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 New Union

BRIEF OF APPELLEES,
Moon Moo Farm, Inc.

Brief # 46
Counsel for the Defendant-Appellee

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to the United States Court of Appeals for the Twelfth Circuit Rules and Operating Procedures, the undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualifications or recusal.

United States of America, Plaintiff-Appellant

Deep Quod Riverwatcher, Inc, Plaintiff-Intervenor-Appellant

Dean James, Plaintiff-Intervenor-Appellant

Moon Moo Farm, Inc., Defendant-Appellee

Counsel for the Plaintiff-Appellant

Counsel for the Plaintiff-Intervenor-Appellant

Counsel for the Defendant-Appellee

STATEMENT REGARDING THE ORAL ARGUMENT

The district court's grant of summary judgment was proper and based on the common law doctrine of trespass, the Clean Water Act, 33 U.S.C. §1342 (2012), and the Resource Conservation and Recovery Act, 42 U.S.C. §§6901-6992 (2012). Moon Moo Farm is not a CAFO and therefore not a point source under the Clean Water Act. Furthermore the appellant has failed to produce admissible evidence that shows Moon Moo Farm violated the Clean Water Act with an illegal discharge of pollutants. Oral argument would do nothing to clarify the district court's ruling on these facts. For these reasons, the Appellee waives oral argument on the issue, but if this court deems oral arguments necessary, Appellee wishes to appear along with the Appellant to answer any questions the court may have.

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Defendant-Appellee.

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

STATEMENT OF JURISDICTION

This Court has jurisdiction of this appeal pursuant to 28 U.S.C. § 1291 (2006), as an appeal from a final decision of the United States District Court of New Union.

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

The district court properly concluded that the evidence presented by plaintiffs, the United States of America (on behalf of the Environmental Protection Agency), Deep Quod Riverwatcher (Riverwatcher), and Dean James, did not provide any genuine issue of material fact that should have been presented to a jury for consideration and that defendant Moon Moo Farm, Inc. was entitled to judgment as a matter of law. The district court properly concluded that the Queechunk Canal is capable of private ownership because it is not a public trust navigable water of the State of New Union. Additionally, the court properly concluded that evidence obtained by Dean James during his unlawful trespass onto Moon Moo Farm's privately owned property was inadmissible in a civil enforcement proceeding brought under CWA §§ 309(b), (d) and 505. The district court also properly concluded that Moon Moo Farm's discharge was agriculture storm water runoff, not a CAFO discharge, because they conducted their landspreading in accordance with a Nutrition Management Plan (NMP). According they were correct in Classifying Moon Moo Farm, Inc. is not a CAFO, making any discharge from the ditch exempt from the NPDES permitting requirement. In addition, the court properly dismissed the "open dumping" and "imminent and substantial endangerment" claims because they do not fit the definition of "solid waste" that is being "discarded" as required for a civil action to be applicable under RCRA § 7002(a)(1)(b).

STATEMENT OF THE CASE

Statement of Facts

This is an appeal from the United States District Court for the District of New Union. Moon Moo Farm owns and operates a dairy farm ten miles outside the City of Farmville with 350 head of milk cows. (R. 4). The farm is classified by the state of New Union as a "no discharge" animal feeding operation, which requires Moon Moo Farm to submit a "Nutrient Management Plan" (NMP) to the Farmville Regional Office of the State of New Union Department of Agriculture. (R. 5). The NMP establishes the planned seasonal application rates for the manure as well as their calculation of expected nutrient uptake of the Bermuda fields where the manure spreading takes place. (R. 5). Moon Moo Farm's records evidence their compliance with the NMP application rates, which in turn exempts them from having to obtain a permit under the National Pollutant Discharge Elimination System (NPDES) under CWA § 402. (R. 6).

Moon Moo Farm is made up of 150 acres of fields, and is located at the bend in the Deep Quod River. (R. 5). Under previous ownership, the Queechunk Canal was dug into solid ground at the bend of the Deep Quod River in order to alleviate flooding to the surrounding fields. (R. 5). Presently, Moon Moo Farm retains ownership to the sides and bed of the Canal, and has prominently posted no trespassing signs on both ends. (R. 5).

