No. 14-1248

IN THE UNITED STATES COURT OF APPEALS

UNITED STATES OF AMERICA,
Plaintiff-Appellant,
and
DEEP QUOD RIVERWATCHER, INC. and DEAN JAMES,
Plaintiff-Intervenors-Appellants

v.

MOON MOO FARM, INC.
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR NEW UNION,
THE HONORABLE JUDGE ROMULUS N. REMUS PRESIDING.

Case No. 155-CV-2014

BRIEF OF APPELLANT UNITED STATES OF AMERICA

ORAL ARGUMENT REQUESTED

TEAM 31
Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF CONTENTS

(Continued)

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES

(Continued)

TABLE OF AUTHORITIES

(Continued)

TABLE OF AUTHORITIES

(Continued)

TABLE OF AUTHORITIES

(Continued)

UNITED STATES CONSTITUTION

STATUTES AND REGULATIONS

TABLE OF AUTHORITIES

(Continued)

TABLE OF AUTHORITIES

(Continued)

FEDERAL REGISTER

SECONDARY SOURCES

STATEMENT OF JURISDICTION

Appellant, the United States of America, on behalf of the Environmental Protection Agency, and Riverwatcher, Inc. and Dean James (collectively, Riverwatcher), appeal a finding that there was no discharge of pollutants into navigable waters of the United States by Moon Moo Farm, Inc. in violation of § 301 of the Federal Water Pollution Control Act (the Clean Water Act), 33 U.S.C. §§ 1311(a), 1319(c), (d), and 1342. The Clean Water Act (CWA) grants jurisdiction to district courts without regard to the amount in controversy. 33 U.S.C. § 1365(a). RCRA grants jurisdiction to district courts without regard to the amount in controversy. 42 U.S.C. § 6972(a). The district court's final order granted summary judgment for Moon Moo on June 1, 2014, and appellant EPA filed a timely notice of appeal. Fed. R. App. P. 4(a)(1)(A). This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. Is the Queechunk Canal, a man-made water body, a public trust navigable water of the State of New Union allowing for a public right of navigation despite private ownership by Moon Moo Farm of the banks on both sides and the bottom of the Canal?

II. If the Queechunk Canal is not a public trust navigable water, is evidence obtained through warrantless trespass admissible in a civil enforcement proceeding under CWA §§ 309(b), (d) and 505?

III. Does Moon Moo Farm require a permit under the CWA NPDES permitting program because:

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

IV. Is Moon Moo Farm 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?

and

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

STATEMENT OF THE CASE

This case stems from nitrate pollution caused by a manure-acid whey mixture applied to fields as a fertilizer, its discharge into a navigable water, and its proper regulation under the CWA. Moon Moo Farm (Moon Moo) failed to apply the mixture in a way that ensures appropriate agricultural utilization of the manure mixture's nutrients. As a result, when it rains, the rainwater carries nitrates and fecal coliforms from the mixture into its runoff, which is discharged through a drainage ditch on Moon Moo's property into the Queechunk Canal (Canal). R. at 6. The Canal runs into the Deep Quod River (River), which is used by the town of Farmville as drinking water. R. at 5.

EPA, a plaintiff below, filed this civil enforcement proceeding seeking civil penalties and injunctive relief in an effort to bring Moon Moo into compliance with the CWA. R. at 1, 7. EPA respectfully requests that Moon Moo obtain a National Pollutant Discharge Elimination System (NPDES) permit for its discharges resulting from its manure-acid whey land application. R. at 7. Riverwatcher intervened as a matter of right under CWA § 505(b)(1)(B), and brought an additional cause of action under the citizen suit provision of the Resource Conservation and Recovery Act (RCRA), RCRA § 7002, to control Moon Moo's discharge of pollutants. R. at 7. Moon Moo asserted a counterclaim against Riverwatcher seeking damages and injunctive relief for James' alleged trespass while collecting evidence of Moon Moo's discharges. *Id.* All parties moved for summary judgment. *Id.*

The district court granted summary judgment for Moon Moo. R. at 12. It determined that Riverwatcher's evidence was not admissible because it was obtained through warrantless trespass. R. at 8-9. Without probative evidence, the court found that Moon Moo is not a concentrated animal feeding operation (CAFO) that is discharging pollutants. Rather, the district court determined that it is discharging agricultural stormwater, and is therefore exempt from regulation under the CWA. R. at 9-10. The court also dismissed Riverwatcher's RCRA claim alleging open dumping, finding that Moon Moo's discharge was not "solid waste," and that the discharge did not present an imminent and substantial endangerment to human health or the environment. R. at 10-11.

EPA appeals from summary judgment granted for Moon Moo because the district court erroneously suppressed evidence that proves that Moon Moo is subject to the CWA regulation. R. at 1. This Court ordered additional briefing on the substantive merits of the case. R. at 2.

STATEMENT OF THE FACTS

Moon Moo Farm. Moon Moo, located at the River's bend, operates a dairy farm that houses 350 milk cows in a barn, which are not pastured. R. at 4-5. Their manure is collected in a lagoon, and for the last two years, it has been mixed with acid whey from the Farmville Chokos Greek Yogurt plant. R. at 5. The mixture is "periodically pumped from the lagoon into tank trailers," hauled by tractor, and spread as fertilizer for Bermuda grass on Moon Moo's 150 acres of fields. R. at 4-5. Runoff from this land application contains pollutants, specifically a chemical waste called "nitrates," fecal coliforms and suspended solids. R. at 7.

New Union Department of Agriculture. The New Union Department of Agriculture (DOA) requires that a "no-discharge" animal feeding operation (AFO) submit a Nutrient Management Plan (NMP). R. at. 5. It has the authority to reject NMPs it finds insufficient. *Id.* However, it does

not ordinarily review them. NMPs filed by "no-discharge" AFOs are not subject to public comment in New Union. *Id.* Moon Moo is regulated by the State of New Union as a "no-discharge" medium AFO, and has submitted a NMP with the DOA which "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." R. at 5, 8. Moon Moo has complied with its NMP at all relevant times. R. at 6.

The Queechunk Canal and Deep Quod River. The Canal, fifty yards wide, three to four feet deep, is navigable by canoe or small boat upstream and downstream. R. at 5. Located at the River's bend, the Canal diverts most of the River's flow into itself. *Id*. It was excavated by a previous owner as a bypass canal to alleviate flooding over sixty years ago. *Id*. Moon Moo owns the land on both sides of the Canal and its bottom. *Id*. Despite Moon Moo's "no trespass" signs, the Canal is commonly used as a shortcut up and down the River. *Id*. The River flows year round, and is a "water of the United States" subject to CWA jurisdiction that eventually flows into the Mississippi River, a navigable-in-fact interstate water used for commercial navigation. R. at 4-5. The town of Farmville, located ten miles downstream, uses the River as a drinking water source. R. at 5.

Farmville's "Nitrate" Advisory. In early 2013, the Farmville Water Authority issued a "nitrate" advisory for its drinking water customers, warning that the high levels of nitrates in the River, which "smelled of manure and was an unusually turbid brown color," had caused the town's municipal water supply to be unsafe for drinking by infants under two, but not by adults. R. at 6.

Dean James and Riverwatcher, Inc. James, the River's "Riverwatcher," made an investigatory patrol of the River on April 12, 2013, during a rain event. *Id*. James floated down the River and along the Canal in a "jon boat." *Id*. Upon reaching Moon Moo's property, he witnessed manure spreading on Moon Moo's fields and a drainage ditch discharging "discolored brown

water" into the Canal, both of which James photographed. *Id*. He also sampled the brown water flowing through the drainage ditch, test results of which showed "highly elevated levels of nitrates and fecal coliforms." *Id*.

