In the United States District Court
For the Northern District of West Virginia

LOIS ALT d/b/a EIGHT IS ENOUGH, Plaintiff, AMERICAN FARM BUREAU and WEST VIRGINIA FARM BUREAU, Plaintiff Intervenors, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Defendant, POTOMAC RIVERKEEPER, WEST VIRGINIA RIVERS COALITION, WATERKEEPER ALLIANCE, CENTER FOR FOOD SAFETY, AND FOOD & WATER WATCH Defendant Intervenors.	)	Case No. 2:12-cv-00042-JPB

MEMORANDUM SUPPORTING ENVIRONMENTAL INTERVENORS' MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF'S AND PLAINTIFF INTERVENORS' MOTION FOR SUMMARY JUDGMENT

August 1, 2013

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Environmental Intervenors submit this memorandum in support of their motion for summary judgment that the United States Environmental Protection Agency ("EPA") did not act arbitrarily, capriciously, contrary to law or in excess of its jurisdiction in issuing an Administrative Compliance Order ("ACO") requiring the concentrated animal feeding operation ("CAFO") owned by Lois Alt (d/b/a Eight is Enough) (the "Alt CAFO") to obtain a permit under the Clean Water Act ("CWA") to control its discharge of manure, feathers and other pollutants from ventilation fans in its poultry confinement houses and the clean out of those houses, through man-made barnyard ditches and culverts, and into waters of the United States. This memorandum is also submitted in opposition to the motion for summary judgment of the Alt CAFO and Plaintiff-Intervenors, the American Farm Bureau Federation ("AFBF") and the West Virginia Farm Bureau ("WVFB") (together "Plaintiffs").

INTRODUCTION

This case presents a clear question: Are the undisputed discharges of pollutants into waters of the United States from what Plaintiffs call the Alt CAFO's "farmyard" and what Environmental Intervenors explain is the CAFO's "production area," subject to the prohibition in the CWA on discharging without a permit? For all the reasons discussed in this memorandum, the answer is inarguably yes.

Plaintiffs present a number of smokescreens to persuade this Court that the Alt CAFO should be allowed to discharge pollutants from its "farmyard" areas under the veil of the CWA's "agricultural stormwater discharge exemption." But EPA's regulations and guidance documents, as well as federal appellate case law, make clear that the "agricultural stormwater discharge exemption" narrowly applies to CAFOs, and never applies to discharges from the CAFO production area. And EPA regulations are clear that the "barnyards" of an animal feeding

operation – which are surely the same as the farmyards of those operations – fall squarely within the definition of "production area." 40 C.F.R. § 122.23(b)(8). Under this circumstance, for this Court to accept Plaintiffs' arguments, it would have to ignore the United States Court of Appeals for the Fifth Circuit's decision recognizing that it is settled law to hold poultry CAFOs responsible for discharges like the ones at issue here from the Alt CAFO. *Nat'l Pork Producers Council v. EPA*, 635 F.3d 738 (5th Cir. 2011).[1] And it would have to reject the decision of the United States Court of Appeals for the Second Circuit that courts should defer to EPA's reasonable construction of the CWA in defining the scope of the agricultural stormwater discharge exemption for CAFOs. *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486 (2d Cir. 2005).[2] Finally, it would have to override EPA's reasonable and longstanding interpretation of the CWA. This, it should not do. Accordingly, there is no basis for finding that EPA acted arbitrarily, capriciously, contrary to law or in excess of its jurisdiction in issuing the ACO based on discharges from the Alt CAFO production area.

Plaintiffs paint a false portrait of an industry of universally responsibly-managed livestock operations that have merely "incidental" impacts on water quality. Far from "incidentally" impacting water quality, "[a]gricultural operations, including CAFOs, now account for a significant share of the remaining water pollution problems in the United States." AR 11 at 7; National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations (CAFOs), 68

[1] Pursuant to 28 U.S.C. § 2112(a)(3), the Fifth Circuit was assigned to hear challenges to the 2008 CAFO Rule originally brought in the Fifth, Seventh, Eighth, Ninth, Tenth, and D.C. Circuits. *Nat'l Pork Producers*, 635 F.3d at 741.

[2] Pursuant to 28 U.S.C. § 2112(a)(3), the Second Circuit was assigned to hear the challenges to the 2003 CAFO Rule on consolidated petitions for review originally brought in six circuits, including the Fourth Circuit (D.C., Second, Fourth, Eighth, Ninth, and Eleventh Circuits). *Waterkeeper Alliance*, 399 F.3d at 490.

Fed. Reg. 7176, 7181 (Feb. 12, 2003) (the "2003 CAFO Rule"). In fact, concentrated animal feeding operations are among the "leading contributor[s] of pollutants to identified water quality impairments in the Nation's rivers and streams." *Id.*; *see also* National Pollutant Discharge Elimination System (NPDES) Concentrated Animal Feeding Operation (CAFO) Reporting Rule, 76 Fed. Reg. 65,431, 65,434 (Oct. 21, 2011) (indicating that twenty-nine states in EPA's 2009 National Water Quality Inventory identified animal feeding operations as contributors to water quality impairment). The Chesapeake Bay watershed, into which the Alt facility discharges its pollutants, has been particularly hard hit by the livestock industry and its discharges. Nutrients, specifically nitrogen and phosphorus, discharged into the Chesapeake Bay and its tributaries are the main cause of the Bay's continued poor health. AR 13 at 1; AR 8 at 2-3. Most of the Bay and its tidal waters are listed as impaired waters due to excess nitrogen and phosphorus levels. AR 8 at 2-3 & n.6. These pollutants cause algae blooms that consume oxygen and create dead zones where fish and shellfish cannot survive, block sunlight that is needed for underwater Bay grasses, and smother aquatic life on the floor of the Bay. *Id.* at 3.

Given their immense potential to harm water quality, discharges from CAFOs are regulated under the Clean Water Act and, like the discharges from other industries, are not eligible for a *de minimis* exception to permitting. Nor does a CAFO's implementation of "prudent" standards of care negate the need for CWA permitting. Indeed the premise that a "negligence" standard applies to CWA permitting decisions, which lies at the core of Plaintiffs' arguments here, is antithetical to the basic letter and spirit of the CWA and decades of case law. Since the enactment of the CWA, many of this nation's industries have operated under Clean Water Act permits that protect water quality. Plaintiffs offer the Court no legally cognizable

reason why the Alt CAFOs should be allowed to pollute the nation's waters, even if "incidentally," without a Clean Water Act permit.

STATEMENT OF UNDISPUTED FACTS IN SUPPORT OF ENVIRONMENTAL INTERVENORS' MOTON FOR SUMMARY JUDGMENT[3]

1. The Alt CAFO houses 200,000 broiler chickens and thus is a large poultry CAFO, within the meaning of 40 C.F.R. § 122.23(b)(4). AR 1 ¶ 20.[4]

2. Plaintiff's CAFO has eight confinement houses, a litter storage shed, a compost shed, and feed storage bins. AR 2 at 4-5; AR 1 ¶¶ 20-21.

3. The confinement houses have ventilation exhaust fans. AR 1 ¶ 23.

4. Man made ditches were dug between the confinement houses. AR 1 ¶ 22.

5. These ditches are culverted to facilitate the flow of stormwater away from the confinement houses and towards Mudlick Run. AR 2 at 6.

6. Mudlick Run is a water of the United States. AR 1 ¶ 31.

7. The exhaust fans draw manure, litter, dander, and feathers out of the confinement houses; these materials settle on the ground. AR 1 ¶ 23; Plaintiffs' Statement of Undisputed Material Facts ¶ 4, Pl. Mem. at 5.

8. The manure, litter, dander, and feathers are pollutants. AR1 ¶ 23.

9. The pollutants are deposited outside of the confinement houses in close proximity to the man-made ditches. *Id.*

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[3] In support of its Motion for Summary Judgment, Environmental Intervenors rely on the undisputed facts in the record before EPA. Plaintiffs, on the other hand, rely on facts that are both in dispute and extra record. Thus, Federal Rule of Civil Procedure 56 precludes granting Plaintiffs' Motion. Because Environmental Intervenors rely exclusively on facts in the administrative record, summary judgment is proper. *See* note 11, *infra*.

[4] For ease of discussion, citations to Administrative Record documents, filed with the Court at Doc. 30, will appear as "AR [document number] at [page number]" or "AR [document number] ¶ [paragraph number]."

10. Once it is deposited on the ground, the manure from the poultry houses is exposed in a manner such that it would come into contact with precipitation during rain, such that the rain will carry the pollutants into the nearby man-made ditches. *Id.* ¶ 24.

11. Precipitation carries the pollutants through the man-made ditches and culverts and the pollutants are discharged into Mudlick Run. *Id.* ¶ 32.

12. Manure is removed from the confinement houses at the southern end of the houses. AR 2 at 4-5.

13. During removal, manure is deposited on the gravel area outside the confinement house. *Id.*

14. Precipitation carries the manure to Mudlick Run. AR 1 ¶ 32.

15. Plaintiff does not have a permit under the CWA or West Virginia Law to discharge pollutants into Mudlick Run. *Id.* ¶ 28.

16. The Alt CAFO does not challenge EPA's factual conclusion in the ACO concerning the runoff of manure and other pollutants from the facility, via storm water, to waters of the United States without an NPDES permit. Joint Meeting Report at 2, October 5, 2012, Doc. No. 26 (hereinafter "Joint Meeting Report").

17. The Alt CAFO does not have a land application area. AR 2.

LEGAL BACKGROUND

The CWA aims to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To minimize water pollution, the CWA prohibits the discharge of any pollutant without a permit issued under the National Pollutant Discharge Elimination System ("NPDES"). *See id.* § 1311(a) (requiring a permit for "the discharge of any pollutant" except as authorized under § 1342, the NPDES permitting program). The CWA

defines "[d]ischarge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12). The term "pollutant" covers the manure, litter (which is a mixture of poultry excreta, spilled feed, feathers and material uses as bedding in poultry operations), dander (which is skin cells shed from the chickens), and feathers emitted from the Alt CAFO's confinement houses. *Id.* § 1362(6). Navigable waters are "waters of the United States," including Mudlick Run. *Id.* § 1362(7); AR 3. The term point source includes CAFOs. 33 U.S.C. § 1362(14).

According to the United States Court of Appeals for the Second Circuit: "CAFOs are large-scale industrial operations that raise extraordinary numbers of livestock." *Waterkeeper Alliance*, 399 F.3d at 492. EPA's regulations implementing the CWA define which livestock facilities will be considered CAFOs. Under the regulations, an animal feeding operation, or AFO, means a lot or facility where "[a]nimals . . . 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 "[c]rops, 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)(i)-(ii). CAFOs are AFOs that meet certain numerical thresholds for the number of animals they house. A poultry facility is considered a Large CAFO if it stables or confines more than 125,000 chickens (other than laying hens) and does not use a liquid manure handling system. *Id.* § 122.23(b)(4)(x); *see also* AR 1 ¶¶ 11, 20. There is no dispute that the Alt CAFO is a large CAFO.

A critical question in this case is what areas of the facility are considered part of the CAFO. EPA's regulations establish that a CAFO is made up of distinct areas, including a production area and a land application area, though not all CAFOs have a land application area (indeed, the Alt CAFO does not). *Id.* § 122.23(b)(8); *id.* § 122.23(b)(3); *see also* AR 2. Under

EPA's regulations, the production area is defined as "that part of an AFO that includes the animal confinement area, the manure storage area, the raw materials storage area, and the waste containment areas." *Id.* § 122.23(b)(8). The "animal confinement area," in turn, includes, but is not limited to, "confinement houses" and "barnyards," the latter of which is akin to farmyards. *Id.*; *see also* Section I.B.1, *infra*. The land application area of the CAFO is defined as the "land under the control of an AFO owner or operator, whether it is owned, rented, or leased, to which manure, litter or process wastewater from the production area is or may be applied." 40 C.F.R. § 122.23(b)(3).

Although CAFOs are defined as point sources that must obtain a permit for discharges of pollutants, the definition of the term point source "does not include agricultural stormwater discharges." 33 U.S.C. § 1362(14). To qualify as agricultural stormwater, a discharge must be from a CAFO's land application area; must have been caused by rain, and must have occurred even though the CAFO applied manure, litter, or process wastewater to the land at rates calculated to ensure that all the nutrients would be used by the land, and would not runoff. *See* 40 C.F.R. § 122.23(e). For unpermitted Large *CAFOs*, like the Alt CAFO, EPA regulations provide that:

> a precipitation-related discharge of manure, litter, or process wastewater from land areas under the control of a CAFO shall be considered an agricultural stormwater discharge <u>*only*</u> where the manure, litter, or process wastewater has been land applied in accordance with site-specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter, or process wastewater, as specified in § 122.42(e)(1)(vi) through (ix).

Id. § 122.23(e)(1)(emphasis added).

Discharges from a CAFO's production area are not eligible for the stormwater exemption. 2003 CAFO Rule at 7198 ("discharges from the production area at the CAFO (e.g., the feedlot and lagoons) are not eligible for the agricultural storm water exemption at all, because

they involve the type of industrial activity that originally led Congress to single out CAFOs as point sources.").

