UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

Docket No. 14-1248

UNITED STATES OF AMERICA,

Plaintiff-Appellant, and

DEEP QUOD RIVERWATCHER, INC., and DEAN JAMES,

Plaintiffs-Intervenors-Appellants,

v.

MOON MOO FARM, INC.,

Defendant-Appellee.

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

BRIEF FOR UNITED STATES OF AMERICA *Plaintiff-Appellant*

Team No. 10
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

Constitutional Provisions

Statutes

Code of Federal Regulations

Federal Register

Federal Rules

Legislative Materials

Secondary Sources

STATEMENT OF JURISDICTION

The plaintiffs brought claims under the Clean Water Act (CWA), 33 U.S.C. § 1251 *et seq.* (2012), and the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901 *et seq.* (2012). The Court has federal question jurisdiction over these claims pursuant to 28 U.S.C. § 1331 (2012), and supplemental jurisdiction over defendant Moon Moo Farm's counterclaims, which are part of the same case or controversy pursuant to 28 U.S.C. § 1367(a). Each plaintiff demonstrated Article III standing, showing an injury in fact, "a sufficient 'causal connection between the injury and the conduct complained of,'" and redressability. *See Susan B. Anthony List v. Driehaus*, __U.S. __, 134 S. Ct. 2334, 2341 (2014). Petitioners filed this timely appeal after the district court issued its final order granting summary judgment for Moon Moo Farm. Fed. R. App. P. 4(a)(1)(A). This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES ON APPEAL

I. Whether a private landowner, having constructed a canal that diverts a navigable water of the United States and allowed the public to use it, can argue Plaintiff-Intervener James trespassed by navigating the canal?

II. If James' navigation of the Queechunk Canal was a trespass, whether the evidence James gathered should be suppressed under the federal exclusionary rule, which the Supreme Court has held does not apply to civil proceedings?

III. Whether Moon Moo Farm requires a CWA discharge permit because the runoff of manure and whey from its land application practices into a protected waterway constitutes point source discharge from a concentrated animal feeding operation?

IV. If the Court holds Moon Moo Farm is not a concentrated animal feeding operation, is the discharge of manure and whey from its farmland area no longer from a confined point source and exempt from CWA regulation as agricultural stormwater?

V. Is Moon Moo Farm's mixture of manure and whey a RCRA solid waste when beneficially reused on the manure-producer's fields as a fertilizer and soil conditioner?

VI. When concentrations of nitrates in water are high enough to endanger infant health, is a solid waste that may be contributing to the nitrate concentration sufficient to establish an imminent and substantial endangerment claim subject to redress under RCRA?

STATEMENT OF THE CASE

The purpose of this case is to protect the community of Farmville and our nation's waters. Appellee Moon Moo Farm is polluting Farmville's drinking water with harmful nitrates and fecal coliforms. Accordingly, the EPA urges this Court to take urgent action under the CWA to defend the physical and ecological health of Farmville's residents and their environment. In light of the extraordinary amount of manure that concentrated animal feeding operations (CAFOs) produce, and the attendant threat to the nation's waters, Congress singled out CAFOs—like Moon Moo Farm—for regulation under the CWA. Enforcement falls first to the states that have accepted CWA jurisdiction, and then, if the state does not act, to the Environmental Protection Agency (EPA). Presented with evidence of Moon Moo Farm's ongoing water pollution, EPA had to act.

EPA filed this suit pursuant to its authority and duty under the CWA to prevent point source pollution from endangering both the integrity of waters of the United States and the health of a community. Riverwatcher joined this suit, bringing additional alternative claims under RCRA. While the EPA applauds Riverwatcher's efforts on behalf of the environment, it does not join in the RCRA claims. EPA maintains that CAFOs like Moon Moo Farm are more appropriately regulated under the CWA. Moon Moo Farm counterclaimed, alleging that the evidence used against it was collected by trespass and thus is inadmissible.

The lower court granted Moon Moo Farm's motion for summary judgment on all counts. The court suppressed evidence of Moon Moo Farm's discharge, finding that it was collected by trespass and was not admissible in a civil proceeding. The court further found that Moon Moo Farm was not a CAFO, and that its manure mixture did not constitute a RCRA solid waste. The EPA appeals the district court's erroneous finding of trespass, exclusion of relevant evidence, and determination that Moon Moo Farm is not a CAFO.

STATEMENT OF FACTS

Moon Moo Farm is an animal feeding operation with 350 dairy cows. R. at 4. It is located at a bend in the Deep Quod River, upstream of the community of Farmville. R. at 5. Farmville

uses the Deep Quod River as a source of drinking water. R. at 6. In 2013, river water flowing past Farmville turned an unusually turbid brown color and smelled of manure. R. at 6. The Farmville Water Authority issued a drinking water advisory for elevated nitrates, which can be harmful to infants. R. at 6. After investigating the source of this pollution, the nonprofit environmental organization Riverwatcher presented EPA with evidence that Moon Moo Farm's manure spreading operations were discharging pollutants into navigable. R. at 4, 6, 7. Specifically, samples of water flowing from Moon Moo Farm into the River contained elevated levels of nitrates and fecal coliforms. R. at 6.

Riverwatcher obtained its samples from Dean James, a "Riverwatcher," who piloted a small boat up the Queechunk Canal. R. at 6. The Canal, which is fifty yards wide and three to four feet deep, was excavated by a previous owner in the 1940s, after New Union became a state. R. at 4–5. The Canal bypasses a bend in the River. R. at 5. Both the Deep Quod River and the Canal itself are navigable by small boat. R. at 5. The River flows year round, and connects to the Mississippi. R. at 5. Because the Canal is a "shortcut" around a river bend, it is commonly used by people navigating the Deep Quod River. R. at 5. Moon Moo Farm has posted "No Trespassing" signs, but never previously attempted enforcement. R. at 5.

After navigating the Canal, James photographed and sampled discolored brown water flowing from Moon Moo Farm's drainage ditch into the Canal. R. at 5–6. James also observed manure being spread onto fields; Moon Moo Farm collects manure from its cows, which it stores in a lagoon, then loads into tank trailers and sprays onto the Farm's Bermuda grass fields. R. at 4–6. Bermuda grass is grown as silage. R. at 5. Moon Moo is regulated as a "no-discharge" animal feeding operation in the State of New Union, and must submit a Nutrient Management Plan (NMP) to the State. R. at 5. In 2010, Moon Moo increased its milking herd from 170 to 350 cows. R. at 5. Since 2012, Moon Moo has accepted acid whey byproduct from the off-site Chokos greek yogurt plant, which it adds to the manure sprayed on its fields. R. at 5.

In addition to James' samples, Riverwatcher's expert agronomist, Dr. Ella Mae, reviewed samples of Moon Moo Farm's manure and whey mixture obtained during discovery. R. at 6. The

samples had a pH of 6.1, a weak acid. R. at 6. Applying an acidic manure mixture to soil makes the soil more acidic; Bermuda grass grown in acidic soil is less able to absorb nutrients from manure. R. at 6. In Dr. Mae's expert opinion, applying an acidic manure mixture to Bermuda grass fields would result in the release of excess nutrients into the environment through rainfall runoff or groundwater leaching. R. at 6. Moon Moo Farm's own expert, Dr. Green, states that applying whey as a soil conditioner is a traditional practice in New Union, but concedes that acidic soil reduces the grass' nutrient uptake. R. at 6.

STANDARD OF REVIEW

To prevail on summary judgment the moving party must demonstrate that there is "no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The court reviews a grant of summary judgment *de novo*, viewing all evidence in the light most favorable to the non-moving party. *Flood v. Young Woman's Christian Ass'n of Brunswick, Ga., Inc.*, 398 F.3d 1261, 1264 (11th Cir. 2005).

SUMMARY OF THE ARGUMENT

Appellants EPA, and Dean James and Riverwatcher (collectively "Riverwatcher"), brought CWA actions for civil penalties and injunctive relief against Appellee Moon Moo Farm for discharging pollutants into the Deep Quod River without a permit. Riverwatcher brought additional claims against Moon Moon Farm under RCRA's citizen suit provision. Moon Moo Farm argued that the evidence of its ongoing pollution of the Deep Quod River was acquired through trespass and thus inadmissible. The lower court granted summary judgment for Moon Moo Farm on all claims. The lower court erred in all holdings except the dismissal of Riverwatcher's RCRA claims. With respect to the remaining issues, this Court should reverse and remand for further proceedings.

In granting summary judgment for Moon Moo Farm, the court erroneously found that James trespassed when he navigated the Queechunk Canal, and then improperly applied the criminal law exclusionary rule to a civil enforcement action. First, Moon Moo Farms lacks a

sufficient property interest in the Canal to sustain a trespass claim; as a navigable water, the State of New Union has a public trust interest in the water itself, which it holds in trust for public use. Alternatively, the man-made Canal may be subject to the federal servitude of navigation because it diverts a navigable river. Second, application of the exclusionary rule to this case was improper because the Supreme Court has stated that the rule does not apply to purely civil proceedings. Furthermore, the rule's constitutional basis is the Fourth Amendment, which only protects against searches and seizures by government officials or agents. Because James is a private citizen and his alleged trespass occurred without the EPA's knowledge or approval, James could not have been acting as a government agent.

