Team 23

No. 14-1248

In the UNITED STATES
COURT OF APPEALS FOR THE TWELFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiffs-Appellant,

and

DEEP QUOD RIVERWATCHER, INC., *and* DEAN JAMES,

Plaintiffs-Intervenors-Appellants

vs.

MOON MOO FARM, INC.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE STATE OF NEW UNION, THE HONORABLE JUDGE ROMULUS V. REMUS PRESIDING.

Case No. 155-CV-2014

BRIEF OF APPELLEE MOON MOO FARM, INC.

ORAL ARGUMENT REQUESTED

Team 23
Attorneys for Appellee

TABLE OF CONTENTS

TABLE OF AUHTORITIES

Cases

Statutes and Regulations

Rules

United States Consitution

Secondary Sources

Proposed Rules

Other Sources

JURSIDICTION

This case is appealed from the United States District Court for the State of New Union. Plaintiff, The United States of America, brought action against Moon Moo Farm, Inc., for violations under 33 U.S.C. §§ 1311(a), 1319(b), 1342. Plaintiffs-Intervenors Riverwatcher filed suit against Moon Moo Farm, Inc. under 33 U.S.C. § 505 and 42 U.S.C. § 7002. The Acts grant district courts federal question jurisdiction without regard to amount in controversy or diversity. 33 U.S.C. § 1365(a); 42 U.S.C. 6972(a)(2). Plaintiffs filed a timely Notice of Appeal. Fed. R. App. P. 4(a)(1)(A). On April 24, 2013, the district court granted defendant Moon Moo Farm's motion for summary judgment on all counts and denied plaintiffs' motions for summary judgment on the CWA and RCRA claims. The order of the district court is final and this Court has appellate jurisdiction under 28 U.S.C. § 1291 (2012).

STATEMENT OF THE ISSUES

I. Can the Queenchunk Canal be classified as a public trust navigable water of the State of New Union, allowing for a public right of navigation, when Moon Moo Farm has private ownership of the banks on both sides and the bottom of the canal?

II. Is the evidence Mr. James collected during the April 12, 2013 patrol admissible in a civil enforcement proceeding brought under the Clean Water Act §§ 309(b), (d) and 505 if that patrol was conducted through trespass and without a warrant?

III. Does the Clean Water Act National Pollution Discharge Elimination System program require Moon Moo Farm to obtain a permit because either:

(a) It is a contained animal feeding operation (CAFO) subject to NPDES permitting by virtue of a discharge from 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. Under the Resource Conservation and Recovery Act, is Moon Moo Farm subject to a citizen suit because

(a) Its land application of fertilizer and soil amendments constitutes a solid waste subject to regulation under RCRA Subtitle D

AND

(b) Plaintiffs can establish that the mixture constitutes an imminent and substantial endangerment to human health subject to redress un RCRA § 7002(a)(1)(B)?

STATEMENT OF THE CASE

Plaintiff United States (on behalf of the Environmental Protection Agency (EPA)) instituted this action against Moon Moo Farm for civil penalties and injunctive relief for claimed violations under the Federal Water Pollution Action, also known as the Clean Water Act (CWA), 33 U.S.C. §§ 1311(a), 1319(c), (d), 1342. Plaintiffs-Intervenors Riverwatcher, together with Dean James (collectively "Riverwatcher") brought citizen suits against Moon Moo Farm under the CWA § 505 and the Resource Conservation and Recovery Act (RCRA) § 7002 in connection with Moon Moo Farm's land application of a manure/acid whey mixture. Moon Moo Farm counterclaimed for common law trespass against Riverwatcher asserting that Riverwatcher trespassed on its property to collect evidence pursuant to these claims. The district court denied plaintiffs' motions for summary judgment on their CWA and RCRA claims. Moon Moo Farm's motion for summary judgment dismissing the CWA and RCRA claims was granted and its motion for summary judgment on the trespass counterclaim was granted. Plaintiffs United States and Riverwatcher appealed the district court's decision.

STATEMENT OF THE FACTS

Moon Moo Farm (Moon Moo) is being sued under the citizen suit provisions of the CWA and RCRA for conditioning their soil with a longstanding practice traditionally used in its locality. R. at 6-7. Moon Moo operates a small dairy farm outside the City of Farmville (Farmville) in the State of New Union (New Union). R. at 4. Moon Moo is located at a bend in the course of the Deep Quod River (the River) known as the Queenchunk Canal (the Canal). R. at 5. Moon Moo has 350 head of milk cows that it houses in a barn. R. at 4. Through a series of drains and pipes, Moon Moo runs manure and liquid waste from these cows to an outdoor lagoon where it is stored for use as fertilizer on its 150 acres of fields. R. at 4-5. This lagoon is

designed and maintained to contain all the manure produced by these cows without overflowing during a 25-year rainfall event. R. at 5. Moon Moo sells milk to Chokos for its Greek yogurt production, and has increased its head of cows from 150 to the 350 to meet the increased demand for Chokos Greek yogurt. R. at 4. Moon Moo also accepts the acid whey by-product from Chokos's production, which it adds to the manure and applies to their fields as fertilizer. R. at 5. The fields produce Bermuda grass that is dried and harvested for silage. R. at 5.

Moon Moo is regulated by the State of New Union as a "no discharge" animal feeding operation (AFO) because it does not normally have a direct discharge from its manure handling facilities to a water of the state in conditions up to and including the 25-year storm event. R. at 5. In compliance with this delegation, Moon Moo submits a "Nutrient Management Plan" (NMP) to the Farmville Regional Office of the State of New Union Department of Agriculture (DOA). R. at 5. Thus far, Moon Moo's NMP has not been rejected by the DOA. R. at 5. Also, the State has not determined that Moon Moo requires a permit pursuant to the National Pollutant Discharge Elimination System (NPDES) program as the manure containment and application does not discharge directly into a water of the state. R. at 6.

Yet, on April 12, 2013, Dean James, on behalf the Deep Quod Riverwatcher nonprofit organization, made an investigatory patrol of the Canal, ignoring the prominently posted "No Trespassing" sign. R. at 5-6. The man-made Canal was dredged by the previous owner in the 1940s to alleviate flooding from the River. R. at 6. This investigation stemmed from recent complaints that the River smelled of manure and was an unusual color. R. at 6. These complaints resulted in the Farmville Water Authority issuing a nitrate advisory for local drinking water. R. at 6. Once on Moon Moo's private property, Riverwatcher observed and photographed the manure spreading operation Moon Moo disclosed in its NMP. R. at 6. He also

observed discolored water flowing from the fields through a drainage ditch in the Canal, most likely due to the significant storm event Farmville experienced the preceding day. R. at 6. Riverwatcher contends that the samples taken from Moon Moo showed highly elevated levels of nitrate and fecal coliforms. R. at 6.

