Docket No. 14-1248

IN THE
UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant, and

DEEP QUOD RIVERWATCHER, INC. and DEAN JAMES,

Plaintiffs-Intervenors-Appellants

v.

MOON MOO FARM, INC.,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW UNION
Civ. No. 155-CV-2014

BRIEF FOR MOON MOO FARM, INC.
Defendant - Appellee

Team 30

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STATEMENT OF JURISDICTION

Appellants United States of America and Appellant-Intervenors Deep Quod Riverwatcher and Dean James filed an action under the federal Clean Water Act and federal Resource Conservation and Recovery Act in the United States District Court for the District of New Union. The district court had proper jurisdiction to hear the case pursuant to 28 U.S.C. § 1331 and granted Appellee Moon Moo Farm's motion for summary judgment on all counts. The United States Court of Appeals for the Twelfth Circuit has proper jurisdiction to hear appeals from this final decision of the United States District Court for the District of New Union. 28 U.S.C. § 1291 (2006).

STATEMENT OF THE ISSUES

1. Whether the Queechuck 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.
2. Whether evidence obtained through trespass and without a warrant is admissible in a civil enforcement proceeding under the Clean Water Act even though the canal is not a public trust navigable water.
3. Whether Moon Moo Farm requires a NPDES permit under the Clean Water Act.
4. Whether Moon Moo Farm is subject to a citizen suit under the federal Resource Conservation and Recovery Act because its land application of fertilizer and soil amendment constitute a solid waste that poses an imminent and substantial endangerment to human health.

STATEMENT OF THE CASE

The Appellant, the United States of America, on behalf of the United States Environmental Protection Agency (EPA), brought an action for civil penalties and injunctive relief for violations of NDPES permitting requirements of the Clean Water Act (CWA), 33 U.S.C. § 1311(a), 1319(c), (d), 1342. In addition, Appellant-Intervenors Deep Quod Riverwatcher (Riverwatcher) brought claims under § 505 of the Clean Water Act (CWA) and § 7002 of the Resource Conservation and Recovery Act (RCRA), alternatively alleging violations of either the CWA or RCRA by Moon Moo Farms (Moon Moo). As discovery was conducted by both parties, Moon Moo subsequently counterclaimed for common law trespass, alleging that Dean James (James) illegally entered its property in order to obtain evidence of stormwater runoff from its fields. Prior to trial, Moon Moo moved the court for summary judgment on all claims asserted by EPA and Riverwatcher.

The District Court appropriately granted Moon Moo's motion for summary judgment to dismiss the CWA and RCRA claims, as well as Moon Moo's motion for summary judgment in favor of its trespass counterclaim. The District Court entered a judgment dismissing the complaints and awarding Moon Moo $832,560 in damages on the trespass counterclaim.

Following the issuance of the District Court's Order on June 1, 2014, the EPA, Riverwatcher, and Dean James each filed a Notice of Appeal to contest the District Court's holding. This Court granted review on September 15, 2014.

STATEMENT OF THE FACTS

Moon Moo operates a dairy farm with 350 head of milk cows, ten miles from the City of Farmville in the State of New Union. (R. at 4.) The cows are housed in a barn, where the manure and liquid waste is collected through a series of drains and pipes. The manure is funneled from

the barn to an outdoor lagoon where it is mixed with acid whey from the local Chokos Greek Yogurt processing facility in Farmville and stored for use as fertilizer. (R. at 5.) The manure lagoon is designed to contain all manure produced by the dairy operation without overflowing during a 25-year rain fall event (that is, a rainfall event that statistically is expected to occur no more frequently than once every twenty five years). (R. at 5.) The mixture is then spread by tractor on to Moon Moo's Bermuda grass crop fields, which are dried and harvested by Moon Moo each summer for sileage. (R. at 5.)

Moon Moo, including its 150 acres of fields, is located at a bend in the course of the Deep Quod River. (R. at 5.) The Deep Quod River flows year around and runs into the Mississippi River, which is a navigable-in-fact interstate body of water. (R. at 5.) During the 1940s, in order to alleviate flooding at the river bend, a previous owner of the farm excavated a bypass canal in the Deep Quod River, which has come to be known as the Queechunk Canal (Canal). (R. at 5.) The Canal is fifty yards wide, three to four feet deep, and can only be navigated by a canoe or other small boat. (R. at 5.) Moon Moo owns the land on both sides of the Canal and has prominently posted "No Trespassing" signs. (R. at 5.) Despite the signs, the Canal is commonly used as a shortcut up and down the Deep Quod River. (R. at 5.)

Moon Moo is regulated by the State of New Union as a "no-discharge" animal feeding operation – that is, an animal feeding operation that does not normally have a direct discharge from its manure handling facilities to waters of the State in conditions up to and including the 25-year storm event. (R. at 5.) As a "no-discharge" operation, Moon Moo submits a "Nutrient Management Plan" (NMP) to the Farmville Region Office of the State of New Union Department of Agriculture (DOA). (R. at 5.) The State of New Union has the delegated authority to issue CWA discharge permits. (R. at 5.) Moon Moo Farms does not currently hold any permit

issued pursuant to the National Pollutant Discharge Elimination System (NPDES) permitting system administered under the CWA § 402. (R. at 5-6).

In the late winter and early spring of 2013, Riverwatcher received complaints that the Deep Quod River smelled of manure and was an unusually turbid brown color. (R. at 6.) In response to these complaints, James, the Deep Quod "Riverwatcher", made an investigatory patrol of the Deep Quod River on April 12, 2013. (R. at 6.) Between April 11 and April 12, 2013, two inches of rain fell in the Farmville Region – a significant storm event, but far short of the 25 year storm. (R. at 6.) When James reached the Canal, he disregarded the "No Trespassing" signs and proceeded up the Canal through Moon Moo's property, where he collected water samples and took pictures of the area without permission from the owner. (R. at 6.) James had the water samples tested and the results showed elevated levels of nitrates and fecal coliforms. (R. at 6.)