In the spring of 2013, there was a nitrate advisory was issued by the Farmville Water Authority warning that the Deep Quod River's water supply was unsafe for infants to drink. (R. 6). Further the customers were advised that infants should be given bottle water to avoid the risk

from high nitrate levels in the water. (R. 6). In the Farmville Region, nitrate advisories have been regularly posted. (R. 6).

On April 12, 2013, Dean James ignored posted no trespassing signs and entered into the privately owned Queechunk Canal in order to obtain samples from Moon Moo Farms property. (R. 5) On that day and the day prior, a storm event occurred amounting to an additional two inches of rain, which was significant for the region. (R. 6).

Course of Proceedings

Plaintiff's served a letter of intent to sue under the citizen suit provisions of CWA §505 and RCRA §7002. (R. 7). EPA commenced this civil enforcement action against Moon Moo Farm, seeking civil penalties and injunctive relief under CWA §309(d). (R. 7). Riverwatcher intervened as plaintiffs and asserted claims under CWA §505, and Resource Conservation and Recovery Act (RCRA) §7002 alleging violations by Moon Moo Farm for their manure management practices. (R. 4). Moon Moo Farm answered the complaint and asserted a counterclaim seeking civil damages and injunctive relief for trespass against Deep Quod Riverwatcher and James. (R. 7). Both parties have moved for summary judgment. (R. 7). Appellants' motions for summary judgment were both denied, and the appellee's motions for summary judgment dismissing the appellants' claims, and seeking relief for trespass were both granted. (R. 4).

SUMMARY OF THE ARGUMENT

The Queechunk Canal is not a public trust navigable water of the State of New Union. The canal is a man-made body of water that was constructed on privately owned land, which was non-navigable in its natural state, and therefore falls outside the definition of "navigable waters" as applied to the Public Trust Doctrine. Additionally, the Canal cannot be considered the sort of "great navigable stream" that makes the property incapable of private ownership. Accordingly, Moon Moo Farm has the right to exclude outsiders from use and enjoyment of their property, and any information obtained by Dean James during his illegal trespass should be inadmissible because it was obtained without a warrant and is barred under the Exclusionary Rule.

Even if the evidence were admissible, Moon Moo Farm fails to meet the regulatory definition of a CAFO under EPA and CWA standards, thus making any discharge form their fields through the drainage ditch exempt from NPDES permitting as agriculture stormwater runoff. This exemption is especially applicable here, because the alleged discharge was the direct result of a precipitation related storm event that effected the region in the days prior to the evidence being obtained. Further, because Moon Moo Farm has adhered to the NMP, as to application rates and nutrient uptake, their operation cannot be considered a CAFO.

The "open dumping" and "imminent and substantial endangerment" claims should also be dismissed because the animal manure spreading operation is not applying "solid waste. Further, because the manure is being used as a fertilizer and soil conditioner, it has beneficial use, and is not being "discarded" as required for the citizen suit provision of the RCRA to be applicable. Even if the waste can be classified as "solid waste" that is being "discarded" it does not constitute an imminent and substantial endangerment to human health, because the danger has already been remedied through instruction to parents to administer bottled water to infants.

In conclusion, the district courts denial of summary judgment was proper and should be affirmed by this court for aforementioned reasons.

ARGUMENT

I. The court should affirm the denial of summary judgment because the Queechunk Canal is not a navigable water of the state of New Union due to the fact that it was man-made and not navigable in its natural state.

At English common law, the public was given a right of access to navigate waters subject to the "ebb and flow" the tide, in what became known as the "Public Trust Doctrine".[1] This Doctrine was extended and adopted under American common law, giving the public a right of access to "navigable waters of the United States."[2] "Navigable waters" include "streams, oceans, rivers, lakes, and bodies of water forming geological features" that are "presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce."[3]

We agree with the Petitioners that the Deep Quod River is a "navigable water of the United States", subjecting it to use under the Public Trust Doctrine. We disagree with the Petitioners on the issue of whether the Queechunk Canal constitutes a "navigable water" under the Public Trust Doctrine.