STANDARD OF REVIEW

Plaintiffs' challenge to the ACO is subject to judicial review under the Administrative Procedure Act ("APA"), which requires both that the Court's review is limited to the administrative record and that EPA's actions in this case be upheld unless the court finds that they were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706. *See Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 416 (1971).

On a motion for summary judgment in a case arising under the APA, the agency record "provides the complete factual predicate for the court's review." *Coalition to Pres. McIntire Park v. Mendez*, 862 F. Supp.2d 499, 508 (W.D. Va. 2012) (quoting *Krichbaum v. Kelley,* 844 F. Supp. 1107, 1110 (W.D. Va. 1994)). Whether to uphold EPA's decision to issue the ACO "is to be determined exclusively on the administrative record." *Richards v. INS*, 554 F.2d 1173, 1177 (D.C. Cir. 1977). The Court may decide questions of law but may not "find" underlying facts. *Lujan v. Nat'l Wildlife Fed'n,* 497 U.S. 871, 883–84 (1990); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

A district court may only grant summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that 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(c); *see also Celotex*, 477 U.S. at 322. The movant has the initial burden of establishing that there is an absence of any genuine issue of material fact. *Celotex*, 477 U.S. at 322-23. The district court must construe all facts in the light

most favorable to the non-moving party and draw all justiciable inferences in the non-moving party's favor. *Murrell v. Ocean Mecca Motel, Inc.*, 262 F.3d 253, 255 (4th Cir. 2001).

Moreover, where the question of law concerns a determination by an administrative agency within the scope of its authority, a Court is obligated to defer to the agency's determination. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–845 (1984). This Court's review of EPA's action is not *de novo*, as Plaintiffs argue. "An agency's construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985) (citations omitted). In this case, EPA's interpretation in its ACO (an agency adjudication) that the Alt CAFO must obtain a NPDES permit covering the discharges from its production area is "controlling unless plainly erroneous or inconsistent with the regulation." *Kentuckians for Commonwealth Inc. v. Rivenburgh*, 317 F.3d 425, 339 (4th Cir. 2003); *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

As addressed in detail below, this case concerns issues that have been well-settled by two Courts of Appeal and longstanding agency practice. Both the doctrine of *stare decisis* and the deference accorded an administrative agency under *Chevron* compel the Court's denial of Plaintiffs' Motion for Summary Judgment and the granting of Environmental Intervenors' Cross Motion for Summary Judgment.

ARGUMENT

I. ENVIRONMENTAL INTERVENORS ARE ENTITLED TO SUMMARY JUDGMENT

Environmental Intervenors are entitled to summary judgment that EPA did not act arbitrarily, capriciously, in excess of its authority, or contrary to law in ordering the Alt CAFO to obtain a NPDES permit based on its determination, which is undisputed here, that the Alt CAFO

was emitting pollutants from its confinement house fans, and that these pollutants were discharged into Mudlick Run via a series of man-made ditches and culverts. AR 1 ¶¶ 22-27, 32; *see also* AR 2.

A. Under Well-Settled Law, the Alt CAFO Discharges Are Subject to NPDES Permitting and Are Not Exempt Agricultural Stormwater

The CWA authorizes EPA to require a NPDES permit for the discharges of pollutants into Mudlick Run that EPA inspectors observed at the Alt CAFO, and these discharges are not exempt "agricultural stormwater discharges."

1. The Alt CAFO Needs a NPDES Permit Because it Discharges Pollutants Into Waters of the United States

Plaintiffs do not dispute that the Alt facility is a large CAFO, within the meaning of 40 C.F.R. § 122.23(b). In addition, plaintiffs concede that manure, litter, dander, and feathers from its 200,000 broiler chickens are blown out of the poultry confinement houses at the Alt CAFO, and are deposited on land under the control of the CAFO. Pl. Mem. at 5, Statement of Undisputed Facts 4. Plaintiffs further concede that the chicken-related waste blown out from the confinement houses is carried into Mudlick Run, a water of the United States. Pl. Mem. at 5, Statement of Undisputed Facts 4-5. Finally, Plaintiffs concede that the manure, litter, dander and feathers deposited on land controlled by the Alt CAFO are carried through man-made ditches to Mudlick Run by run-off during precipitation events. Pl. Mem. at 3-4 n.3.

Under the terms of the Clean Water Act, these undisputed facts establish that EPA's ACO, which directed the Alt CAFO to apply for a NPDES permit, was not arbitrary, capricious, contrary to law, or in excess of its jurisdiction. The CWA prohibits the addition of any pollutant to navigable waters from a point source without a NPDES permit. *See* 33 U.S.C. § 1311(a); *id.* § 1362(12). The manure, litter, dander, and feathers released from the Alt CAFO are "pollutants" within the meaning of the CWA. 33 U.S.C. § 1362(6). The Alt CAFO "add[s]" pollutants to

waters of the United States, via ditches around and between the Alt CAFO confinement houses, which capture the pollutants that are blown from the confinement houses and convey those pollutants through a culvert and into Mudlick Run, constituting a "discharge." *Id.* § 1362(12). Because the Alt facility is a large CAFO, within the meaning of 40 C.F.R. 122.23(b), it is a statutory point source. 33 U.S.C. § 1362(14). Accordingly, EPA was fully within its authority to direct the Alt CAFO – as a point source discharger of pollutants – to apply for a NPDES permit.

The Fifth Circuit's decision in *National Pork Producers Council v. EPA*, confirms that EPA has the authority to require a permit for discharges of manure, litter, feathers, and dander from a poultry CAFO's confinement houses. 635 F.3d 738. In that case, livestock industry plaintiffs challenged three guidance letters issued by EPA in response to inquiries from industry and members of Congress, to clarify the scope of the then-newly promulgated 2008 CAFO rule. In those letters, building on authority clearly granted it under the statutory provisions of the CWA, EPA explained that "poultry growers *must* apply for NPDES permits for the releases of dust through poultry confinement house ventilation fans." *Id.* at 755 (emphasis added); AR 14 at 2 (explaining that potential sources of pollutants at a CAFO include "litter released through confinement house ventilation fans"). Unhappy with EPA's interpretation of the CWA, industry attempted to challenge these guidance letters as part of its challenge to the 2008 CAFO rule. 635 F.3d at 754-55.

In determining whether these letters constituted a final agency action, such that the court had jurisdiction to review them, the Fifth Circuit applied the test set forth in *Bennett v. Spear*, 520 U.S. 154 (1997). Under that test, an agency action will be considered final only if it meets two criteria: (1) the action marked the consummation of the agency's decision-making process, and (2) determined rights or obligations or created new legal consequences. *See Nat'l Pork*

Producers, 635 F.3d at 755. Although the court found that guidance letters marked the consummation of an agency's decision-making process, *id.* at 755-56, it also determined that the letters did not meet the second prong of the test because they did not determine obligations or create new legal consequences. *See id.* at 756. Far from creating new permitting requirements, the court found that the guidance letters "only reiterate what has been well-established since the enactment of the CWA – CAFOs are prohibited from discharging pollutants without a permit." *Id.* at 756 (citations omitted).

In other words, the Fifth Circuit recognized that the analysis in EPA's guidance letters, including the conclusion that a poultry CAFO must obtain a NPDES permit for discharges that commence with releases of pollutants from ventilation fans, is fully consistent with well-established obligations of poultry CAFOs under the CWA. Here, there is no doubt that the Alt CAFO "releases . . . dust through poultry confinement house ventilation fans," *id.* at 755; AR 14 at 2, which leads to discharges, and thus under well-settled law it must operate under a NPDES permit. 635 F.3d at 755-56.

The Fifth Circuit was correct to explain that the guidance letters did not change the operative law, and that poultry CAFOs have always been required to obtain a NPDES permit to control discharges of pollutants from the ventilation fans that are carried from the production area to waters of the United States. EPA's NPDES Permit Writers' Manual, which is periodically updated to reflect changes in the law, has always clearly explained that such discharges are subject to permitting. The manual explains the limitations to be included in a permit to control discharges from a CAFO. *See* AR 21 at 43 (EPA, NPDES Permit Writers' Guidance Manual and Example NPDES Permit for Concentrated Animal Feeding Operations, Dec. 31, 2003, Section 4.1.1. at 4-2). In particular, the manual explains that permit writers can

"use BPJ [best professional judgment] or special permit conditions to address specific discharges at a CAFO," including *the discharge of "pollutants (such as manure, feathers, and feed) which have fallen to the ground immediately downwind from confinement building exhaust ducts and ventilation fans and are carried by storm water runoff to waters of the United States.*" *Id.* at 4-2 n.2 (emphasis added).[5] EPA's position that NPDES permits can regulate discharges from pollutants emanating from a poultry CAFO's confinement houses has not changed in the intervening ten years since the 2003 NPDES Permit Writers' Manual was issued.

Thus, in accord with the Fifth Circuit's ruling and EPA's NPDES Permit Writers' Manual, EPA's order requiring the Alt CAFO to apply for a NPDES permit was not arbitrary, capricious, contrary to law or in excess of its jurisdiction; indeed, in issuing the ACO, EPA was merely following its long-standing interpretation of the CWA.

2. Under Long-Standing EPA Regulations, the Agricultural Stormwater Exemption Does Not Apply to "Production Area" Discharges

Plaintiffs' only argument for why EPA lacks the authority to require the Alt CAFO to obtain a NPDES permit is its contention that the conceded discharges are exempt "agricultural stormwater" discharges. However, EPA regulations interpreting the scope of the CWA exemption for "agricultural stormwater" discharges make clear that this exemption never applies to production area discharges, such as the discharges from the Alt CAFO. Rather, the "agricultural stormwater" exemption applies only to certain discharges from the land application area of a CAFO. Because the discharges at the Alt CAFO come from its production area, and

[5] Permit writers use BJP to fill in the gaps where the regulations do not include an effluent limitation guideline to address a source of pollution. *See, e.g.,* AR 21 at 43 (EPA, NPDES Permit Writers' Guidance Manual and Example NPDES Permit for Concentrated Animal Feeding Operations, Dec. 31, 2003, Section 4.1.1. at 4-2).

that facility does not even have a land application area, the exemption does not shield the Alt CAFO from the NPDES permitting requirements.

As part of the 2003 CAFO Rule, EPA promulgated regulations that defined the "agricultural stormwater discharge" exemption as limited to discharges from the CAFO's land application area. *See* 40 C.F.R. § 122.23(e) (exemption applies to discharges from the CAFO's land application area caused by rain, only where the CAFO applied manure, litter, or process wastewater to the land at rates calculated to ensure that all the nutrients would be used by the land, and would not runoff). The 2003 CAFO Rule leaves no question that EPA intended this application of the agricultural stormwater discharge exemption to be its sole application in the context of CAFOs. In the preamble to that rule, EPA expressly stated that "*discharges from the production area* at the CAFO (e.g., the feedlot and lagoons) *are not eligible for the agricultural storm water exemption at* all because they involve the type of industrial activity that originally led Congress to single out CAFOs as point sources." AR 11 at 24; 2003 CAFO Rule at 7198 (emphases added).

Of critical importance here is that EPA regulations define the CAFO "production area" to include the CAFO's "confinement houses" and "barnyards," i.e., the area surrounding the confinement houses. 40 C.F.R. § 122.23(b)(8); *see also* Section I.B.1, *infra*. In other words, the discharges from the Alt CAFO confinement houses onto the barnyard and then into Mudlick Run are production area discharges that are "not eligible for the agricultural storm water exemption at all." AR 11 at 24; 2003 CAFO Rule at 7198.

In *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 492 (2d Cir. 2005), the Second Circuit evaluated the validity of the 2003 CAFO Rule, which established that the agricultural stormwater exemption would apply only to a subset of discharges from land application areas of

a CAFO, namely precipitation induced discharges of manure, litter, or process wastewater where those materials "ha[ve] been applied in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization." *Id.* at 507-510; 40 C.F.R. § 122.23(e). Invoking *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–845 (1984), the court upheld the rule as a reasonable interpretation of the ambiguity in 33 U.S.C. § 1362(14), which defines all CAFOs as point sources but excludes agricultural stormwater discharges from the definition of point source. *See Waterkeeper Alliance*, 399 F.3d at 507-510; *see also* Section I.C., *infra*. As the court reasoned, the rule provides a reasonable basis for distinguishing between runoff related to legitimate agricultural practices that should be exempt—such as the spreading of CAFO waste to fertilize the land—and runoff resulting from the discharge of CAFO waste as a disposal method that serves no legitimate agricultural purpose, and thus should not be exempt. *See* 399 F.3d at 509 ("[T]he CAFO rule classifies precipitation-related discharges as agricultural stormwater discharges only where the CAFO [has applied waste to land areas for purposes] . . . expressly tethered to agricultural endeavors"). In deferring to EPA's interpretation of the ambiguity in the definition of the term point source under *Chevron*, the Second Circuit did not disturb EPA's conclusion that discharges from the production area serve no legitimate agricultural purpose, but rather are industrial and thus ineligible for the agricultural exemption. 2003 CAFO Rule at 7198.

