Team 42

Docket No. 14-1248

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
THE HONORABLE ROMULUS N. REMUS, DISTRICT JUDGE

BRIEF FOR DEFENDANT-APPELLEE MOON MOO FARM, INC.

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STATEMENT OF JURISDICTION

Plaintiff, the United States of America on behalf of the Environmental Protection Agency ("EPA"), brought this action in the United States District Court for the District of New Union ("District Court") against Defendant, Moon Moo Farm, Inc. ("Moon Moo Farm") under § 309 of the Clean Water Act ("CWA"), 33 U.S.C. § 1319, for alleged discharges of pollutants into a water of the United States. Plaintiff-Intervenors, Deep Quod Riverwatcher, Inc. and Dean James ("Riverwatcher"), intervened, asserting claims under the citizen suit provisions of the CWA, 33 U.S.C. § 1365, and the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6972. Moon Moo counterclaimed against Riverwatcher for common law trespass. Because this action arose under the laws of the United States, the District Court had subject matter jurisdiction. *See* 28 U.S.C. § 1331. On April 21, 2014, the District Court denied EPA and Riverwatcher's motions for summary judgment and granted Moon Moo's motion for summary judgment. The District Court's order is a final decision, and jurisdiction is proper in this court pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the Queechunk Canal—a privately owned, man-made waterway—is a publicly navigable waterway subject to a public right of navigation.

2. Whether evidence obtained through an illegal trespass on private land is admissible in a CWA civil enforcement proceeding.

3. Whether Moon Moo Farm requires a National Pollutant Discharge Elimination System ("NPDES") permit because:

    a. It is a Concentrated Animal Feeding Operation ("CAFO") subject to NPDES permitting; or

    b. Excess nutrient discharges remove it from the agricultural stormwater exemption, subjecting it to NPDES permitting liability.

4. Whether Moon Moo Farm is subject to a RCRA §7002 citizen suit because:

a. Its land application of a manure and acid whey mixture constitutes a solid waste under RCRA Subtitle D; and

b. Plaintiffs can establish that the mixture constitutes an imminent and substantial endangerment to human health.

STATEMENT OF THE CASE

EPA commenced a CWA civil enforcement action against Moon Moo Farm after Riverwatcher served EPA and Moon Moo Farm with a notice of intent to sue under the citizen suit provisions of the CWA and RCRA. R. at 7. EPA sought civil penalties under CWA § 309(d) as well as injunctive relief under CWA § 309(b). R. at 7. Riverwatcher joined EPA's CWA suit as a Plaintiff-Intervenor and brought additional causes of action under RCRA § 7002. R. at 7. Moon Moo Farm counterclaimed seeking damages and injunctive relief from Riverwatcher for trespass. R. at 7. Both Plaintiffs and Defendant moved for summary judgment. R. at 7. On April 21, 2014, the District Court denied EPA and Riverwatcher's motions for summary judgment and granted Moon Moo Farm's motion on all claims, dismissing Plaintiff's complaints and awarding Moon Moo Farm $832,560 in damages on its counterclaim. R. at 12.

EPA and Riverwatcher both a filed Notice of Appeal to this court taking issue with the following holdings of the District Court: (1) that, "because there is no public right of navigation in a man-made body of water," Dean James was trespassing when he collected evidence against Moon Moo Farms; (2) that, because evidence obtained through trespass is not admissible in a civil enforcement action, Plaintiffs had no admissible evidence to establish a CWA violation; (3) that Moon Moo Farm is not a CAFO and is not subject to NPDES permit obligations; and (4) that Moon Moo Farms landspreading practices did not constitute an imminent and substantial endangerment under RCRA. R. at 1-2. Independently, Riverwatcher challenges the District Court's holdings: (1) that discharges from Moon Moo Farm's fields fall under the agricultural

stormwater exemption of the CWA; (2) that the manure and acid whey mixture used by Moon Moo Farm as fertilizer and soil amendment is not a solid waste under RCRA; and (3) that Moon Moo Farm be awarded damages based on its trespass claim against Riverwatcher. R. at 1-2.

STATEMENT OF FACTS

Moon Moo Farm

Moon Moo Farm is a dairy farm with 350 head of cattle that sits on 150 acres of land at a bend in the Deep Quod River. R. at 4-5. Moon Moo Farm collects manure and liquid waste from its cows into a lagoon, where the manure is combined with acid whey recovered from the process used to make the cows' milk into yogurt. R. at 5. Use of whey as a soil conditioner is consistent with longstanding practice in the Deep Quod rivershed. R. at 5. Moon Moo Farm applies the fertilizer and soil amendment to its Bermuda grass fields in accordance with its Nutrient Management Plan ("NMP"). R. at 5. Farms like Moon Moo Farm, that are regulated as "no-discharge" animal feeding operations, must submit and receive approval from the New Union Department of Agriculture for their NMP. R. at 5. To be approved, an NMP must specify planned seasonal manure application rates based on calculations of expected nutrient uptake. R. at 5.

Because Moon Moo Farm is located at a bend in the Deep Quod River, lands near the river bend are susceptible to flooding. R. at 5. In the 1940's, a previous owner of the property created a bypass canal to alleviate this problem. R. at 5. Known as the Queechunk Canal, the bypass is approximately 50 yards wide and three to four feet deep. R. at 5. The canal alleviates flooding by allowing some of the flow of the Deep Quod River to pass through the Moon Moo Farm property before returning to the Deep Quod River downstream. R. at 5. The canal does not affect the ability of boaters to navigate the Deep Quod River, and Moon Moo Farm has

prominently posted "No Trespassing" signs to prevent the use of its private property as a shortcut. R. at 5.