The lower court further erred in finding that Moon Moo Farm did not violate the CWA. The CWA prohibits the unpermitted discharge of a pollutant from a point source into a navigable water. The lower court erred in both excluding and overlooking relevant evidence of a discharge from Moon Moo Farm's land application of manure. Because of the size of Moon Moo Farm's dairy operation, and because there is sufficient evidence that it discharges manure—a pollutant—into the navigable Deep Quod River, Moon Moo Farm qualifies as a medium CAFO subject to CWA regulation as a point source. Because this discharge occurred without a permit, Moon Moo Farm is in plain violation of the CWA. This discharge is not exempt as agricultural stormwater because the acidic whey Moon Moo Farm applies to its fields falls outside the scope of this exception. Furthermore, Moon Moo Farm's over-application of manure causes discharge absent any rainfall. However, if this Court holds that Moon Moo Farm is not a CAFO, then there is no point source to regulate and the discharges should be classified as nonpoint source stormwater runoff from an agricultural operation.

The lower court correctly granted summary judgment on Riverwatcher's RCRA claims because Moon Moo Farm's manure mixture is not solid waste. It is not solid waste because under a plain meaning analysis it was not "discarded," and because it is being put to beneficial and intended use. Furthermore, the manure mixture is specifically exempt from open dumping regulations. The lower court also properly dismissed Riverwatcher's RCRA imminent and

substantial endangerment claim because the manure mixture is not solid waste. However, aspects of the lower court's reasoning were erroneous. The EPA urges this Court to clarify that a solid waste need only result in the threat of harm and be a source of that harm to sustain an imminent and substantial endangerment claim.

In light of the lower court's errors, EPA requests that this Court reverse the lower court's grant of summary judgment on the CWA claims and Moon Moo Farm's trespass claim, and remand this case for further proceedings.

ARGUMENT

I. Navigating a Public Trust Water Cannot Be Trespass

The lower court's decision to grant summary judgment for Moon Moo Farm hinged on its determination that James' navigation of the Queechunk Canal was a trespass. Moon Moo Farm argues that because it owns the land around the Canal, James' patrol was a trespass, and therefore this Court should suppress the evidence of pollution James collected. Because the Queechunk Canal is a navigable water subject to public trust rights, James has a right to navigate the Canal and thus Moon Moo Farm cannot sustain a trespass claim.

A. The Queechunk Canal Is a Public Trust Navigable Water of the State

Under the public trust doctrine, the navigable waters of each state are held in trust in order to protect the public's right to use the waters for fishing, commerce, and navigation. *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892). Traditionally, states are empowered to protect the public's use rights because the state holds title to the bed and banks of navigable waters. *Id.* at 435–36. The public trust doctrine is traditionally a state doctrine; virtually every state has incorporated it in some form. Cathy J. Lewis, *The Timid Approach of the Federal Courts to the Public Trust Doctrine*, 19 Pub. Land & Resources L. Rev. 51, 56 (1998). When states keep navigable waters "in trust," it necessarily limits private control over those waters. *See id.* In this case, New Union does not own the Canal's bed and banks because the Canal was constructed after New Union became a state. R. at 4–5; *see also Utah v. United States*, 403 U.S.

9, 10 (1971) (state title to the bed and banks accrues at the time of statehood). Nevertheless, the state retains a public trust interest in the water itself. *See Kauai Springs, Inc. v. Planning Comm'n of Kauai*, 324 P.3d 951, 982 (Haw. 2014).

State courts have articulated at least two types of public trust cases: (1) those regarding state *title* to submerged lands (as in *Illinois Central Railroad Co.*), and (2) those focused directly on the public's right to *use* navigable waterways. *See Fish House, Inc. v. Clarke*, 693 S.E.2d 208 (N.C. Ct. App. 2010); Joseph J. Kalo, *"It's Navigable in Fact So I Can Fish in It": The Public Right to Use Man-Made, Navigable-in-Fact Waters of Coastal North Carolina*, 89 N.C. L. Rev. 2095, 2102 (2011) (differentiating between submerged lands title cases and water use cases). This is consistent with the philosophical underpinnings of the public trust doctrine: navigable waters are valuable communal resources, and should therefore be at least partially open for public use. *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 284 (1997).

Even when a private individual does own the bed and banks of navigable waters, the state retains an interest in the water itself. *See Kauai Springs, Inc.*, 324 P.3d at 982. As the Hawai'i Supreme Court emphatically stated, "the public trust doctrine applies to all water resources without exception or distinction." *Id.* Hawai'i is not alone. As far back as 1907, the Oregon Supreme Court recognized public trust rights specific to water *use*. *Hume v. Rogue River Packing Co.*, 92 P. 1065, 1073 (Or. 1907) (upholding public fishing rights in waters over privately owned beds). In a later case involving private lakes, the Oregon Court explained, "[r]egardless of the ownership of the bed, the public has the paramount right to the use of the waters . . . for the purpose of transportation and commerce." *Luscher v. Reynolds*, 56 P.2d 1158, 1162 (Or. 1936). Thus, Moon Moo Farm's ownership of the Canal does not preclude application of the public trust doctrine, which protects the public's right to use the water itself.

B. The Queechunk Canal and Deep Quod River Are Navigable Under State Law

The public trust doctrine protects the waters of Queechunk Canal because they are navigable. The public trust doctrine protects the public's right to use only navigable waters. *See*

The Daniel Ball, 77 U.S. (10 Wall.) 557 (1870). Waterways are legally navigable when they are navigable-in-fact. *Gwathmey v. North Carolina*, 464 S.E.2d 674, 682 (N.C. 1995). Waters are navigable-in-fact "when they are used . . . in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted." *The Daniel Ball*, 77 U.S. (10 Wall.) at 563; *see also Utah*, 403 U.S. at 10–11 (citing *The Daniel Ball* as the first important test of navigability and stating that that test applies to all waters). The Court's test in *The Daniel Ball* thus focused on a waterway's practical utility; if the waterway is adequately navigable for purposes of trade or travel, it should be considered navigable in fact and law. State courts generally follow the practical approach underlying this "use test." *See, e.g.*, *Gwathmey*, 464 S.E.2d at 682 ("[I]f a body of water in its natural condition can be navigated by watercraft, it is navigable in fact . . . ."); *Guilliams v. Beaver Lake Club*, 175 P. 437, 441 (Or. 1918) (measuring navigability by the waterway's capacity "to afford the length, width and depth to enable boats and vessels to make successful progress through its waters").

Because the state retains a public trust interest in the water itself, the use test for navigability should apply even when the waterway is man-made. While New Union courts have not addressed this question, states like North Carolina provide persuasive precedent for applying the public trust doctrine and the use-based navigability test to privately owned, man-made waterways. For example, in *Fish House*—which is factually similar to this case—the court upheld the dismissal of a trespass claim regarding a man-made ditch because the ditch was a navigable waterway and thus subject to the public trust doctrine. 693 S.E.2d at 208. The *Fish House* court held that an artificial waterway is subject to the public trust doctrine and navigability analyses, finding that the "natural condition" language in *Gwathmey* referred to the water's actual capacity to support navigation. *Id.* at 211. *Fish House* adopted the reasoning from a similar South Carolina case, noting that "[t]he fact that a waterway is artificial, not natural, is not controlling. When a canal is constructed to connect with a navigable river, the canal may be regarded as a part of the river." *Id.* (quoting *Hughes v. Nelson*, 399 S.E.2d 24, 25 (S.C. Ct. App. 1990)).

These state cases show that construction of a private waterway does not defeat the public's trust rights in the water. Courts evaluate a waterway's practical utility to decide whether to apply the public trust doctrine. In cases like *Hughes*—where the canal was "privately constructed to connect with a navigable river, had the capacity for navigation, and had indeed been navigated for the past fifteen years without exclusion of the public"—common sense demands a navigable classification. *Hughes*, 399 S.E.2d at 25.

Like the canal in *Hughes*, the Queechunk Canal passes the "practical use" navigability test because the Canal's waters support navigation. It is undisputed that the Canal is navigable-in-fact: it is "fifty yards wide, three to four feet deep, and can be navigated by a canoe or other small boat." R. at 5. Furthermore, it is undisputed that the Deep Quod River, to which the Canal connects, is also navigable-in-fact: it is "navigable by small boat both upstream and downstream" of the Canal. R. at 5. Therefore, the Queechunk Canal should be regarded as "part of" the Deep Quod River for public trust purposes. *See Hughes*, 399 S.E.2d at 25. Like the canal in *Hughes*, the public trust doctrine protects the public's right to navigate the Queechunk Canal.