Upon analyzing the samples, Riverwatcher's expert, Dr. Ella Mae, concluded the combination of manure and acid whey created a weak acidity which prevented the Bermuda grass from effectively taking up the nutrients in the manure. R. at 6. But, Moon Moo's expert, Dr. Emmet Green, explained that Bermuda grass was a crop that tolerated a wide range of acidity conditions. R. at 6. For this reason, this method used by Moon Moo has been a long-standing practice in soil conditioning since the 1940s. R. at 6. Furthermore, heavy farming around the River has required similar advisories of elevated nitrates many times in the past. R. at 7. Even Riverwatcher's expert conceded that while Moon Moo may have contributed to the elevated nitrate levels in the River, it was impossible to state that Moon Moo was the "but for" cause of it. R. at 7.

Relying on this evidence alone, Riverwatcher served Moon Moo, the New Union Department of Environmental Quality, and the Environmental Protection Agency a letter of intent to sue under the citizen suit provisions of the Clean Water Act § 505 and the Resource Conservation and Recovery Act § 7002. R. at 7.

SUMMARY OF THE ARGUMENT

The district court's ruling granting Moon Moo's motion for summary judgment should be affirmed for the following reasons. First, the Canal is not a public trust navigable water of the New Union allowing for public right of navigation because it is not a navigable-in-fact body of water that's use affects interstate commerce. Therefore, it does not necessitate public trust

protection against private interruption or encroachment. The Canal is not a navigable-in-fact water body because it is not susceptible to use in its ordinary condition as a highway for which trade and travel may be conducted. Additionally, the Canal is a man-made canal which does not qualify as a publically navigable waterway because the record indicates that its only transportation use is as a shortcut for the River and not substantial commerce.

Second, the Public Trust Doctrine (the Doctrine) does not apply to the Canal because Moon Moo has private property ownership of the banks on both sides and the bottom of the Canal that is not susceptible to use as a highway of commerce. Thus, the State has no interest in protecting its availability for public use. Because the Canal does not qualify as a public trust navigable water body, the evidence Riverwatcher collected during the April 12th patrol was obtained through trespass and without a warrant. Because evidence used in Administrative proceedings is subject to the Fourth Amendment and this evidence is not entitled to the exclusionary rule, the evidence is inadmissible in civil enforcement proceedings. Since this evidence is required for EPA and Riverwatcher to claim issues of material fact, the granting of Moon Moo's motion for summary judgment was appropriate.

Third, Moon Moo does not require a permit under the CWA NPDES permitting program because it is not a contained animal feeding operation (CAFO). Although Moon Moo meets the CAFO definition's animal count requirement, it does not meet the requirements that pollutants be discharged into water of the United States through a man-made device, nor does the Canal come into direct contact with the animal confinement operation on the farm. Furthermore, it is not subject to NPDES permitting by virtue of the discharge resulting from its manure/acid whey land application practices because it falls under the agricultural stormwater exemption. The discharge in question resulted from a precipitation runoff event and not the landspreading itself.

Finally, Moon Moo is not subject to a citizen suit under RCRA because its land application of fertilizer and soil amendments does not constitute a solid waste under RCRA's Subtitle D as it is not a discarded material. Moreover, Riverwatcher has failed to show that the manure/acid whey mixture constitutes an imminent and substantial endangerment because the higher nitrate levels, while creating an inconvenience for the affected parties, does not create liability under RCRA. For these reasons, this Court should affirm the ruling of the district court.

STANDARD OF REVIEW

The district court for the State of New Union granted Moon Moo's motion for summary judgment, dismissing Plaintiffs' CWA and RCRA claims. The court also granted Moon Moo's motion for summary judgment of its trespass counterclaim. This court reviews the district court's grant of summary judgment *de novo*. *Lefevers v. GAF Fiberglass Corp.*, 667 F.3d 721, 723 (6th Cir. 2012).

ARGUMENT

I. THE QUEENCHUNK CANAL IS NOT A PUBLIC TRUST NAVIGABLE WATER OF THE STATE OF NEW UNION ALLOWING FOR PUBLIC RIGHT OF NAVIGATION BECAUSE IT IS NOT A NAVIGABLE-IN-FACT BODY OF WATER THAT'S USE AFFECTS INTERSTATE COMMERCE; THEREFORE IT DOES NOT NECESSITATE PUBLIC TRUST PROTECTION AGAINST PRIVATE INTERRUPTION OR ENCROACHMENT.

The CWA prohibits unpermitted discharges of pollutants in "navigable waters." The term "navigable waters" is defined to mean "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). Ultimately, the question comes down to what is a "water of the United States" as it pertains to the Act and whether a man-made canal such as the Canal meets such criteria. Riverwatcher argues that the Public Trust Doctrine requires that all navigable waters of the State of New Union must remain open to navigation. However, based on

the available case law, the Canal does not constitute a "water of the United States" and, thus, the April 12, 2013 patrol was a trespass.

A. *The Queenchunk Canal Is Not A Navigable Water Of The United States Because It Is Not A Navigable-In-Fact Water Body Susceptible To Use In Its Ordinary Condition As A Highway For Which Trade And Travel May Be Conducted.*

Historically, Congress' power to regulate navigable bodies of water, or "waters of the United States," stems from its power to regulate commerce. *Gilman v. Philadelphia*, 3 Wall 713, 724-25 (1866); *United States v. Appalachian Power Co.*, 311 U.S. 377, 426-27 (1940). Still, the EPA has very broadly defined "waters of the United States" to not only include those bodies of water subject to interstate commerce, but additionally, "All other waters…the use, degradation or destruction of which could affect interstate or foreign commerce." 40 C.F.R. § 230.3(s)(3).

In determining whether a particular water body is navigable, courts must first consider the purpose for which the concept of navigability is invoked. In 1870, the Supreme Court established the test of navigability-in-fact. *The Daniel Ball*, 10 Wall. 557, 563 (1870). This test is applied to streams in their natural condition and considers whether it is (1) used, or susceptible of being used, (2) in its ordinary condition, (3) as a highway for commerce, (4) over which trade and travel may be conducted, (5) in the customary modes of trade and travel on water. *U.S. v. Cress*, 243 U.S. 316, 323-24 (1917) (citing *The Daniel Ball*, 10 Wall. At 563).

The Court in *The Montello* elaborated on this rule stating "the true test of navigability of a stream does not depend on the mode by which commerce is, or may be, conducted, nor the difficulties attending navigation." *The Montello*, 87 U.S. 430, 441 (1874). It is the capability of the public to use the stream for transportation or commerce and not the extent of the use. *Id*. While the Ninth Circuit has held that tributaries, or streams that flow into larger bodies of water, are considered navigable waters, transportation and commerce are enduring qualifications.

Cmty. Ass'n for Restoration of the Env't v. Henry Bosma Dairy, 305 F.3d 943, 954 (9th Cir. 2002) (citing *Headwaters, Inc. v Talent Irrigation District*, 243 F.3d 526, 533-34 (9th Cir. 2001)). Courts have consistently held that the ability of navigability for the purposes of transportation or commerce is the controlling factor, not the actual use. *Econ. Light & Power Co. v. United States*, 256 U.S. 113, 122 (1921); *United State v. Utah*, 283 U.S. 64, 83 (1931). However, this notion has been qualified by requiring that a "practical and beneficial use in commerce" over and above transportation during irregular periods is more essential for establishing navigability. *Oklahoma v. Texas*, 258 U.S. 574, 591 (1922).

