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*Pace National Environmental Law Moot Court*  
*Competition*

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Article 1

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## 2015 National Environmental Law Moot Court Competition Problem

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**2015 National Environmental Law Moot Court  
Competition Problem**

**UNITED STATES COURT OF APPEALS  
FOR THE TWELFTH CIRCUIT**

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|  |   |                  |
|--|---|------------------|
| UNITED STATES OF AMERICA,                | ) |                  |
| <i>Plaintiff-Appellant,</i>              | ) |                  |
| and                                      | ) |                  |
| DEEP QUOD RIVERWATCHER,                  | ) |                  |
| INC., and DEAN JAMES,                    | ) | C.A. No. 14-1248 |
| <i>Plaintiffs-Intervenors-Appellants</i> | ) |                  |
| v.                                       | ) |                  |
| MOON MOO FARM, INC.,                     | ) |                  |
| <i>Defendant-Appellee.</i>               | ) |                  |

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**APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR NEW UNION IN NO. 155-CV-2014,  
JUDGE ROMULUS N. REMUS\***

**ORDER**

Following the issuance of the Order of the District Court dated June 1, 2014, in Civ. 155-2014, the United States of America (on behalf of the Environmental Protection Agency) and

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*\* Grayed out text denotes a change from the original Problem in response to official Competition Q&A period.*

Deep Quod Riverwatcher (Riverwatcher) and Dean James each filed a Notice of Appeal. The United States of America takes issue with the District Court's holdings that defendant Moon Moo Farm, Inc. is not a Concentrated Animal Feeding Operation (CAFO) subject to permitting under the National Pollutant Discharge Elimination System (NPDES) permit program pursuant to the Clean Water Act (CWA), 33 U.S.C. § 1342 (2012), that evidence of Moon Moo Farm's discharge was obtained by trespass, and that such evidence was not admissible in a civil enforcement proceeding. Riverwatcher and Dean James join the United States' appeal of each of these issues, and also take issue with the District Court's holding that discharges from Moon Moo Farm's fields fell under the agricultural stormwater exemption of the CWA, the dismissal of Riverwatcher's open dumping and imminent and substantial endangerment claims under the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6992k (2012), and the award of damages against them based on Moon Moo Farm's trespass claim.

Therefore, it is hereby ordered that the parties brief all of the following issues:

1. Whether the Queechunk Canal, a man-made water body, is a public trust navigable water of the State of New Union allowing for a public right of navigation despite private ownership of the banks on both side and the bottom of the canal by Moon Moo Farm. (Riverwatcher and EPA argue that the Queechunk Canal is a publicly navigable waterway; Moon Moo Farm argues that it is not.)

2. If the canal is not a public trust navigable water, whether evidence obtained through trespass and without a warrant is admissible in a civil enforcement proceeding brought under CWA §§ 309(b), (d) and 505. (EPA and Riverwatcher argue it is, Moon Moo Farm argues it is not.)

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

- a. It is a CAFO subject to NPDES permitting by virtue of a discharge from its manure land application area. (EPA and Riverwatcher argue it is, Moon Moo Farm argues it is not.)

or

- b. If it is not a CAFO, excess nutrient discharges from its manure application fields remove it from the agricultural

stormwater exemption and subject it to NPDES permitting liability. (Riverwatcher argues that the Farm is subject to NPDES permitting liability, EPA and Moon Moo Farm argue that application of manure in compliance with a nutrient management plan (NMP) exempts it from NPDES permitting requirements as agricultural stormwater.)

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

a. Its land application of fertilizer and soil amendment (a mixture of manure and acid whey from a yogurt processing facility) constitutes a solid waste subject to regulation under RCRA Subtitle **D**. (Riverwatcher argues that the landspread mixture constitutes a solid waste and Moon Moo Farm is not exempt from RCRA Subtitle **D** regulation, EPA and Moon Moo Farm argue that the mixture is not a solid waste and that the Farm is exempt.)

and

b. Plaintiffs can establish that the mixture constitutes an imminent and substantial endangerment to human health subject to redress under RCRA § 7002(a)(1)(B). (EPA and Riverwatcher argue that Riverwatcher has established an imminent and substantial endangerment, Moon Moo Farm argues that it has not.)

SO ORDERED.

Entered this 1<sup>st</sup> day of June 2014.

