Team 3

IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

NO. 14-1248

UNITED STATES OF AMERICA,
Plaintiff-Appellant, and

DEEP QUOD RIVERWATCHER, INC. and DEAN JAMES
Plaintiffs-Intervenors-Appellants
v.
MOON MOO FARM, INC.,
Defendant-Appellee

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

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BRIEF OF MOON MOO FARM, INC.
Defendant-Appellee

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STATEMENT OF JURISDICTION

This case concerns an appeal following the Order of the District Court of New Union issued on June 1, 2014. The United States District Court for the District of New Union had proper federal-question jurisdiction to hear the case under 28 U.S.C. § 1331 (2012). The order of the District Court was final, and jurisdiction is thus proper in this Court. *Id.* § 1291.

STATEMENT OF THE ISSUES

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

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

III. Whether Moon Moo Farm requires a National Pollutant Discharge Elimination System (NPDES) permit under the CWA because:

   A. It is a concentrated animal feeding operation (CAFO) subject to NPDES permitting by virtue of a discharge from its manure land-application area,
   OR,
   B. Excess nutrient discharges from its manure application fields remove it from the agricultural stormwater exemption and subject it to NPDES permitting liability.

IV. Whether Moon Moo Farm is subject to citizen suit under the Resource Conservation and Recovery Act (RCRA) because:

   A. Its land application of fertilizer and soil amendment constitutes a solid waste subject to regulation under RCRA Subtitle IV,
   AND,
   B. Riverwatcher can establish that the mixture constitutes an imminent and substantial endangerment to human health as required by RCRA § 7002(a)(1)(B).

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

EPA brought a CWA civil enforcement action against Moon Moo Farm, seeking civil penalties and injunctive relief for the farm's alleged violations of the Act's permitting

requirements, 33 U.S.C. §§ 1311(a), (d), 1342 (2012). R. 7. Deep Quod Riverwatcher and Dean James, its "Riverwatcher" (collectively, Riverwatcher), intervened as plaintiffs in the EPA action under CWA § 505(b)(1)(B) and brought a citizen suit under RCRA § 7002(a)(1)(B). R. 4. Moon Moo Farm answered and asserted a counterclaim for trespass against Riverwatcher. After discovery, both sides moved for summary judgment. R. 7. The United States District Court for the District of New Union granted summary judgment in favor of Moon Moo Farm on the CWA, RCRA, and trespass claims, R. 4, and EPA and Riverwatcher filed notices of appeal. R. 1.

II. STATEMENT OF UNDISPUTED FACTS

Nestled along a bend in the Deep Quod River, Moon Moo Farm has produced fresh milk from its dairy operations near Farmville, New Union, for many decades. R. 4. Cows at Moon Moo Farm are housed in a barn, from which manure and liquid waste are piped into an outdoor lagoon designed to withstand as much as a 25-year rain event. *Id.* In accordance with Moon Moo's Nutrient Management Plan (NMP), manure is held in the lagoon temporarily and then spread over 150 acres of Moon Moo property as fertilizer for Bermuda grass, a hardy crop that can tolerate a wide range of soil pH conditions. R. 5, 6. The grass is harvested each summer for use as animal feed in winter. R. 5.

Local demand for milk soared after Chokos Greek Yogurt opened a yogurt-making facility in Farmville in 2009. *Id.* Moon Moo responded to the need by increasing the size of its herd from 170 cows to 350 to provide milk for the facility. *Id.* In 2012, Chokos deepened its relationship with Moon Moo by providing acid whey produced at its plant for use in the fertilizer mixture that Moon Moo sprays on its fields. *Id.* The use of whey as a soil conditioner is a traditional practice in New Union dating back to the 1940s. R. 6.

Moon Moo is regulated by the New Union Department of Agriculture (DOA) as a no-discharge animal feeding operation (AFO) and thus is not required to obtain a permit under the CWA's NPDES program. R. 5, 6. The farm's NMP, which notably allows for application of fertilizer during rainy weather, R. 7, has not been deemed insufficient by the DOA, R. 5. Moon Moo's records show that farm's manure application has remained consistent with the plan. R. 5.

The Queechunk Canal, a bypass canal off the Deep Quod River, has formed a part of Moon Moo's property since the 1940s, when a previous owner of the farm excavated a portion of his land in order to alleviate flooding problems at the river bend. *Id.* Approximately fifty feet wide and only three to four feet deep, the canal is only navigable by canoes and other small vessels. *Id.* Moon Moo owns the land on both sides of the man-made canal and considers it part of its property. *Id.* Indeed, it has been clearly designated as such by "No Trespassing" signs posted prominently along both sides of the canal. *Id.* Although the canal has been used by trespassers as a "shortcut" to travel along the Deep Quod River, boaters may travel unimpeded without use of the canal. *Id.*

In the late winter and early spring of 2013, the Farmville Water Authority issued a nitrate advisory, its sixth since 2002. R. 6, 7. Even then, adults and children could drink from the city's water supply without ill effect. R. 6. Nitrate levels were deemed potentially hazardous only to infants less than two years old, *id.*, whose families gave them bottled water, R. 11. Captured by the spirit of vigilantism, Riverwatcher representative Dean James ignored the "No Trespassing" signs and ventured without permission onto the Queechunk Canal on April 12, 2013, following a significant two-day rainstorm. R. 6. While trespassing in a small "jon boat" on the canal, James secretly photographed farm operations on Moon Moo's private lands and collected samples from the mouth of a ditch on Moon Moo's property. *Id.*

STANDARD OF REVIEW

United States Courts of Appeal review a "'grant of summary judgment de novo, applying the same legal standards as the district court.'" *Black Warrior Riverkeeper, Inc. v. Black Warrior Minerals, Inc.*, 734 F.3d 1297, 1300 (11th Cir. 2013) (citation omitted).

SUMMARY OF THE ARGUMENT

The district court correctly held that James was trespassing when he entered the Queechunk Canal. The Canal is not a publicly navigable waterway of New Union because it is a man-made body of water that was dredged on private property after New Union became a state. Thus, it is not subject to the public trust doctrine, a conclusion echoed by Supreme Court precedent and further supported by the doctrine's underlying policy considerations. Since James was therefore trespassing, the district court properly suppressed the evidence he obtained from the Canal. Because James was acting as an agent of EPA during his trespass, and the interest in deterring similar agency overreaches outweighs the societal cost of disallowing the evidence, the court did not err in its application of the exclusionary rule.

Furthermore, the district court properly granted summary judgment in favor of Moon Moo on the CWA claims. Aside from the lack of admissible evidence establishing a discharge, any alleged discharge would not violate the CWA because it would not have come from a point source. Only point source discharges require an NPDES permit under the CWA, and while "point source" is defined to include a "ditch" and a "CAFO," it specifically excludes "agricultural stormwater runoff." Moon Moo does not meet the regulatory definition of a CAFO and is therefore not subject to NPDES permitting. Moreover, any discharge from the farm's manure application fields is exempt from NPDES permitting liability as agricultural stormwater because of the farm's NMP-compliant application of the mixture of manure and acid whey.

Finally, summary judgment was proper on Riverwatcher's RCRA claim for two reasons, either one of which alone would defeat Riverwatcher's argument. First, the mixture is not a jurisdictional "solid waste." The heart of the statutory definition of solid waste is "discarded material," a term understood to entail disposal, abandonment, or throwing away. Because material retained for reuse is not thrown away in any sense, it follows that there is no discard when material has been recycled or otherwise put to a beneficial use. Thus, recycled agricultural waste like the mixture at issue is not discarded when applied for its valuable soil-conditioning properties. Moreover, EPA has consistently and reasonably read RCRA to exempt land-applied agricultural waste from its solid waste jurisdiction. These agency regulations and interpretations are entitled to substantial deference, and further reinforce the conclusion that the mixture is not a RCRA solid waste. Second, Riverwatcher cannot establish that the mixture may have presented an imminent and substantial endangerment to human health, as required to bring citizen suit under RCRA. Read as a whole, the language of the citizen suit provision predicates jurisdiction on a realistic pathway of exposure from the waste to the at-risk population. Because Farmville residents give bottled water to their infants—the only endangered group—and these infants are effectively unable to reach other sources of drinking water, no such pathway exists. Thus, Riverwatcher's citizen suit is barred by statute and summary judgment must be affirmed.