Thus far, the Public Trust Doctrine doctrine has only been applied to natural bodies of water, and has not been extended to man-made bodies constructed within the confines of privately owned land.[4] This was the holding in *Keiser*, where the court found that a man-made pond, which was later converted into a marina, did not constitute "navigable waters" and

[1] *See* Arnold v. Mundy, 6 N.J.L. 1,12 (1821).
[2] *See* Illinois Cent. R.R. v. Illinois, 146 U.S. 387 (1892).
[3] 33 CFR § 329.4 (1986).
[4] *See generally* Kaiser Aetna v. United States, 444 U.S. 164 (1979).

therefore no right of public access existed. The justices based the holding in *Keiser* on two primary factors. First, the property was incapable of navigation in its natural state prior to modifications by the property owner. Second, the marina did not constitute a "great navigable stream" making it incapable of private ownership. The combination of these factors made the man-made body of water fall outside of the "navigable waters" definition applied to the Public Trust Doctrine.

The factors presented in *Kaiser Aetna* provide the basis for our conclusion here. First, the land where the Queechunk Canal was constructed was not navigable in its natural state. Instead, it was private property, which the owner modified at his discretion to benefit the farm as a whole. Accordingly, The property was not navigable in fact until it was modified from its natural state, which was originally solid ground, and was at no time subject to the tides ebb and flow. In addition, the modifications were made in an attempt to protect the fields from flooding, and at no time were meant to give up title to the land or forgo the rights associated. Under the second line of reasoning, the Queechunk cannot be considered the sort of "great navigable stream" that is incapable of private ownership. The Canal is a small, man-made body of water, and is subsequently capable of private ownership. Moon Moo Farm has exclusive ownership of both sides of the canal for its entire length and can therefore not be considered a "great navigable stream". Lastly, the Deep Quod River remains navigable for interstate commerce purposes regardless of whether the Canal had ever been constructed, which removes any need for public use of the canal for commerce purposes. Because the land was non-navigable in its natural state, and cannot be considered a "great navigable stream", Moon Moo Farms should be allowed to maintain exclusive control of the Canal, enabling them to exclude the public at their discretion.

For the aforementioned reasons, the Queechunk Canal should not be considered a "navigable water of the United States" and therefore does not afford the public a right of access under the Public Trust Doctrine. Subsequently, when James disregarded the prominently posted no trespassing signs, and continued onto Moon Moo Farm's privately owned property, he committed an actionable trespass.

II. Moon Moo Farm applied manure in compliance with their nutrient management plan and therefore Moon Moo Farm falls under the agricultural stormwater exemption and are exempt from NPDES permitting requirements

The Federal Water Pollution Control Act was passed in 1948 as a means to combat against water pollution, by starting at the point source.[5] By the terms of this legislation, the government had difficulty controlling discharges, and therefore amended the act in 1972; thus becoming the Clean Water Act that we are familiar with today.[6] The Clean Water Act was a response to the declining condition of the nation's natural water sources.[7] It was passed in order to eliminate the discharge of pollutants by prohibiting the pollutants from being discharged into navigable waters from a point source.[8]

While the Clean Water Act prohibits the discharge of pollutants into navigable waters, the National Pollution Discharge Elimination System or NPDES permit, allows for discharges within effluent limitations.[9] We concede that the Deep Quod River fits the definition of a "water of the United States," and we also have no objection to the assertion that runoff from Moon Moo Farm's fields contained pollutants. We do object to the contention however, that Moon Moo Farm is a point source, and that they are required to obtain a permit under the Clean Water Act.

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[5] Nat'l Pork Producers Council v. U.S. E.P.A., 635 F.3d 738, 742 (5th Cir. 2011).
[6] *Id.*
[7] *Id.*
[8] 33 U.S.C.A. § 1311 (West).
[9] 33 U.S.C.A. § 1342 (West).

Originally under the Clean Water Act a "point source" was defined as, "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged."[10] In 1973 however, the EPA issued regulations that sufficiently narrowed the definition of a point source and thus exempted many sources of pollution from the permit requirement.[11] The rationale for this was to conserve agency funds by focusing on point sources of pollution that were more significant, and allowing minor sources of pollution to continue operating as they were.[12]

In 1987 the EPA amended the Clean Water Act yet again, creating an exemption from the definition of a "point source" of agricultural stormwater discharges.[13] Since agricultural stormwater discharges and return flows are not considered to be point sources, "There is no requirement that a property owner discharging these waters have an NPDES permit."[14] The Eleventh Circuit determined that the agricultural stormwater exemption applied by looking to three different factors.[15] Rainfall, groundwater withdrawn into the canals from the areas being drained, and seepage from the lake, all led the court to determine the discharge was not from a point source. While they did not specify whether all these factors are necessary to qualify, the determination was that the discharge was a "result of precipitation."[16]