Far from limiting EPA's authority to issue a permit to the Alt CAFO, Pl. Mem. 10-16, the *Waterkeeper Alliance* ruling supports it. In recognizing EPA's authority to interpret the CWA and deferring to EPA's reasonable interpretations under *Chevron*, *Waterkeeper Alliance* sanctioned EPA's conclusion that production area discharges are not "tethered to agricultural endeavors," 399 F.3d at 509, and must be regulated by NPDES permits. Thus, Plaintiffs misread

Waterkeeper Alliance in arguing that all CAFO discharges, including discharges of manure, dust, and feathers emitted from the Alt CAFO's confinement house ventilation fans and deposited on the ground during clean outs, and flushed from the barnyard, are agricultural and thus can be exempt from regulation as agricultural stormwater. Pl. Mem. at 8-10. Instead, *Waterkeeper Alliance* stands for the narrower proposition that it was reasonable for EPA to limit the agricultural stormwater exemption to the select CAFO discharges—and, by extension, to require a permit for industrial discharges from the CAFO production area.

Notably, the attempt by Plaintiffs to bring the Alt CAFO discharges within the scope of the agricultural stormwater exemption is directly at odds with AFBF's assertions about the scope of that exemption as offered to the Second Circuit during the *Waterkeeper Alliance* litigation. In its Brief to the Second Circuit in that proceeding, Petitioner/Intervenor-Respondent AFBF announced that "*the* obvious purpose of the stormwater exemption … is to ensure that farmers *fertilizing their fields* are not held responsible for discharges that result from the weather." *See* Reply Brief of Petitioners/Intervenors-Respondents American Farm Bureau Federation, National Chicken Council, and National Pork Producers Council at 68, *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486 (2d Cir. 2005) (Nos. 03-4470(L), 03-4621(C), 03-4631(C), 03-4641(C), 03-4709(C), 03-4849(C), 03-40199(C), 03-40229(C)), 2004 WL 3757416, at *68 (2d Cir. June 30, 2004) (emphases added), a copy of which is attached hereto as Exhibit 1. In the context of the 2003 CAFO Rule, AFBF shared EPA's concern that the agricultural stormwater exemption not be employed in such a manner as to utilize the CAFO land application area as a "dumping ground." *Id*. at *69-70. Now, in this case, AFBF is asking for a "do-over" regarding the scope of the agricultural stormwater exemption, seeking to give CAFOs license to discharge their waste in and around the production area where its disposal serves absolutely no agricultural purpose.

Thus, despite originally claiming that "*the* obvious purpose" of the agricultural stormwater exemption is to allow for the fertilization of fields for the production of crops (*id*. at *68 (emphasis added)), AFBF now claims that it would be "nonsensical" to think that "Congress only intended the exemption to apply to land application areas." Pl. Mem. at 18. Yet AFBF's attempt to re-label the obvious as nonsensical must fail. A decade ago, EPA explained that the agricultural stormwater exemption could apply to land application discharges, and land application discharges alone, and the Second Circuit upheld that interpretation. This Court must reject AFBF's attempt to expand the scope of the agricultural stormwater exemption now and instead must defer to EPA's longstanding interpretation.

* * *

In sum, Plaintiffs are wrong in arguing that "neither the Act nor EPA's implementing regulations has defined 'agricultural stormwater discharges' within the context of the CAFO farmyard runoff." Pl. Mem. at 8. Rather, taken together, the CWA, EPA's regulations and the NPDES Permit Writers' Manual, as affirmed and upheld by the courts in *National Pork Producers* and *Waterkeeper Alliance*, as well as AFBF's own briefing in the *Waterkeeper* case, establish that EPA has the authority to require the Alt CAFO to obtain a permit for discharging pollutants from its ventilation fans and during clean outs, and from man-made ditches in its

barnyard or farmyard, to waters of the United States. Given EPA's long-established authority,[6] and the facts in the record, EPA's ACO was not arbitrary, capricious, contrary to law or in excess of jurisdiction. Accordingly, Environmental Intervenors, not Plaintiffs, are entitled to summary judgment.

B. Environmental Intervenors Are Entitled To Summary Judgment Despite Plaintiffs' Attempts to Distort the Issues

Plaintiffs rely on a game of semantics to try to define away responsibility for the fact that pollutants from the Alt CAFO are polluting waters of the United States. For example, they argue that both the Alt CAFO itself and its "production area" are comprised solely of "roofed structures," and do not include areas between the Alt CAFO's eight confinement houses. Pl. Mem. at 18-19. Plaintiffs also use semantics to portray the industrial activities at the Alt CAFO as "agricultural" in an attempt to avail this facility of the agricultural stormwater exemption. Finally, they attempt to distract the Court from the real issues by focusing on what is (or is not) "process wastewater" – a question that is irrelevant here. The Court should not be distracted by this wordplay. This is a straightforward case. In view of the record evidence, and the clear law on point, EPA was reasonable to require the Alt CAFO to obtain a permit for discharging pollutants via man-made ditches and culverts in its production area without a NPDES permit.

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[6] *See, e.g., Planned Parenthood v. Casey*, 505 U.S. 833, 854 (1992) (explaining the importance of stare decisis and noting that "the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable"); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 630 F. Supp. 2d 295, 304-06 (S.D.N.Y. 2009) (giving serious consideration to a decision in a case consolidated under 28 U.S.C. 2112(a)(3), like both *National Pork Producers* and *Waterkeeper Alliance*); *see also Rose Acre Farms Inc. v. N.C. Dep't of Envt. & Natural Res.*, No. 12-cvs-10, 2013 WL 459353, slip op. at ¶ 52 (N.C. Sup. Ct. Jan. 4, 2013) (treating the decision in *National Pork Producers* as binding on the question of whether North Carolina poultry growers must apply for NPDES permits for the release of dust through poultry confinement house ventilation fans, and finding in the affirmative).

1. Discharges from the Alt CAFO Farmyard Are Production Area Discharges That Are Never Subject to the Agricultural Stormwater Exemption

Plaintiffs admit that EPA has a "long-held interpretation, clearly articulated in the preamble to its 2003 CAFO Rule" that production area discharges are not eligible for the agricultural stormwater discharge exemption. Pl. Mem. at 20. Yet Plaintiffs argue that the agricultural stormwater discharge exemption should nonetheless shield the Alt CAFO from permitting requirements because the pollutants are emanating from the facility's "farmyard," or "ordinary farmyard spaces between and around the houses and other structure"—areas that Plaintiffs claim are not part of the CAFO or the "production area." Pl. Mem. at 18-20. In fact, Plaintiffs argue that both the term CAFO and the term "production area" are limited to the "roofed structures used for confinement and storage, nothing else." Pl. Mem. at 18-19. Yet Plaintiffs' attempt to narrow the definition of the CAFO and the production area, and thus avoid the CWA permitting requirements, is fatally flawed because it ignores EPA's regulations and case law on point.

First, Plaintiffs' attempt to narrowly define what parts of the Alt facility constitute "CAFO" must fail as those arguments are fundamentally inconsistent with clear law on point from this Circuit. Plaintiffs argue that because the regulations define an AFO, and thus a CAFO, with respect to whether the facility confines animals in an unvegetated area, 40 C.F.R. § 122.23(b)(1) – (2), it must follow that the "areas of a farm where animals are not confined, fed or maintained, or where vegetation does grow are, by definition, not part of a 'facility' that can be considered a CAFO." Pl. Mem. at 18. However, this argument was squarely rejected by the court *Waterkeeper Alliance, Inc. v. Smithfield Foods, Inc.*, Nos 4:01-cv-27-H(3), 4:01-cv-30-H(3), 2001 WL 1715730, at *3-4 (E.D. N.C. Sept. 20, 2001), which explained:

> limiting the CAFO area to the land underneath the feeding areas would compromise the goals of the CWA by allowing widespread pollution by industrial feedlots pumping waste into other areas of their farms. By definition, a CAFO is not limited to the concentrated animal feeding area because the word 'operation' encompasses the entire process involved in running a concentrated animal feeding facility.

Id. So too here, the Court should reject Plaintiffs' attempt to narrow the scope of the term CAFO, and with it EPA's authority to regulate "the entire process involved in running a concentrated animal feeding facility." *Id*.

Second, Plaintiffs' attempt to narrow the definition of the production area must fail as it ignores the regulatory language on point. Under 40 C.F.R. § 122.23(b)(8), the "production area" includes the "animal confinement area," which in turn includes the confinement houses (also known as barns) as well as the "barnyards," areas that are not under a roof. Under any reasonable interpretation, the barnyard must mean the yard surrounding the barn, and the yard surrounding the barn must be akin to what Plaintiffs calls the farmyard. Widely used dictionaries support this conclusion. The Oxford English Dictionary defines the term barn-yard as "the enclosure round a barn, a farm-yard." *See* Oxford English Dictionary, *barn-yard*, *http://www.oed.com/*, a copy of which is attached hereto as Exhibit 2. And, Merriam-Webster's defines the farmyard as the "land around or enclosed by farm buildings; especially: barnyard." Merriam-Webster Dictionary, *farmyard*, http://www.merriam-webster.com/dictionary/farmyard (last visited Aug. 1, 2013). Thus, Plaintiffs cannot avoid regulation by calling the area between the confinement houses at the Alt CAFO the "farmyard." The farmyard and the barnyard are one and the same, and both are part of the CAFO production area, and subject to regulation, even if not under a roof.

Plaintiffs make much ado about a statement, allegedly in the Response to Comment Document for the 2003 CAFO Rule (Exhibit C to Plaintiffs' Memorandum) in which EPA

apparently "disagree[d] that the definition of production area explicitly includes the *entire* farmyard." Pl. Mem. at 20-21 (emphasis added). According to Plaintiffs, this statement means that EPA did not intend for the term production area to include "ordinary farmyard spaces between and around the houses and other structures." *Id.* at 20.[7] The quoted language—*which does not appear anywhere in the document Plaintiffs attach as Exhibit C* and which Environmental Intervenors cannot substantiate by other means—however, does not mean that production area excludes the farmyard. To the contrary, the language Plaintiffs include in their memorandum seems to indicate that EPA was not extending the definition of the CAFO production area to the "entire" farmyard. Read together with the definition of the term production area—which includes the barnyard—one can conclude that EPA did intend to cover at least those farmyard areas surrounding the confinement houses, an area short of the *entire* farmyard.

Plaintiffs are not the first to argue that the area just outside the confinement houses is not part of the production area and is thus exempt from the CWA's permitting scheme. Livestock industry groups made a similar claim in *National Pork Producers*, discussed above, to support their argument that EPA's guidance letters, which explained that poultry CAFOs are required to obtain a NPDES permit for discharges of dust released from confinement house ventilation fans,

[7] Plaintiff characterizes the area from which the discharges flow as ordinary "farmyard" adjacent to a grassy pasture, Pl. Mem. at 5, but EPA inspectors found that the pollutants were released from the houses in the animal confinement area through ventilation fans to strips of land between the houses. AR 1 ¶¶ 22-25. According to the inspection report, the areas around and between the confinement houses are equipped with a system of man-made ditches that were designed to receive manure and litter waste released from the ventilation systems of the adjacent CAFO poultry houses. *Id.*; AR 2 at 3-5. Once water comes into contact with these pollutants, it discharges through the system of ditches and culverts ultimately discharging into Mudlick Run. AR 2. Thus, what Plaintiffs describe as an ordinary farmyard is more accurately described as an extensive outdoor system designed for managing wastes removed from the CAFO production area.

imposed new obligations on poultry producers and thus were "final agency action." 635 F.3d at 754-55. In that case, poultry industry petitioners argued that the "farmer's yard" area near the poultry confinement houses was not considered part of the CAFO production area before the challenged guidance letters were issued, and thus newly obligated the poultry petitioners to obtain a permit. *See* Final Brief of Petitioners National Chicken Council & U.S. Poultry & Egg Ass'n at 23, *Nat'l Pork Prods. Council v. EPA*, 635 F.3d 738 (5th Cir. 2011) (No. 08-61093), 2010 WL 3693598, at *23 (5th Cir. May 7, 2010) (arguing that the production area of a CAFO, as defined in 40 C.F.R. § 122.23(b)(8) "does not include areas, such as a farmer's yard, that are near, but outside of, the confinement house production area"), a copy of which is attached hereto as Exhibit 3. In holding that the letters did not impose new requirements for poultry CAFOs to obtain a permit for discharges from the farmer's yard, the Fifth Circuit Court of Appeals implicitly recognized that the farmer's yard, a.k.a. the farmyard, is part of the production area, and discharges from that area were always actionable under the CWA. 635 F.3d at 756.

For all of these reasons, Plaintiffs are wrong in arguing that that the discharges from the Alt CAFO are coming from mere farmyard, unconnected to the CAFO or the production area. EPA was reasonable to conclude that the discharges from the Alt CAFO are the type of production area discharges that have long been subject to regulation. Thus, EPA did not act arbitrarily, capriciously, contrary to law, or in excess of its authority in requiring the Alt CAFO to obtain a permit.

2. The Manure, Litter, and Dander and Feathers Spewed from the Alt CAFO's Ventilation Fans Have No Agricultural Purpose

Throughout their memorandum, Plaintiffs argue that the Alt CAFO is just an ordinary farm, engaging in ordinary agricultural activities. Under Plaintiffs' view, then, any discharges from the Alt CAFO fall within the CWA's exemption for agricultural stormwater discharges, and

EPA erred in requiring a permit for these discharges. EPA, however, has long indicated that the discharges of manure, litter, dander, and feathers from a poultry CAFO's confinement houses that are deposited near the confinement houses and wash to waters of the United States are decidedly not the type of agricultural discharges that should be exempt. Indeed, in the preamble to the 2003 CAFO Rule, EPA explicitly stated that the discharges from the CAFO production area "involve the type of industrial activity that originally led Congress to single out CAFOs as point sources." 2003 CAFO Rule at 7198.

