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

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STATEMENT OF JURISDICTION

The district court had jurisdiction over this case pursuant to 42 U.S.C. § 6972(a)(2) (2012). Jurisdiction of this Court is invoked under 28 U.S.C. § 1291 (2012), as an appeal from a final decision of the United States District Court for New Union. The district court entered a final judgment in this matter on April 21, 2014. Notice of appeal was timely filed in accordance with Rule 4(b) of the Federal Rules of Appellate Procedure on September 15, 2014.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Under the Public Trust Doctrine, is a canal a navigable body of water, when it connects to a river which flows year round into a navigable-in-fact interstate river used for commercial navigation, and is deep and wide enough to be travelled upon by canoe and other small boat?

II. Is evidence admissible in a civil enforcement proceeding when the officer who effected the search and seizure, has no duty, responsibility nor any agreement to the agency seeking to initiate the proceedings, and where the exclusion of the evidence would result in the continuation of polluting a city's drinking water with hazardous cow manure?

III. Is Moon Moo Farm a concentrated animal feeding operation, or CAFO, given that it meets the requisite type and number of stabled animals of a CAFO, and that it discharges pollutants into a navigable body of water?

IV. If not classified as a CAFO, is Moon Moo Farm exempted from National Pollutant Discharge Elimination System, or NPDES, permitting if it discharged excess nutrients from its Bermuda grass fields only during a significant rainfall event in accordance with the Nutrient Management Plan issued to it by the State of New Union?

V. Is Moon Moo Farm's fertilizer and soil amendment a solid waste subject to regulation under RCRA Subtitle D prohibiting the reuse of a discarded byproduct, given that agricultural wastes are explicitly exempted from Subtitle D regulation?

VI. Is Moon Moo Farm is subject to a citizen suit under RCRA because its waste management presents an imminent and substantial endangerment to health or the environment?

STATEMENT OF THE CASE

A. Proceedings Below

This is an appeal from a judgment issued by the United States District Court for the District of New Union. Moon Moo Farm, the defendant-appellee, was charged with violating the permitting requirements of the Clean Water Act. (R. at 4.) Deep Quod Riverwatcher, an environmental organization, intervened as a plaintiff and alleged additional charges under the citizen suit provision of the Resource Conservation and Recovery Act (RCRA). (R. at 7.) On April 21, 2014, the district court granted Moon Moo Farm's motion for summary judgment on all claims. (R. at 12.) The United States of America, on behalf of the Environmental Protection Agency (EPA), now appeals the district court's order and respectfully requests that this Court reverse the district court's judgments.

B. Statement of the Facts

Moon Moo Farm operates a dairy farm with 350 head of milk cows, which are housed in a barn, and not pastured. (R. at 4.) Moon Moo Farm is 10 miles from the City of Farmville in the State of New Union. (R. at 5.) Manure and liquid waste from the cows is collected through a series of drains and pipes from the cow barn and run to an outdoor "manure lagoon" that is designed not to overflow during a 25-year "rainfall event" (that is, a rainfall event that statistically is expected to occur no more frequently than once every twenty five years; defined as 5 inches of rainfall in one 24 hour period). (R. at 4-5.) The liquid manure in the lagoon is periodically pumped from the lagoon into tank trailers and spread across 150 acres of fields where Moon Moo Farm grows Bermuda grass to be dried and harvested each summer as Sileage. (R. at 5.) In 2010, Moon Moo Farm increased the number of cows at its operation from 170 to the current 350 in order to serve the growing demand for milk for Greek yogurt production at the

Chokos Greek Yogurt ("Chokos") processing facility in Farmville. (R. at 5.) During the past two years (since 2012), Moon Moo Farm has accepted acid whey produced by the Chokos plant, which it has added to its manure lagoons and included in the mixture sprayed on its fields. (R. at 5.)

Moon Moo Farm, together with the aforementioned 150 acres of fields used to grow Bermuda grass, is located at a bend in the course of the Deep Quod River (hereinafter "the River") known as the Queechunk Canal ("the Canal"). (R. at 5). The Canal was excavated as a bypass canal in the Deep Quod River in order to alleviate flooding at the river bend by a previous owner of the farm facility during the 1940s. (R. at 5). The Canal is fifty yards wide, three to four feet deep, can be navigated by canoe or small boat, and carries most of the flow of the River. (R. at 5.) The Canal is commonly used as a shortcut up and down the River. (R. at 5.) The River flows year round and runs into the Mississippi River. (R. at 5.) The Mississippi is a navigable-in-fact interstate body of water that has long been used for commercial navigation. (R. at 5.) Downstream of Moon Moo Farm, the community of Farmville uses the River as a drinking water source. (R. at 5.)

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

issued to the National Pollutant Discharge Elimination System ("NPDES") permitting system administered under Clean Water Act § 402. (R. at 5-6.)

In the late winter and early spring of 2013, Deep Quod Riverwatcher received complaints that the Deep Quod River smelled of manure and was an unusually turbid brown color. (R. at 6.) In addition, the Farmville Water Authority issued a "nitrate" advisory for its drinking water customers, warning them that high levels of nitrates in the Deep Quod River made the Farmville municipal water supply unsafe for drinking by infants. (R. at 6.) In response to these complaints, James, the Deep Quod "Riverwatcher," made an investigatory patrol of the Deep Quod River in a small metal outboard craft known as a "jon boat" on April 12, 2013. (R. at 6.). James took samples of the water flowing from the ditch and later had them tested by a water-testing laboratory. (R. at 6.) The test results showed highly elevated levels of nitrates and fecal coliforms. (R. at 6.)

Riverwatcher has submitted an affidavit of Dr. Ella Mae ("Dr. Mae"), an agronomist, stating that that the lowered pH of the liquid manure resulted from adding acid whey from the Chokos plant lowered the pH of the soil. (R. at 6.) Based on tests of the liquid manure/whey combination obtained during discovery, Dr. Mae determined that the pH of the mixture was 6.1, a weak acid. (R. at 6.) According to Dr. Mae, this acidity prevented the Bermuda grass crop from effectively taking up the nutrients in the manure. (R. at 6.) According to Dr. Mae, these unprocessed nutrients were then released to the environment, including the River, by leaching into groundwater and through runoff during rain events. (R. at 6.) Dr. Mae also opined that land application of manure during a rain event is a very poor management practice and will nearly always result in excess runoff of nutrients from fields. (R. at 6.)

Moon Moo Farm's expert agronomist, Dr. Emmet Green ("Dr. Green"), submitted an affidavit that did not dispute that the acid whey reduced soil pH and reduced nitrogen uptake by the Bermuda Grass. (R. at 6.) Dr. Green opined, however, that land application of whey as a soil conditioner was a longstanding practice that has been traditional in New Union since the 1940s. (R. at 6.) Riverwatcher's environmental health expert, Dr. Susan Generis, conceded at her deposition that, although it was her opinion that Moon Moo Farm's discharges contributed to the April 2013 nitrate advisory, it was impossible to state that Moon Moo Farm was the "but for" cause. (R. at 7.)

Because the Deep Quod watershed is heavily farmed, nitrate advisories have been required in Farmville periodically in the past, and it is not disputed that such advisories were also issued in 2002, 2006, 2007, 2009, and 2010, before the increase in Moon Moo Farm's operations. (R. at 7.)