In early 2013, the Farmville Water Authority issued a "nitrate" advisory for its water service customers. R. at 6. The only recommendation of this advisory was that infants drink bottled water. R. at 6. Such advisories are common in the Deep Quod rivershed, which is heavily farmed. R. at 7. No expert has identified Moon Moo Farm's landspreading practices as the "but for" cause of the 2013 nitrate advisory, and it is undisputed that the Farmville Water Authority has issued nitrate advisories in 2002, 2006, 2007, 2009, and 2010, all prior to Moon Moo Farm's use of acid why as a soil amendment. R. at 7.

James Dean's Trespass onto Private Property

On April 12, 2013, during a significant storm event, James Dean of the Deep Quod Riverwatcher organization ignored Moon Moo Farm's "No Trespassing" signs and navigated a small boat into the Queechunk canal to observe the farm's fields and sample stormwater runoff. R. at 6. Information obtained by James was submitted as evidence in the EPA's civil enforcement action. R. at 9.

STANDARD OF REVIEW

The District Court denied Riverwatcher and EPA's motions for summary judgment and granted Moon Moo Farm's motion for summary judgment. R. at 12. This Court reviews *de novo* grants of summary judgment by the District Court. *Petroski v. H & R Block Enters., LLC*, 750 F.3d 976, 978 (8th Cir. 2014).

SUMMARY OF THE ARGUMENT

The District Court's grant of Moon Moo Farm's summary judgment motion and its dismissal of the complaints against Moon Moo Farm should be upheld for the following reasons: (1) the evidence supporting Plaintiff's CWA claims was gathered through trespass and should be excluded because the Queechunk Canal is not a public trust navigable water allowing for a public right of navigation; (2) regardless of whether Moon Moo Farm is a CAFO, its excess nutrient discharges are exempt from NPDES permitting requirements by applicable stormwater exemptions; and (3) because the application of the manure and whey acid mixture does not constitute the disposal of a "solid waste" and because the mixture does not present an imminent and substantial endangerment to human health, Riverwatcher has no cause of action against Moon Moo Farm under RCRA. Accordingly, this Court should uphold the District Court's judgment.

The Queechunk canal is not a publicly navigable waterway as it was built on private land with private funds. A privately owned canal cannot be subject to public use unless action is taken to open it to the public or the construction of the waterway diverts or destroys a pre-existing publicly navigable water way. Neither of these circumstances exist in this case. The Queechunk canal does not divert nor destroy the pre-existing publicly navigable waterways—both the Deep Quod River and the Mississippi River—and the government has never initiated a takings action to subject the canal to public use. Accordingly, Dean James' conduct of April 12, 2013 constitutes an illegal trespass on private land.

Because the water samples and photographs obtained by Dean James were obtained through trespass, that evidence should be inadmissible. Case law and policy concerns support the application of the Fourth Amendment's exclusionary rule to CWA enforcement actions. EPA

failed to follow the CWA's procedures for collecting evidence. The EPA cannot rely on evidence obtained by a private citizen pursuant to an illegal trespass to make their case.

Plaintiff's CWA claims compel three possible lines of reasoning, all of which arrive at the same conclusion—Moon Moo Farm is not subject to NPDES permitting. First, Plaintiffs allege that Moon Moo Farm is a CAFO and thus subject to NPDES permitting, but they fail to present admissible evidence to substantiate this claim. Second, even if Moon Moo Farm was classified as a CAFO, EPA's regulations clearly apply the agricultural stormwater exemption to the alleged discharge, and Moon Moo Farm is exempt from NPDES permitting. Third, if the alleged discharge is evaluated independent of EPA's CAFO regulations, well established case law demonstrates that the CWA's agricultural stormwater exemption applies to the alleged discharge, and Moon Moo Farm therefore had no permit obligation.

Finally, Moon Moo Farm is not subject to a RCRA citizen suit. First, to plead a cause of action under RCRA § 7002(a)(1)(A) or § 7002(a)(1)(B) there must be a "solid waste" subject to RCRA regulations. To qualify as a solid waste under RCRA, material must be "discarded." Because neither the manure nor the acid whey have ever been abandoned or disposed of, they cannot be solid wastes under RCRA. Second, a cause of action under RCRA § 7002(a)(1)(B) requires that the disposal of a solid waste pose an imminent and substantial endangerment to human health. The only evidence in the record that can possibly support an imminent and substantial endangerment claim—a single nitrate advisory—is patently insufficient to support a claim of substantial endangerment given the statutory language and the relevant case law.

ARGUMENT

I. THE QUEECHUNK CANAL IS NOT A PUBLIC TRUST NAVIGABLE WATER ALLOWING FOR A PUBLIC RIGHT OF NAVIGATION.

Relevant case law clearly establishes that a privately owned, man-made water body like the Queechunk Canal will only be subject to a public right of navigation in two circumstances: (1) if the construction of the water body diverted or destroyed a pre-existing navigable waterway or (2) if the government compensates the land owner for the imposition of public use as required by the Taking Clause of the Constitution. Because the Queechunk Canal does not divert of destroy the Deep Quod River and because the government has never compensated Moon Moo Farm for the imposition of a public use right, James Dean's intrusion into the Queechunk canal was an illegal trespass.

A. The Queechunk Canal Neither Diverts Nor Destroys a Pre-Existing Navigable Water.

In *Vaughn v. Vermilion Corp.*, the United States Supreme Court addressed the question of "whether channels built on private property and with private funds, in such a manner that they ultimately join with other navigable waterways, are [] open to use by all citizens of the United States." 444 U.S. 206, 208 (1979). The Supreme Court held that "no general right of use in the public arose" over the system of man-made canals in that case. *Id.* at 208-09. Similar to the Queechunk canal, the canals at issue in Vaughn were navigable-in fact. The Court ultimately remanded the case to resolve a factual dispute concerning whether or not the man-made canals had diverted or destroyed the pre-existing natural navigable waterway, reasoning that if the pre-existing waterway was diverted or destroyed by a private landowner's actions, the public would have a right to use the canals. *Id.* at 209.