Acknowledging that whether a discharge is a result of precipitation or if it just happens to be raining at the time of the discharge is a difficult issue to flush out. Looking at the Legislative

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[10] Natural Res. Def. Council, Inc. v. Costle, 568 F.2d 1369, 1372 (D.C. Cir. 1977).
[11] 33 U.S.C.A. § 1362 (West).
[12] *Supra* note 10.
[13] 33 U.S.C.A. §1362 (West).
[14] 33 U.S.C.A. § 1311 (West).
[15] Concerned Area Residents for Env't v. Southview Farm, 34 F.3d 114, 123 (2d Cir. 1994).
[16] *Id*.

intent, it is clear that the drafters of the Clean Water Act sought to "Conserve the [Environmental Protection Agency's] resources for more significant point sources of pollution."[17] Furthermore, even a discharge that is only "precipitation-related" is covered by this stormwater exemption.[18] Thus, even if it cannot be shown that precipitation caused a discharge of pollutants, when

> "Manure, litter or process wastewater has been applied in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter or process wastewater…a precipitation-related discharge of manure, litter or process wastewater from land areas under the control of a CAFO is an agricultural stormwater discharge."[19]

This clearly states that when a site-specific nutrient management plan has been implemented, as long as the site is in compliance with it, a precipitation *related* discharge will fall under the stormwater exemption. When "manure, litter or process wastewater," are utilized agriculturally for their nutrients, runoff that occurs simultaneously with rain, is not to be considered discharge.[20] Nutrient Management Plans are issued in order to ensure proper use of these by-products that will have a minimal impact on the environment.[21]

Under this section of the Clean Water Act, a cause of action is established when there is a discharge of pollutants from a point source. The District Court has already determined that Moon Moo Farm is not a Concentrated Animal Feeding Operation, and therefore is not considered a point source under this term in the act. Therefore the only other way Moon Moo Farm could be considered a point source is if they directly discharge pollutants through a "pipe, ditch, channel…" There is no legally obtained

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[17] *Supra* note 10.
[18] 40 C.F.R. § 122.23.
[19] *Id*.
[20] 68 FR 7176-01.
[21] *Id*.

evidence that establishes Moon Moo Farm has discharged pollutants through one of these conveyances, and therefore we ask this Court to affirm the District Courts holding.

Even if the evidence obtained by James, the Deep Quod "Riverwatcher" as a result of trespass, were admissible, Moon Moo Farm would still be exempt from the permit requirement. This is because the alleged discharge was a result of precipitation, and definitely satisfies the much lesser standard of, "precipitation- related," in order to qualify for the stormwater exemption. While the rainfall between April 11, and April 12, did not meet the requirement to be considered a 25-year rainfall event, it was a significant storm. This storm caused the discharge and therefore Moon Moo Farm is exempt under the stormwater exemption.

Furthermore, §122.23 clearly states that when manure is applied in compliance with a nutrient management plan, the stormwater exemption applies. Again, we reiterate that Moon Moo Farm was in compliance with their nutrient management plan and were taking all the necessary precautions required by an animal feeding operation of their size. Holding Moon Moo Farm responsible for the pollutants that were a result of natural causes directly contradicts the purpose of the statute. We ask that the Court affirm the District Court's ruling that the discharges from Moon Moo Farm's fields fell under the agricultural stormwater exemption.

III. The Queechunk Canal is not a public trust navigable water and therefore any evidence against Moon Moo Farm was illegally obtained and is not admissible in a civil enforcement proceeding under the Clean Water Act

The Clean Water Act §309(b) allows the Administrator to commence a civil action for appropriate relief, or permanent or temporary injunction upon any violation of the Act.[22]

[22] 33 U.S.C.A. § 1319 (West).

However, since the canal is not a public trust navigable water, any evidence against Moon Moo Farm was obtained through trespass and without a warrant, and is therefore not admissible in a civil enforcement proceeding. While there is no case law on point to determine whether illegally obtained evidence can be used with respect to an alleged violation of The Clean Water Act, courts have continuously held that the Fourth Amendment's exclusionary rule applies in civil penalty actions.