Moon Moo applied manure to its fields at rates consistent with the NMP filed with the Farmville Field Office at all relevant times. (R. at 6.) Riverwatcher submitted the affidavit of Dr. Ella Mae, an agronomist, who opined that although she had no basis to dispute the records, it was her opinion that the lower pH (increased acidity) of the liquid manure resulting from adding acid whey from the Chokos plant lowered the pH of the soil. (R. at 6.) According to Dr. Mae, this increased acidity prevented the Bermuda grass crop from effectively taking up the nutrients in the manure and as a result, these unprocessed nutrients were released into the environment, including the Deep Quod River, by leaching into groundwater and through runoff during rain events. (R. at 6.)

However, Moon Moo's expert agronomist, Dr. Emmet Green, submitted an affidavit that did not dispute that acid whey reduced soil pH and reduced nitrogen uptake by the Bermuda

Grass. (R. at 6.) Dr. Green opined, however, that the land application of whey as a soil conditioner is a longstanding practice that has been traditional in New Union since the 1940s and that Bermuda Grass was a crop tolerant of a wide range of soil pH conditions. (R. at 6.) Dr. Green noted that nothing in the Moon Moo's NMP prevented it from land applying manure during a rain event. (R. at 7.)

Because the Deep Quod River watershed is heavily farmed, nitrate advisories have been required in Farmville in the past, and such advisories were issued in 2002, 2006, 2007, 2009, and 2010, before the increase in Moon Moo's operations. (R. at 7.) Riverwatcher's environmental health expert, Dr. Susan Generis, conceded at her deposition that, although it was her opinion that Moon Moo's discharges contributed to the April 2013 nitrate advisory, it was impossible to state that Moon Moo Farm was the "but for" cause of the nitrate advisory. (R. at 7.)

SUMMARY OF THE ARGUMENT

The district court properly granted summary judgment on all counts in favor of Moon Moo when it held that (1) the Public Trust Doctrine does not extend to the Canal; (2) James was trespassing when he entered the Canal and accordingly, the evidence obtained during his visit in not admissible; (3) Moon Moo does not require an NPDES permit; and (4) the alternatively alleged RCRA argument must fail as Moon Moo's discharge is not a solid waste that may present an imminent and substantial endangerment to human health or the environment.

First, the Public Trust Doctrine does not extend to the Canal because the doctrine only applies to natural water bodies. The Canal, however, is not a natural water body, but man-made body of water. While no New Union decisions address the scope of the public trust navigation rights generally, the district court correctly deferred to the United States Supreme Court's

decision in *Kaiser Aetna* which held that there is no public right of navigation in a man-made water body.

Since the Canal is not open to public navigation, the district court correctly held that James was trespassing when he ignored the clearly posted "No Trespassing" signs and entered the Canal. Thus, the evidence obtained during his visit is not admissible. Accordingly, summary judgment was appropriate as EPA and Riverwatcher lacked any admissible evidence to establish a discharge of pollutants from the ditch on Moon Moo's fields.

Third, regardless of any admissible evidence, the district court correctly held that Moon Moo's discharge is classified as agricultural stormwater runoff, not a CAFO discharge. Applicable case law and plain statutory language specifically exempt agricultural stormwater landspreading that is performed in accordance with an NMP, as Moon Moo's landspreading was, from NPDES permitting requirements.

Finally, the district court properly held that EPA and Riverwatcher's alternative claim alleging a RCRA violation must also fail. For RCRA to apply, Moon Moo's discharge practices must constitute the disposal of a solid waste that may present an imminent and substantial endangerment to human health or the environment. The district court correctly held that this alternative argument must fail on two grounds as Moon Moo's discharge was expressly excluded from the definition of "solid waste" under EPA provisions and furthermore, Riverwatcher has presented insufficient evidence to establish that Moon Moo's practices present an imminent and substantial endangerment to human health or the environment. Therefore, summary judgment was proper as to all four issues, and this Court should affirm the lower court's decision in its entirety.

STANDARD OF REVIEW

The appropriate standard of review for granting a motion for summary judgment is *de novo*. *Tradewinds Envtl. Restoration, Inc. v. St. Tammany Park, LLC*, 578 F. 3d 255, 258 (5th Cir. 2009). The court will grant a motion for summary judgment when the moving party shows that there are no genuine issues of material fact and the movant is therefore entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(a). Questions of law are reviewed *de novo* and, thus, it is the appropriate standard of review in the present case. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988).

ARGUMENT

I. THE DISTRCIT COURT PROPERLY HELD THAT THE QUEECHUNK CANAL IS NOT A PUBLIC TRUST NAVIGABLE WATER OF THE STATE OF NEW UNION, AND THEREFORE DOES NOT ALLOW FOR A PUBLIC RIGHT OF NAVIGATION.

Riverwatcher and EPA assert that the Canal is a publicly navigable waterway despite private ownership of the banks on both side and bottom of the Canal by Moon Moo. Under this assertion, James's actions would not be considered trespass because all navigable waters of the State of New Union must remain open to navigation by the public under the ancient doctrine known as the "Public Trust Doctrine." Under the Public Trust Doctrine, at English common law, the public had a right to navigation in waters subject to the ebb and flow of tides. *See Arnold v. Mundy*, 6 N.J.L. 1, 12 (1821). Cases in the United States extended the Public Trust Doctrine to navigable freshwater bodies as well. *See Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374 (1977); *Barney v. Keokuk*, 94 U.S. 324, 388 (1877). However, the Canal is not a natural water body, but a privately owned man-made body of water.

A. The Queechunk Canal is a Non-Navigable Body of Water.

Section 502(7) of the Clean Water Act states that the term "navigable waters" means the waters of the United States, including the territorial seas. For a water body to qualify as a 'navigable water of the United States', it must meet any of the tests set forth in 33 C.F.R. Part 329. Part 329.5 provides several factors that must be considered when determining whether a water body is navigable water of the United States. These factors include (1) whether the water body is subject to the ebb and flow of the time; and/or (2) if the water body is presently used or has been used in the past, or may be susceptible for use, (with or without reasonable improvements) to transport intrastate or foreign commerce.