Similar to the canals in *Vaughn*, the Queechunk canal was built with private funds on private property that is now leased by Moon Moo Farm. R. at 5. The Queechunk Canal joins with the Deep Quod River and, ultimately, the Mississippi River, both of which are navigable waterways. R. at 5. The Queechunk Canal has not destroyed the navigability of the Deep Quod

River which it is still navigable by small boat. R. at 5. Therefore, Plaintiffs cannot assert the destruction of its navigability as a defense to Moon Moo Farm, Inc.'s trespass claim. *See Vaughn*, 444 U.S. at 209. The reasoning in *Vaughn* applies here. No general right of use by the public existed due to destruction of a pre-existing water body when Dean James made use of the Queechunk canal.

Additionally, the Queechunk Canal does not divert the Deep Quod River in the sense intended by the *Vaughn* Court. *See Black's Law Dictionary* (9th ed. 2009), *available at* Westlaw BLACKS (defining "diversion" as "[a] deviation or alteration from the natural course of things; esp., the unauthorized alteration of a watercourse *to the detriment of a lower riparian owner*") (emphasis added). While the Queechunk canal does divert some of the water in the Deep Quod River in the colloquial sense, the canal does not alter or diminish the flow of the Deep Quod River such that the River would be considered "diverted" as the term is used in *Vaughn*. If creation of a water body through diversion automatically subjected a man-made water body to public use, the Court would simply have said so. It is a necessary implication of *Vaughn* that the type of diversion the Court refers to is one that somehow harms the rights of the public in pre-existing public use navigable waters. There is no evidence of such a diversion in this case. Therefore, no public right to use the Queechunk Canal exists due to diversion.

In *Buckskin Hunting Club v. Bayard* the Louisiana Court of Appeal expanded on the issue of destruction and diversion. 868 So.2d 266 (La. Ct. App. 2004). The *Buckskin* Court held that the man-made pipeline canals at issue were not navigable waters subject to public use, rejecting the argument that, because the canals were subject to the ebb and flow of the tides, they should be subject to public use. *Id*. at 271. The court also found that navigability-in-fact would not automatically make the water open to the public. *Id*. Thus, it is not the connection that a man-

made water body shares with pre-existing navigable waters that matters. The question is whether a man-made canals allows water to leave the privately owned land "through its natural channel and [without] unduly diminish[ing] its flow" *Id.* at 274. In the words of the Louisianan Court of Appeal: "No public rights to use of a canal located on private property arise[] from the [mere] fact that water flows through [a] channel." *Id.*; *see also People For Open Waters, Inc. v. Estate of Gray*, 643 So.2d 415, 417-18 (La. Ct. App. 1994) (emphasizing that, "[a] canal built entirely on private property for private purposes is a private thing.…The fact that such a canal contains navigable waters within its banks is not sufficient to…subject the waterway to public use.").

Consistent with the *Vaughn* and *Buckskin* criteria for exempting a man-made water body from a public use right, Moon Moo Farms allows the water in the Queechunk canal to leave the property "through its natural channel" as the canal merely bypasses part of the Deep Quod River and the water which flows through the Queechunk canal ultimately rejoins the Deep Quod River. R. at 5. Moreover, the Queechunk canal does not unduly diminish the flow of the Deep Quod River which "flows year round" and is "navigable by small boat both upstream and downstream of the Queechunk canal." R. at 5. As such, regardless of whether the Queechunk Canal is navigable-in-fact, there is no right of public use.

B. The Government Has Never Opened Up the Queechunk Canal to Public Use Through a Takings Action.

In *Kaiser Aetna v. United States*, the United States Supreme Court held that a marina, although within the definition of 'navigable waters," could not be opened to the public without paying the petitioner just compensation for its use. 444 U.S. 164 (1979). In so holding the Court explicitly stated that: "[W]hile [the pond] may be subject to regulation by the Corps of Engineers…it does not follow that the pond is also subject to a public right of access." *Id.* at 172-

73. The Court further reasoned that, "the imposition of the navigational servitude in this context will result in an actual physical invasion of the privately owned marina." *Id*. at 180.

As in *Kaiser*, opening the Queechunk canal to the public would constitute an actual physical invasion of a privately owned body of water. As such, unless and until the proper government agencies, pursuant to prescribed legal procedures, take action to open the canal to the public at large, use of the Queechunk Canal remains an illegal trespass. The record contains no evidence, and Plaintiffs have not offered any evidence, that any such action has been taken to open the canal to the general public. Therefore, there is no general right of use in the Queechunk Canal on this basis.

A manmade canal built on private property with private funds is not a publicly navigable waterway unless the man-made canal diverts or destroys a pre-existing navigable waterway, or action is taken to subject the privately owned canal to public use. Neither of these conditions exist in this case. Therefore, the Dean James' conduct on April 12, 2013 constituted trespass. Accordingly, the District Court's grant of summary judgment on Moon Moo Farm's counterclaim should be affirmed.

II. EVIDENCE OBTAINED BY TRESPASS AND WITHOUT WARRANT IS INADMISSIBLE IN A CWA CIVIL ENFORCEMENT PROCEEDING.

The exclusionary rule, rooted in the rights preserved by the Fourth Amendment, prevents the government from using evidence that is gathered pursuant to an unreasonable search or seizure. *Mapp v. Ohio*, 367 U.S. 643 (1961). While the exclusionary rule typically only applies to criminal proceedings, at least three circuits have held that it may also apply in a government proceeding that is nominally civil. *See Trinity Indus., Inc. v. Occupational Safety & Health Review Comm'n*, 16 F.3d 1455, 1462 (6th Cir. 1994) (addressing agency inspections of work

facilities following allegations of OSHA violations); *Smith Steel Casting Co. v. Brook*, 800 F.2d 1329, 1334 (5th Cir. 1986) (same); *Donovan v. Sarasota Concrete Co.*, 693 F.2d 1061, 1071 (11th Cir. 1982) (same). The text and structure of the CWA itself as well as the reasons that compelled the Sixth, Fifth, and Eleventh Circuits to apply the exclusionary rule in other civil enforcement cases support the District Court's holding that the exclusionary rule should apply in CWA civil enforcement actions.

