Team No. 24

C.V. 155 – 2014

In the United States

Court of Appeals for the Twelfth Circuit

UNITED STATES OF AMERICA,

Plaintiff – Appellant,

v.

DEEP QUOD RIVERWATCHER, INC., and DEAN JAMES,

Plaintiffs- Intervenors-Appellants,

v.

MOON MOO FARM, INC.,

Defendant-Appellee.

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

BRIEF FOR MOON MOO FARM, INC.

Defendant, Appellee

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JURISDICTIONAL STATEMENT

Cross-Appellee Moon Moo Farm filed a complaint in the United States District Court for the District of New Union for common law trespass. This appeal is from a Final Judgment entered by the district court on April 21, 2014 dismissing both claims against Moon Moo Farm. The district court's jurisdiction is based on 28 U.S.C. § 1331. This Court's jurisdiction is proper under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether Queenchunk Canal is a public trust navigable water of the State of New Union allowing for a public right of navigation.

2. Whether the evidence obtained through trespass and without a warrant is admissible in a civil enforcement proceeding brought under CWA §§309(b), (d) and 505.

3. Whether Moon Moo Farm is a CAFO requiring a permit under the CWA NPDES permitting program by virtue of a discharge from its manure land application area under 33 U.S.C. § 1342.

4. Whether Moon Moo Farm's excess nutrient discharges remove it from the agricultural stormwater exemption, subjecting it to NPDES permitting liability under 40 C.F.R. § 122.2.

5. Whether Moon Moo Farm's beneficial reuse of secondary agricultural products as fertilizer and soil conditioner constitutes "discarded material" RCRA 1004(27), 42 U.S.C. 6903(27).

6. Whether the application of fertilizer and soil conditioner constitutes an imminent and substantial endangerment to human health under RCRA 7002(a)(1)(B), 42 U.S.C. 6972(a)(1)(B).

STATEMENT OF THE CASE

This is an appeal from a final order of the United States District Court for New Union denying EPA's and Riverwatcher's motion for summary judgment, and granting Moon Moo Farm's motion for summary judgment. (R. at 12). The United States ("EPA") brought this action for civil penalties and injunctive relief for alleged violation by defendant Moon Moo Farm ("Moon Moo") of the permitting requirements of the CWA, 33 U.S.C. §§ 1311(a), 1319(b), (d), and 1342. (R. at 4) Riverwatcher and Dean James (collectively, "Riverwatcher") intervened as

plaintiffs and asserted claims under CWA § 505, 33 U.S.C. 1365 and RCRA § 7002, 42 U.S.C. 6972, alleging violations of either the CWA or RCRA by defendant Moon Moo Farm in connection with its manure management practices. *Id*. Moon Moo Farm has counterclaimed for common law trespass. *Id.*

The district court held that (1) Queechunk Canal is not a public trust navigable water of the State of New Union; (2) evidence obtained through trespass and without a warrant is not admissible in a civil enforcement proceeding brought under CWA §§ 309(b), (d), and 505; (3) Moon Moo Farm is not a CAFO subject to NPDES permitting; (4) Moon Moo Farm's use of manure and whey as fertilizer is exempted from the NPDES permitting requirements as agricultural stormwater runoff; (5) the mixture of manure and whey used in Moon Moo's manure management practices are not solid wastes subject to regulation under RCRA Subtitle D; and (6) Moon Moo's manure management practices are not an imminent and substantial endangerment to human health subject to redress under RCRA § 7002(a)(1)(B). (R. at 4).

EPA and Riverwatcher each filed a separate Notice of Appeal (R. at 1). EPA takes issues with the District Court's holdings that Moon Moo Farm is not a CAFO subject to the NPDES permit program pursuant to CWA, 33 U.S.C. § 1342, Queechunk Canal is not a public trust navigable waterway, and evidence obtained by trespass was not admissible at a civil enforcement proceeding. Riverwatcher joins EPA's appeal of each of these issues, and also takes issue with the District Court's holding that Moon Moo's use of manure and whey as fertilizer is exempted from the NPDES permitting requirements as agricultural stormwater runoff, that Moon Moo's manure management practices are not an imminent and substantial endangerment to human health, and the award of damages against Riverwatcher based on Moon Moo's trespassing claim.

STATEMENT OF THE FACTS

Moon Moo Farm operates a dairy farm ten miles from the City of Farmville in the State of New Union. (R. at 4). In 2010, the farm increased its herd to 250 dairy cows to facilitate milk demand for the Chokos Greek Yogurt processing facility in Farmville. (R. at 5). The Farm is located at a bend in the course of the Deep Quod River where the Queenchuck Canal is situated. *Id*. The Deep Quod River flows year round into the Mississippi River, a navigable-in-fact interstate body of water used for navigation. *Id*.

Moon Moo must submit a "Nutrient Management Plan" (NMP) to the Farmville Regional Office of the Department of Agriculture (DOA). *Id*. The DOA has the authority to reject an insufficient NMP but the Farm's records indicate that it applied manure at levels consistent with the NMP it filed at all relevant times. (R. at 5-6). The State of New Union also has the authority to issue CWA discharge permits, although the Farm does not have any CWA permit issued pursuant to the National Pollutant Discharge Elimination System (NPDES). *Id*.

New Union regulates Moon Moo as a "no-discharge" animal feeding operation because its manure lagoon is designed to not have a direct discharge from its manure handling facilities up to and including a 25-year rainfall event. (R. at 5). Since 2012, Moon Moo has added acid whey from the Chokos plant to its manure lagoons for use as fertilizer. *Id*. These lagoons collect manure and liquid waste from the barn housing the cows. *Id*. Moon Moo periodically pumps the waste into tank trailers to be spread across 150 acres of fields that grow Bermuda grass that is harvested for silage. *Id*.

The Farmville Water Authority issued a "nitrate" advisory in late winter and early spring of 2013, advising customers that their drinking water had a high level of nitrates. (R. at 6). Such advisories were also issued in Farmville in 2002, 2006, 2007, 2009 and 2010, before the increase

in Moon Moo's operations. (R. at 7). After a two-inch rainfall between April 11 and April 12, 2013, Dean James took a small "jon boat" up the Deep Quod River into the Canal despite the "No Trespassing" signs on the Farm's property. (R. at 6). During this trespass, James took samples of the water, and observed and photographed Moon Moo's manure spreading applications, as well as discolored brown water flowing from a drainage ditch into the Queechuck Canal. *Id*.

Moon Moo's expert agronomist, Dr. Emmet Green, stated in his affidavit that the liquid manure/whey application was a longstanding practice, and that the Bermuda grass can tolerate a wide range of soil pH conditions. *Id*. He also noted that nothing in Moon Moo's NMP prevents it from applying manure during a rainfall event. *Id*. Even Riverwatcher's health expert, Dr. Susan Generis, stated at her deposition that in light of past nitrate advisories, it was impossible to state that Moon Moo's manure management practices were the "but for" cause of the April 2013 advisory. (R. at 7).