The Supreme Court of the United States held that the common law test to determine navigability of waters has no application in the United States, as the ebb and flow of the tide does not constitute a determination if a water body is navigable or not. *Daniel Ball*, 77 U.S. 557, 563 (1871) The court explained that all waters in the United States are subject to the ebb and flow of the tide and there is no significant difference between circumstance tide water and navigable water. The court further declared that waters are "navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." *Id*.

The navigability-in-fact test granted the government with jurisdiction over all waters naturally capable of use in interstate commerce. It did not however, include small tidal water bodies not capable of use in interstate commerce. *Id*. Under the *Daniel Ball* rationale, the Great Lakes, the Mississippi River, and other waters useful for commerce in their natural condition

were held to be public navigable waters. But, shallow waterways not useful for commerce were held to be non-navigable. *Leovy v. United States*, 177 U.S. 621(1900).

Here, the parties do not dispute that the Mississippi River is a navigable-in-fact body of water. The Mississippi River has been used for commercial navigation and interstate commerce for many years. However, there are important differences between the Mississippi River and the Canal. The Canal is approximately 50 yards wide and only three or four feet deep, while the Mississippi River is almost one mile wide and approximately 200 feet deep. Compared to the Mississippi River, it is clear why it would be unrealistic, if not impossible, for the Canal in its natural condition to be capable of navigation or interstate commerce.

More importantly, the Canal does not need to be used for navigation or interstate commerce. The Mississippi River and Deep Quod River are the main water bodies, while the Canal is a simple privately owned bypass that starts and ends at the Deep Quod River. Those who trespass on the Canal for use as bypass are not left without a waterway to use; they can use the two main rivers just as they did before the Canal was built.

Section 33 C.F.R. 329 states that waters can be navigable if, with or without reasonable improvements, would make the water way navigable for commerce. In *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 407 (1940), the court held that a water body is navigable if it can be made useful for interstate commerce by means of reasonable improvements, balanced in terms of cost and need. In this case, the balance between cost and need is clearly disproportional. First, there is no need for the Canal to be used for navigation or commerce purposes, as its main purpose was to alleviate flooding on private farmland. With the Mississippi River and Deep Quod River close by, there is no need for the Canal to be developed

for navigation or commerce. Second, the cost to convert this shallow canal into a water body would be unreasonable compared to the benefit it would provide.

B. The Queechunk Canal is Private Property.

The Supreme Court held that when an owner connects a body of water that is recognized by law as private property into a body of water in which no private property rights are recognized and which is clearly navigable in fact, that owner does not thereby lose its private property rights if it has a reasonable, investment-backed expectation that its property rights will remain and will not be extinguished. *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) Here, the Canal is connected to the Deep Quod River, which is arguably navigable in fact. Therefore, Moon Moo would not lose its private property rights as there was a reasonable, investment-backed expectation that the property right would remain and not be extinguished when the Canal was created.

In *Boone v. United States*, 743 F. Supp. 1367 (D. Haw. 1990), the court held that when the owner of a fish pond connected the fish pond to a lagoon, which was public property, the owner did not lose private property rights where it had a reasonable, investment-backed expectation that its property rights would not be extinguished. *See*, *Palama v. Sheehan*, 50 Haw. 298, 440 P.2d 95 (1968) (holding that the court treated the fishing pond as it would any other form of real property.) Like the fish pond, the Canal is a body of water that is positioned on private property yet flows to public property. The former owner created the Canal for the betterment of its property with a reasonable, investment-backed expectation that this property right would not be extinguished. The present owner, Moon Moo, purchased this property under that continuing assumption.

Similarly, in *Vaughn v. Vermilion Corp*., 444 U.S. 206 (U.S. 1979), the Vermilion Corporation built artificial channels on private property with private funds, in such a manner that they ultimately join with other navigable waters. The court held that there was no general right of use in the public in channels built on private property and with private funds. *See, Harvey v. Potter,* 19 La. Ann. 264 (1867) (holding that the public does not have a right of access to a canal constructed entirely on private lands exclusively at the owner's expense.) The Canal was constructed entirely on private land exclusively at the previous owner's expense, thus the public does not have a general right of access or use.

In *National Audubon Soc. v. White,* 302 So. 2d 660 (La.App. 3 Cir. 1974), the court addressed the issue of whether a private land owner can restrict or limit the use of, or prohibit others from using, a navigable canal constructed by him on his own property. The court determined that the canal was a privately owned canal, constructed, financed, and maintained by the plaintiffs or their ancestors in title on their own lands. *Id*. at 666. The court further stated that there had been no dedication of the canal for public use nor contract or agreement giving defendants the right to use it. Accordingly, the court concluded the plaintiffs had the right to regulate and control the use of their canal, including the right to prohibit defendants from using it. *Id*. at 667.

Finally, the Michigan Supreme Court in *Bott v. Commission of Natural Resources etc.*, 415 Mich. 45 (Mich. 1982) recognized that the established law of Michigan is that the title of a riparian owner includes the bed to the threat or midpoint of the water, subject to a servitude of commercial navigation, where the waters are so navigable for. Here, the Appellee owns both sides of the Queechunk Canal. Applying *Bott,* the ownership would extend to the midpoint of the canal, thus Moon Moo owns the entire Queechunk Canal, which includes the bed of the canal.

Here, the Queechunk Canal was built entirely on private property with private funds for a private benefit with a reasonable, investment-backed expectation that its property rights would not be extinguished. Accordingly, Moon Moo should retain private rights in the Canal and as a result, the Public Trust Doctrine would no longer apply.

II. THE DISTRICT COURT PROPERLY HELD THAT THE EVIDENCE WAS OBTAINED THROUGH TRESPASS AND IS THERFORE INADMISSIBLE.

The EPA and Riverwatcher rely on evidence obtained without a warrant and through trespass. James, acting on behalf of Riverwatcher, ignored the 'No Trespassing' signs and entered Moon Moo's private Canal to obtain samples of the water flowing from the fields through the drainage ditch into the Queechunk Canal. This evidence was obtained through trespass, without a warrant and is therefore inadmissible.