SUMMARY OF THE ARGUMENT

The Queechunk canal, a man-made body of water, is a navigable body of water because it is susceptible of being used as a highway for interstate commerce. The Queechunk canal connects with the Deep Quod River, which runs into the Mississippi River, which is a navigable-in-fact interstate body of water that is used for commercial navigation. Even more, there is actual evidence that demonstrates the Queechunk canal's 150 foot width and three-four foot depth is capable of sustaining commercial navigation, because the canal is navigable by small boat.

Additionally, the significant costs imposed on society by the exclusion of the evidence outweighs the minimal deterrent effect. Excluding the evidence in an EPA civil federal proceeding, a proceeding which a Farmville city officer has no connection with, would have very

little effect on deterring Riverwatcher's conduct. Moreover, the costs imposed on society are extremely high because excluding such evidence would not only permit the continued polluting of Farmville drinking water with cow manure, but would also even have an adverse effect on future EPA administrative proceedings.

Moon Moo Farm is a medium CAFO subject to NPDES permitting requirements. A medium CAFO is an animal feeding operation that houses between 200 and 699 mature dairy cows and discharges pollutants into a navigable body of water. Here, the district court erroneously determined that Moon Moo Farm was not a CAFO. Moon Moo Farm houses 350 heads of mature milk cows and discharged pollutants into the Queechunk Canal, which then flow into the Deep Quod River. Agricultural stormwater is a discharge of manure that occurs due to a precipitation-related event. Additionally, Moon Moo is not subject to the Agricultural Stormwater Exemption because it haphazardly applied manure to its land. When manure has been misapplied or over-applied and discharge occurs, it is not subject to the agricultural stormwater exemption. Here, Moon Moo Farm applied manure on a rainy day, thus ensuring that pollutants would be discharged from its land.

If Moon Moo Farm is not designated a CAFO, it does not require NPDES permitting because it is subject to the agricultural stormwater exemption. When manure has been applied in accordance with a NMP and rainfall-caused discharge occurs, it is subject to the agricultural stormwater exemption. Here, Moon Moo Farm submitted a NMP to the requisite authorities and applied manure to its fields at rates consistent to its plan. The discharge of pollutants from the farm into the Queechunk Canal and Deep Quod River was the result of a significant rainfall in Farmville over which the farm had no control.

RCRA is a set of rules and regulations intended to give the EPA and private citizens grounding to bring suit, and district courts to grant relief for, the abatement the improper handling, treatment and storage of hazardous or solid waste. The citizen suit provision of RCRA contemplates two types of citizen suits, the first of which implies a more stringent definition of solid waste, and the second of which is more lenient. Riverwatcher bring suit against Moon Moo Farm under the second type of citizen suit. Moreover, the plain language of the second type of citizen suit supports overturning the trial court because the it contemplates regulation of not just solid waste, but of solid or hazardous waste. Accordingly, the district court's ruling on the imminent and substantial endangerment suit claim should be overturned.

RCRA also contains a provision that prohibits the open dumping of solid waste. Jurisprudence holds that in order to be solid waste, a material must be discarded. If a material is reused it is not discarded. Some courts hold that this permits inter-industry reuse (broad interpretation), while others hold that it is restricted to reuse within the generating industry itself (narrow interpretation); however, neither the manure nor the acid whey is discarded under either interpretation. Under the narrow interpretation, Moon Moo Farm and Chockos Greek Yogurt are conceivably within the generating industry. Additionally, under a broad interpretation, inter-industry reuse is permissible. Finally, RCRA expressly excludes the reuse of agricultural waste from its open dumping regulation. Thus, the open dumping claim was properly dismissed.

ARGUMENT

I. The Evidence Collected by Riverwatcher is Admissible Because the Queechunk Canal is a Navigable Body of Water Held in Trust for the Public.

The public trust doctrine stipulates that ownership in navigable waters are to be reserved as a trust for the benefit of the whole community for common use and common navigation, rather than for purposes of private property. *Shively v. Bowlby*, 152 U.S. 1, 16 (1894). The

fundamental purpose of the public trust doctrine is to preserve navigable bodies of water for the common use for transportation. *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 487 (1988). Specifically, "waterways that are part of a navigable body of water belong to the public trust." *Id.* at 491.

In determining what constitutes a navigable body of water, the United States Supreme Court has stated that waterways are navigable in fact when they are susceptible of being used as highways for interstate commerce, when by themselves, or by uniting with other waters, form a continued highway "over which trade and travel may be conducted . . . on water." *The Daniel Ball*, 77 U.S. 557, 563 (1870). In other words, a waterway's capacity to meet the needs of commerce can be determined by the waterway's physical characteristic or by the uses to which the waterway has been put. *United States v. State of Utah*, 283 U.S. 64, 83 (1931). Thus, it is irrelevant if a waterway is "only capable of being navigated by steam or sail vessels," for the true criterion of the navigable in fact river is whether it is capable of public use for commerce and transportation, no matter how the mode, extent, and manner the commerce may be conducted. *The Montello*, 87 U.S. 430, 441 (1874). The Court has even extended its concept of "navigation in fact" to man-made bodies of water, explaining, "a waterway, otherwise suitable for navigation, is not barred from that classification merely because artificial aids must make the highway suitable for use before commercial navigation may be undertaken." *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407 (1940). The standard review for a district for a district court's legal conclusions in public trust doctrine issues is *de novo*. *State of Alaska v. United States*, 754 F.2d 851, 853 (9th Cir. 1985).

A. The Queechunk Canal is Susceptible to Public Use in Interstate Commerce Because it Unites with Other Bodies of Water that Feed into Interstate Waters.

An artificial body of water is a navigable body of water when it is a highway suitable for commercial navigation. *Appalachian Elec. Power Co.*, 311 U.S. at 407. For example, in *In re Boyer*, the Court held a canal was an artificial navigable body of water when it connected with a lake, which then in turn connected with an interstate body of water. *In re Boyer*, 109 U.S. 629, 631 (1884). There, the canal connected with Lake Michigan and the Mississippi River, an interstate river used for commercial navigation. *Id.* The Court reasoned that because the canal could be used as "a highway for commerce between ports and places in different states," it was therefore a public water of the United States. *Id.* at 632; *see also United States v. Lamastus & Associates, Inc.*, 785 F.2d 1349, 1351-53 (5th Cir. 1986) (holding a canal that connected to a lake, which then in turn connected to the Gulf of Mexico, was a navigable body of water in fact because it joined existing waterways used in interstate commerce, thereby making the canal susceptible of commercial use).

Here, the Queechunk Canal connects with a river that feeds into a navigable body water, thereby making it a suitable public highway for commerce. For instance, just as the canal in *In re Boyer*, connecting with a lake and feeding into the Mississippi River, could be used as a highway in interstate commerce, the Queechunk Canal here also, connecting to a river and feeding into the Mississippi River, can similarly be used as a highway of commerce for ports in different states as well. (R. at 5.) And further, like the canal in *Lamastus & Associates, Inc.*, which joined existing waterways used in interstate commerce, made it capable of commercial use, the Queechunk canal here also joins the Deep Quod River and Mississippi River, waterways used in interstate commerce, making the canal susceptible to commercial use as well. (R. at 5.) Therefore, the Queechunk canal is a public water because it unites with a body of water that feeds into navigable-in-fact interstate body of water.

