or other similar manmade device; or (2) waters of the United States originating outside of and passing over through the facility, or otherwise coming into direct contact with the animals confined in the operation. *Id.*

Appellants do not contend that the latter is met; therefore, in order to meet the statutory definition of a CAFO, Moon Moo must discharge pollutants through a manmade ditch, flushing system, or other similar manmade device. *Id.* Appellants contend that runoff from land applications collected from the Queechunk Canal constitutes a discharge of pollutants through a manmade ditch. Appellants' only evidence of any runoff entering the Queechunk Canal was collected through trespass and was properly excluded. However, even if these samples are deemed admissible, they do not prove that the runoff constituted a "discharge of pollutants."

"Discharge" and "discharge of pollutants" are defined terms of the Clean Water Act. 33 U.S.C. § 1362(12), (16). In order for addition of pollutants into navigable waterways to constitute a discharge, it must be from a "point source." 33 U.S.C. § 1362(12). However, the definition of a "point source" excludes discharges that are "agricultural stormwater discharges." 33 U.S.C. § 1362(14).

The case law regarding the classification of CAFOs shows that something more than land application must be shown to satisfy the "discharge" requirement. In *Com. Energy & Env't Cabinet v. Sharp*, a hog-feeding operation, which met the minimum numerical requirements, did not discharge, and, therefore, could not be classified as a CAFO. *Com. Energy & Env't Cabinet v. Sharp*, 2012 WL 1889307, at *5, 8 (Ky. App. May 25, 2012). In applying a state law analog described as "broader" than the federal statute, the court in *Com. Energy* held that a farm which

performed land application operations in conformity with a nutrient management plan had no discharge and therefore was not a CAFO. *Id.* at *9–10.

Facilities found to be CAFOs each have something more than a precipitation-related agricultural discharge to meet the requirements of section 122.23(b)(6)(ii). In the case of *Carr v. Alta Verde Industries, Inc.*, the Fifth Circuit held that a man-made spillway from a holding pond was sufficient to constitute a discharge. *Carr v. Alta Verde Indus., Inc.*, 931 F.2d 1055, 1059 (5th Cir. 1991). Similarly, courts will find a discharge in cases of negligent application that results in "ponding" or dry-weather runoff. *See Am. Canoe Ass'n v. Murphy*, 412 F.3d 536 (5th Cir. 2005) (holding a discharge where an employee left open a valve resulting in "ponding"); *Southview*, 34 F.3d 114 (holding that a dry-weather runoff did not qualify for the agricultural exemption and was a discharge). Unlike the facilities in *Southview*, *Murphy*, and *Carr*, there is no evidence that Moon Moo's land application resulted in a discharge other than an exempt agricultural stormwater discharge. Because agricultural stormwater discharges are not "discharges of pollutants" under the statute, they cannot meet the definition of a CAFO under Section 122.23.

B. Compliance with a site-specific nutrient management plan (NMP) in accordance with 40 C.F.R. § 122.23(e) qualifies Moon Moo as an agricultural stormwater discharge and exempts it from NPDES permitting requirements.

In 1987, Congress carved out "agricultural stormwater discharges" from the definition of "point source," and thus exempted them from NPDES permitting requirements under the CWA. 33 U.S.C. §§ 1311(a), 1342, 1362(12), (14). The purpose of the exemption "was [to affirm] the impropriety of imposing . . . liability for agriculture-related discharges triggered not by negligence or malfeasance, but by the weather—even when those discharges came from what would otherwise be point sources." *Alt v. EPA*, 979 F. Supp. 2d 701, 714 (N.D. W. Va. 2013) (quoting *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486 (2d Cir. 2005)). Although Congress

did not define the term "agricultural stormwater discharge" in the statute, EPA specified one type of discharge classified as an agricultural stormwater discharge through rulemaking. 40 C.F.R. § 122.23(e). In that regulation, the court exempts land application discharges that are conducted in accordance with a site specific Nutrient Management Plan ("NMP"). *Id.* This Court should affirm the lower court's decision to exempt Moon Moo's land application from NPDES permitting. The district court correctly applied the statute's plain meaning, the relevant case law, and the NMP rule to decide that Moon Moo's compliance with its NMP qualified Moon Moo's land application runoffs for exempt status. (R. at 9).[3]