C. The Federal Servitude of Navigation Further Protects the Public's Right to Navigate the Canal

1. The Lower Court's Reliance on Kaiser Aetna *Is Misplaced*

The lower court relies on *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), to conclude that "there is no public right of navigation in a man-made water body." R. at 9. *Kaiser Aetna* addressed whether a private marina, made navigable when its owners dredged a channel to a navigable bay, must become open to the public. 444 U.S. at 165–66. Here, the lower court's use of *Kaiser Aetna* is incorrect for two reasons: first, *Kaiser Aetna* deals exclusively with the federal servitude of navigation. *See id.* Since the question here is whether the state public trust doctrine extends to the Queechunk Canal, *Kaiser Aetna* is inapplicable. Second, the lower court mischaracterized *Kaiser Aetna*'s holding. The *Kaiser Aetna* Court declined to apply the federal servitude because doing so under those facts would have resulted in an uncompensated "taking." *Id.* at 179–80. The Court did *not* hold that the federal servitude is categorically inapplicable to

man-made waterways. *See id.*

2. The Federal Servitude May Apply Because the Queechunk Canal Diverts a Navigable River

The federal servitude of navigation is a manifestation of Congress' Commerce Clause power to regulate navigable waterways. U.S. Const. art. I, § 8; *see also United States v. Appalachian Elec. Power Co.*, 311 U.S. 377 (1940). Described as a "dominant servitude," *United States v. Cherokee Nation of Okla.*, 480 U.S. 700, 704 (1987), it generally allows the government to interfere with private riparian or submerged lands without paying compensation. *Boone v. United States*, 944 F.2d 1489, 1493–94 (9th Cir. 1991). Federal control over navigable waters is absolute, *Fed. Power Comm'n v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 249 (1954), limited only by the Fifth Amendment. *Kaiser Aetna*, 444 U.S. at 179–80.

Kaiser Aetna highlights that the federal servitude of navigation may only be applied: (1) to navigable waters, and (2) when the resulting "taking" is consistent with the Fifth Amendment. Waters are "navigable" in this context when they form or connect to "a continued highway over which commerce is or may be carried on with other States." *The Daniel Ball*, 77 U.S. (10 Wall.) at 563. Here, navigability is established because the Canal connects to the Deep Quod River, which flows into the Mississippi River, an "interstate body of water that has long been used for commercial navigation." R. at 5. Application of the servitude is also consistent with the Fifth Amendment. The *Kaiser Aetna* Court explicitly suggested the servitude could be applied in cases where, as here, the "Government is exercising its regulatory power in a manner that will cause an insubstantial devaluation of petitioners' private property." *Kaiser Aetna*, 444 U.S. at 180. By contrast, Queechunk Canal has traditionally been open to public navigation; there is no evidence that Moon Moo Farm or the previous owner attempted to exclude the pubic before the present action.[1] Continuing the public's use of the Canal will not devalue Moon Moo Farm's property.

[1] James may have an additional trespass defense if regular public use of the canal created a navigational easement by prescription or estoppel. Prescriptive easements are acquired when non-owners use land in an "open, notorious, adverse and continuous manner," for a specified period of time. *House v. Hager*, 883 P.2d 261, 263 (Or. 1994). Open and continuous use is

If this Court wishes to assess whether the federal servitude burdens the Queechunk Canal, *Vaguhn v. Vermillion Corp.*, 44 U.S. 206 (1979), suggests that it may apply when private canals divert or destroy natural waterways. *Id.* at 206, 210. Here, it is undisputed that "[m]ost of the flow of the Deep Quod River is diverted into the Queechunk Canal, which is fifty yards wide." R. at 5. Redirecting the majority of a natural river into a private canal half the width of a football field should qualify as a diversion under *Vaughn*. Any individual who diverts a river—a communal resource—for personal benefit should incur the obligation to allow members of the public the same use of the water they would have enjoyed had the river been left undisturbed.

II. Even If James' Patrol Is Considered a Trespass, Improperly Obtained Evidence Is Admissible in Civil Proceedings

After incorrectly labeling James' investigatory patrol a trespass, the trial court erred by applying the federal exclusionary rule to a civil proceeding. The exclusionary rule is a criminal law doctrine that—with the narrow exception of forfeiture actions—does not apply to civil proceedings. Moreover, the rule's constitutional foundation is the Fourth Amendment, which provides no protection against private searches. Finally, the lower court misapplied *Smith Steel Casting Co. v. Brock*, 800 F.2d 1329 (5th Cir. 1986), because the civil enforcement action here is a "purely civil action." *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984).

A. James' Evidence Is Admissible Because the Exclusionary Rule Does Not Apply to Civil Proceedings or Protect Against Searches by Private Citizens

The federal exclusionary rule provides that evidence resulting from a search that violates the Fourth Amendment may be excluded. *United States v. Janis*, 428 U.S. 433, 443 (1976). The exclusionary rule is aimed at government conduct: its primary purpose is to "deter future unlawful police conduct." *United States v. Calandra*, 414 U.S. 338, 347 (1974). The

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presumed to be adverse. *Id.* Easements by estoppel are acquired when users detrimentally rely on "representations" by landowners, which may be verbal or by conduct. *Cleaver v. Cundiff*, 203 S.W.3d 373, 376 (Tex. App. 2006). Here, the Canal is "commonly used" as a public shortcut, R. at 5, but additional details are necessary to determine whether requirements like continuous use over a statutorily-specified period of time are met. This question of fact suggests that remand for further fact finding would be appropriate.

exclusionary rule is a criminal law doctrine: "[i]n the complex and turbulent history of the rule, the Court never has applied it to exclude evidence from a civil proceeding, federal or state." *Janis*, 428 U.S. at 447. Since the matter at issue here is exclusively civil, R. at 7, under *Janis*, this Court should hold that the exclusionary rule is not available to suppress EPA's evidence.

The exclusionary rule is founded in the Fourth Amendment, which protects against unreasonable searches and seizures by the government or its agent—not by private citizens like James. U.S. Const. amend. IV; *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 613–14 (1989); *United States v. Sigillito*, 759 F.3d 913, 926 (8th Cir. 2014). Here the trial court states that James acted to the EPA's benefit. R. at 9. This does not make him the EPA's agent. The legal test for government agency is first, that the government had prior knowledge of (and approved) the action, and second, that the private individual carried out the conduct for the purpose of assisting law enforcement officials. *United States v. Walther*, 652 F.2d 788, 792 (9th Cir. 1981); *see also Sigillito*, 759 F.3d at 926. In this case, the record provides no evidence to support either requirement. Because EPA became involved only after Riverwatcher shared its results from analyzing the samples, it could not have known of James' plan to patrol the Canal. Therefore, James was not acting as EPA's "agent," and the Fourth Amendment is inapplicable.

B. The Court Should Not Extend the Exclusionary Rule to this Purely Civil Enforcement Action

The lower court reached an improper conclusion by relying on *Smith Steel Casting Co. v. Brock*,[2] a Fifth Circuit case, which misinterprets Supreme Court precedent in *I.N.S. v. Lopez-Mendoza*. *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032 (1984); *Smith Steel Casting Co.*, 800 F.2d 1329. In *Lopez-Mendoza*, the Court held the exclusionary rule did not apply to a civil deportation proceeding because it was a "purely civil action" aimed at ending a continuing violation of the law, rather than at "punish[ing] past transgressions." 468 U.S. at 1032–33. *Smith Steel*, which

[2] The lower court also relies on *Trinity Industry, Inc. v. Occupational Safety & Health Review Comm'n*, 16 F.3d 1455, 1462 (6th Cir. 1994), which adopted the *Smith Steel* court's analysis wholesale. This brief will therefore focus on the analysis in *Smith Steel*.

misunderstood *Lopez-Mendoza*, held that the rule *does* apply when the Occupational Safety and Health Administration (OSHA) fines an employer for past workplace safety violations. *Smith*, 800 F.2d at 1331.

In *Lopez-Mendoza*, the Court explained that a deportation hearing is "purely civil" because its only function is to determine the individual's present eligibility to remain in this country. 468 U.S. at 1032. The purpose of deportation is to correct "a continuing violation of the immigration laws." *Id.* at 1032–33. The Court distinguished deportation proceedings from attempts to punish past violations of U.S. immigration laws. *Id.* Punishing a past violation *would* be quasi-criminal because the violations—unauthorized entry and presence in the United States—are breaches of *criminal* law.[3] *Id.* at 1046. The *Smith Steel* court missed this key distinction. Instead, the *Smith Steel* court implicitly labeled *all* fines for past civil violations "quasi-criminal" by holding the exclusionary rule should apply whenever the goal of a civil action is "punishing the crime." *Smith Steel*, 800 F.2d at 1334.

Like *Lopez-Mendoza*, this case, is a purely civil action aimed at stopping an ongoing violation of the CWA. The present action arises from the civil provisions of the CWA, § 309(b) and § 309(d), not from the criminal provision outlined in § 309(c). 33 U.S.C. § 1319(b)–(d).

Instead of following *Smith Steel*, this Court must follow the Supreme Court's case-by-case test for determining whether to apply the exclusionary rule: improperly obtained evidence should be suppressed when the benefits (deterring future unlawful police conduct) outweigh the costs (judicial inefficiency resulting from excluding otherwise probative evidence). *Lopez-Mendoza*, 468 U.S. at 1041 (citing *Janis*, 428 U.S. at 454). Both *Smith Steel* and the lower court here failed to explicitly apply this test. In this case, no government agents were involved in

[3] This analysis is consistent with the Supreme Court's isolated application of the exclusionary rule to civil forfeiture. In *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 700 (1965), the Court applied the rule to civil forfeiture for items "used in violation of the criminal law" because such forfeitures are "clearly a penalty for the criminal offense," and therefore "quasi-criminal." *Id.*; *see also Boyd v. United States*, 116 U.S. 616, 634 (1886). In this case, the civil action arises from breaches of CWA § 309(b) and § 309(d), not violations of criminal law.

obtaining the evidence,[4] so the benefits in deterring their future improper conduct are zero. The costs, however, are significant: incentivizing violations of the CWA by removing civil penalties as a deterrent, lost government income, and a result inconsistent with justice. The *Janis* cost-benefit analysis therefore heavily favors finding the evidence admissible.