B. The Queechunk Canal is a Navigable Body of Water Because the Depth and Width of the Water of the Canal Make it Susceptible to Commercial Use.

As long as a body of water can simply afford a channel for useful commerce, it is navigable in fact regardless of whether or not there is "an absence of occasional difficulties in navigation." *United States v. Holt State Bank*, 270 U.S. 49, 56 (1926). For example, in *Loving v. Alexander*, the United States Court of Appeals for the Fourth Circuit held that even a river that was only eighteen inches deep was still a navigable body of water. *Loving v. Alexander*, 745 F.2d 861, 867 (4th Cir. 1984). There, despite the river's shallow depth and the private ownership of the bed and banks of the river, the river nonetheless could still support log driving. *Id.* The Fourth Circuit reasoned that even though the water was shallow, the river's log floating capacity illustrated the river was physically susceptible of being used as means of commercial transportation. *Id.* The Fourth Circuit further explained that such navigability of the river meant that the public had a right to the river, with or without the permission of the private property owners of the river's bordering land. *Id.* at 868.[1]

Here, the Queechunk Canal's physical characteristics make it susceptible to carry useful transportation on its waters. Just as the Fourth Circuit in *Loving* found that an eighteen inch body of water deep enough to afford useful commercial transportation, the Queechunk canal is substantially deeper at a depth of three to four feet, indicating the canal is susceptible to even more useful commercial use as well. (R. at 5.) Moreover, just how the water's capability of useful commercial transportation in *Ne-Bo-Shone Ass'n*, precluded trespass claims of the adjacent land owners, here the Queechunk canal's susceptibility of useful commercial transportation also precludes the defendant's trespass claims as well. (R. at 5.) Just how a canal's

[1] *See also In re Boyer*, 109 U.S. at 631 (finding a canal's size of sixty feet wide was more than

sixty-foot width in *In re Boyer*, was more than capable enough to accommodate the navigation of vessels in interstate commerce, the Queechunk canal here is substantially larger here at 150 feet, making it more than capable enough to accommodate the navigation of vessels in interstate commerce as well. (R. at 5.) Even further, the Deep Quod River similar to the continuous river in *State of Wis*, equally flows year around into the Mississippi River, making it suitable to support commercial navigation. (R. at 5.) Thus, the Queechunk Canal's physical characteristics make it susceptible for commercial navigation.

C. The Queechunk Canal is a Navigable Body of Water Because it can Support the Navigation of Small Crafts and Canoes Through its Channel.

Vessels of any kind that can float upon the water can be considered in determining the navigability of a river as long as such mode of travel on water affords the channel for uses of commerce. *The Montello*, 87 U.S. at 442; *Holt State Bank*, 270 U.S. at 56. Moreover, a lack of commercial traffic is not "a bar to a conclusion of navigability where personal or private use by boats demonstrates the availability of the stream for the simpler types of commercial navigation." *Appalachian Elec. Power Co.*, 311 U.S. at 416 (1940).

For example, in *Connecticut Light & Power Co. v. Fed. Power Comm'n*, the United States Court of Appeals for the Second Circuit held that a river was navigable in fact when there was actual evidence that small boats had traversed across the waterway. *Connecticut Light & Power Co. v. Fed. Power Comm'n*, 557 F.2d 349, 354-57 (2d Cir. 1977). There, canoes and rafts had commonly travelled along the river in question. *Id.* at 354-56. The Second Circuit reasoned that because the river was capable of such navigation, it was abundantly clear that the river was "used and is suitable for transporting property in interstate . . . commerce." *Id.* at 355-58.[2]

[2] *See also Holt State Bank*, 270 U.S. 49, 56-59 (1926) (holding a three-six foot body of water, which connected to a river, and travelled upon by small boat, was a navigable body of

In this case, there is actual evidence that the Queechunk canal can be navigated by small boat and canoe for commercial purposes. For example, just as the Second Circuit in *Connecticut Light & Power Co.* found a river navigated by canoe and raft to be actual evidence of susceptible commercial use, there is actual evidence here that the Queechunk Canal is susceptible to commercial use as well because the canal is similarly navigated by canoe and boat. (R. at 5.) Also, just as the manmade body of water in *Wisconsin Pub. Serv. Corp.*, which had evidence of canoeing and small boating to constitute a highway of commerce, the Queechunk Canal here also has evidence of small boating and canoeing making it a highway of commerce as well. (R. at 5.) Just how the Fifth Circuit in *Puente de Reynosa, S. A.*, found that a small boat as the only evidence of navigability was sufficient to render it a navigable body of water, the evidence of navigability of the Deep Quod river here by small boat similarly render it a navigable body of water as well. (R. at 5.) Just as the Court in *Holt State* found a body of water connecting to a river, and travelled upon by small boat, was a navigable body of water that was actually used as a highway for commerce, the Queechunk canal here is similarly connected to a navigable river, both travelled upon by small boat, demonstrating it is actually used as a highway for commerce as well. (R. at 5.) Moreover, because the Mississippi River is an interstate body of water used for commercial navigation, and the Deep Quod River, navigable by boat, flows into the Mississippi River, and because the Queechunk canal is a shortcut up the Deep Quod by canoe

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water that was actually used as a highway for commerce); *see Wisconsin Pub. Serv. Corp. v. Fed. Power Comm'n*, 147 F.2d 743, 744-48 (7th Cir. 1945) (holding a river encompassing a man-made structure was navigable in fact because evidence of canoeing and small boating modes of transportation illustrate the river constituted "a highway over which commerce was carried on."); *see FPL Energy Maine Hydro LLC v. F.E.R.C.*, 287 F.3d 1151, 1154-60 (D.C. Cir. 2002) (finding that a tributary of a river, although never actually been used for commercial activity, was actually capable of commercial transportation, based on evidence of just three successful canoe test trips up the river); *see Puente de Reynosa, S. A. v. City of McAllen*, 357 F.2d 43, 50-51 (5th Cir. 1966) (holding that the only evidence of navigability in the last sixty years, was that of small boat, was more than sufficient to render the river a navigable body water).

or small boat, such boatable transportation up the canal serves as a highway to carry commerce on. (R. at 5.) Accordingly, there is actual evidence the Queechunk Canal can carry modes of transportation for commerce on top of its waters.

II. Even if the Queechunk Canal is not Publicly Navigable, the Evidence Obtained by Riverwatcher is Still Admissible.

In considering whether evidence unlawfully obtained by state officers is admissible in civil proceedings, the United States Supreme Court has weighed the exclusionary rule's deterring effect on the conduct of the state officer against the cost on the societal interest imposed by the exclusion of the evidence. *United States v. Janis*, 428 U.S. 433, 454 (1976). Further, the Court has balanced "the likely social benefits of excluding unlawfully seized evidence against the likely costs." *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 1041 (1984). Specifically, on the benefit side of this balancing, the sole purpose of exclusionary rule "is to deter future unlawful police conduct." *Id.* Moreover, on the cost side of the balancing, "there is the loss of often probative evidence and all of the secondary costs that flow from the less accurate or more cumbersome adjudication that therefore occurs." *Id.* The standard of review for a district court's legal conclusions in suppression of evidence issues is *de novo*. *United States v. Awadallah*, 349 F.3d 42, 71 (2d Cir. 2003).