In *Kaiser Aetna*, the Supreme Court elaborated further on the test for navigability by establishing four factors: (1) whether the waterway was navigable in its natural state and comparable to the major natural bodies to which the servitude has been applied; (2) whether the waterway was located on private property; (3) whether the waterway became navigable through the investment of private funds, and (4) whether the Army Corps of Engineers consented to the improvement affected navigability. *Kaiser Aetna v. United States*, 444 U.S. 164, 178-79 (1979). In *Kaiser Aetna*, the petitioners dredged and improved a pond. The government argued that this improvement transformed the formally private land into navigable water of the United States and thus, the public acquired a right to use the pond for navigation. *Id*. at 170. However, the Court explained that while a body of water, once altered, subjects it to certain regulations, it does not automatically become subject to public right of access. *Id*. at172-73. The pond's size made it "incapable of being used as a continuous highway for the purpose of navigation in interstate commerce." *Id*. at 178. The Court concluded that although the dredged area became subject to certain federal regulations, the government would have to pay just compensation to petitioners for the continual public navigation of the body of water. *Id*. at 181. Ultimately, the nature of the

pond was not the sort of "great navigable stream" the Court had previously recognized as being "incapable of private ownership." *Id*. at 179 (citing *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 69 (1913); *United States v. Twin City Power Co.*, 350 U.S. 222, 261 (1956)). The *Kaiser Aetna* test is the appropriate test when determining the navigability of a private, man-made water body. *Vaughn v. Vermilion Corp.*, 444 U.S. 206, 207 (1979).

In the present case, the previous farm owner excavated the Canal to serve as a bypass canal in the River to alleviate flooding at the River bend. The River itself is only navigable by a small boat, though qualifies as a navigable-in-fact interstate body of water used for commercial navigation. Applying the *Daniel Ball* navigability-in-fact test, the Canal does not qualify as a navigable-in-fact body of water. The Canal is not used, or susceptible of being used in its ordinary condition as a highway for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. The Canal is only navigable by a canoe or other small boat. While it is commonly used as a shortcut up and down the River, it is not used in this manner as a highway for commerce to conduct travel or trade. It is the River that holds this classification.

As the Court in *Vaughn* held, application of the *Kaiser Aetna* test is appropriate when determining the navigability of a man-made canal like the Queenchunk. The record is silent regarding exactly how the Canal's dredging was funded or if the Corps was involved. Still, Moon Moo holds private property interest in the land surrounding and beneath the Canal. The fact that it can be navigated does not make it inherently navigable. As the court of appeals of Louisiana analogized, even if navigable-in-fact, a privately owned canal is not necessarily subject to public use in the same way a private road is not subject to public use simply because commercial traffic may use it. *Nat'l Audubon Soc'y v. White*, 302 So.2d 660, 667 (La. Ct. App.

1974) (citing Yiannopoulos, 2 Louisiana Civil Law Treatise, § 31.5). The Canal, based on its depth and width, is not capable of being used as a continuous highway for the purposes of interstate commerce. As the record shows, its only function in terms of transportation is as a shortcut from the River for small canoes and boats. As the case law discusses, this is not the sort of navigability the government has an interest in protecting for public use.

B. *The Public Trust Doctrine Does Not Give The Public A Right To Navigation Of The Queenchunk Canal Because The Canal Is Private Property That Is Not Susceptible To Use As A Highway Of Commerce.*

The Public Trust Doctrine (the Doctrine) is an ancient principle that the public has a right to navigation in waters subject to the ebb and flow of the tide. *Arnold v. Mundy*, 6 N.J.L. 1, 12 (1821). The Doctrine originally applied to tide waters only, but subsequent analysis has determined that the traditional "ebb and flow test" does not adequately meet the Doctrine's ultimate purpose of protecting commerce. *The Daniel Ball*, 10 Wall. At 563. The Supreme Court expanded the Doctrine's use to include most navigable waters reasoning "public authorities ought to have entire control of the great passageways of commerce and navigation, to be exercised for the public advantage and convenience." *Barney v. Keukuk*, 94 U.S. 324, 337-38 (1877). Furthermore, the Doctrine "is founded upon the necessity of preserving the public use of navigable water from private interruption and encroachment." *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 436 (1892). However, while the Doctrine has applied to uses other than transportation, it does not apply to every waterway that "can be used for fishing or for land reclamation." *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 488 (1988).

In *Cress*, the Court determined that the public right to navigation is measured by:

> (1) the capacity of the stream for valuable public use in its natural condition; (2) the right of riparian owners to enjoyment of the natural flow without burden or hindrance imposed by artificial means; and (3) no public easement beyond the natural one can arise without grant or dedication, save by condemnation, with appropriate compensation for the private right.

United States v. Cress, 243 U.S. 316, 321-22 (1917). The *Cress* Court goes on to cite six cases that establish private ownership is subject to the public right of navigation and any governmental control or regulations necessary to ensure that right.[1] *Id*. at 321. However, several cases have discussed the limitation of the public right of navigation to streams in their natural state. *Packer v. Bird*, 137 U.S. 661, 667 (1891) (the susceptibility to use as highways of commerce which gives sanction to the public right of control over navigation upon them, and consequently to the exclusion of private ownership.); *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690 (1899) (in order to give it the character of a navigable stream, it must be generally and commonly useful to some purpose of trade or agriculture.); *Leovy v. United States*, 177 U.S. 621, 631 (1900) (the term "navigable water of the United States" refers to commerce of a substantial and permanent nature.).

Under the *Cress* test, the Canal is not subject to the public right of navigation. The Court recognized that, strictly speaking, most bodies of water would not pass the first prong as most contain some sort of obstruction diminishing its value to the public. However, in this case, the Canal is only reachable by small canoes or boats. As the *Leovy* Court explained, the commerce

---

[1] *Scranton v. Wheeler*, 179 U.S. 141, 163 (1900); *Philadelphia Co. v. Stimson*, 223 U.S. 605, 634 (1912); *United States v. Chandler-Dubnar Water Power Co.*, 229 U.S. 53, 62 (1913); *Lewis Blue Point Oyster Cultinvation Co. v. Briggs*, 229 U.S. 82, 85 (1913); *Greenleaf-Johnson Limber Co. v. Garrison*, 237 U.S. 251, 268 (1915); *Willink v. United States*, 240 U.S. 572, 580 (1916).

must be of a substantial and permanent nature. It is unlikely that any substantial or permanent commerce can take place under such conditions.

Concerning the second prong, Moon Moo rights extend beyond traditional riparian rights, or the rights afforded landowners whose property borders a body of water or watercourse. Black's Law Dictionary 1352 (8th ed. 2004). Moon Moo has actual private property rights to the land alongside and underneath the canal. This interest existed before the Canal was dredged in the 1940s. If riparian rights should be considered when determining a possible public right of navigation, certainly personal property ownership should be afforded special consideration. Moon Moo would be subject to constant trespass on their property if the Canal was subject to public trust navigability. The Canal was initially dredged to alleviate flooding in the bend. It is unclear if such constant use of the Canal would hinder its overall purpose, thus placing a burden on Moon Moo's enjoyment of the natural flow.

