To be Argued by
Team 60

Docket No. 14-1248

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellant, and

DEEP QUOD RIVERWATCHER, INC., and DEAN JAMES
Plaintiffs-Intervenors-Appellants

v.

MOON MOO FARM, INC.,
Defendant-Appellee

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

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BRIEF FOR DEEP QUOD RIVERWATCHER, INC., and DEAN JAMES
Plaintiffs-Intervenors-Appellants

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STATEMENT OF JURISDICTION

This appeal follows the issuance of an Order by the District Court for New Union on June 1, 2014. The Order denied plaintiff EPA and Deep Quod Riverwatcher's (Riverwatcher) motions for summary judgment and granted defendant Moon Moo Farm's (Moon Moo) motion for summary judgment. This court maintains jurisdiction over all appeals from District Courts as granted by 28 U.S.C. § 1291.

STATEMENT OF ISSUES

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

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

III. Whether Defendant Moon Moo Farm requires a permit under the CWA National Pollution Discharge Elimination System (NPDES) permitting program because it is either:

   A. a Concentrated Animal Feeding Operation (CAFO) subject to NPDES permitting liability; or

   B. not a CAFO and instead subject to NPDES permitting liability because excess nutrient runoff is not subject to the agricultural stormwater exemption available to CAFOs.

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

A. the farm's application of fertilizer and soil amendment constitutes a solid waste subject to regulation under RCRA Subtitle D; or

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 a final order of the United States District Court for the District of New Union, which granted Defendant Moon Moo Farm's motion for summary judgment, awarded Moon Moo Farm $832,560 on its counter claim, and denied Plaintiff EPA's and Riverwatcher's motions for summary judgment. R. at 12.

Prior to EPA's filing of the Complaint in this case, Riverwatcher served a letter of intent to sue under the citizen suit provisions of the CWA, Section 505 and the RCRA, section 7002, on Moon Moo and EPA. Before the expiration of the waiting period, EPA filed a Complaint against Moon Moo Farms, alleging that Moon Moo violated the permitting requirements of the CWA 33 U.S.C. §§ 1311(a), 1319(c), (d), and 1342, and seeking civil penalties and injunctive relief.

After the 90-day waiting period, Riverwatcher intervened and asserted claims under CWA, § 505, and alternative claims under RCRA, § 7002. Riverwatcher alleged that Moon Moo's manure handling practices violated the CWA and RCRA.

Moon Moo filed a counterclaim, alleging that a member of Riverwatcher, Dean James, trespassed on Moon Moo's property to obtain evidence of stormwater runoff.

After completing discovery, the district court ruled on the parties' motions for summary judgment. The district court determined (1) that Moon Moo was not a Concentrated Animal Feeding Operation (CAFO) and was not subject to permitting under the CWA's National Pollutant Discharge Elimination System (NPDES) permit program under 33 U.S.C. § 1342. R.

at 8, 9. The district court determined (2) that evidence of Moon Moo's stormwater discharge was obtained through trespass and determined that for that reason, (3) the evidence was not admissible in a civil proceeding. R. at 9. The district court (4) dismissed Riverwatcher's RCRA claim that Moon Moo's open dumping of waste presented an imminent and substantial endangerment. R. at 10-12. Finally, the district court (5) awarded damages against Riverwatcher based on Moon Moo's trespass claim. R. at 12.

Following the issuance of the district court's final order in Civ. 155-2014 on June 1, 2014, EPA and Riverwatcher each filed a Notice of Appeal. R. at 1.

STATEMENT OF THE FACTS

Defendant Moon Moo Farm operates a dairy farm incorporated in the State of New Union, ten miles from the City of Farmville. The farm's 350 milk cows are housed in a barn and not pastured. The waste from the cows is collected and stored in an outdoor lagoon. The liquid manure is used as fertilizer and spread over across 150 acres of the farm's fields by a trailer. The farm grows Bermuda grass on these fields which is harvested and used to feed the cows.

Moon Moo Farm provides milk to a local yogurt manufacturer, Chokos Greek Yogurt and because of this business, has recently increased the number of cows from 170 to 350 that are housed in the facility. Chokos provides Moon Moo Farm with acid whey, free of charge, that is added to the lagoon and sprayed on the fields.

Moon Moo Farm is located adjacent to the Deep Quod River. Most of the Deep Quod River is diverted into the Queechunk Canal at a bend in the river next to Moon Moo Farm. Both banks of the canal are owned by Moon Moo Farm. The canal is three to four feet deep and fifty yards wide. Moon Moo Farm posts no trespassing signs, however the canal is commonly used as

a shortcut up and down the Deep Quod River. The canal is easily navigated by a small boat or canoe.

The Deep Quod River is navigable in fact and flows into the Mississippi River. Downstream from Moon Moo Farm, the town of Farmville uses the river as a source of drinking water. Moon Moo Farm is regulated by the State and is considered a "no-discharge" animal feeding operation (AFO). Because Moon Moo Farm is a "no-discharge" AFO, it must submit a Nutrient Management Plan (NMP) to the Farmville Regional Office of the State of New Union Department of Agriculture (DOA). The NMP includes a plan of application rates and calculation of expected uptake of nutrients by crops grown on Moon Moo Farm's fields where the manure is spread. The State of New Union has the authority to issue National Pollutant Discharge Elimination System (NPDES) permits under the Clean Water Act (CWA). Moon Moo Farm does not hold a NPDES permit.