In upholding the exclusion of evidence in Occupational Safety and Health Administration ("OSHA") proceedings, the Eleventh Circuit emphasized the fact that OSHA's administrative scheme—which relies on searches as a means to gather evidence of potential violations—supports the application of the exclusionary rule despite the fact that OSHA proceedings are nominally civil because "the administrative scheme governing OSHA inspections provides a ready mechanism for the enforcement of fourth amendment rights" and exclusion would serve as a deterrent to unlawful conduct. *Donovan*, 693 F.2d at 1071-72.

Similar to OSHA's administrative scheme, the CWA's administrative scheme relies on searches as a means of obtaining evidence. *See* 33 U.S.C. §§ 1318(a)(B)(i), 1318(a)(B)(ii). Well-established procedures exist whereby the EPA can enforce the CWA and collect evidence. *See* 33 U.S.C. §§ 1251 (tasking the Administrator of the EPA with enforcing the CWA), 1318(a)(B)(i) (granting the EPA a "right of entry to, upon, or through any premises in which an effluent source is located" upon showing of credentials), 1318(a)(B)(ii) (allowing the EPA to, at reasonable times and upon showing of credentials, access and copy records, inspect monitoring equipment, and sample any effluents "which the owner or operator of such source is required to sample"), 1319(a)(2)(A) (conferring upon an administrator the power to enforce any permit

condition or limitation by issuing an order to comply), 1319(b) (authorizing administrators to commence a civil action seeking appropriate relief in the event of noncompliance).

There are ample avenues for the EPA to collect evidence lawfully, but the EPA failed to follow the prescribed procedures for collecting evidence. Instead, the EPA relied on evidence illegally obtained by James Dean. Accordingly, *Donovan*'s reasoning supports the application of the exclusionary rule to the evidence illegally obtained by Dean James for Riverwatcher. Allowing the EPA to rely on illegally obtained evidence, when there are readily available statutory mechanisms for obtaining the same evidence, only encourages the EPA tacitly encourage and reward private individuals who invade the rights of others by using their illegally obtained evidence in enforcement proceedings.

Consider *Matter of Alameda County Assessor's Parcel Nos. 537-801-2-4 and 537-850-9.* 672 F.Supp. 1278 (N.D.Cal. 1987). In that case, the EPA secured an administrative search warrant to collect soil samples from a farm after several representatives of the Department of Fish and Game witnessed the lessee farmers dumping and spreading fill material on potential wetlands. *Id.* at 1280. In upholding the validity of the EPA's search warrant, the Court noted that "the grant of an administrative search warrant is governed by lesser standards than the 'probable cause' standard in criminal law." *Id*. at 1287. The court went on to hold that the Fish and Game representatives' accounts of potential wetland destruction formed the valid basis of the EPA's probable-cause belief that the lessee farmers were violating the CWA. *Id.* at 1282. Dean James' observations, much like the observations of the Game and Fish representatives in *Alameda County*, likely would have served as a probable cause basis for the EPA to secure a search warrant thereby granting them a right of entry onto Moon Moo Farm's land to obtain evidence.

Despite the relaxed procedures governing administrative search warrants, the EPA did not secure a warrant and did not conduct an inspection of Moon Moo Farms.

Moon Moo Farm does not contend that the exclusionary rule must extend to all evidence obtained by private individuals in all civil enforcement actions. However, the exclusionary rule should be applied when a government agency attempts to benefit from a private individual's illegal actions. If the EPA brings a CWA civil enforcement action, either by itself or in response to a notice of intent by a private individual, it should be incumbent on the EPA to follow prescribed procedures for obtaining evidence. Controlling when and how the EPA can collect evidence that may be used in future litigation is an integral part of protecting the reasonable privacy expectations of potential defendants and ensures that governmental agencies do not overstep their authority. The EPA instituted this action against Moon Moo Farms after Riverwatcher served it with a letter of intent to sue. R. at 7. This is the EPA's suit. Therefore, the admissibility of evidence should be governed by the standards applicable to the EPA, not the Intervenor. This Court should not allow the EPA to evade the statutorily-prescribed mechanisms dictating enforcement of the CWA by piggybacking on a private individuals illegal actions. Rather, the EPA should abide by the enforcement provisions of the CWA which require it to secure an administrative search warrant to acquire admissible evidence.

Allowing the EPA in this case to rely on Dean James' illegally obtained photos and water samples sends the message that, in the future, government agencies tasked with enforcing regulatory statutes should simply wait for private citizens to initiate citizen suits to avoid statutory requirements regarding searches and evidence obtainment. This gives private citizens incentive to illegally trespass on privately owned land to obtain evidence on the government's behalf, while giving government agencies incentive to do nothing. This Court should affirm the

District Court's exclusion of evidence obtained through trespass and its dismissal of Plaintiffs' CWA claims for lack of evidence.

III. MOON MOO IS NOT A CAFO SUBJECT TO NPDES PERMITTING.

A. Moon Moo Farm Does Not Meet the Regulatory Definition of a CAFO, and is Not Subject to NPDES Permitting Requirements.

EPA regulations make clear that concentrated animal feeding operations ("CAFOs") are point sources subject to NPDES permitting. 40 C.F.R. § 122.23(a-b). However, the regulations limit what facilities fall under the definition of a CAFO. *Id.* Under the regulations, a farm of Moon Moo's size, 350 dairy cows, would qualify as a "medium CAFO" only if one of two circumstance apply, either: (1) the facility discharges pollutants into waters of the United States, "through a man-made ditch flushing system, or other similar man-made device," or (2) the facility directly discharges pollutants into waters of the United States "which originate outside of and pass over, across, or through the facility or otherwise come into direct contact with the animals confined in the operation." 40 C.F.R. § 122.23(b)(6). The parties agree that the second circumstance does not apply, and because there is no admissible evidence of any discharge from Moon Moo Farm, the first circumstance does not apply either, and Moon Moo Farm cannot be classified as a CAFO.