ARGUMENT

I. THERE IS NO RIGHT OF PUBLIC ACCESS TO THE QUEECHUNK CANAL UNDER THE PUBLIC TRUST DOCTRINE.

A. The public trust doctrine does not apply to the Queechunk Canal because it is a man-made canal that was dredged after New Union became a state.

The public trust doctrine, imported to the United States from English common law, protects our nation's navigable waterways and the public's ability to use them for fishing,

navigation, commerce, recreation, or other uses. *See PPL Montana LLC v. Montana*, 132 S.Ct. 1215 (2012). Under the doctrine, navigable waterways of the United States are held in trust by the states for the public benefit, thereby protected against usurpation by private interests. *See St. Croix Waterway Ass'n v. Meyer*, 178 F.3d 515, 519 (8th Cir. 1999). Indeed, the Supreme Court has said "running water in a great navigable stream is [incapable] of private ownership." *United States v. Chandler-Dunbar Co.*, 229 U.S. 53, 69 (1913).

The title to land under the nation's waterways—i.e., ownership of the waterways—was vested in the respective states at the date of statehood. *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 370–71, (1977) (explaining that a "State's title to the riverbed vests absolutely as of the time of its admission" to the Union). Thus, states hold property rights in the nation's waterways that were entrusted to them for the sake of the public good by common law and, later, by statute. *See, e.g.*, 43 U.S.C. § 1301 (2012). But those rights do not apply to the Queechunk Canal because it was not an existing waterways at the time New Union achieved statehood. The Queechunk Canal was dredged by the owners of Moon Moo Farm on land it already owned in 1940 in what was already the state of New Union. R. 4. Thus, ownership rights in the canal never transferred to the state. Rather, the property interest in the canal always has been, and remains, in private hands.

B. Forcing public access to the Queechunk Canal would constitute a taking, which shows that the Canal is Moon Moo Farm's private property.

In tandem with state property interests under the public trust doctrine, Congress asserts federal regulatory authority over the nation's waters under its Commerce Clause powers. *See Kaiser Aetna v. United States*, 444 U.S. 164, 172 (1979); U.S. Const. art. I, § 8, cl. 3. This authority extends to the regulation of navigable waters. *Kaiser Aetna*, 444 U.S. at 173. However, the Supreme Court "has never held that the federal navigational servitude creates a blanket

exception to the Takings Clause of the Fifth Amendment whenever Congress exercises its Commerce Clause authority to promote navigation." *Id.* at 172. "Congress may . . . assure the public a free right of access . . . if it so chooses, but whether a statute or regulation that goes so far amounts to a 'taking' is an entirely separate question," *id.* at 164, decided case-by-case through "ad hoc, factual inquiries that have identified several factors—such as the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action—that have particular significance." *Id.* at 175.

In *Kaiser Aetna*, the Court determined that forcing public access to a man-made navigable waterway constituted a taking where developers in Hawaii had dredged an eight-foot-deep channel to connect a shallow fishing pond to a bay to provide members of a residential community boat access to the Pacific Ocean. *Id.* at 179–80, 167. The Court found:

> Although the dredged pond falls within the definition of 'navigable waters' as this Court has used that term in delimiting the boundaries of Congress' regulatory authority under the Commerce Clause . . . [H]ere the Government's attempt to create a public right of access to the improved pond goes so far beyond ordinary regulation or improvement for navigation . . . as to amount to a taking requiring just compensation.

Id. at 165. The underlying assumption here is that the property rights of the private owner did not dissolve when the land was dredged to create the channel; rather, the channel remained privately owned. In its decision, the Court noted that the owners of the pond had invested considerable money into the waterway "on the assumption that it was a privately owned pond." *Id.* at 169.

Similarly, the government's position here would force public access of a man-made navigable waterway dredged on private land. Like the ditch in *Kaiser Aetna*, the Queechunk Canal was constructed on private property and did not exist until the owners of the land invested significant resources to build it; allowing a public right of access along the canal to James would essentially create a public thoroughfare across private land not subject to the public trust

doctrine. Moreover, the plaintiffs are not attempting to assert a right of public access prospectively but instead attempting to justify an encroachment after the fact. As the majority noted in *Kaiser Aetna*, New Union could have prohibited the owners from dredging the canal in the first place, or demanded conditions of public access in the planning stages. But it did not. Moon Moo therefore had no indication it might lose a significant interest in its own property by making the investment. *Id.* at 179.

The factual similarities between *Kaiser Aetna* and this case are striking; thus, the Court's reasoning should apply. Moon Moo's substantial investment in the canal, the loss of property rights that forced public access would entail, and the government's tacit approval of the project at the time of the dredging clearly indicate that Moon Moo's private property rights remain and, thus, requiring public access to the Queechunk Canal would constitute a taking.

C. Application of the doctrine would undermine relevant policy considerations.

The public trust doctrine is intended to protect the nation's public water resources from usurpation by private interests. *See* Joseph Sax, *The Public Trust Doctrine*, 68 Mich. L. Rev. 471, 475 (1970). This policy is not implicated here: The canal was constructed on land that had been privately owned by Moon Moo, and there is no evidence that the private nature of the canal has been challenged either by New Union or the federal authorities before now. Indeed, Moon Moo's dredging of the canal served the very public benefit the public trust doctrine is designed to protect by alleviating flooding problems on the Deep Quod River. *Id.* Moreover, the tiny Queechunk Canal, cut only three to four feet deep and non-navigable except by canoes and other small vessels, is far from the kind of interstate water Congress' commerce power is intended to protect. *See Kaiser Aetna*, 444 U.S. at 172. Although it attaches to the Deep Quod River, the man-made canal does not cross state boundaries and is used for little else than as a shortcut down

the Deep Quod by occasional trespassers. R. 4. Thus, in light of Moon Moo's history of ownership, the *Kaiser Aetna* decision, and relevant policy considerations, this Court should affirm the district court's holding that the public trust doctrine does not apply to the Canal.

II. THE DISTRICT COURT CORRECTLY APPLIED THE EXCLUSIONARY RULE TO SUPPRESS EVIDENCE UNLAWFULLY OBTAINED BY RIVERWATCHER.

The Fourth Amendment guarantees the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. Under the Dictionary Act, "the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 1 U.S.C. § 1 (2012). Thus, Moon Moo, an incorporated dairy farm, enjoys the protections of the Fourth Amendment.

To protect the constitutional rights of persons, the courts have long held that evidence obtained by the government through illegal means, violative of the Fourth Amendment, is inadmissible in a criminal trial. *See Mapp v. Ohio*, 367 U.S. 643 (1961). This "exclusionary rule" applies to evidence obtained directly from the illegal search as well as "derivative evidence, both tangible and testimonial, that is the product of the primary evidence, or that is otherwise acquired as an indirect result of the unlawful search." *Murray v. United States*, 487 U.S. 533, 536–37 (1988). The rule "operates as 'a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.'" *United States v. Leon*, 468 U.S. 897, 906 (1984) (quoting *United States v. Calandra*, 414 U.S. 338, 348 (1974)). Although primarily applied in criminal cases, the exclusionary rule has been extended to civil proceedings under specific circumstances. It is an issue of first impression in the 12th Circuit.

A. The exclusionary rule applies because Riverwatcher was acting as an agent of EPA when it trespassed on Moon Moo Farm's property.

The searches and seizures proscribed by the Fourth Amendment occur "when an expectation of privacy that society is prepared to consider reasonable is infringed" or "when there is some meaningful interference with an individual's possessory interests in that property." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). Although this protection guards against government intrusion, it may also be implicated by a private individual acting "as an agent of the Government or with the participation or knowledge of any government official." *Jacobsen*, 466 U.S. at 114 (citing *Walter v. United States*, 447 U.S. 649, 662 (1980) (Blackmun, J., dissenting)).