A. The Exclusionary Rule Should Apply Because The Appellee Had a Reasonable Expectation of Privacy.

The Fourth Amendment to the United States Constitution states that the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. The Fourth Amendment originally enforced the notion that 'each man's home is his castle', secure from unreasonable searches and seizure of property by the government.

The exclusionary rule prevents the government from using most evidence gathered in violation of the United States Constitution. The exclusionary rule applies to evidence gained from an unreasonable search or seizure in violation of the Fourth Amendment.

Generally, the exclusionary rule does not apply in civil proceedings; only criminal proceedings. However, there are courts that have held the exclusionary rule applies even though the enforcement action is nominally a civil action.

In *Trinity Indus., Inc. v. OSHRC,* 16 F.3d 1455 (6th Cir. 1994), the court discussed the applicability of the exclusionary rule. In Trinity, an employee filed a complaint against Trinity with the Occupational Safety and Health Administration (OSHA) alleging certain safety violations. OSHA obtained a warrant and inspected the facility. Trinity challenged the warrant and the evidence that led to the OSHA violations. The issue was that OSHA went above and beyond what the employee alleged and what the warrant allowed. The court held that a full scope inspection authorized by a single warrant initially obtained only on the basis of an employee complaint was improper and the Secretary should have secured a search warrant limited in scope to the employee complaint that triggered the inspection. The court further held, however, that the Secretary relied in objectively reasonable good faith on a facially valid warrant in conducting the full-scope inspection of Trinity's facility, and thus the good faith exception to the exclusionary rule applied. *See also, Smith Steel Casting Co. v. Brock,* 800 F.2d 1329 (5th Cir. 1986).

The court in *Trinity* and *Smith Steel* allowed for the exclusionary rule to be applicable to civil cases, but because of the good faith doctrine on the bases of the gathering of evidence, the evidence was not excluded. These cases apply to the case at bar because the evidence was not obtained through good faith. After ignoring the 'No Trespassing' sign, James entered Moon Moo's property and collected water from its ditch. This evidence was obtained without a warrant. The evidence was then processed and given to the EPA. EPA's claim is relying on evidence that should be suppressed. Just as in *Trinity* and *Smith Steel,* the exclusionary should

apply, and since the good faith exception is not met, the evidence obtained by the Riverwatcher should be suppressed.

Furthermore, the exclusionary rule applies because Moon Moo had a reasonable expectation of privacy and that privacy was violated. For the exclusionary rule to apply, Moon Moo must prove that there was a reasonable expectation of privacy, and that a reasonable person would agree that there was a reasonable expectation of privacy. The Fourth Amendment stands for the notion that a person should be secure on their property from unreasonable search and seizure. Here, that is Moon Moo's notion. Although James was on the Canal, it is considered Moon Moo's private property. *See*, *Harvey v. Potter*, 19 La. Ann. 264 (1867) (holding that the public does not have a right of access to a canal constructed entirely on private lands exclusively at the owner's expense). A reasonable person would expect that while on their privately owned property, there is a reasonable expectation of privacy. This reasonable expectation of privacy was violated the second that the Riverwatcher entered the Canal.

The evidence that was collected by the Riverwatcher should be excluded because there was a reasonable expectation of privacy that was violated and because it was not done so under good faith.

III. THE DISTRICT COURT PROPERLY HELD THAT MOON MOO IS NOT A CAFO THAT DISCHARGES POLLUTANTS FROM A MAN-MADE DITCH, THUS EXEMPTING IT FROM NPDES PERMIT REGULATION

The next assertion presented by Riverwatcher and EPA contends that Moon Moo is a concentrated agricultural feeding operation (CAFO) pursuant to 40 C.F.R. § 122.23(b)(6)(ii)(b) (2012). Specifically, the EPA maintains that Moon Moo's discharge is not agricultural stormwater discharge because it falls under land application subject to NDPES permit requirements. In addition, Riverwatcher maintains that manure is discharged from the Moon

Moo's Bermuda pasture applies manure to Bermuda grass fields on its property, which is a discharge of a pollutant through a man-made ditch or flushing system." (R. at 4.)

From the outset, the Plaintiff's Complaint fails because Moon Moo is not a CAFO subject to NDPES permit requirements pursuant to 40 C.F.R. § 122.23 et. al. Because Moon Moo's land application of manure to the Bermuda crop fields is agriculture and all manure discharge is caused by stormwater, it is not, by definition, a CAFO subject to NDPES permit requirements.

Secondly, EPA has stated that discharges from pasture and/or rangeland were intended to be excluded from NDPES permit regulation. It is clear that all discharges outlined in the Plaintiff's Complaint are discharged from the Bermuda pasture that is located on the Plaintiff's property. No evidence shows that discharge has occurred from anywhere else. Thus, any and all manure discharge from Moon Moo's Bermuda pasture is expressly excluded from NDPES permit regulation.

Lastly, all agricultural stormwater discharge performed by Moon Moo farms has been in compliance with a NMP submitted to the Farmville Regional Office of the State of New Union Department of Agriculture. Moon Moo's NMP has set forth appropriate standards for the utilization of agricultural practices and nutrients. In addition, Riverwatcher and the EPA have provided no evidence to indicate that Moon Moo's NMP was not up to appropriate standards. Further, Moon Moo has been in compliance with the appropriate standards set by the NMP. It is long-established that this discharge is excluded from NDPES permit requirements.

Therefore, it is clear that the Riverwatcher and EPA have asserted claims without merit. Riverwatcher and EPA clearly fail to carry the burden set forth in Civil Rule 56(c). Thus, the

trial court's grant of summary judgment in favor of Moon Moo on the issue of NDPES permit requirements was proper.

A. The Trial Court Correctly Held that Moon Moo is Not a CAFO Because Moon Moo's Manure Discharge Was Agricultural Stormwater Discharge Not Released From a Man-Made Ditch or Similar Device. Thus, Moon Moo is Exempt From NDPES.

