Team 53

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,

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

BRIEF FOR MOON MOO FARM, INC.,
Defendant-Appellee

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JURISDICTIONAL STATEMENTS

Appellants, EPA and Riverwatcher, filed complaints with the United States District Court for the District of New Union requesting the court's review of Moon Moo Farm's agricultural operations as they relate to several alleged violations of the Clean Water Act (CWA). Appellee, Moon Moo Farm, filed a counterclaim, alleging common law trespass. On April 21, 2014, the district court granted Moon Moo's motion for summary judgment under Federal Rule of Civil Procedure 56. The facts constituting the trespass are intertwined with Riverwatcher's federal claims, so this Court has supplemental jurisdiction under 28 U.S.C. § 1367(a). And the district court's order is final, so jurisdiction is proper under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the Queechunk Canal, a man-made body of water, 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 brought under CWA §§ 309(b), (d), and 505.

3. Whether Moon Moo Farm requires a permit under the Clean Water Act NPDES permitting program because:

    a. It is a CAFO subject to NPDES permitting by virtue of a discharge from its manure land application area.

    b. If it is not a CAFO, excess nutrient discharges from its manure application fields remove it from the agricultural stormwater exemption and subject it to NPDES permitting liability.

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

    a. Its land application of fertilizer and soil amendment (a mixture of manure and acid whey from a yogurt processing facility) constitutes a solid waste subject to regulation under RCRA Subtitle IV.

    and

b. Plaintiffs can establish that the mixture constitutes an imminent and substantial endangerment to human health subject to redress under RCRA § 7002(a)(1)(B).

STATEMENT OF THE CASE

This is an appeal from an order of the United States District Court for the District of New Union denying motions for summary judgment filed by the EPA and Deep Quod Riverwatcher and granting summary judgment in favor of Moon Moo Farm (Moon Moo). (R. at 12.)

The United States, on behalf of the EPA, brought suit against Moon Moo for alleged violations of the CWA, seeking both civil penalties and injunctive relief. (R. at 4.) The EPA contended that Moon Moo is a CAFO subject to NPDES permitting and that the Farm's manure mixture poses an imminent threat to human health and welfare. (R. at 2.) Riverwatcher intervened as a plaintiff under CWA § 505(b)(1)(B) and alleged additional claims under the citizen suit provision of RCRA § 7002. (R. at 7.) Riverwatcher substantially agreed with the EPA's allegations but argued also that the Moon Moo's manure mixture constituted a solid waste such that the Farm is not exempt from RCRA Subtitle D regulation. (R. at 2.)

In response, Moon Moo answered the complaints and filed counterclaims against both Riverwatcher and James. (R. at 7.) The Farm alleged that James' navigation of the Canal constituted an act of civil trespass, so (1) the evidence should not be admissible in a civil enforcement proceeding and (2) the Farm should be entitled to damages. (R. at 12.) At the close of discovery, all parties filed motions for summary judgment. (R. at 7.)

The district court denied EPA's and Riverwatcher's motions for summary judgment, finding that Moon Moo is not a CAFO and is, thus, exempt from the NPDES permitting requirement by the agricultural stormwater exemption. (R. at 10.) The district court further found that the Farm's landspread mixture does not pose an imminent threat to human health. (R. at 12.) Finally, the district court granted Moon Moo's motion for summary judgment, finding

that James' illegally-obtained evidence should not be admissible for the purpose of assessing civil penalties. (R. at 12.)

The EPA and Riverwatcher each filed timely notices of appeal. (R. at 1.) The EPA contested the district court's findings (1) that that Moon Moo is not a CAFO subject to NPDES permitting, (2) that evidence of the Farm's discharge was obtained by trespass, and (3) that the evidence was not admissible in a civil enforcement proceeding. (R. at 1.) Riverwatcher also contests the district court's finding that Moon Moo's discharge falls within the agricultural stormwater exemption of the CWA. (R. at 1.)

STATEMENT OF THE FACTS

Moon Moo operates a successful dairy farm near the City of Farmville in the State of New Union. (R. at 4.) The Farm is located at a bend in the commercially-navigable Deep Quod River, which experiences seasonal flooding. (R. at 5.) In response to the flooding, the former owner of the property excavated a bypass channel, known as the Queechunk Canal, which is often used as a shortcut up and down the River. (R. at 5.) The Canal—fifty yards wide and three to four feet deep—is navigable by small vessels. (R. at 5.) But Moon Moo owns the land on both sides of the Canal and has prominently posted several "No Trespassing" signs to ward off intruders. (R. at 5.)

In response to the increasing demand caused by a new dairy processing facility in Farmville, Moon Moo recently expanded its operation by adding an additional 280 cows to its previous herd of 170. (R. at 5.) The cattle are housed in a barn, and the waste product is periodically drained from the housing facility into an outdoor lagoon to be used as fertilizer. (R. at 5.) The lagoon is specially designed to contain the waste—even during exponential flooding. (R. at 5.) And the waste is routinely pumped into tank trailers to be distributed over the Farm's

fields, from which Moon Moo harvests the Bermuda Grass to be used as silage during the winter months. (R. at 5.) Moon Moo also accepts whey from the dairy plant to be included in the fertilizer mixture. (R. at 5.)

The State of New Union classified the Farm a "no-discharge" animal feeding operation, which prohibits the discharge of manure and other waste into the State's waters. (R. at 5.) Consequently, Moon Moo was required to submit a Nutrient Management Plan (NMP), detailing the Farm's systematic application of manure to the fields. (R. at 6.) New Union has the authority to reject NMPs, but the State rarely reviews the plans and has no public comment system in place. (R. at 6.)

Last year, Farmville citizens complained that the Deep Quod River had a slight tinge and smelled of manure. (R. at 6.) The River serves as the City's primary source of drinking water, so Farmville issued a "nitrate" advisory to warn of potential adverse effects on infants and small children. (R. at 6.) After a significant rainfall, Plaintiff-Intervenor Dean James, the Deep Quod "Riverwatcher," proceeded to navigate the private Queechunk Canal, disregarding Moon Moo's "No Trespassing" signs for the purpose of surreptitiously observing the Farm's operations. (R. at 6.) During his trespassory excursion, he took photographs and water samples, noting specifically the discolored water flowing from the Farm's fields into the Queechunk Canal. (R. at 6.) An analysis of the water sample revealed the presence of nitrates and fecal coliforms. (R. at 6.)

The Plaintiffs filed suit under the citizen suit provisions of 33 U.S.C. § 1365, CWA § 505 and 42 U.S.C. 6972, RCRA § 7002. (R. at 7.) In turn, the EPA filed suit, seeking penalties under 33 U.S.C. § 1319, CWA § 309(d) and injunctive relief under CWA § 309(b). (R. at 7.) Riverwatcher intervened in the EPA action and alleged additional causes of action under RCRA § 7002. (R. at 7.) Moon Moo counterclaimed, seeking damages and injunctive relief as a result

of James's act of trespass. (R. at 7.) Finally, both parties filed motions for summary judgment. (R. at 7.)