Determining whether an individual is acting as an instrument or agent of government involves two key factors: whether the government knew of and acquiesced to the search and whether the individual conducted the search for the purpose of assisting the government. *United States v. Feffer*, 831 F.2d 734, 738 (7th Cir. 1987). This analysis "must be made on a case-by-case basis and in light of all of the circumstances." *Id.*

In *Feffer*, the Seventh Circuit let stand a district court's decision to admit evidence of tax fraud provided by an employee to the Internal Revenue Service where the employee may have motivated, in part, by a personal desire for retribution, and where the IRS had never requested the documents. *Id.* at 739–40. Although the court decried the agency's behavior in taking the documents, it accepted the lower court's rationale that the IRS did not necessarily acquiesce to the violation because it did not request the documents. *Id.* In a similar case, however, the court found a disgruntled employee was acting for the government when the employee stole documents for the purpose of giving them to the Federal Trade Commission, and the FTC had "knowingly approved of the employee's conduct by accepting the documents." *Id.* (citing *Knoll Assoc., Inc., v. FTC*, 397 F.2d 530 (7th Cir. 1968).

The facts in this case are closer to *Knoll* than to *Feffer*. Here, Riverwatcher's only discernible motivation in collecting evidence of alleged EPA violations is to assist EPA in its regulation of Moon Moo. The organization's entire purpose is to watch over the river, and the path for pursuing environmental violations in the river leads directly to EPA. Additionally, EPA acquiesced to the search by accepting the photographs, observations, water samples, and lab tests directly from Riverwatcher. Moreover, because the evidence is inherently location specific—the photographs and samples derived necessarily from the canal and were used to obtain derivative lab results—EPA clearly had knowledge that Riverwatcher had ventured onto the property in order to obtain them. Thus, because Riverwatcher conducted its illegal search to obtain evidence to aid the government and EPA demonstrated knowledge and acquiescence to the search by accepting the evidence, Riverwatcher was acting as an agent of the government.

B. Suppression was justified because the significant interest in deterring agency overreach outweighs the marginal societal cost of excluding the evidence.

The exclusionary rule has been employed to ensure the rights of individuals – and, by extension, groups of individuals—and to deter the government or its agents from overreach. *See United States v. Janis*, 428 U.S. 433, 446 (1976). To determine whether to apply the exclusionary rule in a particular case, the Supreme Court has promulgated a balancing test that weighs the rule's deterrent effect on Fourth Amendment violations against the societal cost in proscribing law enforcement efforts. *See I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 1041 (1984). Factors considered by the courts in the balancing test include the egregiousness of the Fourth Amendment violation and whether the resulting government action was corrective or punitive; the personal or professional motivations of those who committed it; and whether the evidence was obtained in good faith. *See, e.g.*, *Trinity Indus., Inc. v. Occupational Safety & Health Review*

Comm'n, 16 F.3d 1455 (6th Cir. 1994); *Smith Steel Casting Co. v. Brock*, 800 F.2d 1329 (5th Cir. 1986); *Tirado v. Comm'r*, 689 F.2d 307 (2d Cir. 1982).

Although there is no Supreme Court precedent for applying the exclusionary rule in EPA proceedings, our sister circuits have excluded evidence improperly obtained by other agencies. *See Trinity*, 16 F.3d at 1460 (excluding evidence obtained by the Occupational Safety & Health Review Commission when it exceeded the scope of its warrant, citing the "increased danger of abuse of discretion and intrusiveness" of such searches and the need for an "appropriate relationship;" between the inspection and the alleged violation.). Similarly, the Fifth Circuit held that that illegally obtained evidence may be admitted to prompt quick corrective action but must be excluded in proceedings seeking merely to "punish[] the crime." *Smith Steel Casting*, 800 F.2d at 1334. In other words, the exclusionary rule will not be applied to suppress evidence if doing so prevents the agency from remedying violations involving unsafe or unhealthy working conditions, but it "should be applied for purposes of assessing penalties after the fact." *Id.*

This distinction was illustrated by the Supreme Court in dicta when it court noted that "presumably no one would argue that the exclusionary rule should be invoked to prevent an agency from ordering corrective action at a leaking hazardous waste dump if the evidence underlying the order had been improperly obtained." *Lopez-Mendoza*, 468 U.S. at 1046. That example is inapplicable here for three key reasons: First, hazardous waste is inherently more serious than the agricultural waste at issue here. *See infra* Part IV.A. Additionally, the dictum refers to a "leak" and suggests the use of evidence to prompt quick corrective action. *Lopez-Mendoza*, 468 U.S. at 1046. There is no such emergency situation at issue in this case, but rather a longstanding farming practice. Moreover, this case concerns not only injunctive relief but potentially substantial financial penalties, a difference the Supreme Court has found significant

in applying the exclusionary rule. *See id.* at 1038 (drawing a line between "a purely civil action" and a proceeding "to punish an unlawful [act]").

The constitutional violation in this case was more egregious than those in *Trinity* or *Smith Steel Casting*: instead of overstepping the bounds of a warrant, EPA seeks to admit evidence obtained by warrantless trespass. Riverwatcher has no independent authority to inspect Moon Moo. Moreover, higher nitrate levels in the Farmville water supply were well known. R. 5. EPA could have acted lawfully to investigate the source of the problem but instead relied on the unlawful actions of a third party. Thus, the need for deterrence in this case is strong.

Moreover, admitting Riverwatcher's illegally obtained evidence would not allow merely corrective action, but would pave the way for "punishment" in the form of a citizen suit and possibly substantial civil penalties. R. 4. Indeed, the CWA allows for criminal penalties as well, though they are not specifically implicated in this case. *See* 33 U.S.C. §§ 1311(a), 1319(c), (d), 1342 (2012). Thus, under the reasoning of the Fifth Circuit, evidence obtained by Riverwatcher should remain inadmissible unless a good faith exception applies.

Courts also look to intent to determine whether to admit improperly obtained evidence. The Second Circuit in *Tirado* examined the underlying motives of the officer who obtained evidence illegally to determine whether the officer's personal interests or official duties provided an incentive to conduct an illegal search: "Determining when the likelihood of substantial deterrence justifies excluding evidence requires some assessment of the motives of the officials who seized the challenged evidence. This inquiry into the officers' motivation is the fundamental issue in translating the idea of deterrence into practical decisions, for deterrence means modifying individual behavior." 689 F.2d at 310.

Surely Riverwatcher, an environmental advocacy group, had a personal stake in its search. The very name of the group indicates its purpose and goal, and its potentially adversarial relationship to industry. That personal relationship casts doubt on the reliability of its evidence; allowing it to be used against Moon Moo Farms despite its unlawful origin would encourage environmental groups elsewhere to thwart the constitutional protections for property and privacy in their quest for evidence, at the expense of individual freedoms.

In cases where the exclusionary rule otherwise applies, a good-faith exception may be employed to allow otherwise suppressible evidence if the offending agent "neither knew nor should have known that they were acting contrary to the dictates of the Fourth Amendment." *Lopez-Mendoza*, 468 U.S. at 1056. The exception is carved out for circumstances in which "law enforcement officers have acted in objective good faith or their transgressions have been minor" in relation to the "magnitude of the benefit" that would be conferred on guilty defendants. *See Leon,* 468 U.S. at 908.