As part of its livelihood, Moon Moo raises livestock and cattle. Moon Moo uses the manure produced by the cattle to provide nutrients and fertilize the Bermuda grass crop fields that are grown on its property. The Complaint entered by EPA and Riverwatcher claim that the manure applied to the Bermuda fields constitute pollutants that are discharged into Canal by runoff.

Riverwatcher and EPA's claims clearly fail because evidence shows that Moon Moo's manure is discharged through precipitation, or events related to precipitation. Also, the manure results from Moon Moo's agricultural practices of raising and rearing livestock. The resulting manure is also used for fertilizer for the Bermuda grass, which also constitutes agriculture. Because the manure was used for the purpose of agriculture and was discharged by rainwater only, it clearly falls in the category of agricultural stormwater discharge. As such, the EPA and Riverwatcher have stated baseless claims with regard to Moon Moo's status as a CAFO required to seek and obtain an NDPES permit. Therefore, the trial court properly concluded that these claims failed raise a genuine issue of material fact and should be dismissed.

The CWA makes unlawful "the discharge of any pollutant to navigable waters of the United States from an point source." 33 U.S.C. § 1311(a), § 1362(12). Congress has defined the "discharge of a pollutant" to include certain types of surface runoff collected or channeled by man." 40 C.F.R. § 122.23. Further, Congress has defined "point source" to mean any discernable, confined and discrete conveyance" including but not limited to…concentrated

feeding operation…from which pollutants are discharged. 33 U.S.C. § 1362(14). EPA is allowed to "issue a permit for the discharge of any pollutant, or combination of pollutants" from a "point source" into waters of the United States" in accordance with the terms of a permit. 33 U.S.C. § 1311(a); 40 C.F.R. 122.1(b); See also., *Alt v. U.S. E.P.A.*, 979 F.Supp.2d 701 (2013) citing 33 U.S.C. § 1342(a)(1).

The CWA expressly exempts "agricultural stormwater discharges and return flows from irrigation agriculture" from the definition of a point source. *See* 33 U.S.C. § 1362(14). Because agricultural stormwater discharge is exempted from the point source definition, there is no requirement to obtain a permit to lawfully discharge agricultural stormwater. *See* 33 U.S.C. § 1311, §1342; *Alt v. U.S. E.P.A.*, 979 F.Supp.2d 701, 715 (2013) (holding that "manure which is washed from… [a] farmyard to navigable waters by a precipitation event is an agricultural stormwater discharge and not a point source, thereby exempting it "from NPDES permit requirement of the Clean Water Act.); *Concerned Area Residents for the Env't v. Southview Farm*, 34 F.3d 114, 121 (2d. Cir. 1994) (holding that "agricultural stormwater exemption applies to any discharges that were the result of precipitation.) *National Pork Producers Council v. U.S. E.P.A.*, 635 F.3d 738 (5th Dist. 2011) (Rainwater that comes into contact with manure and flows into navigable waters is an agricultural stormwater discharge, which are excluded from the Clean Water Act's definition of point sources.) *Fishermen Against the Destruction of the Environment, Inc. v. Closter Farms*, 300 F.3d 1294 (11th Cir. 2002). Thus, federal courts have continuously stated that stormwater runoff from agricultural practices are exempted from NDPES permit regulation.

Notably, in *Alt*, the District Court in West Virginia's North Division held that manure and litter washed from a farmyard by rainfall/stormwater was an agricultural stormwater discharge

exempt from the NDPES permit regulation. *Alt* at 715. Using "plain English and common sense", the court defined the term agricultural to include work such as "*cultivating soil,* producing crops, and *raising livestock. Id*. citing WEBSTER'S NEW WORLD DICTIONARY OF AMERICAN ENGLISH 26 (3rd College Ed.1988) (emphasis added). The court also included "the allied pursuits of gathering in the crops and rearing livestock" to mean agriculture. *Alt,* at 711 citing *Waterkeeper Alliance, Inc. v. EPA,* 388 F.3d 486, 509 (2d Cir.2005); See also OXFORD ENGLISH DICTIONARY 267 (2D Ed.1989) (emphasis added). With regard to "stormwater", the court acknowledged that it was well established that "precipitation-related discharges" were included in the term. The court further explained that "CAFOs raise or rear livestock" *Alt,* at 711, and that manure washed away from rainfall was agricultural discharge related to precipitation. Thus, the farm was not required to obtain an NDPES permit. *Id.*

In *Concerned Area Residents for the Environment,* the Second Circuit held that a farm's application of manure by trucks and helicopters was subject to NDPES permit requirements. The court restated that agricultural discharge from CAFOs resulting from precipitation is not subject to NPDES permit requirements. In that case, a large dairy farm spread liquid manure over fields located on the property and was subject to NDPES permit requirements. *Id.* at 117-118. The manure eventually ran into surface waters due to rainfall at times and other times because of other reasons. *Id*. at 118. Giving the term their ordinary and common-sense meaning, the court stated that discharges of manure caused by precipitation would be exempt from NPDES permit requirements. *Id.* at 121.

In the case at bar, the manure applied by Moon Moo that is washed into the Canal by precipitation is not subject to NPDES permit requirements. The facts here are distinguishable from the *Southview Farm* case because Moon Moo's agricultural discharge is due solely to

rainfall. No evidence has been presented by Riverwatcher or EPA to show that manure discharge was caused by anything other than rainfall.

Here, Moon Moo's manure discharge falls within the same exemption that was set forth in the *Alt* decision. Similar to the facts of *Alt*, Moon Moo is engaged in agriculture. Specifically, the record indicates that Moon Moo raises and rears 350 head of cow and apply manure for the purpose of providing nutrients to the Bermuda grassland located on the property. In addition, manure is discharged into the Canal solely by rainfall. There have been no facts shown by EPA or Riverwatcher indicating that manure is discharged in anyway other than rainfall or precipitated related events.