Discovery revealed that Moon Moo's has not once exceeded the effluent limitations of its NMP. (R. at 6.) Plaintiff's expert witness, Dr. Ella Mae, testified that the application of manure during rain events is an ill-advised practice that usually results in excessive runoff. (R. at 6.) Mae also testified that the application of whey could prohibit Bermuda Grass from properly absorbing nutrients. (R. at 6.) An expert agronomist, however, testified that whey was often and properly used as a soil conditioner. (R. at 6.) And evidence showed that nitrate advisories had been issued for the area in the past—in 2002, 2006, 2007, 2009, and 2010. (R. at 7.) Although waste materials could contribute to increased health risks, the Plaintiff's health expert testified that it was impossible to determine whether Moon Moo's operations caused the nitrate advisory. (R. at 7.)

The district court concluded (1) that Queechunk Canal is not subject to a public right of navigation; (2) that the evidence obtained through James' act of trespass would not be admissible in a civil action brought under the CWA; (3) that Moon Moo is not a CAFO, so any discharge from the ditch is exempted from the NPDES permitting requirement under the agricultural stormwater exemption; (4) that Moon Moo's application of fertilizer does not constitute solid waste; and (5) that Moon Moo's operational procedures do not present an imminent and substantial threat to human health. (R. at 8-11). As to Moon Moo's counterclaim, the district court held that the Queechunk Canal was not subject to the public trust doctrine, and James's intrusion was, therefore, trespassory. (R. at 12.) As a result, the plaintiffs' motions for summary judgment were denied, and Moon Moo's motion for summary judgment on all claims was granted. (R. at 12.)

STANDARD OF REVIEW

The district court denied EPA and Riverwatcher's motions for summary judgment and granted summary judgment to Moon Moo. As such, this Court should review the district court's determinations *de novo*. *B&G Enters., Ltd. v. United States*, 220 F.3d 1318, 1322 (11th Cir. 2000).

SUMMARY OF THE ARGUMENT

The district court properly granted Moon Moo Farm's (Moon Moo) motion for summary judgment for four reasons. First, by applying authoritative Supreme Court precedent, the Queechunk Canal is not subject to a public right of navigation because the Canal is not a public trust navigable waterway. Additionally, the navigational servitude only applies to bodies of water that are incapable of private ownership, namely those bodies of water that are designed for use in interstate commerce. As a shallow waterway that is privately owned, and that was financed and made navigable exclusively through the expenditure of private funds, the district court correctly held that the Canal is not subject to a public right of navigation.

Second, because Dean James acted in bad faith when he ignored Moon Moo's "No Trespassing" signs, the evidence he gathered was properly excluded. Evidence that is obtained through illegal means is a flagrant, knowing violation of the Fourth Amendment and may not be used against an entity to assess penalties except where the good faith exception applies under the exclusionary rule.

Third, Moon Moo is not a CAFO because no admissible evidence was presented at trial to demonstrate that a discharge had occurred either directly or through ditches/channels into a water of the United States. Classification as a CAFO under § 122.23 is only possible if a dairy farm has the appropriate number of cattle and is presently discharging pollutants into waters of

the United States either directly or indirectly. Moreover, Moon Moo is not a CAFO because the land application field is not part of the AFO and any discharge that may have occurred falls under the agricultural stormwater exemption through Moon Moo's valid NMP. Further, Moon Moo's operation is related to agriculture and any potential discharge is precipitation-related. The district court correctly held that Moon Moo is not a CAFO, and that any discharge is covered by the agricultural stormwater exemption.

Fourth, Moon Moo is not subject to a citizen suit under RCRA because its blend of manure and acid whey for use as fertilizer and soil amendment does not constitute solid waste. The citizen suit provision under RCRA Subsection D only applies to materials that have been discarded, and Moon Moo does not discard--but reuses--its manure/whey compound. Further, Moon Moo's fertilization practices at worst pose minimal, avoidable risks of danger to the community such that it does not constitute an imminent and substantial endangerment to health or the environment.

ARGUMENT

I. THE BALANING TEST ARTICULATED BY THE SUPREME COURT IN *KAISER AETNA V. UNITED STATES* DEMONSTRATES THAT QUEECHUNK CANAL IS NOT A PUBLIC TRUST NAVIGABLE WATERWAY SUBJECT TO A PUBLIC RIGHT OF NAVIGATION.

The district court properly concluded that Queechunk Canal is not subject to a public right of access. The public right of navigation (or the navigational servitude) allows the government to authorize public access to channels of interstate commerce under the authority of the Commerce Clause. *Dardar v. Lafourche Realty Co. Inc.*, 985 F.2d 824, 832 (5th Cir. 1993) (citing *Kaiser Aetna v. United States*, 444 U.S. 164, 178 (1979)). But "the navigational servitude does not extend to all navigable waters." *Id*. (citing *Kaiser Aetna*, 444 U.S. at 172-73). To

prevent application of the navigational servitude, a landowner must demonstrate that "its interests outweigh those of the public." *Id*. at 834.

In *Kaiser Aetna*, the Court considered several factors germane to determining if the navigational servitude should be imposed, which establish that Queechunk Canal is not a water subject to a public right of navigation. *Kaiser Aetna*, 444 U.S. at 178-179. First, the Canal is not like other waterways subject to the navigational servitude. *Id*. Second, the Canal is Moon Moos private property. *Id*. And, third, Queechunk Canal is only navigable as a result of Moon Moo's significant expenditure of private funds. *Id*. The fourth factor—initial government consent for the building project—is not at issue here. *Id*. This Court should, therefore, affirm the decision of the district court and hold that Queechunk Canal is not a public trust navigable waterway subject to a public right of access.

A. The district court properly held that Queechunk Canal is not subject to the navigational servitude because it was not designed for use in interstate commerce.

The navigational servitude primarily applies to bodies of water "incapable of private ownership." *Kaiser Aetna*, 444 U.S. at 175 (citing *United States v. Chandler-Dunbar Co.*, 229 U.S. 53, 69 (1913)). For example, a channel designed to connect an adjacent waterway to the Pacific Ocean may be used "by the public under the 'public trust' doctrine." *Abbey Co., LLC v. Lexington Ins. Co.*, 289 F. App'x. 161, 163 (9th Cir. 2008) (citing *City of Long Beach v. Lisenby*, 166 P. 333, 336 (Cal. 1917)). The Mississippi River and other major tributaries are also subject to the public right of access. *Leovy v. United States*, 177 U.S. 621, 633 (1900). But shallow waterways not primarily designed for use in interstate commerce may be exempt from the navigational servitude. *Id*.; *see United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690 (1899).