1. Moon Moo's runoff is an agricultural stormwater discharge under the plain meaning of the term.

Because Congress left the term "agricultural stormwater discharge" undefined in the statute, courts have had to delineate the contours of the exemption themselves. Courts have looked to the plain meaning of the term to decide whether or not the exemption applied to land applications. *Waterkeeper*, 399 F.3d at 509 (quoting dictionary definitions to include "rearing livestock" in the plain meaning of "agricultural"); *Southview*, 34 F.3d at 114 (holding that the deciding inquiry for exemption was whether or not precipitation caused the discharge); *Alt*, 979 F. Supp. 2d at 710–711 ("the terms 'agricultural' and 'stormwater' should be given their ordinary meaning").

[3] EPA has taken the position that Moon Moo has complied with its NMP and is exempted from NPDES permitting liability if it is not a CAFO. (R. at 2). Because this litigation position is not intended to carry the force of law, it is not given *Chevron* deference, but is instead given deference to the extent of its persuasiveness. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *see infra* discussion at III(C). Persuasiveness and therefore the amount of deference afforded depends "upon the thoroughness evident in its consideration, the validity of its reasoning . . . and all those factors which give [the agency] the power to persuade, if lacking power to control." *Skidmore*, 323 U.S. at 140.

In *Waterkeeper*, the Second Circuit used dictionaries and the terms' plain meaning to review a rule regarding CAFOs. *Waterkeeper*, 399 F.3d at 509. They read the term "agricultural" to include livestock rearing and crop growing operations:

> Webster's New World Dictionary defined the term "agriculture" to include, *inter alia,* "work of *cultivating the soil*, producing crops, *and raising livestock.*" WEBSTER'S NEW WORLD DICTIONARY OF AMERICAN ENGLISH 26 (3rd College Ed.1988). The Oxford English Dictionary similarly defined agriculture to include, *inter alia,* "cultivating the soil," "including the allied pursuits of *gathering in the crops and rearing live stock.*" I THE OXFORD ENGLISH DICTIONARY 267 (2D Ed.1989).

Id. (emphasis added). The court in *Alt* quoted the above text and added that "stormwater" is understood to mean "precipitation-related discharges" in the statute. *Alt*, 979 F. Supp. 2d at 711.

The sample at issue here was collected during a rainfall event and there is no evidence of dry-weather runoff. (R. at 8). It is therefore "stormwater" runoff. The land application was performed in order to grow crops and raise livestock. It is therefore "agricultural" under the plain meaning of the term and the case law. The runoff meets the plain meaning definition of an "agricultural stormwater discharge" and is therefore not a point source. In the words of the Second Circuit, if there is "no point source discharge, [there is] no statutory violation." *Waterkeeper*, 399 F.3d at 505.

2. Moon Moo's runoff is an agricultural stormwater discharge under the relevant case law.

When deciding whether or not to apply the agricultural stormwater exemption, courts have examined whether a discharge is caused by precipitation, or if the precipitation is only incidental to the discharge. The district court relied heavily on *Alt v. EPA* when deciding whether to exempt Moon Moo's land application runoff. In *Alt*, the court discussed the history of the agricultural stormwater exemption and decided to exempt runoff from the farmyard of a chicken CAFO. *Alt*, 979 F. Supp. 2d at 706–07, 715. The court in *Alt* exempted discharges of manure and

litter from a farmyard that would "not become discharges unless and until stormwater conveyed the particles to navigable water." *Id.* at 714. Although *Alt* involved a CAFO and the court looked to the regulation for guidance, the *Alt* court held that the facility was exempt under the exemption in Section 502(14), not the regulatory exemption in Section 122.23. Similarly, in the case before this Court, the discharge must be exempt under Section 502(14), as Section 122.23 does not facially apply.

The Second Circuit has addressed the applicability the stormwater exemption to land application processes. *Southview*, 34 F.3d at 114. In that case, the Second Circuit decided not to reverse a jury's finding that discharges from land spreading operations did not constitute an exempt stormwater discharge. *Id.* at 120. The court's decision rested primarily on whether or not discharges "were the result of precipitation." *Id.* at 121. The land application resulted in "heavy cover of liquid manure" and "extra heavy application of manure in fields" thereby making the discharges more attributable to physical oversaturation of the fields than to a storm event. *Id.*

In *Fishermen Against the Destruction of the Env't, Inc. v. Closter Farms, Inc.*, the court applied the statutory exemption to a sugar cane operation. *Fishermen Against the Destruction of the Env't, Inc. v. Closter Farms, Inc.*, 300 F.3d 1294, 1297 (11th Cir. 2002). In *Closter Farms*, the Eleventh Circuit held that a discharge was "precipitation related" even though rain-water had been stored and later pumped to a different water body. *Id*. The case against Moon Moo does not involve the storage and later release of rainwater, but *Closter Farms* highlights the courts' focus on the origin of the water discharged.