The EPA filed suit against Moon Moo for civil penalties and injunctive relief under CWA § 309 claiming it is a CAFO subject to NPDES permitting liability. *Id*. Riverwatcher intervened as a plaintiff in the EPA action pursuant to CWA § 505(b)(1)(B) and under the citizen suit provision of RCRA § 7002, further claiming that the drainage ditch on the Farm's property is a "point source" itself under the CWA and that the mixture used by Moon Moo was a solid waste that created an imminent and substantial endangerment to human health. *Id*. Moon Moo answered and counterclaimed, stating it is not a CAFO, that the drainage ditch is not a point source, that the mixture used in its manure management practices is not a solid waste, and that the only evidence of any discharge was a result of James' trespass, and sought damages and

injunctive relief against Riverwatcher. (R. at 8). Following the District Court's ruling in favor of Moon Moo on all issues, EPA and Riverwatcher each filed a notice of appeal (R. at 1).

STANDARD OF REVIEW

The district court granted Moon Moo Farm's motions for summary judgment. This Court reviews a district court's grant of summary judgment de novo. *Lefevers v. GAF Fiberglass Corp.*, 667 F.3d 721, 723 (6th Cir. 2012).

SUMMARY OF THE ARGUMENT

The District Court was correct in its finding that the Queechunk Canal is not a public trust navigable water of the State of New Union. Though the Queechunk Canal may be navigable, a navigable water is not necessarily a public trust navigable water. *Kaiser Aetna v. United States*, 444 U.S. 164, 172-73 (1979). A public trust navigable water is one which is capable of supporting interstate commerce in its natural state and is thus subject to a public right of use. *Id*. at 175. Since the navigational servitude established on public trust navigable waters limits the right of the property owner to have exclusive control over his property, there are higher standards that have to be met for a water to be declared a public trust navigable water. As a man-made water body, the Queechunk Canal fails to meet the requirement that a public trust navigable water be navigable in its natural condition. *Kaiser*, 444 U.S. at 175. Since the canal was dug on private property, the public has no right of access under *Vaughn v. Vermilion Corp.*, 444 U.S. 206 (1979) and James was thus trespassing when he entered the Queechunk Canal despite the clearly visible "No Trespassing" signs. The Queechunk Canal provides no substantial benefits to interstate commerce and is in fact so shallow and small that it can only be navigated by small boats. (R. at 5). Because of these factors, the benefits of allowing Congress to exercise its

Commerce Clause authority by creating a navigational servitude on the Queechunk Canal are far outweighed by the negative impact of so severely limiting the property rights of Moon Moo.

Since the Queechunk Canal is private property, the District Court was correct in determining that the evidence obtained through trespass and without a warrant was subject to the exclusionary rule. The Constitution protects the people of the United States from "unreasonable searches and seizures" and further provides that "no [w]arrants shall issue, but upon probable cause." U.S, Const. amend. IV. The Supreme Court has held that searches conducted without a warrant are per se unreasonable under the Fourth Amendment. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312 (1978). The Court in *Marshall* extended this doctrine to include both civil and criminal cases with evidence illegally obtained on both private and business property. *Id.* at 309, 312. It also applies to cases involving statutory or regulatory violations, such as the violations claimed in the present case. *Id*. at 312-13. The Supreme Court has long used the exclusionary rule to exclude evidence that was obtained illegally, but there are several exceptions to this rule. Though the rule applies to civil enforcement cases involving punitive damages, it does not always apply to cases in which injunctive relief is sought. *Trinity Indus. v. OSHRC*, 16 F. 3d 1455, 1461 (6th Cir. 1994). The benefits of providing the injunctive relief must outweigh the constitutional rights that are being violated by its inclusion. For example, when injunctive relief is sought to correct dangerous workplace conditions courts have found that the exclusionary rule should not apply because the benefits do not outweigh the losses if business owners are not forced to fix dangerous conditions. *Id*. However, such conditions are not at issue here, where the only safety concerns alleged were not conclusively asserted by even Riverwatcher's own expert. (R. at 6). Thus, the costs of violating Moon Moo's constitutional rights are not justifiable.

The district court was correct in granting Moon Moo Farm's motion for summary judgment because Moon Moo is not an illegally discharging concentrated animal feeding operation (CAFO) under the CWA. The CWA requires a National Pollutant Discharge Elimination System (NPDES) permit for the addition of any pollutant from a point source to waters of the United States. 33 U.S.C § 1342(a)(1). The definition of a "point source" includes a "concentrated animal feeding operation" but specifically excludes agricultural stormwater discharge from the definition of a point source. 40 C.F.R. § 122.2. Any party that does not qualify as a CAFO does not have the duty to apply for a NPDES permit. *Waterkeeper Alliance, Inc. v. U.S. E.P.A.*, 399 F. 3d 486, 504 (2d Cir. 2005). The State of New Union regulates the Farm as a "no-discharge" animal feeding operation. However, opposing parties stipulate that it is still subject to NPDES permitting liability. This is incorrect, and Moon Moo is not subject to NPDES permitting because it is not an illegally discharging CAFO under the CWA and EPA regulations.

Moon Moo is not subject to NDPES permitting regardless of whether or not it is a CAFO because it has no duty to apply for a permit to regulate exempted discharges, namely its agricultural stormwater discharge. Moon Moo is in compliance with a Nutrient Management Plan (NMP) submitted to the State of New Union that allows such discharges, exempting it from NPDES permit liability. Therefore, this court should affirm the district court's ruling in favor of the Farm.

The district court was correct in granting Moon Moo Farm's motion for summary judgment because the CWA requires a NPDES permit for the addition of any pollutant from a point source to waters of the United States. 33 U.S.C § 1342(a)(1). The definition of a "point source" includes a "concentrated animal feeding operation" (CAFO) but specifically excludes agricultural stormwater. 40 C.F.R. § 122.2. Any party that does not qualify as a CAFO does not

have the duty to apply for a NPDES permit. *Waterkeeper Alliance, Inc. v. U.S. E.P.A.*, 399 F. 3d 486, 504 (2d Cir. 2005). The State of New Union regulates the Farm as a "no-discharge" animal feeding operation. However, opposing parties stipulate that it is still subject to NPDES permitting liability. This is incorrect, and the Farm is not subject to NPDES permitting because it is not an illegally discharging CAFO under the CWA and EPA regulations.

The district court properly granted Moon Moo Farm's motion for summary judgment as it pertains to Riverwatcher's citizen suit under RCRA § 7002(a)(1). Riverwatcher brought this suit pursuant to RCRA § 7002(a)(1)(A), which specifically authorizes citizen enforcement of the prohibition of "open dumping of solid waste" under RCRA § 4005(a), 42 U.S.C. 6945(a). In order to be held liable under that section of the Act, the material in question must first be classified as a solid waste. RCRA § 1004(27) defines solid waste as "any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material…resulting from industrial, commercial, mining, and agricultural operations…" 42 U.S.C. 6903(27). However, "solid waste" is also given a regulatory definition by the EPA. 40 C.F.R. 261.2(a)(1)(i) Congress gave the EPA specific authority to regulate hazardous solid waste under Subtitle C, but not Subtitle D; therefore, the regulations passed pursuant to the EPA's Subtitle C powers are not applicable to actions brought under Subtitle D. See 40 C.F.R. 262.1(b)(1) ("The definition of solid waste contained in this part applies only to wastes that also are hazardous for purposes of the regulations implementing subtitle C of RCRA"). For the purposes of actions involving materials alleged to be non-hazardous waste brought under Subtitle D, such as this one, the general statutory definition of "solid waste" applies.