In early 2013, Riverwatcher received complaints that the Deep Quod River smelled of manure and was unusually brown in color. Near the same time, Farmville Water Authority issued a "nitrate" advisory for customers, warning that water was unsafe to drink by infants. The warning also mentioned that the drinking water did not pose a health threat to adults. On April 12, 2013, Dean James investigated the river in a small boat. Between April 11 and 12, 2013, Farmville received two inches of rain. During his investigation by boat, James ignored the no trespassing signs and boated through the Queechunk Canal. James photographed manure spreading on the farm, photographed brown water flowing from fields through a drainage ditch to the canal and took samples of water from the ditch where the water enters the Queechunk Canal. Upon testing the samples, the results showed high levels of nitrates and fecal coliforms.

Moon Moo Farm maintains records indicating they have applied manure to their fields at rates consistent with the NMP submitted to the Farmville Field Office. In addition, Dr. Ella Mae, agronomist, has offered her opinion that the lower pH of the liquid manure resulted in a lower pH of the soil the manure is applied to. The lowered pH, or increased acidity, is attributed to the addition of acid whey to the manure. Dr. Mae opined that the increased acidity prevents the Bermuda grass crop from taking up nutrients in the manure. Subsequently, the unprocessed nutrients from the manure leached into the groundwater during heavy runoff events. Defendants submitted the testimony of Dr. Emmet Green who agrees that the increased acidity in the soil leads to decreased ability of the Bermuda crop to take in nutrients from the manure. Dr. Green also offered, however, his opinion that using acid why as a soil conditioner is a longstanding method that farmers in New Union have used since the 1940s. Dr. Green opined that Bermuda grass typically tolerates a wide range of pH levels. Finally, Dr. Green opined that Moon Moo Farm's NMP does not specify that manure may not be applied during a rain event.

STANDARD OF REVIEW

This is an appeal from the United States District Court for the District of New Union's decision to grant summary judgment in favor of defendant Moon Moo Farm, Inc. District court decisions to grant summary judgment and cross-motions for summary judgment are subject to *de novo* review. Szajer v. City of Los Angeles, 632 F.3d 607, 610 (9th Cir. 2011); Guatay Christian Fellowship v. County of San Diego, 670 F.3d 957, 970 (9th Cir. 2011).

SUMMARY OF THE ARGUMENT

The district court erred in holding that Moon Moo Farm is not a CAFO subject to permitting under the NPDES permit program, that evidence of Moon Moo Farm's discharge was obtained by trespass and that such evidence was not admissible in a civil enforcement

proceeding. In addition, the district court incorrectly found that Moon Moo Farm's fields fall under the agricultural storm water exemption of the CWA, and improperly dismissed Riverwatcher's open dumping and imminent and substantial endangerment claims under RCRA.

The district court was wrong to conclude that Mr. James trespassed on Moon Moo's property when he traveled up the Queechunck Canal. Although Moon Moo owned the bed and banks of the canal, the public had a common law public trust right to access the canal because the canal was in fact navigable. Absent a statement from the New Union state courts changing the scope of the public trust in the state's navigable waters, the canal was open to public access.

Even if Mr. James had trespassed, the evidence obtained by Mr. James while he was in the canal should not have been excluded. First, the Fourth Amendment proscribes government action, not private action. For that reason, the exclusionary rule applies only to government actors. The exclusionary rule does not require the suppression of evidence obtained by private actors and handed over to the government, even if the evidence was obtained illegally. Second, to the extent that Moon Moo could show that Mr. James was acting as a government agent, Mr. James' actions did not violate Moon Moo's Fourth Amendment rights. Mr. James' search occurred in an open field and did not infringe on an expectation of privacy that society would find reasonable.

Mr. James' collection of a sample of water as it flowed out of the ditch on Moon Moo's property and into the canal was not an unreasonable seizure for two reasons. One, Mr. James had probable cause to believe that the water flowing from the ditch contained pollutants and was evidence of a Clean Water Act violation. Two, the seizure was *di minimis*. Finally, even if the Court could find that Mr. James violated Moon Moo's Fourth Amendment rights, the evidence should only be excluded for the purpose of assessing penalties against Moon Moo, not for the

purpose of determining whether a violation occurred. *See Smith Steel Casting Co. v. Brock*, 800 F.2d 1329, 1334 (5th Cir. 1986); R. at 9 (misapplying *Smith Steel Casting*).

Moon Moo Farm qualifies to be considered a CAFO under 40 C.F.R. §122.23(e). As a CAFO, Moon Moo Farm must meet the permitting requirements of the NPDES program under the CWA. Because of Moon Moo Farm's practice of land application of manure, Moon Moo Farm is responsible for the discharge of pollutants into a navigable waterway. Moon Moo Farm discharges these pollutants through multiple point sources as defined in 33 U.S.C. §1362(14) and explored in *Concerned Area Residents for Environment (CARE) v. Southview Farm*, 34 F.3d 114 (2d Cir. 1994).

If this court affirms the district court's finding that Moon Moo Farm is not a CAFO, the farm is still subject to NPDES permitting requirements. Regardless of classification as a CAFO, Moon Moo Farm continually discharges pollutants into a navigable waterway and regardless of the amount of rainfall received. Moon Moo Farm is too large an operation to continue to be classified as a no-discharge facility and should be required to submit a revised NMP in keeping with its categorization as a CAFO.