Moreover, CAFOs were seen as industrial long before EPA expressly stated as much in the preamble to the 2003 CAFO Rule. For example, in *Concerned Area Residents for the Environment v. Southview Farm*, the Second Circuit reasoned that in promulgating the original CAFO rules, EPA sought to target only industrial operations. 34 F.3d 114 (2d Cir. 1994). For support, the Second Circuit posited that EPA defined the term "AFO" as a facility where animals are confined in an unvegetated area because "rel[iance] upon confinement in un-vegetated areas [i]s an indicator of the 'industrialized' nature of the confinement . . . ." *Id.* at 123.[8]

[8] That discharges from a CAFO can be industrial is also borne out by the fact that large CAFOs are subject to the CWA's industrial stormwater permitting program under 33 U.S.C. § 1342(p)(2)(B) (requiring a permit for a discharge composed of stormwater "associated with industrial activity"); 40 C.F.R. § 122.26(a)(1)(ii) (explaining that "discharges composed entirely of storm water shall not be required to obtain a NPDES permit except [a] discharge associated with industrial activity"). Under applicable federal regulations, large CAFOs are considered to be engaging in industrial activities, and thus require a permit for associated stormwater discharges. *See* 40 C.F.R. § 122.26(b)(14)(i) (explaining that "[f]acilities subject to storm water effluent limitations guidelines, new source performance standards, or toxic pollutant effluent standards under 40 CFR subchapter N"—which includes large poultry CAFOs like the Alt CAFO—are engaged in industrial activity, and thus eligible for the industrial stormwater permitting requirements); *id.* § 412.40 - .45 (including effluent limitation guidelines for CAFOs with not less than 125,000 chickens other than laying hens if the facility uses other than a liquid manure handling system, the number of animals that constitute a large poultry CAFO under 40 C.F.R. § 122.23(b)(4)(x)). EPA's most recent NPDES Permit Writers' Manual for Concentrated Animal Feeding Operations confirms that "CAFOs are subject to industrial stormwater permitting requirements of 40 CFR part 122.26." EPA, NPDES Permit Writers' Manual for

In addition, it strains credulity to argue that the manure, litter, dander, and feathers that is spewed from confinement house ventilation fans to prevent the animals from suffocating, and that lands on grassy patches (where no crops are grown) and in drainage ditches in between the confinement houses, has an agricultural purpose. Pl. Mem. at 8-10. It would be arbitrary and inconsistent for EPA to exempt the Alt CAFO from regulation for this type of discharge under the guise of the agricultural stormwater exemption when, in the context of land application discharges, the agricultural stormwater exemption applies only if the waste is applied with an agricultural purpose. *See* 40 C.F.R. § 122.23(e); Section I.A.2, *supra*. In the preamble to the 2003 CAFO Rule, EPA explained that if the waste is over-applied, it loses its true agricultural purpose and discharges will no longer be exempt as agricultural stormwater. *See* 2003 CAFO Rule at 7198 (explaining that "[i]t would not be reasonable to believe that Congress intended to exclude as an 'agricultural' storm water discharge any and all discharges of CAFO manure from land application areas, for example, no matter how excessively such manure may have been applied without regard to true agricultural needs"). Here, because the manure and other pollutants deposited between the Alt CAFO confinement houses serve no "true agricultural needs," it cannot trigger the agricultural stormwater discharge exemption. *See, e.g.*, *Reynolds v. Rick's Mushroom Serv., Inc.*, 246 F. Supp. 2d 449 (E.D. Pa. 2003) ("Defendants' wastewater runoff does not fit within the exclusion for 'agricultural stormwater discharges and return flows from irrigated agriculture.' Defendants concede that they do not grow mushrooms, nor is there any evidence that Defendants conduct agricultural activities. Furthermore, at least one court in

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CAFOs, § 4.1.5 at 4-19 to 4-20; *see also Cmty. Ass'n for Restoration of the Env't v. Henry Bosma Dairy*, 305 F.3d 943, 947 (9th Cir. 2002) ("As a CAFO, Bosma is subject to "effluent guidelines," and is considered to be engaged in industrial activities. Therefore, Bosma must obtain an individual permit for storm water discharges." (citations omitted)). Thus, it is simply not the case that all CAFO discharges are agricultural.

this district has concluded that mushroom composting operations, which are substantially similar to Defendants' operation, is not an 'agricultural activity.' (internal citations omitted) (quoting *United States v. Frezzo Bros., Inc.*, 546 F. Supp. 713, 721-24 (E.D. Pa. 1982)); *cf. Fishermen Against the Destruction of the Env't, Inc. v. Closter Farms, Inc.*, 300 F.3d 1294, 1298 (11th Cir. 2002) ("Any pollutants that originated in the non-agricultural properties adjacent to Closter Farms obviously do not fall within the agricultural exemptions.").

3. EPA's Characterization of the Discharges as Process Wastewater, Rather than Stormwater, Does Not Change the Fact that the Discharges Must be Permitted

Finally, Plaintiffs' argument that EPA was wrong to characterize the discharges as process wastewater discharges has no bearing on whether EPA lawfully issued the ACO. Pl. Mem. at 21-26. Critical here is whether the discharges are from the CAFO's production area. Because, as noted at length above, the Alt CAFO discharges from the ventilation fans and barnyard are production area discharges, they required a permit, and are not eligible for the agricultural stormwater exemption. EPA has broad authority under the CWA to require a permit for the discharge of a pollutant from a point source, including discharges from the Alt CAFO's production area. Here, the discharges from the Alt CAFO contained manure, litter, dander, and feathers, materials that pollute waterways. The water that came in contact with those pollutants may well have become process wastewater as, under pertinent regulations, process wastewater 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). Yet process wastewater or not, the pollutants from the confinement house landed in the barnyard and flowed, through man-made ditches, and into the waters of the United States, and thus required a permit.

C. EPA's Action Is Entitled to *Chevron* Deference

To the extent this Court concludes that the legal questions at issue in the parties' respective summary judgment motions are not answered squarely by prior court rulings, or the plain terms of the CWA and EPA's regulations, it must defer in its review of the law to EPA's interpretation of its own governing statutes. The scope of this Court's review is narrow. It must assess only whether EPA's decision to require Plaintiff Alt to apply for a NPDES permit was "based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Pres. Overton Park*, 401 U.S. at 416 (citing 5 U.S.C. § 706). The court cannot substitute its judgment for that of the agency. Instead, "[r]eview under this standard is highly deferential, with a presumption in favor of finding the agency action valid." *Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 192 (4th Cir. 2009); *Coal. to Pres. McIntire Park v. Mendez*, 862 F. Supp.2d 499, 508, 509 (W.D. Va. 2012).[9]

Section 309(a) of the CWA, 33 U.S.C. § 1319(a), vests the EPA with the authority to issue a Finding of Violation and Order for Compliance. In exercising that authority with respect to the Alt CAFO, EPA interpreted its organic statute and its own duly promulgated regulations and determined that the confinement houses and the surrounding barnyard on the Alt CAFO

[9] In its recent decision in *City of Arlington*, the Supreme Court answered affirmatively and unequivocally the question "whether a court must defer under *Chevron* to an agency's interpretation of a statutory ambiguity that concerns the scope of the agency's statutory authority." *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1869 (2013). *Chevron* applies "when it appears that Congress delegated authority to the agency *generally* to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *Id.* at 1882 (quoting *United States v. Mead Corp.*, 533 U.S. 218, 226-227 (2001)). Thus, as *City of Arlington* makes clear, the *Chevron* preconditions are satisfied where, as here, an agency administers its organic statute through actions that carry the force of law. In the concluding lines of his opinion in *City of Arlington*, Justice Scalia summarized the application of *Chevron*: If "the agency's answer is based on a permissible construction of the statute," that is the end of the matter." *City of Arlington*, 133 S. Ct. at 1874-75 (quoting *Chevron*, 467 U.S. at 842).

comprise the production area of the CAFO pursuant to 40 C.F.R. § 122.23(b)(8). EPA also found that manure and litter are emitted through ventilation fans and settle in the barnyard. AR 1 ¶ 23. It found further that water comes in contact with the manure and transports the manure to Mudlick Run. AR 1 ¶ 24. EPA's Findings and Order also determined that the pollutants from the production area are discharged through man made ditches, pipes, and culverts into waters of the United States. AR 1 ¶ 25. In reaching this conclusion, EPA interpreted its organic statute and reasonably determined that the discharges were point sources subject to the NPDES program and not exempt agricultural stormwater. Each of the findings that were predicates to EPA's determination that the Alt CAFO was discharging pollutants from its production area is well-supported by the Administrative Record and thus entitled to deference.

Moreover, as noted above, because the statutory scope of "agricultural stormwater" is not plain from the statute, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron,* 467 U.S. at 843; *City of Arlington,* 133 S. Ct. at 1868. Just as the Second Circuit found in *Waterkeeper Alliance,* this Court should conclude that EPA's narrow interpretation of the agricultural stormwater exemption as applying only to precipitation-related land application discharges is grounded in a "permissible construction" of the Clean Water Act," and this is entitled to deference under *Chevron*. *Waterkeeper Alliance*, 399 F.3d at 507. Under this analysis, there is simply no question that EPA's determination is both reasonable and consistent with prior law.[10]

[10] Plaintiffs' contention that EPA's decision to issue the ACO is not entitled to deference because "EPA has not developed its position through public notice-and-comment rulemaking," Pl. Mem. at 6, is simply incorrect. Plaintiffs rely on *Christenson v. Harris County*, 529 U.S. 576 (2000), but fail to note that in *Barnhart v. Walton*, 535 U.S. 212, 221-22 (2002), the Court explicitly disclaimed that interpretation of *Christenson*:

> the fact that the Agency previously reached its interpretation through means less formal than "notice and comment" rulemaking, see 5 U.S.C. § 553, does not

II. THE COURT SHOULD DENY PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs' motion for summary judgment rests on two premises -- one that is legally incorrect and one that is factually unproven. Because Plaintiffs' motion does not stand up either legally or factually, it must be denied.

As a legal matter, Plaintiffs contend that "where a farmer employs responsible agricultural practices and precipitation nonetheless causes a discharge of CAFO-related pollutants, that discharge is an exempt agricultural stormwater discharge." Pl. Mem. at 14. They argue that unless the CAFO is engaged in negligence or malfeasance, the precipitation induced discharges of CAFO-related pollutants are exempt from NPDES permitting under the agricultural stormwater discharge exemption. As shown in Section II.A.1, *infra*, however, the CWA is a strict liability statute, and the manner in which the Alts or any other CAFO manager operates their farm is legally irrelevant to whether the CAFO must obtain a NPDES permit. Alt CAFO's discharge from the production area is not subject to lesser liability under the CWA because of its claimed "responsible" practices.

> automatically deprive that interpretation of the judicial deference otherwise its due. If this Court's opinion in *Christensen v. Harris County*, 529 U.S. 576, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000), suggested an absolute rule to the contrary, our later opinion in *United States v. Mead Corp.*, 533 U.S. 218, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001), denied the suggestion. *Id.*, at 230–231, 121 S.Ct. 2164 ("[T]he want of" notice and comment "does not decide the case"). Indeed, *Mead* pointed to instances in which the Court has applied *Chevron* deference to agency interpretations that did not emerge out of notice-and-comment rulemaking. 533 U.S., at 230–231, 121 S.Ct.

Id. (internal citations omitted); *Citizens Exposing Truth about Casinos v. Kempthorne*, 492 F.3d 460 (D.C. Cir. 2007) ("Neither the Supreme Court nor this court has read *Christensen* to have limited *Chevron* deference to rulemakings and formal adjudications only, much less to preclude *Chevron* deference to situations involving application of an agency's delegated authority to particular facts").

As a "factual matter," Plaintiffs' Motion for Summary Judgment must be denied because Plaintiffs rely on nothing more than self-serving and unsupported claims in their memorandum and references to material outside the record, materials that cannot support a motion for summary judgment under Federal Rule of Civil Procedure 56 or the APA. As Environmental Intervenors' Counterstatement of Facts amply demonstrates, summary judgment in favor of Plaintiffs is not warranted.

COUNTERSTATEMENT OF UNDISPUTED MATERIAL FACTS[11]

1. Each of the eight poultry confinement houses at the Alt facility is approximately 400 feet by 42 feet and each has loading areas for cleanout of manure and litter at each end. AR 2 at 4.

2. The houses, which are oriented in a Northeast to Southwest direction, are spaced about 40 feet apart. Smolen Aff. ¶ 13.

3. The poultry barns are ventilated by inlet vents spaced evenly down the sides of the houses and exhaust fans on one side of the house. *Id.*

4. The exhaust fans emit manure, dander, litter and other pollutants from inside the barns. *Id.*

5. The manure may contain pathogens such as fungus, bacteria and viruses, which are released to the air by the fans. *Id.* ¶ 17.