In *Kaiser Aetna*, the most authoritative statement on the matter at bar, the Court considered whether a private pond was subject to the navigational servitude. *Id*. at 166. In 1961, Kaiser Aetna leased a parcel of land, which included Kuapa Pond, and proceeded to invest significant capital for developing a subdivision. *Id*. at 166-67. The company dredged and filled the pond and erected several retaining walls and bridges to create a workable marina. *Id*. at 167. The express purpose of the renovation was to provide simpler ingress and egress for boats seeking navigation to and from the adjacent bay. *Id*. at 168. Kaiser Aetna took significant measures to control access to the marina, including boating regulations and fees. *Id*. Despite the precautionary measures, the Government sued the petitioners and alleged that the earlier improvements made the pond a navigable water subject to public access. *Id*. But Kuapa Pond was not subject to the navigational servitude for three reasons: (1) it was not primarily designed for use in interstate commerce; (2) the shallow structure of the pond made commercial travel difficult; and (3) its commercial value was limited to fishing activities. *Id*. at 178.

Queechunk Canal is comparable to Kuapa Pond, so the navigational servitude should not apply here. The Canal and the Pond are both privately owned and were both built to address economic concerns—Moon Moo's farming operations and Kaiser Aetna's development project, respectively. (R. at 5.) Like Kaiser Aetna, Moon Moo steadfastly attempted to exclude trespassers by posting "No Trespassing" signs along the Canal. (R. at 5.) Importantly, the Canal was not designed for use in interstate commerce, but, rather, to alleviate seasonal river flooding; the value of the Canal is primarily limited to that purpose. (R. at 5.) Although the Canal is used as a shortcut for vessels accessing the river, no evidence exists to suggest that commercial enterprises would be hindered if the Canal's public access were to be curbed. (R. at 5.) And the record demonstrates that the Canal is capable of private ownership, so its use should be reserved

for its owners. (R. at 5.) Additionally, the depth of the Canal makes possible navigation by small vessels, but three to four feet in depth would render substantial commercial travel essentially impossible. (R. at 5.) This Court should, therefore, follow the reasoning in *Kaiser Aetna* and find that Queechunk Canal is not a public trust navigable water.

B. Queechunk Canal is the private property of Moon Moo, so the property rights and investment expectations of the owners should be respected.

The navigational servitude confers upon the Government a "dominant servitude" not applicable in every context; the law must carefully balance the interests of private ownership and interstate commerce. *United States v. Rands*, 389 U.S. 121, 123 (1967). Queechunk Canal's commercial value is limited, so this Court should primarily consider the "reasonable investment-backed expectations of the [Canal's] owners" when determining whether the navigational servitude applies. *Boone v. United States*, 944 F.2d 1489, 1502 (9th Cir. 1991).

The dispute in *Boone* concerned the Puko'o Fishpond, which was a man-made body of water created by native Hawaiians in 1829. *Id*. at 1490. Recurrent weather patterns and natural erosion rendered the pond essentially useless until the appellee's Trust purchased and renovated the property. *Id*. at 1491-92. The Trust purposefully limited public and commercial uses of the waterway to preserve its natural beauty. *Id*. at 1492. Despite the efforts, however, local mariners complained that their exclusion violated the navigational servitude. *Id*. The Ninth Circuit reiterated *Kaiser Aetna*'s distinction between proper regulatory power and unconstitutional takings in violation of the Fifth Amendment. *Id*. at 1499-1500. Puko'o Fishpond was purchased "in reliance on the private status," so the court may "compel others to forbear from interfering with [it] or to compensate for [its] invasion." *Id*. at 1502 (citing *United States v. Willow River Power Co.*, 324 U.S. 499, 502 (1945)).

Queechunk Canal is privately owned and operated by Moon Moo, so a public right of navigation should not apply. Like Puko'o Fishpond, the Canal is an artificial structure designed primarily for use by the owners alone. (R. at 5.) Although both bodies are navigable, the Trust and the Farm sought to eliminate trespassing, albeit for different reasons. (R. at 5.) Following *Boone*'s reasoning, regulation of the Canal would be appropriate under certain circumstances, but this attempt to require public access implicates Moon Moo's constitutional right to be free of governmental intrusion without just compensation. Fundamentally, the Farm's prior owner had built the Canal under the assumption that its use would be reserved for the property owner alone. (R. at 5.) So this Court should adopt the *Boone* holding and find that the navigational servitude does not apply and, consequently, that no public right of access attaches to Queechunk Canal.

C. Queechunk Canal is only navigable as a result of the significant expenditure of private funds, and the use of the Canal does not interfere with any preexisting navigable waterway.

The third *Kaiser Aetna* factor is satisfied because the previous owner of the land upon which Moon Moo operates privately excavated the Canal at his own expense. And Moon Moo's man-made Canal has not displaced a natural waterway, so the public has no right of access to it. *Vaughn v. Vermillion Corp*., 444 U.S. 206, 209 (1979).

In *Dardar*, several commercial fishermen sued for the right to use a system of canals owned and operated by Lafourche Realty. *Dardar*, 985 F.2d at 826. The waterways were connected by a system of gates and levees that had been constructed by the company for the purpose of promoting accessibility and the ease of navigation. *Id.* The Government filed suit and claimed a public right-of-use under the concept of navigational servitudes. *Id*. at 832. In its analysis, the Fifth Circuit referenced *Vaughn*, which held that private waterways constructed with private funds are not subject to the public right of access unless they interfere with natural

waterways. *Id*. (citing *Vaughn*, 444 U.S. at 206). Since the canals at issue were "dredged on private property with private funds" and did not "interfere with or obstruct preexisting navigable waterways," no navigational servitude applied. *Id.* at 833-34.

The circumstances of the instant case mirror those in *Dardar*, and this Court should rule similarly. The canals in *Dardar* were privately owned, and Lafourche Realty had expended significant financial assets to construct the levees and gates by which the waterways operated. Similarly, Moon Moo owns Queechunk Canal, which was constructed at the impetus of the Farm's prior owner and through his financial contributions. (R. at 5.) Additionally, no evidence exists to suggest that Queechunk Canal interferes with the flow of the Deep Quod River or any other preexisting waterway. (R. at 5.) The Canal was constructed to divert flooding at the river bend, but the diversion has not depleted the River or rendered it unfit for use in commercial navigation. (R. at 5.) Since Moon Moo expended capital to ensure the construction and maintenance of the Canal, the navigational servitude does not apply. This Court should find, in light of *Dardar*, that the Canal is not a public trust navigable water.

Queechunk Canal is not like other publicly-accessible waterways, the Canal is privately owned, and was made navigable through the expenditure of private funds, so this Court should find that it is not a publicly navigable waterway.

II. EVIDENCE OBTAINED THROUGH JAMES' ACT OF CRIMINAL TRESPASS WAS PROPERLY EXCLUDED BY THE DISTRICT COURT BECAUSE THE SUPREME COURT ONLY ADDRESSED THE ISSUE IN DICTA AND THE EVIDENCE WAS NOT OBTAINED IN GOOD FAITH.