Finally, based on the outcomes of the first two prongs and before the Canal can be opened up for public use, Moon Moo would be entitled to compensation. The nature of this Canal is not the sort the Doctrine was intended to protect for public use. It is not a means of substantial or permanent transportation pursuant to the government's right to regulate commerce. As the Supreme Court has explained, the Doctrine does not apply to every body of water that happens to be navigable. While small canoes and boats are able to use the Canal as a shortcut, this is not actively pertinent to interstate commerce and therefore the government has no interest in protecting its use for public trust navigability.

According to the *Cress* test, the Doctrine does not give the public a right to navigation of the Canal because the land alongside and underneath the Canal is private property that is not susceptible to use as a highway of commerce. The Canal cannot sustain transportation of the sort

necessary for substantial commerce activities. As such, the government has no interest in preserving the Canal from private interruption or encroachment. Ultimately, affording a public right of navigation would not regulate commerce, but allow for groups like Riverwatcher to enter upon Moon Moo's land for the purpose of collecting evidence to be used against Moon Moo in civil proceedings. This is not the kind of activity Congress is constitutionally allowed to regulate; nor is it the kind of public use the Doctrine was expanded to include.

II. THE EVIDENCE COLLECTED PURSUANT TO THE ALLEGED CWA VIOLATIONS WAS OBTAINED THROUGH TRESPASS AND WITHOUT A WARRANT BECAUSE THE QUEENCHUNK CANAL IS NOT A PUBLIC TRUST NAVIGABLE WATER. THEREFORE IT IS INADMISSIBLE IN A CIVIL ENFORCEMENT PROCEEDING.

The evidence collected by Riverwatcher during the April 12, 2013 visit was obtained without a warrant and through Mr. James' trespass. Therefore, the evidence is excluded from use during these civil proceedings. EPA, seeking to use such evidence, argues that the exclusionary rule applies only to criminal, and not civil, proceedings. However, both the Fifth and Sixth Circuits have held that governmental agencies are subject to the Fourth Amendment in both criminal and civil proceedings. *Trinity Indus, Inc. v. OSHRC*, 16 F.3d 1455, 1462 (6th Cir. 1994); *Smith Steel Casting Co. v. Brock*, 800 F.2d 1329, 1334 (5th Cir. 1986).

The Fourth Amendment protects against unreasonable searches and seizures and, generally, requires a warrant based on probable cause. U.S. Const. amend IV. The Sixth Circuit determined that warrants were required for administrative inspections conducted by the Occupational Safety and Health Administration (OSHA). *Trinity Indus, Inc.*, 16 F.3d at 1460 (citing *Marshall v. Barlow's Inc.*, 436 U.S. 307, 324 (1978)). The court went on to affirm that such warrants would require "specific evidence of an existing violation" or a showing that

"reasonable legislative or administrative standards for conducting an…inspection are satisfied." *Trinity Indus, Inc.*, 16 F.3d at 1460 (citing *Marshall*, 436 U.S. at 320).

Applying the Sixth Circuit's analysis to the present case, the evidence obtained is inadmissible in a civil proceeding because it was procured without a warrant containing the specific evidence being sought or a showing that reasonable administrative standards for conducting the inspection were satisfied. To obtain the evidence, a civilian, without notice to Moon Moo and ignoring prominently posted "No Trespassing" signs, took photographs of Moon Moo's activities and collected water samples from the ditch. While a citizen has the right under the statute to bring a suit alleging CWA violations, there is no precedent allowing that citizen to bypass agency standards and collect evidence through trespass. Furthermore, it is improper for the EPA to rely on this evidence in administrative proceedings. In this case, a more reasonable method would have been for Riverwatcher to inform the EPA of the suspected violations. Then, the EPA could conduct a search satisfying reasonable administrative standards for inspections of that nature pursuant to such allegations.

The Fifth Circuit has elaborated on the Fourth Amendment's application to civil proceedings holding that in OSHA violation cases, the exclusionary rule applies when assessing penalties for past violations, but not to prevent the correction of current violations. *Smith Steel Casting Co.*, 800 F.2d at 1334. In reaching this holding, the court relied on Justice O'Connor's rational in *I.N.S. v. Lopez-Mendoza* where she argued that the exclusionary rule should not be invoked in situations where the cost of losing such evidence allows the criminal action to continue. *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 1046-47 (1984). As Justice O'Connor explains, "The constable's blunder may allow the criminal to go free, but we have never suggested that it allows the criminal to continue in the commission of an ongoing crime." *Id.*

While the EPA and Riverwatcher could argue that the alleged discharge from Moon Moo qualifies as the type of ongoing activity Justice O'Connor considered exempt from the exclusionary rule, there are distinct differences to consider. In the hypothetical situations posed in *I.N.S.*, the only way to stop the dumping of hazardous waste would be to rely on the evidence illegally seized. Public policy and the goals of the governing statute would require invoking the exclusionary rule and relying on illegally seized evidence to prevent catastrophic consequences. In the present case, as discussed above, there is a much more reasonable method for obtaining this evidence that is still available to both Riverwatcher and the EPA. Additionally, as the record shows, the elevated nitrate levels, that Riverwatcher and EPA allege are caused by Moon Moo's landspreading practices, pose only minor risks to affected parties. This is not the calamitous conjecture of corporations dumping hazardous waste into the drinking supply Justice O'Connor was concerned about. Therefore, the exclusionary rule should not apply to this evidence obtained through trespass.

The primary function of the CWA's citizen suit provision is to allow private citizens to assist in enforcement efforts when federal and state authorities are unwilling to act. *McAbee v. City of Fort Payne*, 318 F.3d 1248, 1252 (11th Cir. 2003). It is not, however, a means for circumventing the Fourth Amendment by enlisting private citizens to obtain evidence through warrantless trespasses. Applying the analysis of both the Fifth and Sixth Circuits, the evidence obtained through Riverwatcher's trespass should not be admissible in this civil proceeding. Since going forward with the suit would require this evidence, neither EPA nor Riverwatcher could continue with their claims alleging CWA violations. Therefore, appellants have failed to present a genuine issue of material fact and the summary judgment granted by the district court was proper.

III. MOON MOO FARM DOES NOT REQUIRE A PERMIT UNDER THE CWA NPDES PERMITTING PROGRAM BECAUSE IT IS NOT A CAFO SUBJECT TO NPDES PERMITTING BY VIRTUE OF A DISCHARGE FROM ITS MANURE LAND APPLICATION AREA. FURTHERMORE, MOON MOO IS NOT REMOVED FROM THE AGRICULTURAL STORMWATER EXEMPTION BECAUSE THE DISCHARGE WAS THE RESULT OF PRECIPITATION RUNOFF AND NOT THE APPLICATION OF THE MANURE/ACID WHEY MIXTURE TO ITS FIELDS.