[11] As noted earlier, *see* note 3, *supra*, this Court can grant Environmental Intervenors' Motion for Summary Judgment because this motion can be decided as a matter of law based solely on undisputed facts wholly within the administrative record in this case. Plaintiffs' Motion however cannot be granted. Plaintiffs rely on extra record evidence and putative facts that Environmental Intervenors genuinely dispute. Environmental Intervenors submit the Affidavit of Michael D. Smolen, sworn August 1, 2013 ("Smolen Aff."), pursuant to Fed. R. Civ. P. 56(c)(4), in opposition to Plaintiffs' purportedly undisputed facts.

6. The Alt CAFO has constructed a drainage system comprising ditches, culverts and pipes to convey water and the pollutants it contains away from its poultry houses. AR 2 at 5.

7. The drainage system includes drainage channels between the poultry barns. *Id.*

8. The distance between poultry barns is close enough for litter, dust, and manure blown out of the house to settle in the drainage ditches. Smolen Aff. ¶ 13.

9. The drainage system discharges polluted water into Mudlick Run, a water of the United States. AR 2 at 6.

10. High quality imagery from the Natural Resources Conservation Service Web Soil Survey shows clear evidence of discharge from the Alt CAFO to Mudlick Run. Smolen Aff. ¶ 11.

11. The roof top area of the poultry barns that contributes to each drainage channel is approximately half an acre (400 feet x 50 feet / 43560 sq ft/ac = 0.46 ac). *Id.* ¶ 13.

12. For every inch of rain that lands on the roof tops, about 10,500 gallons will be delivered to the ditches. *Id.*

13. This volume of stormwater is more than can be infiltrated locally and in total more than can be infiltrated in the field below the CAFO. *Id.*

14. Best Management Practices ("BMPs") for a poultry CAFO require that litter and manure are prevented from coming into contact with runoff. *Id.* ¶ 14.

15. The Alt CAFO has not implemented best management practices with respect to prevent pollutants from coming into contact with stormwater runoff. AR 2 at 6; Smolen Aff. ¶ 13.

16. In the case of the Alt CAFO, appropriate BMPs would require the facility to keep stormwater runoff away from the pollutants emitted by the exhaust fan. AR 2 at 4; Smolen Aff. ¶¶ 13-15.

17. The Alt CAFO does not deflect its poultry house ventilation fans away from the drainage ditches. Smolen Aff. ¶¶ 13, 15.

18. The Alt CAFO does not use gutters or other means to direct the rooftop runoff away from the area where pollutants from the fans are deposited or where manure is dropped during cleaning and loading. AR 2 at 5; Smolen Aff. ¶ 15.

19. Appropriate BMPs would include installing a vegetative filter consisting of trees between the fans and the ditches. Smolen Aff. ¶¶ 14-15.

20. The CAFO did not allow enough space for a vegetative filter to be established between the exhaust fan and nearby drainage ditches. *Id.* ¶ 16.

A. Whether Plaintiff Alt Uses Responsible Waste Management Practices Is Not Legally Relevant

Plaintiffs urge the Court to find that because Alt manages its operations in an allegedly responsible manner, it should not be held liable for any precipitation-related discharges. Pl. Mem. at 14-16. Instead, Plaintiffs argue, these "non-negligent" discharges are properly exempt from the NPDES permit requirements as a nonpoint source discharge of agricultural stormwater. *Id.* at 16. Plaintiffs' argument must fail because it is at odds with the Clean Water Act, which creates a strict liability scheme prohibiting all discharges. Plaintiffs argument is also at odds with the Second Circuit's decisions in *Waterkeeper Alliance* and *Southview Farm*, which discuss criteria for finding that discharges from a CAFO's land application areas—areas that serve an agricultural purpose—are exempt from regulation as agricultural stormwater. None of Plaintiffs' proffered authority supports their distorted view that allegedly responsible CAFOs that discharge

when it rains are discharging non-point source agricultural stormwater, irrespective of whether the discharged material serves a legitimate agricultural purpose.

1. The Clean Water Act Imposes a Strict Liability Regime for Unpermitted Discharges

Plaintiffs' would have the Court find that the "agricultural stormwater discharge exemption" in 33 U.S.C. § 1362(14) extends to all precipitation-related discharges from a CAFO, as long as the CAFO has take affirmative steps to avoid discharging pollutants into waters of the United States. Put another way, under Plaintiffs' view of the law, CAFOs would escape liability for *any* waste discharged from a CAFO into surface waters due to precipitation as long as the CAFO could not be shown to be negligent in controlling the release of the waste from the operation. Based on this distorted view of the law, Plaintiffs urge the Court to find that Alt CAFO's alleged prudence in waste management gives it a pass on participating in the NPDES program for all precipitation-related discharges, and thus that EPA acted arbitrarily and capriciously and in excess of its authority in issuing the ACO that required the Alt CAFO to obtain a NPDES permit.

Plaintiffs' argument, however, must fail because it ignores the plain language of the CWA, which prohibits *the* discharge of any pollutant, not just negligent discharges. 33 U.S.C. § 1311(a) ("the discharge of any pollutant by any person shall be unlawful."). In adopting 33 U.S.C. § 1319, Congress distinguished between those violations of Section 1311 subject to civil enforcement and those subject to criminal enforcement. Criminal penalties attach to negligent and knowing violations as well as those committed with knowing endangerment. 33 U.S.C. § 1319(c). In stark contrast however, compliance orders may be issued or civil enforcement suits commenced "*whenever* . . . the Administrator finds any person in violation . . .of section 1311." 33 U.S.C. § 1319(a)(1) (emphasis added). The statute does not require any

intentionality. The CWA creates a strict-liability regime under which EPA may require a permit for all discharges from a point source, regardless of the negligence of the discharger, and may enforce that requirement under § 1319(c). *See, e.g.*, *American Canoe Ass'n v. Murphy Farms*, 412 F.3d 536, 539-540 (4th Cir. 2005) (upholding district court finding of violation of the CWA for inadvertent spraying of swine wastewater toward surface waters even where defendant had undertaken good-faith remedial effort to prevent the spraying "because the CWA creates a regime of strict liability…"). Plaintiffs' argument that the agricultural stormwater exemption operates to shield all non-negligent precipitation related discharges is untenable because it would amount to a *sub silentio* replacement of the strict-liability regime imposed by the CWA with a negligence standard for CAFOs.[12]

Indeed, by seeking to redefine the "agricultural stormwater" exemption to turn on whether the CAFO was negligent or malfeasant in allowing its waste to be deposited on that area, Plaintiffs are asking the Court to radically redefine the liability scheme that Congress established. 33 U.S.C. § 1311(a). Under Plaintiffs' standard, any precipitation-related discharge from a CAFO would be automatically "agricultural" and therefore exempt from regulation, so long as it was neither intentional nor negligent, even if the deposition of waste served no agricultural purpose at all. The Court should not presume that Congress, in enacting the

[12] *See, e.g.*, *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 374 (10th Cir. 1979) ("The regulatory provisions of the [Federal Water Pollution Control Act] were written without regard to intentionality . . . making the person responsible for the discharge of any pollutant strictly liable . . . . The Act would be severely weakened if only intentional acts were proscribed."); *accord Sierra Club v. Abston Constr. Co.*, 620 F.2d 41, 46 (5th Cir. 1980); *Ward v. Coleman*, 423 F. Supp. 1352, 1357 (W.D. Okla. 1976), *rev'd*, 598 F.2d 1187 (10th Cir. 1979), *rev'd sub nom. U.S. v. Ward*, 448 U.S. 242 (1980) ("The essence of strict liability is the shifting of accidental loss, as between non- negligent parties, to the one most able to insure against the risk and bear the cost. In the [CWA], Congress has chosen to shift the cost of damage done to the environment from the public to the owner or operator of the facility from which a harmful discharge emanated." (footnote omitted)).

agricultural stormwater exemption, would have intended to produce such a drastic result without making any express statement regarding an intent requirement. *See Whitman v. American Trucking Ass'ns, Inc*., 531 U.S. 457, 468 (2001) ("Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions — it does not . . . hide elephants in mouseholes."); *MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218, 231 (1994) (conferral of authority to "modify" rates was not a cryptic conferral of authority to make filing of rates voluntary); *Dir. of Revenue of Mo. v. CoBank ACB*, 531 U.S. 316, 323 (2001) ("it would be surprising, indeed," if Congress had effected a "radical" change in the law "sub silentio" via "technical and conforming amendments").

Thus, Plaintiffs are flatly wrong that the Alt CAFO's alleged prudence in operating the CAFO exempts it from liability for the discharges that EPA observed when it visited the facility. The Alt CAFO's prudence is legally irrelevant under the CWA, and Plaintiffs are not entitled to summary judgment that EPA improperly required the Alt CAFO to obtain a permit for its discharges.

2. Plaintiffs' Caselaw Does Not Support Their Attempt to Expand the Agricultural Stormwater Exemption

Plaintiffs rely heavily on language from the Second Circuit's rulings in *Southview Farm* and *Waterkeeper Alliance* for the proposition that the "agricultural stormwater" exemption applies to all non-negligent, precipitation-induced CAFO discharges. *See, e.g.*, Pl. Mem. at 11-16. However, Plaintiffs' reliance on these cases is misplaced because they concern the scope of the agricultural stormwater exemption exclusively *in the context of* CAFOs' intentional placement of waste onto land for the agricultural purpose of fertilizing that land. *See Concerned Area Residents for the Environment v. Southview Farm*, 34 F.3d 114, 120-121 (2d Cir. 1994); *Waterkeeper Alliance*, 399 F.3d at 507. These cases say nothing about any putative application

of the agricultural stormwater exemption to the unwanted deposit of waste onto land for non-agricultural purposes, as Plaintiffs urge here.

In *Southview Farm*, the court upheld a jury decision finding that a discharge of manure that had been over-applied to lands under the control of the CAFO was not exempt under the statutory agricultural stormwater exemption. 34 F.3d at 121. Critical to that case was the fact that the CAFO had continued to spread manure over land that had already been "saturated" with manure. *Id*. In upholding the jury's view that the discharges from the oversaturated fields were not exempt as agricultural stormwater, the court found it was reasonable to conclude that the discharge was "primarily caused" by the CAFO operator's "over-saturation" of the field with manure, not precipitation carrying agricultural waste. *See id*. The key to the court's ruling was not that the CAFO operator was negligent in over-applying waste, but that the over-application rendered the discharges *non-agricultural* in nature; thus, the agricultural stormwater exemption was inapplicable.

The Second Circuit's discussion in *Waterkeeper Alliance* relies on *Southview Farm* in explaining the proper interpretation of the agricultural stormwater exemption. As discussed in Section I.A.2, *supra*, the court in *Waterkeeper Alliance* upheld EPA's regulation limiting the "agricultural stormwater" exemption in the context of CAFOs to runoff related to the legitimate spreading of CAFO waste for the *agricultural* purpose of fertilizing the land. *See* 399 F.3d at 509 ("[T]he CAFO rule classifies precipitation-related discharges as agricultural stormwater discharges only where the CAFO [has applied waste to land areas for purposes] . . . expressly tethered to agricultural endeavors"). *Id.* at 509. Plaintiffs read too much into the statement in *Waterkeeper Alliance* that Congress added the agricultural stormwater exemption to "affirm the impropriety of imposing . . . liability for *agriculture-related* discharges triggered not by

negligence or malfeasance, but by the weather." Pl. Mem. at 16 (quoting *Waterkeeper Alliance*, 399 F.3d at 507 (emphasis added). The court's core ruling was that discharges must be "agriculture-related" to trigger the exemption. *Id.* The court thus recognized that its position was consistent with its earlier ruling in *Southview Farm* that "discharges from land areas under the control of a CAFO can and should generally be regulated, but where a CAFO has taken steps to ensure appropriate agricultural utilization of the nutrients in manure, litter, and process wastewater, it should not be held accountable for any discharge that is primarily the result of 'precipitation.'" *Waterkeeper Alliance*, 399 F.3d at 509.

In sum, *Southview Farm* and *Waterkeeper Alliance* do not support Plaintiffs' claim that the availability of the agricultural stormwater exception depends on negligence or malfeasance. Instead, they support EPA's reasonable determination, expressed in its regulations, that the agricultural stormwater exemption applies only where waste has been applied to the land for a genuinely agricultural purpose. 40 C.F.R. § 122.23(e)(1) ("For unpermitted Large CAFOs, a precipitation-related discharge . . . from land areas under the control of a CAFO shall be considered an agricultural stormwater discharge *only* where the manure, litter, or process wastewater has been land applied in accordance with site-specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients" (emphasis added)). The concern over the cause of the discharge in *Southview Farm* and *Waterkeeper Alliance—i.e.*, whether the discharge was caused by rain or the CAFO's negligence or malfeasance—has no corollary when the discharge is from the CAFO's production area. Discharges from the CAFO's production area are never agricultural and thus they cannot be exempt "agricultural stormwater" regardless of the CAFO's prudence in operating the facility.

B. This Court Cannot Grant Summary Judgment to Plaintiffs Because Their Motion Depends on Extra-Record and Disputed "Facts"

In support of their Motion for Summary Judgment, Plaintiffs identify what they claim are undisputed facts. Pursuant to Rule 56(c)(1)(A) of the Federal Rules of Civil Procedure, "a party asserting that a fact cannot be . . . disputed must support the assertion by citing to particular parts of materials in the record." Because the agency record constitutes the factual predicate for a motion for summary judgment in a case arising under the APA, Plaintiffs may only rely on facts in that record. But a number of the facts Plaintiffs rely on are neither undisputed nor contained within or supported by the Administrative Record. Thus, the constraints of both the APA and Rule 56 preclude summary judgment in favor of Plaintiffs.