To this point, no evidence before this Court shows that Moon Moo has participated in a distinct way to cause liquid manure to be discharged to Canal. In fact, the record is complete with facts showing that precipitation and rainfall are the direct and sole causes of the liquid manure discharge. These facts suggest by clear and convincing evidence that this precipitation Thus, Moon Moo's discharge of manure constitutes agricultural stormwater discharge and is exempt from NDPES permit regulation. The trial court was correct in holding that Moon Moo's discharge was not subject to NDPES permit requirements.

Because Moon Moo participates in agricultural practices and no evidence has been presented to dispute that rainfall is the sole cause of that Moon Moo's liquid manure discharge, Riverwatcher and EPA's claims fail to present an genuine issue of material fact. As such, these claims are without merit and should fail as a matter of law

B. Moon Moo's Discharge Is From A Bermuda Grassland That Is Not Included in the Animal Feeding Operation or Any Production Area, Excluding it From NDPES Permit Regulation.

Even assuming arguendo that Moon Moo's discharge is through a man-made ditch and not through rainfall, EPA and Riverwatcher's claim still fails as a matter of law. Moon Moo's liquid manure is discharged from the Bermuda grass field, which have been held to be excluded from NDEPS permit regulations. In fact, legislative history shows that any liquid manure discharged into from pasture or vegetated areas is to be excluded from NDPES permit regulation. Therefore, even liquid manure that is discharged through a manmade ditch from a vegetated or pasteurized area is to be excluded from NDPES permit regulation. As such, Riverwatcher and EPA's claim is clearly without merit and fails as a matter of law.

It is long-established that the production area of CAFOs have been defined to include the "animal confinement area, manure storage area, raw materials storage area, and the waste containment areas." 40 C.F.R. § 122.23(b)(8) (2012). Clearly, the grassy area containing Bermuda grass does not constitute a production area. Secondly, no facts have been stated by Riverwatcher and EPA that affirmatively shows the manure discharge originates from any area besides the pasture/grassland of Bermuda grass.

Common sense and simple English show that the Bermuda grassland located on the Moon Moo's property does not constitute any "animal confinement area, manure storage area, raw material storage area, or waste containment area." The Bermuda grassland does not contain any presence of animals, thus it is not an animal confinement area. Secondly, Moon Moo applies manure to this grassland to provide nutrients to the grass, not for the purpose to store raw materials, manure, or contain waste. The manure is applied to the Bermuda grass to provide nutrients to the grass.

The legislative history of 40 C.F.R. § 122.23(b)(1) strongly rebuts the arguments asserted by Riverwatcher and the EPA. Clearly, vegetated pastures and/or grasslands are to be excluded from the portion of the facility that constitutes concentrated animal feeding operation. In fact, EPA explained in the 2001 Proposed Rule:

> The definition was not intended to exclude from the definition of an AFO, those confinement areas that have growth over only a small portion of the facility or that have growth only a portion of the time that the animals are present. The *definition is intended to exclude pastures and rangeland that are largely covered with vegetation that can absorb nutrients in the manure.* It is intended to include as AFOs areas where animals are confined in such a density that significant vegetation cannot be sustained over most of the confinement area.

66 Fed. Reg. at 3005 (emphasis added). This was also confirmed by the EPA in the preamble to the 2003 CAFO rule that the definition of animal feeding operation was meant to exclude pastures, croplands, or rangelands. See e.g. 68 Fed. Reg. at 7189; 66 Fed. Reg. at 3005. In addition, federal courts continue to follow EPA's interpretation when addressing discharge from an area of vegetation or other grassland. See e.g. *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199 (2d Dist. 2009) (holding that Berm at gun club did not constitute point source under Clean Water Act (CWA), and thus club was not required to obtain National Pollutant Discharge Elimination System (NPDES) permit, even though lead from spent munitions was leachable)

Because EPA stated in 2001 and 2003 that pastures and rangelands of vegetation were excluded the animal feeding operation area, Moon Moo has not discharged unlawfully. No evidence presented by Riverwatcher or the EPA suggests that Moon Moo has discharged liquid manure from any area other than the pasture of Bermuda grass. Thus, the fact that discharge comes from a pasture of Bermuda grass outside of the animal feeding operation. Because Riverwatcher and EPA have failed to carry their burden to show that liquid manure was discharged from an area other than the Bermuda pasture.

Further, judges have followed the EPA's interpretation when addressing this issue in Federal courts. See e.g. *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199 (2d Dist. 2009) (holding that Berm at gun club did not constitute point source under Clean Water Act (CWA), and thus club was not required to obtain National Pollutant Discharge Elimination System (NPDES) permit, even though lead from spent munitions was leachable)

As such, it is clear that Bermuda pastures such as the one located on the Moon Moo's property was meant to be excluded under the CWA. As such, Riverwatcher and EPA's claim must fail as a matter of law.

C. Moon Moo's Bermuda Grassland Discharges Agricultural Stormwater in Accordance with a Nutrient Management Plan; Thus, it is Exempt From NDPES Permit Requirements.

It is undisputed that Moon Moo has filed a nutrient management plan with the State Agricultural field office. Further, there have been no facts to show that the Moon Moo's nutrient management plan is not an appropriate standard to allow discharge. As such, the claims asserted by both Riverwatcher and EPA should fail as a matter of law.

The statutory language of 40 C.F.R. § 122.23(e) states that the discharge of manure related to precipitation from land areas under the control of a CAFO shall be considered an agricultural stormwater discharge where the manure or process wastewater has been land applied in accordance with site a site specific nutrient management practices and thus, exempt from NDPES permit requirements. The provision further provides that NMPs should insure appropriate agricultural utilization of the nutrients in the manure. *Id.*

In addition, the Second District Court of Appeals held that CAFOs who have taken steps to implement the appropriate utilization of nutrients through nutrient management plans should not be held liable for discharge that is primarily the result of discharge. *Waterkeeper Alliance,*

Inc. v. U.S. E.P.A., 399 F.3d 486, 508-09 (2d. Cir. 2011). The *Waterkeeper* court recognized Congress's intent that CAFOs should be held liable for most land application discharges, but also noted that the express words of the CWA left an exemption for agricultural stormwater discharged in compliance with a NMP. *Id.* 40 C.F.R. § 122.23(e) (2012). The court went on to state that manure or process wastewater applied with these practices it "fulfills an important agricultural purpose, namely the fertilization of crops. *Waterkeeper,* at 524 citing Preamble to Final CAFO Rule.