In order for a material to be classified as a "solid waste" under RCRA § 1004(27), the

material must be considered "discarded." Congress has not defined the term "other discarded material" in RCRA's text. Because the regulations passed pursuant to Subtitle C are inapplicable, to cases brought under Subtitle D, the regulatory definition of "discarded material" found in that section of the C.F.R. does not apply to the present case. Federal Courts and the EPA have determined that the term "discarded material" is ambiguous as it applies to RCRA § 1004(27). See *American Mining Congress v. U.S. EPA*, 824 F.2d 1177, 1185 (D.C. Cir. 1987). Because the statute is ambiguous with respect tot the specific issue of what materials are "discarded," and therefore "solid waste," the court must determine whether the agency's answer is based on a permissible construction of the statute. See *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843 (1984).

The EPA declined to classify the mixture of manure and whey as a "solid waste." The mixture of manure and whey applied to the land as fertilizer and soil amendments are not "discarded material" under RCRA § 1004(27) because the mixture is "destined for beneficial reuse or recycling in a continuous process by the generating industry." *American Mining Congress*, 824 F.2d at 1186. Because the D.C. Circuit is the exclusive venue for pre-enforcement judicial review of regulations promulgated under RCRA, that court's interpretation of the Act is binding upon the EPA. See *Association of Battery Recyclers, Inc. v. U.S. E.P.A.*, 208 F.3d 1047, 1052 (D.C. Cir. 2000). Because of that court's holding that materials are not "discarded" when a member of the generating industry immediately reuses or recycles the material in a beneficial manner, EPA's decision not to classify Moon Moo Farm's mixture of manure and whey as a "solid waste" was reasonable.

Finally, the district court properly held that Moon Moo's land application of manure and whey to fertilize its fields was not an imminent and substantial endangerment to human health

under RCRA § 7002(a)(1)(B). That section of the act requires the presence of solid or hazardous waste for liability to attach, prohibiting only the "disposal **of any solid or hazardous waste** which may present an imminent and substantial endangerment." 42 U.S.C. 6972(a)(1)(B). Because the mixture used by Moon Moo in its land application is not a "solid or hazardous waste," it cannot be held liable under RCRA § 7002(a)(1)(B).

Alternatively, Riverwatcher has not pled sufficient facts to establish an imminent and substantial endangerment claim under RCRA's citizen suit provision, 42 U.S.C. 6972(a)(1)(B). Simply pleading that the water in Farmville contained levels of nitrates higher than the normal state standards does not compel the conclusion that Moon Moo has contributed to any imminent and substantial endangerment to human health. See *Cordiano v Metacon Gun Club*, 575 F.3d 199 (2nd Cir. 2009). Furthermore, the specific regulations cited to support plaintiffs' argument are not applicable to agricultural products returned to the soil as fertilizer or soil conditioner. See 40 C.F.R. 257.1(c)(1). Because more than a "vague possibility" of harm is required to sustain a suit under RCRA's imminent and substantial endangerment provision, see *Chemical Weapons Working Group v. U.S. Dept. of Defense*, 61 Fed.Appx. 556 (10th Cir. 2003), the district court correctly granted Moon Moo's motion for summary judgment.

ARGUMENT

I. AS A MAN-MADE WATER BODY, THE QUEECHUNK CANAL IS THE PRIVATE PROPERTY OF MOON MOO FARM, NOT A PUBLIC TRUST NAVIGABLE WATER OF THE STATE OF NEW UNION, AND THUS THERE IS NO PUBLIC RIGHT OF NAVIGATION

The Queechunk Canal is not a public trust navigable water body under the "Public Trust Doctrine" but is instead the private property of Moon Moo Farms (Moon Moo). Public trust navigable waters are "interstate waters that in their natural condition are in fact capable of supporting public navigation." *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979). As

such, they are important to interstate commerce and are subject to a right of public use due to Congress' power under the Commerce Clause.

Under the Commerce Clause, Congress has power over navigable water bodies of the United States. However, the extent of this power, as well as the definition of navigable water bodies, varies depending on "the *purpose* for which the concept of 'navigability' was invoked in a particular case." *Kaiser*, 444 U.S. at 171. One such purpose is to refer to the requirements of Congressional regulation of the water body; another is to denote that the water body is a public trust navigable water body and thus subject to a public right of access. *Id*. at 172-73. The former is part of Congress' broad powers under the Commerce Clause, which "necessarily includes power over navigation." *Id*. at 173. The latter, public trust navigable water bodies, creates a navigational servitude under which members of the public have free access to the water body in order to protect interstate commerce. *Dardar v. Lafourche Realty Co.*, 985 F.2d 824, 832 (1st Cir. 1993).

Public trust navigable water bodies are held to a much higher standard than that used for water bodies subject to Congress' much broader general regulatory power under the Commerce Clause. Navigational servitude rests on the power of the federal government to take action to ensure navigation on navigable waters. Brian K. McNamara, *"Navigable Waters of the United States:" A Call for Transparency, Clarity, and Uniformity.* 9 Loy. Mar. L. J. 1, 25 (2011). The navigational servitude on public trust navigable water bodies derives from the Takings Clause of the Fifth Amendment. *Boone v. United States*, 944 F. 2d 1489, 1494 (9th Cir. 1991). It allows the government to interfere with the property rights of owners without constituting a taking that would require compensation. *Id.* When determining if this doctrine applies, courts must "take into consideration the important public interest in the flow of interstate waters that in their

natural condition are in fact capable of supporting public navigation" *Kaiser*, 444 U.S. at 175. Courts have generally denied compensation under this servitude because riparian owners are considered to be "on notice" that there is a public right to use the waterway. 9 Loy. Mar. L. J. at 26.

In *Kaiser*, the Supreme Court outlined specific factors to determine whether a water body is a public trust navigable water. Kaiser Aetna leased 6,000 acres of land, including Kuapa Pond, on the island of Oahu, Hawaii for subdivision development. *Kaiser*, 444 U.S. at 167. Kaiser undertook several development measures to facilitate navigability, including dredging and filling part of the pond. *Id.* A dispute arose when the government informed Kaiser it could not preclude the public from using the pond because the developments had turned it into a navigable water subject to public use. *Id.* at 168. The Supreme Court decided that the pond was a navigable water, but that the Government could not open it to public use without compensation, as thatt would be an exercise of eminent domain. *Id.* at 180. In its analysis, the Supreme Court identified the following factors for determining whether a water body is a public trust navigable water: (1) whether, prior to its improvement, the water body was capable of being used as a "continuous highway for the purpose of navigation in interstate commerce", (2) its maximum depth at high tide, (3) whether barriers existed between the water body and other navigable water bodies, and (4) the extent of its principal commercial use. *Id.* at 178. The Court held that a private property water body was not rendered incapable of private ownership just because it was connected to a public trust navigable water body through a canal dredged by Kaiser. *Id.* at 179, quoting *United States v. Chandler-Dunbar Co.*, 229 U.S. 53, 69 (1913).

Vaughn v. Vermilion Corp., 444 U.S. 206 (1979), involved a waterway similar to the Queechunk Canal. Vermilion Corporation (Vermilion) owned a piece of land with a system of

man-made canals. Id. at 207. The canals were approximately sixty feet wide and eight feet deep and were navigable in fact, but constructed with private funds and had been under continuous private ownership and control for years. They entered other naturally navigable waterways, which connected them to public trust navigable water bodies and were used for fishing, hunting, and oil and gas exploration and development. Vermilion attempted to control access to the canals by posting over 400 "No Trespassing" signs. *Id.* The Supreme Court was faced with the issue of "whether channels built on private property and with private funds, in such a manner that they ultimately join with other navigable waterways, are similarly open to use by all citizens of the United States." *Id*. at 208. The Court held that these types of canals are private property, not public trust navigable waters. *Id.* However, the Court also stated that if it could be proven that a privately built canal on private property was diverting a public trust navigable waterway to the point that the public trust navigable waterway could no longer be used, the privately built canal could possibly become a public trust navigable waterway in substitution of the waterway that it destroyed. *Id.* at 209.