Plaintiffs assert that the Alt CAFO "implements management practices and procedures to reduce the amount of manure and litter that will be exposed to precipitation in [the] farmyard." Pl. Mem. at 5. In support of what they purport to be an undisputed fact, Plaintiffs rely on three documents. First, they rely on EPA's August 11, 2011 Inspection Report which does not support the assertions they make. AR 1. The report describes the facility and notes observations of pollutants in a number of locations. It says absolutely nothing about implementing management practices to reduce pollutants or discharge. Second, they rely on the Alt's Nutrient Management Plan ("NMP"), which is not in the Administrative Record and thus cannot be relied on by this Court. Exhibit B to Response of American Farm Bureau Federation and West Virginia Farm Bureau to the U.S. Environmental Protection Agency's Motion to Dismiss, Doc. No. 76-2. Even if the NMP were in the Record, it says nothing about minimizing the discharge of pollutants to Mudlick Run. The NMP was written by Pilgrim's Pride, the corporation with whom Alt contracts. There is nothing in the Record to indicate that the Alt CAFO complied with these minimal NMPs. Nor does the NMP address current poultry best management

practices. *Id*. Moreover, the NMP notes that the plan was due to be updated in June 2008. It also notes "New Plan done June 2011." *Id.* EPA conducted its flyover in November 2010 and its inspection in June 2011. It is not at all clear from the Record what the status of the NMP was at that time. Third, Plaintiffs rely on EPA's report of an inspection conducted nearly a year after it issued the ACO – a document that *did not* form the basis for EPA's reasonable exercise of its authority and that describes changes that took place *after* the issuance of the ACO. Nor is the document part of the Administrative Record in this case.

Plaintiffs assert that their management practices are "essential, and . . . consistent with industry wide standards." Pl. Mem. at 15. First and foremost, as discussed above, the Alt CAFO's management practices are not legally relevant; all that is legally relevant is its discharge of pollutants from its production area. *See* Section I.A., *infra*. Moreover, Plaintiffs base their assertion on an extra record document they themselves wrote to support a rulemaking change and which they attached to their Memorandum of Law. *See* Pl. Mem. Ex. B. This clearly is not the type of evidence to be considered by a Court under Rule 56 or the APA.[13] *See* Fed. R. Civ. P. 56(c).

Thus, there is no record basis for Plaintiffs' "facts." What the Administrative Record does establish is that EPA determined that the Alt CAFO discharged pollutants into waters of the United States from its production area without a permit. These determinations support summary judgment for Environmental Intervenors and EPA, not Plaintiffs.

[13] Throughout their Memorandum of Law, Plaintiffs makes conclusory assertions with respect to the Alt CAFO's management practices that are unsupported by the record. In many instances, Plaintiffs do not even offer a citation for these baseless claims. *See, e.g.*, Pl. Mem. at 14-15.

CONCLUSION

This Court should grant Environmental Intervenors' Motion for Summary Judgment and determine, as a matter of law, that EPA was not arbitrary or capricious or otherwise in violation of law when it issued an ACO to the Alt CAFO directing it to obtain a NPDES permit for the discharge of pollutants into waters of the United States. As Environmental Intervenors plainly demonstrate, the law is well-settled that discharges of the type documented on the Alt CAFO are subject to the CWA's prohibition against discharging without a permit. EPA's regulations and guidance documents, as well as federal appellate case law, make clear that the "agricultural stormwater discharge exemption" narrowly applies to CAFOs, and does not extend to the Alt's discharges from the CAFO production area.

This Court also should deny Plaintiffs' Motion for Summary Judgment. The Court should reject Plaintiffs' claims that they are exempt from the CWA requirements because they were not negligent in discharging pollutants. The CWA is a strict liability statute and unpermitted discharges are prohibited without regard to intentionality. Moreover, Plaintiffs' Motion does not rest on undisputed facts in the record. Instead, it cites extra record documents, makes bald assertions and relies on documents that do not support their claims. Their inability to demonstrate the absence of disputed facts in support precludes summary judgment.

Respectfully submitted this 1st day of August 2013,

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Exhibit 1

NOS. 03-4470(L),

03-4621(C), 03-4631(C), 03-4641(C), *03-4709(C), 03-4849(C), 03-40199(C), 03-40229(C)

In The

United States Court of Appeals

For The Second Circuit

WATERKEEPER ALLIANCE, INC., AMERICAN FARM BUREAU FEDERATION, NATIONAL CHICKEN COUNCIL, NATIONAL PORK PRODUCERS COUNCIL, *NATIONAL TURKEY FEDERATION, AMERICAN LITTORAL SOCIETY, SIERRA CLUB, INC., NATURAL RESOURCES DEFENSE COUNCIL, INC.,

Petitioners/Intervenors – Respondents,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, MICHAEL O. LEAVITT, Administrator, United States Environmental Protection Agency,

Respondents.

*. This appeal has been withdrawn as per 11/26/03 order

ON PETITION FOR REVIEW FROM
THE ENVIRONMENTAL PROTECTION AGENCY

REPLY BRIEF OF PETITIONERS/INTERVENORS – RESPONDENTS AMERICAN FARM BUREAU FEDERATION, NATIONAL CHICKEN COUNCIL, AND NATIONAL PORK PRODUCERS COUNCIL

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INTRODUCTION

Regardless of this Court's decision concerning EPA's unique "duty to apply" provision, the CAFO Rule will significantly expand the number of CAFOs potentially subject to the NPDES program. None of the Petitioners have challenged EPA's authority to eliminate the exemption for feeding operations that discharged only in the event of a large storm. *See* 40 C.F.R. Part 122 Appendix B (2000).[1] Similarly, none of the Petitioners have objected here to the Agency's decision to regulate, for the first time, dry litter chicken operations, which comprise about 75% of the poultry industry. 68 Fed. Reg. 7192 (Feb. 12, 2003). Elimination of these exemptions will increase the number of feeding operations potentially in need of NPDES permits.

EPA argues that because its positions lie between those of the regulated community and the Environmental Petitioners, EPA's regulations must be "reasonable." Placement between opposing public views, however, cannot save regulations that are "in excess of statutory jurisdiction, authority, or limitations . . . ." 5 U.S.C. § 706(2)(C). EPA's expansion of the NPDES program cannot

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[1] "Provided, however, that no animal feeding operation is a concentrated animal feeding operation as defined above if such animal feeding operation discharges only in the event of a 25 year, 24-hour storm event." 40 C.F.R. Part 122, Appendix B (2000), Special Appendix ("SPA") 168.

exceed the authority conferred by the Clean Water Act. In the regulations under review, EPA has exceeded that authority in three important respects.

First, the Agency strayed from the basic structure of the Clean Water Act when it required an entire class of persons (CAFO owners) to apply for a Clean Water Act permit simply because they own a CAFO. As we pointed out in our opening brief, the Clean Water Act does not require anyone to apply for a permit, just as motor vehicle laws do not require persons to apply for driver's licenses. What the modern Clean Water Act established in 1972 was the key principle that no one has a right to pollute the waters of the United States. Permission to discharge pollutants became a privilege; that privilege could be won only by obtaining a Clean Water Act permit. The Agency cannot *require* certain persons to apply for those permits even if they do not discharge pollutants.

Second, the Agency cannot expand its Clean Water Act jurisdiction so it can regulate all large CAFO operations through the device of "presuming" that all large CAFOs are dischargers. The administrative record is utterly devoid of any evidence to support EPA's presumption. To the contrary, the record shows that discharges from CAFOs (of any size) are exceedingly rare.

Finally, although "concentrated animal feeding operations" are defined as "point sources," that definition does not authorize EPA to regulate runoff from croplands (where no animals are concentrated or fed) just because these lands are

fertilized with manure. Moreover, both Congress and this Court have made clear that discharges of "agricultural stormwater" – discharges that result from storm events – are regulated outside the purview of the NPDES program. EPA's regulation is unlawful because it narrows the definition of "agricultural stormwater" based on factors (compliance with EPA regulatory requirements) unrelated to whether a discharge was either "agricultural" or caused by precipitation.

Finally, below we respond to a few of the arguments raised by the Environmental Petitioners. First, their claim that nutrient management plans must be part of the permit is legally unsound because effluent limitations guidelines are supposed to dictate the performance required – not the technical means of achieving it. Moreover, making the NMP's part of the permit would transform a flexible management tool into a stumbling-block to adaptation to changed circumstances or improvements in management systems (such as introducing new facilities or crops).

Second, their argument that EPA's regulations should address groundwater is wrong because – in addition to the reasons given by EPA – the Clean Water Act does not authorize NPDES permit requirements for discharges that reach only groundwater.

These points are discussed below.

I. THE REQUIREMENT THAT ALL CAFOs APPLY FOR NPDES PERMITS IS CONTRARY TO THE STATUTE AND UNSUPPORTED BY THE RECORD

In our opening brief, we pointed out that the Clean Water Act ("CWA" or "the Act") establishes the proposition that there is no right to pollute (§ 301(a)) but that EPA may grant permission to discharge pollutants in permits (§ 402(a)). Neither section 402 nor any other section of the Act requires anyone to apply for such a permit if that person does not seek permission to discharge. Instead the Act imposes heavy criminal fines and imprisonment and civil penalties (currently up to $27,500 per day per violation) for discharging without one. *See* 33 U.S.C. § 1319(c)-(d).

EPA's analysis of the statutory support for its new duty-to-apply is notable for the lack of any reference to any provision of the Act that requires anyone to apply for an NPDES permit. Instead, EPA argues that: (a) it can (based on its own regulation) require *actual* dischargers to apply for permits; (b) *some* CAFOs are actual dischargers; and therefore (c) it can require *all* CAFOs to apply for permits. EPA Br. at 74-75. Alternatively, EPA argues that it can lawfully *presume* that all CAFOs "have the potential" to discharge, so it can require them to apply for a permit based on that *presumed potential*. EPA Br. at 75.

EPA does not contend that most CAFOs have experienced a discharge to waters of the United States – or even that CAFOs are "more likely than not" to

have a discharge. The government merely asserts (albeit repeatedly) that "many" CAFOs have discharged. *See* EPA Br. at 71, 72, 75, 88. Based on that vague assertion alone, the government argues that a categorical permitting requirement for *all* CAFOs is a "reasonable exercise of the Agency's authority to require *actual* dischargers to apply for permits." *Id.* at 75 (emphasis in original). Below we will respond to EPA's arguments.

A. The Regulatory History of CAFO Permitting Does Not Justify EPA's New Interpretation of Its Statutory Authority

EPA begins by arguing that the history of regulation of CAFOs shows that EPA *needs* to impose a new requirement to apply for a permit. Apparently EPA feels that enforcing a universal discharge prohibition is not enough – it also needs to enforce permits that contain that same prohibition.

EPA argues (at 71-72) that enforcement of the Act's discharge prohibition is difficult with respect to CAFOs because CAFOs rarely ("intermittently") discharge, making actual discharges "difficult to document." In fact, potential intermittent weather-related CAFO discharges are no more unique or challenging than other stormwater-induced pollutant discharges. Stormwater discharges from countless sources – including temporary discharges from construction activities (presumably even more "difficult to document") – have always been regulated through NPDES permit requirements for *discharges*, never for *potential* discharges. *See, e.g.*, 40 C.F.R. § 122.26(a)(1), (a)(9) (permit requirements for

certain "discharges composed entirely of stormwater"). The intermittent weather-related nature of such discharges thus plainly does not necessitate categorical permitting for "potential" discharges.

EPA also argues (at 72) that CAFOs should be compelled to apply for permits because "many" of them should have applied for permits before, but didn't. EPA argues that the "duty to apply" is needed "to ensure better compliance by CAFOs with NPDES permitting requirements," citing statistics regarding the historic failure of most CAFO operators to seek NPDES permit coverage. EPA Br. at 70. The government concedes, however, that EPA has no idea how many animal feeding operations *now* defined as "CAFOs" actually met the *exemption* from CAFO status under the prior regulations for operations that discharged only in the event of certain large storms. *Id.* at 71 n.24. In other words, EPA admittedly has no information on how many operations *wrongly* failed to seek permit coverage for discharges under the prior regulations. EPA thus has no basis for its assertion that a novel "duty to apply" for *potential* dischargers was necessary to "ensure better compliance" by animal feeding operations.

Moreover, as EPA itself notes, under its prior rules, if a farm didn't discharge except in the event of a large storm (a requirement of the permit), the farm wasn't a "CAFO" (so it didn't need the permit). EPA Br. at 71 n. 24. Under these circumstances (if the farm complied with the permit then it didn't need it)

what is truly surprising is that any farms *did* apply for permits. The decision by many farms to avail themselves of EPA's exemption does not justify EPA's "reevaluat[ion]" of its 25-year-old interpretation that a CAFO must actually discharge before EPA can require a permit. EPA Br. at 73 n.26.