In the instant case, it is clear that Moon Moo's agricultural stormwater discharge falls within the exception that has been expressly laid out by Congress. As previously mentioned, Moon Moo's liquid manure is agricultural in nature and discharged by precipitation, which is stormwater. Additionally, this liquid manure is discharged in the form in compliance the an appropriate nutrient management plan approved by the State Agricultural Office.

Riverwatcher and the EPA have failed to present any relevant facts showing Moon Moo's NMP was not properly submitted. In addition, no facts have been asserted to show that the NMP submitted was not up to appropriate standards not introduce any relevant facts, testimony or affidavits to show that Moon Moo's nutrient management plan give specific guidelines of how manure and other agricultural practices are utilized appropriately. Further, Congress, the U.S. EPA and recent court decisions strongly suggest that CAFOs should not be held liable for agricultural stormwater discharge in compliance with a NMP. *Watekeeper,* at 524 citing Preamble to Final CAFO Rule at 7179.

Because Moon Moo's liquid manure constitutes agricultural stormwater discharge in compliance with a nutrient management plan, Riverwatcher and EPA's claim are without merit and fail as a matter of law. Therefore, Riverwatcher and EPA failed to raise claims that raise a

genuine issue of material fact. As such, the trial court was correct in granting Defendant's motion for summary judgment.

IV. THE DISTRICT COURT PROPERLY HELD THAT THE RCRA CLAIM MUST FAIL AS THE FERTILIZER MIXTURE IS NOT SOLID WASTE THAT MAY PRESENT AN IMMINENT AND SUBSTANTIAL ENDANGERMENT TO HUMAN HEALTH AND THE ENVIRONMENT.

In 1976, Congress enacted the Resource Conservation and Recovery Act (RCRA) "to promote the protection of health and the environment" and to eliminate "the last remaining loophole in environmental law, that of unregulated land disposal of discarded materials and hazardous wastes." 42 U.S.C. § 6902(a); H.R. Rep. No 94-1491, at 4 (1976). RCRA is a comprehensive environmental statute that governs the treatment, storage, and disposal of solid and hazardous waste. *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 483 (1996).

Riverwatcher makes a claim in the alternative that Moon Moo has violated RCRA if it has not violated the CWA. Riverwatcher brings this action under the citizen suit provision of RCRA, 42 U.S.C. § 6972(a)(1)(B), to enforce RCRA § 4005, 42 U.S.C. § 6945(a), which prohibits the practice of "open dumping of solid waste." To prevail under the citizen suit provision, Riverwatcher must establish that Moon Moo is contributing to the 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. Riverwatcher does not allege that Moon Moo Farm is engaged in the treatment, storage, or disposal of hazardous waste subject to regulation under RCRA Subchapter C. Riverwatcher only asserts that Moon Moo's land application of fertilizer and soil amendment constitutes a solid waste that presents an imminent and substantial endangerment to human health and the environment.

However, Riverwatcher fails to meet this heavy burden as the unambiguous language of the statute clearly expresses that agricultural wastes that are returned to the soil as fertilizer or soil conditioners are exempt from RCRA liability. Both manure and whey are agricultural wastes that are being returned to the soil by Moon Moo for use as fertilizer and soil conditioners. Therefore, the mixture is not a discarded solid waste and Moon Moo would not trigger RCRA liability. In addition, Riverwatcher's open dumping claim must fail as EPA regulations specifically exclude land application of agricultural products from regulation as an open dump. Finally, since the mixture is not subject to RCRA, Riverwatcher's alternative claim arguing the disposal constitutes an imminent and substantial harm subject to redress under RCRA § 7002, would also fail as the group would have no standing to pursue a citizens suit.

A. Moon Moo's Mixture of Manure and Whey is Being Returned to the Soil as a Fertilizer and Conditioner; Therefore it is Exempt From RCRA Liability.

Moon Moo Farm operates a dairy farm with 350 head of milk cows and diligently collects the manure and liquid waste produced through a series of drains and pipes. The manure is funneled to an outdoor lagoon where it is mixed with acid whey and stored for use as fertilizer. This mixture is then spread on the Farm's Bermuda grass crop fields as a fertilizer and soil conditioner. Riverwatcher asserts that Moon Moo's land application practices constitute the disposal of a non-hazardous solid waste in a manner contrary to national sanitary landfill guidelines established by the EPA.

RCRA § 4005 prohibits the practice of "open dumping of solid waste" and authorizes citizen enforcement of this ban in a citizen suit brought pursuant to RCRA § 7002(a)(1)(A), as Riverwatcher seeks to do here. However, in order to be subject to the prohibition against open dumping, a material must first be classified as a solid waste pursuant to RCRA.

RCRA 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) (emphasis added). RCRA itself does not define the term "discarded material," however, several circuits have considered the scope of these two definitions and their determinations are compelling.

In the seminal case of *American Mining Congress v. EPA*, 824 F.2d 1177 (D.C. Cir. 1987), the D.C. Circuit assessed the scope of RCRA's definition of "solid waste" when an industry group of mining and oil refining companies challenged an EPA rule amendment giving the EPA authority to regulate reused materials in the petroleum and mining industries. The D.C. Circuit held that "our analysis of RCRA reveals clear Congressional intent to extend EPA's authority only to materials that are truly discarded, disposed of, thrown away, or abandoned." *Id*. at 1190.

The court further reasoned that "encompassing materials retained for immediate reuse within the scope of 'discarded material' strains… the everyday usage of that term." *Id*. at 1184. Most significantly *AMC I* determined that materials do not contribute to a waste disposal problem when "they are destined for beneficial reuse or recycling in a continuous process by the generating industry itself." *Id*. at 1186.