Expert Opinions. Dr. Mae, Riverwatcher's expert agronomist, opined that the lower pH of the manure-acid whey mixture caused the soil's pH to decrease, which prevented the Bermuda grass crop "from effectively taking up the nutrients in the manure." R. at 6. Excess nutrients were then released into the River through stormwater runoff and groundwater leaching. *Id*. She also opined that "land application of manure during a rain event is a very poor management practice." *Id*. Dr. Green, Moon Moo's expert agronomist, opined that the land application of whey as a soil conditioner was a traditional practice, and Bermuda grass tolerates a wide range of soil pH conditions. *Id*. Dr. Generis, Riverwatcher's environmental health expert, opined that Moon Moo might not be the "but for" cause of the nitrate advisories because the River's watershed was heavily farmed, and other nitrate advisories had been issued between 2002 and 2010. However, she believed that Moon Moo's discharges contributed to the cause of the 2013 advisory. R. at 7.

SUMMARY OF THE ARGUMENT

This case arises under the CWA, 33 U.S.C. § 1251 *et seq.* (2006). R. at 1. Appellant EPA brought a civil enforcement action under 33 U.S.C. §§ 1311(a), 1319(c), (d), and 1342 against appellee Moon Moo because pollutants discharged from its dairy are continuously contaminating navigable waters and Farmville's drinking water. R. at 1, 6. The district court granted summary judgment for Moon Moo. R. at 4. The court correctly dismissed Riverwatcher's imminent hazard citizen suit, and this Court should affirm. R. at 10. However, EPA takes issue with the remaining

three issues of the district court's holdings below. R. at 1, 11. This Court should reverse and grant summary judgment for EPA.

First, the district court erred in excluding evidence that is highly probative to the enforcement of the CWA. R. at 9. The court incorrectly reasoned that James obtained evidence while trespassing on the Canal. R. at 9. However, the Canal is a public trust navigable waterway susceptible to interstate commerce that is open to public use. Therefore, no trespass occurred as a matter of law. Even if the Canal is a not a public trust navigable waterway and James did trespass, evidence is admissible because Moon Moo had no privacy interest protected by the Fourth Amendment which only protects against unreasonable government searches.[1] James was not a government agent, and Moon Moo had no reasonable expectation of privacy in activity that was in the open and in plain view. R. at 6. Therefore, this Court should reverse summary judgment for Moon Moo and find James' evidence admissible.

Second, the district court incorrectly granted summary judgment for Moon Moo, holding that it is not a CAFO subject to NPDES permitting, and that Moon Moo's discharges are excluded from regulation as agricultural stormwater. R. at 10. The district court erred in finding that Moon Moo is not a CAFO because James' highly probative admissible evidence, were it admitted, would show that Moon Moo, a medium AFO, discharges pollutants into the Canal, an act strictly prohibited by the CWA without a NPDES permit. Thus, after admitting evidence improperly suppressed, this Court should hold that Moon Moo is a CAFO subject to NPDES permitting. However, if this Court finds that Moon Moo is not a CAFO, then it is exempt from NPDES permitting under the

[1] The Fourth Amendment states: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV.

agricultural stormwater exemption by definition. This is because the *only* way this Court can hold that Moon Moo is not a CAFO is on a finding that Moon Moo does not discharge *any* pollutants into the Canal. Therefore, if Moon Moo's excess nutrients do not pollute the Canal, it is not a CAFO, and its compliance with a NMP exempts Moon Moo from NPDES permitting as agricultural stormwater. R. at 6.

Third, the district court correctly dismissed Riverwatcher's citizen suit to enforce RCRA's ban on open dumping of solid waste against Moon Moo because its discharges are not within the definition of "solid waste." This dismissal properly precludes Moon Moo from double liability under both the CWA and RCRA. R. at 10-11. However, the court erred in finding that Riverwatcher did not establish that Moon Moo's manure-acid whey land application was an imminent and substantial endangerment to human health and the environment. R. at 11. Were James' evidence admitted, it would show that Moon Moo's discharges present a serious potential harm and is a present threat that will result in harm to human health if not remedied. However, this error was harmless because reversal would be insufficient to sustain an open dumping claim in the absence of finding that Moon Moo's discharges were solid waste. *Id.* As such, this Court should affirm the dismissal of Riverwatcher's RCRA claim because Moon Moo is appropriately subject to regulation under the CWA.

STANDARD OF REVIEW

To survive a motion for summary judgment, there must be a genuine issue of material fact when viewed in the light most favorable to the non-moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). If no material issue of fact exists, summary judgment should be granted to the moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 318 (1986). Review of statutory

interpretations are deferential to EPA's "permissible construction of the statute" unless Congress has unambiguously and "directly spoken to the precise question at issue." *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-3 (1984). EPA's interpretation of its own regulations are given "controlling weight unless it is plainly erroneous." *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Agency action should be upheld unless EPA's action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A); s*ee also Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

ARGUMENT

I. The Fruits of James' Investigation are Admissible Because the Canal is a Public Trust Navigable Waterway.

Evidence highly relevant to the enforcement of the CWA obtained by James should not be excluded because the Canal is a public trust navigable waterway. States have a duty to hold navigable waters in trust for the public. *Shively v. Bowlby*, 152 U.S. 1, 16 (1894). The Canal is a navigable water because it is susceptible for use as a highway for commerce. *See The Montello*, 87 U.S. 430, 439 (1874). Therefore, the Canal is a public trust navigable water, and no trespass occurred as a matter of law. As such, summary judgment for Moon Moo should be reversed.

A. The Canal is a Navigable Water, even if Man-Made, Because it is Susceptible to Navigation and Interstate Commerce, and Boats Float upon its Continuous Flow.

The Canal is a navigable waterway under any definition. The definition of "navigable water" has broadened over time to serve the changing public interest. *See The Genesee Chief*, 53 U.S. 443 (1851) (defining navigable waters for admiralty jurisdiction). For CWA jurisdiction, "navigable waters" or "the waters of the United States, including the territorial seas," 33 U.S.C. § 1362(7), are all waters used, previously used, or susceptible to use in interstate commerce. 40 C.F.R. § 122.2

(2013). They include, in relevant part, intrastate rivers and streams, including intermittent streams, which could be used by interstate travelers for recreational or other purposes. 40 C.F.R. § 232.2. Only "relatively permanent, standing or continuously flowing bodies of water" are navigable waterways. *Rapanos v. United States*, 547 U.S. 715, 716 (2006). Navigable waters have a significant nexus to navigable-in-fact waters as assessed under the goals of the CWA. *Id*. at 717.

Traditional navigable waters "susceptible for use in commercial navigation" are evidenced by vessels floating upon them such that commerce could be conducted. *The Montello*, 87 U.S. 430, *passim* (1874). Factors of susceptibility to commercial navigation include physical characteristics, such as size, depth and flow velocity. The "likelihood of future commercial navigation" can be demonstrated by "current boating and canoe trips for recreation and other purposes." Definition of "Waters of the United States" Under the Clean Water Act, 79 Fed. Reg. 22,200 (Apr. 21, 2014).

The Canal has the physical characteristics and purpose of navigability. It is an excavated bypass with origin and terminus in the River that flows year round, diverting most of the River into itself. R. at 5. It is fifty yards wide and three to four feet deep. R. at 5. Completely within New Union, the Canal is susceptible to interstate commerce because it could float James' small metal outboard craft. R. at 6. Its waters also support interstate commerce because they have a significant nexus with a navigable-in-fact water, flowing continuously and eventually into the Mississippi River. R. at 5-6. Additionally, the Canal does not come within the narrow definition of "navigable waters" that was challenged in *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs,* 531 U.S. 159 (2001) and *Rapanos*, which excluded waters such as ephemeral channels and insubstantial hydrological connections. 79 Fed. Reg. 22,191-94 (Apr. 21, 2014).

Furthermore, a "man-made" water can be a navigable water. *Sanders v. Placid Oil Co.,* 861 F.2d 1374, 1377 (5th Cir. 1988) (holding that navigable waters are capable of interstate travel,

"and distinctions between natural and man-made waters are immaterial." *Id.*). The district court abused its discretion on an improper reading of *Kaiser Aetna v. United States*, 444 U.S. 164 (1979). The district court stated that *Kaiser* stood for a rule of law that a man-made water cannot be navigable. However, *Kaiser* actually stands for the premise that unlimited public access to man-made navigable waters on private property can be *so extensive* as to be a compensable taking of a fundamental property right to exclude.