Queechunk Canal is a man-made bypass canal that was built by a previous owner of Moon Moo in the 1940s. (R. at 5). The canal is fifty yards wide and three to four feet deep and can be navigated by a canoe or small boat. *Id.* Moon Moo has posted "No Trespassing" signs prominently around the canal to prevent trespassing. *Id.* However, the canal is still commonly used as a shortcut for those traveling on the Deep Quod River, which connects to the Mississippi River. *Id*. The Deep Quod River is a water of the United States and the Mississippi River is a navigable-in-fact interstate water long used for commercial navigation. (R. at 7; 5).

Applying the factors from *Kaiser* to determine whether a water body is a public trust navigable water, it is clear that Queechunk Canal does not fall into this category. While it is

occasionally used for transportation with canoes or small boats, it does not constitute a "highway for navigation in interstate commerce," as envisioned by the Supreme Court. It is a narrow and shallow man-made canal even smaller than the one at issue in *Vaughn*. While there are no distinct barriers that separate Queechunk Canal from the nearby Mississippi River, a navigable-in-fact water body, its commercial use is minimal to non-existent, limited to transportation and use as drinking water. Additionally, while the canal does divert some water from the Deep Quod River, it does not divert so much that the Deep Quod River is no longer navigable. Since the Queechunk Canal does not make the Deep Quod River non-navigable, it does not need to be converted to a public trust navigable water to preserve commerce. Overall, Queechunk Canal is strikingly similar to the canal in *Vaughn*, in that it is man-made, shallow, and barely used for commercial activities. In fact, the Queechunk Canal is even less necessary for purposes of interstate commerce since it connects on both sides to the Deep Quod River and is only used by trespassers as a shortcut on the Deep Quod River. (R. at 5). The canal thus provides no additional route on which interstate commerce can occur, providing it with even less reason to so drastically limit the property rights of Moon Moo. Since it is man-made, in its *natural state*, Queechunk Canal is not filled with water and therefore not navigable. Therefore, Queechunk Canal is not a public trust navigable water and not open to public use, making any unauthorized entry a trespass to private property.

II. SINCE THE CANAL IS NOT A PUBLIC TRUST NAVIGABLE WATER, EVIDENCE OBTAINED THROUGH TRESPASS AND WITHOUT A WARRANT IS NOT ADMISSIBLE IN CIVIL ENFORCEMENT PROCEEDINGS BROUGHT UNDER CWA §§ 309(b), (d) AND 505

Evidence obtained through a trespass on Moon Moo's private property is not admissible in an enforcement action under the CWA. The case is a civil enforcement action under CWA §§ 309(b), (d), and 505. 33 U.S.C. §§ 1319, 1365 (2012). CWA §309 describes enforcement under

the CWA, with subsections (b) and (d) providing for injunctive relief and civil penalties, respectively. CWA §505 provides for citizen suit and subsection (a) provides courts in these cases with jurisdiction to grant both injunctive relief and civil penalties. There is no case law concerning this particular subject in relation to the CWA so it is necessary to look to other statutory and regulatory enforcement administrative law cases in order to determine the issue. The Constitution provides the people with the right to be "secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" and further provides that "no [w]arrants shall issue, but upon probable cause." U.S. Const. amend. IV. It is well-established by Supreme Court precedent that warrantless searches of private property, regardless of whether they are commercial or residential, are generally unreasonable. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312 (1978). In *Marshall*, the Supreme Court ruled that a warrantless search of a business under § 8 of the Occupational Safety and Health Act (OSHA) was unconstitutional. *Id.* at 309, 325. This protection of private property against warrantless searches applies to both civil and criminal investigations. *Id.* at 312. The Court explained that regardless of whether the warrantless search was based on a violation of criminal law or the breach of statutory or regulatory standards, the owner always suffers a violation of his privacy interest. *Id.* at 312-313. Because of these considerations, the Supreme Court has long used the exclusionary rule to exclude evidence that is obtained without a warrant. However, there are many exceptions to the exclusionary rule, and Supreme Court jurisprudence has stated that the benefits of protecting the rights of citizens must be weighed against the consequences of not being able to use the evidence that was illegally obtained. *Trinity Indus. v. OSHRC*, 16 F. 3d 1455, 1461 (6th Cir. 1994).

In *Donovan v. Dewey*, 452 U.S. 594 (1980), the Supreme Court held that a warrantless inspection could be made by inspectors on a regular basis under the Mine Safety and Health Act.

A federal mine inspector tried to ascertain whether health and safety violations had been corrected without a warrant. *Id.* at 597. The Court decided that sometimes a warrantless search can be reasonable and identified several factors that allowed for such an exception. *Id.* at 606. These factors include (1) the inherent danger of working conditions in mines, (2) the fact that the owners knew these inspections would be conducted twice a year, (3) the fact that most safety and health hazards could be easily concealed with advance notice (undermining the effectiveness of the Act), and (4) the fact that the Act provided a mechanism for mine operators to report any special privacy concerns they may have with regard to these searches. *Id*. at 602-605.

In considering the use of evidence obtained through a warrantless search in a regulatory and statutory enforcement cases, much as in criminal law, it is necessary to balance the infringement upon the Constitutional rights of property owners with the benefits gained through using the evidence. The Court in *Marshall* described these factors in the context of regulatory and statutory enforcement cases. *Marshall*, 436 U.S. at 318. In these cases, warrants: ensure the search is conducted by a neutral officer, the search is reasonable under the Fourth Amendment and statutorily authorized, and the search is made pursuant to an administrative plan with specific neutral criteria, as well as advising the owner of the property of the object and scope of the search. *Id.*

In *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956), the Supreme Court also recognized the right of an owner of commercial private property that his property be free from intrusion through investigation, even when such intrusion was restricted to "nonworking areas of the plant and during nonworking hours." Additionally, the Supreme Court held that this prohibition applied to nonemployee organizers. *Id.* In *Trinity*, the Sixth Circuit Court of Appeals explained that illegally obtained evidence must be excluded to punish the trespasser,

unless the good faith exception applies. 16 F. 3d at 1462.

In the case at hand, Dean James of the organization "Riverwatcher" clearly trespassed on Moon Moo's private property and searched it without a warrant. (R. at 6). Moon Moo's privacy interest in its private property was clearly violated. Under the exclusionary rule of the Fourth Amendment, evidence obtained through this trespass should be inadmissible, in a civil as well as a criminal investigation, unless they are subject to a statutory or regulatory exception. There is no such exception provided for in the CWA. 33 U.S.C. § 1319.

In *Babcock*, the exclusion of evidence obtained through trespass encompassed nonemployee organizers. By analogy, the evidence gathered by James, who was neither an employee of Moon Moo nor a member of the government agency responsible for enforcing the CWA, is within the scope of the exclusionary rule. Applying the factors from *Donovan* further shows that the evidence obtained by James should not be included. Moon Moo's operation is not inherently dangerous. The owners did not know that James was going to enter upon the premises. Moon Moo could not easily conceal the alleged safety and health hazards. Finally, there is no special method for Moon Moo to address privacy concerns about trespass from individual actors. Therefore, the evidence obtained by James must be excluded.