The predominant test courts apply when determining the plain meaning of agricultural stormwater discharge is whether or not the discharge was primarily caused by rainfall. *Alt*, 979 F. Supp. 2d at 714; *Southview*, 34 F.3d at 121; *see also Closter Farms*, 300 F.3d at 1297 (because

the source of the water was rain, it did not matter that the water had been pumped into the lake). The runoff from Moon Moo occurred during a rainfall event, and no evidence has been shown of a dry-weather discharge or that such a discharge is possible. Because of this, it may be inferred that stormwater is a but-for cause of Moon Moo's land application runoff, and therefore qualifies for the stormwater exemption.

3. EPA's 2003 regulations are also persuasive to decipher the "agricultural stormwater exemption" under CWA Section 502.

In 2003, EPA promulgated a rule clarifying the definition of exempt "agricultural discharges" to explicitly include land application discharges by CAFOs if the land application complied with site-specific NMPs. *Alt*, 979 F. Supp. 2d at 708 (citing National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations (CAFOs), 68 Fed. Reg. 7176-01, 7197 (Feb. 12, 2003) (codified in scattered sections of 40 C.F.R.)). In promulgating the rule, EPA meant to clarify application of the CWA section 502 agricultural stormwater exemption to CAFOs, not to create a separate, new exemption.[4] The rule was intended in part to clarify the fact that the agricultural stormwater exemption applies to CAFOs as well as other point sources. *Id.* Although the regulation facially only applies to CAFOs, use of administrative publications to decipher ambiguous statutory language is proper under the rules of statutory interpretation. 40 C.F.R. § 122.23(e) (applicable specifically for land applications by CAFOs).

While resolving a challenge to the most recent version of the regulation, the Fifth Circuit explained that the regulation clarifies the application of the Section 502(14) exemption to

[4] 68 Fed. Reg. at 7197 (explaining that an agricultural stormwater discharge under the regulation is not a point source discharge under section 502, not just exempt under 40 C.F.R. § 122.23(e). "It is necessary to identify the conditions under which discharges from land application area of a CAFO are point source discharges . . . and those under which they are agricultural storm water discharges and therefore are not point source discharges.").

CAFOs. *Nat'l Pork Producers Council v. EPA*, 635 F.3d 738, 745 (5th Cir. 2011). This regulation does not create a new exemption, but instead is meant to clarify "ambiguity" as to whether and when CAFO discharges can be "agricultural stormwater discharges." *Id.* This clarification was necessary, as some courts did not think that CAFO runoff could ever constitute a stormwater discharge. *See Water Keeper Alliance, Inc. v. Smithfield Foods, Inc.*, 2001 WL 1715730 (E.D.N.C. Sept. 20, 2001) (holding that agricultural stormwater exemptions cannot apply to CAFOs). *Com. Energy* shows that an operation, such as Moon Moo's here, that is not facially subject to Section 122.23, but still chooses to perform land application in compliance with a nutrient management plan, can be exempt from NPDES requirements. *Com. Energy*, 2012 WL 1889307, at *9–10.

4. Moon Moo meets requirements of the NMP rule.

According to the regulation, a precipitation-related discharge of agricultural stormwater due to land application operations is exempt from NPDES permitting requirements. 40 C.F.R. § 122.23(e). Specifically, the regulation states that discharges constitute exempted agricultural stormwater discharge under section 502 where manure, litter, or process wastewater is applied in accordance with site-specific nutrient management practices. *Id.* The regulation also requires the NMP to meet the requirements of section 122.42(e)(1)(vi)–(ix) and 40 C.F.R. pt. 12. *Id.*

The exemption applies only to application of "manure, litter, or process wastewater." *Id.* Although the acid whey added to the mixture applied to Moon Moo's fields does not itself meet the plain meaning of "manure, litter, or process wastewater," regulatory definitions and accompanying guidance documents indicate that the exemption still applies.