Having established that Queechunk Canal is not subject to the navigational servitude, this Court should following the reasoning of the Fifth and Sixth Circuits and hold that the evidence illegally obtained through James's trespass was properly excluded. *See Smith Steel Casting Co. v. Brock*, 800 F.2d 1329 (5th Cir. 1986); *Trinity Indus., Inc. v. OSHRC*, 16 F.3d 1455 (6th Cir.

1994). The Fourth Amendment provides that personal property must be protected against "unreasonable searches and seizures," particularly searches effectuated without proper authorization, i.e., a warrant. U.S. Const. amend. IV. The exclusionary rule primarily applies to criminal proceedings, but its rationale—the "protection of individual constitutional rights"—is applicable in all judicial contexts. *Wolf v. C.I.R.*, 13 F.2d 189, 192 (6th Cir. 1993) (citing *Weeks v. United States*, 232 U.S. 383, 398 (1914)). To determine whether the rule applies, this Court should consider "whether application of the rule is deemed substantially likely to deter future violations of the Fourth Amendment." *Id*. at 193 (citing *United States v. Janis*, 428 U.S. 433, 453-54 (1976)). The exclusionary rule may be properly applied to any proceeding "where it has a realistic prospect of achieving marginal deterrence." *Tirado v. C.I.R.*, 689 F.2d 307, 314 (2d Cir. 1982)

The exclusionary rule should be applied in this context for two reasons. First, the primary Supreme Court authority—*Lopez-Mendoza*—regarding the application of the rule in the civil context did not concern civil proceedings under the CWA. *Smith Steel*, 800 F.2d at 1334 (citing *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 1046-47 (1984)). Second, illegally-obtained evidence may not be applied to "assess penalties" except where the good faith exception applies. *Id*.

A. The rejection of the exclusionary rule in *Lopez-Mendoza* was merely dicta and need not be followed here because the Court was considering a deportation hearing entirely unaffiliated with the CWA.

The *Lopez-Mendoza* Court held that the exclusionary rule does not apply to deportation proceedings. *Lopez-Mendoza*, 468 U.S. at 1046-47. But the Court never ruled on the applicability of the exclusionary rule to other civil proceedings, so that language is mere dicta and is not binding on this case. *Smith Steel*, 800 F.2d at 1334. The Supreme Court recognizes

that dicta is not controlling. *Cohens v. Virginia*, 19 U.S. 264, 399 (1821). Although "general expressions" may be respected, "they ought not to control the judgment in a subsequent suit when the very point is presented for decision." *Id*.; *see also United States v. Rubin*, 601 F.2d 51, 69 (2d Cir. 1979) (Friendly, J., concurring) (stating that "[a] judge's power to bind is limited to the issue that is before him").

The Court considered an issue of first impression in *Lopez-Mendoza*. *Lopez-Mendoza*, 468 U.S. at 1041. In holding that the exclusionary rule should not apply to deportation proceedings, the Court analyzed the balancing test articulated in *Janis*, designed to balance the costs of losing substantial probative evidence with the interest in deterring future Fourth Amendment violations. *Id*.; *see Janis*, 428 U.S. at 433. The Court noted several factors that would "reduce the likely deterrent value of the exclusionary rule in a civil deportation proceeding." *Id*. First, other evidence may be obtained that would be sufficient to support a judgment. *Id*. Second, the exclusionary rule only applies when invoked by the aggrieved party. *Id*. at 1044. Third, the INS has sufficient safeguards to prevent constitutional violations in the deportation context. *Id*. at 1045. And, finally, the exclusionary rule's deterrent effect is diminished in the deportation context by the availability of alternative federal remedies. *Id*. The weight of these factors, therefore, prompted the Court to reject the application of the exclusionary rule in that limited context. *Id*. at 1050.

Like the Court in *Lopez-Mendoza*, this Court is presented with an issue of first impression: whether the exclusionary rule applies to civil proceedings under the CWA. But the reasoning in *Lopez-Mendoza*, derived from the *Janis* balancing test, does not apply under these circumstances for several reasons. First, any judgment against Moon Moo would have been procured solely by virtue of the illegally-obtained evidence. (R. at 6.) A judgment could not

stand without the photographs and water samples obtained through James's act of criminal trespass. (R. at 6.) Second, Moon Moo intends to invoke the exclusionary rule to ensure preservation of its constitutional rights. (R. at 9.) And, unlike the INS, James's behavior was unchecked by government review, and fewer remedies are available under these circumstances. (R. at 6.) So the deterrent effect of the exclusionary rule would be preserved in this context; the weight of the factors used in *Lopez-Mendoza* tips the balance the opposite way here. The risk of losing probative evidence is substantially outweighed by James's drastic infringement on Moon Moo's constitutional right. Since the language in *Lopez-Mendoza* is merely dicta, this Court should rule that evidence obtained through trespass is not admissible in this action.

B. Moon Moo may not be penalized as a result of the illegally-obtained evidence because James acted in bad faith.

The district court properly excluded the illegally-obtained evidence because it was not procured by good faith. The exclusionary rule must be applied if the evidence in question was obtained in knowing violation of the Fourth Amendment. *Smith Steel*, 800 F.2d at 1334.

The exclusionary rule applies when the object of the evidence is to "assess penalties." *Id.* at 1334. In *Smith Steel*, an OSHA officer conducted an inspection of the appellant corporation's facility and noted several improper working conditions. *Id*. at 1331. After obtaining and executing a warrant, OSHA issued several citations, which the company contested because the warrant was obtained *ex parte*. *Id*. The issue on appeal concerned whether the improperly-obtained evidence should be admitted in the administrative proceedings against the company. *Id*. at 1333. The Fifth Circuit considered *Lopez-Mendoza* but ultimately held that the exclusionary rule should be applied to the proceedings at issue. *Id*. at 1334. The court reasoned that illegally-obtained evidence must be excluded if offered for the purpose of "punishing the crime" for which it was obtained. *Id*.

Even so, the illegally-obtained evidence may be admitted if it was obtained in good faith. *Trinity Indus.*, 16 F.3d at 1462. In *Trinity Industries*, one of the appellant corporation's employees filed a complaint with OSHA, alleging that several conditions within the facility violated industry standards. *Id*. at 1457. As a result, the Secretary of Labor sought to obtain a comprehensive warrant from a magistrate judge, which was granted. *Id*. at 1458. OSHA executed the warrant and issued several citations, and Trinity Industries challenged the warrant, alleging that it was too broad in scope. *Id*. On appeal, the corporation argued that the exclusionary rule should be applied to the OSHA proceedings. *Id*. at 1459. Although the scope of the warrant was in dispute, application of the exclusionary rule was improper because the Secretary "relied in objectively reasonable good faith on a facially valid warrant." *Id*. at 1462.