The Exclusionary Rule was initially recognized as an implicit part of the 4th Amendment when the Court recognized that there were limited remedies outside of excluding illegally obtained evidence.[23] The Court has long justified the exclusionary rule due to the fact that allowing illegally obtained evidence to be used in court would be a sacrifice to judicial integrity and the truth-seeking process.[24] The extent to which the exclusionary rule applies outside of criminal prosecutions is ambiguous, but Courts have consistently held that even in civil actions, the rule bars illegally obtained evidence from being introduced.[25]

In the context of working conditions, the Fifth Circuit ruled that "illegally obtained evidence must be excluded for purposes of 'punishing the crime,' i.e. the exclusionary rule should be applied for purposes of assessing penalties against an employer after the fact for OSHA violations."[26] While the court allowed evidence to be admitted for the purpose of correcting the unhealthy working conditions that were ongoing, the exclusionary was applied "where the object [was] to assess penalties…for past violations."[27]

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[23] *See generally* Wolf v. People of the State of Colo., 338 U.S. 25, 69 S. Ct. 1359 (1949).
[24] *See generally* Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1684 (1961).
[25] Trinity Indus. v. OSHRC, 16 F.3d 1455, 1465 (6th Cir. 1994) *and* Smith Steel Casting Co. v. Brock, 800 F.2d 1329, 1334 (5th Cir. 1986).
[26] Smith Steel Casting Co. v. Brock, 800 F.2d 1329, 1334 (5th Cir. 1986).
[27] *Id.*

Similarly, in *Trinity Indus., Inc., v. OSHRC*, the Fifth Circuit upheld its previous ruling from *Smith Steel*.[28] In this case an employee filed a complaint against their employer with the Occupational Safety and Health Administration, alleging that their employer was violating safety regulations.[29] OSHA subsequently acquired a permit to search the manufacturing plant, and attempted to introduce evidence at trial that was obtained during the search.[30] OSHA had a permit to search the plant, however the Court ruled that the search exceeded the scope of the warrant.[31] The Court continued by stating that OSHA's object, "was to assess penalties against Trinity for past violations," and therefore, "the exclusionary rule does have [the] potential [for] application in this case."[32]

Ultimately in *Trinity Indus. V. OSHRC* the evidence was admissible under the good faith exception.[33] This exception to the exclusionary rule states that when a government agent relies on a warrant with objectively reasonable good faith, the evidence is admissible.[34] It is important to note however, that this exception only applies when an officer or agent of the government act in good faith, and has not been expanded to private entities.[35]

It is clear that the exclusionary rule should prevent this illegally obtained evidence from being used against Moon Moo Farm. The Queechunk Canal is not a public trust navigable water, and therefore James, the Deep Quod "Riverwatcher," was trespassing and the evidence he acquired is not admissible. The Fourth Amendment provides that "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,

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[28] Trinity Indus. v. OSHRC, 16 F.3d 1455, 1465 (6th Cir. 1994).
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] United States v. Leon, 468 U.S. 897, 920 (U.S. 1984).

shall not be violated."[36] Even though a government entity was not involved in this instance, it can hardly be argued that the drafters of the Constitution would have permitted a third party to do the government's dirty work.

Furthermore, the Judicial Integrity that gave way to the recognition of the Exclusionary Rule, would be greatly sacrificed by admitting this illegally obtained evidence. It would be contradictory for a Court to issue a ruling of the law based on evidence that was obtained in direct violation of the law. In addition to these common sense arguments that make the application of this rule obligatory, the rule requires a cost-benefit analysis. Allowing this evidence to come in would promote and encourage trespass, and ultimately be an encroachment on the Fourth Amendment.

We concede that the exclusionary rule might not apply when it pertains to evidence of an ongoing condition. Similarly this plays into the cost-benefit analysis mentioned above, in that an ongoing condition that is detrimental to public health should be corrected. Unfortunately for the petitioners, there is a lack of evidence showing unhealthy conditions, since the higher levels of nitrate in the drinking water pose no health threats to adults. Even though infants may be affected by drinking the water, there is no evidence that Moon Moo Farm is responsible for the high levels of nitrate, and further, it is easy to avoid the high nitrate levels by purchasing bottled water.