B. EPA Identifies No Statutory Provision That Supports a Mandatory Permit Application Requirement for Potential Dischargers

Faced with the absence of any statutory provision that actually authorizes mandatory NPDES permit applications, EPA claims that three statutory provisions "directly support" its new "duty to apply" that it would impose on presumed potential dischargers: (1) the definition of "point source" at CWA § 502(14); (2) the authority to establish effluent limitations that require "the elimination of discharges of all pollutants" and "no discharge of pollutants" pursuant to CWA § 301(b)(2) and § 306(a), respectively; and (3) EPA's CWA information-gathering authority under § 308. None of these provisions supports a "potential discharger" permit requirement.

1. The Definition of "Point Source"

EPA argues that it may require permits for potential dischargers because the CWA defines "point source" as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, . . . [or] concentrated animal feeding operation . . . from which pollutants are *or may be*

discharged." *See* CWA § 502(14), 33 U.S.C. § 1362(14); EPA Br. at 76 (emphasis in EPA Br.). Because CWA § 301(e) requires that "[e]ffluent limitations . . . shall be applied to *all* point sources of discharge" (emphasis in EPA Brief), the government reasons that "[t]hese provisions clearly allow EPA to require all CAFOs that 'may' discharge to apply for NPDES permits . . . ." EPA Br. at 77.

The cleverly elided quotation from § 301(e) is misleading. Section 301(e) provides that "[e]ffluent limitations established pursuant to this section or section 302 of this Act shall be applied to all point sources of *discharge of pollutants* in accordance with the provisions of this Act." A "discharge of pollutants" (a real one, not "presumed potential") is unlawful without an NPDES permit. CWA §§ 301(a), 402(a). Section 301(e) thus requires that NPDES permits issued to those real dischargers incorporate the two categories of effluent limitations specified in section 301(e). Those two categories are (1) technology-based effluent limitations "established pursuant to [§ 301]" and (2) water quality based effluent limitations established pursuant to section 302. The clear purpose of section 301(e) is not to require presumed "potential dischargers" to apply for permits, but rather to assure that all NPDES permits will require all dischargers (real ones) to meet the more stringent of these two requirements – EPA's technology-based effluent limits at a minimum, or lower limits if necessary to protect water quality.

EPA's view would render the existence of an *actual* discharge immaterial for purposes of Clean Water Act permitting. Indeed, the Agency's proposed reading of these two provisions would *require* NPDES permits not just for CAFOs but for every pipe, ditch, and channel in the United States from which pollutants *could "potentially" be emitted.* The only rational reading of the Act, however, is that while all such conveyances are "point sources" – only point sources *that discharge* require the application of effluent limitations. *See* 33 U.S.C. §§ 1311(e) ("Effluent limitations . . . shall be applied to all *point sources of discharge* of pollutants") and 1362(11) ("The term 'effluent limitation' means any restriction established by a State or [EPA] . . . on quantities, rates, and concentrations of . . . constituents which *are discharged from point sources* into navigable waters . . . .") (emphasis added). EPA thus cannot require permit applications from CAFOs that do not discharge.

2. Authority for "Zero Discharge" Effluent Limits

EPA places particular weight on its CWA authority to establish "zero discharge" effluent limitations, which EPA argues *must* be applied to (presumed potential) dischargers through NPDES permits. *See, e.g.*, EPA Br. at 75-79. The function of a zero discharge effluent limitation (which must be adopted by EPA by rule (*see* CWA § 301(b)(2)(A)), however, is to preclude the issuance of an NPDES permit that allows that category of discharger to discharge a particular effluent.

This ban also applies to NPDES permits issued by states under their own NPDES programs. *See* CWA § 402(b)(1)(A). A zero-discharge effluent limitation guideline regulation does not, as EPA would have it, require a person to apply for a permit forbidding that person to do what was already forbidden. .

Moreover, EPA ignores that the CAFO effluent limitations at issue here are *not* "zero discharge" limits, but instead *authorize discharges* of precipitation-induced overflow from CAFO production areas that are operated in accordance with specified standards. *See* 40 C.F.R. §§ 412.31(a) and 412.46(a). CAFO operators who cannot ensure against a discharge during extreme weather have strong incentives to eliminate the risk of CWA discharge liability by seeking NPDES permit coverage and complying with the specified standards. Indeed, compliance with an NPDES permit is arguably a CAFO operator's only protection from CWA liability in the event that unavoidable weather-related discharges *do* occur. *See* 33 U.S.C. § 1342(k) ("[c]ompliance with a permit issued pursuant to [section 402]" is deemed to be compliance with the section 301 discharge prohibition). The strength of the incentive to obtain permit coverage increases in direct proportion to the likelihood of discharge – which is a key feature of the statutory scheme.

Nevertheless, EPA's argument posits that if the Agency did, hypothetically, establish a "zero discharge" effluent limitation for a category of sources, then surely those sources should not "wholly escape the permitting system" by meeting

the "zero discharge" requirement.[2] Although it has no real bearing on this case (which does not concern a "zero discharge" limit), the answer to EPA's riddle is that the specter of *non-dischargers* "escaping the permitting system" does not offend the Clean Water Act.[3] Indeed, the CWA's discharge prohibition renders *all* potential dischargers subject to an automatic "no discharge" limit until EPA takes action to authorize a discharge. While the Act authorizes EPA to issue permits with "no discharge" limits, nothing in the Clean Water Act requires a person to *apply* for one – without the permit, any discharge is prohibited.

3. Information-Gathering Authority

Finally, EPA contends that requiring NPDES permits for presumed potential dischargers is a "reasonable exercise of EPA's information collection authority under section 308 of the Act." EPA Br. at 78. The government reasons that EPA may use an NPDES permit application as an "information collection tool." *Id.* at 79. While

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[2] As a practical matter, zero discharge requirements sometimes do appear in NPDES permits, invariably in permits that authorize the same permittee to make *other* discharges, but prohibit the particular discharge subject to the zero discharge effluent limitation.

[3] As explained in the Farm Petitioners' Opening Brief, the key regulatory mechanism of the Clean Water Act is the prohibition on "the *discharge* of any pollutant" – "except as in compliance with" various other provisions, including §§ 301, 306, and 402, among others. One who simply engages in the business of raising livestock, or manufacturing widgets, *without discharging to waters of the United States*, has not run afoul of the § 301 discharge prohibition or any other provision of the Act.

NPDES permit applications may be a source of information for EPA, however, they extract far more than "information" from the applicants. Among other things, permit applications require an affirmative commitment to comply with all permit conditions, including the duty to reapply for coverage upon permit expiration and, for CAFOs, the requirement to develop and implement a nutrient management plan that incorporates protocols for operation and maintenance, land application and conservation practices, and management of animal mortalities. *See* 40 C.F.R. §§ 122.41 and 122.42. Because more than "information" is required of NPDES permit holders, EPA's information-gathering authority cannot justify its permit requirement.

C. EPA's New Regulation Is Inconsistent With Its Current Regulations and Its Longstanding Interpretation of the Act

The government's brief does not justify EPA's departure from 40 C.F.R. § 122.1(b), which defines the "Scope of the NPDES permitting requirement." This regulation's statement that "[t]he NPDES program *requires permits for the discharge* of 'pollutants' from any 'point source' into 'waters of the United States,'" 40 C.F.R. § 122.1(b) (emphasis added), simply cannot be reconciled with the statement in the CAFO Rule that CAFOs "*require NPDES permits for* discharges or *potential discharges*," *id.* § 122.23(a) (emphasis added).

EPA's regulations carry the force of law and bind the Agency just as the statute itself does. *See Pfizer, Inc. v. Heckler*, 735 F.2d 1502, 1507 (D.C. Cir. 1984) ("It is axiomatic that an agency is bound by its own regulations"); *Bergamo*

v. CFTC, 192 F.3d 78, 79 (2d Cir. 1999) (agency is bound to follow its own regulations even if they were not statutorily or constitutionally mandated); *Frisby v. HUD*, 755 F.2d 1052, 1055-56 (3d Cir. 1985) (agency actions in conflict with agency regulations are "not in accordance with law") (quoting *Bradley v. Weinberger*, 483 F.2d 414 n.2 (1st Cir. 1973)). EPA may revise its regulations, through appropriate notice and comment procedures, but it has taken no such action here to revise § 122.1. *See* 40 C.F.R. § 122.1(b) (2003). For EPA to issue additional, new rules that directly contradict its long-standing and still-binding regulations is on its face arbitrary and capricious and "contrary to law."[4]

The government dismisses a 1976 preamble in which EPA stated that "[b]efore a permit is required, there must be a 'discharge of a pollutant' from the point source into 'navigable waters,'" arguing that an agency may depart from its previously held positions. *See* EPA Br. at 73 n.26; Farm Pet. Br. at 41. An agency may not, however, depart from the authorizing statute. EPA has offered no reason

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[4] *See Purter v. Heckler*, 711 F.2d 682, 697 (3d Cir. 1985) (agency action "cannot be sustained" where agency ignored existing regulations and imposed different standard); *Confederated Tribes & Bands of the Yakima Indian Nation v. FERC*, 746 F.2d 466, 474 (9th Cir. 1984) (agency improperly disregarded existing regulatory requirements in issuing new license order, notwithstanding agency claim of discretion to modify its regulations); *Bartholomew v. United States*, 740 F.2d 526, 531 (7th Cir. 1984) (agency action must be invalidated if it contradicts agency's own regulations). Because EPA's new permit requirement for *potential* dischargers violates both the statute and the agency's own existing regulations, it is unlawful.

for this Court to defer to its belated re-interpretation of the statute to suit its current regulatory goals. *See Solid Waste Agency of Northern Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159, 168 (2001) (rejecting agency's current position as inconsistent with its "original interpretation of the CWA"); *United States v. Leslie Salt Co.*, 350 U.S. 383, 396 (1956) ("more recent ad hoc contention as to how the statute should be construed cannot stand" against "prior long-standing and consistent administrative interpretation").

D. The Court Decisions Relied Upon by EPA Do Not Support Mandatory Permits for *Potential* Dischargers

EPA insists that courts have found it unlawful for CAFOs to *operate* without an NPDES permit, not just to *discharge* without one. EPA Br. at 80-81. Yet all of the cases relied upon by the government concerned CAFOs or other operations that *had actually discharged to waters of the United States*. *See Carr v. Alta Verde Indus., Inc.*, 931 F.2d 1055, 1057-58 (5th Cir. 1991); *Water Keeper Alliance, Inc. v. Smithfield Foods, Inc.*, 2001 WL 1715730, at *2 (E.D.N.C. Sept. 20, 2001); *Hudson River Fishermen's Ass'n v. City of New York*, 751 F. Supp. 1088, 1103 (S.D.N.Y. 1990). In *Carr* and *Hudson River*, the courts determined that the defendants were likely to *continue discharging* (and thus needed a permit), based on the extensive factual record on the individual defendants' operations. *Carr*, 931 F.2d at 1063-64; *Hudson River*, 751 F. Supp. at 1103. The *Water Keeper* district court based its unpublished decision in part on the proposed version of the EPA regulations that are

being challenged here. *Water Keeper*, 2001 WL 1715730, at *2 n.2. Contrary to EPA's arguments, the Fifth Circuit did not divorce the discharge requirement from a duty to obtain a permit: "In order for any person lawfully to discharge any pollutant from a point source into navigable waters of the United States, that person must obtain an NPDES permit and comply with its terms." *Carr*, 931 F.2d at 1058.

None of these cases supports the notion of mandatory permitting of CAFOs based on the *mere potential* to discharge, no matter how remote. To hold otherwise would be to rule that EPA may subject *any* business or industrial operation to NPDES permitting – and prohibit operations until permit coverage is obtained – if the operation could possibly discharge to waters of the United States. Such boundless authority to regulate *operations*, rather than *discharges*, contradicts the fundamental jurisdictional limitation that lies at the core of the Clean Water Act. *See* Farm Pet. Br. at Part I.A.

E. EPA Improperly Presumes Its Own Regulatory Jurisdiction

As shown above, EPA jurisdiction is limited in the Clean Water Act to cases involving actual discharges. To assert jurisdiction over all Large CAFOs, as the new rule does, it would have to be reasonable to presume that all Large CAFOs will in fact discharge pollutants into U.S. waters. EPA does not dispute that such presumptions of fact are permissible only if the presumed fact more likely than not follows from the predicate fact. Farm Pet. Br. at 52-53. Accordingly, EPA cannot

require all Large CAFOs to seek an NPDES permit unless the Agency can show that every Large CAFO is more likely than not to pollute federal waters. As we showed in our opening brief, EPA has not come close to satisfying that standard.

The Agency identifies three lines of record evidence in response—evidence that (1) CAFOs are among the leading sources of surface water nutrient pollution; (2) some CAFOs have discharged manure nutrients into surface water; and (3) CAFOs are becoming more concentrated in certain areas that lack the acreage needed to land apply the manure at agronomic rates. EPA's response is misguided. The fact that some portion of nutrient pollution in surface water has been traced to CAFOs, that we know of specific instances in which CAFOs have discharged, and that CAFOs are becoming more concentrated in some areas does not prove that any Large CAFO is more likely than not to discharge into U.S. waters. EPA cannot point to any evidence to support *that* showing, without which the new rule's presumption is invalid.[5]

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[5] EPA claims (at 85) that its presumption "warrants particular deference" because it "involves the technical expertise and regulatory experience of EPA," citing *Federal Power & Light v. Florida Power & Light Co.*, 404 U.S. 453, 463 (1972). But *Florida Power Comm'n* involved a technical issue—how electricity travels through a "bus"— on which "first-hand evidence" was "unavailable," and the court made the unremarkable decision to follow the "considered and carefully articulated" opinions of the agencies' expert witnesses. *Id.* at 463-65. Here, in contrast, the facts are known and set out in the record, and they fall well short of the Agency's required showing.