Appropriately, Moon Moo Farm operates as a "no discharge" animal feeding operation and is so regulated by the State of New Union. This does not necessarily absolve Moon Moo Farm from permitting obligations. If the EPA seeks to regulate a "no discharge" facility as a CAFO, then the Agency may employ a designation process outlined in 40 C.F.R. § 122.23(c). That is the proper procedure for subjecting a farm like Moon Moo to CAFO regulations, but no such action has been taken here. For the government to classify Moon Moo Farm as a "no discharge" facility and then proceed, unsupported by admissible evidence, to regulate Moon Moo

Farm as if it is a discharging facility, undermines the clear regulations that EPA has promulgated. Plaintiffs cannot demonstrate a discharge has occurred as required by § 122.23(b)(6)(ii)(B), so absent a designation process pursuant to § 122.23(c), Moon Moo Farm cannot be classified as a CAFO and does not require a NPDES permit.

B. If Moon Moo Farm is Classified as a CAFO, it is Not Subject to NPDES Permitting Due to § 122.23(e)'s Incorporation of the Agricultural Stormwater Exemption.

If a discharge occurred as alleged by Plaintiffs, then the elements of § 122.23(b)(6) would be met and Moon Moo Farm would fall into the regulatory definition of a medium CAFO. Plaintiffs allege that this imposes permitting obligations on Moon Moo Farm, but this is not the case. 40 C.F.R. § 122.23(a) ("[CAFOs] are point sources, subject to NPDES permitting requirements *as provided in this section*.") (emphasis added). Under EPA's CAFO regulations, agricultural stormwater discharges are exempt from NPDES permitting requirements. 40 C.F.R. § 122.23(e). A land application discharge from a CAFO constitutes, "a discharge from that CAFO subject to NPDES permit requirements, except where it is an agricultural stormwater discharge." *Id*. The regulations further clarify that when manure is applied in accordance with site-specific nutrient management practices, "a precipitation-related discharge of manure, litter or process wastewater from land areas under the control of a CAFO is an agricultural stormwater discharge." *Id.*

In the preamble to the CAFO rule, the Agency identifies its rationale behind exempting from NPDES permitting CAFO discharges that happen concurrent with nutrient management practices:

> EPA recognizes that even when the manure, litter, or process wastewater is land applied in accordance with practices designed to ensure appropriate agricultural utilization of nutrients, some runoff of nutrients may occur during rainfall events, but EPA believes that this potential will be minimized and any remaining runoff can reasonably be considered an agricultural storm water discharge.

NPDES Permit Regulation and Effluent Limitation Guidelines and Standards for CAFOs, 68 Fed. Reg. 7176-01 (Feb. 12, 2003). The Second Circuit reviewed and, correctly, upheld this portion of EPA's CAFO rule. *Waterkeeper Alliance, Inc. v. E.P.A.,* 399 F.3d 486, 507 (2d Cir. 2005) (determining that Congress's intent in drafting the exemption to remove liability from discharges that were a result of natural precipitation events.).

Moon Moo Farm operates under a NMP that is submitted to and approved by New Union Department of Agriculture. R. at 5. The NMP sets forth planned seasonal manure application rates, and it calculates the expected uptake of nutrients by the crops grown on the fields where the manure is spread. R. at 5. It is undisputed that Moon Moo Farm was in compliance with its NMP when the alleged discharge occurred and that the discharge occurred during a significant storm event with heavy precipitation. R. at 6, 9. Therefore, if Moon Moo Farm is classified as a CAFO, the circumstances of its alleged discharge fall squarely within the CWA's agricultural stormwater exemption as clarified by both *Waterkeeper Alliance* and the EPA's interpretation of the Act.

EPA and Riverwatcher may argue that Moon Moo Farm's NMP was deficient and point to the requirement that for a CAFO to fall under the agricultural stormwater exemption as explained in 40 C.F.R. § 122.23(e), its site-specific nutrient management practice must comply with 40 C.F.R. § 122.42(e)(1)(vi) through (ix). These provisions require: (vi) site specific practices, (vii) testing protocols, (viii) application protocols, and (ix) recordkeeping. *Id*. The record reflects that Moon Moo Farm's NMP meets the requirements of § 122.42(e)(1). Moon Moo Farm's NMP was site specific; it was submitted by the farm and approved by the state, fulfilling § 122.42(e)(1)(vi). R. at 5-6. The record reflects that the NMP contained planned seasonal application rates calculated for proper nutrient uptake, meeting § 122.42(e)(1)(viii)'s

requirement of application protocols. R. at 5. Finally, Moon Moo Farm produced application records, demonstrating that records are kept under the NMP, meeting § 122.42(e)(1)(vii)'s record keeping requirement. R. at 6. Therefore, Moon Moo Farm's NMP brings it cleanly within the agricultural stormwater exemption as incorporated in EPA's regulation § 122.23(e).

Even if Appellants could demonstrate deficiencies in Moon Moo Farm's NMP, Moon Moo Farm should not be punished for abiding by a permit issued by the State of New Union, a State that has been delegated CWA permitting authority. NPDES permit holders are granted a "permit shield" defense from CWA liability for discharges within the reasonable contemplation of the permitting authority. *Piney Run Pres. Ass'n v. Cnty. Comm'rs of Carroll Cnty.*, 268 F.3d 255, 269 (4th Cir. 2001). The policy behind this defense is "to relieve [permit holders] of having to litigate in an enforcement action the question whether their permits are sufficiently strict." *E. I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 138 n.28 (1977). "In short, [the permit shield] serves the purpose of giving permits finality." *Id.* While NMPs are not identical to NPDES permits, similar policy considerations support allowing reliance on NMPs against litigation. To issue an NMP and then require recipients to abide by some more stringent, undefined standard for purposes of CWA enforcement creates an incoherent system contrary to EPA's goal of establishing, "clear and binding legal obligations" under its CAFO rule. 68 Fed. Reg. 7181.