The manure and acid whey Moon Moo Farm is applying to land constitute solid wastes subject to regulation under RCRA. Defendant is in violation of the EPA regulations prohibiting the open dumping of solid wastes. The argument that these materials are exempt is not persuasive because the quantity and quality of the materials are detrimental to the crop on which they are applied. Furthermore, Defendant has contributed or is contributing to the handling, storage, treatment, transportation, or disposal of any solid waste which may present an imminent and substantial endangerment to human health. Specifically, the manner in which Defendant

applies the manure and acid whey creates a threat of high nitrate levels, endangering the infants of Farmville.

ARGUMENT

I. The public has a public right of navigation through Queechunk Canal.

The boundaries of a state's public trust in navigability, fishing, or recreation does not depend on the state maintaining ownership of the riverbed. Rather, the power to determine the extent of a public trust derives from a state's sovereignty over the land within its borders. In *PPL Montana, LLC v. Montana*, the Supreme Court noted that "[t]he public trust doctrine is of ancient origin." 132 S. Ct. 1215, 1234 (2012). "[I]ts principles can be found in English common law on public navigation and fishing rights over tidal lands and in the state laws of this country." *Id.* In *PPL Montana*, the State of Montana argued that denying the state title to the riverbed would "undermine" public trust access the water above the riverbed for purposes of navigation, fishing, and recreation. *Id.* That is not so; the Supreme Court held that the public trust in navigation, fishing, and recreation does not depend on title. *Id.* at 1235.

The Supreme Court noted that the public right to access to navigable water was recognized by English Common law. "[T]he public retained the right of water passage" in waters classified as "public highways" even though title to the riverbed was private. *Id.* at 1227. The public also had a navigation right to waters subject to the ebb and flow of the tide. *Id.* In both kinds of waterways, the public retained the right of navigation. *Id.* The same background principles of the public trust apply to states today. The Supreme Court affirmed that states retain the ability to maintain a public trust right to navigable waterways regardless of who owns the riverbed. "Under accepted principles of federalism, the States retain residual power to determine the scope of the public trust over waters within their borders…." *Id.* at 1235.

The Supreme Court's prior statements in *Illinois Central Railroad Company v. Illinois* regarding the background principles of the public trust are applicable to the case at hand. Mainly, that the public trust, which in that case referred to the public trust in submerged lands beneath navigable waters, is part of the people's "inherent sovereignty." *Illinois Central*, 146 U.S. 387, 459 (1892). Although, the Supreme Court reiterated in *PPL Montana* that *Illinois Central* "was necessarily a statement of Illinois law," that can only be true to the extent that *Illinois* central described the scope of Illinois' public trust, not the Court's statements regarding the source of the public trust. *PPL Montana*, 132 S. Ct. at 1235. Absent a statement from the New Union state courts restricting the scope of the public right of passage though navigable waters, the background scope of the common law public trust applies. Just as the public trust right in submerged land is inherent to the people's sovereignty, so too is the right of passage through navigable waterways, regardless of the artificiality of their channels.

II. The Fourth Amendment proscribes government action, not private action, and for that reason, evidence obtained by Mr. James should not have been excluded.

Evidence of Moon Moo's stormwater discharges obtained by Mr. James on April 12, 2013 is admissible. Mr. James' actions did not violate Moon Moo's Fourth Amendment rights, and for that reason, the evidence should not have been excluded. The Fourth Amendment provides people the right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. The Fourth Amendment protects against searches and seizures by government actors, not private actors like Mr. James. *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921). The Amendment's protection "is wholly inapplicable to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984) (internal quotations and citations omitted).

A. Mr. James did not act as a government agent, and had he acted as a government agent his actions did not violate Moon Moo's Fourth Amendment rights.

The district court described Mr. James' actions on April 12, 2013 as a "private act of trespass," in other words, not a government action. Discovery did not reveal any evidence that EPA officials participated in or had knowledge of Mr. James' actions prior to Riverwatcher's service of its letter of intent to sue. The Fourth Amendment does not prevent the government from using evidence obtained illegally by private individuals. *See e.g. Jacobsen*, 466 U.S. at 114-115. Even if Moon Moo could show that Mr. James was acting as an agent of the government when he discovered the source of the pollution, Mr. James' actions did not violate Moon Moo's Fourth Amendment rights.

B. Fourth Amendment protections do not apply to open fields.

Assuming for the sake of argument that Mr. James, acting as a government agent, trespassed on Moon Moo's property, the alleged trespass occurred over Moon Moo's "open fields." By its own language, the Fourth Amendment protections do not apply to open fields. *Oliver v. United States*, 466 U.S. 170, 176 (1984). "[The] special protection accorded […] to people in their 'persons, houses, papers, and effects' is not extended to the open fields." *Id.* (quoting *Hester v. United States*, 265 U.S. 57, 59 (1924)). Although an intrusion onto an open field "was trespass at common law," an open field "is not one of those protected areas enumerated in the Fourth Amendment." *United States v. Jones*, 132 S. Ct. 945, 953 (2012). It is neither a "home" nor an "effect." *Oliver*, at 176-77, 180. Therefore, entering an "open field" without a warrant is not an unreasonable search proscribed by the Fourth Amendment. *Oliver*, 466 U.S. 170.