The good faith exception clearly does not apply in these circumstances because Riverwatcher, and by extension EPA, were both aware of the trespass required to obtain the evidence in question. Posted signs alerted James that he was in private property, and he clearly had no permission to enter. Moreover, Moon Moo remains subject to EPA regulation and permitting; procedures already are in place to monitor compliance and to correct and/or punish violations. Excluding Riverwatcher' evidence does not allow Moon Moo to circumvent any regulatory responsibilities: the alleged violations do not relate to a one-time action but implicate Moon Moo's standard operating procedures, and EPA remains free to monitor and regulate the farm through lawful means. On the other hand, the transgression is not minor: Allowing the EPA to accept unlawfully obtained evidence from an environmental group would offer an incentive

for the agency to circumvent constitutional protections by accepting evidence by any means necessary through a proxy. Because Riverwatcher's trespass was egregious, the statutory penalties at issue are punitive as well as corrective, and Riverwatcher had a personal stake in the search and was not acting in good faith, evidence obtained by the group was properly excluded by the District Court.

III. MOON MOO FARM DOES NOT REQUIRE A PERMIT UNDER THE NPDES PERMITTING PROGRAM OF THE CWA BECAUSE IT IS NOT A CAFO AND ANY DISCHARGE FROM ITS MANURE APPLICATION FIELDS IS EXEMPT FROM PERMITTING REQUIREMENTS AS AGRICULTURAL STORMWATER.

Under the CWA, all discharges of pollution from point sources to waters of the United States require an NPDES permit. 33 U.S.C. § 1311(a) (2012). By contrast, nonpoint source discharges—including most agricultural runoff—do not require an NPDES permit. *Id.* § 1362(14). The CWA thus effectively removes nonpoint sources from federal oversight and instead delegates regulation and control of these sources to the states. As such, the runoff from Moon Moo Farm's land application field must constitute a point source discharge subject to the NPDES permitting program for the farm to incur liability under the CWA.

The CWA specifically defines a "point source" to include a "ditch" and a "CAFO" but specifically excludes "agricultural stormwater discharges" *Id.* § 1362(14). EPA and Riverwatcher argue that Moon Moo Farm is a "medium CAFO" and that the discharge from the farm's land application area is a point source discharge that requires an NPDES permit. R. 7. Riverwatcher's second claim, which EPA does not join, is that excess nutrient discharges from the farm's manure application fields subject it to NPDES permitting liability even if the farm is not a CAFO. R. 7, 8. However, neither of these reasons requires Moon Moo Farm to obtain an NPDES permit. First, Moon Moo Farm does not meet the regulatory definition of a CAFO and is

therefore not subject to NPDES permitting liability in that respect. Second, any discharge from the manure application fields falls under the CWA agricultural stormwater exemption and therefore is not subject to NPDES permitting requirements. *See* 33 U.S.C. § 1362(14) (2012). Accordingly, any discharge from the farm's land application field is a nonpoint source discharge exempt from NPDES permitting requirements.

A. Without evidence of a discharge from Moon Moo Farm's land application area, the farm cannot meet the regulatory definition of a CAFO, and therefore is not subject to NPDES permitting.

In contrast to most agricultural runoff, AFOs are not always exempt from the NPDES permit program. Specifically, EPA designates certain AFOs as CAFOs allowing for potential NPDES regulation, as CAFOs are expressly listed within the definition of "point source" in the CWA. 33 U.S.C. § 1362(14) (2012); 40 C.F.R. § 401.11(d) (2014). Thus, only AFOs that meet the regulatory definition of a CAFO are subject to the NPDES permitting program. 40 C.F.R. § 122.23(a) (2014). Moon Moo Farm falls within the definition of a "medium" AFO. *Id.* § 122.23(b)(6). A "medium" AFO cannot be considered a CAFO unless it meets one of two conditions:

> (A) Pollutants are discharged into waters of the United States through a man-made ditch, flushing system, or other similar man-made device; or
>
> (B) Pollutants are discharged 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.

Id. As recognized by the district court, no parties claim that any waters of the United States pass over, across, or through Moon Moo Farm's milk production area. R. 8. Therefore, Moon Moo Farm cannot be a CAFO unless Riverwatcher and EPA show that the farm discharged pollutants through a "man-made ditch, flushing system, or other similar man-made device." 40 C.F.R. § 122.23(b)(6)(ii) (2014).

Riverwatcher and EPA assert that that the drainage ditch from the land application field satisfies the criteria of discharging pollutants "through a man-made ditch." R. 8. However, the appellants must show that Moon Moo Farm actually discharged pollutants through the drainage ditch from the land application field in order for the farm to be considered a CAFO. 40 C.F.R. § 122.23(b)(6)(ii) (2014). The only evidence presented of any discharge flowing from this ditch consisted of the samples and photographs taken by James when he entered the Queechunk Canal on April 12, 2013. R. 6, 8. As discussed above, James was trespassing when he entered the property on April 12, and appellants may not rely on evidence obtained through his trespass to establish that Moon Moo Farm violated the CWA. *See supra* Parts I–II. Accordingly, EPA and Riverwatcher have no admissible evidence to show that Moon Moo Farm discharged pollutants from the drainage ditch on its fields. Without such evidence, Moon Moo Farm is not a CAFO. Therefore, this Court should affirm the district court's holding that Moon Moo Farm is not a CAFO subject to permitting under the NPDES permit program pursuant to the CWA.

B. Because Moon Moo Farm applied the manure and acid whey mixture to its land application area in compliance with its NMP, any resulting discharge is agricultural stormwater exempt from NPDES permitting liability.

The plain text of the CWA makes clear that agricultural stormwater discharges are nonpoint source discharges that are not subject to NPDES permitting requirements. 33 U.S.C. § 1362(14) (2012). The CWA specifically excludes "agricultural stormwater discharges" from its definition of "point source." *Id.* The term "agricultural stormwater discharge" is not defined in the statute. Rather, EPA regulations define the agricultural stormwater exemption as it relates to NPDES regulated discharges from CAFO land application areas. 40 C.F.R. § 122.23(e) (2014). Under EPA regulations, land application discharges from CAFOs are point source discharges subject to NPDES permitting requirements. *Id.* However, where CAFOs land-apply waste in

accordance with site-specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in that waste, any resulting "precipitation-related" discharge is considered to be an "agricultural stormwater discharge" that is exempt from regulation under the CWA. *Id.*

Because EPA administers this section of the CWA, its regulatory interpretation of the statute is entitled to heightened judicial deference under the two-part test established in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984). In reviewing an agency's interpretation of a statute it administers, this Court must first decide "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. Under the second prong, where "Congress has explicitly left a gap" to be filled, the agency's regulatory interpretation is "given controlling weight unless . . . arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 843–44. "[I]f the statute is silent or ambiguous with respect to the specific issue, the question . . . is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. The interpretation must have been reached in a formal adjudication or notice-and-comment rulemaking in order to be afforded *Chevron* deference. *Christensen v. Harris County*, 529 U.S. 587 (2000). The CWA is silent—and thus ambiguous—with respect to the definition of "agricultural stormwater discharge," and EPA's comprehensive regulations interpreting the statutory terms "point source" and "agricultural stormwater" as applied to CAFOs were promulgated through notice-and-comment rulemaking. Thus, EPA's interpretation of the statute is entitled to *Chevron* deference if its interpretation is a permissible construction of the statute. *Chevron*, 467 U.S. at 843.

The Supreme Court has provided little guidance as to how a court should evaluate whether the agency's interpretation is "permissible" or "reasonable" under *Chevron's* second

prong. Generally, in order to discern whether the agency's interpretation is reasonable, a court will consider whether the agency's position comports with the overall purpose and goal of the statute in question. For example, in *Chevron*, the Supreme Court noted that the agency's interpretation "of the term 'source' is a permissible construction of the statute" in light of the statute's goals "to accommodate progress in reducing air pollution with economic growth." *Id.* at 866. EPA reads the CWA's definition of "point source" as generally authorizing the regulation of CAFO discharges, but exempting such discharges from regulation to the extent that they constitute agricultural stormwater. This is a reasonable construction in light of the legislative purpose of the CWA's agricultural stormwater exemption.