The exclusionary rule is not the only exception to the warrant requirement of the Fourth Amendment that is relevant in this case. In applying the exclusionary rule to civil deportation hearings in which a search was conducted without a warrant, the Supreme Court found that the costs of excluding illegally obtained evidence were not outweighed by the societal benefit of using said evidence. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050 (1984). The Fifth Circuit applied this rule to civil hearings under the OSHA in *Smith Steel Casting Co. v. Brock*, 800 F.2d 1329, 1334 (5th Cir. 1986) and the Sixth Circuit chose to adopt the rule as well. *Trinity*, 16 F.3d

1455, 1462. Under this rule, illegally obtained evidence is still excluded for the purpose of punishment, but will not be excluded for the purpose of injunctive relief. *Id*. This is because of the balancing test the Supreme Court uses when applying the exclusionary rule between the benefits of protecting the rights of citizens and the negative societal consequences that arise from losing evidence. In determining that the exclusionary rule should not apply to cases in which injunctive relief is sought, the courts were seeking to avoid the negative consequences of preventing the OSHA from getting injunctions which would correct dangerous workplace conditions that were threatening the health and safety of employees. *Id*. In this case, the plaintiffs and plaintiff-interveners are seeking both civil penalties and injunctive relief. (R. at 4).

It is clear that the illegally obtained evidence obtained by James must be excluded under *Smith Steel* and *Trinity* in regards to the civil penalties under CWA §§ 309(d) and 505. In the case at hand, no employees of Moon Moo are claiming dangerous work conditions and though some dangers have been claimed by plaintiffs, even Riverwatcher's own environmental health expert "conceded in her deposition that…it was impossible to state that Moon Moo Farms was the 'but for' cause of th[e] nitrate advisory." (R. at 7). Thus, there is no immediate and provable health concern at issue, and so the benefit of protecting the Constitutional rights of Moon Moo's owner outweighs any benefits from including this evidence in the case, making the exclusionary applicable under CWA §§ 309(b) and 505 as well.

III. MOON MOO FARM DOES NOT REQUIRE A PERMIT UNDER THE CLEAN WATER ACT NPDES PERMITTING PROGRAM.

NPDES permits are required for the addition of any pollutant from a point source to waters of the United States. 33 U.S.C § 1342(a)(1). Moon Moo is not subject to NPDES permitting regulations because it has no duty to apply for a permit unless and until it is illegally discharging from a point source. 73 Fed. Reg. 70,418 (Nov. 20, 2008). Point sources include CAFOs,

however Moon Moo does not meet the statutory requirements of a CAFO. 40 C.F.R. 122.23(b)(6)(ii). Regardless of its qualification as a CAFO, Moon Moo is still not subject to permitting liability because its manure management practices result in agricultural stormwater discharge that is exempt from the definition of a point source. 33 U.S.C. § 1362(14). Accordingly, this court should uphold the district court's ruling in favor of Moon Moo.

A. Moon Moo Farm is not a CAFO subject to NPDES permitting by virtue of a discharge from its manure land application area.

A farm must meet one of the two requirements under 40 C.F.R. 122.23(b)(6)(ii) to be classified as a CAFO. Opposing counsel stipulates that subsection (A)'s requirement, which includes pollutants discharged by a farming operation through a man-made device, applies to Moon Moo and qualifies it as a CAFO. Dean James, the Deep Quod "Riverwatcher", procured the evidence of this man-made device. However, this evidence was illegally obtained and is inadmissible in a civil enforcement proceeding brought under CWA §§ 309(b), (d) and 505. Since there is no legally obtained, admissible evidence revealing that Moon Moo illegally discharged pollutants through a man-made device, the opposing parties will inevitably fail to prove that Moon Moo qualifies as a CAFO.

Prior to Moon Moo increasing its operation size in 2010, nitrate advisories had been issued in Farmville in 2002, 2006, 2007, 2009 and 2010. It is also undisputed that the Dr. Susan Generis, Riverwatcher's own environmental health expert, conceded that it was impossible for Moon Moo to be the "but for" cause of the nitrate advisory in question. These facts imply that a source other than Moon Moo was the cause of the Farmville nitrate advisory. Without any admissible evidence to the contrary, there is no proof Moon Moo was discharging pollutants through a man-made device. Since there is no way for the opposing counsel to prove that Moon Moo is

discharging in violation of the CWA, Riverwatcher and the EPA cannot require Moon Moo to apply for a NPDES permit because it does not meet the statutory requirements of a CAFO.

Alternatively, if the court finds that Moon Moo does meet the statutory requirements for a CAFO, it is still not subject to NPDES permitting because the discharge has not come from a "point source." A point source is defined as a "concentrated animal feeding operation… from which pollutants are or may be discharged…" but "does not include agricultural stormwater discharge." 33 U.S.C. § 1362(14). Agricultural stormwater runoff is defined as any "precipitation-related discharge of manure… from land areas under the control of a CAFO" where the "manure… has [otherwise] been applied in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization." 40 C.F.R. § 122.23(e). Regulated land application areas include all lands under control of a CAFO owner or operator to which manure from the production area may be applied. 40 C.F.R. § 122.23(b)(3). Moon Moo is not subject to NPDES permitting because the discharge falls under the agricultural stormwater exemption.

Even though Congress designated CAFOs as point sources, they specifically exclude agricultural stormwater runoff from that definition. The EPA has attempted to require all CAFOs acquire permits; however, those attempts have been rejected in several federal courts. See *Waterkeeper Alliance, Inc. v. U.S. E.P.A.,* 399 F. 3d 486, 506 (2d Cir. 2005); *see also National Pork Producers Council v. U.S. E.P.A.*, 635 F. 3d 738, 749 (5th Cir. 2011); *Alt v. U.S. E.P.A.*, 979 F. Supp. 2d 701, 712 (N.D. W. Va. 2013). Federal courts have long held this exemption, and it is easy to see that it applies to Moon Moo as well. The 150 acres of fields where Moon Moo applied manure were definitely agricultural in nature and, given the proximity

of the Canal to the farm, it would easily result in discharge from the precipitation that caused James' investigation.

The district court judge in *Alt. v. EPA* rejected the EPA's narrow argument that the discharges must have an agricultural purpose, holding that discharges only need to be "agriculture related" to be exempt. *Id.* at 704. This case was decided in the Northern District of West Virginia and was not contested by the Fourth Circuit. In the case at hand, Moon Moo's manure land application is the consequence of its general dairy farm activities. The land application of manure is a result of raising the dairy cows that supply Chokos Greek Yogurt processing facility. The manure application would easily be considered "related" to the agriculture activity as a result of raising the dairy cows, and therefore easily satisfies the broad definition of the agricultural stormwater runoff exemption given by the court in *Alt*.

Moon Moo has no duty to apply for a NPDES permit and is therefore not subject to NPDES permitting since there is no illegal discharge from a point source. The EPA published the NPDES Guidelines and Standards for CAFOs in 2003 to clarify the complicated provisions of the NPDES permitting scheme and specially stipulated that any CAFO that even had the potential to illegally discharge was required to apply for a permit. 68 Fed. Reg. 7,176 (Feb. 12, 2003). The *Waterkeeper* decision quickly challenged this in the Second Circuit. That court overruled the Guidelines' provision, holding that there was no statutory basis requiring non-discharging CAFOs to apply for permits. 399 F. 3d at 505.