Because any pollutants originating from Moon Moo Farm are clearly covered by the CAFO agricultural stormwater exemption, Moon Moo Farm does not require a NPDES permit. Therefore, the District Court's grant of summary judgment to Moon Moo Farm on this issue should be affirmed.

IV. EXCESS NUTRIENT DISCHARGES FROM MOON MOO'S FIELDS ARE COVERED BY THE CWA AGRICULTURAL STORMWATER EXEMPTION.

Riverwatcher, but not the EPA, alleges that even if Moon Moo Farm is not a CAFO, its alleged discharge constitutes a "point source" under the CWA and invokes liability. Riverwatcher is mistaken. The CWA specifically exempts agricultural stormwater discharges from classification as point sources. 33 U.S.C. § 1362(14). Consistent precedent confirms that the circumstances surrounding Moon Moo Farm's alleged discharge exempt it from NPDES permitting obligations under the CWA's agricultural stormwater exemption.

In *Concerned Area Residents for Environment v. Southview Farm*, the Second Circuit was faced with a dairy operation much larger than Moon Moo Farm. 34 F.3d 114 (2d Cir. 1994). Unlike Moon Moo farm, the facility at issue was applying manure to its fields in gross excess of what the vegetation could manage through nutrient uptake. *Id.* Stormwater runoff was being channeled away from the Southview operation via a drainage ditch, similar to Moon Moo Farm's drainage ditch. *Id.* In its discussion of the agricultural stormwater exemption, the *Southview* Court identified a simple rule to guide questions of applicability: "the real issue is not whether the discharges occurred during rainfall or were mixed with rain water run-off, but rather, whether the discharges were the result of precipitation." *Id*. at 120-21. In *Southview Farm*, the discharge was not caused by precipitation, and would have occurred independent of a precipitation event, thus it could not be classified as a stormwater discharge. *Id.*

The Eleventh Circuit further clarified the applicability of the agricultural stormwater exemption in *Fishermen Against Destruction of Environment, Inc. v. Closter Farms, Inc.*, a case that involved a sugarcane operation's pumping of excess drainage from its fields into Lake Okeechobee. 300 F.3d 1294 (11th Cir. 2002). To the extent that such drainage was a result of rainwater, the Circuit Court cited to *Southview Farm* and held the discharge to fall under the

agricultural stormwater exemption. *Id* at 1297. The Eleventh Circuit held that stormwater pumped through pipes before its discharge still falls within the agricultural stormwater exemption, stating, "[n]othing in the language of the statute indicates that stormwater can only be discharged where it naturally would flow." *Id*.

In this case, the record shows no evidence that Moon Moo Farm has discharged at any time other than the single alleged instance which occurred during a significant storm event. *See* R. at 6. Heavy rainfall caused Moon Moo Farm's alleged discharge, and this demonstrates accordance with the test in *Southview Farm* and *Fishermen*. Moon Moo's alleged discharge of field drainage as a result of a serious stormwater event falls well within the agricultural stormwater exemption.

The District Court, correctly, cites to *Alt v. E.P.A.*, to support its conclusion that the agricultural stormwater exemption applies to the facts at issue here. 979 F. Supp. 2d 701 (N.D.W. Va. 2013). This case clarifies that agricultural waste that originates in a CAFO production area and is subsequently conveyed by stormwater is properly classified under the agricultural stormwater exemption. *Id* at 714. Any argument that manure, the alleged pollutant at issue in the present case, should not qualify for the agricultural stormwater exemption is foreclosed by *Alt* and the body of precedent concerning the agricultural stormwater exemption. *See Nat'l Pork Producers Council v. E.P.A.*, 635 F.3d 738, 743 (5th Cir. 2011) (specifically identifying "when rainwater comes in contact with manure and flows into navigable waters" as an example of an agricultural stormwater discharge).

In *Alt*, the District Court for the Northern District of West Virginia discusses the history of the agricultural stormwater exemption and its relationship with EPA's CAFO regulation. 979 F. Supp. 2d at 714. The court states what the case law makes clear, "that the agricultural

stormwater exemption existed prior to the 2003 [CAFO] regulation." *Id*. This is important and directly applicable to any argument raised by Riverwatcher that if Moon Moo Farm is not a CAFO, it is still a point source unprotected by the agricultural stormwater exemption. Consistent precedent supports the applicability of the agricultural stormwater exemption to discharges related to stormwater's effect on manure spreading. *Id* at 710-715 (discussing *Southview Farm*, 34 F.3d 114, *Closter Farms* 300 F.3d 1294, *Waterkeeper Alliance*, 399 F.3d 486, and *Nat'l Pork Producers Council*, 635 F.3d 738). Riverwatcher's claim that Moon Moo Farm's alleged discharge is a point source subject to NPDES permitting therefore fails under the agricultural stormwater exemption.

V. THE MANURE AND ACID WHEY MIXTURE IS NOT A SOLID WASTE UNDER RCRA.

RCRA's citizen suit provision allows individuals to bring suit against those alleged to be in violation of any RCRA "permit, standard, regulation, condition, requirement, prohibition, or order." 42 U.S.C. § 6972(a)(1)(A). Riverwatcher, but not the EPA, argues that Moon Moo's application of the manure and acid whey mixture to its Bermuda grass fields violates RCRA's prohibition on "[the] disposal of solid waste . . . which constitutes the open dumping of solid waste." 42 U.S.C. § 6945(a). Because the manure and acid whey mixture has not been "discarded," such that it fits the definition of a "solid waste" under RCRA, the application of the mixture to Moon Moo's fields is outside RCRA's open dump prohibition.