The relevant regulation defines the term "manure" to include "raw materials or other materials commingled with manure or set aside for disposal." 40 C.F.R. § 122.23(b)(5). The

preamble accompanying the 2003 rule explains that discharge of soil additives should not be disallowed simply because they are not themselves manure. 68 Fed. Reg. at 7197 ("EPA does not intend that the applicability of the agricultural storm water exemption to discharges from land application areas of a CAFO be constrained by requirements to control runoff resulting from the application of pesticides or other agricultural practices"). According to agronomist Dr. Emmet Green, whey has been used as a soil conditioner in New Union for over sixty years. (R. at 6). Use of whey as a soil conditioner meets the ordinary meaning of an "agricultural practice" and thus should be allowed under the regulatory definition of "manure."

The regulatory exemption requires an NMP to "ensure appropriate agricultural utilization" of the nutrients discharged with the manure by complying with 40 C.F.R. § 122.42(e)(1)(vi)-(ix). 40 C.F.R. § 122.23(e). The regulatory provisions referenced do not prohibit nutrient discharges outright or place numerical limits on nutrient levels, but rather outline ways to minimize the impact of land application on nearby waters of the United States. *Id.*; 40 C.F.R. pt. 412; *see also* 68 Fed. Reg. at 7197 (explaining that when nutrients are applied within the parameters of a compliant NMP, "EPA believes it is reasonable to conclude that any remaining discharge is agricultural storm water"). Explaining the narrative nature of stormwater requirements, the court in *Waterkeeper* stated that "[a]gricultural stormwater discharges are . . . statutorily exempt from any effluent limitations, including [water quality based effluent limitations] because they are not point source discharges." *Waterkeeper*, 399 F.3d at 522.

Appellants do not contend that Moon Moo did not comply with the recordkeeping requirements or application procedures of the NMP. (R. at 2). Instead, appellants contend that requirements under Moon Moo's NMP were insufficient to ensure appropriate agricultural utilization of the nutrients applied to Moon Moo's fields as required by 40 C.F.R. § 422.23(e).

Appellants misconstrue the requirement of "appropriate agricultural utilization" to state that no nutrients may reach the waters of the United States. They assert that elevated levels of nitrogen prove that utilization of nutrients under the NMP was not "appropriate." However, the regulations themselves show that elevated nutrient levels are allowable under an NMP. Section 412.4(c) allows land application procedures to "achieve reasonable production goals, while *minimizing* nutrient movement." 40 C.F.R. § 412.4(c) (emphasis added). This requirement does not prohibit all nutrients from reaching the waters of the United States, but rather recognizes that production may result in addition of nutrients to a water body. It is misleading to argue that no discharges may occur when Congress created this exemption specifically to insulate operators from discharge liability.

C. EPA's positions in this civil enforcement action should be given deference, but only to the extent of their persuasiveness.

Because EPA's litigation position does not carry the weight of law, *Chevron* deference does not apply. *United States v. Mead*, 533 U.S. 218 (2001). When Congress has delegated authority to an agency to make rules carrying the force of law, and an agency uses that authority to promulgate such a rule, said rule qualifies for highly deferential treatment under *Chevron*. *Id.*; *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). For example, rules resulting from notice-and-comment rulemaking procedures and formal adjudications are binding on third parties and thus enjoy *Chevron* deference. *Mead*, 533 U.S. at 226. However, an agency decision or position not meant to carry the weight of law is to be given deference only in proportion to "all those factors which give it the power to persuade." *Id.* (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 139 (1944)). Many courts have given interpretations advanced for the first time in litigation deference according to *Skidmore*. *See SEC v. Rosenthal*, 650 F.3d 156, 160 (2d Cir. 2011); *see also TVA v. Whitman*, 336 F.3d 1236, 1250 (D.C. Cir. 2010); Bradley George Hubbard,

Deference to Agency Statutory Interpretations First Advanced in Litigation? The Chevron *Two-Step and the* Skidmore *Shuffle*, 80 U. CHI. L. REV. 447, 466 (2013).