As for assessing damages that have already occurred, it is clear that this evidence is inadmissible. Courts have unmistakably held that the exclusionary rule prohibits the admission of evidence for the purpose of "punishing crime." Had a permit been acquired, the petitioners argument might hold more vigor, but even so, the exclusionary rule would strike down this

[36] U.S. Const. amend. IV.

evidence as it would likely have been outside the scope of the supposed permit. In conclusion the good faith exception only applies to agents of the government, and thus the exclusionary rule clearly precludes this evidence. James' utter disregard for the "No Trespassing" signs should not be rewarded by admitting this evidence. We therefore ask that the Court affirm the District Court's ruling that this evidence should be excluded, and additionally ask that the Court enter summary judgment in favor of the defendant.

IV. The court should affirm the denial of summary judgment on the RCRA "open dumping" and "imminent and substantial endangerment" claims because the animal manure application does not constitute "solid waste" that is being "discarded"

The Resource Conservation and Recovery Act (RCRA) was originally enacted "to reduce the generation of hazardous waste and to ensure the proper treatment, storage, and disposal of that waste."[37] The framers used the RCRA to address a substantial risk that improper disposal would result in a "present and future threat to human health and the environment."[38] In order for a Plaintiff to succeed under the citizens suit provision of the RCRA, 42 U.S.C.S. § 6972(a)(1)(B), they must establish that the defendant 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."[39] When enacting the RCRA, Congress was clear that agriculture waste "that could be recycled or reused as fertilizers were not its concern."[40]

[37] Meghrig v. Kfc W., 516 U.S. 479, 483 (1996).
[38] 42 U.S.C. § 6902(b) (West).
[39] 42 U.S.C.S. § 6972(a)(1)(B) (West).
[40] Safe Air v. Meyer, 373 F.3d 1035, 1045 (9th Cir. 2004).

According to the RCRA, "any solid waste management practice or disposal of solid waste which constitutes the open dumping of solid waste or hazardous waste is prohibited."[41] An "open dump" refers to "any facility or site where solid waste is disposed of which is not a sanitary landfill which meets the criteria promulgated under RCRA § 6944 and which is not a facility for disposal of hazardous waste."[42] This definition can be broken into four elements to assist in determining whether the site constitutes an "open dump," including (1) whether there is solid waste; (2) if solid waste exists, whether it is "disposed" of at the site; (3) whether the site qualifies as a landfill under section 6944; and finally, (4) whether the site is qualified to dispose of hazardous waste.[43] Additionally, according to EPA regulations, "agricultural wastes, including manures and crop residues, returned to the soil as fertilizers or soil conditioners" do not constitute open dumping.[44]

We agree with Petitioners that Moon Moo Farm is disposing of animal waste by applying it to the Bermuda grass fields and that said waste is not "hazardous" under the RCRA definition. Additionally, we agree that Moon Moo Farm does not qualify as a landfill under RCRA § 6944. We disagree with the Petitioners concerning whether an "open dump" exists under these facts because the first two elements, requiring "solid waste' that is "disposed of" cannot be established under the present facts.

As to the first element, "solid waste" is defined 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, and from community

[41] 42 U.S.C. § 6945(a) (West).
[42] 42 U.S.C. § 6903(14) (West).
[43] Parker v. Scrap Metal Processors, Inc., 386 F.3d 993, 1012 (11th Cir. 2004).
[44] 40 C.F.R 257.1(c)(1) (West).

activities…"[45] In *Oklahoma v. Tyson Foods, Inc.,* the court found that liter from chickens did not constitute a "solid waste within the meaning of the RCRA when it is applied to the normal beneficial usage for which the product was intended merely because some aspect of the product is not fully utilized…"[46] Similarly, in the present case, the application of manure to the fields cannot be considered a "solid waste" because it is applied in a beneficial way by Moon Moo Farm in accordance with NPS guidelines as a fertilizer and soil conditioner.