Finally, even if this Court applies the exclusionary rule with respect to the claims for civil penalties, the evidence should remain admissible with respect to EPA's request for injunctive relief. Injunctive relief, like the deportation proceeding in *Lopez-Mendoza*, is focused solely on correcting the ongoing violation. Applying the exclusionary rule here would lead to absurd and unjust results. The Supreme Court has even stated: "Presumably no one would argue that the exclusionary rule should be invoked to prevent an agency from ordering corrective action at a leaking hazardous waste dump." *Lopez-Mendoza*, 468 U.S. at 1046.

III. Moon Moo Farm Is Discharging Pollutants in Violation of the Clean Water Act

When manure from animal feeding operations leaks into surface or ground water, nitrogen and fecal bacteria pose an immediate threat to public health. *Save the Valley, Inc. v. U.S. Envtl. Prot. Agency*, 223 F. Supp. 2d 997, 1004 (S.D. Ind. 2002). Congress enacted the CWA to protect the integrity of our nation's waters from such harmful toxins. 33 U.S.C. § 1251. To achieve this objective, Congress prohibited the discharge of any pollutant from a point source into the waters of the United States, unless authorized by a permit or exempted by statute. 33 U.S.C. §§ 1311(a), 1342(a). Even where states have been delegated CWA permitting authority, EPA retains a high-level of involvement and authority, and can institute enforcement proceedings if a state fails to do so. *Save the Valley, Inc.*, 223 F. Supp. 2d at 1006. To sustain a CWA claim, plaintiff must prove that (1) there was an unpermitted discharge, (2) from a point source, (3) into a water of the United States. 33 U.S.C. §§ 1311(a); 1362(14). As a CAFO, Moon Moo Farm's land application of manure results in a point source discharge without a permit.

[4] *Smith Steel* is further distinguishable because it was government agents who improperly obtained the evidence of the OSHA violations. *Smith Steel*, 800 F.2d at 1331.

A. Moon Moo Farm Is a Point Source Under Both Agency Regulations and Case Law

CAFOs are point sources under the CWA. A point source is defined as "any discernable, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, . . . *concentrated animal feeding operation*, . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14) (emphasis added). As a point source, a CAFO that discharges pollutants requires a permit unless the discharge qualifies as "agricultural stormwater." *Alt v. U.S. Envtl. Prot. Agency*, 979 F. Supp. 2d 701, 710 (N.D. W. Va. 2013); *see also* 33 U.S.C. § 1362(14). Because Moon Moo Farm qualifies as a CAFO under EPA regulations, and because the agricultural stormwater exception does not apply to its discharges, Moon Moo Farm's unpermitted discharges of pollutants into Deep Quod River violate the CWA.

1. Moon Moo Farm Qualifies as a Medium CAFO Under EPA Regulations

Congress left the term CAFO undefined in the CWA. However, EPA regulations define CAFOs as animal feeding operations (AFOs) that meet certain animal volume requirement. *Save the Valley, Inc.*, 223 F. Supp. 2d at 1003; 40 C.F.R. § 122.23(b)(2) (2014). "'AFOs' are industrial farms that congregate animals, feed, manure and urine, dead animals, and production operations into a small area of land." *Save the Valley, Inc.*, 223 F. Supp. 2d at 1003. A farm is an AFO if it contains animals which "have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12–month period, and crops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility." 40 C.F.R. § 122.23(b)(1). Moon Moo Farm is an AFO because it houses cows year-round that are not pastured.[5] R. at 4–5.

Under EPA regulations, a AFO is regulated under the CWA if it meets the definition of either a large or medium CAFO. 40 C.F.R. § 122.23(b)(2). An AFO qualifies as a "medium

[5] The fact that Bermuda grass is grown on Moon Moo Farm's adjacent farmlands does not preclude it from being a CAFO. Other courts have held similar operations to be CAFOs when the animals themselves are housed in an area where neither crops nor vegetation is grown. *See Cmty. Ass'n for the Restoration of the Env't v. Henry Bosma Dairy*, 305 F.3d 943, 955–56 (9th Cir. 2002).

CAFO" if it: (1) contains between 200 and 699 mature dairy cows, and (2) discharges pollutants into a water of the United States either directly, or though a man-made ditch. *Id.* § 122.23(b)(6). Courts have used the EPA's definition of a CAFO. *See e.g.*, *Waterkeeper Alliance, Inc. v. U.S. Envtl. Prot. Agency*, 399 F.3d 486, 492 (2d Cir. 2005) (citing the regulatory definition of CAFO). Moon Moo Farm contains 350 dairy cows,[6] R. at 4, meeting the numerical requirement of a medium CAFO. *See* 40 C.F.R. § 122.23(b)(6). In order to fully qualify as a medium CAFO, and to be found in violation of the CWA, Moon Moo Farm must also be found to discharge pollutants into a protected body of water.

2. Discharges from Moon Moo Farm's Manure Land Application Are Pollutants

The manure applied to Moon Moo Farm's fields qualifies as a pollutant. The term "pollutant" is defined broadly in the CWA. *Rapanos v. United States*, 547 U.S. 715, 723 (2006). A "pollutant" includes "biological materials . . . and agricultural waste discharged into water." 33 U.S.C. § 1362(6). The Second Circuit recognized that when manure is improperly applied to land, "the nutrients contained in the waste become pollutants that can and often do run off into adjacent waterways or leach into soil and ground water." *Waterkeeper Alliance, Inc.*, 399 F.3d at 493. Several courts have held manure to be a pollutant. *See, e.g.*, *id.* at 494 ("Animal waste includes a number of potentially harmful pollutants."); *Cmty. Ass'n for Restoration of the Env't v. Henry Bosma Dairy*, 305 F.3d 943, 955 (9th Cir. 2002) ("The CWA considers agricultural waste discharged into water a pollutant.").

Furthermore, the discharge of a pollutant from the land application area of a CAFO is a point source discharge. 40 C.F.R § 122.23(e) ("The discharge of manure, litter or process wastewater to waters of the United States from a CAFO as a result of the application of that manure, litter or process wastewater by the CAFO to land areas under its control is a discharge

[6] The record is unclear as to whether the 350 dairy cows on Moon Moo Farm are "mature," as required under 40 C.F.R. § 122.23(b)(6)(i)(A). As this is an appeal from a grant of summary judgment, however, this Court must view the disputed facts in the light most favorable to EPA as the non-moving party. *See Scott v. Harris*, 550 U.S. 372, 378 (2007).

from that CAFO subject to NPDES permit requirements . . . ."). The definition of a point source is to be broadly construed. *Dague v. City of Burlington*, 935 F.2d 1343, 1354 (2d Cir. 1991), *rev'd in part on other grounds*, 505 U.S. 557 (1992).

The fields where Moon Moo Farm grows Bermuda grass and sprays the manure mixture are considered part of the CAFO. *See Concerned Area Residents for the Env't v. Southview Farm*, 34 F.3d 114, 123 (2d Cir. 1994) (holding fields used for land application of manure to be part of the CAFO point source); 40 C.F.R. § 122.23(b)(3). Moon Moo Farm discharges manure, a pollutant, from an area included as part of the CAFO, thus satisfying the regulatory definition of CAFO. Furthermore, the unpermitted discharge of a pollutant from the CAFO establishes a CWA violation. *See* 33 USC § 1311(a).

3. Discharges from Moon Moo Farm Flow into a Water of the United States

It is undisputed that Deep Quod River is a water of the Untied States, protected by the CWA. R. at 7. The district court granted summary judgment for defendant because it found that plaintiffs produced no admissible evidence that the pollutants from Moon Moo Farm are actually discharged into the Deep Quod River. Granting summary judgment on this ground was error.

Summary judgment is only proper if there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). A material fact is in "genuine" dispute "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. If, as in this case, the moving party does not bear the burden of proof at trial, it may discharge its burden on summary judgment by pointing to the absence of evidence to support an essential element of the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). As an essential element of a CWA claim, the presence of a discharge of a pollutant is a material fact. Riverwatcher and EPA presented sufficient evidence to produce a genuine dispute as to whether there was a discharge. Thus, summary judgment was not proper.

As previously explained, the district court erred in excluding the water samples and photographs obtained by Riverwatcher. This photographic evidence shows a discharge of "discolored brown water flowing from the fields through a drainage ditch into the Queechunk Canal." R. at 6. Additionally, the samples of the discolored water from the ditch where it entered the Canal tested positive for "highly elevated levels of nitrates and fecal coliforms." R. at 6. This evidence was admissible, and clearly discharged the burden of petitioners, as the nonmoving parties, to show a genuine dispute for trial as to presence of a discharge of a pollutant.