A. There is a Low Deterrent Effect on the Exclusion of the Evidence Obtained by Riverwatcher Because the Riverwatcher is not an Agent of the EPA.

The deterrent effect on the officer's conduct imposed by the exclusionary rule is minimal when the evidence is used in a proceeding that "falls outside the offending officer's zone of primary interests." *Janis*, 428 U.S. at 458. For example, in *Janis*, the Court held the exclusionary rule did not apply in a civil proceeding when one sovereign is using evidence

seized by a state enforcement agent of another sovereign. *Id.* at 460. There, local officers in search of bookmaking paraphernalia, seized the defendant's wagering records from his apartment without a proper warrant. *Id.* at 436-37. Further, the IRS in relying solely on these wagering records, sought to impose a penalty on the defendant for apparent past tax violations. *Id.* at 436-437. The Court explained that such illegally obtained evidence was admissible in civil enforcement proceeding because the local police officers had no responsibility or duty to the sovereign, the IRS, seeking to use the evidence. *Id.* at 455. The Court further reasoned that "the deterrent effect of the exclusion of relevant evidence is highly attenuated when the "punishment" imposed upon the offending criminal enforcement officer is the removal of that evidence from a civil suit by or against a different sovereign." *Id.* at 457-58. The Court stressed such attenuation is even further augmented because the proceeding was only to enforce the regulations of the other sovereign, the IRS. *Id.* at 457-58. The Court concluded that such attenuation, combined "with the existing deterrence effected by the denial of use of the evidence by either sovereign in the . . . trials with which the searching officer is concerned, creates a situation in which the imposition of the exclusionary rule sought in this case is unlikely to provide significant, much less substantial, additional deterrence." *Id.* at 457-58; *see also Adamson v. C.I.R.*, 745 F.2d 541, 546 (9th Cir. 1984) (holding the exclusion of evidence from a civil tax proceeding "would not provide a substantial and effective deterrent" because without any participation by the IRS agents in the illegal search, it could not be presumed "the state officers were motivated by a desire to help federal tax authorities to obtain evidence" for the IRS's civil proceedings); *see United States v. Bazzano*, 712 F.2d 826, 832-33 (3d Cir. 1983) (reasoning that "the zone of primary interest for state officers is the acquisition of evidence for use in" state proceedings, and

such interest becomes attenuated when the "evidence is used in a proceeding by another sovereign").

Here, there is low deterrent value because the primary zone of interest for Riverwatcher is the acquisition of evidence solely for New Union's proceedings, not EPA's civil proceedings. For instance, just as the Court in *Janis* observed that illegally obtained evidence was admissible in an IRS civil enforcement proceeding, where the local police officers who seized the evidence had no duty to the IRS, the evidence obtained by Riverwatcher here equally is admissible because Riverwatcher has no duty or responsibility to the EPA as well. Just as the Court in *Janis* found that there is little deterrent effect when the penalty for illegally obtained evidence is the exclusion of evidence from a proceeding outside of the state officer's sovereignty, there is similarly minimal deterrent effect here because the evidence would be excluded from an EPA proceeding, a proceeding in a different sovereign from Riverwatcher. Further, as the Court in *Janis* emphasized that the highly attenuated deterrent effect of the exclusion of evidence justified the admissibility of evidence used to penalize past IRS violations, the highly attenuated deterrent effect on the exclusion of evidence here likewise justifies the admissibility of evidence used to penalize past EPA violations.

Even more, just as the Ninth Circuit in *Adamson* reasoned that without any participation by the IRS agents in the illegal search, it could not be presumed "the state officers were motivated by a desire to help federal tax authorities to obtain evidence" for the IRS's civil proceedings, here similarly because there was no participation by the EPA agents in the search, it equally cannot be presumed the Riverwatcher was motivated by a desire to help EPA authorities obtain evidence for EPA proceedings. Just as the Third Circuit in *Bazzano*, noted that "the zone of primary interest for state officers is the acquisition of evidence for use in" state proceedings,

Riverwatcher's zone of primary interest here is the acquisition of evidence used only in New Union's proceeding, not in EPA proceedings. Accordingly, because the EPA proceedings are not within Riverwatcher's zone of primary interest, the exclusion of the evidence would provide little and ineffective deterrence of Riverwatcher's conduct.

B. The Societal Costs in Excluding the Evidence Obtained by Riverwatcher are Great.

The exclusionary rule does not extend to proceedings other than criminal trials when the exclusion of reliable probative evidence imposes a significant cost on society. *Pennsylvania Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 363-64 (1998). For example, in *I.N.S. v. Lopez-Mendoza*, the United States Supreme Court held that illegally obtained evidence was admissible, even in a case where the arresting officer's primary objective was to use the evidence in the civil proceedings, because of the significant societal consequences. *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 1043-51 (1984). There, INS agents made an illegal search and seizure of the defendant. *Id.* at 1035-36. Further, the INS agents who effected the illegal seizure, were the same agents seeking to initiate INS enforcement proceedings using the illegal evidence they had just obtained. *Id.* at 1035-36. The Court reasoned that despite the INS arresting officers and the INS agency being a part of the same sovereign, the societal costs of imposing the exclusionary rule in the INS's proceedings were nevertheless significant because such a rule would not only inhibit the agency from preventing continuing transgressions but also force the agency to ignore ongoing violations of the law. *Id.* at 1046. The Court emphasized "the exclusionary rule should [not] 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" *Id.*

Furthermore, the Court also stressed that invocations of the exclusionary rule at such agency civil proceedings would have an adverse impact on the character of the proceedings. *Id.* at 1048. Specifically, the Court explained that issues at INS civil proceedings involve factual allegations, but when unreasonable search and seizure issues are raised at such proceedings, "the result is a diversion of attention from the main issues which those proceedings were created to resolve" *Id.* Thus, as the Court reasoned, such a diversion would result in a long delay that would have a negative impact on "the effective administration of the" agency's immigration laws. *Id.* at 1048-49; *see also Pennsylvania Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 365 (1998) (explaining the exclusion of evidence had significant societal interests because the escape of consequences would result in noncompliance with agency regulation).

Here, the costs imposed on society by the exclusion of Riverwatcher's obtained evidence are significant. For instance, just as the Court in *Lopez-Mendoza* found that high societal concerns justified the admissibility of illegally obtained evidence in civil proceedings, where the arresting officers initiated the enforcement proceeding, the significant societal interests here also justify the admissibility of evidence obtained by Riverwatcher in a civil proceeding, which he subsequently intervened into as well. (R. at 7.) Further, just as the societal cost of excluding the evidence in *Lopez-Mendoza* cured the INS official's primary objective to use its seized evidence in a civil deportation proceeding, the extreme societal costs here also cure any potential primary objective of Riverwatcher to use the photographs and water samples in an EPA civil enforcement proceeding as well. (R. at 6.)

Moreover, similar to the significant societal costs resulting from the exclusion of reliable evidence in *Lopez-Mendoza*, excluding the reliable evidence here would also similarly inhibit the EPA from putting a stop to the defendant's continuous violations of the Clean Water Act as well.