The positions of EPA in this civil enforcement action are not the result of notice-and-comment rulemaking. There is also no evidence in the record that formal adjudication took place to determine Moon Moo's permitting requirements. Because the civil enforcement action in this case is the result of a classification decision, the facts closely resemble those in *Mead*, a case that also involved an agency's pigeonholing. Thus, this Court should give deference to EPA's positions in both Clean Water Act issues to the extent of their persuasiveness as outlined in *Skidmore*.

It is EPA and Moon Moo's position that compliance with its NMP, and therefore classification as an agricultural stormwater discharge, exempts Moon Moo's precipitation-related runoff from NPDES permitting requirements. Agricultural stormwater discharges do not meet the requirement that discharges be from a "point source." 33 U.S.C. § 1362(14). Because agricultural stormwater discharges are not from "point sources," they cannot meet the definition of "discharge of pollutants." 33 U.S.C. § 1362(12). Without a discharge, EPA has no authority, and there can be no duty to apply for a permit. *Waterkeeper*, 399 F.3d at 504; *Nat'l Pork Producers Council*, 635 F.3d at 753. Therefore, this Court should affirm the district court's decision not to require NPDES permitting for Moon Moo.

IV. EPA AND RIVERWATCHER'S CITIZEN'S SUIT UNDER RCRA WAS PROPERLY DENIED BECAUSE MOON MOO DOES NOT DISPOSE SOLID WASTE AND THERE IS NOT AN IMMENIENT AND SUBSTANTIAL THREAT TO FARMVILLE'S CITIZENS.

The Resource and Conservation and Recovery Act ("RCRA") provides for a citizen action against one "who has contributed or who is contributing to the past or present handling,

storage, treatment, transportation, or disposal of any solid[5] or hazardous waste which may present an imminent and substantial endangerment to health or the environment." Resource Conservation and Recovery Act § 7002(a)(1)(B), 42 U.S.C. § 6972 (2006). Moon Moo's land spreading practices are not considered solid waste under RCRA because it's mixture of manure and acid whey are not discarded waste as it is used for an intended purpose.

Moon Moo's farming operations comply with farming regulations and customs and do not pose an imminent and substantial threat to human health. Courts define a threat as imminent if the endangerment threatens to occur immediately and substantial if the threat is serious. *See Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 486 (1996) ("endangerment can only be 'imminent' if it threaten[s] to occur immediately"); *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 210 (2d Cir. 2009) ("endangerment is substantial if serious"). Moon Moo's fertilizer does not pose an imminent and substantial threat because the mere presence of elevated levels of nitrate, with no causation link to Moon Moo, does not indicate a probable risk of harm to Farmville citizens and the environment.

A. Moon Moo's land application of fertilizer and soil amendment does not constitute as a solid waste under RCRA Subtitle D because it is not discarded waste.

RCRA defines solid waste as any garbage, refuse, sledge and other discarded material; however, the statute is silent on the definition of "other discarded material." 42 U.S.C. § 6903(27). The courts consider discarded material, under the ordinary meaning of the word, as material that is cast aside, abandoned or rejected. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1041 (9th Cir. 2004) ("we consider discard in its ordinary meaning").

[5] Solid waste is defined 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 resulting from industrial, commercial, mining, and agricultural operations . . . ." 42 U.S.C. § 6903(27) (2006).

In *Meyer*, the Ninth Circuit considered cases from its sister Circuit Courts to determine relevant considerations in whether a material is solid waste under RCRA. 373 F.3d at 1041–43. The court concluded that courts must evaluate whether a material is: (1) for beneficial reuse or recycling in a continuous process by the generating industry itself; (2) being actively reused, or merely has the potential of being reused; and (3) being reused by its original owner, as opposed to a salvager or reclaimer. *Id.* at 1043. The court determined that grass residue is not solid waste because it was reused as a fertilizer for defendant's fields, as it had numerous benefits for the crops and land. *Id*. The court also stated that Congress declared agricultural products that could be used as fertilizers from reuse and recycling were not its concern under RCRA. *Id*. at 1045.