In *Kaiser,* private investors spent millions to convert a pond into a private aquatic park linked to navigable water by a dredged channel. Only later were investors informed that the channel they dredged had become subject to the public trust doctrine. The resulting "free public use" would have prevented investors from recovering their investment. *Kaiser*, 444 U.S. at 179-80. This was government exercise of regulatory power "so far beyond ordinary regulation or improvement for navigation" that it caused "a substantial devaluation of private property" amounting to a compensable taking. *Id.* at 178, 180. Thus, the investors could exclude the non-paying public from man-made navigable waters because the government did not compensate them. In this case, any investment in the Canal was made over 60 years ago by a previous owner, so there is no *Kaiser* taking. A proper reading of *Kaiser* does not foreclose a finding that the man-made Canal at issue is a navigable water. Therefore, the district court abused its discretion applying a phantom rule of law that man-made waters are not navigable. This Court should find that Moon Moo's man-made Canal is a navigable water.

B. As a Navigable Water, the Canal is Held in Public Trust by New Union Despite its Private Ownership.

Under the public trust doctrine, states have a duty to hold their resources in trust for the public. *Nat'l Audubon Soc'y v. Super. Ct. of Alpine Cnty.,* 33 Cal.3d 419, 441 (1983). Congress helps states discharge their duties by mandating EPA's joint participation in enforcement of the CWA.

States have a "duty of continuing supervision over the taking and use of appropriated water." *Nat'l Audubon*, 33 Cal. 3d at 448. These duties "can only be discharged by the management and control of property," and "cannot be relinquished by a transfer of the property." *Ill. Cent. R.R. Co. v. Ill.*, 146 U.S. 387, 453 (1892). Thus, Moon Moo's private ownership cannot frustrate public use of navigable waters which must remain "free to interstate and foreign commerce." *See Montana v. United States*, 450 U.S. 544, 551 (1984); *Kaiser*, 444 U.S. at 175 (privately owned lands, submerged lands, and borders are held in public trust for public navigation).

The Canal is the kind of resource that is held in public trust: it is a navigable waterway. As such, New Union has a duty to protect and hold in trust waters heading downstream to Farmville despite private ownership of the banks and bottom by Moon Moo. New Union has this duty even though Moon Moo appropriates the River's waters when the Canal diverts most of the River's flow into itself. Finding otherwise would contravene *Nat'l Audubon*. It is untenable under the public trust doctrine for the Canal to be under the exclusive control of Moon Moo simply because Moon Moo owns its banks and bottoms. Because the Canal is a navigable water held in trust by New Union, the fruits of James' investigation are admissible.

II. The Fruits of James' Investigation Obtained in Warrantless Trespass are Admissible in a Civil Enforcement Proceeding.

James' evidence is admissible even if the Canal is not a public trust navigable waterway because the appropriate remedy for common law trespass is damages, not suppression of evidence. Trespass does not deserve Fourth Amendment protection, or the remedy of exclusion of evidence that sometimes comes with it, because "the common law of trespass furthers a range of interests that have nothing to do with privacy." *Oliver v. United States*, 466 U.S. 170, 183 n.4 (1984). Also, state trespass law should not be an obstacle to CWA enforcement under the Supremacy Clause. U.S. Const. art. VI, cl. 2.

Fourth Amendment protections extend to commercial operations in civil enforcement actions, *Marshall v. Barlow's Inc.*, 436 U.S. 307 (1978), including administrative inspections, *See v. City of Seattle*, 387 U.S. 541 (1967), but only prohibit *unreasonable* searches by government officials. *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921). However, James was not a government agent. He is a private individual who was acting without the participation or knowledge of a government official. *See United States v. Jacobsen*, 466 U.S. 109, 113 (1984). Further, Moon Moo had no reasonable expectation of privacy, a predicate for an unreasonable search. *Katz v. United States*, 389 U.S. 347 (1967). Therefore, with no Fourth Amendment search, the exclusionary rule cannot apply even if James trespassed.

Furthermore, no warrant was required because even if this were a government inspection, it was a reasonable "special needs" administrative inspection that is subject to a warrant exception. *New York v. Burger*, 481 U.S. 691, 702 (1987). Special needs administrative inspections are reasonable in a "closely regulated" industry if the government has a substantial interest in the regulatory scheme that the inspection furthers, and property owners are aware that their property will be "periodically inspected" for a particular purpose. *Burger*, 482 U.S. at 702, citing *Donovan v. Dewey*, 452 U.S. 594, 600 (1981). The facts at bar show that this is a special needs administrative inspection. Moon Moo operates in the closely-regulated agriculture industry, Congress has a substantial interest in eliminating water pollution, which citizen inspections further, and dairy farms, such as Moon Moo, know that citizens are likely to investigate pollution in their own backyard and in furtherance of a CWA citizen suit. Thus, as a special needs administrative search, James did not require a warrant.

James' evidence is admissible even if tainted by an unconstitutional intrusion. The district court misread *Smith Steel Casting Co. v. Brock*, 800 F.2d 1329 (5th Cir. 1986), as prohibiting the

admission of tainted evidence altogether. In fact, *Smith Steel* admitted tainted evidence to enjoin ongoing illegal OSHA violations, but not to impose punitive penalties. Whether tainted evidence for non-punitive administrative penalties is admissible was not before the *Smith Steel* court. EPA uses administrative penalties not as punishment but to compel regulatory compliance and swiftly resolve environmental problems, tantamount to injunctive relief. Thus, James' evidence, tainted or not, should have been admitted in this administrative penalty and injunctive relief action under CWA § 309(b) and (d) in order to swiftly remedy Moon Moo's discharge of pollutants into the Canal.

Finally, James' evidence is admissible to allow EPA to correct Moon Moo's violations through injunctive relief and penalties because suppressing such evidence is detrimental to human health. Exclusion of evidence is a "last resort" remedy with high societal costs. *Herring v. United States*, 555 U.S. 135, 140, 159 n.4 (2009). Thus, with sufficient evidence before the court, summary judgment for Moon Moo should be reversed to allow EPA to resolve Moon Moo's continuous violations of the CWA.

A. James' Investigation does not Violate the Fourth Amendment so its Fruits are Admissible.

A Fourth Amendment search requires government conduct, *Burdeau*, 256 U.S. at 475, and a claimant's reasonable expectation of privacy. *Katz*, 389 U.S. 347, 361 (1967). James was not a government actor, and Moon Moo had no reasonable expectation of privacy. Without a Fourth Amendment search, the exclusionary rule cannot apply. Thus, the fruits of James' search are not poisoned and are admissible. *See Mapp v. Ohio*, 367 U.S. 643 (1961).

i. James' Investigation did not Violate the Fourth Amendment Because There was no Government Intrusion.

The Fourth Amendment only protects against *unreasonable government* intrusions. Even unreasonable searches "by a private individual not acting as an agent of the government or with the participation or knowledge of any governmental official" are not protected. *United States v. Jacobsen*, 466 U.S. 109,113 (1984). Whether a private individual is a government agent "for Fourth Amendment purposes necessarily turns on the degree of the government's participation in the private party's activities." *Skinner v. Railway Labor Execs. Ass'n.*, 489 U.S. 602, 614 (1989). Nothing in the record indicates any degree of government participation in James' activities sufficient to label him a government actor. Moreover, that a § 505 citizen suit triggers an EPA enforcement action does not turn a private citizen into a government actor. After all, Congress intended for citizens to be involved in citizen suits, not government actors. Thus, James' investigation did not violate Moon Moo's Fourth Amendment rights, and its fruits are admissible.

ii. James' Investigation did not Violate the Fourth Amendment Because Moon Moo had no Reasonable Expectation of Privacy.