The addition of a pollutant from a point source into the waters of the United States requires a NPDES permit under the CWA. 33 U.S.C. § 1342 (2012). All parties in this case agree that the manure/acid whey mixture Moon Moo spreads on its fields for fertilizer contains pollutants in the form of "nitrate, a chemical waste, and fecal coliforms, as well as suspended solids." R. at 7. The EPA asserts Moon Moo falls within the definition of a "medium CAFO" but that its application of manure complies with the nutrient management plan (NMP) which exempts it from NPDES permitting requirements as agricultural stormwater. However, Riverwatcher asserts that Moon Moo is subject to NPDES permitting liability as a medium CAFO. First, it must be established whether Moon Moo can be characterized as a point source under the statute and, thus, subject to NPDES permitting liability.

The CWA defines a "point source" as:

> Any discernible, confined and discrete conveyance, including but not limited to any pipe, ***ditch***, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, ***concentrated animal feeding operation***, or vessel or other floating craft, from which pollutants are or may be discharged. This term ***does not include agricultural stormwater discharges*** and return flows from irrigated agriculture.

33 U.S.C. § 1362(14) (2012). This definition resulted from Congress' 1987 amendments to the CWA. Determining whether Moon Moo is subject to permitting requirements under the NPDES program requires two considerations: (1) whether Moon Moo is classified as a CAFO, and therefore a point source, and (2) whether the landspreading, a point source or not, qualifies as a agricultural stormwater exemption.

A. *Moon Moo Farm Is Not A CAFO Under The CWA Because The Pollutants Are Not Discharged Into Waters of The United States Through A Man-Made Device Nor Does The Canal Come Into Direct Contact With The Animals Confined On The Farm.*

Strictly speaking, the discharge of pollutants into navigable waters is prohibited by the CWA. 33 U.S.C. § 1311 (2012). However, the NPDES permitting program allows facilities to be declared point sources, which may discharge pollutants within set parameters called effluent limitations. 33. U.S.C. § 1342, 1362(14). In this case, the EPA and Riverwatcher contend that Moon Moo is a CAFO and subject to NPDES permitting requirements.

A CAFO is defined as a facility where "animals are stabled or confined and fed or maintained for a total of 45 days or more in any 12 month-period and crops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility." 40 C.F.R. 122.23(1)(b)(i)-(ii). EPA and Riverwatcher contend that Moon Moo is a medium CAFO meaning that the type of animal it stables or confines "falls within the range of 200-699 mature dairy cows, whether milked or dry." 40 C.F.R. 122.23(1)(b)(6)(i)(A). While Moon Moo falls under this definition with a milking heard of 350 cows, it still does not qualify as a CAFO. In 2008, the EPA published a proposed rule that required the owner or operator of a CAFO to submit a NPDES permit request only if it "discharges or proposes to discharge pollutants." 73 Fed. Reg. 70, 418 (Nov. 20, 2008). Because Moon Moo is classified as a "no-discharge" operation under New Union's NMP, it falls under the 2008 Rule's exemptions for a NPDES permit.

Even if New Union's classification of a no-discharge operation under its NMP is found to be inconsistent with the CWA's guidelines, Moon Moo still falls outside the definition of a CAFO. The Code of Federal Regulations also places two additional conditions on the classification of a medium CAFO. 40 C.F.R. § 122.23(b)(6)(ii). In addition to the animal count

requirements, a medium CAFO must also (1) discharge pollutants into waters of the United States through a man-made device or (2) discharge pollutants directly into waters of the United States which "originate outside of and pass over, across, or through the facility or otherwise come into direct contact with the animals confined in the operation." 40 C.F.R. § 122.23(b)(6)(ii).

No party claims that any waters of the United States "pass over, across, or through" Moon Moo's production area. There are two issues in asserting that the pollutants are discharged into the waters of the United States through a man-made device. First, as previously discussed, the Canal does not constitute a water of the United States. Second, even if the Canal was classified as a water of the United States, the only evidence presented of discharge through a man-made device is available from photographs taken during a trespass. As previously discussed, that evidence would be inadmissible in civil proceedings. Since the CWA empowers the EPA to regulate the discharge of pollutants, and not the point sources themselves, evidence of a discharge would be required. *S.D. Warren Co. v. Maine Bd. Of Envtl. Protection*, 547 U.S. 370, 380-81 (2006); *Natural Res. Def. Council, Inc. v. EPA*, 859 F.2d 156, 194 (D.C. Cir. 1988). The EPA does not have authority over the CAFO itself, as it is not considered a point source until there is a nonexempt discharge. *Serv. Oil Inc., v. EPA*, 590 F3d 545, 550 (8th Cir. 2009). There is no violation of the CWA until there is an actual discharge. *Nat'l Pork Producers Council v. U.S. E.P.A.*, 635 F.3d 738, 751 (2011); *Waterkeeper Alliance, Inc. v. U.S. E.P.A.*, 399 F.3d 486, 504 (2nd Cir. 2005). While Moon Moo contends that the Canal is not a water of the United States, even if it classified as such, there is no admissible evidence that the pollutant was discharged through a man-made device.

Moon Moo contends that its farm cannot be classified as a CAFO for the above-mentioned reasons. However, even if Moon Moo Farm is characterized as a CAFO, it is still exempt from the NPDES permitting requirements because the pollutants that it discharges falls under the agricultural stormwater exemption.

B. *The Discharge From Moon Moo Farm Is The Result of Runoff Caused By A Precipitation Event And Not The Landspreading Practice Itself Which Qualifies It As An Agricultural Stormwater Exemption Under The CWA.*

While neither Congress nor the EPA have defined "agricultural stormwater," courts have provided guidance on how it should be defined. Both the Fourth and Second Circuits have determined that "agricultural" and "stormwater" should be given their ordinary meaning. *Alt v. U.S. E.P.A.*, 979 F. Supp. 2d 701, 710-11 (N. D. W. Va. 2013) (citing *BP v. Burton*, 549 U.S. 84, 91 (2006); *Perrin v. United States*, 444 U.S. 37, 42 (1979)). The Fourth Circuit applied two principles of statutory construction, "plain English and common sense." *Kofa v. U.S. INS*, 60 F.3d 1084, 1088-89 (4th Cir. 1995) (citing *First United Methodist Church v. United States Gypsum Co.*, 882 F.2d 862, 869 (4th Cir. 1989); *Sutton v. United States*, 819 F.2d 1289, 1292 (5th Cir. 1987)). Using these same principles, the Second Circuit determined the plain meaning of "agriculture" was the "work of cultivating the soil, producing crops, and raising livestock." *Waterkeeper Alliance, Inc.*, 399 F.3d at 509 (citing Webster's New World Dictionary of American English 26 (3rd College Ed. 1988)). The Second Circuit also agreed with the EPA that "stormwater" should mean "precipitation-related discharges." *Id*. at 508. Relying simply on the common sense meaning of "agricultural stormwater," Moon Moo is entitled to this exemption to the NPDES permitting requirements. There can be no dispute Moon Moo is engaged in agriculture since it raises livestock. Moreover, the record offers no evidence that the discharge resulted from the application of the manure/acid whey mixture, but from runoff created from

precipitation. Other courts have spoken on such occurrences and have determined that an operation like Moon Moo's should be exempt from the NPDES permitting program.