[NOTE: No decisions entered or documents dated after September 1, 2014 may be cited in briefs or oral arguments.]

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW UNION

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|                                |   |                |
|--------------------------------|---|----------------|
| UNITED STATES OF AMERICA,      | : |                |
| <i>Plaintiff,</i>              | : |                |
| and                            | : |                |
| DEEP QUOD RIVERWATCHER,        | : |                |
| INC., and DEAN JAMES,          | : | 55CV2014 (RMN) |
| <i>Plaintiffs-Intervenors,</i> | : | DECISION       |
| v.                             | : | AND ORDER      |
| MOON MOO FARM, INC.,           | : |                |
| <i>Defendant.</i>              | : |                |

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Plaintiff, the United States (on behalf of the United States Environmental Protection Agency) (collectively referred to as EPA) brought this action for civil penalties and injunctive relief for claimed violations by defendant Moon Moo Farm of the permitting requirements of the Clean Water Act (CWA), 33 U.S.C. §§ 1311(a), 1319(b), (d), 1342. Plaintiffs-Intervenors, an environmental organization known as the Deep Quod Riverwatcher, together with its “Riverwatcher,” Dean James (collectively, Riverwatcher), intervened as plaintiffs and asserted claims under CWA § 505, and Resource Conservation and Recovery Act (RCRA) § 7002, alleging (in the alternative) violations of either the CWA or RCRA by defendant Moon Moo Farm in connection with Moon Moo Farm’s manure management practices. Moon Moo Farm has counterclaimed for common law trespass, alleging that Deep Quod Riverwatchers and Dean James (James) illegally entered its property in order to obtain evidence of stormwater runoff from its fields. For the following reasons, plaintiffs’ motions for summary judgment on their CWA and RCRA claims are denied, defendant’s motion for summary judgment dismissing the CWA and RCRA claims is granted, and defendant’s motion for summary judgment in its favor on its trespass counterclaim is granted.

### FACTUAL BACKGROUND

The following facts are drawn from the affidavits and documents submitted by plaintiffs and defendant. Except where noted, I find these facts to be undisputed based on the affidavits and evidence submitted.

Moon Moo Farm operates a dairy farm with 350 head of milk cows located ten miles from the City of Farmville in the State of New Union, where it is also incorporated and has its principal place of business. New Union became a state prior to 1940. These cows are housed in a barn and are not pastured. 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 lagoon where it is stored for use as fertilizer. The manure lagoon is designed to contain all manure produced by the dairy operation without overflowing 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). The liquid manure in the lagoon is periodically pumped from the lagoon into tank trailers, which are then hauled by tractor and spread on 150 acres of fields that are part of the Moon Moo Farm's operation. Bermuda grass is grown on these fields, which is dried and harvested each summer as silage. In 2010, Moon Moo Farm substantially increased its milking herd from 170 cows to the current 350 cows, in order to serve the growing demand for milk for Greek yogurt production at the Chokos Greek Yogurt processing facility in Farmville. The Chokos plant opened for operation in 2009. During the past two years (since 2012), Moon Moo Farm has accepted (without paying for) acid whey produced by the Chokos plant, which it has added to its manure lagoons and included in the mixture sprayed on its fields.

Moon Moo Farm, together with its 150 acres of fields, is located at a bend in the course of the Deep Quod River. During the 1940s, a previous owner of the farm facility excavated a bypass canal in the Deep Quod River, in order to alleviate flooding at the river bend. This bypass canal has come to be known as the Queechunk Canal. Most of the flow of the Deep Quod River is diverted into the Queechunk Canal, which is fifty yards wide, three to four feet deep, and can be navigated by a canoe or other small boat. Moon Moo Farm owns the land on both sides of the Queechunk Canal and has prominently posted

the Canal with “No Trespassing” signs. The Deep Quod River is navigable by small boat both upstream and downstream of the Queechunk Canal, and, despite the “No Trespassing” signs, the Canal is commonly used as a shortcut up and down the Deep Quod River. The Deep Quod River flows year round and runs into the Mississippi River, which is a navigable-in-fact interstate body of water that has long been used for commercial navigation. Downstream of Moon Moo Farm, the community of Farmville uses the Deep Quod River as a drinking water source.