Moreover, courts have examined whether the material has a market value and the party's intent of either throwing away the material or using it for a beneficial use. *Oklahoma v. Tyson Foods, Inc.*, No. 05-CV-0329-GKF-PJC, 2010 BL 39823, at *10 (N.D. Okla. Feb. 17, 2010). In *Tyson Foods*, the court was presented with the issue of whether poultry litter was considered solid waste or a fertilizer. *Id*. at *7. The court stressed that the party's intent and whether the material has a market value is not outcome determinative, but are issues to consider. *Id.* at *10. Ultimately, the court held that poultry litter is not solid waste because the farmers valued the poultry litter not just as a fertilizer, but also as a market commodity. *Id.*

Moon Moo's fertilizer is not solid waste because it is used for the purpose of fertilizing its field. Like the defendants in *Meyer*, who used the grass residue to restore beneficial minerals and fertilizers to the field, Moon Moo used the manure and acid whey as a fertilizer because it has beneficial purposes for the Bermuda grass, the same grass that is at issue in *Meyer*. Moreover, the manure and acid whey are not discarded material. Both the acid whey and manure are not "discarded, abandoned, or given up," as they are being reused and recycled in a process

of farming and harvesting. Moon Moo used the manure from its animals and the acid whey for a mixture that is a fertilizer to the Bermuda grass that is dried and harvested each summer as silage. Therefore, it is not discarded material under the ordinary meaning of the word.

Furthermore, Moon Moo values the acid whey because it is accepts and uses it as a fertilizer for its farm. Like the farmers in *Tyson Foods*, who place a value on the poultry litter, Moon Moo also values the acid whey for the benefits it brings to fields. Even though Moon Moo does not pay for the acid whey, Moon Moo still considers the acid whey as valuable because it uses the acid whey in the fertilizing process. Moreover, using the acid whey has been a long standing custom in the industry since the 1940s because of its valued ability in tolerating a wide range of soil pH conditions. Furthermore, Moon Moo does not change any part of the manure or the acid whey, and in this manner it is not "reclaimed."

Even if the fertilizer seeps into the water that flows from the fields, it is still not considered solid waste, because it had an intended purpose. In *No Spray Coal., Inc. v. City of New York*, 252 F.3d 148 (2d Cir. 2001), the court established that material is not discarded until after it is has served its intended purpose. In *No Spray*, the Second Circuit held that pesticides are not discarded when sprayed into the air because they are fulfilling its intended purpose of reaching and killing mosquitoes. *Id*. at 150. The court determined that certain chemical products are not solid waste if its standard method is to be spread on the land. *Id*. ("not solid waste if it is applied to the land and that is their ordinary manner of use").

In *Ecological Rights Found. v. Pac. Gas & Electric Co*., 713 F.3d 502 (9th Cir. 2013), the Ninth Circuit addressed whether wood preservatives that escaped from utility poles that contained certain chemicals were considered solid waste. The court, citing *No Spray*, concluded that wood preservatives that escaped through normal wear and tear were not solid waste. *Id*. at

515. The court reasoned that the wood preservatives have an intended use, and if the preservatives are washed or blown away through natural means "as an expected consequence of the preservative's intended use," it is not discarded waste. *Id*. at 516.

The runoff from the fertilizer is not solid waste because it has an intended purpose. Like the defendants in *No Spray*, whose pesticides that drifted further into the air beyond the intended target, the runoff that drifts off from the fields is not solid waste, as its purpose is to provide nutrients to the field. Moreover, the run off from the fertilizer is like the wood preservatives that fall from the utility poles in *Ecological Rights* because it is a natural consequence of the intended use. The run off is a natural consequence when it is applied during a rainstorm, which is not prohibited. Therefore, because the run off is a natural consequence of applying the fertilizer, which is serving the intended purpose of adding nutrients to the field, it is not solid waste.

Even assuming, *arguendo*, that the land fertilizer is solid waste, the petitioner's open dumping claim would still fail because the petitioners have not introduced evidence that specifically links Moon Moo as the cause of the nitrate advisories. RCRA prohibits open dumping of solid waste and defines open dump as any facility or site that does not meet the guidelines of EPA. Resource and Conservation Recovery Act § 1004(14); 42 U.S.C. § 6903(14) (2006).

In *South Road Assocs. v. IBM*, 216 F.3d 251 (2d Cir. 2000), defendants were sued for violation of an open-dumping claim because of the alleged contamination of groundwater from its chemical wastes storage. The Second Circuit analyzed the relative regulatory statutes and determined that if a facility fails any criteria listed in "*Criteria for Classification of Solid Waste Disposal Facilities and Practices*" then the facility would be in violation of RCRA. *Id*. at 256 (citing 40 C.F.R. § 257 (2014)). However, the court found that the defendants were not in

violation of contaminating the groundwater. *Id*. The court held that the word "contaminate" means to introduce a substance that would cause exceedances. *Id*. Because the plaintiffs failed to show that the defendants introduced substances that caused the exceedances, the court stated the open dumping claim fails. *Id*.