The Second Circuit has determined that liquid manure spreading on large dairy farms is a point source discharge when it results in pollution. *Concerned Area Residents for the Env't v. Southview Farm*, 34 F.3d 114, 118 (2nd Cir. 1994). However, when the pollution is a result of precipitation flowing naturally into the water body, these operations were no longer point sources. *Id*. at 121. In that case, a citizen suit was brought against a dairy farm pursuant to its manure landspreading practices. *Id*. at 114. The manure had discharged into surrounding surface waters, during both dry and rainy conditions. *Id*. at 117-18. The court examined the legislative history surrounding the then new agricultural stormwater exemption and determined that Congress intended such instances to be exempt from NPDES permitting requirements. *Id*. at 117-18. The court ultimately elaborated on the distinction created by this exemption stating, "A discharge of liquid manure would not be exempt just because it happened to be raining at the time, but a discharge of such manure caused by precipitation would be exempt." *Id*. at 121.

In the present case, neither the EPA nor Riverwatcher has presented evidence that the discharge was the result of Moon Moo's landspreading of the manure/acid whey mixture. In contrast, Riverwatcher's expert opined that the nutrients were released into the environment through runoff during rain events. As Moon Moo's expert pointed out, there is nothing in the State approved NMP that prevents Moon Moo from landspreading the manure/acid whey mixture during a rain event. In any case, the runoff is caused by naturally flowing precipitation and therefore exempt from NPDES permitting requirements.

Additionally, the Eleventh Circuit expanded the exemption stating that the language of the statute does not indicate that stormwater can only result from naturally flowing precipitation.

Fishermen Against the Destruction of the Env't v. Closter Farms, Inc., 300 F.3d 1294, 1297 (11th Cir. 2002). In that case, although the polluted water was pumped into the adjoining lake, the water originated as rainfall and, thus, the discharge was a result of precipitation and constituted agricultural stormwater. *Id*. Again, as Riverwatcher's expert concedes, the runoff was the result of rain events. If actively pumping polluted rainwater is exempt, as the Eleventh Circuit determined, than the naturally flowing runoff from Moon Moo's farm should be exempt as well.

Riverwatcher also contends Moon Moo's practices fall under regulations which specifically include discharges from landspreading of manure in the NPDES permitting requirements. 40 C.F.R. § 122.23©; R. at 9. However, Moon Moo's manure application field does not remove it from the agricultural stormwater exemption because that application is in compliance with a nutrient management plan (NMP) which exempts it from NPDES permitting as agricultural stormwater. The EPA's 2008 rule requires that "a permit issued to a CAFO must include a requirement…to develop and implement" an NMP. 73 Fed. Reg. at 70, 437. New Union, working under NPDES permitting delegated authority, requires an NMP and Moon Moo is in compliance with this requirement. Even if the land application constitutes a point source, under the permitting system implemented by New Union, Moon Moo is still exempt from NPDES permitting requirements.

Moon Moo Farm does not require a permit under the CWA NPDES permitting program because it is not a CAFO subject to such permitting by virtue of a discharge from its manure land application. While it does meet the livestock requirements, it does not meet the requirement that the discharge pass into a water of the United States through a man-made ditch. Furthermore, Moon Moo is not removed from the agricultural stormwater exemption because the discharge

was the result of precipitation runoff and not the land application of the manure/acid whey mixture.

IV . MOON MOO FARMS IS NOT SUBJECT TO A CITIZEN SUIT UNDER RCRA BECAUSE ITS LAND APPLICATION OF FERTILIZER AND SOIL AMENDMENT DOES NOT CONSTITUTE A SOLID WASTE AND DOES NOT POSE AN IMMINENT AND SUBSTANTIAL ENDANGERMENT TO HUMAN HEALTH.

Riverwatcher, alone, makes a claim, in the alternative, that even if Moon Moo has not violated the CWA, it has violated the Resource Conservation and Recovery Act (RCRA). RCRA amended the Solid Waste Disposal Act in 1976. Riverwatcher asserts that Moon Moo's land application practices constitute the disposal of a non-hazardous solid waste in a manner contrary to national sanitary landfill guidelines established by the EPA. However, manure used as a fertilizer or soil amendment does not constitute "solid waste" under RCRA. Even after the addition of acid whey from the factory, the mixture still does not constitute "solid waste" because of the method used to apply it to the land as fertilizer.

A. *Moon Moo's Land Application of Fertilizer And Soil Amendment Is Not A Solid Waste Because It Is Not A Discarded Material, But The Land Application Of An Agricultural Operation. Therefore, Both Riverwatcher's Open Dumping Claim And Sanitary Landfill Requirement Claim Must Fail.*

RCRA defines "solid waste" as "any garbage, refuse, sludge … and other discarded material, including… liquid … material resulting from … agricultural operations ...." 42 U.S.C. § 6903(27). In order to determine whether a material constitutes a solid waste, it is important to interpret what Congress meant when using the terms "discarded" and "agricultural operations." In construing statutory meaning, courts must "give effect to the intent of Congress." *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 542 (1940). The canons of statutory construction require that an analysis begin with the "plain and unambiguous meaning" of the language in the

statute. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997); *Wilderness Soc'y v. U.S. Fish & Wildlife Serv.*, 353 F.3d 1051, 1060 (9th Cir. 2003). Traditionally, if no definition is provided by the organic statute, it is construed by its "ordinary or natural meaning." *Bonnichsen v. United States*, 367 F.3d 864, 875 (9th Cir. 2004). If, after application of the traditional tools of statutory construction, it can be understood in two or more reasonable ways, it is considered ambiguous under the first step of the *Chevron* test. *Chickasaw Nations v. United States*, 534 U.S. 84, 90 (2001) (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984)).

To determine if Moon Moo's practices fall under the definition of "solid waste" provided in the statute itself, it must be discerned if liquid manure mixed with acid whey is a discarded material resulting from agricultural operations. Since the word "discarded" is not defined in the statute, the analysis continues with its plain meaning. The "ordinary or natural meaning" of discarded is "to throw (something) away because it is useless or unwanted." *Bonnichsen*, 367 F.3d at 875; Merriam-Webster Dictionary (11th ed, 2003). The Ninth Circuit has relied on the Oxford Dictionary's definition of "discarded" as to "cast aside; reject; abandon; give up." *Safe Air For Everyone v. Meyer*, 373 F.3d 1035, 1041 (9th Cir. 2004). Additionally, the EPA defined "discarded" material to be any material, which is abandoned, recycled, or inherently waste-like. 40 C.F.R. § 261.2(a)(2)(i). The C.F.R. also states that, "materials are solid wastes if they are 'abandoned' by being 'disposed' of." 40 C.F.R. § 261.2(b); *Zands v. Nelson*, 779 F. Supp. 1254, 1261-62 (S.D. Cal. 1991).