Moon Moo Farm is regulated by the State of New Union within its authority under the CWA as a “no-discharge” animal feeding operation – that is, as 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. 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). The NMP sets forth planned seasonal manure application rates, together with a calculation of expected uptake of nutrients by the crops grown on the fields where the manure is spread. Although the New Union DOA has the authority to reject an NMP that it finds to be insufficient, the New Union DOA does not ordinarily review submitted NMPs, nor is there any provision for public comment on the NMPs filed by no-discharge animal feeding operation. Although the State of New Union has the delegated authority to issue CWA discharge permits, Moon Moo Farm does not hold any permit issued pursuant to the National Pollutant Discharge Elimination System (NPDES) permitting system administered under CWA § 402.

In the late winter and early spring of 2013, Deep Quod Riverwatcher, a nonprofit organization incorporated in the State of New Union, received complaints that the Deep Quod River smelled of manure and was an unusually turbid brown color. 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. Customers were advised to give any infants in their households bottled water. The levels of nitrates in the Farmville drinking

water were high enough to be hazardous to infants less than two years old, but did not pose any health threat to adults.

In response to these complaints, James, the Deep Quod “Riverwatcher” and a citizen of the State of New Union, made an investigatory patrol of the Deep Quod River in a small metal outboard craft known as a “jon boat” on April 12, 2013. Between April 11 and April 12, 2013, two inches of rain fell in the Farmville Region – a significant storm event, but one far short of the 25 year storm (defined as 5 inches of rainfall in one 24 hour period). When James reached the Queechunk Canal, he ignored the “No Trespassing” signs and proceeded up the canal through Moon Moo Farm’s property. There he observed and photographed manure spreading operations taking place on Moon Moo Farm’s fields. He also observed and photographed discolored brown water flowing from the fields through a drainage ditch into the Queechunk Canal. James took samples of the water flowing from the ditch where it entered the canal and later had them tested by a water testing laboratory. The test results showed highly elevated levels of nitrates and fecal coliforms.

According to records retained by Moon Moo Farm, it has applied manure to its fields at rates consistent with the NMP filed with the Farmville Field Office at all relevant times. Plaintiff Riverwatcher has submitted an affidavit of Dr. Ella Mae, an agronomist, who opines that although she has no basis to dispute these records, it is her opinion that the lower pH (increased acidity) of the liquid manure resulting from adding acid whey from the Chokos plant lowered the pH of the soil. Based on tests of the liquid manure/whey combination obtained during discovery, Dr. Mae determined that the pH of the mixture was 6.1, which is a weak acid. According to Dr. Mae, this acidity prevented the Bermuda grass crop from effectively taking up the nutrients in the manure. According to Dr. Mae, these unprocessed nutrients were then released to the environment, including the Deep Quod River, by leaching into groundwater and through runoff during rain events. 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. Moon Moo Farm’s expert agronomist, Dr. Emmet Green, submitted an affidavit that did not dispute that the acid whey reduced soil pH and reduced nitrogen uptake by the Bermuda Grass. 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 and that Bermuda grass was a crop that tolerates a wide range of soil pH conditions. Dr. Green

points out that nothing in the Farm's NMP prevents it from land applying manure during a rain event.

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. Riverwatcher's own 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 of that nitrate advisory.

### **PROCEDURAL BACKGROUND**

Plaintiffs properly served on Moon Moo Farm, the New Union Department of Environmental Quality (DEQ), and EPA a letter of intent to sue under the citizen suit provisions of CWA § 505 and RCRA § 7002. Before the expiration of the waiting period after notice, EPA commenced this civil enforcement action against Moon Moo Farm, seeking civil penalties under CWA § 309(d) as well as injunctive relief under CWA § 309(b). At the conclusion of the ninety day RCRA waiting period, Riverwatcher intervened as a plaintiff in the EPA action pursuant to CWA § 505(b)(1)(B), and alleged additional causes of action under the citizen suit provision of RCRA § 7002. Moon Moo Farm answered the complaint and asserted a counterclaim seeking damages and injunctive relief for trespass against Riverwatcher and James. Having completed discovery, both sides have moved for summary judgment.