A reasonable expectation of privacy deserving Fourth Amendment protection requires a two-prong showing: (1) a legitimate subjective expectation of privacy that (2) society finds reasonable. *Katz*, 389 U.S. at 361. Moon Moo demonstrated no subjective expectation, failing the first *Katz* prong. Moon Moo posted "no trespass" signs, but these signs do not establish a privacy expectation. *Oliver*, 466 U.S. at 179. The standard for what is private outdoors is high. In *Dow Chemical Co. v. United States*, 476 U.S. 227 (1986), even a high-walled industrial complex was not private, so law enforcement observations by helicopter were admissible. Furthermore, when an owner abandons property, he demonstrates no privacy interest in it. *California v. Greenwood*, 486 U.S. 35, 51 (1988). Moon Moo's demonstrated privacy interest fell well short of the standard in *Dow Chemical* because there was no fence, no wall, just trespass signs which boaters ignored, and Moon Moo abandoned the effluent that James took from the canal, casting out any remote

privacy interest in it. Therefore, Moon Moo had no subjective expectation of privacy sufficient to sustain a Fourth Amendment claim.

Moon Moo also fails the second *Katz* prong because it has no objectively reasonable expectation of privacy. Society does not find that trespass invades a privacy interest. *Oliver*, 466 U.S. at 171 ("a government intrusion that is a trespass at common law on an open field is not a "search" in the constitutional sense." *Id*.). Trespass "is insufficiently linked to privacy to warrant the Fourth Amendment's protection." *Id.* at 174. In *Oliver*, there was no Fourth Amendment intrusion when a police officer entered a fenced field and ignored "no trespass" signs because these signs do not "effectively bar the public from viewing open fields ...." *Id.* at 171. James also ignored "no trespass" signs when he proceeded on the Canal through Moon Moo's property. R. at 6. What James observed was not private because it was in a field, *Oliver,* 466 U.S. at 176, in plain view, *Harris v. United States,* 390 U.S. 234, 236 (1968), and not protected. *Oliver*, 466 U.S. at 177. The "manure spreading operations on the fields," and the "discolored brown water flowing from the fields through a drainage ditch," R. at 6, that James photographed were in plain view, devoid of "activities whose privacy is sought." *Oliver,* 466 U.S. at 184 n.10. None of this was within the Fourth Amendment protected categories of "persons, houses, papers or effects." U.S. Const. amend. IV. Thus, Moon Moo had no reasonable expectation of privacy sufficient to sustain a Fourth Amendment claim.

Moreover, state trespass law must yield to the CWA under the Supremacy Clause. Federal laws are supreme, U.S. Const., art. VI, cl. 2, and preempt conflicting state laws that are "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Arizona v. United States,* 132 S.Ct. 2492 (2012), *quoting Hines v. Davidowitz,* 312 U.S. 52, 67 (1941).

Trespass laws are not a sword for Moon Moo to use against enforcement of the CWA and are preempted under the Supremacy Clause. As such, James' evidence is admissible.

B. The Fruits of James' Investigation are Admissible Because the Investigation Falls Within a Warrant Exception as a Special Needs Administrative Inspection.

If James' investigation is a government inspection, it falls within a warrant exception as a reasonable special needs administrative inspection. In closely regulated industries, commercial owners' privacy interests are diminished, and government regulatory interests are heightened. *Burger*, 482 U.S. at 702. Warrantless searches are reasonable when three criteria are satisfied: (1) the government has a substantial interest in the regulatory scheme; (2) the warrantless inspection furthers the scheme; (3) the statute authorizing inspection provides a "constitutionally adequate substitute for a warrant" whereby commercial property owners know "that their property will be periodically inspected for specific purposes." *Id.* at 702-3.

The three criteria are satisfied here. As a threshold matter, the agriculture industry is closely regulated. *See* J.W. Looney, *The Changing Focus of Government Regulation of Agriculture in the United States*, 44 Mercer L. Rev. 763 (1993). First, Congress has a substantial interest in eliminating water pollution spelled out in Congress' very purpose and ambition in its CWA regulatory programs – a goal of eliminating *all* water pollution. CWA § 101(a)(1). Second, warrantless inspections enable citizens to collect information to inform § 505 citizen suits. Such inspections uphold the integrity of the NPDES program; it is only fair to NPDES-compliant CAFOs that non-compliant CAFOs are not rewarded with an extra layer of privacy protection for their failure to follow the rules. Third, the CWA is comprehensive and defined such that those subject to NPDES permitting know about CWA § 505 and expect citizen oversight, including periodic property inspections for discharges. Because citizen suits have been a resounding success in compelling enforcement, CAFOs subject to NPDES enforcement "cannot help but be aware,"

Donovan v. Dewey, 452 U.S. at 603, that citizen inspections loom. Thus, James required no warrant.

The district court relied on two administrative inspection cases where *inspectors* required warrants, *Smith Steel* and *Trinity Indus., Inc. v. OSHRC*, 16 F.3d 1455 (6th Cir. 1994). But, James cannot directly enforce the NPDES compliance the way an inspector would. He can only seek relief through a citizen suit. Furthermore, it would be impractical if not impossible for an ordinary citizen to obtain a warrant whereas administrative inspectors routinely obtain warrants.

The district court chides EPA for "allowing a do-gooder organization to do its dirty work for it," R. at 9, but this is exactly what Congress intended. The 60-day notice that citizens must give EPA under CWA § 505 before commencing suit calls EPA to task. EPA can either rise to the task, or the citizen will rise instead. There is nothing dirty about EPA using the fruits of a lawful citizen investigation except the dirty water itself. A warrant requirement would be merely an obstacle to stymie highly effective citizen enforcement. If EPA could not use James' findings, the purpose of the 60-day notice under CWA § 505 to give EPA time to enforce would be pointless if EPA had no admissible evidence provided by the citizen. Scrapping the evidence and then requiring EPA to scramble to engage in the formality of obtaining a warrant to recreate evidence of ongoing violations would only delay inevitable enforcement, during which pollution would flow. Thus, this Court should allow EPA to use James' evidence for its civil enforcement proceeding.

C. The Fruits of James' Investigation are Admissible Because Suppression is Disfavored for Injunctive Relief and Administrative Penalties.

Suppression is an inappropriate remedy in this civil enforcement action seeking injunctive relief and penalties under CWA §§ 309(b) and (d). First, under a *United States v. Janis*, 428 U.S.

433 (1976) cost-benefit analysis, the societal cost of suppression on law enforcement outweighs its deterrent effect on Fourth Amendment violation.

Second, the district court abused its discretion by improperly suppressing all evidence for *both* injunctive relief and civil penalty purposes. The court looked to *Smith Steel*'s application of the rule in *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 1047 (1984), which suppressed tainted evidence in a punitive penalty action. However, *Smith Steel* did not suppress evidence to enjoin ongoing OSHA violations as the district court did in this case. *Smith Steel*, 800 F.2d at 1334. *Smith Steel* only suppressed tainted evidence to impose punitive penalties for past behavior. *Id.* The rule applied in *Smith Steel* does not control this administrative penalty action because the question of administrative penalties was not even before the *Smith Steel* court. EPA penalties are administrative because EPA uses them to influence future behavior, and are not punitive. Thus, applying the rule in *Smith Steel*, evidence is admissible for both injunctive relief and administrative penalties.

i. Admission of James' Evidence is Favored due to the High Cost of its Exclusion.

The *Janis* cost-benefit analysis weighs the societal cost of suppression against its deterrent effect on Fourth Amendment violations. *Janis*, 428 U.S. at 449. In *Janis*, evidence obtained illegally by state law enforcement was admissible in a federal tax case because suppression would have no deterrent effect. The primary purpose of the exclusionary rule is to deter over-zealous law enforcement officers engaged in the "competitive enterprise of ferreting out crime," *Johnson v. United States*, 333 U.S. 10, 14 (1948). Suppression has a "'costly toll' upon truth-seeking and law enforcement." *Pa. Bd. of Prob. v. Scott*, 524 U.S. 357, 364 (1998). It is not appropriate absent appreciable deterrence. *Janis*, 428 U.S. at 454. Suppressing evidence which prevents regulatory enforcement would harm the residents of Farmville who will end up drinking polluted water. Such

harm outweighs the deterrent effect of suppression on the behavior of ordinary citizens who do not even contemplate the Fourth Amendment when pollution is ravaging their waters.