Further, as the Court in *Lopez-Mendoza* reasoned "the exclusionary rule should [not] 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," the exclusionary rule should not similarly be invoked here to prevent the EPA from stopping the defendant from dumping cow manure into the Farmville drinking water, hazardous to the residents, simply because the photographs and water samples were improperly obtained. (R. at. 6.) Even more, as stressed in *Lopez-Mendoza*, search and seizure issues here also similarly complicate the character of EPA proceedings as well, because such issues inhibit EPA's effective administration by boggling it down with issues not related to clean water. Being forced to consider irrelevant Fourth Amendment issues in EPA proceedings would only slow up the administrative process, thereby allowing for the Defendant's continuous hazardous pollution of the Farmville drinking water to manifests itself into an even more a severe problem. (R. at 6.) Additionally, just as the exclusion of evidence had significant societal costs in *Scott*, because it would result in noncompliance with agency regulation, the exclusion of evidence here would encourage noncompliance with the

Clean Water Act as well, resulting in those like Moon Moo Farm, to freely pollute the city's drinking water with hazardous waste, free of consequences. Accordingly, because of the significant societal cost at stake by the loss of probative evidence, the evidence obtained by Riverwatcher should be admissible.

III. Moon Moo Farm is a CAFO Subject to NPDES Permitting Because it Houses the Requisite Number of Mature Dairy Cows and it Discharges Pollutants into a Navigable Body of Water through a Point Source.

A. The Clean Water Act Regulates CAFOs as Point Sources and Requires a NPDES Permit for any Discharge from a Point Source into a Navigable Body of Water.

The purpose of the Clean Water Act is to maintain the "chemical, physical and biological integrity of [the] Nation's waters . . ." 33 U.S.C. § 1251(a). To further this goal, the EPA regulates the quality standards of surface waters. Generally, it is unlawful to discharge any pollutant from a point source into navigable waters unless a permit is obtained via the NPDES. 33 U.S.C. § 1342. A point source is "any discernable, confined, and discrete conveyance, including but not limited to, any pipe, ditch . . . concentrated animal feeding operation . . . or other floating craft from which pollutants are or may be discharged." 40 C.F.R. § 122.2. A CAFO is "an [Animal Feeding Operation (AFO)] that is defined as a Large CAFO or as a Medium CAFO . . . or that is designated as a CAFO in accordance with [further regulations in the section]." 40 C.F.R. § 122.23(b)(2). An AFO is a Medium CAFO if "[t]he type and number of animals that it stables or confines falls within . . . 200 to 699 mature dairy cows, whether milked or dry; . . . and . . . [p]ollutants are discharged into waters of the United States through a man-made ditch . . ." 40 C.F.R. § 122.23(b)(6)(i)(A), (b)(6)(ii)(A).

Here, Moon Moo Farm is a medium CAFO.[3] It is undisputed that the farm houses 350 head of mature dairy cows. (R. at 4, 5.) This is well within the required range of mature cattle. *Concerned Area Residents for the Env't v. Southview Farm*, 34 F.3d 114, 122 (2d Cir. 1994) ("[I]f an AFO exceeds the relevant number of animal units . . . the AFO is presumably a CAFO . . .") Further, Moon Moo Farm discharged manure, a pollutant, from its farm into the Deep Quod River, which is a navigable body of water of the United States. (R. at 6.) The discharge flowed from the farm's fields through a drainage ditch into the Queechunk Canal, into which the flow of the river is diverted. (R. at 5, 6.) Therefore, Moon Moo Farm is a Medium CAFO. Courts review

[3] The State of New Union regulates Moon Moo Farm as an AFO. (R. at 5.)

violations of the Clean Water Act de novo. *Nat'l Resources Defense Council v. Southwest Marine, Inc.*, 236 F.3d 985, 998 (9th Cir. 2000).

B. Moon Moo Farm is a Medium CAFO that is Ineligible for the Agricultural Stormwater Exemption Because it Discharged Pollutants into a Navigable Body of Water and Haphazardly Applied Manure to its Fields.

Moon Moo Farm is a medium CAFO because it discharged manure into the Queechunk Canal, which then flowed into the Deep Quod River. (R. at 6.) To qualify as a Medium CAFO, "[p]ollutants [must be] discharged into waters of the United States through a man-made ditch, flushing system, or other similar man-made device[.]" 40 C.F.R. § 122.23(b)(6)(ii)(A). It is not subject to the agricultural stormwater exemption. Agricultural stormwater is defined as "a precipitation-related discharge of manure, litter[,] or process wastewater from land areas . . ." 40 C.F.R. § 122.23(e). When this type of discharge occurs and a farm has otherwise adhered to its Nutrient Management Plan (NMP), it is deemed agricultural stormwater and is exempted from NPDES permitting requirements. However, a farm is not afforded the agricultural stormwater exemption merely because a discharge occurs on a rainy day. *Southview Farm*, 34 F.3d at 120. If a farm has misapplied manure to its fields or over-saturated them, the agricultural stormwater exemption does not apply. *See Cmty. Ass'n for the Restoration of the Env't v. Sid Koopman Dairy*, 54 F. Supp. 2d 976, 982 (E.D. Wash. 1999) ("The agricultural stormwater discharge . . . does not act to relieve CAFO farmers from responsibility for over applications and misapplications of CAFO animal wastes to fields in amounts or locations which will then discharge into the waters of the United States.") Here, Moon Moo Farm carelessly applied manure to its fields on a rainy day, which virtually ensure that there would be discharge from its fields into the Queechunk Canal and Deep Quod River. (R. at 6.) Therefore, it is not subject to

the agricultural stormwater exemption and is, therefore, a medium CAFO that requires NPDES permitting before discharging pollutants into waters of the United States.

Courts have held that farms were CAFOs when there was discharge from a liquid manure spreading operation. In *Southview Farm*, the Second Circuit Court of Appeals held that the defendant farm was a CAFO when it discharged liquid manure during rainfall. *Southview Farm*, 34 F.3d at 115. The court noted that the farm exceeded the requisite number of animal units and that it was not exempt from that designation simply because some of its crops grew outside the area in which its animals were confined. *Id.* at 123. The court reasoned that, since the farm was a CAFO and, subsequently, a point source, it was not subject to the agricultural stormwater exemption. *Id.*; *see also Cmty. Ass'n for the Restoration of the Env't v. Bosma Dairy*, 305 F.3d 943, 955 (9th Cir. 2002) (noting that the definition of a CAFO is to be broadly interpreted and encompasses any manure storing fields). Here, Moon Moo Farm is a medium CAFO. It houses 350 head of mature dairy cows, which exceeds the required minimum. (R. at 4-5.) Further, the farm discharged pollutants from a drainage ditch into the Queechunk Canal, which is a navigable body of water. (R. at 5, 6.) Therefore, Moon Moo Farm is a medium CAFO.

In *Southview Farm*, the defendant farm argued that its discharge was the result of precipitation, so should be exempt under the agricultural stormwater exemption. *Id.* at 121. However, the court noted that the farm over-applied manure to its fields. *Id.* It held that discharges of CAFO waste that result from excessive or improperly timed application violate the Clean Water Act. *Id.* The court reasoned that "there can be no escape from liability for agricultural pollution simply because it occurs on rainy days." *Id.*; *see also Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 509 (2d Cir. 2005) ("[D]ischarges from land areas under the control of a CAFO can and should generally be regulated . . ."); *Reynolds v. Rick's Mushroom*

Service, Inc., 246 F.Supp.2d 449, 456 (E.D. Pa. 2003) (holding that the discharge of wastewater from a hay field land application was not agricultural stormwater).