Even if the Court finds James' evidence inadmissible, there was sufficient additional evidence presented to raise a genuine dispute as to the discharge. Based on samples obtained from discovery, Riverwatcher's expert agronomist, Dr. Ella Mae, opined that the addition of the acid whey to the manure spread on Moon Moo Farm's fields resulted in the leaching of excess nutrients into groundwater and through runoff events. R. at 6. Additionally, Riverwater's environmental health expert, Dr. Susan Generis, opined that Moon Moo Farm's "discharges" "contributed to" the nitrate advisory for Deep Quod River. R. at 7. While Moon Moo Farm provided expert testimony to the contrary, the evidence produced by plaintiffs was sufficient to create a material dispute of fact to survive summary judgment. "The fact that the evidence of the point source discharge 'is circumstantial does not render the jury's conclusion conjectural.'" *Southview Farm*, 34 F.3d at 120. This evidence on its own was sufficient circumstantial evidence from which a reasonable juror could find a point source discharge.

A CAFO is strictly liable for discharging without a permit. *Nat'l Pork Producers Council v. U.S. Envtl. Prot. Agency*, 635 F.3d 738, 743 (5th Cir. 2011). As a CAFO, Moon Moo Farm's discharges violate the CWA.

B. The Agricultural Stormwater Exception Does Not Apply to Moon Moo Farm's Discharges

Despite the fact that the CWA clearly applies to land application discharges from CAFOs, Moon Moo Farm claims that their discharges are exempt from CWA regulation as "agricultural stormwater." Moon Moo Farm's exemption argument stands at odds with the plain

meaning of the statute, EPA regulations, and case law interpreting this exemption.

Congress exempted "agricultural stormwater" discharges from the definition of a point source, but left that term undefined. 33 U.S.C. § 1362(14); *Alt*, 979 F. Supp. 2d at 707. The CWA is ambiguous as to whether discharges from a CAFO, a type of agricultural operation, "can ever constitute agricultural stormwater." *Waterkeeper Alliance, Inc.*, 399 F.3d at 506, 508; *see also* 33 U.S.C. § 1362(14). EPA regulations clarify that they can.

In 2003, EPA expanded the definition of exempt agricultural stormwater discharges to include land applications of manure when done in compliance with appropriate site-specific nutrient management practices. *Alt*, 979 F. Sup. 2d at 708; 68 Fed. Reg. 7176, 7197–98 (Feb. 12, 2003). Under EPA regulations, "a precipitation-related discharge of manure, litter or process wastewater from land areas under the control of a CAFO" is agricultural stormwater only where "manure, litter or process wastewater has been applied in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization." 40 C.F.R. § 122.23(e). The Second Circuit held that, in light of congressional intent and precedent, this regulation was a permissible interpretation of the CWA entitled to deference. *Nat'l Pork Producers Council*, 635 F.3d at 745; *Waterkeeper Alliance, Inc.*, 399 F.3d at 507–09; *Alt*, 979 F. Sup. 2d at 709.

Improper land application of manure is "[p]erhaps the most common way by which pollutants reach the surface waters" from CAFOs. *Waterkeeper Alliance, Inc.*, 399 F.3d at 494 & n.11. Land application of manure not in compliance with site-specific nutrient management practices, and which does not provide for the proper reabsorption of nutrients, is an unpermitted discharge in violation of the CWA. *Nat'l Pork Producers Council*, 635 F.3d at 744; *Alt*, 979 F. Sup. 2d at 708; 68 Fed. Reg. at 7198. It is uncontested that Moon Moo Farm applied manure in accordance with its NMP. R. at 9. Regardless, the discharges from Moon Moo Farm are not exempt as agricultural stormwater because (1) the addition of whey to the applied manure is not "process wastewater," and (2) the discharges are not solely the result of precipitation.

1. The Addition of Whey to Moon Moo Farm's Manure Mixture Takes this Discharge out of the Land Application Exception

The land application exception for agricultural stormwater only applies when manure, litter, or "process wastewater" from the CAFO is applied in accordance with site-specific nutrient management practices. 40 C.F.R. § 122.23(e). Process wastewater is defined as:

> [*W*]*ater* directly or indirectly *used in the operation of the AFO for any or all of the following:* spillage or overflow from animal or poultry watering systems; washing, cleaning, or flushing pens, barns, manure pits, or other AFO facilities; direct contact swimming, washing, or spray cooling of animals; or dust control. Process wastewater also includes any *water* which comes into contact with any raw materials, products, or byproducts including manure, litter, feed, milk, eggs or bedding.

40 C.F.R. § 122.23(b)(7) (emphasis added). The acid whey from the Chokos plant, which Moon Moo Farm applies to its lands, does not qualify as "process wastewater" because it is not water. Additionally, it is not used in the operation of the CAFO for any of the specified purposes. While land application of manure, when properly managed, is an important way in which manure produced by a CAFO is "recycled," mixing an outside substance into that manure should not shield CWA liability. As it is not process wastewater, the fact that Moon Moo Farm applied the whey to its fields in accordance with its NMP does not bring this practice under the agricultural stormwater exception for land applications.

This Court should defer to this EPA regulation as a reasonable interpretation of agricultural stormwater. Congress was silent on the meaning of "agricultural stormwater" in the CWA; thus this Court must consider whether the EPA's answer is based on a "permissible construction of the statute." *See Chevron, U.S.A. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984); *Waterkeeper Alliance, Inc.*, 399 F.3d at 497. The Second Circuit has upheld the EPA's interpretation of agricultural stormwater. *Waterkeeper Alliance, Inc.*, 399 F.3d at 509. The Second Circuit noted that it was permissible for the EPA to treat CAFOs as "agricultural in character," and that only exempting those discharges where "manure, litter or process wastewater" was applied in accordance with site-specific nutrient management practices, assured that the stormwater exception was "expressly tethered to agricultural endeavors." *Id.* at 509.

Limiting the agricultural exception to discharges from the application of manure, litter, or wastewater originating from the CAFO, makes sense. To hold otherwise would effectively grant CAFOs a free pass to mix any substance generated off its facility into its manure applications. This would create a perverse incentive for industries to pair with CAFOs to dispose of pollutants in CAFO manure land applications, threatening our nation's waters. Limiting the agricultural stormwater exception for CAFO land applications to "manure, litter, or process wastewater," ensures that only CAFO practices that are truly serving their intended agricultural purposes in a responsible manner receive a grant of exemption under the CWA.

2. The Discharge from Moon Moo Farm Is Caused by Over-Application, Not Precipitation

The CAFO land application agricultural stormwater exception only applies if the discharges are "precipitation-related." 40 C.F.R. § 122.23(e). Interpreting this provision, the Second Circuit stated, "a discharge of liquid manure would not be exempt just because it happened to be raining at the time, but a discharge of such manure *caused by* precipitation would be exempt." *Alt*, 979 F. Supp. 2d at 712 (citing *Southview Farm*, 34 F. 3d at 121). However, "[t]he agricultural stormwater . . . exception . . . 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." *Cmty. Ass'n for Restoration of the Env't v. Sid Koopman Dairy*, 54 F. Supp. 2d 976, 981 (E.D. Wash. 1999). Courts have distinguished discharges from CAFOs that occur only as the result of rainfall, from those where over-application causes discharge even in the absence of rainfall; the latter being subject to CWA liability. *See Alt*, 979 F. Supp. 2d at 713–14 (holding a poultry CAFO was subject to agricultural stormwater exception where the litter and manure would remain in place if not for rainwater); *Southview Farm*, 34 F.3d at 121 (upholding jury finding that manure runoff was caused primarily because of over-saturation, and thus was not "stormwater").

Here, there is evidence and expert testimony that the quantity of manure and whey applied to the land caused acidification, inhibiting proper nutrient absorption. R. at 6. Testimony

from Dr. Mae provided evidence that some of the manure was discharged into the groundwater because the over-acidification caused inadequate soil absorption. R. at 9. As some of the discharge occurred independent of a rainfall event, the agricultural stormwater exception does not shield Moon Moo Farm from CWA liability.

IV. If the Court Decides that Moon Moo Farm Is Not a CAFO, Then There Is No Point Source to Regulate

Moon Moo Farm is a point source regulated under the CWA because it is a CAFO. However, if this Court holds that Moon Moo Farm is not a CAFO, that determination should be the end of this Court's CWA analysis because there would be no point source. Riverwatcher argues that even if Moon Moo Farm is not a CAFO, the Farm's excessive land application of manure and whey creates CWA liability by removing Moon Moo Farm from the agricultural stormwater exception. This position mischaracterizes the CWA regulatory scheme and ignores the requirement that only discharges *from a point source* are regulated. If this Court finds that Moon Moo Farm is not a CAFO, then there is no point source to regulate, and the resulting farm runoff should qualify as exempted agricultural stormwater.

A. The CWA Does Not Regulate Diffuse and Unchanneled Discharges

The CWA only regulates discharges from point sources: discernable, confined, and discrete conveyances. 33 USC § 1362(14). Unchanneled and uncollected discharges are not included in this definition. *Consolidation Coal Co. v. Costle*, 604 F.2d 239, 249 (4th Cir. 1979), *rev'd on other grounds sub nom. Envtl. Prot. Agency v. Nat'l Crushed Stone Ass'n*, 449 U.S. 64 (1980). Although nonpoint source pollution is not defined in the CWA, courts have interpreted it to encompass "the type of pollution that arises from many dispersed activities over large areas, . . . not traceable to any single discrete source." *Pac. Coast Fed'n of Fishermen's Ass'ns v. Glaser*, No. CIV S–11–2980–KJM–CKD, 2012 WL 3778963, at *4 (E.D. Cal. Sept. 16, 2013). The diffuse nature of this discharge makes it difficult to identify and regulate by permit. *Id.*

Accordingly, a CWA permit is not required for nonpoint source pollution. *Id.*; *see also* 33 U.S.C. §§ 1311(a), 1342(a).