Congress amended the CWA in 1987 to exclude all "agricultural stormwater discharges" from "point source" status. Water Quality Act of 1987, Pub. L. No. 100-4, § 503, 101 Stat. 7, 75 (codified at 33 U.S.C. § 1362(14) (2012)). When Congress added the agricultural stormwater exemption to the CWA, it affirmed that liability would not be imposed for agriculture-related discharges triggered not by negligence or malfeasance, but by the weather—even when those discharges came from what would otherwise be point sources. *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 507 (2d Cir. 2005). Indeed, there is no authoritative legislative history to the contrary. *Id.* While the regulations hold CAFOs liable for most land application discharges, it prevents CAFOs from being held liable for "precipitation-related discharge[s]" where "manure, litter or process wastewater has [otherwise] been applied in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization." 40 C.F.R. § 122.23(e) (2014). In other words, like the CWA itself, the regulations seek to remove liability for agriculture-related discharges primarily caused by nature, while maintaining liability for other discharges. *Waterkeeper,* 399 F.3d at 507. In light of these shared purposes, EPA's regulatory

agricultural stormwater exemption is based on a permissible interpretation of the CWA and is thus entitled to *Chevron* deference. Therefore, this Court must give controlling weight to the regulation.

Accordingly, where manure has been applied in a manner consistent with site-specific nutrient management practices, a CAFO may consider any subsequent discharge as "agricultural stormwater" and thereby avoid both CWA jurisdiction and NPDES permitting requirements. 40 C.F.R. § 122.23(e) (2014). Site-specific nutrient management practices are accomplished through the development of a NMP ensuring appropriate agricultural utilization of nutrients in land applied waste. *Id.* § 122.42(e). Thus, the only way to determine whether a precipitation-related discharge from Moon Moo Farm's land application area is a discharge in violation of the CWA is to determine whether the farm has complied with the conditions of its NMP. *Id.* § 122.23(e). It is undisputed that Moon Moo Farm filed an NMP with the Farmville Regional Office of the State of New Union Department of Agriculture. R. 6, 9. Moon Moo Farm retains the appropriate records certifying that it has applied manure to its fields at rates consistent with the NMP filed with the Farmville office at all relevant times. R. 9. Consequently, any precipitation-related discharge of manure from Moon Moo Farm's manure application fields are exempt from the NPDES permitting requirement as agricultural stormwater due to the farm's compliance with a NMP. 40 C.F.R. § 122.23(e) (2014).

Riverwatcher's expert opined that adding the acid whey from the Chokos plant increased the acidity of the liquid manure and lowered the pH of the soil. R. 6. According to their expert, this acidity prevented the Bermuda grass—a plant known for its pH tolerance—from effectively taking up the nutrients in the manure. *Id.* But even if this were the case, the manure and acid whey mixture was applied in accordance with the NMP. R. 9. The New Union DOA had the

authority to reject Moon Moo Farm's NMP if the agency found it to be insufficient. Even if the DOA does not ordinarily review submitted NMPs, this does not diminish the fact that Moon Moo Farm properly submitted its NMP and complied with its terms.

Thus, any resulting discharge from Moon Moo Farm's manure application field is exempt agricultural stormwater discharge. The only tool available to rebut this defense is the argument that the discharge was not "precipitation-related." *Waterkeeper,* 399 F.3d at 507. If a CAFO owner over-applies manure and a discharge occurs because of oversaturation, rather than precipitation, it is regulated under the NPDES permitting provisions of the CWA. *Id.* However, Riverwatcher has presented no evidence to show that the discharge was not caused by the rain event that occurred while James was collecting evidence. James collected the water samples at issue on April 12, 2013. R. 6. Between April 11 and April 12, 2013, two inches of rain fell in the Farmville region. *Id.* Indeed, Riverwatcher's own expert stated that the unprocessed nutrients were released into the environment, including the Deep Quod River, by leaching into groundwater and through runoff during rain events. *Id.* Nothing in the Farm's NMP prevents it from land applying manure during a rain event. R. 7. Therefore, even if the fields were oversaturated because the Bermuda grass failed to effectively take up the manure nutrients, these excess nutrients were discharged as a result of stormwater runoff.

The CWA and EPA regulations do not expressly address stormwater runoff from land application of manure by AFOs that do not qualify as CAFOs, such as Moon Moo Farm. However, the CAFO regulations defining agricultural stormwater discharges should apply to AFOs in general, as CAFOs are just a subset of AFOs. Thus, the agricultural stormwater exemption permits the discharge of pollutants from land areas of AFOs, just as it does from CAFOs, where manure has been applied in compliance with an NMP. Accordingly, this Court

should affirm the district court's holding that discharges from Moon Moo Farm's land application fields falls under the agricultural stormwater exemption because the farm correctly applied manure in compliance with its NMP.

IV. MOON MOO FARM IS NOT SUBJECT TO CITIZEN SUIT UNDER RCRA BECAUSE THE MIXTURE AT ISSUE IS NOT A STATUTORY "SOLID WASTE" AND BECAUSE RIVERWATCHER FAILED TO ESTABLISH THAT THE MIXTURE MEETS THE CITIZEN SUIT ENDANGERMENT STANDARD.

RCRA "is a comprehensive environmental statute" regulating the handling and disposal of solid and hazardous waste. *City of Chicago v. Envtl. Def. Fund*, 511 U.S. 328, 331 (1994). The statute aims "to minimize the present and future threat to human health and environment" by "reduc[ing] or eliminat[ing]" the rate at which such waste is generated. 42 U.S.C. § 6902(b) (2012). RCRA regulates materials classified as either solid or hazardous waste, reserving its most stringent restrictions for the latter. *Compare id.* § 6921 et seq. *with id.* § 6941 et seq. Among its other enforcement mechanisms, RCRA allows for citizen suits against "any person" whose contribution to the "disposal of . . . solid or hazardous waste . . . may present an imminent and substantial endangerment to health or the environment." *Id.* § 6972(a)(1)(B). Because Riverwatcher rightly concedes that the mixture at issue is not a hazardous waste, R. 10, it must prove that the mixture is a solid waste in order to be subject to RCRA at all. Moreover, unless Riverwatcher shows that the mixture contributed to contamination that meets the citizen suit endangerment standard, its claim is barred by statute. Because Riverwatcher cannot establish a genuine issue of material fact as to one—let alone both—of the requisite showings, the district court's grant of summary judgment must be affirmed. *See* Fed. R. Civ. P. 56(a).

A. Moon Moo Farm's mixture of recycled agricultural waste cannot be a statutory "solid waste" because it is not a "discarded material."

1. RCRA's language, purpose, and legislative history show that recycled agricultural waste put to beneficial use as fertilizer is not "discarded."

When "interpreting a statute" such as RCRA, this Court must "determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). RCRA defines solid waste as "any garbage, refuse, sludge . . . and other discarded material, including . . . material resulting from . . . agricultural operations." 42 U.S.C. § 6903(27) (2012). Because this case does not deal with garbage, refuse, or sludge, the operative statutory language is "discarded material."[1] *See Robinson*, 519 U.S. at 341 (relying on "the specific context in which . . . language is used" to give meaning to the statute).

"RCRA itself does not define the term '*discarded material*.'" *Safe Air for Everyone v. Meyer* (*SAFE*), 373 F.3d 1035, 1041 (9th Cir. 2004); *see* 42 U.S.C. § 6903(27) (2012). Thus, courts interpreting RCRA have "assum[ed] that the legislative purpose is expressed by the ordinary meaning of the words used." *Russello v. United States*, 464 U.S. 16, 21 (1983) (citation omitted). Our sister circuits agree as to this ordinary meaning: material is discarded if it is disposed of, abandoned, cast aside, or thrown away. *See, e.g.*, *SAFE*, 373 F.3d at 1041 (defining *discard* as "to cast aside; reject; abandon; give up") (internal quotation marks omitted); *AMC I*, 824 F.2d at 1184 (defining *discarded* as "disposed of, thrown away or abandoned") (internal quotation marks omitted).