There are two ways to effectuate a search under the Fourth Amendment: through trespass, by "physically occup[ying] private property for the purpose of obtaining information," or by

infringing upon an expectation of privacy that "society recognizes as reasonable." *Jones*, 132 at 949; *Katz v. United States*, 389 U.S. 347, 361 (1967). Neither concern applies to open fields. *Oliver*, at 176-77, 179, 181. First, trespass on open fields, which courts distinguish from trespass on curtilage, the land immediately surrounding a home, does not constitute a Fourth Amendment search. *Oliver*, at 180; *Jones*, at 953, n.8. Second, people do not have a legitimate or reasonable expectation of privacy in their fields. *Oliver*, at 177-181. Despite fences and "no trespassing signs," fields exist entirely within the public's view because they can be surveyed from the air. *Oliver*, at 179. Unlike homes and curtilage, fields are not associated with the intimacy and sanctity of private life. *See Oliver* at 180. Moreover, "[t]here is no societal interest in protecting the privacy of those activities, such as the cultivation of crops that occur in open fields." *Oliver*, at 179.

C. Mr. James' alleged trespass of Moon Moo Farm's property occurred in an open field where Moon Moo Farm did not have a reasonable expectation of privacy.

Like the warrantless searches described in *Oliver*, Mr. James' warrantless search from the canal did not violate Moon Moo's Fourth Amendment rights. From his boat, located in the canal separating two fields, Mr. James observed and photographed Moon Moo's manure spreading operation as well as turbid brown water flowing off Moon Moo's fields, through a ditch, and into the canal. The fact that Mr. James floated over Moon Moo's property in a boat, instead of walking along a footpath or road, like the police officers in *Oliver*, makes no difference. *See Oliver*, at 173-74. The canal in this case and the pathways in *Oliver* overlay and cut through open fields. In these circumstances, they occupy an area of land distinguishable from curtilage and one not enumerated in the Fourth Amendment. *Oliver*, at 180; *Jones*, at 953, n.8.

Finally, Moon Moo's "no trespassing" signs do not create an expectation of privacy that society recognizes as reasonable. The fact that one landowner in *Oliver* "had posted 'No

Trespassing' signs at regular intervals," did not change the outcome in that case. *Oliver*, at 173, 179. Signs may prevent trespass, but they do not prevent public viewing and therefore do no create a legitimate privacy interest. *See Oliver*, at 179. Mr. James' presence in the canal did not trespass on an area of property or infringe upon a reasonable expectation of privacy protected by the Fourth Amendment. For this reason, the evidence obtained through Mr. James' observations and photographs should not be excluded.

D. Mr. James' collection of water coming out of the ditch was not an unreasonable seizure.

There are two reasons why Mr. James' collection of a sample of water flowing from the ditch into the canal is not an unreasonable seizure. First, the water sampled by Mr. James was evidence of a violation in plain view. "Law enforcement officers may seize evidence in plain view, provided that they have not violated the Fourth Amendment in arriving at the spot from which the observation… is made." *Kentucky v. King*, 131 S. Ct. 1849, 1858 (2011). "A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." *Jacobsen*, 466 U.S. at 113.

The circumstances leading up to Mr. James' collection of the water sample presented the prima facie case of a Clean Water Act violation—the discharge of pollutants from a point source into waters of the United States. Mr. James was aware of the nitrate advisory, he was aware of the recent rainfall event, and he could see Moon Moo's manure spreading operations. Under these circumstances, the "incriminating character" of the brown water flowing off Moon Moo's fields, through the ditch, and into the canal was "immediately apparent." *Horton v. California*, 496 U.S. 128, 136-37 (1990). At the very least, Mr. James had probable cause to believe that the water flowing from the ditch violated the Clean Water Act. *See Minnesota v. Dickerson*, 508

U.S. 366, 375 (1993). Under the plain view doctrine, Mr. James' seizure of the water sample did not violate Moon Moo's Fourth Amendment rights.

The second reason the seizure did not violate Moon Moo's Fourth Amendment rights was that the impact was *de minimis*. *See e.g. Jacobsen*, 466 U.S. at 125. The intrusion on Moon Moo's possessory interests in the sampled water was minimal, and similar the destruction of a trace amount of contraband in *Jacobsen*, the intrusion "appears to have gone unnoticed." 466 U.S. at 125. Mr. James' act of collecting a sample of water moments before it mixed with the waters in the canal had at most a *de minimis* effect on Moon Moo's fleeting possessory interest. Moon Moo was not and would not be putting the water flowing out of the ditch to any beneficial use. Like the defendant in California v. Greenwood who placed his trash on the curb, and the search and seizure of the trash was not unreasonable, Moon Moo was similarly diverting its water off fields for disposal. 486 U.S. 35 (1988). The water was flowing irretrievably out of the ditch and into the public waters flowing through the canal.

III. Moon Moo Farm requires a permit under the CWA NPDES permitting program.

The NPDES permitting program requires Moon Moo Farm to obtain a permit to discharge waste into waters of the United States. 33 U.S.C. §1342(a); 40 C.F.R. §122.23(e). According to §1342(a)(1), the Administrator of the EPA may issue a permit for the "discharge of any pollutant, or combination of pollutants." An exemption is provided under this statute for agricultural return flows. *Id*. at §1342(l)(1). Moon Moo Farm's discharge of pollutants is not exempted under the agricultural return flows provision.