Here, the exclusionary rule should be applied, first, because the Government sought to admit the evidence to obtain a judgment against Moon Moo and, second, because it was not obtained in good faith. Like the evidence at issue in *Smith Steel*, James's pictures and water samples were introduced solely for the purpose of obtaining a judgment in the district court action. (R. at 6.) Following the Fifth Circuit's reasoning, that evidence must be excluded. And, unlike the Secretary of Labor in *Trinity Industries*, James did not act in objectively reasonable good faith. (R. at 6.) He ignored the prominent "No Trespassing" signs and actively invaded Moon Moo's private property. (R. at 6.) Once there, he consciously took photographs and water samples to prove his theories concerning Moon Moo's farming operations. (R. at 6.) No evidence exists to indicate that he believed his conduct to be appropriate or permissible. (R. at 6.) The rationale behind the exclusionary rule is instructive here; the rule's application in this context would have a deterrent effect on future Fourth Amendment violations.

Because the Supreme Court has not addressed the issue at bar and James did not act in objectively reasonable good faith when procuring the contested evidence, this Court should find that the evidence obtained through trespass is not admissible in this civil enforcement proceeding.

III. THE DISTIRCT COURT CORRECTLY HELD THAT MOON MOO IS NOT A CAFO SUBJECT TO A NPDES PERMIT, AND THAT BECAUSE THE LAND APPLICATION OF MANURE IS PURSUANT TO A NMP, THE DISCHARGE PLAINLY FALLS UNDER THE AGRICULTURAL STORMWATER EXEMPTION.

The district court correctly held that Moon Moo is not a Concentrated Animal Feeding Operation (CAFO) because it does not meet the criteria set forth in 40 C.F.R. § 122.23. In order for an Animal Feeding Operation (AFO) to be considered a Medium CAFO it must have between "200 and 699 mature dairy cows, whether milked or dry; . . . and either one of the following conditions are met: (A) [p]ollutants are discharged into waters of the United States through a man-made ditch, flushing system, or other similar man-made device; or (B) [p]ollutants are discharged directly into waters of the United States which originate 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(i)(A),(ii)(A)(B).

The district court correctly observed that no waters of the United States pass over, across, or through Moon Moo's milk production area, so the Farm cannot be a CAFO under § 122.23(ii)(B). Because no evidence suggests that Moon Moo is discharging pollutants through ditches or similar conveyances, the district court properly held that Moon Moo is not a CAFO subject to NPDES permitting. Furthermore, even if this Court were to find the evidence admissible, Moon Moo is not a CAFO because the discharge is precipitation-related discharge and falls plainly under the agricultural stormwater exemption. Similarly, Moon Moo's land

application of manure is not removed from the agricultural stormwater exemption because the land application is pursuant and subject to a Nutrient Management Plan (NMP) and is consequently exempt from a NPDES permit. This Court should find that Moon Moo is not subject to an NPDES permit because it is not a Medium CAFO, and any discharge that may have occurred is exempt from permitting as agricultural stormwater.

A. Moon Moo is not a CAFO because there is no admissible evidence exists to show that a discharge occurred.

The district court properly held that no admissible evidence was presented showing that Moon Moo met the criteria set forth in § 122.23. Although Moon Moo has the appropriate number of cattle to be considered a Medium CAFO, no evidence exists to show that a discharge has occurred into a water of the United States either directly or through ditches or channels as required by the Act. Without evidence of a discharge of pollutants into a water of the United States, Moon Moo simply does not meet the criteria set forth in § 122.23 required to classify the Farm as a CAFO.

The Sixth Circuit held that the exclusionary rule under the Fourth Amendment will apply when evidence is obtained illegally for the purpose of assessing penalties for past violations. *Trinity Indus., Inc.*, 16 F.3d at 1462; (*see Lopez-Mendoza*, 468 U.S. 1032 (holding 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 . . .) (*see also Smith Steel Casting Co.*, 800 F.2d at 1334). Trinity Industries manufactures tanks or pressure vessels, and there were complaints of safety violations. *Id.* at 1457. The Occupational Safety and Health Review Commission (OSHA) conducted a full-scope safety inspection of the Trinity Industries Sharonville facility. *Id.* OSHA had obtained a warrant, but Trinity argued that the warrant was invalid and the evidence was illegally obtained. *Id.* at 1459. The court held that when evidence is

obtained illegally solely for the purpose of assessing penalties, the exclusionary rule will apply. *Id.* at 1462. Additionally, the court held that the good faith exception to the exclusionary rule would apply, and because the Secretary acted on a facially valid warrant the exclusionary rule would not apply in this case. *Id. (see U.S. v. Leon*, 468 U.S. 897 (1984) (holding the exclusionary rule should be applied for purposes of assessing penalties against an employer after the fact for OSHA violations, unless it can be shown that the good faith exception applies to the Secretary's actions).

Similarly, the Supreme Court held that "no one would argue that the exclusionary rule should be invoked to prevent an agency from ordering corrective action at a leaking hazardous waste dump if the evidence underlying the order had been improperly obtained . . . ." *Lopez-Mendoza*, 468 U.S. at 1046. The exclusionary rule is used to add protection to 4th Amendment rights, and will apply where the proceeding intends to punish past transgressions. *Id.* The exclusionary rule will not, however, extend so far as to allow continued violations of the law. *Id.*

Like the example given by the Supreme Court in *I.N.S.*, the evidence obtained by Dean James should not allow the agency to order a corrective action. The Supreme Court reasoned that evidence illegally obtained to punish past transgression should be excluded. *Id.* James entered onto Moon Moo's property without permission and without a warrant, and by doing so illegally obtained his evidence. Moon Moo owns the land on both sides of the Queechunk Canal and prominently posted "No Trespassing" signs at the entrance to the Canal, which James willfully ignored. (R. at 5.) The good faith exception to the exclusionary rule addressed in *Trinity* does not apply here because James acted in bad faith when he ignored the "No Trespassing" signs and illegally entered the property. In *Trinity*, OSHA had a facially valid warrant from which the search was executed. Yet James had no warrant and no right to enter onto private

property. This resulted in an unlawful search and seizure in violation of Moon Moo's Fourth Amendment right.

James trespassed on Moon Moo's property to obtain his samples and this Court should apply the exclusionary rule to any illegally obtained evidence used to punish past transgressions. The sole purpose of this proceeding is to punish Moon Moo for allegedly polluting the Deep Quad River, and as dictated in *I.N.S.* and *Trinity*, illegally obtained evidence must be excluded when it is used to assess penalties for past acts. The EPA should not be able to circumvent the Fourth Amendment; consequently, the exclusionary rule should be applied to this case and the evidence obtained illegally through trespass should not be considered. The Supreme Court held that a property owner has the right to exclude and that man-made bodies of water carry no right to public access. *Kaiser Aetna*, 444 U.S. at 192 (1979). While the United States has the authority to regulate all "navigable water," this does not give the public the right to use privately created waters. *Id.* Therefore, James had no right to enter into Moon Moo's Canal to look for evidence. A previous owner to the property dug this Canal to prevent flooding and it is plainly located within the property lines of Moon Moo. (R. at 5.) Because James obtained his evidence illegally, no evidence exists to show that Moon Moo has acted in a way to bring it under the definition of a CAFO. So this Court should find that it is not subject to NPDES permitting.