Unless the entire CAFO itself can be the considered the identifiable source of this discharge, there is no other single source that would include the diffuse discharges from the 150 acres of Moon Moo Farm's farmland. R. at 5. In Dr. Mae's expert opinion, the pollutants discharged from the land application area are released into the environment "by leaching into groundwater and through runoff during rain events." R. at 6. Because it is listed as a point source, "a CAFO is, itself, a 'channel' under the Act." *Waterkeeper Alliance, Inc.*, 399 F.3d at 510. Outside the special context of CAFOs, diffuse runoff from a large field such as this, absent some sort of channeling mechanism, is not a point source.

Riverwatcher may argue that Moon Moo Farm's manure spreading equipment is a point source. Some courts have noted that tractors and equipment used to apply fertilizer can constitute a point source. *See, e.g.*, *Sid Koopman Dairy*, 54 F. Supp. 2d at 981. Here, this argument fails because there is no evidence of a discharge from Moon Moo Farm's equipment. Riverwatcher's own expert has opined that the discharges occurred through "leaching into groundwater and through runoff during rain events." R. at 6. Riverwatcher provided no evidence linking the manure spreading vehicles themselves to a discrete, channeled conveyance of pollutants. Such a claim should not be entertained by this Court.

B. The Agricultural Stormwater Exception Should Apply If Moon Moo Farm Is Not a CAFO

"Agricultural stormwater" is not defined in the CWA and EPA has only defined the term with reference to land application discharges from CAFOs. *Alt*, 979 F. Supp. 2d at 712. However, the agricultural stormwater exception covers more activity than just CAFO land applications, and courts apply a plain meaning analysis to determine its scope. *Id.* at 713.

To be "agricultural stormwater," courts have first required the discharge be "agriculture-related." *See id.* at 714. Applying a plain meaning approach, the term agriculture includes the raising of livestock. *Id.* at 711. To further qualify as "stormwater" the discharge must be

precipitation-related. *Id.*; *Waterkeeper Alliance, Inc.*, 399 F.3d at 508. Some of the discharge of manure from Moon Moo Farm happens during rainfall events. R. at 6. Accordingly the non-CAFO discharge from Moon Moo Farm meets the plain meaning of "agricultural stormwater."

"The Clean Water Act leaves regulation of . . . agricultural runoff to the states, regardless of the quality of the water used to irrigate the fields." *Hibenthal v. Meduri Farms*, 242 F. Supp. 2d 885, 887 (D. Or. 2002). Congress specifically exempted agricultural fields from regulation under the CWA by excluding agricultural stormwater from the definition of point source. *See* 33 U.S.C. § 1362(14). This principle is reflected in EPA regulations, which exempt from the CWA:

> Any introduction of pollutants from non point-source agricultural and silvicultural activities, including storm water runoff from orchards, cultivated crops, pastures, range lands, and forest lands, but not discharges from concentrated animal feeding operations as defined in § 122.23 . . . .

40 C.F.R. § 122.3(e). These regulations indicate that although CAFOs may agricultural in nature, are treated differently than other agricultural activities. If Moon Moo Farm is not a CAFO, then it must be an agricultural operation to which the agricultural stormwater exemption would apply.

Nevertheless, Riverwatcher argues that the over-application of manure causes excess nutrient discharges and thereby takes Moon Moo Farm out of the agricultural exemption and makes it subject to CWA permitting requirements. This argument ignores the point source requirement of the CWA. Application of waste to fields in excess of the actual absorption rates of the land does not create CWA jurisdiction where there is no underlying point source to regulate. *Hibenthal*, 242 F. Supp. 2d at 888. In *Hibenthal*, an Oregon District Court considered and rejected a similar argument. *Id.* at 886. In *Hibenthal*, the defendant stored excess wastewater produced from dehydrating fruit, and used it to irrigate its orchards and fields. *Id.* at 886. The plaintiffs claimed that the defendant's over-application of fruit processing wastewater to its crops was more industrial than agricultural, and thus did not qualify as exempt agricultural stormwater. *Id.* at 888. The district court rejected this argument because even if there was evidence that the over-application caused the runoff, this did not create CWA jurisdiction because in that case—like in this one—there was no point source discharge. *Id.*

V. Riverwatcher Cannot Sustain a RCRA Open Dumping Claim Because Moon Moo Farm's Manure Mixture Is Not Solid Waste

EPA has not joined in Riverwatcher's RCRA claims because Congress has determined that the CWA, not RCRA, is the appropriate statute for regulating CAFOs. *See* 42 U.S.C. § 6905(a)–(b) (prohibiting duplicative regulation). Where an activity is regulated under the CWA, summary judgment is appropriate on RCRA claims. *See, e.g.*, *Jones v. E.R. Snell Contractor, Inc.*, 333 F. Supp. 2d 1344, 1350 (N.D. Ga. 2004). Because the CWA regulates Moon Moo Farm's discharges, the Court should affirm summary judgment on the RCRA claims.

Nonetheless, EPA writes separately on these issues to clarify two points. First, Moon Moo Farm should not be liable under RCRA because its manure mixture, consisting of manure and acid whey, is not a RCRA solid waste. Second, even if the Court finds that the manure mixture is a solid waste, Moon Moo Farm would not be liable because manure used as a fertilizer is specifically exempt under EPA regulations from open dumping requirements.

A. Congress Enacted RCRA to Regulate the Disposal of Solid Waste

RCRA is a comprehensive statute "that governs the treatment, storage, and disposal of solid and hazardous waste." *Meghrig v. KFC Western, Inc*., 516 U.S. 479, 483 (1996). Congress understood that the "disposal of solid waste and hazardous waste in or on the land without careful planning and management can present a danger to human health and the environment." 42 U.S.C. § 6901(b)(2). RCRA generally prohibits the "open dumping" of any solid waste. *Id.* § 6945(a). This prohibition is enforceable by citizen suit. *Id.* § 6972(a)(1)(A).

Riverwatcher brought a citizen suit against Moon Moo Farm, alleging that its land application of the manure mixture "constitute[s] the [improper] disposal of *non-hazardous* solid waste" "subject to regulation under RCRA Subtitle D." R. at 2, 10 (emphasis added). Because Riverwatcher does not allege that the manure mixture constitutes *hazardous* waste, the primary issue is if it is a *non-hazardous* solid waste. Riverwatcher's claim necessarily fails because the manure mixture is not a solid waste since it is not "discarded" under RCRA.

B. Moon Moo Farm's Manure Mixture Does Not Constitute Non-Hazardous Solid Waste

Courts have taken two complimentary paths to classify materials as RCRA solid wastes: (1) applying a plain meaning analysis to the term "discarded," and (2) determining if a material has served its intended purpose. Under either analysis, the manure mixture is not solid waste.

1. Because the Manure Mixture Is Used as Fertilizer, It Is Not "Discarded" Under a Plain Meaning Analysis

The Court must look to the statutory definition of "solid waste" to determine if the manure mixture constitutes solid waste.[7] *See, e.g.*, *Ecological Rights Found. v. Pac. Gas & Electric Co.*, 713 F.3d 502, 514 (9th Cir. 2013).

RCRA defines "solid waste" as "any . . . discarded material, including solid, liquid, semisolid . . . material resulting from industrial, commercial, . . . and agricultural operations." 42 U.S.C. § 6903(27). The meaning of "discarded" is key to determining whether the manure mixture is a RCRA "solid waste." *See, e.g.*, *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1041 (9th Cir. 2004). Congress did not define "discarded." *See, e.g.*, 42 U.S.C. § 6903; *Conn. Coastal Fishermen's Ass'n v. Remington Arms Co., Inc.*, 989 F.2d 1305, 1314 (2d Cir. 1993).

When a statute does not define a term, courts first look to the plain and ordinary meaning of that word. *Perrin v. United* States, 444 U.S. 37, 42 (1979). Courts have thus defined "discard" to mean: "to cast aside; reject; abandon; give up." *See, e.g.*, *Ecological Rights Found.*, 713 F.3d at 515 (internal quotations omitted); *accord Am. Mining Cong. v. U.S. Envtl. Prot. Agency*, 824 F.2d 1177, 1184 (D.C. Cir. 1987) (*AMC I*); *Oklahoma v. Tyson Foods, Inc.*, No. 05-CV-0329-GKF-PJC, 2010 WL 653032, at *10 (N.D. Okla. Feb. 17, 2010).

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[7] The lower court erroneously utilized a definition of solid waste found in 40 C.F.R. § 261.2(a)(i) to determine that the manure mixture was "discarded." R. at 11. This definition of solid waste applies only to solid waste that is also hazardous. *See* 40 C.F.R. § 261.1(b)(1) ("The definition of solid waste contained in this part applies only to wastes that are also hazardous for purposes of the regulations implementing subtitle C of RCRA."); *Ecological Rights Found.*, 713 F.3d at 516 n.9; *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 206 (2d Cir. 2009). Because Riverwatcher alleges that the manure mixture is *non-hazardous* solid waste, the Court should only look to the statutory definition of "solid waste."