The 2008 EPA Guidelines further clarified this confusion, stating that there is no "duty to apply" unless and until an illegal discharge occurs. 73 Fed. Reg. 70,418 (Nov. 20, 2008). This has been affirmed since the 2008 Guidelines issuance in *National Pork Producers Council v. US EPA*. 635 F. 3d at 749. In *National Pork*, the Fifth Circuit held that certification for NPDES is

voluntary, and a CAFO can be liable for failing to obtain a permit only once there has been an actual, illegal discharge. *Id*. at 746. There is no illegal discharge and Moon Moo is not subject to NPDES permitting unless and until there is illegal discharge because the discharge in question qualifies as agricultural stormwater discharge.

Applying the circuits' holdings, EPA Guidelines and statutory interpretations, it is clear that Moon Moo has no statutory duty to apply for a NPDES permit. There is nothing to prove that Moon Moo was illegally discharging pollutants through a man-made device without other legally obtained evidence. Even if the evidence submitted by Riverwatcher is admissible, the discharge is agricultural stormwater runoff, which is specifically excluded from the definition of a point source by CAFOs. Moon Moo is not subject to NPDES liability since there is no duty to apply for an NPDES permit unless and until there is an illegal point source discharge. For these reasons, this court should uphold the district court's ruling that Moon Moo is not a CAFO subject to NPDES permitting.

B. Moon Moo Farm is exempt from NPDES permitting liability because it is in compliance with a NMP and the excess nutrient discharges from its manure application fields fall under the agricultural stormwater exemption.

An unpermitted Large CAFO must comply with site-specific nutrient management practices to ensure the appropriate agricultural utilization of nutrients in order to avail itself of the agricultural stormwater exemption. 40 C.F.R. § 122.23(e)(1). If a CAFO applies more nutrients than necessary for crop growth, the application is contrary to the nutrient management plan and any resulting discharge is a violation of the CWA. 40 C.F.R. § 122.42(e)(1). In the present case, Moon Moo is not in violation of the CWA because it has complied with the NMP it submitted to New Union at all relevant times.

Under 40 C.F.R. § 122.23(b)(6), Moon Moo falls under the "Medium CAFO" definition. 40 C.F.R. § 122.23(e)(1) states that unpermitted Large CAFOs require a NMP to fall under the agricultural stormwater exemption, but is ambiguous as to whether Medium CAFOs also require NMPs. Given this omission, the regulation can be interpreted two different ways. Read narrowly, the provision requiring a NMP to qualify for the agricultural stormwater exemption does not apply to Medium CAFOs, and therefore the exemption applies regardless of whether or not Moon Moo has submitted an NMP. This result would imply that Moon Moo falls under the exemption regardless of its NMP and would therefore not subject Moon Moo to permitting liability. Read broadly, the provision would be interpreted to include Medium CAFOs as well, which would mean that since Moon Moo has submitted a NMP to New Union, it still qualifies for the exemption. Applying *Chevron* doctrine to this ambiguity, as long as the interpretation of an agency determination is reasonable, courts must defer to the agency determination of that statute. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc*., 467 U.S. 842 (1984). Moon Moo will be exempt regardless of which determination is applied because it has complied with a site-specific NMP, and therefore will be a qualified unpermitted CAFO under either interpretation.

There are six key requirements for NMPs under 40 C.F.R. § 122.42 (e). However, the requirement that is at issue in the current case is in subsection (5), which is whether or not Moon Moo properly utilized the nutrients in the land application manure. Moon Moo has accepted acid whey from the Chokos Yogurt plant, which they have applied in the mixture sprayed on the manure application fields. The affidavit submitted by agronomist Dr. Ella Mae opined that Moon Moo was engaging in a poor management practice that likely resulted in excess runoff. Moon Moo's expert agronomist, Dr. Emmet Green contradicted this notion, stating that

application of whey as a soil conditioner has been a longstanding practice in New Union since the 1940s and the Bermuda grass grown on the application area could easily tolerate a lesser pH level. The lower pH level still facilitated the crop growth of the Bermuda grass and the application of a soil conditioner was in compliance with Moon Moo's NMP. Therefore, any resulting discharge is still permissible agricultural stormwater runoff under the CWA.

The manure application is agricultural stormwater runoff because it is a necessary part of the land application process. Again, agricultural stormwater runoff is defined as any "precipitation-related discharge of manure… from land areas under the control of a CAFO" where the "manure… has [otherwise] been applied in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization." 40 C.F.R. § 122.23(e). Applying *Alt*, the discharge in question is an exemption because it relates to agriculture, and the runoff was the consequence of a rain event. 979 F. Supp. 2d at 712. This is consistent with Moon Moo's NMP because there is nothing in the NMP that prevents Moon Moo from applying manure during a rain event. The discharges could not come from the lagoon because the rain event that occurred did not exceed the threshold of the 25-year storm event.

Under the 2008 Rule, EPA revised its NMP related provisions to provide for: (1) Receipt and review of the NMP by the permitting authority prior to issuing an individual permit or granting coverage under a general permit; (2) Adequate public participation prior to issuing an individual permit or granting coverage under a general permit; (3) Incorporation of the terms of the NMP into the NPDES permit; and (4) The process to address changes to the NMP once permit coverage is granted. 73 Fed. Reg. 70,418. The record stipulates that New Union does not ordinarily review submitted NMPs, nor is there any provision for public comment on the NMPs.

Moon Moo's NMP was submitted to New Union but was not reviewed by New Union or subjected to public comment about its implementation, which is in accordance with New Union's traditional practices. Normally this is required for NMPs to be valid under the CWA and EPA provisions. Even the *Waterkeeper* court challenged the 2003 Guidelines because the Guidelines did not stipulate an opportunity for public notice and comment to submitted NMPs. 399 F. 3d at 504. However, this is only a requirement for NMPs that are submitted prior to issuance of an NPDES permit. If Moon Moo does not need to apply for the permit then it does not need to subject itself to public review. Therefore, Moon Moo's NMP does not require review by New Union or public comment because it has no duty to apply for a NPDES permit.

Moon Moo's excess nutrient discharges are agricultural stormwater exemption under the statutory definition and are sufficiently related to the agricultural practice of raising dairy cows. Whether interpreting the regulations broadly or narrowly, Moon Moo is in compliance with a NMP submitted to New Union, and is not subject to further requirements unless it actually applies for an NPDES permit. For these reasons, this court should uphold the district court's ruling because Moon Moo is in compliance with a NMP not subject to NPDES permitting.

IV. THE MIXTURE OF FERTILIZER AND SOIL AMENDMENT USED BY MOON MOO FARM IS NOT A "SOLID WASTE" UNDER RCRA § 7002(A)(1)(A)

The Resource Conservation and Recovery Act (RCRA) is "a comprehensive statute that governs the treatment, storage, and disposal of solid and hazardous waste." *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 483 (1996). RCRA § 4005 specifically prohibits the practice of "open dumping of solid waste." 42 U.S.C. 6945(a). RCRA § 4005(a) specifically authorizes citizen enforcement of the prohibition against the "open dumping of solid waste" in a citizen suit brought pursuant to RCRA § 7002(a)(1)(A). (R. at 10). Thus, it is necessary that Riverwatcher sufficiently allege that the material in question is considered a "solid waste" to sustain an action

under the citizen suit provision of RCRA. As will be discussed, the mixture used by Moon Moo in its manure management practices is not a "solid waste," and therefore, Riverwatcher's citizen suit under RCRA § 7002(a)(1)(A) must be dismissed.