Even if this Court were to consider the evidence presented by James, no violation has occurred. Moon Moo is covered under the agricultural stormwater exemption of the CWA because the land application of manure was pursuant to a NMP, and any discharge that occurred was precipitation-related. Therefore, Moon Moo is simply an AFO—not a CAFO subject to NPDES permitting.

B. Moon Moo is not a CAFO because the land application field is not part of the AFO, Moon Moo land applies its manure per a NMP and any discharge is covered by the agricultural stormwater exemption.

The district court properly held that Moon Moo is not a CAFO because the land application field is not part of the AFO. In order for an AFO to be classified as a CAFO it must discharge a pollutant into a water of the United States. Moon Moo has not discharged any pollutants from the confinement area, wastewater lagoons, or equipment that transports the waste and therefore has not met the criteria set forth by the Act.

Historical analysis is helpful to understanding the application of the Act. "The EPA has chosen not to include the land application areas at an animal feeding operation within the definition of an AFO or CAFO in the final regulations." *Nat'l Pollutant Discharge Elimination System Permit Regulation & Effluent Limitation Guidelines & Standards for CAFO's*, 68 FR 7176-01, 7197 (Feb. 12, 2003). The EPA stated that it is important to be able to differentiate when a discharge from an AFO is a point source subject to NPDES permitting, and when it is covered by the agricultural stormwater exemption. *Id.* at 7198. The discharge of manure or wastewater shall be an agricultural stormwater discharge when the manure is field applied pursuant to a site-specific NMP. *Id.* at 7197. According to the Code of Federal Regulations § 122.23(e) "where the manure, litter or process wastewater has been 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."

This Court should distinguish between point source and non-point source discharges. If Moon Moo had discharged pollutants from the lagoons, from the tank trailers, or from the animal confinement area, it would be considered a point source of pollution because it could be classified as a discernable, confined, discrete conveyance. 33 U.S.C. § 1362(14). But, here, the

alleged discharge has occurred from a land application field where manure is applied and then mixed with precipitation, consequently inducing runoff. This is precisely the opposite of a discernible, confined, and discrete conveyance.

Moon Moo has a NMP, and no evidence exists to show that it has applied manure in any manner inconsistent with that plan. (R. at 5.) Dr. Emmet Green testified by affidavit that nothing in Moon Moo's NMP prohibits them from applying manure in the rain. (R. at 6.) Moon Moo has a site-specific plan which dictates how and when manure can be applied to their fields; nothing in the record that indicates that it has deviated from these limitations. In accordance with EPA guidance and the Code of Federal Regulations § 122.23(e), when an AFO applies manure pursuant to a NMP, any precipitation-related discharge will fall under the agricultural stormwater exemption.

This Court should hold that Moon Moo has not discharged any pollutant from their animal confinement area, which is required to classify the AFO as a CAFO. Because the land application field is not included in the definition of a CAFO, Moon Moo cannot be classified as such because they do not meet the qualifications set forth in § 122.23(ii)(B). The EPA stated that in order to meet the criteria set forth in the Act, an AFO must have the proper number of cattle and must discharge a pollutant from the AFO into a water of the United States.

Moon Moo prepared and filed a NMP with the State agricultural field, which was subject to rejection by the State. Although the State may not have reviewed the plan or subjected it to public comment, Moon Moo acted in good faith by submitting the plan. According to § 122.23(h) it is the Director's duty to review the NMP to ensure that the plan meets the applicable effluent limitations and standards. Additionally, the Act states that the Director must notify the public of his intention to grant coverage. 40 C.F.R. § 122.23(h). The only thing that the Act

requires of a potential CAFO is that they keep on site or nearby a NMP and make it readily available to the Director or Regional Administrator upon request. 40 C.F.R. § 122.23(e)(2). It would be bad public policy to punish farmers for something the State failed to do. It is the Directors duty, and Moon Moo should not be punished because New Union failed to carry out its duties.

Consequently, any discharge that may have occurred falls under the agricultural stormwater exemption because Moon Moo land applies its manure in accordance with a site-specific NMP, and any runoff was precipitation-related. And even if this Court were to find that Moon Moo is a CAFO, the alleged discharge would still be covered be the agricultural stormwater exemption, thus removing it from NPDES permitting.

C. Moon Moo is not a CAFO, and the only possible discharge that occurred is precipitation-related and falls under the agricultural stormwater exemption.

The district court properly held that Moon Moo is exempt from NPDES permitting because the alleged discharge is covered by the agricultural stormwater exemption. In order to fall under the agricultural stormwater exemption the discharge must be two things: (1) agriculture related; and (2) a precipitation-related discharge. *Alt v. U.S. E.P.A.*, 979 F. Supp.2d 701, 712 (N.D. W. Va. 2013).

The court in *Alt* added that agricultural stormwater discharges are exempt from regulation "even when those discharges came from what would otherwise be point sources." *Id.* at 714. (quoting *Waterkeeper Alliance, Inc. v. U.S. E.P.A.*, 399 F.3d 486, 507 (2d Cir. 2005) (holding that agriculture can be construed to encompass CAFOs and that "stormwater" should mean precipitation-related). The Alts operated a CAFO, which consisted of eight poultry houses. *Id.* at 704. Some particles of manure and litter were mixed with precipitation and were carried into a water of the United States. *Id.* The court found that common sense dictated that the Alt's

operation was agricultural in nature, and that the precipitation-caused runoff from the Farm was stormwater. *Id.* at 711. The court held "the litter and manure which is washed from the Alt farmyard to navigable waters by a precipitation event is an agricultural stormwater discharge and therefore not a point source discharge, thereby rendering it exempt from the NPDES permit requirement of the CWA." *Id.* at 715.

The Second Circuit held that a defendant was liable for discharges that occurred at a land application site when the manure was discharged from a pipe (a common point source) into a water of the United States. *Concerned Area Residents for Env't v. Southview Farm*, 34 F.3d 114, 118 (2d Cir. 1994). In this case the court found that oversaturation of the fields—and not rain—caused the runoff, and therefore the discharge did not meet the agricultural stormwater exemption. *Id.* at 121. Due to the fact that the discharge was from a pipe, and was not caused by precipitation, the court found Southview liable under the CWA. *Id.* The court stated that the ultimate question is not whether "the discharge occurred during rainfall or were mixed with rainwater run-off, but rather, whether the discharges were a result of precipitation." *Id.*

The EPA stated that the discharge of manure, or processed wastewater to waters of the United States to land areas under its control, is a discharge subject to NPDES permitting, *except* where it is an agricultural stormwater discharge provided for in 33 U.S.C. § 1362 (14). 68 FR 7176-01, 7197 (Feb. 12, 2003). Like in *Alt*, Moon Moo's operation is agriculturally related, and the runoff clearly falls within the agricultural stormwater exemption because it is entirely caused by precipitation. Unlike Southview, Moon Moo did not over apply manure to its field, and the discharge was not caused by oversaturation. The record indicated that it was raining at the time of the discharge, and no facts indicate that Moon Moo over applied the manure. (R. at 6.) The Fifth Circuit found that the agricultural stormwater exemption was expanded to include a land

application discharge. *Nat'l Pork Producers Council v. U.S. E.P.A.*, 635 F.3d 738, 744 (5th Cir. 2011) (holding the definition of point source excludes "agricultural stormwater discharges," and that this type of discharge occurs when rainwater comes in contact with manure and flows into navigable water). Like in *Pork Producers*, the only discharge that occurred was a result of rainwater coming in contact with manure, and this type of discharge is not subject to NPDES permitting.