The manure mixture at issue in the present case is not "discarded" and is therefore not solid waste. The manure and whey are used as soil conditioners, and thus are neither "cast aside" nor "abandoned." *See, e.g.*, *Tyson Foods, Inc.*, 2010 WL 653032, at *10. Moon Moo Farm is purposefully keeping its manure, and is the intended recipient of the Chokos plant's whey. R. at 5. The Chokos plant is not "abandoning" or throwing away the whey, rather it is purposefully giving the whey to Moon Moo Farm. *Id.* The Farm is putting both materials to beneficial use as a fertilizer and soil conditioner. Multiple cases have held that when an agricultural or farming waste product is used as a fertilizer, it does not constitute solid waste. *See, e.g.*, *Safe Air for Everyone*, 373 F.3d 1035 (holding that burned Kentucky Bluegrass residue is not solid waste because it acts as a fertilizer); *Tyson Foods, Inc.*, 2010 WL 653032 (holding that poultry litter applied to the land as fertilizer is not "discarded" and therefore not solid waste).

Courts have used the plain meaning of "discarded" to identify materials that are not solid waste. The D.C. Circuit held that materials "destined for beneficial reuse or recycling in a continuous process by the generating industry itself," are not "'discarded' by virtue of being disposed of, abandoned, or thrown away." *AMC I*, 824 F.2d at 1185–86, 1193 (italics removed). Thus, these in-process secondary materials are not solid waste. Similarly, in-process secondary materials cannot be regulated under RCRA a "solid waste," because they are not "part of the waste disposal problem." *Id.* at 1193, 1196; *see also Am. Mining Cong. v. U.S. Envtl. Prot. Agency*, 907 F.2d 1179, 1186 (D.C. Cir. 1990) (*AMC II*). The Eleventh Circuit indicated, however, that if somebody in-fact abandons the material, it is solid waste even if a later reclaimer puts it to use. *See United States v. ILCO, Inc.*, 996 F.2d 1126, 1131 (11th Cir. 1993).

Drawing on these cases, the Ninth Circuit developed a three-part test to determine whether reused material is "discarded" and thus a RCRA non-hazardous solid waste. *Safe Air for Everyone*, 373 F.3d at 1043. Under this test the court evaluated: "(1) whether the material is 'destined for beneficial reuse or recycling in a continuous process by the generating industry itself,' (2) whether the materials are being actively reused, or whether they merely have the *potential* of being reused, and (3) whether the material is being reused by its original owner, as

opposed to by a salvager or reclaimer." *Id.* (citations omitted). Utilizing these criteria, the court found that Kentucky Bluegrass farmers did not violate RCRA by burning grass residue because the farmers "reuse[d] the grass residue in a continuous farming process effectively designed to produce Kentucky bluegrass." *Id.* at 1045. Because the grass residue was reused for a beneficial purpose, it was not "discarded." *Id.* Since *Safe Air*, the D.C. Circuit has clarified that material which is transferred between firms and reused is not necessarily "discarded." *See Safe Food & Fertilizer v. Envtl. Prot. Agency*, 350 F.3d 1263, 1268 (D.C. Cir. 2003).

Based on these cases, Moon Moo Farm's manure mixture does not constitute a RCRA solid waste. First, the manure and the whey are "destined for beneficial reuse." *Safe Air for Everyone*, 373 F.3d at 1043 (internal quotations omitted); *see also AMC I*, 824 F.2d at 1186. Moon Moo Farm accepts the whey from Chokos not to discard it, but to add it to its manure as an additional soil conditioner, consistent with long-standing practice. *See* R. at 6. Second, the mixture is actually being used, and is not part of the waste disposal problem. R. at 5, 6; *Contra AMC II*, 907 F.2d at 1186. Third, the manure itself comes from Moon Moo Farm, and is therefore unquestionably being used by its original owner. Although the Farm is not the original owner of the whey, because the original owner is not discarding it—and because it is being reused along with Moon Moo Farm's own manure—the whey is not discarded under RCRA.[8]

2. Where a Material Serves Its Intended Purpose, It Is Not "Discarded"

Courts have also determined that when a product is serving its intended purpose, it is not discarded, and thus not solid waste. *See No Spray Coal. Inc. v. City of New York*, 252 F.3d 148, 150 (2d Cir. 2001); *Ecological Rights Found.*, 713 F.3d at 516. In *No Spray Coalition Inc. v. City of New York*, the Second Circuit held that sprayed pesticides are not "discarded" because they are

[8] In *United States v. ILCO, Inc.* the court concluded that lead plates taken from recycled car batteries were RCRA hazardous solid waste because the batteries had actually been discarded by someone other than the recycling industry. *ILCO, Inc.*, 996 F.2d at 1131. *ILCO* is distinguishable from the present case. The Chokos facility is not discarding—throwing away or abandoning—its acid whey. It is *giving* it to Moon Moo Farm for use as a soil conditioner. R. at 5.

serving their intended purpose by killing mosquitoes. 252 F.3d at 150. Similarly, in *Ecological Rights Foundation*, the Ninth Circuit held that wood preservative "applied to utility poles to preserve them is being used for its intended purpose, and is not a RCRA 'solid waste.'" 713 F.3d at 516. Both Moon Moo Farm's manure and whey are not "discarded" because they are being put to their ordinary and intended use by enhancing the soil and fertilizing the silage crop.

C. Finding that Moon Moo Farm's Manure Mixture Does Not Constitute Solid Waste Comports with RCRA's Legislative Intent and History

Moon Moo Farm's manure mixture is not the type of material meant to be regulated as solid waste under RCRA. The House Committee recognized that the term "solid waste" is "laden with false connotations." H.R. Rep. 94-1491(I), at 2 (1976), *reprinted in* 1976 U.S.C.C.A.N 6238, 6240. The Committee was concerned with a more narrow set of materials: those that were "discarded," specifically wastes and sludges. *Id.* The Committee was not concerned with materials that could be reused and reclaimed. *Id.* Indeed, "[a]n increase in reclamation and reuse practices is a major objective of [RCRA]." *Id.*

To that end, the Committee specifically recognized that, "[m]uch industrial and agricultural waste is reclaimed or put to new use and is therefore not part of the discarded materials disposal problem the committee addresses." *Id.* "Agricultural wastes which are returned to the soil as fertilizers or soil conditioners are not considered discarded materials in the sense of this legislation." *Id.*

The legislative history shows that RCRA was enacted "in an effort to help States deal with the ever-increasing problem of solid waste *disposal*." *AMC I*, 824 F.2d at 1185.

> To fulfill these purposes, it seems clear that EPA need not regulate 'spent' materials that are recycled and reused in an *ongoing* manufacturing or industrial process. These materials have not yet become part of the waste disposal problem; rather, *they are destined for beneficial reuse or recycling in a continuous process* . . . .

Id. at 1186 (footnote omitted). Congress designed RCRA to allow EPA to regulate only materials that are truly thrown away or abandoned, not those that are "passing in a continuous stream or

flow from one production process to another." *Id.* at 1190; *see also Safe Food & Fertilizer*, 350 F.3d at 1268. Moon Moo Farm is not disposing of the manure mixture, but rather is reusing it for a beneficial purpose. Following congressional intent, the manure mixture is not solid waste.

D. Riverwatcher's Counter-Arguments Are Not Persuasive

Riverwatcher will likely argue that because acid whey reduces soil pH, the Bermuda grass cannot effectively take up the nutrients in the manure, and these excess nutrients constitute solid waste. Riverwatcher may cite *Ecological Rights Foundation* to support this proposition because in that case the court did not rule out the possibility that if enough wood preservative accumulated and created a dangerous situation it could become "solid waste" under RCRA. 713 F.3d at 518. Riverwatcher may also point to cases holding spent munitions and lead bullets that have accumulated over a long period of time are RCRA solid wastes, even though spent munitions are an intended consequence of the ordinary use of ammunition. *See, e.g.*, *Conn. Coastal Fishermen's Ass'n*, 989 F.2d at 1308, 1316 (holding that, "[w]ithout deciding how long materials must accumulate before they become discarded," the 5 million pounds of lead shot that had accumulated over nearly 70 years "long after they [had] served their intended purpose," constituted solid waste). Riverwatcher may also highlight recent cases out of the Eastern District of Washington where the court denied a motion to dismiss a RCRA claim based on the over-application or leakage of manure allegedly resulting in nitrate and phosphorous above agronomic needs. *See, e.g.*, *Community Ass'n for Restoration of the Env't v. George & Margaret LLC*, 954 F. Supp. 2d 1151, 1158 (E.D. Wash. 2013).

However, these cases are distinguishable and not persuasive. First, none of these cases provided a legal test for when a material has accumulated enough to become solid waste. Neither the Ninth Circuit nor the Eastern District of Washington actually held that accumulated run-off was solid waste. Although the court in *Connecticut Coastal Fisherman's Ass'n* did find that 5 million pounds of lead shot that had piled up over 70 years at a gun range was solid waste, that is

a far cry from the situation in this case where the alleged solid waste can absorb naturally into the ground and act as a soil enhancer.