[1] Although the Supreme Court has not passed on this question, this is likely because the circuits have reached well-reasoned accord on the issue. *See, e.g.*, *Am. Mining Cong. v. EPA* (*AMC I*), 824 F.2d 1177, 1189–90 (D.C. Cir. 1987) (applying *ejusdem generis* to conclude that RCRA grants jurisdiction over all "discarded material" similar in kind to the enumerated garbage, refuse, and sludge); *Military Toxics Project v. EPA*, 146 F.3d 948, 951 (D.C. Cir. 1998) ("Solid waste is by statute defined broadly as any 'discarded material.'"); *see also* H.R. Rep. No. 94-1491, pt. 1, at 2 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6240 ("The words discarded materials more accurately reflect" RCRA's ambit than does the term "solid waste.").

To determine whether material is discarded in the statutory sense—i.e., disposed of, thrown away, or the like—the reasonable inquiry is whether it has been recycled or otherwise put to some beneficial use. *See generally AMC I*, 824 F.2d 1177. This query reflects common-sense limitations on what can fairly be described as discarded, and moreover promotes RCRA's express goal of easing waste disposal issues by reducing the production of solid waste. *Cf. Cmm'r v. Brown*, 380 U.S. 563, 571 (1965) (explaining that statutory purposes may guide the probe into the ordinary meaning of an undefined statutory term).

Describing a material "retained for immediate reuse" as discarded "strains . . . the everyday usage of that term." *AMC I*, 824 F.2d at 1184. This is simple logic: materials "passing in a continuous stream from one production process to another" are never abandoned, cast aside, or thrown away. *Id.* at 1190. Regardless, Riverwatcher may claim that Chokos' acid whey was discarded by pointing to case law finding a discard when material passes between industries before being reclaimed. *See United States v. ILCO, Inc.*, 996 F.2d 1126 (11th Cir. 1993). This view stems not from the statute but from a too-strict reading of the D.C. Circuit's decision in *AMC I*, which the Circuit has since clarified. *Safe Food & Fertilizer v. EPA*, 350 F.3d 1263 (D.C. Cir. 2003).

In *Safe Food*, the court explained that material produced and immediately reclaimed by the same firm is per se not discarded. *Id.* at 1268. But the inverse is not true: RCRA's statutory language does not "compel[] the conclusion that material destined for recycling in another industry is necessarily 'discarded.'" *Id. Safe Food*'s rule hews more closely to congressional intent than does the one set out in *ILCO*. Not only are "firm-to-firm transfers . . . hardly good indicia of a 'discard'" in the modern marketplace, *id.*, but *Safe Food*'s reading of *discarded* does

more to incentivize the recycling and reclamation practices that RCRA encourages.[2] *See* 42 U.S.C. § 6902(b) (2012). Thus, the acid whey's transfer from Chokos to Moon Moo should not decide its status under RCRA.

Under *Safe Food*, both the whey and manure should be considered recycled. The manure is reclaimed immediately to fertilize the cows' sileage (i.e., for use in the dairy farm—the industry that produced the manure), and thus is per se not discarded. *See Safe Food*, 350 F.3d at 1268. Although it sits in the lagoon prior to being land-applied, a period of storage between reclamation and reuse should not establish a discard. Rather, Moon Moo's investment in storing the manure prior to its reuse indicates just the opposite: if the dairy intended to cast aside or throw away the manure, it would do so immediately instead of first going to the expense of storing it safely in the lagoon. Moreover, our sister circuits' persuasive precedent generally runs the clock much longer before finding materials discarded by virtue of their accumulation over time. *See, e.g.*, *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199 (2d Cir. 2009) (50 years' accumulation of bullets not discarded).

This same line of reason applies to the acid whey. Although it is not reclaimed by the producing industry, the whey is only one step removed from this cycle of production and reclamation. That is, while the manure is a byproduct of the cows' milk production, the acid whey is a byproduct of Chokos processing the same milk. This extra step does not prove a discard, especially in a symbiotic relationship where the byproduct from the secondary process is

[2] Adding further weight to *Safe Food*'s authority, EPA expressly adopted its holding in a 2011 rulemaking. Identification of Non-Hazardous Secondary Materials That Are Solid Waste, 76 Fed. Reg. 15,456, 15,536 (March 21, 2011) (codified at 40 C.F.R. pt. 241) ("[P]er the holding of the *Safe Food* case, the act of transferring [non-hazardous byproduct materials like manure or whey] to a third-party does not automatically involve discard."); *cf. Clarke v. Secs. Indus. Ass'n*, 479 U.S. 388, 403 (1987) ("[C]ourts should give great weight to any reasonable construction of a regulatory statute adopted by the agency charged with the enforcement of that statute.") (citation omitted) (internal quotation marks omitted).

returned directly to the primary process. Moreover, acid whey is produced by Greek yogurt facilities in such vast amounts that its application as fertilizer should be welcomed rather than penalized. *See* Stephen R. Miller, *Three Legal Approaches to Rural Economic Development*, 23 Kan. J.L. & Pub. Pol'y 345, 359 (2014). Should this practice be banned, Chokos would be forced to discard rather than recycle its sea of acid whey. The whey would then be filling our nation's already-overflowing landfills rather than helping to reduce farmers' reliance on manufactured fertilizer, a result that would defeat RCRA's waste-reduction goal. Therefore both ingredients in the mixture are recycled, a status that is strong evidence against the mixture's discard.

Just as *discarded* does not comprehend recycled material, "clearly it would not include materials that are still useful products." *Zands v. Nelson*, 779 F. Supp. 1254, 1262 (S.D. Cal. 1991). Thus, a material cannot be "discarded until after it has served its intended purpose," even if this purpose is born of the material's reclamation. *See No Spray Coal. v. City of New York*, 252 F.3d 148, 150 (2d Cir. 2001) (citation omitted). Following this logic, our sister circuits give great weight to the intended, beneficial use of a material. *See*, *e.g.*, *Ecological Rights Found. v. Pac. Gas & Elec. Co.*, 713 F.3d 502, 516 (9th Cir. 2013) (explaining that a material is not discarded if it escapes into the environment "by natural means, as an expected consequence of [its] intended use"). This effectively creates a presumption: A potentially useful material can be discarded only if its presence in the environment was the result of an unintended or non-beneficial use. *Compare id.* (wood preservative not discarded when leached naturally from utility poles to which it was beneficially applied) *and No Spray Coal.*, 252 F.3d at 150 (pesticides not discarded "when sprayed into the air [to] effect[] their intended purpose") *with Zands*, 779 F. Supp. at 1262 (gasoline discarded when leaked from storage tank and no longer useful).[3]

[3] This is a common-sense distinction. A farmer sowing her seeds in the field does not discard them, even if some are naturally carried by runoff into a stream. Only if she throws the seeds

Thus, land-application of the mixture could only violate RCRA if it were over-applied such that its soil-conditioning properties were no longer beneficial or useful. *Accord Cmty. Ass'n for Restoration of the Env't v. George & Margaret LLC*, 954 F. Supp. 2d 1151, 1158 (E.D. Wash. 2013) (holding that "manure [applied as fertilizer] may become 'discarded' under RCRA only after it has ceased to be 'useful' or 'beneficial,' or when it has served its 'intended purpose.'"). Again, it is undisputed that Moon Moo applied the mixture consistent with its NMP. R. 6. Thus it was never over-applied, but rather was put to its intended use such that it retained its beneficial properties. *See* 40 C.F.R. § 122.42(e)(1)(viii) (2014) (an NMP "must . . . ensure appropriate agricultural utilization of the nutrients in the manure"). As a result, the mixture cannot be discarded material. By extension, Riverwatcher cannot establish a genuine issue of material fact as to the mixture's classification as a RCRA solid waste.