As the court in *Southview* stated, the ultimate question is not whether "the discharges occurred during rainfall or were mixed with rainwater run-off, but rather, whether the discharges were a result of precipitation." The record indicates that prior to the samples gathered by James, there was a "significant storm event" and that two inches of rain fell in a 24-hour period. (R. at 6.) This Court should find that any discharge that occurred from Moon Moo on April 12, 2013 was precipitation related and therefore exempt from NPDES permitting. Moon Moo clearly meets the criteria set forth in *Alt, Pork Producers*, and *Southview* because the runoff of manure was induced by excess precipitation and was not a result of over application of manure. This Court should find that Moon Moo is agriculturally related because the fields where the manure is applied are used to grow grass for silage. Because Moon Moo is agriculturally related and the discharge was the result of precipitation, no NPDES permit is required. For these reasons Moon Moo is plainly covered by the agricultural stormwater exemption.

IV. MOON MOO IS NOT SUBJECT TO A CITIZENS SUIT UNDER RCRA BECAUSE ITS FERTILIZER BLEND IS NEITHER SOLID WASTE NOR AN IMMINENT AND SUBSTANTIAL ENDANGERMENT TO HEALTH OR THE ENVIRONMENT.

The district court properly held that because Moon Moo's fertilizer mixture was not being discarded, but instead was being reused for a beneficial purpose, it did not constitute solid waste and thus did not violate the Resource Conservation and Recovery Act (RCRA) §

7002(a)(1)(A), 42 U.S.C. 6972 . Further, the district court correctly held that the mixture does not constitute an imminent and substantial endangerment to human health or the environment violative of RCRA § 7002(a)(1)(B), 42 U.S.C. 6972. As such, this Court should affirm the lower court's ruling and hold that Moon Moo is not subject to a citizen suit under RCRA.

RCRA expressly prohibits the "open dumping of solid waste;" and the Act 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*. . . ." 42 U.S.C. § 6945(a); 42 U.S.C. § 6903(27) (emphasis added). The ordinary, everyday meaning of the term "discarded" is "'disposed of," "thrown away" or "abandoned.'" *Am. Min. Cong. v. U.S. E.P.A.*, 824 F.2d 1177, 1184 (D.C. Cir. 1987). And material is not discarded until after it has been utilized for its intended purpose. *No Spray Coal., Inc. v. City of New York*, 252 F.3d 148, 150 (2d Cir. 2001).

Those who abandon solid waste may also be subject to RCRA jurisdiction if the materials present an "imminent and substantial threat of endangerment to health or the environment." 42 U.S.C. § 6972(a)(1)(B). Danger is imminent if it "threaten[s] to occur immediately." *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 485 (1996) (quoting Webster's New International Dictionary of English Language 1245 (2d ed.1934)). Substantial endangerment exists when the potential for bodily or environmental harm is great. *Foster v. United States*, 922 F. Supp. 642, 661 (D.D.C. 1996).

Moon Moo reuses the manure from its milk cows combined with the acid whey from the Chokos Greek Yogurt facility as a substitute for commercially available grass fertilizers and soil amendments, and the health and environmental risks from Moon Moo's fertilizing mixture is low. (R. at 5-6.) Accordingly, this Court should affirm the district court's decision and hold that Moon Moo is not subject to a citizen suit under RCRA.

A. Moon Moo's sustainable fertilizer mixture falls outside of the statutory definition of solid waste and unsalvageable materials that RCRA regulates.

Congress enacted RCRA to "eliminate[ ] the last remaining loophole in environmental law" by setting forth standards to regulate the "disposal of discarded materials and hazardous wastes." *Ecological Rights Found. v. Pac. Gas & Elec. Co.*, 713 F.3d 502, 515 (9th Cir. 2013) (quoting H.R. Rep. No. 94–1491(I), at 4 (1976)). Specifically, RCRA was passed to reduce the "rising tide" of waste and unsalvageable materials that was accumulating across the country—particularly scrap, discarded, and waste materials. *Am. Min. Cong.*, 824 F.2d at 1179 (citing 42 U.S.C. § 6901(a)(2,4)). Section 4005 of RCRA prohibits "any solid waste management practice or disposal of solid waste or hazardous waste which constitutes the *open dumping of solid waste* or hazardous waste." 42 U.S.C § 6945(a) (emphasis added). Congress empowered private citizens with the authority to enforce the newly heightened standards of waste management by specifically adding a citizen suit provision which allows any person to commence a civil action—on her own behalf—against any person alleged to be in violation of any of RCRA's standards. 42 U.S.C. § 6972(a)(1)(A).

To properly glean the meaning of RCRA § 4005, the most rudimentary canon of statutory construction requires first examining the language Congress employed in the statute. *Am. Min. Cong.*, 824 F.2d at 1183 (citing *CBS v. FCC*, 453 U.S. 367, 377 (1981)). The Act defines an "open dump" as any facility where solid waste is disposed, which does not qualify under the Act as a sanitary landfill. 42 U.S.C. § 6903(14). Solid waste includes "garbage, refuse, sludge . . . and other discarded materials." 42 U.S.C. § 6903(27).

Although RCRA does not include a definition for the term "discarded materials," when construing undefined terms in a statute, another basic canon of statutory construction dictates that courts should supply the words with their ordinary, current, and common meaning. *Safe Air*

for Everyone v. Meyer, 373 F.3d 1035, 1041 (9th Cir. 2004) (*Safe Air*) (citing *The Wilderness Soc'y v. U.S. Fish & Wildlife Serv.*, 353 F.3d 1051, 1060 (9th Cir. 2003). The most common meaning of "discard" is to "'cast aside; reject; abandon; give up.'" *Ecological Rights Found*., 713 F.3d at 515 (quoting *Safe Air*, 373 F.3d at 1041; quoting 1 The New Shorter Oxford English Dictionary 684 (4th ed. 1993)).

In *Safe Air*, the Ninth Circuit Court examined three well-reasoned considerations promulgated by sister circuits to determine whether grass residue that was burned after harvest constituted solid waste within RCRA:

> (1) whether the material is "destined for beneficial reuse or recycling in a continuous process by the generating industry itself," (2) whether the materials are being actively reused, or whether they merely have the *potential* of being reused, (3) whether the materials are being reused by its original owner, as opposed to use by a salvager or reclaimer.