A. The structure and language of RCRA contemplates a dichotomy in the definition of "solid waste" between Subtitle C and Subtitle D of the Act

RCRA defines "solid waste" generally at § 1004(27), 42 U.S.C. § 6903(27). However, a more specific regulatory definition of "solid waste" is found at 40 C.F.R. 261.2(a)(1). Due to the competing language in the statue and regulations, a dichotomy has been created in the definition of solid waste, further complicating an already complex statute. See *Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co., Inc*, 989 F.2d 1305, 1314 (2nd Cir. 1993) ("Dual definitions of solid waste are suggested by the structure and language of RCRA"). Due to the anomaly of using different definitions for the same term, it is important to determine which definition of "solid waste" applies as a preliminary matter.

i. The regulatory definition of solid waste DOES NOT apply to RCRA Subtitle D

"RCRA includes two major parts: [Subtitle D] deals with the non-hazardous solid waste management and [Subtitle C] with hazardous waste management." *American Mining Congress v. U.S. EPA*, 824 F.2d 1177, 1179 (D.C. Cir. 1987). Congress has explicitly given the EPA the authority to promulgate regulations establishing "criteria for identifying the characteristics of hazardous waste subject to the provisions of [RCRA subtitle C]," 42 U.S.C. § 6921(a), while no such authority has been given under RCRA subtitle D, see 42 U.S.C. 6941 ("The objectives of this subchapter...are to be accomplished through Federal technical and financial assistance to States"). Because "hazardous waste" is defined as a subset of "solid waste," See 42 U.S.C. § 6903(5), a material must be classified as a "solid waste" to fall within the EPA's regulatory authority of hazardous waste under RCRA subtitle C. In order to determine which solid wastes

are also hazardous under RCRA Subtitle C, the EPA defined "solid waste" at 40 C.F.R. § 261.2(a)(1); however, that section explains that the regulatory definition of solid wastes "**does not apply to materials...that are not otherwise hazardous wastes** and are recycled." 40 C.F.R. § 261.1(b)(1) (emphasis added). Conversely, the regulatory definition of "discarded material" listed in 40 C.F.R. § 262.2(a)(2), does not apply to materials that are not considered to be hazardous wastes and are recycled. As a result, the more general statutory definition of solid waste found at 42 U.S.C. § 6903(27) applies to cases, such as the present one, involving materials alleged to be non-hazardous solid wastes.

B. Moon Moo Farm's application of fertilizer and soil amendments to its fields DOES NOT constitute the prohibited open dumping of solid waste under RCRA § 4005(a)

Any practice "which constitutes the open dumping of solid waste" is prohibited by RCRA § 4005 42 U.S.C. 6945(a). In order to fall within this provision, the material in question must be considered a "solid waste." RCRA § 1004(27) defines solid waste as "any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and *other discarded material*, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations..." 42 U.S.C. § 6903(27). As discussed in the previous section, this statutory definition of "solid waste" applies because "Riverwatcher does not assert that Moon Moo Farm is engaged in the disposal of hazardous waste subject to regulation under RCRA subchapter C." (R. at 10).

When analyzing an issue of statutory interpretation, "the starting point in every case involving statutory construction is the language employed by Congress". *CBS v. FCC*, 453 U.S. 367, 377 (internal quotes omitted). Additionally, the principles of *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984) must guide the analysis. In *Chevron*, the Supreme Court explained that the reviewing court is to consider whether Congress has directly spoken to the precise question at issue." *Id.* at

842. This inquiry focuses first on the language and structure of the statute itself. See *id.* ("if the intent of Congress is clear, that is the end of the matter"). However, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute....In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Id*. at 843-4.

Under RCRA Subtitle D's statutory scheme, Congress specifically prohibited the "open dumping of solid waste." 42 U.S.C. § 6945(a). Congress went on to specifically define "solid waste" as "discarded material." 42 U.S.C. § 6903(27). In the seminal case of *American Mining Congress v. U.S. EPA*, the District of Columbia Circuit Court found that, "the statutory term 'discarded' calls for more than resort to the ordinary, everyday meaning of the specific language at hand." 824 F.2d 1177, 1185 (D.C. Cir. 1987). Compounded with this holding is the fact that the term discarded material is defined differently depending on which definition of solid waste applies, creating even more ambiguity. See, e.g. *Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co., Inc*, 989 F.2d 1305 (2nd Cir. 1993). Due to the uncertainty of what Congress intended by the term "discarded material," the EPA is within its authority to reasonably interpret the statute. Cf. *Howmet Corp. v. E.P.A.*, 614 F.3d 544, 549 (D.C. Cir. 2010).

Under *Chevron*, 467 U.S. 837, the court must determine whether or not the agency's interpretation of the term "discarded material" as it applies to the statutory definition of "solid waste" is reasonable in this case. See *id.* at 843. EPA contends that Moon Moo's mixture of manure and acid whey protein is not a solid waste subject to regulation under RCRA Subtitle D. (R. at 2). Several jurisprudential interpretations of the RCRA solid waste provisions support

EPA's interpretation—that materials such as the manure and whey mixture used by Moon Moo Farm are not "discarded" under the statutory definition of solid waste—as reasonable.

i. Moon Moo Farm's mixture of fertilizer and soil amendments are not "discarded" because they are destined for beneficial reuse or recycling in a continuous process by the dairy industry

The D.C. Circuit is the exclusive venue for pre-enforcement judicial review of regulations promulgated under RCRA, so that court's interpretation binds the EPA. See *Association of Battery Recyclers, Inc. v. U.S. E.P.A.*, 208 F.3d 1047, 1052 (D.C. Cir. 2000). In *American Mining Congress* (*"AMC I"*), several mining and oil refining companies challenged an EPA regulation that gave the agency the authority to regulate "secondary materials reused within an industry's ongoing production process." 824 F.2d at 1178. The D.C. Circuit held that materials were not "discarded" when they were "destined for beneficial reuse or recycling in a continuous process by the generating industry itself." *Id.* at 1186.

The holding in *AMC I* was slightly limited in *American Mining Congress v. U.S. E.P.A.* (*"AMC II"*), 907 F.2d 1179, 1185 (D.C. Cir. 1990). In *AMC II*, plaintiff's smelting operations were using surface impoundments to collect the wastewater produced from the smelting activities. The surface impoundments produced sludges that precipitated from the wastewater, which were stored and **may have been reclaimed at some time in the future**. *Id.* at 1186 (emphasis added). The court in *AMC II* explained that the reasoning in *AMC I* did not apply to materials that merely have the **potential** of being reused; instead the materials must be **destined** for beneficial reuse within the generating industry to fall within the holding of *AMC I*. See *id.*

In *Safe Air for Everyone v. Meyer,* 373 F.3d 1035 (9th Cir. 2004) the Ninth Circuit held that grass residue left following the harvest of Kentucky Bluegrass was not "discarded" because the material was beneficially reused in the continuous process of growing Kentucky bluegrass by "returning nutrients to bluegrass fields and facilitating the open burning process." *Id.* at 1043.