### **EPA'S AND RIVERWATCHER'S CLAIMS**

#### **Clean Water Act Violations**

The Federal Clean Water Act requires a permit, known as a NPDES permit, for any addition of a pollutant from a point source to waters of the United States. CWA §§ 301(a), 402. All parties

agree that the runoff from Moon Moo Farm's land application fields contained pollutants in the form of nitrates, a chemical waste, and fecal coliforms, as well as suspended solids. The parties also agree that Deep Quod River is a "water of the United States" subject to CWA permitting jurisdiction. CWA § 502(7). The parties disagree about whether the addition of pollutants can fairly be characterized as "from a point source" as that term is defined in the CWA. The CWA specifically defines a "point source" to include a "ditch" and a "concentrated animal feeding operation" (CAFO) but specifically excludes "agricultural stormwater runoff" from the definition of "point source." CWA §502(14). EPA regulations further define CAFO and the scope of the agricultural stormwater exemption. 40 C.F.R. §§ 122.23, 122.23(e) (2013).

EPA and Riverwatcher both assert that Moon Moo Farm falls within the definition of a "Medium CAFO" under the EPA regulation. 40 C.F.R. § 122.23(b)(6). In addition, Intervenor Riverwatcher argues that, whether or not Moon Moo Farm is a CAFO, the farm has discharged pollutants from the drainage ditch, itself a "point source" under the CWA. Moon Moo Farm responds that it does not meet the regulatory definition of a CAFO under the CWA and EPA's regulations, and that any discharge from the drainage ditch is exempt as an agricultural stormwater discharge. In addition, Moon Moo Farm asserts that any evidence of a discharge from its ditch was obtained illegally, through an act of criminal trespass, and cannot be used against it in this enforcement case.

### **Is Moon Moo Farm a CAFO?**

With 350 head of dairy cattle, Moon Moo Farm falls within the definition of a "Medium" Animal Feeding Operation (AFO) under the EPA regulations. 40 C.F.R. § 122.23(b)(6). In order for a medium AFO to be considered a CAFO, it must meet one of the two conditions set forth in section 122.23(b)(6)(ii) of that regulation:

(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.

There is no claim that any waters of the United States pass over, across, or through Moon Moo Farm's milk production area, so the only possible way for Moon Moo Farm to be considered a CAFO is if it discharges pollutants "through a man-made ditch, flushing system, or other similar man-made device."

Riverwatcher and EPA both assert that the drainage ditch from the land application field satisfies the criteria of discharging pollutants "through a man-made ditch." However, the only evidence presented of any discharge flowing from this ditch consisted of the samples and photographs taken by James on his April 12 foray up the Queechunk Canal. Accordingly, this Court must determine 1) whether James was trespassing when he entered the Queechunk Canal in his jon boat, and 2) if so, whether this Court may nonetheless consider evidence obtained through an act of civil and criminal trespass as proof in a case seeking punitive penalties under CWA § 309(d).

### **Was the April 12 Site Visit a Trespass?**

James asserts that navigation of the Queechunk Canal cannot be considered a trespass because all navigable waters of the State of New Union must remain open to navigation by the public under the ancient doctrine known as the "Public Trust Doctrine." Under the Public Trust Doctrine, at English common law, the public had a right to navigation in waters subject to the ebb and flow of the tide. *See Arnold v. Mundy*, 6 N.J.L. 1, 12 (1821). Cases in the United States extended the public trust doctrine to navigable freshwater bodies as well. *See Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374 (1977); *Barney v. Keokuk*, 94 U.S. 324, 338 (1877). The Queechunk Canal, however, is not a natural water body, but a man-made body of water. I have been unable to find (and counsel have cited) no New Union decisions addressing the scope of public trust navigation rights generally, or the more specific question posed by this case of whether such rights can attach to man-made bodies of water that happen to be navigable. In the absence of any applicable New Union cases, this Court will follow the decision of the United States Supreme Court, which has held that there is no public right of navigation in a man-made water

body. *Kaiser Aetna v. United States*, 444 U.S. 164 (1979). Accordingly, this Court finds that James was trespassing when he ignored the clearly posted “No Trespassing” signs and entered the Queechunk Canal.