RCRA defines "solid waste" as "garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other *discarded material*, including . . . material resulting from industrial, commercial, mining, and agricultural operations." 42 U.S.C. § 6903(27) (emphasis added); *cf.* 42 U.S.C. § 6901(a)(2) (reporting the congressional finding that the nation had a "rising tide of scrap, discarded, and waste materials").

Although the explicit inclusion of material resulting from agricultural operations in RCRA's definition of solid waste might suggest that Moon Moo's manure and acid whey mixture should be classified as a solid waste, the critical limiting language is that such materials must be *discarded*.

RCRA itself does not define "discarded," and EPA regulations define it only for purposes of regulation under RCRA Subtitle C, not D, the provision at issue here. *See* 40 C.F.R. § 261.2(a)(1) (defining discarded material); 40 C.F.R. § 261.1(b)(1) ("The definition of solid waste contained in this part applies only to wastes that also are hazardous for purposes of the regulations implementing subtitle C of RCRA."); *see also Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co.*, 989 F.2d 1305, 1314 (2d Cir. 1993) (noting the distinction between solid wastes under Subtitles C and D). Because RCRA does not define discarded, the proper course is to interpret it according to "its ordinary or natural meaning." *F.D.I.C. v. Meyer*, 510 U.S. 471, 476 (1994) (citing *Smith v. United States*, 508 U.S. 223, 228 (1993)); *see Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1041 (9th Cir. 2004) (defining "discarded" according to its ordinary meaning).

"[I]tems that are 'disposed of, abandoned, or thrown away' are discarded." *Am. Petroleum Inst. v. E.P.A.*, 216 F.3d 50, 56 (D.C. Cir. 2000) (quoting *Am. Min. Cong. v. E.P.A.*, 824 F.2d 1177 (D.C. Cir. 1987)); *see Safe Air*, 373 F.3d at 1041 (quoting *The New Shorter Oxford English Dictionary* 684 (4th ed.1993)) ("'[D]iscard' is defined by dictionary and usage as to 'cast aside; reject; abandon; give up.'") As noted by the D.C. Circuit, interpreting "discarded" according to its plain meaning is further supported by reading it in relation to the other items listed as solid waste. *Am. Min.*, 824 F.2d at 1189-90 ("[The definition of solid waste] brings to mind a long-standing canon of statutory construction, *ejusdem generis*."). The scope of the

definition's general term, "discarded material," is informed by the inclusion of "garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility" in the definition of "solid waste." *See id.* In short, the clear directive from the statutory text is that materials are only "discarded" under RCRA when they have been abandoned or thrown away.

Here, neither the acid whey nor the manure have ever been abandoned or thrown away. Moon Moo collects manure from its dairy cows to use as fertilizer, adds acid whey as a soil amendment, and applies this mixture to its Bermuda grass fields consistent both with longstanding agricultural practice in New Union and with its NMP. R. at 5-6. At all points in time, both the acid whey and the manure have value as sources of nutrients for Moon Moo Farm's fields. The fact that the acid whey is procured from an outside operation does not change the conclusion that it has never been discarded. For many years, the D.C. Circuit has, correctly, recognized that "materials neither disposed of nor abandoned, but passing in a continuous stream or flow from one production process to another" are not discarded. *Am. Min.*, 824 F.2d at 1190. In this case, milk is processed into two products: yogurt and soil amendment. R. at 5. This is part of a larger agricultural process whereby Bermuda grass becomes silage which feeds the cows that produce manure and, indirectly, acid whey, which is returned to support the soil. R. at 5.

The fact that part of this process occurs outside the farm itself is not dispositive. *See Safe Food & Fertilizer v. E.P.A.*, 350 F.3d 1263, 1268 (D.C. Cir. 2003) ("[W]e have never said that RCRA compels the conclusion that material destined for recycling in another industry is necessarily 'discarded.'"). As phrased by the Second Circuit: "[M]aterial is not discarded until after it has served its intended purpose." *No Spray Coal., Inc. v. City of New York*, 252 F.3d 148, 150 (2d Cir. 2001); *see Ecological Rights Found. v. Pac. Gas & Elec. Co.*, 713 F.3d 502, 515

(9th Cir. 2013) ("The key to whether a manufactured product is a "solid waste," then, is whether that product 'has served its intended purpose and is no longer wanted by the consumer.'"). Here, the material at issue, the acid whey, has a purpose as part of an ongoing agricultural operation, and the fact that some of the agricultural material (the milk) is spun off into another product before the acid whey is returned to the agricultural cycle does not change the controlling fact in this case—the acid whey has "not yet become part of the waste disposal problem; rather, [*it is*] *destined for beneficial reuse or recycling in a continuous process by the generating industry itself*." *Am. Min.*, 824 F.2d at 1186 (emphasis in original).

This case is essentially similar to *Oklahoma v. Tyson Foods, Inc.*, where the District Court for the Northern District of Oklahoma recognized that the application of poultry litter to fields as a fertilizer and soil amendment did not constitute solid waste. 2010 WL 653032, at *11 (N.D. Okla. Feb. 17, 2010). It is true, that the District Court in *Tyson Foods* viewed the established monetary value of the poultry litter as significant, but the Court also made note that having—or not having—an established market value was not a dispositive factor. *Id.* The fact of greater significance and similarity between this case and *Tyson Foods* is that agricultural byproducts like poultry litter and acid whey are routinely intended to be put back into beneficial use through application to the soil.

The simple fact is that the fertilizer and soil amendment mixture has not been discarded. It has been beneficially applied to the soil in accordance with longstanding agricultural practice and with Moon Moo Farm's NMP. R. at 5-6. If some of the nutrients have not been effectively taken up by the Bermuda grass, that is an issue best addressed by New Union Department of Agriculture when it approves NMPs, but has no real bearing on whether the mixture has been discarded. *See Safe Air*, 373 F.3d at 1046 n.13 (explaining that "[t]he determination of whether

grass residue has been 'discarded' is made independently of how the materials are handled"). Because the application of the fertilizer and soil amendment mixture to Moon Moo Farm's fields falls outside of the plain meaning of discarded, the mixture cannot be a solid waste under RCRA, leaving no basis for a citizen suit. Accordingly, the District Court's grant of summary judgment on this issue should be upheld.