A. Moon Moo Farm requires a permit under the NPDES permitting requirements because it is a CAFO.

In order to be considered a CAFO, Moon Moo Farm must meet the statutory requirements of 40 C.F.R. §122.23(b)(6). Moon Moo Farm is an CAFO because it is a facility

where animals have been confined and fed for 45 days or more in any 12-month period. 40 C.F.R. §122.23(b)(1)(i). Moon Moo Farm also qualifies as a Medium CAFO according to 40 C.F.R. §122.23(b)(6) because the facility houses between 200 and 699 dairy cows and at least one of the following conditions are met:

> (A) Pollutants are discharged into waters of the United States through a man-made ditch, flushing system, or other similar man-made device; or (B) Pollutants are discharged directly into waters of the United States which originate outside of and pass over, across, or through the facility or otherwise come into direct contact with the animals confined in the operation.

40 C.F.R. §122.23(b)(6). Moon Moo Farm meets the above requirements. Moon Moo Farm currently houses 350 milk cows and the drainage ditch running into the Queechunk Canal, and subsequently the Deep Quod River, is a man-made ditch or similar flushing system.

Discharge of pollutants into waters of the United States due to land application by CAFOs are subject to NPDES permitting requirements. 40 C.F.R. §122.23(e). The rule provides that "all land application discharges from a CAFO are subject to NPDES requirements, i.e., any discharge of manure, litter, or process wastewater that results from the land application of these materials by a CAFO is a discharge that is regulable and subject to NPDES permitting requirements." *Waterkeeper Alliance, Inc.*, 399 F.3d 486 (2d Cir. 2005). (citing 40 C.F.R. §122.23(e)). In *Waterkeeper*, petitioners on behalf of multiple farmers challenged the constitutionality of the NPDES permitting scheme in place until 2003. *Id*. at The NPDES permitting scheme in place at that time required all CAFOs to apply for a NPDES permit or affirmatively demonstrate their operation had no discharge potential. *Id*. at The court in *Waterkeeper* agreed this requirement was unconstitutional because it imposed obligations on all CAFOs regardless of whether they contributed pollutants to waters of the United States. *Id*. at 504. The court also upheld, however, the authority of the EPA to regulate the discharge of pollutants into the waters of the United States through the NPDES scheme. *Id*. Furthermore, the

court noted that there is little room to dispute the Congressional intent behind the term "discharge of pollutant." *Id*.

> The Act expressly defines the term to mean '(A) any addition of any pollutant to navigable waters from any point source'…Thus, in the absence of an actual addition of any pollutant to navigable waters from any point, there is no point source discharge, no statutory violation, no statutory obligation of point sources to comply with EPA regulations for point source discharges, and no statutory obligation of point sources to seek or obtain an NPDES permit in the first instance.

Id. at 504-505. In the case before the court today, however, Moon Moo Farm maintains a point source that continually discharges pollutants into waters of the United States and is therefore subject to NPDES permitting requirements.

Moon Moo Farm is subject to the NPDES permitting requirements because the farm maintains at least two point sources: (a) the ditch leading into the Queechunk Canal and later, the Deep Quod River from the farm's property, and (b) the tractors used to spread manure over the farm's fields. The CWA defines point source to mean "any discernible, confined and discrete conveyance…from which pollutants are or may be discharged." 33 U.S.C. 1362(14). This definition includes both ditches and CAFOs through which waste is discharged. *Id*. Under this definition, the man-made ditch extending from Moon Moo Farm into the Queechunk Canal is considered a point source through which pollutants enter waters of the United States.

In addition to the man-made ditch extending from the farm, the tractors that are used to spread the liquid manure over the farm's crops are also considered a point source. The court previously found manure-spreading vehicles to qualify under the point source definition. *Concerned Area Residents for Environment (CARE) v. Southview Farm*, 34 F.3d 114, 119 (2d Cir. 1994). In *CARE*, the Defendants engaged in a process of collecting manure in several onsite lagoons and loaded the liquid manure into vehicles to spread across the farm's crops. *Id*. at 116. The court found that "[t]he collection of liquid manure into tankers and their discharge on fields

from which the manure directly flows into navigable waters are point source discharges under the case law." *Id*. at 119. (citing *U.S. v. Tull*, 615 F. Supp 610, 622 (E.D. Va. 1983)). Similarly, the tractors spreading manure on Moon Moo Farm's crops are considered a second point source maintained by Moon Moo Farm.

B. If Moon Moo Farm is not considered a CAFO, it is still subject to NPDES permitting requirements because excess nutrient discharges remove it from the agricultural stormwater exemption.

Moon Moo Farm, regardless of its status as a CAFO, empties pollutants into the waters of the United States through a point source. A pollutant is defined as "solid waste, …sewage, …biological materials…and agricultural waste discharged into water." 33 U.S.C. §1362(6). In the case at bar, this includes manure. The Supreme Court ruled that "[t]he [Clean Water] Act generally prohibits discharge of effluent into a navigable body of water unless the point source obtains a National Pollution Discharge Elimination System (NPDES) permit from a State with an EPA-approved permit program or from the EPA itself." *Arkansas v. Oklahoma*, 112 S.Ct. 1046, 1049 (U.S. 1992). *Arkansas* involved a claim by Oklahoma against the state of Arkansas due to the discharge of a sewage treatment plant flowing upstream to reach Oklahoma. *Id*. Although *Arkansas* does not concern an agriculture-related issue, the case does reinforce the authority of the state to require permits for facilities that affect state water quality standards. *Id*.