In addition to the plain meaning of the language used in the statute, courts have also applied factors such as the material's market value, any beneficial use it may have, and if there was an intent to dispose of the material, when determining if the material has been discarded. *Id.* at 1262 (gasoline that has leaked and contaminated the ground cannot be re-used or recycled and

has been abandoned); *Craig Lyle Ltd. P'ship v. Land O'Lakes*, 877 F. Supp 476, 482 (D. Minn. 1995) (although once useful, after gasoline leaks into soil or groundwater it ceases to be useful).

Moon Moo is using the liquid manure/whey acid mixture as a fertilizer. While Riverwatcher asserts the action of spreading this manure/whey acid mixture on Moon Moo's land constitutes the discarding of solid waste as defined in the statute, that is not the case. The manure is used for an intended purpose and thus is not discarded. Moon Moo is taking the manure and whey acid, both useful materials independently, mixing them together, and applying that mixture to the land as fertilizer. Nothing in this chain of events can be construed as casting aside, abandoning, or rejecting these materials. The mixture has value, a beneficial use and an intended purpose as a fertilizer. Since the manure is not discarded, it cannot be classified as "solid waste" based on RCRA's statutory definition of "solid waste" as "discarded material."

i. Riverwatcher's open dumping claim must fail because the statute specifically excludes land application of agricultural products.

RCRA § 4005 prohibits the "open dumping of solid waste." 42 U.S.C. § 6945(a). An "open dump" is defined as "any facility or site where solid waste is disposed of which is not a sanitary landfill." 42 U.S.C. § 6903(14). Riverwatcher, alone, contends the manure/acid whey mixture constitutes a solid waste and Moon Moo's application of the mixture to open fields violates EPA guidelines prohibiting (1) the application of solid wastes to floodplains, 40 C.F.R. § 257.3-1 (2013), (2) application of solid wastes in a manner that may contaminate groundwater, 40 C.F.R. § 257.3-4, and (3) application of solid wastes with a pH below 6.5 to food chain crop areas, 40 C.F.R. § 257.3-5. Even if the mixture is found to be a solid waste, Riverwatcher cannot prove that Moon Moo violated any of the listed regulations. Even if the "ordinary or natural meaning" of "discarded" does not clearly establish the manure/acid whey mixture's status as an

exception, Moon Moo Farm's usage of the mixture would still exclude it from RCRA for the following reasons.

First, Moon Moo has not violated EPA guidelines regarding the application of solid wastes to floodplains. According to the Code of Federal Regulations, "Facilities or practices in floodplains shall not…result in the washout of solid waste, so as to pose a hazard to human life, wildlife, or land or water resources." 40. C.F.R. § 257.3-1(a). While the geographical layout of the farm may constitute a floodplain due to its proximity to the Canal, Riverwatcher has not established that any potential runoff poses such a hazard. Furthermore, the mixture being applied as fertilizer does not constitute a solid waste under the statute. The application classifies as an "agricultural operation" and qualifies for further exemptions.

Second, Moon Moo has not violated EPA guidelines regarding the application of solid waste in a manner that may contaminate groundwater. According to the regulation, "A facility or practice shall not contaminate an underground drinking water source beyond the solid waste boundary or beyond an alternative boundary specified in accordance with paragraph (b) of this section." 40 C.F.R. § 257.3-4(a). Once again, the manure/whey acid mixture does not constitute a solid waste under the statute. Furthermore, there is no evidence in the record to suggest that the mixture, even if classified as a solid waste, contaminated an underground source of drinking water. While there was evidence of higher nitrate levels in the Canal, this body of water does not constitute ground water per the definition in the regulation. 40 C.F.R. § 257.3-4(c)(3) (water below the land surface in the zone of saturation).

Finally, Riverwatcher has not shown Moon Moo violated EPA guidelines regarding the application of solid waste with a pH below 6.5 to food chain crops. Once again, it should be reiterated that the mixture does not constitute a solid waste under the statute. Nevertheless, even

if it were assumed the mixture constituted a solid, this regulation still would not apply to Moon Moo. While the samples taken of the mixture itself produced a pH of 6.1, there is no evidence in the record to determine what the pH was at the time the crop was planted per the regulation. 40 C.F.R. § 257.3-5(a)(2)(ii).

Ultimately, the regulations Riverwatcher alleges Moon Moo violated do not apply to Moon Moo's activities. The discussion of Moon Moo's possible RCRA violations do not center on whether its land application violates the aforementioned regulations, but whether the mixture being applied constitutes a solid waste at all, and whether the land application constitutes an agricultural operation. An examination of the language of the statute itself concludes both that the manure/acid whey mixture does not constitute a solid waste and the application of the mixture as fertilizer constitutes an exempted "agricultural operation" under the statute.

ii. Agricultural operations are exempt from RCRA's definition of solid waste and any sanitary landfill requirements.

The EPA has consistently excluded land applications classified as "agricultural operations" from RCRA's definition of solid waste. Under RCRA, solid waste must be disposed of in "sanitary landfills." The disposal of solid waste in any other manner constitutes open dumping which is prohibited under the statute. However, since Moon Moo is not disposing of the mixture, it should be classified as a land application of an agricultural product and not a disposal of solid waste.

Under RCRA, the EPA has excluded, "agricultural wastes, including manures, returned to the soil as fertilizers or soil conditioners." 43 Fed. Reg. 4942, 4943 (Feb. 6, 1978). In other words, land spreading of the manure/acid whey mixture as a fertilizer is not an illegal "open dump" under RCRA because the mixture is not classified as a solid waste under the statute.

Additionally, EPA has specifically cited Congress' view that "agricultural wastes which are returned to the soil as fertilizers or soil conditioners are not considered discarded materials." *Safe Air For Everyone*, 373 F.3d at 1045.

The EPA has continually upheld this interpretation that agricultural wastes returned to the soil as fertilizers or soil amendments are not discarded materials. As the Supreme Court explained, when an agency re-authorizes a statute, it is presumed that Congress was aware of any agency interpretations pertaining to that statute. *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978). When Congress re-authorized RCRA in 1984, it did not amend the definition of solid waste, nor did it mention the exclusions of agricultural waste that was returned to the soil as fertilizer. This suggests that Congress intended those definitions and exclusions to be applied consistently with previous EPA interpretations.

Riverwatcher's open dumping claim must fail because agricultural waste such as the manure/acid whey mixture used by Moon Moo Farm is not a solid waste, thus, it does not have to be disposed of in a "sanitary landfill" in accordance with the statute. Moon Moo is mixing two useful products together, in accordance with industry standards, to create fertilizer for Bermuda grass located on the Farm for its benefit. Since Moon Moo is utilizing the mixture in an agricultural operation and not merely disposing of it, such application does not have to conform to the "sanitary landfill" requirements of RCRA. It is proper for Moon Moo to apply the mixture in its fields as beneficial fertilizer as this action is excluded from RCRA.