Here, Moon Moo Farm is ineligible for the agricultural stormwater exemption. It applied manure to its fields on April 12, 2013, one of the two days in which the Farmville region received two inches of rainfall. (R. at 6.) Riverwatcher's agronomist professionally opined that "land application of manure during a rain event is a very poor management practice and will nearly always result in excess runoff of nutrients from fields." (R. at 6.) As the *Southview Farm* court noted, discharges from CAFOs that result because of "improperly timed application" violate the Clean Water Act and are not subject to exemption simply because they occur on rainy days. *Southview Farm*, 34 F.3d at 121. Therefore, because Moon Moo Farm consciously elected to apply manure on a rainy day, it is not subject to the agricultural stormwater exemption and is a medium CAFO subject to NPDES permitting requirements.

IV. If Moon Moo Farm is not Classified as a CAFO, it does not Require NPDES Permitting Because it is Subject to the Agricultural Stormwater Exemption.

If Moon Moo Farm is not designated a CAFO, it does not require NPDES permitting because it applied manure to its fields in a manner consistent with its NMP and is, therefore, subject to the agricultural stormwater exemption. (R. at 6.) The exemption applies when "the manure, litter[,] or process wastewater has been applied in accordance with site specific nutrient management practices . . ." 40 C.F.R. § 122.23(e). Thus, while the Clean Water Act requires NPDES permits for discharges flowing from point sources, ejections because of precipitation-related events are not considered as having derived from point sources and subsequently do not require an NPDES permit. *See* Terence J. Centner, *Clarifying NPDES Requirements for Concentrated Animal Feeding Operations*, 14 Penn St. Envtl. L. Rev. 361, 373-74 (2006) (noting that agricultural stormwater is an exception to the rule against point source discharges).

In *Waterkeeper Alliance*, the court held that the agricultural stormwater exemption did not violate the Clean Water Act. *Waterkeeper Alliance,* 399 F.3d at 509 (2d Cir. 2005). The action arose from concerns raised by environmental and farm groups regarding the 2003 version of the CAFO regulation. *Id.* at 490. The groups argued that the EPA had construed the term "agriculture" too broadly because it included "any stormwater discharge from a land area under the control of a CAFO." *Id.* at 509. The court rejected this contention, noting that agriculture is defined as ""cultivating the soil," "including the allied pursuits of gathering the livestock,"" which CAFOs inevitably did by "rais[ing]" or "rear[ing]" livestock and using land-applied manure to prepare soil. *Id.* The court reasoned that, because the Clean Water Act expressly excludes agricultural stormwater from the definition of point source and does not offer an explanation for the phrase, it should afford *Chevron* deference to the EPA's interpretation. *Id.* at 507. *See generally Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984) ("If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statue by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.")

Courts have held that pollutant discharge from CAFOs caused by rainfall was subject to the agricultural stormwater exemption. For example, in *Alt v. EPA*, the court held that the precipitation-caused runoff of manure from a CAFO was agricultural stormwater, so was exempt from the NPDES permit requirement. *Alt v. EPA*, 979 F.Supp.2d 701, 715 (N.D. W. Va. 2013). There, the farm owner did not have a permit to discharge and operated a poultry production facility where particles of manure landed on her farmyard. *Id.* at 704. When it rained, precipitation contacted the manure particles and created runoff that carried into a navigable body

of water. *Id.* Based on the plain construction of the phrase "agricultural stormwater," the court reasoned that the farm owner was subject to the exemption. *Id.* at 710; *see also Waterkeeper Alliance*, 399 F.3d at 509 (noting that, when a farm "has taken steps to ensure appropriate agricultural utilization of the nutrients in manure, litter, and process wastewater, it should not be held accountable for any discharge that is primarily the result of "precipitation."); *Fishermen Against Destruction of Env't, Inc. v. Closter Farms, Inc.*, 300 F.3d 1294, 1297 (11th Cir. 2002) (holding that a sugar cane farm's rainfall-caused discharge into a lake was agricultural stormwater).

Here, Moon Moo Farm does not require a NPDES permit if it is not a CAFO because it is subject to the agricultural stormwater exemption. The agricultural stormwater exemption applies when a farm has applied its manure in accordance with its NMP. *See* 40 C.F.R. § 122.23(e). Moon Moo Farm is required to submit a NMP to the Farmville Regional Office of the State of New Union Department of Agriculture and it has applied manure to its fields at rates that align with its plan. (R. at 5, 6.) So long as a farm has taken the necessary steps to comply with its NMP, it should not be held accountable for discharge that occurred due to a precipitation-related event. *See Waterkeeper*, 399 F.3d at 509. The manure that entered the Queechunk Canal from Moon Moo Farm did so because of the two inches of rainfall Farmville received in two days, which was described as a "significant event." (R. at 6.) The precipitation combined with unprocessed manure nutrients to create a runoff that subsequently infiltrated Queechunk Canal and the Deep Quod River. (R. at 6.) Therefore, because Moon Moo Farm applied manure to its land at rates pursuant to its NMP and the discharge was a result of precipitation, it is subject to the agricultural stormwater exemption if it is not designated a CAFO.

V. Moon Moo Farm's use of Manure and Acid Whey Soil Amendment Combination Presents an Imminent and Substantial Endangerment to Health or the Environment.

A. The plain Language of the RCRA Citizen Suit Statute Permits the District Court to Abate the Handling, Storage, and Treatment of Solid or Hazardous Waste.

Currently RCRA authorizes two types of citizen suits. The first, under 42 U.S.C. § 6972(a)(1)(A) enables private citizens to enforce EPA hazardous waste regulations. 42 U.S.C. § 6972(a)(1)(A). Courts apply the more stringent definition of solid waste located in 40 C.F.R. § 261.1(b)(2)(ii) to this first type of citizen suit. 40 C.F.R. § 261.1(b)(2)(ii); *see also Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co.*, 989 F.2d 1305, 1314-15 (2d Cir. 1993). The second type of citizen suit, however, authorizes citizens to sue to abate an "imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a)(1)(B). The standard of review of a district court's grant of summary judgment on RCRA claims is *de novo*. Brod v. Omya, Inc., 653 F.3d 156, 164 (2d Cir. 2011)

The comparatively broader language of part (B) of 42 U.S.C. § 6972(a)(1) grants courts broad injunctive power to grant relief. *See Conn. Coastal Fishermen's Ass'n*, 989 F.2d 1305 (2d Cir. 1993). The United States Court of Appeals for the Second Circuit, reasoning RCRA regulations apply the broader statutory definition of solid waste to imminent hazard suits, held that the second type of citizen suit contemplates wider range of types of wastes regulated. *Id.*

A brief examination of the remaining canons of statutory interpretation supports this position. As with any statute, it is necessary to look next to the ordinary meaning of the words in question. *See Moskal v. United States*, 498 U.S. 103, 108 (1990). By its plain meaning, "or" is "used as a function word to indicate an alternative." *Merriam-Webster's Collegiate Dictionary* 208 (10th ed. 2001). *See also Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004) ("[W]hen the statute's

language is plain, the sole function of the courts...is to enforce it according to its terms.") (internal quotation omitted).