The pollutants entering the Deep Quod River from Moon Moo Farm are discharged into waters of the United States regardless of the rainfall amounts experienced. The court previously found that "while [33 U.S.C. §1362(14)] does include an exception for 'agricultural stormwater discharges,' there can be no escape from liability for agricultural pollution simply because it occurs on rainy days." *CARE v. Southview Farm*, 34 F.3d 114, 120 (2d Cir. 1994). In *CARE*, Plaintiffs filed suit against Southview Farm after they identified liquid manure discharges from

the farm's fields on three different days, two days during which the farm received heavy rainfall. *Id*. The court acknowledged that all discharges are mixed with precipitation run-off in ditches or streams at some point and that "the fact that discharge might have been mixed with run-off cannot be determinative. *Id*. at 121. The court found that the district court jury was correct in finding the polluted run-off in *CARE* was "primarily caused by the over-saturation of the fields rather than the rain and that sufficient quantities of manure were present so that the run-off could not be classified as stormwater." *Id*. at 121. In the case at bar, the discharge of pollutants into waters of the United States was similarly caused because the fields were over-saturated with manure. The discharge was not resultant from a rainfall event.

Plaintiffs complied with the requirements of no-discharge AFOs in that they submitted a NMP exempting them from permitting requirements due to the agricultural stormwater exemption. Classification as a no-discharge facility indicates that Moon Moo Farm alleges it does not discharge pollutants from their facility into waters of the United States. Moon Moo Farm maintains that pollutants may possibly run-off their property during a 25-year rainfall (a rainfall event that statistically is expected to occur no more frequently than once every twenty-five years). R. at 5. The rain event during which the samples were collected from the point where the ditch water meets the Queechunk Canal yielded two inches of rain—far short of the five inches required to be considered a 25-year rainfall event. First, this indicates that Moon Moo Farm's fields are far more saturated with the manure mixture than their NMP accounts for because they release pollutants into the Deep Quod River with rainfall much lower than the 25-year event. Second, Moon Moo Farm has submitted a NMP compliant with their status as a "no-discharge" operation. Moon Moo Farm has failed, however, to consider their status as a Medium CAFO, requiring a new NMP.

IV. Moon Moo Farm is subject to a citizen suit under RCRA because its land application of manure and acid whey constitutes a solid waste.

The Resource Conservation and Recovery Act (RCRA) governs the standards for the management of solid and hazardous waste. The provisions of RCRA can be enforced by citizen suit. 42 U.S.C. § 6972. Under the citizen suit enforcement provision of RCRA, Riverwatcher must prove that 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." 42 U.S.C. § 6972(a)(1)(B). There are several elements to this statute. The first is whether Defendant is engaged in handling, storage, treatment, transportation, or disposal of the material in question. The second element is whether the material can be qualified as either a solid waste or a hazardous waste. The third and final element is, if the first two elements are met, does the manner in which Defendant managed the material present a possible imminent and substantial endangerment to health or the environment.

A. The manure and whey mixture was placed on land where it may enter water and is therefore a disposal.

Under RCRA, 'disposal' is defined as,

> 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.

42 U.S.C. § 6903(3). Defendant does not dispute that it placed a manure and acid whey mixture on land in a place where it could have, and did, enter water. Therefore, the question is whether the material that was placed was a solid or hazardous waste.

B. The manure and acid whey mixture constitutes a solid waste.

Riverwatcher does not assert that the manure and acid whey mixture is hazardous. Therefore, the only question related to this factor is whether the mixture is a solid waste within the meaning of RCRA. The definition of 'solid waste' in RCRA includes, in relevant part,

> …other discarded material…including solid, liquid, semisolid…material resulting from…agricultural operations…but does not include solid or dissolved material in…irrigation flows or industrial discharges which are point sources subject to permits under section 1342 of Title 33.

42 U.S.C. § 6903(27). If Moon Moo Farm is not subject to a NPDES permit, because the material in question is a solid waste subject to regulation, Defendant has violated RCRA. In order to determine whether the material in question is a solid waste, we must determine whether it is "discarded material".

i. The manure and whey mixture was discarded material because it was not destined for beneficial reuse in a continuous process, it was not actually being used for the purported purpose, and some of the material was coming from sources other than the original owner of the material.

'Discarded material' is not defined by statute in RCRA. However, the Ninth Circuit Court has used the ordinary or natural meaning of 'discard' to mean "cast aside; reject; abandon; give up." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1041 (9th Cir. 2004) (quoting 1 The New Shorter Oxford English Dictionary 684 (4th ed. 1993)); s*ee also Am. Mining Cong. v. U.S. EPA*, 824 F.2d 1177, 1184 (D.C. Cir. 1987) (defining "discarded" as "'disposed of,' 'thrown away' or 'abandoned'" (citation omitted)). In order to determine whether the material in that case was discarded, the court analyzed three factors.

1. The manure and whey mixture is not destined for a beneficial reuse in a continuous process and therefore is discarded.

The first factor the court analyzed was whether the material is destined for a beneficial reuse in a continuous process by the generating industry itself. *Safe Air for Everyone v. Meyer*,

373 F.3d at 1043. In *Safe Air for Everyone*, the material in question was grass residue that was being burned. Plaintiffs in that case alleged that burning the grass was a disposal, while Defendant argues that the burning process yielded benefits to their crops. *Id*. at 1043-1044. The court held that because the Defendant was reusing "the grass residue in a continuous farming process effectively designed to produce Kentucky bluegrass," the residue "is not discarded, abandoned, or given up, and it does not qualify as "solid waste" under RCRA." *Id.* at 1045.