VI. THE MANURE AND ACID WHEY MIXTURE DOES NOT CONSTITUTE AN IMMINENT AND SUBSTANTIAL ENDANGERMENT TO HUMAN HEALTH.

RCRA § 7002(a)(1)(B) permits citizen suits to be brought against "any person . . . who has contributed or is contributing to the past or present . . . disposal of any solid or hazardous waste which may present an *imminent and substantial* endangerment to health or the environment." 42 U.S.C. § 6972(a)(1)(B) (emphasis added). In this case, for the reasons already stated, there is no "solid waste" that endangers health or the environment. However, if the Court finds that the application of fertilizer and soil amendment does constitute the disposal of solid waste, then the RCRA § 7002(a)(1)(B) claim still fails because the only evidence produced to support a claim of imminent and substantial endangerment is the issuance of a single nitrate advisory by the Farmville Water Authority. R. at 6. This type of advisory is common within the Deep Quod watershed, having been issued in 2002, 2006, 2007, 2009, and 2010, well before Moon Moo began using acid whey as part of its fertilizer mixture in 2012. R. at 5-7. Moreover, adults and children older than two are unaffected by the nitrate levels recorded for the Deep Quod River. R. at 6. Infants less than two were advised to drink bottled water. R. at 6. Nothing from the nitrate advisory suggests that elevated nitrate levels present a danger to the environment, so the only possible basis for a claim is the asserted health risk to infants. A single nitrate advisory does not substantiate the allegation that Moon Moo's landspreading practices present either an imminent

or substantial endangerment to health sufficient to survive summary judgment, especially when the practice cannot be identified as the but-for cause of the elevated nitrate levels. R. at 7.

The language of RCRA § 7002(a)(1)(B) is indisputably expansive. It allows any person to bring suit when the "handling, storage, treatment, transportation, or disposal of any solid or hazardous waste [] *may* present an imminent and substantial endangerment." 42 U.S.C. § 6972(a)(1)(B) (emphasis added). The use of the word "may" indicates a broad scope for potential sources of proscribed "endangerment." *See Dague v. City of Burlington*, 935 F.2d 1343, 1355 (2d Cir. 1991) *rev'd* in part, 505 U.S. 557 (1992). However, "no matter how broadly read," this scope is cabined by the requirement that potential dangers be both imminent and substantial. *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 210 (2d Cir. 2009).

Neither RCRA, nor EPA regulations define the statutory terms "imminent" or "substantial," but, as the Circuit Courts have recognized, the terms mean what they purport to mean: an endangerment must be both present and serious. *See Maine People's Alliance & Natural Res. Def. Council v. Mallinckrodt, Inc.*, 471 F.3d 277, 296 (1st Cir. 2006) ("[A]n imminent and substantial endangerment requires a *reasonable prospect* of a near-term threat of *serious* potential harm."). Riverwatcher's evidence fails on both counts.

"[T]he word "substantial" is not defined in RCRA or its legislative history." *Burlington N. & Santa Fe Ry. Co. v. Grant*, 505 F.3d 1013, 1021 (10th Cir. 2007). However, the Circuit Courts have agreed that the plain meaning applies—a substantial endangerment is a serious one. *See Cordiano*, 575 F.3d at 211. Similarly, the term "imminent" means a present, not a past, endangerment. *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 485-86 (1996); *see Tilot Oil, LLC v. BP Products N. Am., Inc.*, 907 F. Supp. 2d 955, 963 (E.D. Wis. 2012) ("[T]he threat of harm must be present and ongoing."). Together, these requirements mandate that "[a]n endangerment that is

'imminent and substantial' requires a '*reasonable* prospect of future harm.' *Cordiano*., 575 F.3d at 211 (quoting *Maine People's Alliance*, 471 F.3d at 296).

In *Cordiano v. Metacon Gun Club*, the Second Circuit found there was insufficient evidence to support an imminent and substantial endangerment claim when the expert report on spent munitions casing concluded that there was only a potential exposure risk to humans and that determining the seriousness of that risk required further testing. 575 F.3d at 211-12. The relevant circumstances are the same in this case. The only evidence offered by Plaintiffs is a single nitrate advisory that makes no indication of whether the potential risk is actually serious or if the advisory is merely the better part of caution. *See* R. at 6. More than that, a necessary component of a solid waste presenting a reasonable prospect of future harm is the requirement that the solid waste itself is generating the harm. There is no evidence in the record that Moon Moo Farm's landspreading practices are the but-for cause of the nitrate advisory. R. at 7. In fact, as a heavily farmed area, the Deep Quod watershed contains many possible sources of nitrates. R. at 7. This fact is further evidenced by the issuance of nitrate advisories many times prior to Moon Moo Farm's application of whey acid as a soil amendment. R. at 7.

As the District Court concluded, the imminent and substantial endangerment claim is one without merit and there is no genuine issue of material fact given the evidence on record. Accordingly, the District Court's grant of summary judgment on this issue should be upheld.

CONCLUSION

For the reasons stated above, Moon Moo Farms respectfully requests that this Court affirm the District Court's holdings that: (1) the Queechunk canal is not a publicly navigable waterway subject to a public right of navigation; (2) evidence obtained pursuant to trespass is inadmissible in a civil enforcement proceeding under the CWA; (3) Moon Moo Farm is not a

CAFO subject to NPDES permitting; (4) Moon Moo Farms is exempted from NPDES permitting by the agricultural stormwater exemption; (5) Moon Moo Farm's manure and acid whey mixture is not a solid waste under RCRA; and (6) the manure and acid whey mixture does not constitute an imminent and substantial endangerment to human health.