It is not unconstitutional to admit tainted evidence. *United States v. Leon*, 468 U.S. 897, 906 (1984). Tainted evidence has been admitted in federal civil tax cases, (*United States v. Janis*, 428 U.S. 433 (1976)), grand jury proceedings (*United States v. Calandra*, 414 U.S. 338 (1974)), and federal habeas cases (*Stone v. Powell*, 428 U.S. 465 (1976)). Thus, under *Janis* and other precedent, exclusion of evidence, tainted or otherwise, harms regulatory enforcement with no positive offset on deterrence. This favors admission.

ii. James' Evidence is Admissible for Injunctive Relief and Administrative Penalties Because they are Mechanisms for Enforcing Compliance, not Punishment.

James' evidence is admissible for injunctive relief and administrative penalties to remedy Moon Moo's ongoing CWA violations, specifically, its impermissible discharge of pollutants without a NPDES permit. The *Smith Steel* court relied on the rule in *Lopez-Mendoza*, delivered by Justice O'Connor:

> 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 if the evidence underlying the order had been improperly obtained.... [W]e have never suggested that it allows the criminal to *continue* in the commission of an ongoing crime.

Lopez-Mendoza, 468 U.S. at 1046-47. Because *Lopez-Mendoza* expressly established that suppression would not prevent corrective action for an ongoing environmental hazard, it does not follow that *Lopez-Mendoza* established a bright-line rule to suppress evidence where administrative penalties are used to affect injunctive relief. Fourth Amendment jurisprudence is replete with bright-line rules, but this is not one of them. *See, e.g.*, *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (police may order driver out of car); *Terry v. Ohio*, 392 U.S. 1 (1968) (police may conduct weapons search of outer clothes).

Moon Moo's violations of 33 U.S.C. § 1311(a) and NPDES permitting are recurrent infractions that needed to be stopped. James' photographs and samples show that on the singular date of April 12, 2013, Moon Moo applied a manure-acid whey mixture on its fields, and the discolored brown water flowing from a drainage ditch off of its property contained highly elevated levels of nitrates and fecal coliforms. R. at 6. Evidence of Moon Moo's violations from a single day allows a reasonable inference of ongoing infractions because the mixture was "periodically pumped from the lagoon and spread on 150 acres of [Moon Moo's] fields," a practice for which Moon Moo had no NPDES permit. R. at 5-6. There were also ongoing reports of water pollution in the fall and spring of 2013. R. at 8. Pursuant to § 309(b), injunctive relief was necessary to stop ongoing misbehavior. Therefore, James' evidence is admissible for injunctive relief under the rule in *Lopez-Mendoza* to allow EPA bring Moon Moo into compliance and stop pollutants from entering our nation's waterways.

Furthermore, evidence obtained in trespass is admissible for administrative penalties pursuant to § 309(d) because EPA penalties are non-punitive administrative penalties. Administrative penalties are used to deter violations, compel regulatory compliance and resolve environmental problems quickly. EPA administrative penalties are not like punitive penalties for past violations for which tainted evidence was suppressed in *Smith Steel*. Rather, EPA penalties influence violators' future conduct and bring "swift resolution of environmental problems, deterrence, and treat[] the regulated community fairly." EPA, Policy on Civil Penalties, General Enforcement Policy – GM #21, (Feb. 16, 1984). States may impose penalties under CWA for a similar purpose – "to abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement." 33 U.S.C. § 1342(b)(7). Thus, James' evidence is

admissible under *Smith Steel* for both injunctive relief and administrative penalties under § 309(b) and (d).

III. Moon Moo is a CAFO Subject to NPDES Permitting Pursuant to the CWA.

Moon Moo is a CAFO subject to NPDES permitting because it is a medium AFO that discharges pollutants into waters of the United States. R. at 8. Congress enacted the CWA with the goal of eliminating all water pollution in the United States. CWA § 101(a)(1). The CWA's NPDES permitting program prevents excess discharges of pollutants into navigable waters by regulating point sources. 33 U.S.C. § 1342. An AFO that discharges pollutants into waters of the United States "through a man-made ditch, flushing system, or other similar man-made device" is regulated under the NPDES program as a CAFO point source. 40 C.F.R. § 122.23(b)(6)(ii). Moon Moo is an AFO, R. at 8, which discharges pollutants, including nitrates and fecal coliform, into waters through a drainage ditch running into the Canal. R. at 6. Consequently, Moon Moo is subject to NPDES permitting as a CAFO. Furthermore, as a CAFO, Moon Moo is not subject to an agricultural stormwater exemption, and must have a NPDES permit because the farm's NMP does not "ensure appropriate utilization of the nutrients in the manure[-acid whey mixture]" as required by regulation. 40 C.F.R. § 122.23(e). As such, Moon Moo must comply with NPDES permitting.

However, if this court finds that Moon Moo is not a CAFO, it is exempt from NPDES permitting under the agricultural stormwater exemption, by definition. That is because the *only* way that Moon Moo is not a CAFO is if Moon Moo does not discharge any pollutants into the Canal under 40 C.F.R. § 122.23(b)(6)(ii)(A), making any run off agricultural stormwater. Accordingly, if Moon Moo is not a CAFO and is in compliance with a NMP, Moon Moo is exempt from NPDES permitting as agricultural stormwater.

A. Moon Moo is a CAFO that is not Subject to an Agricultural Stormwater Exemption.

Moon Moo is a CAFO because it is a point source that discharges excess nutrients from its land application area through a drainage ditch into the Canal. Under the CWA, a point source is a discrete conveyance, such as a pipe or man-made ditch, and expressly includes CAFOs. 33 U.S.C. § 1362(14). Moon Moo's excess nutrients are discretely conveyed into the Canal, so it is a CAFO.

Moon Moo is not exempt from NPDES permitting. A § 1362(14) point source has only two exclusions – agricultural stormwater discharges and return flows from irrigated agriculture. Moon Moo gets no agricultural stormwater exemption because its NMP does not "ensure appropriate utilization of the nutrients" in the manure-whey mixture as required by regulation. 40 C.F.R. § 122.23(e). Moon Moo may have applied the mixture according to its NMP, but because its excess nutrients pollute the Canal, the NMP necessarily falls short of regulatory requirements to "ensure appropriate utilization of nutrients." 40 C.F.R. § 122.23(e). Nothing in the record suggests that discharges are "return flows from irrigated agriculture." So, with no valid exemption, Moon Moo must have a NPDES permit.

i. Moon Moo is a CAFO Because it Discharges Pollutants from its Land Application into the Canal Through a Man-Made Ditch.

Moon Moo is a CAFO point source because it meets the condition in 40 C.F.R. § 122.23 (b)(6)(ii)(A) which requires that "[p]ollutants are discharged into waters of the United States through a man-made ditch, flushing system, or other similar man-made device ...." *Id.* Only on erroneous suppression of highly probative evidence did the district court find that 40 C.F.R. § 122.23(b)(6)(ii)(A) was not satisfied. R. at 10. Proper admission of evidence compels a finding that Moon Moo meets these conditions. James witnessed and photographed manure spreading on Moon Moo's fields and a drainage ditch discharging "discolored brown water" into the Canal from Moon Moo's property during a rain event. R. at 6. The water sample he collected from the drainage ditch showed "highly elevated levels of nitrates and fecal coliforms." R. at 6. The Bermuda grass

could not absorb excess nutrients due to the acid whey's high acidity, as theorized Riverwatcher's expert, Dr. Mae, leaving the excess nutrients to flow into the Canal. R. at 6. This conclusively demonstrates that the farm discharges pollutants through a man-made ditch. Thus, on properly admitted evidence, Moon Moo is a CAFO.

ii. Moon Moo is not Subject to an Agricultural Stormwater Exemption Because its NMP does not "Ensure Appropriate" Use of Excess Nutrients from its Land Application.