The petitioners have failed to satisfy the burden of proving that Moon Moo's fertilizer has caused exceedances in the Deep Quod River. Like the defendants in *IBM*, whose chemicals could not be tied to the exceedance of certain chemicals in the groundwater, Moon Moo's fertilizer is not the but-for cause for the nitrate advisories. The Deep Quod is a heavily farmed area in which a farming custom is to use acid whey in the fertilizer. In addition, there have been nitrate advisories in the past, before Moon Moo increased its farming operations. This evidence suggests that Moon Moo has not introduced substances that caused the exceedances because the river is know for high levels of nitrate with its location near numerous farms, and experts testified that there is not a causation link to Moon Moo for the high level of nitrate. Therefore, assuming that fertilizer is solid waste, the open dumping claim would still fail.

B. Moon Moo's fertilizer does not pose an imminent and substantial threat because the threat of contamination is neither present nor serious.

To meet the criteria of a citizen suit under RCRA, the plaintiff must not only prove disposal of solid or hazardous waste, but also prove that the waste may present an imminent and substantial endangerment to health or the environment. 42 U.S.C. § 6972(a)(1)(B) (2006). The courts have interpreted the word "may" under the statute to confer expansive authority in defining the degree of risk to support liability under RCRA. *Me. People's Alliance v. Malinckrodt, Inc.*, 471 F.3d 277, 288 (1st Cir. 2006).

The courts have defined endangerment as a "threatened or potential harm," and require "reasonable prospect of future harm." *See Me. People's Alliance*, 471 F.3d at 296. The First

Circuit stated in *Me. People's Alliance* that the combination of 'may' with the word 'endanger' suggests that "a reasonable prospect of future harm is adequate to engage the gears of section 6972(a)(1)(B) so long as the threat is near-term and involves potentially serious harm." *Id*.

An endangerment is imminent if there is a reasonable prospect of future harm. *Cordiano*, 575 F.3d at 210 (citing *Me. People's Alliance*, 471 F.3d at 296). A vague possibility of harm does not satisfy section 6972(a). *See Chem. Weapons Working Grp., Inc. v. U.S. Dep't of Def.*, 61 F. App'x 556, 561 (10th Cir. 2003) (not designated for publication) ([statute] only applies to dangers that are both imminent and substantial). RCRA does not define substantial, but the other circuits have concluded that substantial endangerment is serious endangerment. *Burlington N. & Santa Fe Ry. Co. v. Grant*, 505 F.3d 1013, 1021 (10th Cir. 2007); *Cox v. City of Dallas*, 256 F.3d 281, 300 (5th Cir. 2001). The courts, however, do not quantify the level of the harm. *Me. People's Alliance*, 471 F.3d at 288; *see also Burlington,* 505 F.3d at 1021 (serious endangerment "does not necessitate quantification of endangerment").

1. Moon Moo's disposal of fertilizer is not an imminent threat because it is not the cause of the nitrate advisories.

Moon Moo's disposal of fertilizer is not a reasonable prospect of future harm. In *Cordiano v. Metacon Gun Club, Inc*., 575 F.3d 199, 202 (2d Cir. 2009), the plaintiffs filed a citizen suit under RCRA against defendants alleging that the discharge of lead from bullets at their shooting range posed a imminent and substantial threat. The plaintiffs argued that because the shooting range was located near a river, the discharge from the lead would mix with the river when it flooded which caused an increase of lead contamination. *Id*. at 202–03. The court held that defendant's discharges did not pose an imminent threat because there was a lack of evidence to support a probable risk of harm. *Id*. at 212. The expert report only stated that there was a "degree of potential risk" and never utilized a risk assessment to evaluate the degree of risk. *Id*.