### **Use of Evidence Obtained by Trespass in a Civil Enforcement Proceeding**

There remains the question whether EPA and Riverwatcher may rely on evidence obtained without a warrant, through James’ private act of trespass, in order to establish a violation of federal law. EPA and Riverwatcher both assert that there is no exclusionary rule in a civil case such as this civil enforcement action. EPA thus seeks to get the benefit of Riverwatcher’s warrantless invasion of Moon Moo Farm’s private property in an action to collect penalties for violations of federal law. In the analogous context of civil penalty actions to enforce the Occupational Safety and Health Act, at least two circuits have held that the Fourth Amendment exclusionary rule applies even though the enforcement action is nominally a “civil” action. *Trinity Indus., Inc. v. OSHRC*, 16 F.3d 1455, 1462 (6th Cir.1994); *Smith Steel Casting Co. v. Brock*, 800 F.2d 1329, 1334 (5th Cir.1986). This Court will follow these cases, and holds that the evidence obtained during James’ illegal April 12, 2013 visit to Moon Moo Farm is not admissible. EPA should not be able to avoid the Fourth Amendment limits on unwarranted search and seizures by allowing a do-gooder organization to do its dirty work for it. EPA and Riverwatcher thus lack any admissible evidence to establish a discharge of pollutants from the ditch on Moon Moo Farm’s fields, and summary judgment in favor the defendant is appropriate. See *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

### **Is Moon Moo Farm’s Discharge Exempt under the Agricultural Stormwater Exemption?**

Wholly apart from the lack of admissible evidence establishing a discharge from the ditch on Moon Moo Farm’s property, applicable case law establishes that this kind of discharge is agricultural stormwater runoff, not a CAFO discharge. In *Alt v. EPA*, 979 F. Supp. 2d 701 (N.D. W. Va. 2013), the Court held that runoff from a field outside of the animal

production area does not constitute a discharge from the CAFO itself under the EPA regulation; rather such discharges constitute agricultural stormwater runoff. This was found even though the pollutants (poultry manure and litter) may have originated inside the production area. Riverwatcher seeks to distinguish *Alt* on the grounds that the EPA regulations specifically include discharges from landspreading of AFO manure in the NPDES permitting requirement, citing 40 C.F.R. § 122.23(e). However, this section is of no avail to Riverwatcher, as it specifically exempts as agricultural stormwater landspreading that is performed in accordance with an NMP, as Moon Moo Farm's landspreading was. It is undisputed that Moon Moo Farm filed an NMP with the State agricultural field office and applied manure in accordance with its filed plan.

Accordingly, it is undisputed under the admissible evidence before this Court that Moon Moo Farm is not a CAFO, and that any discharge from the ditch (even if it were proven) is exempted from the NPDES permitting requirement by the agricultural stormwater exemption.

### **Resource Conservation and Recovery Act Claims**

The Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901, establishes federal guidelines for management of solid waste generally, and establishes a rigorous program of federal permitting and regulation of hazardous waste disposal. Recognizing that RCRA's definition of solid waste excludes discharges subject to NPDES permitting under the CWA, RCRA § 1004(27), 42 U.S.C. § 6903(27), Riverwatcher makes a claim in the alternative that Moon Moo Farm has violated RCRA if it has not violated the CWA. Riverwatcher does not assert that Moon Moo Farm is engaged in the treatment, storage, or disposal of hazardous waste subject to regulation under RCRA Subchapter C. Rather, Riverwatcher asserts that Moon Moo Farm's land application practices constitute the disposal of a non-hazardous solid waste in a manner contrary to national sanitary landfill guidelines established by EPA. Riverwatcher also asserts a claim that Moon Moo Farm's landspreading practices constitute a disposal of solid waste in a manner that presents an imminent and substantial endangerment to human health or the environment, subject to judicial redress under RCRA § 7002. EPA has not joined

in Riverwatcher's RCRA claims. Moon Moo Farm asserts that neither Congress, nor EPA's implementing regulations, ever contemplated that application of manure and other soil amendments to agricultural fields would be considered a solid waste disposal practice subject to regulation under RCRA.

### **Open Dumping Claim**

RCRA § 4005 specifically prohibits the practice of "open dumping of solid waste." 42 U.S.C. § 6945(a). RCRA § 4005(a) specifically authorizes citizen enforcement of this ban in a citizen suit brought pursuant to RCRA § 7002(a)(1)(A), as Riverwatcher seeks to do here. 42 U.S.C. § 6972(a)(1)(A). An "open dump" is defined as "any facility or site where solid waste is disposed of which is not a sanitary landfill which meets the requirements of [guidelines for sanitary landfills promulgated by EPA]." RCRA § 1004(14), 42 U.S.C. § 6903(14). According to Riverwatcher, the manure and acid whey from yogurt production constitute "solid wastes," and application of these wastes to open fields violates EPA guidelines prohibiting, among other things, application of solid wastes to floodplains, 40 C.F.R. § 257.3-1 (2013), application of solid wastes in a manner that may contaminate groundwater, 40 C.F.R. § 257.3-4, and application of solid waste with a pH below 6.5 to food chain crop areas, 40 C.F.R. § 257.3-5.