The agricultural stormwater exemption prevents "liability for agriculture-related discharges triggered not by negligence or malfeasance, but by the weather – even when those discharges came from what would otherwise be point sources." *Waterkeeper Alliance, Inc. v. U.S. Envtl. Prot. Agency,* 399 F.3d 486, 507 (2d Cir. 2005). Because EPA did not define the term until 2003, many CAFOs had inappropriately exempted themselves from NPDES permitting under the "agricultural stormwater" exemption, just as Moon Moo did. They did this even when manure nutrients exceeded the capacity of crops to uptake nutrients, resulting in pollutants entering navigable waterways. *Regulation of Concentrated Animal Feeding Operations for the Protection of the Environmental and Public Health: Hearing on S. 1323 Before the S. Comm. on Agric. Nutrition, & Forestry*, 105th Cong. (1998) (testimony of Michelle Nowlin, Attorney, S. Envtl. Law Ctr.), *available at* http://gos.sbc.edu/n/nowlin.html.

However, *Concerned Area Residents for the Env't v. Southview Farm,* 34 F.3d 114 (2d Cir. 1994), put a stop to such CAFO practices by interpreting "agricultural stormwater." In *Southview,* a dairy claiming an agricultural stormwater exemption was a CAFO when it discharged liquid manure into a nearby river. *Id.* At the time, EPA had not considered whether land application areas were part of a CAFO, and no case law had interpreted "agricultural stormwater." *Id.* at 117-18. Nonetheless, *Southview* held that a discharge under the agricultural stormwater exemption had to

have been *caused by* precipitation. Discharges could not transform into agriculture stormwater simply when it happened to rain. *Id.* at 121. *Southview* found that liquid manure had been spread so thick that the discharge could not have been the "result of precipitation." Thus, the farm was not exempt from NPDES permitting.

After *Southview*, EPA explicitly modified its NPDES permit regulations and effluent limitations for CAFOs in 2003. Now, CAFO land applications must spread manure in accordance with appropriate site-specific nutrient management practices in order to qualify for an agricultural stormwater exemption. 40 C.F.R. § 122.23(e). These practices must "ensure appropriate agricultural utilization of the nutrients in the manure" in comportment with 40 C.F.R. § 122.42(e)(1)(vi)-(ix). 40 C.F.R. § 122.23(e). Manure applied accordingly minimizes the risk of subsequent discharges of pollutants into navigable waters. *See* NPDES Permit Regulation and Effluent Limitation Standards for CAFOs, 68 Fed. Reg. 7176 (Feb. 12, 2003). EPA further declared that manure "applied so thickly that it ran off into surface waters even during dry weather" would not "ensure appropriate agricultural utilization of nutrients." *Id.*

Waterkeeper not only upheld EPA's 2003 rule regarding agricultural stormwater exemptions for land applications, but required EPA bolster the rule by promulgating specific technical regulations for the NMP because "not just *any* nutrient management plan suffices under the rule" *Waterkeeper*, 399 F.3d at 499. Under EPAs final 2008 rule, a plan should address 40 C.F.R. § 122.42(e)(1)(vi)-(ix), which requires at a minimum that it:

> (vi) Identify appropriate site specific conservation practices to be implemented, including as appropriate buffers or equivalent practices, to control runoff of pollutants to waters of the United States;
>
> (vii) Identify protocols for appropriate testing of manure…and soil;

> (viii) Establish protocols to land apply manure…in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure…and;
>
> (ix) Identify specific records that will be maintained to document the implementation and management of the minimum elements described in paragraphs (e)(1)(i) through (e)(1)(viii) of this section.

40 C.F.R. § 122.42(e)(1)(vi)-(ix). Moreover, because the CWA requires state permitting programs to *"ensure compliance* with any applicable [effluent limitations and standards]," 33 U.S.C. § 1342(b), *Waterkeeper* further required review of NMPs by an administrator. This is to ensure that farmers would not exploit the lack of review under the 2003 rule's "impermissible self-regulatory permitting scheme." *Waterkeeper*, 399 F.3d at 498.

Notwithstanding Moon Moo's uncontested compliance with its NMP, R. at 6, the substance of Moon Moo's NMP does not meet CWA minimum requirements. Its NMP only "sets forth planned seasonal manure application rates, together with a calculation of expected uptake of nutrients by the crops grown on the field where the manure is spread." R. at 5. The record is devoid of any suggestion that the NMP identifies appropriate conservation practices, including practices to control run off of pollutants into navigable waters. No evidence suggests it contains protocols for testing the manure and soil, and the record is silent on what specific records need to be maintained to document Moon Moo's implementation and management practices.

Most importantly, Moon Moo's NMP protocols do not ensure appropriate agricultural utilization of nutrients. Dr. Mae said that land application of manure during a rain event is a very poor management practice; it nearly always results in excess runoff of nutrients from fields. R. at 6. Dr. Green simply rejoined that applying whey as a soil conditioner was a longstanding practice in New Union, since the 1940s. R. at 6. However, a longstanding practice does not establish that it ensures appropriate agricultural utilization of manure nutrients.

Moreover, DOA failed to review the NMP submitted by Moon Moo nor has New Union provided for public comment on NMPs filed with the DOA. R. at 5. Operating under a NMP that is never subject to review, Moon Moo is free to self-declare that its management practices ensure appropriate agricultural utilization of manure nutrients. This contravenes EPA's express requirement that a NMP be reviewed for the very "impermissible self-regulation" that Moon Moo engaged in, 40 C.F.R. § 122.23(h)(1), and that was objected to by *Waterkeeper*, 399 F.3d at 498. With a NMP in place that does not "ensure appropriate" nutrient utilization, Moon Moo's compliance with it was hollow because it did not prevent the very discharge that makes Moon Moo a CAFO.

As a result, precipitation-related discharges of manure from land areas controlled by Moon Moo could not have been agricultural stormwater. *Only* runoff from site specific management practices that ensure appropriate agricultural nutrient utilization are agricultural stormwater. James could not have captured fecal coliform and high levels of nitrates had Moon Moo been in compliance been with a NMP that ensured appropriate utilization of agricultural nutrients. As such, this Court should find that Moon Moo's discharge does not get an agricultural stormwater exemption.

B. If Moon Moo is not a CAFO, Excess Nutrient Runoff that Complies with its NMP is Agricultural Stormwater, Exempting Moon Moo from NPDES Permitting.

If Moon Moo is not a CAFO, it could only be because Moon Moo did not discharge pollutants into navigable waters. As an AFO, Moon Moo is classified as a CAFO only on satisfaction of 40 C.F.R. § 122.23(b)(6)(ii)(A) – it discharges pollutants through a man-made ditch into a waterway. If there is no "'discharge of any pollutant,' there is no violation of the Act…" because the runoff is agricultural stormwater. *Waterkeeper,* 399 F.3d at 504. Thus, Moon Moo gets the agricultural stormwater exemption from NPDES permitting if it is compliant with its NMP. R. at 5.

Furthermore, if there is no discharge of pollutants, Moon Moo's NMP's substantive requirements for the manure-acid whey land application are irrelevant; if Moon Moo is not a CAFO, its discharge is not sufficient to trigger a NPDES permit requirement as a CAFO. Therefore, the entire discussion of excess nutrients is moot. This Court should hold that if Moon Moo is not a CAFO, then the farm's runoff is agricultural stormwater and exempt from NPDES permitting.