Riverwatcher and Dean James seek to bring a citizen suit under 42 U.S.C. § 6927(a)(1)(B). Thus, they should be given a fair chance to establish that the agribusiness practices of Moon Moo Farm may contribute to an imminent and substantial health risk to the citizens of Farmville or to the environment. It is not dispositive that the manure and acid whey combination is or is not a "solid waste" in its strictest sense. The statute clearly says that the citizen suit provision of RCRA allows courts to grant equitable relief to abate the production and improper handling of solid *or* hazardous waste. To dispose of the citizen suit because the manure is not solid waste requires reading the statute to say courts can only intervene treatment and storage of "hazard *and* solid waste." This is not what the plain, clear language of the statute says. Thus, Riverwatcher's citizen suit should have survived the preliminary motion for summary judgment.

B. Moon Moo Farm's Handling of its Manure and Acid Whey Combination Contributes an Imminent and Substantial Endangerment to Health or the Environment.

A plaintiff must establish that the solid or hazardous waste presents an endangerment that is both "imminent" and "substantial." RCRA: 42 U.S.C. § 6972(a)(1)(B); *see also Prisco v. A & D Carting Corp.*, 168 F.3d 593, 608 (2d Cir. 1999). An endangerment does not need to be immediate in order to be "imminent." *See Envtl. Defense Fund, Inc. v. EPA*, 465 F.2d 528, 535 (D.C. Cir.1972) ("[a]n 'imminent hazard' may be declared at any point in a chain of events which may ultimately result in harm to the public."); *Price v. United States Navy*, 39 F.3d 1011, 1019 (9th Cir. 1994) ("immanency" does "not require a showing that actual harm will occur

immediately so long as the risk of threatened harm is present."). Additionally, an endangerment does not need to be actual or realized in order to be "substantial." *See Ethyl Corp. v. EPA*, 541 F.2d 1, 13 (D.C. Cir. 1976) (en banc) ("[c]ourts have also consistently held that "endangerment" means a threatened or potential harm and does not require proof of actual harm."), *cert. denied*, 426 U.S. 941 (1976); s*ee also* S.Rep. No. 284, 98th Cong., 1st Sess. at 59 ("[a]n endangerment means a risk of a harm, not necessarily actual harm, and proof that the past or present handling . . . of any solid or hazardous waste may present an imminent and substantial endangerment is grounds for an action seeking equitable relief.").

An expert's opinion that a given practice may cause or contribute to a risk to human health is enough to at least survive summary judgment on a citizen suit. *Dague v. City of Burlington*, 935 F.2d 1343 ("[defendant] asserts that there is no evidence to support the court's conclusion, because . . . (3) plaintiffs' expert, [the Ph.D Ecologist], did not cite evidence in support of his opinion. We disagree with the city's contention that the district court erred."), 1355 (2d Cir. 1991), *rev'd on other grounds*, 505 U.S. 557 (1992). In *Dague* the United States District Court for the District of Vermont reasoned that waste disposal practices of the city of Burlington "may have presented an imminent and substantial endangerment to health or the environment" and held its continued operation in violation of U.S.C § 6972(a)(1)(B). *Id.* 732 F. Supp. at 471-72. Both the plaintiffs, a group of Burlington property owners, and the city of Burlington put on experts to buttress their claims. *Id.* at 468. The City of Burlington's expert, a zoologist, contended that "[he] would require some form of actual harm before determining that there may be an imminent and substantial endangerment." *Id.* at 469. The court found that this argument unpersuasive, however, reasoning that the but for standard of proof of harm applied by defendant's expert was "more stringent than is legally required." *Id.*

The disagreement of Moon Moo's expert, Dr. Emmit Green ("Dr. Green"), and Riverwatcher's experts, Dr. Ella Mae ("Dr. Mae") and Dr. Susan Generis ("Dr. Generis"), should be resolved in favor of Riverwatcher. Both Dr. Mae, Dr. Generis and Dr. Green, having the benefit of discovery and relevant scientific backgrounds, are qualified to testify as to whether the manure may contribute to an imminent and substantial endangerment to health or the environment. (R. at 6, 7.) Dr. Mae proffered the opinion that the addition of the acid whey from Chockos Greek Yogurt was preventing the Bermuda Grass from taking up the manure and thereby allowing the unprocessed manure to leech into the groundwater. (R. at 6.) Dr. Green contends that this has been a longstanding practice that is "tradition in New Union." (R. at 6.) The purpose of RCRA, however, is to fix longstanding practices that are harmful to the environment. *See Subcommittee on Oversight and Investigations of the Committee on Interstate and Foreign Commerce*, *Report on Hazardous Waste Disposal*, H.R.Comm. Print No. 96–IFC 31, *96th Cong., 1st Sess. 32* (1979) (Eckhardt Report) ("[t]he only tool that [the Act] has to remedy the effects of past disposal practices which are not sound is its imminent hazard authority.") Moreover, although Dr. General conceded that it was impossible to say that Moon Moo was the "but for" cause of the nitrate advisory, like the City of Burlington's expert in *Dague*, RCRA imminent and substantial endangerment does not require "but for" proof. Rather, an expert's plausible opinion is enough to find that a party contributes to an imminent and substantial endangerment to human health. Thus, summary judgment was improper as to Riverwatcher's imminent and substantial endangerment citizen suit.

VI. Moon Moo Farm is Not Subject to Subsection D Regulation Under RCRA Because its Fertilizer and Soil Amendment is not a Solid Waste.

A. In Order for Manure to be a Solid Waste, it must be Discarded.

For determining whether a material is potentially subject to regulation under Subtitle D of RCRA, the EPA has promulgated a regulatory definition of "solid waste." *See generally Association of Battery Recyclers v. EPA*, 208 F.3d 1047, 1050-51 (D.C. Cir. 2000). A "solid waste" is "any discarded material." 40 C.F.R. § 261.2(a). A material is "discarded" when it has been "Abandoned… or Recycled" in a way that constitutes "solid waste." *Id.* § 261(a)(2).

The United States Court of Appeals for the Ninth Circuit defined "discarded" according to its ordinary meaning, as "to cast aside; reject; abandon; give up." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1041 (9th Cir. 2004). *See also American Mining Congress v. U.S. E.P.A.* [hereinafter "AMCI"], 824 F.2d 1177, 1186 (D.C. Cir. 1987)(materials are not discarded when "*they are destined for beneficial reuse or recycling in a continuous process by the generating industry itself.*")(emphasis in original.)

In *Safe Air*, the Ninth Circuit reasoned that grass silage burned in open bluegrass fields was not "discarded." *Safe Air for Everyone*, 373 F.3d at 1041 (9th Cir. 2004). There, bluegrass seeds were separated from the tall grass stalks on which they grew and harvested. *Id.* at 1038. the left over stalks, or "residue," remained in the fields where it underwent drying, or "curing," and was subsequently burned at the start of the next growing season as silage. *Id*. The D.C. Circuit reasoned that this type of reuse was continuous reuse within the generating industry. *Id.* Thus, the court reasoned, that the grass residue was not "discarded" before reuse and was not "solid waste." *Id.* at 1045(citing *AMCI*, 824 F.2d 1177, 1186).