The D.C. Circuit again reaffirmed the holding of *AMC I* in *Association of Battery Recyclers v. EPA*, 208 F.3d 1047 (D.C. Cir. 2000). The issue in *Battery Recyclers* was whether materials generated and reclaimed within the mineral processing industry could be deemed "solid waste" under RCRA, such that it could be regulated by the EPA. The court held that "at least

some of the secondary material EPA seeks to regulate as solid waste is destined for reuse as part of a continuous industrial process and thus is not abandoned or thrown away." *Id*. at 1056.

Using the established precedent above, the United Stated Court of Appeals for the Ninth Circuit created a test for determining whether a material was a "solid waste" under RCRA. *Safe Air v. Meyer*, 373 F.3d 1035 (9th Cir. 2004) The test evaluated: (1) whether the material was destined for beneficial reuse or recycling in a continuous process generated by the industry itself; (2) whether the materials were being actively reused, or whether they merely had the potential of being reused; and (3) whether the materials were being reused by its original owner, as opposed to use by a salvager or reclaimer. *Id*. at 1043.

Moon Moo does not discard the manure it produces, but instead actively reuses the manure in a continuous process of growing Bermuda grass, which is then dried and harvested each summer as silage. The sole purpose of the reuse is to return nutrients to the Bermuda grass fields to ensure a plentiful crop of grass to feed the milk cows, thus it is an essential and valuable component of the farm's operation. There is no doubt the manure is being reused by its original owner. The acid whey added to the mixture is also arguably being reused by its original owner.

Acid whey is a by-product that remains after milk has been used to make certain dairy products. In this case, Chokos makes its Greek Yogurt from the milk produced at Moon Moo. The acid whey is a by-product of that milk and when Chokos returns the acid whey to Moon Moo it is essentially being returned to its original owner. Additionally, Moon Moo's expert agronomist, Dr. Emmet Green, testified that the land application of whey as a soil conditioner is a longstanding practice that has been traditional in New Union since the 1940s. Since the mixture is used for beneficial purposes in a continuous process by the generating industry itself, the

mixture cannot be deemed to be "discarded" material. Thus the mixture cannot be considered a "solid waste" that is subject to RCRA enforcement.

Finally, RCRA's legislative history reinforces the conclusion that the manure-whey mixture is not a solid waste under RCRA as Congress explicitly exempted it from RCRA liability. The House Report stated, "much industrial and agricultural waste is reclaimed or put to new use and is therefore not a part of the discarded materials disposal problem the committee addresses… Agricultural wastes which are returned to the soil as fertilizers or soil conditioners are not considered discarded materials in the sense of this legislation." H.R. Rep. No. 94-1491, at 2, 3 (1976). In the alternative, even if manure and whey could be considered a "solid waste," Riverwatcher's open dumping claim must fail because the EPA regulations specifically exclude land application of agricultural products from regulation as an open dump: "(1) The criteria do not apply to agricultural wastes, including manures and crops residues, returned to the soil as fertilizers or soil conditioners." 40 C.F.R. § 257.1(c)(1).

In conclusion, it can be discerned from Congress's explicit language in RCRA, resulting case law, and the EPA's express provisions, that agricultural wastes which are returned to the soil as fertilizers or soil conditioners, such as Moon Moo's mixture, are not a discarded material, were never intended to be classified as such, and are exempt from open dump regulations. Accordingly, Riverwatcher's open dumping claim must be dismissed.

B. Moon Moo's Land Spreading Practices Do Not Constitute an Imminent and Substantial Endangerment.

Riverwatcher also asserts a claim that Moon Moo's land spreading practices constitute a disposal of solid waste in a manner that presents an imminent and substantial endangerment to human health or the environment, subject to judicial redress under RCRA § 7002.

RCRA § 7002(a)(1)(B) provides:

> any person may commence a civil action on his own behalf – against any person… who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid waste which may present an imminent and substantial endangerment to health or the environment.

42 U.S.C. § 6903(27). The law is very clear. The imminent and substantial endangerment must arise from some use of a solid waste. As addressed above, the fertilizer mixture is not a discarded solid waste and therefore Riverwatcher's claim on this issue cannot succeed and must be dismissed.

In the alternative, even if the fertilizer mixture constituted a disposal of a solid waste, Moon Moo Farm's land spreading practices do not present an imminent and substantial endangerment to human health or the environment. Riverwatcher's claim relies solely on a nitrate advisory that was issued by the Farmville Water Authority to its drinking water customers, which warned that high levels of nitrates in Deep Quod River made the Farmville municipal water supply unsafe for drinking by infants, but did not pose any health threats to adults. Customers were advised to give any infants in their household bottled water.

Riverwatcher's claim and offered evidence suffers from three main defects. First, because the Deep Quod watershed is heavily farmed, nitrate advisories were issues in Farmville periodically in the past, and it is not disputed that such advisories were also issues in 2002, 2006, 2007, 2009, and 2010, before the increase in Moon Moo Farm's operations. Moon Moo Farm increased its operations in 2011, yet no nitrate advisory was issued that year. Second, Riverwatcher's own expert conceded that Moon Moo Farm's practices are not the "but-for" cause of nitrate advisories in Farmville. Finally, the nitrates posed no health risk to adults and

juveniles, and households with infants administered bottle water to their infants, thus avoiding any potential health risk.

In conclusion, Riverwatcher's claim must fail for two reasons. First, the fertilizer mixture applied to the field does not constitute a discarded solid waste and therefore RCRA § 7002 is not applicable. Second, even if the fertilizer mixture was considered a solid waste, Riverwatcher presented insufficient evidence to establish a genuine issue that Moon Moo Farm's landspreading practices presented an imminent and substantial danger to human health or the environment.

CONCLUSION

For the stated reasons, the district court correctly granted Moon Moo's motions for summary judgments on all grounds. Accordingly, the order of the court below should be affirmed.

Respectfully Submitted,

Team 30