IV. A RCRA Imminent Hazard Citizen Suit is Foreclosed Because Moon Moo's Mixture is not Solid Waste.

Riverwatcher's RCRA citizen suit was correctly dismissed because Moon Moo's discharges are rightly subject to regulation under the CWA, not RCRA. RCRA comprehensively regulates solid waste disposal to minimize present and future threats to human health and the environment. 42 U.S.C. § 6902(a). RCRA prohibits solid waste disposal "which constitutes the open dumping of solid waste." 42 U.S.C. § 6945(a). Subject to certain exemptions, RCRA defines "solid waste," in relevant part, to include "*discarded* material" from "agricultural operations." 42 U.S.C. § 6903(27) (emphasis added). A citizen can commence an "imminent hazard" citizen suit under RCRA alleging "open dumping" violations on a showing of, in relevant part, three elements: (1) the defendant is a person (2) who in the past or present contributed to the disposal of solid waste (also known as "open dumping of solid waste") that (3) "may present an imminent and substantial endangerment to health or environment." 42 U.S.C. § 6972(a)(1)(B).

Riverwatcher fails the second imminent hazard element because Moon Moo is a CAFO subject to CWA NPDES permitting, so its discharges are exempt from the RCRA definition of "solid waste." *Id.* Otherwise, Moon Moo would suffer double liability under CWA and RCRA, contravening Congress' express intent. Guidelines for Development and Implementation of State Solid Waste Management Plans [hereinafter Solid Waste Guidelines], 46 Fed. Reg. 47,052 (Sept. 23, 1981). Alternatively, even if Moon Moo is not a CAFO, the fertilizer and soil amendment

mixture applied to its fields is not solid waste because it was not discarded. By definition, solid waste is "discarded." Moon Moo's mixture cannot be "discarded" because agricultural wastes "used as fertilizers or soil conditioners are not considered discarded materials." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1045 (9th Cir. 2004), *quoting* H. Rep. No.94-1491 (1976), *reprinted* in 1976 U.S.C.C.A., 6238-41. Therefore, Moon Moo's discharges are not solid waste.

However, contrary to the district court's finding, Riverwatcher has fulfilled the third imminent hazard element by establishing that Moon Moo's land application of a manure-acid whey mixture is an imminent and substantial endangerment to health and the environment. The mixture is causing a serious and present threat to drinking water that, if not remedied, will harm the citizens of Farmville because it is likely they will ingest contaminated drinking water. Although Riverwatcher arguably proves an endangerment, the court's error was harmless since Riverwatcher still fails to fulfill the second element.

Additionally, Riverwatcher's claim in the alternative that Moon Moo has violated RCRA if it has not violated the CWA, R. at 10, must fail on a tortured interpretation of "solid waste" for substantial EPA policy reasons, including regulatory certainty.

A. Moon Moo is a CAFO Subject to NPDES Permitting, so its Discharges Cannot be Solid Waste.

Moon Moo is not subject to a RCRA citizen suit because its discharges are not solid waste. First, Moon Moo is a CAFO subject to NPDES permitting, so it is exempt from the definition of "solid waste." Industrial point source discharges subject to NPDES permitting are not "solid waste." 42 U.S.C. § 6903(27). A CAFO is an industrial point source subject to "effluent guidelines." 40 C.F.R. § 122.26(b)(14)(i) & (v). Therefore, because Moon Moo is a CAFO, it does not discharge "solid waste."

Second, even if Moon Moo is not a CAFO, Moon Moo's discharges still do not fall within the definition of "solid waste" because its manure-acid whey land application is not "discarded." RCRA does not define "discarded," but EPA regulation states that agricultural wastes returned to the soil as fertilizers are not discarded. 40 C.F.R. § 257.1(c)(1). And, EPA and case law have suggested that discarded materials are those that have exhausted their purpose. Therefore, this Court should affirm the district court's dismissal of Riverwatcher's RCRA claim because it cannot fulfill the second imminent hazard element.

i. Moon Moo's Regulation Under the CWA Exempts its Discharges from the Definition of Solid Waste.

Industrial point source discharges subject to NPDES permitting are outside the definition of solid waste. 42 U.S.C. § 6903(27). A CAFO is a point source subject to NPDES permitting, so its discharges cannot be solid waste. 40 C.F.R. § 122.26(b)(14)(i) & (v). Furthermore, "point sources subject to [NPDES] permits" means point sources *requiring* a NPDES permit, whether or not they have one. EPA, Office of Solid Waste and Emergency Response, Interpretation of Industrial Wastewater Discharge Exclusion from the Definition of Solid Waste 1 (Feb. 17, 1995). Therefore, a facility, such as Moon Moo, that is required to have a NPDES permit does not escape CWA regulation, and cannot be subject to RCRA under the duplicate regulation rule. *Id.*

To avoid duplicate regulation as Congress requires, industrial point source discharges subject to NPDES permitting are excluded under RCRA. 42 U.S.C. § 6905(b)(1). *See also* Solid Waste Guidelines, 46 Fed. Reg. at 47,050 (Sept. 23, 1981) (parties subject to CWA discharge suits are not subject to RCRA "open dumping" suits to avoid duplicate penalties). Furthermore, because CWA and its NPDES enforcement mechanisms are sufficient to handle [NPDES] violations, *id.*, "summary judgment is appropriate on the RCRA claim to avoid duplication." *Coon v. Willet Dairy LP*, WL 2071746 at 6 (N.D.N.Y. July 17, 2007) *aff'd* 536 F.3d 171 (2d Cir. 2008).

The district court correctly dismissed Riverwatcher's RCRA claim because Moon Moo's status as a CAFO subject to NPDES permitting precludes Moon Moo from a RCRA imminent hazard citizen suit. In *Coldani v. Hamm,* WL 2160929 at *1 (E.D. Cal. June 1, 2011), a dairy that discharged nitrates into navigable water consequent to manure spreading was a CAFO, so the discharge was not solid waste, and the dairy was not subject to a RCRA open dumping citizen suit. Like *Coldani*, Moon Moo's discharge of nitrates and fecal coliform into the Canal is not "solid waste," foreclosing a RCRA citizen suit. Also, Moon Moo's failure to hold a NPDES permit, R. at 5-6, is of no avail to Riverwatcher. Moon Moo only needs to be "subject to" NPDES permitting to be excluded from solid waste. Therefore, Moon Moo's discharges are not solid waste, and Riverwatcher cannot fulfill the second imminent hazard element. Thus, this Court should affirm the dismissal of Riverwatcher's RCRA citizen suit to avoid double liability.

ii. Moon Moo's Mixture is not Discarded Even if Moon Moo is not a CAFO Because it is put to its Intended Use as a Fertilizer.

An "open dumping of solid waste" claim under RCRA § 4005 must fail because Moon Moo's mixture is not solid waste, regardless of whether Moon Moo is a CAFO. "Discarded" is an essential element of RCRA's statutory definition of solid waste. 42 U.S.C. § 6903(27) ("solid waste is… other *discarded* material… resulting from… agricultural operations." *Id.*). The statute does not define "discarded," and *Conn. Coastal Fishermen's Ass'n v. Remington Arms Co.*, 989 F.2d 1305, 1316 (2d Cir. 1993), determined that "discarded" was ambiguous because neither statute nor legislative history resolved when material became discarded. *Conn. Coastal* determined that imminent hazard citizen suits require a broad definition of solid waste. The court noted that other circuits relied on a definition of "discarded materials" appropriate for *hazardous* wastes. However, the waste at issue in *Conn. Coastal* was *non-hazardous*. The court deferred to EPA's interpretation

in its amicus brief which defined materials as discarded when "left to accumulate long after they have served their intended purpose." *Conn. Coastal*, 989 F.2d at 1316.

The legislative history of RCRA supports *Conn. Coastal*'s holding and EPA's interpretation. When adopting criteria to determine which solid waste disposal facilities and practices pose a reasonable probability of adverse effects on health or the environment, Congress stated that "[a]gricultural wastes which are returned to the soil as fertilizers or soil conditioners are not considered discarded materials." H.R. Rep. No. 94-1491, 94th Cong., 2d Sess. at 2. Congress' specific intent was even codified under 40 C.F.R. § 257.1(c)(1).