As to the second element, "disposal" refers to "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters."[47] Even if the court were to find the animal manure to be "solid waste," nevertheless, the waste is not being disposed of. Instead Moon Moo Farm has been applying the waste pursuant to NPS guidelines, in a beneficial way as a fertilizer and soil conditioner. In addition, the manure waste has market value to Moon Moo Farm and other similar operations, and thus clearly falls outside the RCRA definition of "disposal". The Petitioners argument that the fields were incapable of utilizing all the nutrients due to excessive rainfall also falls short, subsequent to *Tyson,* which held that animal waste is not held to be "disposed of" just because "some aspect of the product is not fully utilized."[48] Due to the aforementioned reasons, the petitioners claim that Moon Moo Farm is disposing of "solid waste" is not corroborated by the facts of the case, and therefore should be dismissed.

[45] 42 U.S.C.A. § 6903(27) (West).
[46] Oklahoma v. Tyson Foods, Inc., 2010 U.S. Dist. LEXIS 14941 (N.D. Okla. Feb. 17, 2010).
[47] 42 U.S.C. § 6903(3).
[48] Oklahoma v. Tyson Foods, Inc., 2010 U.S. Dist. LEXIS 14941, 43 (N.D. Okla. Feb. 17, 2010).

Under RCRA § 6972(a)(1)(b), a private party "to bring suit only upon a showing that the solid or hazardous waste at issue may present an imminent and substantial endangerment to health or the environment."[49] The original framers reasoning for enacting the provision was "to minimize the present and future threat to human health and the environment."[50] Courts have interpreted "imminent" to imply "that there must be a threat which is present now, although the impact of the threat may not be felt until later."[51] To rise to the level of "substantial" there must be "reasonable cause for concern that someone or something may be exposed to a risk of harm… if remedial action is not taken."[52]

Here, the animal waste being applied to Moon Moo Farm's field do not constitute a "solid waste" that is being "disposed of", and therefore falls outside the scope of the citizens suit provision codified in RCRA § 7002(a)(1)(B). Even if the court was to determine that Moon Moo Farm's land spreading practices fall within the RCRA definition, the Petitioner's have failed to provide sufficient evidence to establish an "imminent and Substantial to health or the environment" due to two primary factors. First, as established by the Petitioner's expert, the manure application to the Bermuda fields cannot be considered the "but for" cause of Farmville's nitrate advisories. These advisories could have been issued subsequent to a number of combining factors including contamination by other farms or point sources along the Deep Quod River. Secondly, the record establishes that the health risk stemming from the nitrates in the drinking water only pose a significant health risk to infants, and this problem has already been remedied by the advisory prompting parents to administer bottle water to these infants. It follows that

[49] Meghrig v. Kfc W., 516 U.S. 479, 485, 116 S.Ct. 1251, 1255 (1996) (internal quotations omitted).
[50] 42 U.S.C. § 6902(b) (West).
[51] Price v. United States Navy, 39 F.3d 1011, 1019 (1994).
[52] United States v. Conservation Chemical Co., 619 F. Supp. 162, 193 (W.D. Mo. 1985).

because there is no imminent and substantial harm to juveniles or adults, and the harm has been addressed for infants, potential health risks are avoided. For the aforementioned reasons, there is not an imminent and substantial harm to human health, and thus the citizen suit provision under the RCRA does not apply under the present facts.

CONCLUSION AND REQUEST FOR RELIEF

For the foregoing reasons, this Court should affirm the district court's decision that Moon Moo Farm is not a Concentrated Animal Feeding Operation (CAFO) subject to permitting under the National Pollutant Discharge Elimination System (NPDES) permit program pursuant to the Clean Water Act, 33 U.S.C. §1342 (2012). Furthermore, this Court should affirm the district court's dismissal of Riverwatcher's open dumping and imminent and substantial endangerment claims under the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6992 (2012), and the award of damages against Riverwatcher based on Moon Moo Farm's trespass claim.

Respectfully submitted,

Brief #46
Counsel for the Defendant-Appellee
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By:_____&

_____

Counsel for the Appellee,

CERTIFICATION OF SERVICE

We hereby certify that we have served (7) copies of the above and foregoing brief, in addition to the measuring brief, on all counsel of record by placing signed copies thereof in the United States mail, postage paid, on this 2nd day of December, 2014, addressed to the following:

Pace University School of Law
National Environmental Law Moot Court Competition
78 North Broadway, Preston 212
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_____ &

_____
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Brief #46

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the font type, font size, margins and volume limitation in accordance with the United States Court of Appeals for the Twelfth Circuit Rules and Internal Operating Procedures.

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