However, unlike the continuous process the Kentucky bluegrass farmers employed, here the manure and whey product are not part of the generating industry. The acid whey is generated from a yogurt processing facility in Farmville. The acid whey is then shipped to Moon Moo Farm, mixed with the manure in lagoons, and ultimately discarded on the Moon Moo Farm's fields. While Moon Moo Farm provides milk to the yogurt factory, discarding the acid whey on the grazing fields is too far attenuated to be considered part of the continuous process of making yogurt. Additionally, while application of acid whey is a traditional practice in New Union, there is evidence that it prevents the Bermuda grass from effectively taking up nutrients in the manure. The farmers in *Safe Air for Everyone* burned the grass residue because it was beneficial to their industry, whereas applying acid whey to Bermuda grass fields negatively impacts the grazing crop. Less silage means less food for the dairy cows of Moon Moo Farm. Further, because Moon Moo Farm is a dairy farm, not a yogurt processing facility, applying yogurt waste to the grazing fields is not part of a continuous process of making milk. Therefore, this factor weighs in favor of characterizing the practice of applying manure and acid whey as discarding or abandoning that material.

2. The manure portion of the mixture is not actually being used and is instead functionally being stored on the fields.

The second factor that the court in *Safe Air for Everyone* considered was whether the material in question was actually being used, or whether it was being stored for potential reuse. *Safe Air for Everyone*, 373 F.3d at 1045. The court held that because the grass farmers were using the grass residue "to provide nutrients and to act as a fire accelerant for open burning" and that the grass was not "being kept in storage for potential reuse," this factor weighed against considering the practice as discarding.

Here, the acid whey and manure combination purportedly functions as a fertilizer. However, the acidity of the yogurt waste limits the ability of the Bermuda grass to uptake nutrients from the manure. Therefore the manure that is spread on the field is not being used for its intended purpose, and instead is practically functioning as a storage space for an unwanted waste. While the manure has a potential to fertilize, the addition of the acid whey prevents that use. Therefore, applying the combination of the acid whey and manure to the fields is not an actual reuse of either material. Thus, this factor weighs in favor of characterizing the application of acid whey and manure to the fields as discarding the materials.

3. The acid whey is not being used by its original owners

In *Safe Air for Everyone*, the farmers who were allegedly discarding grass residue were also the farmers who grew and generated the grass residue. The residue was a direct byproduct of the Kentucky bluegrass harvesting process. *Safe Air for Everyone v. Meyer*, 373 F.3d at 1037.

Unlike *Safe Air for Everyone*, the acid whey is a byproduct from the yogurt processing facility in Farmville. It is true that Moon Moo Farm produces milk for the yogurt facility, but this exchange creates a separation that did not exist in *Safe Air for Everyone*. In that case, the farmers were reusing a product they created as a result of harvesting their main crop. Acid

yogurt whey is not a natural byproduct of a dairy farm. When the whey is given to Moon Moo Farm, the intention is to remove it from the yogurt facility, which no longer has a use for it. Thus, this factor weighs in favor of characterizing the process of applying acid whey to farmland as discarding the material.

ii. The manure and acid whey mixture was discarded because the over-application of the material negated any beneficial purpose the material might have had.

In a case very similar to the one at bar, the court was not willing to accept the argument that "manure that was initially intended to be used as fertilizer can *never* become "discarded" merely because it is "unintentionally" leaked or over-applied." *Cmty. Ass'n for Restoration of the Env't, Inc. v. George & Margaret LLC*, 954 F.Supp. 2d 1151, 1158 (E.D. Wash. 2013). In another similar case, the court refused to accept that manure cannot be RCRA "solid waste" because it is used as fertilizer. *Water Keeper Alliance, Inc. v. Smithfield Foods, Inc.*, 2001 WL 1715730 at *4-5 (E.D.N.C Sept. 20, 2001). Instead, the court found that "[t]he question of whether defendant returns animal waste to the soil for fertilization purposes or instead apply waste in such large quantities that its usefulness as organic fertilizer is eliminated as a question of fact." *Id.*

Here, the lower court held that "EPA regulations specifically exclude land application of agricultural products from regulation as an open dump." *Deep Quod Riverwatcher, Inc. v. Moon Moo Farm, Inc.*, 155-CV-2014, at 11 (District of N.U. 2014) citing 40 C.F.R. § 257.1(c)(1). The court continued, stating that "[b]oth manure and whey are agricultural wastes that are being returned to the soil as fertilizer and soil conditioners." *Id.* However, *Cmty. Ass'n for Restoration of the Env't, Inc.* and *Water Keeper Alliance, Inc.* indicate that a soil conditioner or fertilizer can lose its exemption under 40 C.F.R. § 257.1(c)(1) if it is over-applied. The evidence in the record shows that the combination of manure and acid whey result in the inability of the grass to take up

the nutrients from the manure. The manure thus loses its character as a fertilizer, because it is prevent from providing nutrients to the grass by the acidity of the whey. Additionally, due to the effect of the whey on the manure, and the low pH levels found on the farm, the whey is not necessary as a soil conditioner. At the very least, the court erred in not considering the quantity and effects the combination of the two materials have on the crop they are intended to aid.