Similarly, excess whey from commercial dairy plants has long been beneficial as a source of plant nutrients. See William Wendorff, *Uses of Whey in Farmstead Setting* 16 (Wisconsin Department of Agriculture, Trade and Consumer Protection, 2008) (Wisconsin researchers found that whey improved soil aggregation and increased corn yields the first and second year after application following extensive research on the effects of whey on soil properties and plant growth); see also (R. at 6) ("land application of whey as a soil conditioner [is] a longstanding practice that has been traditional in New Union since the 1940s").

Both the manure and whey used in Moon Moo's fertilizer and soil amendment mixture are destined for reuse, unlike the sludges at question in *AMC II.* There is no question of if and when the fertilizer and soil are to be reused; Moon Moo Farm applies mixture to its fields "at rates consistent with the NMP filed with the Farmville Field Office at all relevant times." (R. at 6). Additionally, the manure and whey mixture used by Moon Moo is a beneficial part of the continuous process of production of milk and yogurt by members of the dairy industry. Whey is added to manure as a soil conditioner in order to fertilize grass for cattle silage (R. at 5), much like the grass residue used as a soil conditioner in *Safe Air*, 373 F.3d 1035. These cattle produce milk, which is used by Chokos to produce yogurt, as well as more whey to be reused as a soil conditioner by Moon Moo, closing the loop on the continuous industrial process utilized to benefit the production of various dairy products. (R. at 5). Because the material used by Moon Moo in its manure management practices is being actively reused to benefit the ongoing production of milk and yogurt by members of the dairy industry, it is reasonable to determine that the manure and whey mixture is not "discarded material," and therefore, not a "solid waste" subject to regulation under RCRA Subtitle D.

V. MOON MOO FARM'S MANURE MANAGEMENT PRACTICES DO NOT CONSTITUTE AN IMMINENT AND SUBSTANTIAL ENDANGERMENT SUBJECT TO REDRESS UNDER RCRA § 7002(A)(1)(B)

RCRA § 7002(a)(1)(B), provides a cause of action "…against any person...who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal **of any solid or hazardous waste** which may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a)(1)(B) (emphasis added). Courts have indicated that the "imminent and substantial endangerment" standard is a broad one. See *Me. People's Alliance v. Mallinckrodt, Inc.*, 471 F.3d 277, 288 (1st Cir.2006) (noting "at least four...circuits have construed [§ 6972(a)(1)(B)] expansively"). However, the text of RCRA requires the presence of solid or hazardous waste for liability to attach. 42 U.S.C. § 6972(a)(1)(B); see also *Cordiano v. Metacon Gun Club*, 575 F.3d 199, 210 (2nd Cir. 2009) ("42 U.S.C. § 6972 requires the presence of solid or hazardous waste"). As discussed previously, the mixture used by Moon Moo in its manure management practices is not a "discarded material" and therefore not a solid waste under RCRA § 1004(27). Because Moon Moo has not contributed to the past or present disposal of any solid waste, it cannot be held liable under an imminent and substantial endangerment claim pursuant to RCRA § 7002(a)(1)(B), 42 U.S.C. § 6972(a)(1)(B).

In the alternative, Riverwatcher's claim must fall because it has failed to produce sufficient evidence that Moon Moo's land spreading practice creates a "substantial endangerment to human health and safety." *Id*. While the evidence and the inferences drawn from the evidence must be "viewed in the light most favorable to the party opposing the motion…a 'mere scintilla of evidence' in favor of the nonmoving party will not defeat summary judgment." *Lewis v FMC Corp.*, 786 F.Supp.2d 690, (W.D.N.Y. 2011) (internal quotes omitted). Riverwatcher points to the nitrate advisory issued by the Farmville Water Authority in early 2013 as proof that Moon Moo is contributing to an imminent and substantial endangerment (R. at 11); however, such

advisories had been repeatedly issued by the Water Authority—in 2002, 2006, 2007, 2009, and 2010—long before Moon Moo began adding whey to its manure mixture. (R. at 7). Additionally, Riverwatcher points to EPA guidelines, 40 C.F.R. § 257.1 *et al.*, prohibiting the application of solid wastes in a number of scenarios as evidence of Moon Moo's liability. (R. at 10); however, the criteria in that section "do not apply to agricultural wastes, including manures and crop residues, returned to the soil as fertilizers or soil conditioners.

In *Cordiano,* defendant operated an outdoor shooting range in Connecticut. 575 F.3d at 202. The range contained a 100-yard shooting range at the back of which stands an engineered earthen berm for bullet containment. *Id.* Plaintiff alleged that lead bullets that had collected in the berm had caused arsenic to leak into the groundwater, causing an imminent and substantial endangerment to human health. *Id* at 203-4. In support of this contention, the plaintiffs cited a report by Advanced Environmental Interface, Inc., which found "that various samples drawn from the Metacon site exceeded Connecticut's RSR and SEH thresholds for residential sites, and draws the conclusion that lead contamination on the site presents a potential exposure risk to both humans and wildlife." *Id.* at 212. The court found that "the mere fact that some samples taken from the Metacon site may exceed Connecticut's RSR standards provides an insufficient basis for a jury to find a reasonable prospect of future harm that is both 'near-term and ... potentially serious.'" *Id.*

In *Lewis*, the defendant operated a pesticide formulations facility that left soils and groundwater in the northern half of the Facility extensively contaminated. 786 F.Supp.2d at 694. FMC performed and/or contracted for a number of studies and remedial actions under an Administrative Order of Consent with the EPA. *Id.* Several years later, plaintiffs brought suit, alleging that FMC was liable under RCRA § 7002(a)(1)(B). Specifically, plaintiffs pointed to

the fact that "soil arsenic levels in Middleport that 'are in excess of a plethora of cleanup standards and guidance values in use in upstate New York specifically and around the country in general ... compels the conclusion that an imminent and substantial endangerment ... exists.'" *Lewis*, 786 F.Supp.2d at 709. The court rejected this argument, explaining that on its own, "such a fact is "plainly insufficient" to allow a reasonable factfinder to assess the magnitude of a possible risk, the immanency of the potential harm, or whether the potential harm is serious." *Id.* (citing *Cordiano*, 575 F.3d at 212-14).

Similar to the plaintiffs in *Cordiano* and *Lewis*, Riverwatcher has not plead sufficient facts to establish a claim under RCRA § 7002(a)(1)(B), 42 U.S.C. § 6972(a)(1)(B). Simply pleading that the water in Farmville contained levels of nitrates higher than the normal state standards does not compel the conclusion that Moon Moo has contributed to any imminent and substantial endangerment to human health. Furthermore, the specific regulations cited to support plaintiffs' argument are not applicable to agricultural products returned to the soil as fertilizer or soil conditioner. Therefore, the district court correctly held that Moon Moo was not contributing to an imminent and substantial endangerment to human health pursuant to RCRA § 7002(a)(1)(B).

CONCLUSION

For these reasons, we respectfully ask this court uphold the district court's findings that Moon Moo Farm did not violate the permitting requirements of the CWA and that Moon Moo Farm did not violate either the CWA or the RCRA in connection with its manure management practices. Additionally, we request this court to uphold the district court's finding that Queenchunk Canal is not a public trust navigable water, that Deep Quod Riverwatcher and Dean James illegally trespassed upon Moon Moo Farm's property and that the evidence obtained

through that trespass is not admissible in a civil enforcement proceeding brought under the CWA.

Respectfully submitted,

Team 24

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