Safe Air for Everyone, 373 F.3d at 1043 (quoting *Am. Min. Cong.*, 824 F.2d at 1186; citing *Am. Min. Cong. v. U.S. E.P.A.*, 907 F.2d 1179, 1186 (D.C. Cir. 1990); citing *United States v. ILCO*, 996 F.2d 1126, 1131 (11th Cir. 1993)).

As to the first consideration, whether the material is "destined for beneficial reuse or recycling in a continuous process by the generating industry itself," the court in *Safe Air* concluded that the growers who burned the residue of their crops after harvest did so for the positive effects the open burning process has on subsequent crops rather than to quickly and cheaply discard of the remains. *Id*. The court cited testimony that open burning released nutrients into the soil that would otherwise be lost, and that the incineration process acts as an effective fertilizer, insect repellent, and primer for future crops. *Id*. Similarly, in the instant case, Moon Moo is returning cow manure and acid whey to its Bermuda Grass fields as a fertilizer and soil conditioner. (R. at 5.) The grass is annually collected, dried, and used as

silage, which allows Moon Moo's cows to create more milk and more manure, which in turn creates more silage. (R. at 5.) At the district court, Moon Moo presented expert testimony that the land application of whey as a soil conditioner is a common practice in New Union and has been for over 70 years. (R. at 6.) Accordingly, in the case at hand and in *Safe Air*, the material at issue is being used in a continuous, beneficial process by the generating industry itself.

Regarding the second consideration, whether the materials are being actively reused, or whether they merely have the potential of being reused, the court in *Safe Air* concluded that the farmers reuse the grass residue to provide nutrients to the land and to facilitate the open burning process. *Safe Air*, 373 F.3d at 1045. In the same way, Moon Moo reuses manure and acid whey to provide nutrients to its fields and to ensure silage for its cows. (R. at 5.)

Finally, regarding the third consideration, whether the materials are being reused by its original owner, as opposed to use by a salvager or reclaimer, the *Safe Air* court determined that the farmers who grew the grass were clearly the original owners of the grass residue. *Safe Air*, 373 F.3d at 1045. The court thus concluded that the grass residue was not solid waste. *Id*.

Here, Moon Moo is undoubtedly the original owner of the manure its dairy cows produce, but the acid whey that is also included with the manure in Moon Moo's fertilizer compound originally comes from the Chokos Greek Yogurt facility. (R. at 5.) But, RCRA does not compel "the conclusion that material destined for recycling in another industry is necessarily 'discarded.'" *Safe Food & Fertilizer v. E.P.A.*, 350 F.3d 1263, 1268 (D.C. Cir. 2003). Firm-to-firm transfers do not fall within the ordinary, contemporary, common meaning of the term "discard." *Id*. Furthermore, when describing the limiting nature of the phrase "discarded materials" it used to identify solid waste, the House Committee explained: "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." H.R. Rep. No. 94–1491(II), at 3 (1976) (see 40 C.F.R. 257.1(c)(1)).

Because Moon Moo does not discard its fertilizer but instead uses it for a beneficial purpose, the district court properly held that Moon Moo is not discarding solid waste and is not subject to a citizen suit under RCRA.

B. Moon Moo's fertilizing mixture is not a solid waste, nor does it constitute an imminent and substantial endangerment to human health or the environment.

Under RCRA, a person who discards solid waste may also be subject to a citizen suit if the materials present an "imminent and substantial threat of endangerment to health or the environment." 42 U.S.C. § 6972(a)(1)(B). For a plaintiff to prevail in an "imminent and substantial endangerment" citizen suit under RCRA, she must prove:

> (1) the defendant has been or is a generator or transporter of solid or hazardous waste, or is or has been an operator of a solid or hazardous waste treatment, storage or disposal facility; (2) the defendant has "contributed" or "is contributing to" the handling, storage, treatment, transportation, or disposal of solid or hazardous waste; and, (3) the solid or hazardous waste in question may present an imminent and substantial endangerment to health or the environment.

Ecological Rights Found., 713 F.3d at 514. (citing 42 U.S.C. § 6972(a)(1)(B)).

As discussed at length above, Moon Moo is not discarding solid waste through its application of manure and whey. (R. at 5.) Rather, Moon Moo is creating and using its own valuable fertilizer through recycling. (R. at 5.) As such, the Plaintiff's imminency claim must fail.

But, assuming for the sake of argument that Moon Moo is discarding solid waste through its land treatment processes, it still does not present an imminent and substantial endangerment to human health such that Moon Moo would be subject to RCRA jurisdiction.

In *Price v. U.S. Navy*, 39 F.3d 1011, 1021 (9th Cir. 1994), the Ninth Circuit held that a homeowner, Price, whose home was located on top of a contaminated former landfill, failed to

establish that an imminent endangerment to health or the environment existed, and the court denied her RCRA claim. The court held that the imminence provision in RCRA requires that there be a current risk and that the risk be so serious that there is some necessity for the legal action. *Id*. at 1019. Price had concrete barriers covering the ground above where the landfill once sat, and with such an arrangement, Price could not demonstrate that there was a current risk. *Id*. at 1020. Satisfaction of the imminency requirement does not require proof that actual harm will occur, one must simply demonstrate that a serious, threatened harm is present. *Id.* at 1019.

The plaintiffs in *Price* was unable to demonstrate that an imminent endangerment was present, and in the same vein, Plaintiff's in the case at bar have failed to demonstrate that a serious, substantial endangerment exists. (R. at 6-7.) Missing either component is a fatal flaw to one's claim. Plaintiff's own expert conceded that she could not conclude that Moon Moo was the "but-for" cause of the nitrate advisories because identical advisories had been issued in Farmville in 2002, 2006, 2007, 2009, and 2010—all before Moon Moo increased its farming operations and before it started receiving acid whey from the yogurt facility in 2012. (R. at 7.) In fact, the only persons who are even remotely at risk of danger are children under the age of two, and those children can be spared from any danger by using bottled water. (R. at 6.) Those over the age of two are not at risk from the elevated nitrate levels. (R. at 6.)

Because Moon Moo is not discarding solid waste, and because its fertilizer poses no imminent and substantial threat to health or the environment, this Court should affirm the district court's decision and hold that Moon Moo is not subject to an imminency citizen suit under RCRA.

CONCLUSION

For the foregoing reasons, the district court's grant of summary judgment to the Defendant Moon Moo should be AFFIRMED. The Queechunk Canal is not a waterway subject to the navigational servitude, and James had no right to enter the Canal to obtain his evidence. James acted in bad faith, and the evidence was properly excluded. Additionally, Moon Moo is not a CAFO subject to NPDES permitting, and any discharge that may have occurred is exempt under the agricultural stormwater exemption of the CWA. Moon Moo acted pursuant to a valid NMP, and no point source discharge occurred. Finally, Moon Moo is not subject to a citizen's suit under RCRA because its fertilizer is neither a solid waste nor an imminent threat to human health and the environment. We respectfully request that this Court AFFIRM the district court decision granting summary judgment on all issues.

Respectfully Submitted

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Counsel for Moon Moo Farm