RCRA's legislative history echoes the dictionary definition of *discarded*. *See Blum v. Stenson*, 465 U.S. 886, 896 (1984) (courts must "look first to the statutory language and then to the legislative history if the statutory language is unclear."). House Report 1491 removes any doubt as to whether RCRA applies to Moon Moo's fertilizing mixture: "Agricultural wastes which are returned to the soil as fertilizers or soil conditioners are not considered discarded materials in the sense of [RCRA]." H.R. Rep. No. 94-1491, pt. 1, at 2 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6240. The Report corroborates the plain language of the statute: agricultural waste applied as fertilizer is not disposed of, thrown away, or abandoned, and thus is not discarded material under the statutory definition of solid waste. Such affirmative "legislative history adds compelling support to [the district court's] holding": applied as fertilizer, the mixture at issue is not a solid waste. *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 432 n.12 (1987);

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directly into the stream or over-plants the field (thus leaving the seeds where they have no beneficial effect) can they accurately be described as discarded.

cf. Rodriguez v. United States, 480 U.S. 522, 526 (1987) (explaining that statutory analysis need not proceed if legislative history supports statutory language that is "sufficiently clear in its context"). Given this added context, RCRA's plain language makes clear that agricultural waste like the mixture is not solid waste. Thus, the mixture is not subject to RCRA regulation and the district court's grant of summary judgment must be affirmed.

2. EPA's interpretation of RCRA reinforces this conclusion.

Congress expressly tasked EPA with establishing and enforcing several of RCRA's provisions. *See, e.g.*, 42 U.S.C. §§ 6912, 6928, 6973, 7429 (2012). This delegation engages the gears of the well-established *Chevron* framework. *See supra* Part III.B. Thus, if this Court finds the statute's definition of solid waste is ambiguous, relevant EPA regulations must be "given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." [4] *Chevron*, 467 U.S. at 843–44 (1984). These regulations establish that the mixture is not a solid waste under RCRA.

In one of its first RCRA rulemakings, EPA drew the line between prohibited "open dumps" and approved "sanitary landfills." *See* 40 C.F.R. part 257 (2014). Because this distinction relies on the statutory definition of solid waste, part 257 reflects EPA's reading thereof. *Cf.* 42 U.S.C. § 6903(14) (2012) (defining open dump as "any facility or site where solid waste is disposed of" that does not meet certain criteria). Importantly, EPA's "criteria do not apply to agricultural wastes . . . returned to the soil as fertilizers or soil conditioners." 40 C.F.R. § 257.1(c)(1) (2014). Subsection (c)(1) thus indicates EPA's intent to exempt the beneficial land-application of agricultural wastes like the mixture at issue from RCRA's solid waste regulations.

[4] Even if Congress did not expressly delegate the solid waste issue to EPA, "a court may not substitute its own construction of [an ambiguous] statutory provision for a reasonable interpretation made by the administrator of an agency." *Chevron*, 467 U.S. at 844.

This view cleaves to the statutory reading established above, and thus is neither unreasonable nor contrary to the statutory scheme. *Chevron* therefore mandates that this Court defer to the interpretation of "solid waste" implicit in EPA's regulation.[5]

Even if the Court declines to give *Chevron* deference to EPA's reading of solid waste, the agency's view is still entitled to substantial *Skidmore* deference. EPA guidance, reports, and other publications "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Bragdon v. Abbott*, 524 U.S. 624, 642 (1998) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). At the very least, EPA's interpretation of RCRA should be afforded deference consistent with "the thoroughness evident in its consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements." *Skidmore*, 323 U.S. at 140.

Applying the *Skidmore* framework, we see that since enacting 40 C.F.R. part 257 in 1979, EPA has consistently and reasonably held that agricultural waste applied as fertilizer is not a RCRA solid waste. *See, e.g.*, EPA, *Classifying Solid Waste Disposal Facilities: A Guidance Manual* 4 (1981) (exempting "facilities where agricultural wastes (e.g., manure and crop residues) are returned to the soil as fertilizer or soil conditioners" from coverage); 2 EPA, *Report to Congress: Solid Waste Disposal in the United States* 3-30 (1988) ("[A]gricultural wastes . . . that are returned to the soil as fertilizers or soil conditioners, are exempt from regulation under RCRA."). EPA still sticks to this position, which it has recognized stems from the great value that recovered agricultural wastes can present to farmers. EPA, *Profile of the Agricultural*

[5] Adding further weight to this reading is the 1984 amendment and re-authorization of RCRA, which left alone the definition of solid waste. Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 98 Stat. 3221 (codified as amended at 42 U.S.C. § 6901 et seq. (2012)). Because "Congress is presumed to be aware of an administrative . . . interpretation of a statute," where it "re-enacts a statute without change" it "is presumed . . . to adopt that interpretation." *Lorillard v. Pons*, 434 U.S. 575, 580 (1978).

Livestock Production Industry 43 (2000) (referring to manure as "an important and valuable resource," the recycling of which can "reduce[] commercial fertilizer use and increase[] soil quality"). By endorsing the value of recycled agricultural waste, EPA demonstrates that its exclusion of such material from *solid waste* is reasonable. *Cf. Safe Food*, 350 F.3d at 1269 ("[M]arket valuation" is one of many "reasonable tool[s] for distinguishing products from wastes."). Thus, even if EPA's interpretation receives only *Skidmore* deference, the agency's sound reasoning and consistent approach entitles its statutory reading to great weight. In sum, whether EPA regulations receive *Chevron* deference or substantial *Skidmore* deference, they provide further compelling evidence that the mixture is not a RCRA solid waste.

B. Because Riverwatcher has not established a pathway of exposure to the contaminated Farmville water, there cannot be an imminent and substantial endangerment to the at-risk population.

RCRA § 7002 allows for citizen suits against defendants who contribute to conditions that "may present an imminent and substantial endangerment to the health or environment." 42 U.S.C. § 6972(a)(1)(B) (2012). To interpret this statutory requirement for citizen suits, this Court must ask "whether the language at issue has a plain and ambiguous meaning." *Robinson,* 519 U.S. at 340. To determine this meaning, courts turn "to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Id.* at 341.

First, Riverwatcher must establish that the mixture "*may present* an imminent and substantial endangerment." 42 U.S.C. § 6972(a)(1)(B) (2012) (emphasis added). This is a "probabilistic" term that eases a citizen plaintiff's burden of proof. *Me. People's Alliance v. Mallinckrodt, Inc.*, 471 F.3d 277, 296 (1st Cir. 2006). Nonetheless, "there is a limit to how far the tentativeness of the word *may* can carry a plaintiff." *Crandall v. City & Cnty. of Denver, Colo.*, 594 F.3d 1231, 1238 (10th Cir. 2010). It allows for some leeway, but reduces rather than

eliminates the burden that Riverwatcher must carry. *Cf. United States v. Rogers*, 461 U.S. 677, 706 (1983) ("The word 'may' . . . usually," but not "invariabl[y]," "implies some degree of discretion.").

Next, the endangerment must be imminent. The Supreme Court has explained that "[a]n endangerment can only be 'imminent' if it 'threatens to occur immediately.'" *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 485 (1996) (alteration omitted) (citation omitted). That is, "there must be a threat which is present *now*, although the impact of the threat may not be felt until later." *Id.* (emphasis in original) (quoting *Price v. U.S. Navy*, 39 F.3d 1011, 1019 (9th Cir. 1994)).

The endangerment must also be "substantial," a term that "is not defined in RCRA or its legislative history." *Burlington N. & Santa Fe Ry. v. Grant*, 505 F.3d 1013, 1021 (10th Cir. 2007). We therefore look to the ordinary meaning of the term to ascertain congressional intent. *Russello*, 464 U.S. at 21. Following this approach, several circuits have found that "an endangerment is 'substantial' under RCRA when it is 'serious.'" *Burlington N.*, 505 F.3d at 1021 (citing *Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 399 F.3d 248, 259 (3d Cir. 2005); *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1015 (11th Cir. 2004); *Cox v. City of Dallas, Tex.*, 256 F.3d 281, 300 (5th Cir. 2001)).