The manure and acid whey being placed on Moon Moo Farm's grazing lands is discarded for the reasons discussed above. Because the materials are discarded, they should be considered "solid waste" for the purposes of RCRA. The materials do not qualify for the exemption under 40 C.F.R. § 257.1(c)(1) because they are over-applied and do not impart any beneficial effects to the lands they are intended to benefit. As such, Defendant has violated the open dumping prohibitions of RCRA.

II. Application of the solid wastes to Moon Moo Farm may present an imminent and substantial endangerment to health or the environment.

Defendant Moon Moo Farm, by applying solid wastes to its land, has contributed to conditions that may present an imminent and substantial endangerment to health or the environment. In order to satisfy the provisions of the citizen suit provision of Section 7003 of RCRA, Riverwatcher will need to demonstrate three basic requirements: (1) there are conditions which may present an imminent and substantial endangerment to health or the environment; (2) the potential endangerment stems from the past or present handling, storage, treatment, transportation, or disposal of any solid waste; and (3) Defendant has contributed or is contributing to (2). 42 U.S.C. § 6972(a)(1)(B).

A. "Imminent and Substantial Endangerment" is broadly defined.

The language of Section 7003 of RCRA "should be construed in a liberal, rather than restrictive, manner." *U.S. v. Valentine*, 856 F.Supp. 621, 626 (D. Wyo. 1994). The court there held that in

order to take action under Section 7003, EPA only needs to show that "there *may* be 'an imminent and substantial endangerment.'" *Id.* (emphasis in original) (internal citations omitted). Further, "[e]ndangerment need be neither immediate nor tantamount to an emergency to be imminent and warrant relief." *Id.* citing *U.S. v. Waste Indus., Inc.*, 734 F.2d 159, 165 (4th Cir. 1984). If there are factors giving rise to the harm are present, the endangerment is considered imminent. *Id.* The endangerment must be substantial. *Id.*

In this case, the threat of nitrates contaminating drinking water for citizens of Farmville is real. While the nitrates do not affect adults or juveniles, the threat to infants is substantial. The over-application of manure creates an ever-present threat of contamination. The court mistakenly reasons that because household administer bottled water to infants, there is no imminent and substantial endangerment to human health. However, the court errs in its application of the law. The case law is clear that no actual harm need occur in order for there to be an imminent and substantial endangerment. Rather, the law must be read liberally. If there is a chance of imminent and substantial endangerment, then the citizen suit to enforce the provisions of RCRA which would prevent the endangerment is appropriate. It is possible that a household with an infant could not receive a warning about elevated nitrate levels in the drinking water and provide harmful water to their child. This is precisely the scenario RCRA was meant to prevent.

B. Moon Moo Farm need not be the "but-for" cause of the nitrate advisories in order to cause an imminent and substantial endangerment.

The second and third conditions Riverwatcher must prove under the citizen suit provision of RCRA are that the potential endangerment stems from the handling, storage, treatment, transportation, or disposal of solid waste and that Moon Moo Farm has contributed or is contributing to that handling, storage, treatment, transportation, or disposal. RCRA does not

require "but-for" proof of the imminent and substantial endangerment. In fact, neither certainty nor proof of actual harm is required, only a risk of harm. *See Dague, v. City of Burlington*, 935 F.2d 1343, 1356 (2nd Cir. 1991).

As discussed above, Moon Moo Farm has contributed to the handling, storage, treatment, transportation, or disposal of solid waste in the form of manure and acid whey. The potential endangerment that stems from the management of the manure and acid whey is the likelihood of the nitrate-rich materials entering the waters of the Deep Quod River via the Queechunk Canal. Moon Moo Farm, by applying the manure and acid whey to the farm land adjacent to the waters above, have created conditions which may present a risk of harm to human health. The lower court's reasoning that because Riverwatcher could not prove that Defendant was the "but-for" cause of the contamination no imminent and substantial endangerment exists is flawed. The court relies on *Davies v. Nat'l Co-op. Refinery Ass'n*, 963 F.Supp. 990 (D. Kan. 1997), and reasons that providing bottled water in that case was equitable, so therefore, it must be here as well. The cases are distinguishable because in *Davies* the threat of exposure to the hazard was limited to a single building and property. In the present case, the contamination can spread to an entire city. The scale of these issues alone is enough to distinguish the two cases. The court in *Davies* even highlighted this point by stressing that it would take approximately 100 years for the plume of groundwater contamination to reach the nearest city. *Id.*at 999. Moon Moo Farm's contamination could reach the city of Farmville in a much shorter time.

For the foregoing reasons, the over-application of manure and acid whey to Moon Moo Farm's grazing lands bordering the Queechunk Canal and Deep Quod River may present an imminent and substantial endangerment to human health.

CONCLUSION

For the foregoing reasons, Riverwatcher asks this court to reverse the lower court's decision granting summary judgment in favor of defendant Moon Moo Farm. This court should reverse the district's holdings and find that defendant Moon Moo Farm is a CAFO subject to permitting under the NPDES permit program; evidence of Moon Moo Farm's discharge was not obtained by trespass and such evidence is admissible in a civil enforcement proceeding; discharges from Moon Moo Farm's fields do not fall under the agricultural storm water exemption of the CWA; and Moon Moo Farm engaged in open dumping and is subject to open dumping and imminent and substantial endangerment claims under RCRA. In addition, Riverwatcher asks this court to reverse the district court's award of damages to Moon Moo Farm on the basis of their counterclaim.