Moon Moo's fertilizer does not provide an imminent threat because there is not a probable risk of harm. Similar to the plaintiff's evidence in *Cordiano*, which only stated that there was a potential risk of harm, the petitioners have not stated the degree of risk that Moon Moo's fertilizer imposes. The agronomist acknowledges that the fertilizer has a low pH, which makes it harder for the nutrients to be broken down, however, this does not pose a probable risk of harm. Moreover, it has been a longstanding practice since the 1940s as a farming custom to use acid whey in the soil conditioner. This suggests that both the farming industry and the State of New Union Department of Agriculture view acid whey soil amendment and its application to not be a threat to citizens and environment as the DOA has approved Moon Moo's NMP and application of the soil conditioner has been used for decades.

Furthermore, the petitioner has failed to show more than the presence of high levels of nitrates. In *City of Fresno v. U.S.*, No. 1:06-CV-1559-OWW-GSA, 2010 BL 147629, at *10 (E.D. Cal. June 30, 2010), the court addressed whether the failure of establishing more than the exceedance of a chemical material was sufficient to prove imminent and substantial endangerment. In *Fresno*, plaintiffs sued the defendants, who were cleaning up an old airport, stating that the presence of 1, 2, 3-trichloropropane (TCP) constituted an imminent and substantial endangerment under RCRA. *Id*. at *9. The court concluded that the plaintiffs had failed to establish the point of disposal and that the city was required "to show more than that TCP exists at or near the OHF field." *Id*. at *10. The court reasoned that the presence of TCP does not automatically translate into a probable risk of imminent endangerment. *Id*. at *11.

The agronomist, Dr. Mae, fails to state how the presence of the fertilizer in the water poses an imminent threat to the citizens and environment. Like the petitioners in *City of Fresno*, who failed to provide specific detail about the exposure of the contaminant in the water, Dr. Mae

has not provided specific detail as to the threat the fertilizer imposes. Petitioners simply rely on tests that show an elevated amount of nitrate. As the court stated in Fresno, this is not enough to show an imminent threat of endangerment. *See City of Fresno*, at *13 ("the mere fact that a plaintiff has produced contaminant samples exceeding non-binding levels does not support a reasonable inference that the contamination presents an imminent and substantial endangerment to health or to the environment").

2. Moon Moo's fertilizer does not pose a substantial threat because the waste is not a serious threat as nitrate advisories have been in affect for many years.

Moon Moo's fertilizer does not pose a substantial threat because there is no evidence to show that the nitrate levels are harming the environment, and the nitrate advisories have been issued for many years with no causation link with Moon Moo. The Third Circuit states that substantial means "having substance" and "not imaginary." *Interfaith Cmty. Org. v. Honeywell Int'l, Inc*., 399 F.3d 248, 259 (3d Cir. 2005) (citing WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 1817 (2d ed. 1983)). In *Interfaith*, the court held that the plaintiffs had provided enough evidence to show that the endangerment was serious. *Id*. at 261–63. The defendants were owners of a site that emitted hexavalent chromium that seeped into the Hackensack River. *Id*. at 252. The court concluded that there was enough evidence that showed substantial endangerment because there were breaches in the plastic liners that held the waste, there was ample evidence that people trespassed around the site and tests showed high mortality rates for organisms living in the river. *Id.* at 262.

Unlike the evidence that illustrates the substantial endangerment the defendant's site presents in *Interfaith*, there is no evidence that shows Moon Moo's fertilizer is an endangerment to Farmville citizens and environment. Moon Moo's farm is surrounded by water and farmland

with “No Trespassing” signs to protect Moon Moo’s property against trespassers, unlike the *Interfaith* defendants’ site where trespassers frequently trespassed on site.

Furthermore, Moon Moo’s fertilizer has not been proven to be linked to the nitrate advisory. In the past few years, there have been nitrate advisories, with some years not having an advisory. These past advisories illustrate that the nitrate levels are not a substantial threat to Farmville citizens. It is understandable to be cautious and recommend for children under two to not drink the water as a precaution, as they do not have strong immune systems like adults. However, it is crucial to note that nitrate advisories are advisory, rather than mandatory. Because the city has continually issued advisories rather than mandatory orders, it appears that Farmville does not view elevated levels of nitrate to be a substantial threat. Therefore, because the nitrate advisories are not caused by Moon Moo and have been used in the past, which suggests the levels are not a threat to the citizens, the fertilizer is not a substantial endangerment to the citizens and environment.

CONCLUSION

For the foregoing reasons, Moon Moo respectfully requests this Court to affirm the judgment of the United States District Court for New Union on all issues addressed.