Second, *Connecticut Coastal Fisherman's Ass'n* dealt with materials that constituted hazardous waste under RCRA. 989 F.2d at 1317 (lead shot is hazardous solid waste). Hazardous waste is regulated more stringently than non-hazardous solid waste. *Id.* at 1313. This case deals strictly with non-hazardous solid waste, and thus EPA has less authority to regulate it.

Finally, there is case law that explicitly states "a substance does not necessarily become a solid waste within the meaning of RCRA when it is applied to the normal beneficial usage for which the product was intended merely because some aspect of the product is not fully utilized." *Tyson Foods, Inc.*, 2010 WL 653032, at *10.

This Court should not hold that nitrogen run-off from the manure mixture is solid waste. Doing so could chill the reuse of materials, contrary to RCRA's intended purpose. *See* H.R. Rep. 94-1491(I), at 2. Riverwatcher's arguments are unpersuasive, and this Court should find that Moon Moo Farm's manure mixture does not constitute a RCRA solid waste.

E. Even If the Court Considers the Manure Mixture Solid Waste, the Claim Must Fail Because Agricultural Wastes Used as Fertilizer Are Exempt

Even if this Court finds that Moon Moo Farm's manure mixture constitutes solid waste Riverwatcher's RCRA claim must fail. The EPA has specifically exempted "agricultural wastes, including manures and crop residues, returned to the soil as fertilizers or soil conditioners" from the criteria that apply to "solid waste disposal facilities and practices." 40 C.F.R. §§ 257.1(c)(1), 257.1(c). Because Congress has not spoken directly to whether agricultural waste used as fertilizer is categorically exempt, this Court must determine if the agency's regulation is based on a permissible interpretation of the statute. *See Chevron, U.S.A.*, 467 U.S. at 843. Based on RCRA's legislative history, which clearly indicates congressional intent to not regulate reused agricultural wastes, EPA's exemption is reasonable and deference is appropriate. *See* H.R. Rep. 94-1491(I), at 2; *Chevron, U.S.A.*, 467 U.S. at 843.

Under this regulation, the manure in the mixture is returned to the soil as fertilizer and is therefore exempt from any solid waste practices. Given that the acid whey is also being used as a soil conditioner—for the same purpose and in the same manner as the manure—it would be illogical to single out that portion of the mixture and regulate it as a solid waste.

Moon Moo Farm's manure mixture is not a RCRA solid waste. In coming to this determination, the EPA is tied by the language and legislative intent of RCRA. RCRA is not the appropriate federal statute under which to regulate excess discharges of nutrients from manure. Utilizing RCRA to regulate these discharges would undermine the statutory purpose: fostering reuse and reclamation of waste materials.

VI. Solid Waste Need Not Actually Cause Harm or Be the "But For" Cause to Constitute an Imminent and Substantial Endangerment

Riverwatcher brought an imminent and substantial endangerment claim under RCRA's citizen suit provision, which allows any person to begin a civil action against any past or present generator, 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).

EPA has not joined Riverwatcher's imminent and substantial endangerment claim because Moon Moo Farm's manure mixture is not a solid waste. However, EPA writes separately on this issue to express its view that the district court erred in determining that Moon Moo Farm's practices did not present an imminent and substantial endangerment to human health because they are not the "but-for" cause of the nitrate advisory in Farmville. R. at 11. The district court also erred when it stated that there was no imminent and substantial endangerment because the nitrates do not pose a health risk to adults and juveniles, and because households with infants can avoid the potential health risk. R. at 11–12. EPA asserts that any solid waste that "may contribute" to an ongoing imminent and substantial threat to human health can be the basis for an imminent and substantial endangerment claim under RCRA's citizen suit provision, 42

U.S.C. § 6972(a)(1)(B). This finding comports with the statute's language and protects human and environmental health by ensuring the appropriate and safe disposal of solid waste.

RCRA's imminent and substantial endangerment provision is written in broad language, allowing the courts "to grant affirmative equitable relief to the extent necessary to eliminate *any risk* posed by toxic wastes." *Dague*, 935 F.2d at 1355 (citations omitted); *see also Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 210 (2d Cir. 2009). To effectuate this purpose, "[C]ongress used the word 'may' to preface the standard of liability." *Dague*, 935 F.2d at 1355.

RCRA requires three elements to sustain a suit under this provision. There must be a solid waste that presents (1) an endangerment, that is (2) imminent, and (3) substantial. *See* 42 U.S.C. § 6972(a)(1)(B); *Cordiano*, 575 F.3d at 210. An endangerment means that there is an "a threatened or potential harm." *Burlington N. & Santa Fe Ry. Co. v. Grant*, 505 F.3d 1013, 1020 (10th Cir. 2007). To establish an endangerment, there need only be the risk of harm—an individual does not need to prove actual harm to persons or the environment. *Id.* While the risk of harm must be ongoing, the conduct that created that risk does not. *Id.* Imminency requires only that "the risk of threatened harm is present." *Dague*, 935 F.2d at 1356; *see also Burlington N.*, 505 F.3d at 1020. There does not need to be an emergency, nor does the harm need to occur immediately. *Dague*, 935 F.2d at 1355–56. Instead, "an 'imminent hazard' may be declared at any point in a chain of events which may ultimately result in harm to the public." *Id.* at 1356. "Substantial" means that the endangerment is "serious." *Burlington N.*, 505 F.3d at 1021 (internal quotations omitted).

In the present case, there is an endangerment that is both imminent and substantial. There is a real risk of harm to infants; the Farmville Water Authority declared the public water supply "unsafe" for infants to drink. R. at 6. The statute does not differentiate between people who may be harmed—infant and adult health are protected equally. The fact that a family *could* avoid the danger by providing bottled water does not remove the fact that the danger is there. Furthermore, the danger is ongoing and serious. Had there been a solid waste that contributed to this danger, Riverwatcher could have sustained an imminent and substantial endangerment citizen suit.

The lower court erred when it determined that there was no imminent and substantial endangerment because there was no proof that Moon Moo Farm's discharges were the "but for" cause of Farmville's nitrate advisories. R. at 11. RCRA does not require that a solid waste be the "but for" cause of an imminent and substantial endangerment from solid waste pollution. *Cf. Attorney Gen. of Okla. v. Tyson Foods Inc.*, 565 F.3d 769, 778 (10th Cir. 2009) (implying that it would be error if the district court required the plaintiff to establish the solid waste was the only cause of contamination). The solid waste needs to be one of the possible sources of the imminent and substantial endangerment, but it does not need to be the only one. *Id.* In the present case, Riverwatcher has presented evidence that the manure mixture was one of the possible causes of the nitrate advisory. R. at 7. This causal connection—if it had involved a solid waste—would be sufficient to support an imminent and substantial endangerment claim.

The lower court also erred when it held that because families could avoid danger by only using bottled water with their infants, there was no imminent and substantial endangerment. To support this assertion, the lower court relied on *Davies v. Nat'l Coop. Refinery Ass'n*, 963 F. Supp. 990 (D. Kan. 1997). In that case, the court abstained from deciding the RCRA issue, but noted in dicta that there was not enough evidence of an actual imminent and substantial endangerment. *Id.* at 999. The court implied that if the danger could be avoided by using bottled water, there is no endangerment. *Id.* This dicta contradicts more recent circuit court decisions. Other circuits have indicated that the mere threat of harm—not actual harm—is all that is necessary to establish an endangerment. *See, e.g.*, *Cordiano*, 575 F.2d at 211 (an endangerment "'mean[s] a threatened or potential harm'"); *Burlington N.*, 505 F.3d at 1020 (interpreting endangerment "to mean a threatened or potential harm" and stating "injunctive relief is authorized when there *may* be a risk of harm"). This Court should follow its sister circuits and hold that endangerment requires only the *threat* of harm—a threat which is present in this case.[9]

[9] In the present case there is a threat of harm not only to infant health, but also to the environment. Excessive amounts of nitrates in the water can result in harm to water bodies, including eutrophication. *Nitrogen and Water*, The USGS Water Science School, http://water.usgs.gov/edu/nitrogen.html (last visited Nov. 29, 2014). The threat of harm to the

Although EPA cannot join in Riverwatcher's imminent and substantial endangerment claim because the manure mixture does not constitute solid waste, EPA encourages this Court to correct the lower court's erroneous reasoning. If this Court determines the manure mixture is a solid waste, then this Court should find that Riverwatcher has presented enough evidence to sustain an imminent and substantial endangerment claim under RCRA.

CONCLUSION

For the foregoing reasons this Court should reverse the grant of summary judgment on the CWA claims and Moon Moo Farm's trespass claim. Because evidence of Moon Moo Farm's discharge is both admissible and supports its classification as a CAFO in violation of the CWA, this Court should remand for further consideration of EPA's motion for summary judmgent. Additionally, this Court should affirm summary judgment on Riverwatcher's RCRA claims, but clarify that a solid waste need only result in the threat of harm, and need only be a source of that harm to sustain a RCRA imminent and substantial endangerment claim.

Respectfully submitted,

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Counsel for U.S. Environmental Protection Agency

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environment is also enough to sustain a RCRA imminent and substantial endangerment claim. *See* 42 U.S.C. § 6972(a)(1)(B); *Burlington N.*, 505 F.3d at 1021.