Although *serious* aids our understanding of *substantial*, it hardly suffices to give the term deep and definitive meaning. Thus, we turn to the "broader context of the statute as a whole" for guidance. *Robinson*, 519 U.S. at 341. RCRA § 7003, which sets out the requirements for EPA to bring suit against RCRA violators, "contains language *identical* to the citizen suit provision of § [7002](a)(1)(B)." *Cox*, 256 F.3d at 294 n.22 (emphasis in original); *compare* 42 U.S.C. § 6972(a)(1)(B) (2012) *with id.* § 6973(a). Because "identical words used in different parts of the

same act are intended to have the same meaning," this Court may properly consult § 7003 to shed light on § 7002. *See Comm'r v. Lundy*, 516 U.S. 235, 250 (1996).

In passing § 7003, Congress explained that it should be read and enforced "like other imminent and substantial endangerment provisions in environmental statutes," such as "section 1431 of the Safe Drinking Water Act [SWDA]." S. Rep. No. 96-172, at 5 (1979), *reprinted in* 1980 U.S.C.C.A.N. 5019, 5023. As explained in House Report 1185, SWDA § 1431 is not to be invoked "where the risk of harm is remote in time, completely speculative in nature, or de minimis in degree." H.R. Rep. No. 93-1185, pt. 2, at 35 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6454, 6488. RCRA § 7003—which reflects the same congressional intent as § 7002—incorporates this standard by reference. *See* S. Rep. No. 96-172, at 5. Thus, it follows that the use of the word *substantial* "is plainly intended by Congress to limit the reach of RCRA to sites where the potential for harm is great." *United States v. Aceto Agric. Chem. Corp.*, 827 F.2d 1373, 1383 (8th Cir. 1989) (citation omitted).

Finally, no citizen suit may be brought unless there is an "endangerment." Because RCRA does not define this term, courts imbue it with its ordinary meaning. *Russello*, 464 U.S. at 21. *Endangerment* thus has been read to describe "a threatened or potential harm" rather than "actual harm." *Parker*, 386 F.3d at 1015 (citation omitted); *see also Price*, 39 F.3d at 1019; *Burlington N.*, 505 F.3d at 1020. However, "some risk of harm is necessary" to fairly describe the health or environment as endangered. *United States v. Ottati & Goss, Inc.*, 630 F. Supp. 1361, 1394 (D.N.H. 1985) (citation omitted).

To bridge this gap between "some risk" and "actual harm," this Court should look not to the presence of but rather exposure to solid waste. *Accord Foster v. United States*, 922 F. Supp. 642, 661 (D.D.C. 1996) ("§ [7002](a)(1)(B) requires more than a mere showing that solid or

hazardous wastes are present."). However, due to the *may present* language, actual exposure should not be required. *See Robinson*, 519 U.S. at 341 ("the specific context in which . . . language is used" helps determine plain meaning). Rather, § 7002(a)(1)(B) requires a so-called "pathway of exposure": an avenue through which the waste can reach the population at risk. *See Interfaith*, 399 F.3d at 259 n.2 (explaining that a pathway of exposure "is implicit in a finding of liability under § [7002](a)(1)(B)").[6] That is, there can be no "present" threat, *Meghrig*, 516 U.S. at 485, which poses a "great" "potential for harm," *Aceto*, 827 F.2d at 1383, unless there is some realistic way for the waste to come in contact with the purportedly exposed population.

Under this statutory framework, even if the mixture is a solid waste it cannot present an imminent and substantial endangerment to Farmville's citizens. It is not disputed that the nitrate levels in the Deep Quod "did not pose any health threat to adults." R. 6. Without a threat of harm, there can be no endangerment, let alone the substantial endangerment required by § 7002. Thus, Riverwatcher's claim is barred by statute unless it establishes a pathway of exposure to Farmville infants, the sole at-risk population.

No party disputes "that households with infants administer bottled water to their infants." R. 11. Thus, a pathway of exposure exists only if an unsupervised baby drank tap water of its own accord. This scenario strains the imagination: the child's infancy—the very factor that puts her at risk—is an insurmountable barrier to exposure. RCRA does not require this Court to suspend its disbelief in such a manner. *Cf. Avondale Fed. Sav. Bank v. Amoco Oil Co.*, 170 F.3d

[6] Although the case law explicitly requiring pathways of exposure deals primarily with hazardous waste, this requirement sensibly would extend to solid waste. *Cf. City of Chicago*, 511 U.S. at 331 (noting that "[solid] wastes are regulated much more loosely" than hazardous wastes). If an additional showing can be required to establish liability for disposal of more tightly regulated hazardous wastes, then the showing reasonably should be required for solid wastes as well. Furthermore, § 7002 does not differentiate between solid and hazardous wastes. *See* 42 U.S.C. § 6972 (2012). Thus, there is no statutory basis for establishing different elements for § 7002 liability depending on the type of waste at issue.

692, 695 (7th Cir. 1999) (where pathway of exposure may only be present after a hypothetical, unplanned excavation, contamination was not actionable under § 7002 and summary judgment was proper). Therefore the requisite pathway simply does not exist. Rather, the only injury suffered by any Farmville resident is the "inconvenience and . . . economic burden" of "us[ing] bottled water." *Davies v. Nat'l Coop. Refinery Ass'n*, 963 F. Supp. 990, 999 (D. Kan. 1997). This "is the type of injury for which an action at [state] law provides [the proper] remedy." *Id.* (abstaining from exercising jurisdiction and dismissing RCRA citizen suit).

As a last gasp effort to maintain its citizen suit against Moon Moo, Riverwatcher may point to the district court's misstatement of the *may present* standard in its grant of summary judgment. *See* R. 11. This Court should "decline to read the [d]istrict [c]ourt's" accidental omission of *may* as indicating its "reli[ance] on [authority] that was not controlling." *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 386 (2008). Rather, "[a]n appellate court should not presume that a district court intended an incorrect legal result when the order is equally susceptible of a correct reading." *Id.* Because the district court based its holding on the impossibility of harmful exposure—which would defeat citizen-suit liability under the proper legal standard—the "omi[ssion] of the word 'may' in its order does not . . . demonstrate that it applied a test requiring actual current harm." *Chem. Weapons Working Group, Inc. v. U.S. Dep't of Def.*, 61 Fed. App'x 556, 561 (10th Cir. 2003); *accord Attorney Gen. of Okla. v. Tyson Foods, Inc.*, 565 F.3d 769, 777 (10th Cir. 2009) (no error for district court to fail to "explicitly discuss RCRA's 'may present' language," where in the court's view the evidence failed to connect land-application of manure with heightened water bacteria levels). Thus, because this same finding supports a grant of summary judgment under the *may present* standard, the order "is equally susceptible of a correct reading," and should be read as applying the proper standard. *See*

Sprint/United, 522 U.S. at 386. Because Riverwatcher cannot establish a pathway of exposure, and the district court did not err in its application of RCRA, this Court should affirm the grant of summary judgment.

CONCLUSION

Because the public trust doctrine does not apply to the Queechunk Canal, the district court properly held that James was trespassing when he collected the only samples showing a discharge from the farm. The district court did not err in suppressing this evidence. As there was thus no admissible evidence of a discharge, Moon Moo cannot be a CAFO and therefore is not subject to NPDES permitting. Furthermore, any discharges from the farm's land application area is exempted as agricultural stormwater runoff, due to the NMP-compliant application of the mixture of manure and whey. Thus, the district court's grant of summary judgment on the CWA claims should be affirmed.

Finally, the district court correctly found that Moon Moo is not subject to citizen suit under RCRA. Because the mixture at issue was recycled material applied beneficially as fertilizer, it was not discarded material and thus cannot be a statutory solid waste; Moon Moo therefore is not subject to RCRA in the first place. Moreover, Riverwatcher failed to establish a realistic pathway of exposure from the contaminated water to the at-risk Farmville infants. This failure precludes a finding of the requisite imminent and substantial endangerment, thus barring Riverwatcher's claim by statute. Therefore, summary judgment was properly entered on the RCRA claim and should be affirmed.

In light of the foregoing, defendant Moon Moo Farm respectfully requests this Court to affirm the judgment on appeal in all respects.