Like *Conn. Coastal*, this Court should defer to EPA's interpretation that Moon Moo's mixture is not "discarded material" because it was used beneficially as a fertilizer and soil conditioner. R. at 6. Although Riverwatcher's expert agronomist said that the Bermuda grass did not *effectively* take up the manure nutrients due to heightened acidity from the acid whey, Moon Moo's expert stated that Bermuda grass tolerates a wide range of acidity. R. at 6. There is no evidence that the mixture provided *no* benefit to the Bermuda grass. Even if excessively applied, it was not left to accumulate long after having served its intended purpose. Thus, this Court should find that Moon Moo's manure-acid whey mixture is not discarded, and therefore not solid waste. As such, Riverwatcher's imminent hazard suit must be dismissed.

B. Riverwatcher Established an Imminent and Substantial Endangerment to Health.

To sustain a claim for a RCRA open dumping violation, a citizen plaintiff need only show that the defendant's disposal of solid waste "may present an imminent and substantial endangerment to health or the environment." RCRA § 7002(a)(1)(b). Endangerment is a "threatened or potential harm," but no actual harm to health or the environment is required. *Burlington N. & Santa Fe Ry. Co. v. Grant*, 505 F.3d 1013, 1020 (10th Cir. 2007). An

endangerment is "imminent" if there is a present threat, "although the impact of the threat may not be felt until later." *Meghrig v. KFC Western, Inc.,* 516 U.S. 479, 480 (1996), *quoting Price v. U.S. Navy,* 39 F.3d 1011, 1019 (9th Cir. 1974). A "substantial" endangerment need not be quantified, but is substantial when "serious" and on reasonable concern that exposure to hazards will result in harm unless remedial action is taken. *Burlington*, 505 F.3d at 1021.

That disposal of solid waste "may" present an endangerment has legal significance. *Cox v. City of Dallas,* 256 F.3d 281, 299 (5th Cir. 2001). "May" is expansive language that is intended to empower courts "to grant affirmative equitable relief to the extent necessary to eliminate *any risk* posed by toxic wastes." *Dague v. City of Burlington,* 935 F.2d 1343, 1355 (2d Cir. 1991), *overruled on other grounds by Burlington v. Dague,* 112 S.Ct. 2638 (1992), *citing United States v. Price,* 688 F.2d 204, 213-14 (1982) (emphasis added). Further, RCRA's exclusion of agricultural wastes returned to the soil as fertilizer due to their lack of probable *adverse effects* on health or environment is not dispositive because such regulation speaks only to the probability of *adverse effects,* not *endangerment*. 40 C.F.R. § 257.1.

If an imminent and substantial endangerment is found, relief may only be denied if the defendant did not "contribute" to the risk. *Zands v. Nelson*, 797 F. Supp. 805, 809 (S.D. Cal. 1992). "Contribute" means having "a part or share in producing an effect," *Cox*, 256 F.3d at 295, such as shared production of the contamination. *K-7 Enterprises, L.P. v. Jester*, 562 F. Supp. 2d 819, 830 (E.D. Tex. 2007). Only if the defendant did not cause the imminent and substantial endangerment can a defendant escape liability for an endangerment. *Zands*, 797 F. Supp. at 809-10. Contribution can be shown, for example, through waste migration to an adjacent property. *Hoxsie Real Estate Trust v. Exxon Educ.*, 81 F. Supp. 2d 359, 361, 367-68 (D.R.I. 2000). Notably, at least one circuit

has held that RCRA imposes strict liability if a defendant shared in producing a contamination. *United States v. Ne. Pharm. & Chem. Co.*, 810 F.2d 726, 741 (8th Cir. 1986).

Riverwatcher established that Moon Moo's mixture was a serious present threat from which harm would result if not remedied. First, Riverwatcher's expert, Dr. Generis, stated that Moon Moo's discharges contributed to the nitrate advisory, even if Moon Moo was not definitively the "but-for" cause. R. at 6. Second, the Farmville nitrate advisory warned of high nitrate levels in the River due to the pollutant's migration. This threatened the municipal water supply, making the drinking water a potential harm for infants. R. at 6. Third, like *Hoxsie*, the contaminated water supply is a present threat to adults that, if not remedied, would result in harm when contaminants migrate down the River into Farmville's drinking water which citizens could not avoid due to lack of notice. R. at 5-6. Fourth, adding acid whey to the manure sprayed on fields threatens the environment. Acid whey depletes oxygen from streams and rivers that could destroy aquatic life over large areas. Justin Elliott, *Whey Too Much: Greek Yogurt's Dark Side*, Modern Farmer (May 22, 2013), http://modernfarmer.com/2013/05/whey-too-much-greek-yogurts-dark-side/.

Furthermore, the district court improperly relied on *Davies v. Nat'l Coop. Refinery Ass'n.,* 963 F.Supp. 990, 999 (D. Kan. 1997). *Davies* found no imminent and substantial endangerment when human exposure to contaminated groundwater was unlikely, plaintiffs had been warned, and others would not be harmed even without remedial action. Here, human exposure to contaminated drinking water is very likely. The Farmville nitrate advisory only warned against infant consumption, and adults are at risk because drinking water would be harmful without remedial action. R. at 6. Thus, present risk of human exposure and future risk of harm without remedial action in *Davies* was much lower than the facts in the case at bar suggests. As such, Riverwatcher fulfilled the third imminent hazard element through a showing of imminent and substantial

endangerment. However, without a showing that the manure mixture is solid waste, Riverwatcher's RCRA imminent hazard suit cannot be sustained, and this Court should uphold the district court's dismissal.

C. Riverwatcher's Alternative Pleading Should be Dismissed Based on Public Policy.

Congress' desire to avoid dual liability does not facially foreclose Riverwatcher's pleading in the alternative. However, it should be foreclosed for other reasons. Alternative citizen suit actions are precluded under 33 U.S.C. § 1365(b) because EPA commenced a CWA action in this matter. *Cf.* Jeffrey G. Miller, *Theme and Variation in Statutory Preclusion Against Successive Environmental Enforcement Actions by EPA and Citizens*, 28 Harv. Envtl. L. Rev. 401 (2004). Congress was statutorily silent about alternative pleadings as between various environmental statutes, but spoke to dual liability. Congress' silence created an ambiguity – neither expressly allowing nor disallowing alternative pleadings which are generally allowed. Fed. R. Civ. P. 8(a)(3). When Congress' silence creates ambiguity in environmental statutes, EPA's permissible construction governs. *Chevron*, 467 U.S. at 843.

EPA construes the CWA in a manner that supports important policy reasons favoring foreclosing alternative pleadings. Certainty of regulation for regulated entities is an important policy. The purpose of regulation is to modify conduct of regulated entities to advance the end-goal of the CWA statute – preventing water pollution. Regulated entities deserve certainty about which regulations govern them so that they can modify their conduct accordingly. This should not be eclipsed by third-party enforcers who are statute-shopping to quash any conduct they find objectionable by any means they can pull off the shelf. AFOs, including the concentrated kind, are certain that their discharges and land applications are regulated by CWA. Undermining CAFOs' certainty about which regulations govern their conduct would be unfair and counterproductive to

overall enforcement. CAFOs should be confident that they will not be held to shifting standards of conduct on a tortured reading of "solid waste" in RCRA, a statute with broad-brush goals of "protection of health and environment." 42 U.S.C. § 6902(a). When CAFOs' behavior does not violate the main statute that circumscribes their conduct, they either are not polluting, or the statute should be changed to quell "loophole pollution" through the political process. The solution is not to let ambiguity in alternative pleadings give third-party enforcers open season on regulated entities. For this reason, this Court should quash Riverwatcher's RCRA claim in the alternative.

CONCLUSION

For the forgoing reasons, this Court should admit James' evidence and reverse the district court's grant of summary judgment for Moon Moo. This Court should grant summary judgment for EPA, holding that Moon Moo is a CAFO subject to NPDES permitting pursuant to the CWA. EPA also asks this Court to affirm the district court's dismissal of Riverwatcher's RCRA citizen suit.