The fertilizer stored temporarily in the manure lagoon and periodically spraying onto fields by Moon Moo Farm, is never "discarded." Like in *Safe Air*, where the grass was temporarily left to "cure" in the fields and then burned according to the growing season, the manure is stored and reused according to the cycle of Moon Moo Farm's Bermuda grass growing

seasons. (R. at 5.) Thus, the manure which Moon Moo Farm uses to fertilize its Bermuda grass to feed its cows is not "discarded" and thus not "solid waste" subject to EPA regulation under RCRA Subsection D.

B. The Manure and Acid Whey Combination is Not Solid Waste Because it is Reused in an Ongoing Manufacturing Process.

Recently a series of cases have held that materials are not necessarily "discarded" when they are reused in a different industry. *See generally Safe Food & Fertilizer v. E.P.A.*, 350 F.3d 1263, 1268 (D.C. Cir. 2003) *on reh'g in part,* 365 F.3d 46 (D.C. Cir. 2004). In *Safe Food & Fertilizer*, the D.C. Circuit reasoned that "[a]s firms have ample reasons to avoid complete vertical integration, firm-to-firm transfers are hardly good indicia of a 'discard' as the term is ordinarily understood." *Id.* (citing Ronald Coase, "The Nature of the Firm," 4 *Economica* 386 (1937)). *See also American Mining Congress v. U.S. E.P.A.* [hereinafter "AMCII"], 824 F.2d 1177, 1193 n.11 (D.C. Cir. 1987)("[M]aterials that are recycled and reused in an *ongoing* manufacturing or industrial process… have not yet become part of the waste disposal problem" and are not "discarded" under RCRA)(emphasis in original). *See also H.R.Rep. No. 94–1491* at 2 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6239([m]uch *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.")(emphasis added).

In *Safe Food & Fertilizer*, the D.C. Circuit reasoned that zinc byproduct of industrial operations was not "discarded" when it was added to manure from agricultural operations; and thus, it held that the zinc-fertilizer combination produced was not "solid waste." *Safe Food & Fertilizer* at 1266, 68 (D.C. Cir. 2003). There, the court relied, *inter alia*, on the EPA's "identity principle," which considers whether the product of inter-industry recycling is substantially

different from the "virgin product" (the product before combining.) *Id.* at 1269. The court reasoned that because the zinc fertilizer was not substantially different from a "virgin fertilizer," the zinc was not "discarded" and thus the zinc-fertilizer compound was not a "solid waste." *Id.* at 1270-71. Alternatively, in *Ass'n of Battery Recyclers*, the D.C. Circuit found that slag left over from mining, iron and steel, and chemical manufacturing, which was reused in another industry, was "discarded." *Ass'n of Battery Recyclers v. U.S. E.P.A.*, 208 F.3d 1047 (D.C. Cir. 2000). There, the slag was "first treated as part of a mandatory waste treatment plan prescribed by the EPA" before being reclaimed by another industry, typically primary zinc smelting. *Id.* at 1054. In addition to the fact that the slag was reclaimed entirely outside of the generating industry itself, the court pointed out that reuse of the slag required it be treated in a process that created a large volume of wastewater runoff—a byproduct that had no potential for reuse and was instead collected and stored at wastewater impoundments. *Id.* at 1056 n.6. Thus, the court held that the slag was "discarded" before being reclaimed and was thus "solid waste." *Id.* at 1056.

Where courts have yet to define or agree upon the extent of the "generating industry" aspect of "discarded," courts look to Congressional intent behind RCRA: "[a]n increase in *reclamation and reuse practices* is a major objective of the Resource Conservation and Recovery Act." *H.R.Rep. No. 94–1491* at 2 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6239(emphasis added). The same report goes on to state:

> Much industrial and agricultural waste is reclaimed or put to new use.... Agricultural wastes which are returned to the soil as fertilizers or soil conditions are not considered discarded materials in the sense of this legislation.

Id. at 6239–41.

The fertilizer and acid whey soil amendment is not "discarded" under a broad or narrow reading of solid waste because either the reuse of the acid whey by Moon Moo Farm is a inter-

industry reuse that courts hold as permissible under a broad reading; or the acid whey is reused in an ongoing process within the Greek Yogurt, generating industry, itself, which courts hold permissible under a narrow reading. The addition of the acid whey is more like the inter-industry addition of zinc to the fertilizer in *Safe Food and Fertilizer* than the inter-industry reuse of the slag in *Ass'n of Battery Recyclers*. The acid whey is a soil amendment that does not substantially alter the "identity" of the fertilizer; moreover, the process by which the acid whey is added does not create any additional waste. (R. at 5.) The fact that nitrate advisories were issues with regularity before the addition of the acid whey indicates that the identity of the fertilizer has not substantially changed after the addition of the acid whey. (R. at 6.) Alternatively, the addition of the acid whey produced by Chokos to the manure produced by Moon Moo Farm does even not remove it from one industry to another. It is conceivable that Chokos Greek Yogurt and Moon Moo Farm both participate in the Greek Yogurt industry, which has allowed Moon Moo to more than double its herd in 2010. (R. at 5.) Nothing in case law addresses whether the "generating industry" must be a company's primary industry. To reason that Moon Moo and Chokos are co-participants in the same industry seems in-line with Congressional intent of promoting "reuse or put[ting] to new use." 1976 U.S.C.C.A.N. at 6239. Finally, the Court should look to the United States Legislature's declaration of express intent ("[m]uch *agricultural and industrial waste* is reclaimed or put to new use") to extend the language permitting inter-industry reuse in *AMCII* to "*ongoing* manufacturing or industrial process" to agricultural operations as well. *Id*; *AMCII,* 824 F.2d at 1193 n.11. This would be a slight extension. Thus, under a narrow or a broad reading of the term, the acid whey is not "discarded" when it is added to the fertilizer because it either does not changes the "identity" of the fertilizer, or it does it leave the generating industry industry

itself. Thus, the fertilizer/soil amendment is not "solid waste" subject to EPA regulation under RCRA Subsection D.

C. Even if the fertilizer and soil amendment combination could be identified as a solid waste, Riverwatcher's open dumping claim must fail because the EPA regulations specifically exclude land application of agricultural products from RCRA Subtitle D.

The EPA has specifically stated that "[t]he [Open Dump] criteria do not apply to agricultural waste, including manures and crop residues, returned to the soil as fertilizers or soil conditioners." 40 C.F.R. § 257.1(c)(1). Facing ambiguity concerning legislative intent, courts should show deference to the Agency's interpretation. *Chevron U.S.A., Inc. v. NRDC,* 467 U.S. 837, 841 (1984). The exclusion for open dumping promulgated by the EPA, as the Agency charged to carry out the Legislative intent behind RCRA, specifically exempts the factual scenario present in Riverwatcher's Open Dumping claim. (R. at 5.) Thus, Riverwatcher's first claim against Moon Moo Farm was properly dismissed as a matter of law. (R. at 11.)

CONCLUSION

For the foregoing reasons, the Plaintiff-Appellant, the United States of America, respectfully requests that this Court reverse the decisions of the district court.

Respectfully Submitted,

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Team 62