In order to be subject to the prohibition against open dumping, a material must first be classified as a solid waste pursuant to RCRA. RCRA defines "solid waste" as follows:

The term "solid waste" means any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under section 1342 of title 33, or source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954, as amended (68 Stat. 923).

42 U.S.C. § 6903(27). Although, as Riverwatcher argues, the manure and whey may be liquid or solid materials resulting from agricultural activities, it is far from clear that these materials are being “discarded” within the meaning of this definition. 40 C.F.R. 261.2(a)(i). Indeed, some courts have rejected the application of RCRA’s solid waste regulations to similar agricultural practices. See *Oklahoma v. Tyson Foods, Inc.*, 2010 WL 653032 at \*10 (N.D. Okla. Feb. 17, 2010) (poultry litter applied to fields not “solid waste”); *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1041 (9th Cir. 2004) (grass residue burned as soil amendment not “solid waste”).

Even if manure and whey could be considered a “solid waste,” Riverwatcher’s open dumping claim must fail because the EPA regulations specifically exclude land application of agricultural products from regulation as an open dump: “(1) The criteria do not apply to agricultural wastes, including manures and crop residues, returned to the soil as fertilizers or soil conditioners.” 40 C.F.R. § 257.1(c)(1). Both manure and whey are agricultural wastes that are being returned to the soil as fertilizer and soil conditioners. Accordingly, Riverwatcher’s open dumping claim must be dismissed.

### **Imminent and Substantial Endangerment Claim**

RCRA § 7002(a)(1)(B) provides for a citizen action

(B) against any person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present 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). Riverwatcher alleges that Moon Moo Farm’s land application practices present an imminent and substantial endangerment to human health, pointing to the nitrate advisories that have been issued to Farmville’s drinking water customers.

This claim likewise suffers from the defect, noted above, that manure and whey applied to the soil are not “discarded materials” that fall within the definition of “solid waste” in the first place. Even if they were, however, Riverwatcher has presented insufficient evidence to establish a genuine issue that Moon Moo Farm’s landspreading practices present an imminent and substantial endangerment to human health. Riverwatcher’s own expert conceded that Moon Moo Farm’s practices are not the “but-for” cause of the nitrate advisories in Farmville. Moreover, it appears that nitrates pose no health risks to adults and juveniles, and that households with infants administer bottled water to their infants, avoiding any potential health risk. No imminent and substantial endangerment to human health thus exists. See *Davies v. Nat’l Co-op. Refinery Ass’n*, 963 F. Supp. 990, 999 (D. Kan. 1997).

### **Moon Moo Farm’s Counterclaim for Trespass**

Moon Moo Farm has filed a counterclaim for trespass damages against James and Riverwatcher, alleging that their sampling activities on April 12, 2013 constituted a civil trespass for which they are entitled to damages, including the costs of defending this lawsuit, which would not have been brought in the absence of the evidence illegally obtained through trespass. It is undisputed that James entered Moon Moo Farm’s property despite the clearly posted “No Trespassing” signs. As discussed above, James’ entry into Moon Moo Farm’s was not protected by the public trust doctrine, which does not apply to man-made bodies of water. As the facts constituting the trespass are inextricably bound up with the occurrences giving rise to Riverwatcher’s affirmative federal claims, this Court has supplemental jurisdiction pursuant to 28 U.S.C. § 1367(a). Moon Moo Farm is entitled to summary judgment in its favor. Riverwatcher has not disputed that Moon Moo Farm spent \$832,560 defending this action. Accordingly, judgment shall be entered in that amount against James and Riverwatcher.

### **CONCLUSION**

For the foregoing reasons, plaintiff EPA’s and Riverwatcher’s motions for summary judgment are denied, and defendant Moon



Moo Farm's motion for summary judgment on all claims, including its counterclaim, is granted, and judgment shall be entered dismissing the complaints and awarding Moon Moo Farm \$832,560 in damages on its counterclaim.

SO ORDERED.

Romulus N. Remus  
U.S.D.J.  
April 21, 2014