B. *Riverwatcher Cannot Establish That The Mixture Constitutes An Imminent And Substantial Endangerment To Human Health Subject To Redress Under RCRA Because The Elevated Nitrate Levels Do Not Pose An Immediate Risk Of Harm To The Citizens Of Farmville.*

RCRA contains two provisions that could require responsible parties to clean up potential contamination regardless of how the waste is classified. Section 7002(a)(1)(b) of RCRA states, "Any person may commence a civil action on his behalf against any person…who has contributed to the disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a)(1)(B). Section 7003 then authorizes the EPA to sue anyone who's actions meet the "imminent and substantial endangerment" standard of § 7002(a)(1)(b).

The Supreme Court addressed the plain meaning of the time restriction established by the inclusion of the word "imminent" and determined that an endangerment could only be imminent if it threatens to occur immediately. *Meghrig v. KFC Western*, 516 U.S. 479, 485-86 (1996). The Court relied on the Ninth Circuit's interpretation that the language of the statute "implied that there must be a threat which is present now although the impact of the threat may not be felt until later." *Meghrig*, 516 U.S. at 486 (citing *Price v. United States Navy*, 39 F.3d 1011, 1019 (9th Cir.1994)). It is not required a party prove actual or immediate harm, but need only to show a risk of harm. *United States v. Waste Indus, Inc.*, 734 F.2d 159 (4th Cir. 1984); *Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 399 F.3d 248 (3d Cir. 2005). Courts have consistently held that "endangerment" means a threatened or potential harm and does not require proof of actual harm. *United States v. Ottati & Gross, Inc.*, 630 F. Supp 1361, 1394 (D.N.H. 1985); *United States v. Vertac Chem. Corp.*, 489 F. Supp. 870, 885 (E.D. Ark. 1980). The final anticipatory injury does not have to occur prior to the determination that an imminent hazard exists. *Envt'l Def. Fund v. EPA*, 465 F.2d 528, 535 (D.C. Cir. 1972). This determination can be made at any point "in the

chain of events, which may ultimately result in harm to the public." *Id.* While there is no statute of limitations contained in the statute, the language is clear that effects of a party's actions must pose a present threat before notice of a pending suit can be served. *Meghrig*, 516 U.S. at 486.

Courts have held that an endangerment can still be considered imminent if the affected party has a means to avoid the hazard. *Davies v. Nat'l Co-op Refinery Ass'n*, 963 F.Supp. 990, 999 (D. Kan. 1997) (plaintiffs had an alternative water supply available). The court in *Davies* explained that threats of endangerment could usually be avoided, though sometimes that would require extraordinary measures. *Id*. (citing *Morris v. Primetime Stores of Kansas, Inc.*, 1996 WL 563845 (D. Kan. Sept. 5, 1996) (plaintiffs moved out of their home because of the presence of explosive vapors). However, the court in *Davies* went on to explain that using bottled water instead of groundwater was an inconvenience and an economic burden for which there was an adequate remedy at law. *Id*. Additionally, a landowner may be held liable for "contributing" to waste management that gives rise to the risk of harm standard set forth by the circuit courts in *Waste Indus., Inc.* and *Interfaith Cmty. Org.* if the landowner was aware of the contamination and failed to reduce it. *United States v. Price*, 688 F.2d 204, 208 (3d Cir. 1982). Generally, courts have allowed for broad application of the imminent and substantial endangerment standard. However, Riverwatcher still has not presented sufficient evidence to establish such a claim against Moon Moo.

Riverwatcher alleges that the nitrate advisories issued by Farmville establish that Moon Moo's land application of the manure/whey acid mixture presents an imminent and substantial endangerment to human health. However, Riverwatcher has not presented enough evidence to establish a genuine issue of this allegation. Specifically, Riverwatcher has been unable to provide expert opinion that the higher levels of nitrate pose a present risk of harm.

There is no evidence in the record to suggest that Moon Moo's land application practices are the "but-for" cause of the heightened nitrate levels. While the case law does not require proof of actual harm, Riverwatcher has been unable to present evidence to suggest that the heightened nitrate levels pose a present and substantial risk of harm to the citizens of Farmville. There is no evidence in the record to suggest that the higher nitrate levels pose a risk of health to adults or juveniles. While households with infants are encouraged to use bottled water, the court in *Davies* explained that this is a mere inconvenience with an adequate remedy at law. Such families could simply seek monetary restitution. This does not, however, create liability for Moon Moo under RCRA's imminent and substantial endangerment standard.

The combination of whey acid produced by Greek yogurt production and manure to be used as fertilizer was developed to meet the disposal needs of the growing Greek yogurt industry. According to a 2012 study conducted at Ondokuz University, the acid whey alone is too acidic to be beneficial as a fertilizer.[2] When combined with the manure produced at Moon Moo Farm, the acidity is stabilized when digested as a fertilizer.[3] As the study concluded, "Co-digestion of manure with cheese whey or blood helps to convert these waste organic materials to the energy source, protects the environment and recycles the organic materials back to the agricultural sector."[4] As the Congressional findings pursuant to RCRA explain, the ever-increasing nature of consumer manufacturing requires a continuing concentration on waste management techniques and methods. 42 U.S.C. § 6901(a)(1)-(4). Ultimately, this application of the manure/acid whey

---

[2] Bahtiyar Ozturk, *Evaluation of Biogas Production Yields of Different Waste Materials*, 2 Earth Science Research 165, 177 (2012).
[3] *Id.*
[4] *Id.*

mixture confirms and fulfills RCRA subtitle D's goal of encouraging states to engage in area-wide waste management planning.

CONCLUSION

For the above reasons, Moon Moo asks this Court to affirm the ruling of the district court. The Canal is not a public trust navigable water of the United States because it is not a navigable-in-fact body of water susceptible to use as a highway of commerce. The Canal cannot function as more than a shortcut for small canoes and boats from the River. Therefore, the government has no interest in protecting such commerce against private interruption or encroachment by the landowners.

Because the Canal is not a public trust navigable water, the evidence obtained during the April12th patrol was obtained through trespass and without a warrant. The Fourth Amendment requires that such an inspection conform with establish administrative standards. Consequently, the evidence obtained is not admissible in civil enforcement proceedings.

Moon Moo is not required to obtain a permit under the CWA NPDES program because it does not qualify as a CAFO. Additionally, even if it was found to meet the definition of a CAFO, the discharge falls under the agricultural stormwater exemption because it is the result of precipitation runoff and not the landspreading practice itself.

Finally, Moon Moo is not subject to a citizen suit under RCRA because its land application of the manure/acid whey mixture does not constitute a solid waste under the statute. It is not a discarded material from an agricultural operation as it is applied for an intended, beneficial use. Riverwatcher has not supported its claim that the discharge poses an imminent and substantial endangerment to human health because the elevated nitrate levels pose only a minor inconvenience with a remedy at law.

Neither the EPA nor Riverwatcher have claims supported by genuine issues of material fact. Therefore, this Court should affirm the ruling of the district court.

Respectfully Submitted,

_____

Team 23
Attorneys for Appellee