1. The Record Must Show That A Large CAFO Is More Likely Than Not To Discharge Into U.S. Waters

In our opening brief, we demonstrated that federal agencies must establish their jurisdiction before exercising regulatory power,[6] and that even if the presumption at issue here were not necessary for the exercise of EPA jurisdiction (as it plainly is), it fails under the well-established rules governing factual presumptions generally. Farm Pet. Br. at 48-64. In particular, it is beyond question that an agency "presumption that causes a shift in the burden of production" survives "'only . . . when proof of one fact renders the existence of another fact *so probable* that it is sensible and timesaving to assume the truth of [the inferred] fact . . . until the adversary disproves it.'" *National Mining Ass'n* v. *Babbitt*, 172 F.3d 906, 910, 912 (D.C. Cir. 1999) (quoting *NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 788-789 (1990)); *see* Farm Pet. Br. at 52.

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[6] In support of this point, we described in detail two cases where courts struck down regulations in which federal agencies improperly presumed facts required for the exercise of jurisdiction—*Michigan v. EPA*, 268 F.3d 1075 (D.C. Cir. 2001), and *Arizona Cattle Growers' Ass'n v. United States Fish & Wildlife Service*, 273 F.3d 1229 (9th Cir. 2001). Farm Pet. Br. at 48-51. EPA refers to these cases only in a footnote, distinguishing them on the purported ground that, unlike in those cases, EPA here "had an overwhelming base of evidence" for its presumption. EPA Br. at 84 n.33. But this is the crux of the parties' dispute. As shown below and in our opening brief, the record in fact provides no basis for the Agency's presumption that all Large CAFOs discharge pollutants to the navigable waters of the United States.

See also National Mining Assoc. v. United States Dep't of the Interior, 177 F.3d 1, 6 (D.C. Cir. 1999) (rejecting agency's rebuttable presumption where presumed fact was not "ordinarily likely to" follow from the predicate fact). Specifically, "*the circumstances giving rise to the presumption must make it more likely than not that the presumed fact exists.*" 172 F.3d at 910 (emphasis added); *see* Farm Pet. Br. at 52. The presumption that all Large CAFOs discharge must satisfy at least this standard, for this presumption shifts not only the burden of production (as in *National Mining*) but the burden of *persuasion* as well.

EPA does not (and cannot) challenge these principles. Indeed, the Agency quotes the same language from *Curtin Matheson Scientific*. EPA Br. at 83. But EPA ignores the finer point that courts have put on this standard—that for a presumption to be reasonable the Agency must show that it is "more likely than not that the presumed fact exists" whenever the predicate fact is present. EPA does not dispute that this is the law; the Agency simply omits to recite this governing standard. And the record does not come close to making this required showing here.

2. EPA's Reliance On Evidence That CAFOs Are A Leading Cause Of Surface Water Pollution Is Misplaced

Like the preambles to the proposed and final rules, EPA's brief relies heavily on "evidence identifying agriculture in general, and AFOs in particular, as

important contributors to water pollution." EPA Br. at 85; *see also id.* at 86, 87, 88. This evidence fails in two respects.

First, even if this claim were true, it says nothing about whether *all* Large CAFOs discharge into U.S. waters. Second, EPA exaggerates the record evidence of AFOs as a source of water pollution, and much of this evidence is highly unreliable in any event. As described below, EPA's chief sources have been roundly discredited. And other sources on which EPA now purports to rely do not support the Agency's bold assertions about AFOs' role in polluting U.S. waters.

a. EPA Relies Heavily On The Discredited *National Water Quality Inventories*

As we observed in our opening brief (at 17-18), the preambles to the proposed and final rules rely on the *1998* and *2000 National Water Quality Inventories* ("*Inventories*") to show that agriculture (not CAFOs, specifically) is a leading source of surface water pollution. As our brief explained in detail (at 16-26), the General Accounting Office ("GAO") and EPA's Inspector General have thoroughly discredited the *Inventories* as a basis for environmental policymaking. In a March 2000 report, the GAO criticized the *Inventories* for their failure to assess more than a "small percentage of" U.S. waters, the "considerable subjectivity" involved in identifying sources of water pollution, the outdated and subjective evidence underlying the reports, the sampling bias that systematically

overstates pollution levels, and the state-by-state variations in water quality standards that make it impossible to aggregate data across jurisdictions. Farm Pet. Br. at 19-26. The GAO concluded that the *Inventories* are "unreliable," do "not accurately portray water quality conditions nationwide," and "may call into question some of EPA's decisions that rely on" them. *Id.* at 25 (quoting GAO report). The EPA Inspector General reached similar conclusions in a 1997 report. *See* Farm. Pet. Br. at 25-26.

Remarkably, EPA's brief fails even to acknowledge the existence of these GAO and Inspector General reports, let alone explain how its heavy reliance on the *Inventories* can be justified in light of their stark conclusions. Instead, the Agency belatedly backpedals from its previous reliance on the *Inventories* in promulgating the new CAFO rule. EPA now pretends that it cited the *1998 Inventory* only "as one of many sources of data that led EPA to believe revisions to the CAFO regulations were needed." EPA Br. at 90-91 (citing 66 Fed. Reg. 2972-84). But the very pages that EPA cites begin with a section entitled "Water Quality Impairment Associated with Manure Discharge and Runoff" that is based *solely* on data from the *1998 Inventory*. *See id.* at 2972-74. The ensuing pages likewise rely very heavily on this report. *See* references at 66 Fed. Reg. 2976, 2977, 2978, 2980, and 2981. And the preamble to the final rule similarly depends on the *2000 Inventory*. *See* Farm Pet. Br. at 18; 68 Fed. Reg. at 7181 ("Agricultural operations,

including CAFOs, now account for a significant share of the remaining water pollution problems in the United States, as reported in the *National Water Quality Inventory: 2000 Report*").

Indeed, EPA continues to rely on the *1998* and *2000 Inventories* in its *brief*, citing them for the proposition that "the agricultural sector, including CAFOs, is the leading contributor of pollutants to identified water quality impairments in the nation's rivers and streams, and its lakes, ponds, and reservoirs." EPA Br. at 88; *see also id.* at 91-92. EPA contends that it is permissible to use the *Inventories* for "general information" (*id.* at 91) (though the quoted conclusion is in fact quite specific and at the heart of EPA's effort to justify its faulty presumption). But this contention shows only that the Agency still has not come to terms with the fatal defects in these reports. The *Inventories* are so inherently unreliable and subject to such obvious and pervasive sampling bias that they should not be used at all in EPA decision-making.

b. EPA's Reliance On Other Sources Is Equally Misplaced

EPA also seeks to justify its reliance on the *Inventories* by claiming that they are "'consistent with other reports and studies . . . that identify CAFOs as an important contributor of surface water pollution.'" EPA Br. at 92 (quoting 68 Fed. Reg. 7181); see also *id.* at 86 ("Data collected in major river basins suggest that

AFOs play a significant role in observed water quality degradation"). Even if this were true, how "important" or "significant" CAFOs are as sources of water pollution is immaterial in deciding whether all Large CAFOs are more likely than not to discharge. As it happens, however, EPA mischaracterizes the sources on which it relies:[7]

• Stephen J. Kalkhoff *et al.*, United States Dep't of Interior, USGS Circular 1210, *Water Quality in the Eastern Iowa Basins, Iowa and Minnesota, 1996-1998*, at 1-2, 13 (2000), Joint Appendix ("JA") 1656-58 (cited in EPA Br. at 86 n.34). Although the cited portions of this report list AFOs—along with "Agricultural storm runoff," "Tile-line drainage," and "Urban areas"—as "Major influences on streams and rivers," it does so without explanation or supporting facts. JA1657. Elsewhere, moreover, the report makes clear that it assigns little independent weight to AFOs as sources of nitrogen or phosphorus pollution. The report concludes that "[t]he highest

[7] In places, the Agency merely cites its own conclusions, unsupported by any scientific or other studies. *See, e.g.*, EPA Br. at 85 (citing 66 Fed. Reg. 3007, which reports: "Given the large volume of manure these facilities generate and the variety of ways they may discharge, and based on EPA's and the States' own experience in the field, EPA believes that all or virtually all large CAFOs have had a discharge in the past, have a current discharge, or have the potential to discharge in the future"); *id.* (citing 68 Fed. Reg. 7201, which makes the conclusory statement that "there is a sound basis in the administrative record for the presumption that all CAFOs have a potential to discharge to the waters of the United States"). These self-serving conclusions, obviously, are not evidence that the discharge presumption is justified.

nitrate concentrations occurred in medium-sized streams draining basins with the most intensive *row-crop* agriculture and in *a stream* draining a basin with *both* intensive row-crop agriculture *and* dense concentrations of large-scale animal feeding operations." JA1656 (emphasis added). "Total phosphorus concentrations," meanwhile, "were greatest in streams and rivers that drain basins with more highly erodible soils and in large river basins that contain the largest cities and towns in the Study Unit"—no mention of AFOs at all. *Id.* Finally, page 13 of the report (JA1658), on which EPA also relies, notes that nutrient levels in the South Fork of the Iowa River were higher than in another portion of the same river with fewer AFOs, but the report suggests merely that these higher concentrations "may indicate that a reduction in chemical fertilizer application equivalent to the increased manure application has not occurred in the South Fork Basin." JA1658. These passages do not by any stretch of the imagination characterize AFOs as "significant" or "important" contributors to nutrient pollution in U.S. waters.

• George E. Groschen *et al.*, United States Dep't of Interior, USGS Circular 1209, *Water Quality in the Lower Illinois River Basin, Illinois, 1995-98*, at 3-4 (2000), JA1652-53 (cited in EPA Br. at 86 n.34). The "typical[]" agricultural land use in this area is "corn and soybean row crops." JA1652. The only reference to AFOs on these pages is a note that "[a]nimal farming is also a significant industry in the basin," followed by the observation that "runoff from manure spreading is a

contributor" to nitrate and nitrogen pollution in the region. JA1653. The report hardly characterizes AFOs as "significant" contributors to nutrient pollution.

• Michael A. Mallin, *Impacts of Industrial Animal Production on Rivers and Estuaries*, 88 American Scientist 26 (Jan./Feb. 2000), JA585-96 (cited in EPA Br. at 86 n.34, 92 n.42). This article focuses on specific cases in which extreme circumstances caused AFO manure discharges—chiefly a well-publicized, 1995 spill from a hog waste lagoon in North Carolina and discharges caused by hurricanes in the same region. The article also refers to a handful of North Carolina studies on the effect of manure lagoons on nearby *ground* water and observes that certain counties lack the land needed to absorb all of the manure nutrients produced in those counties. JA594. Here again, however, the article does not suggest that CAFOs generally and nationwide, or Large CAFOs in particular, are "significant" or "important" sources of water nutrient pollution.

• Richard A. Smith *et al.*, *Regional Interpretation of Water-Quality Monitoring Data*, 33 Water Resources Research 2781, 2793-2796 (1997), JA536, 548-51 (cited in EPA Br. at 86 n.34, 93). As we noted in our opening brief (at 27), this study found only a "moderate[]" statistical link between the presence of livestock production facilities and nitrogen pollution in water. EPA counters, claiming that "the study in fact shows that livestock waste production produces the third highest percentage share of total nitrogen transport." EPA Br. at 93. First,

this is only partially true. The model estimates that livestock waste production would be the third highest contributor (out of five tested sources) in watersheds likely to have large amounts of total nitrogen in their waters, and fourth (of five tested sources) in watersheds likely to have smaller total nitrogen amounts. JA550, Table 7. Second, these findings do not change the fact that the model found only a relatively weak causative relationship between animal farms and nitrogen pollution. Finally, as we explained in our opening brief (at 27), the study relies on old data from the 1970s and 1980s merely to *test* a new statistical model, and the study's authors readily admit its many flaws and artificial constructs. EPA does not (and cannot) dispute these obvious failings, which make the model useless as a basis for policymaking. The Agency seeks to put the study to a use for which it plainly was not intended.

• T.C. Daniel *et al.*, *Agricultural Phosphorus and Eutrophication: A Symposium Overview*, 27 J. Envt'l Quality 251 (Mar. 1998), JA494-500 (cited in EPA Br. at 92 n.42). This is a collection of summaries of symposium pieces about issues such as the chemical effects of excess phosphorus, ways to test for it and identify problem areas, and methods for reducing the phosphorus content of manure applied to land as fertilizer. As relevant here, the paper notes merely that "[i]n an increasing number of areas, the potential for P[hosphorus] loss in runoff

has been increased by the continual land application of fertilizer and/or manure from intensive livestock operations." JA494. The paper does not quantify this "potential," and it concedes that "distinct areas of general P[hosphorus] deficit and surplus exist" "within states and regions." *Id.* This is a far cry from identifying CAFOs as "important" or "significant" water polluters.

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In sum, EPA relies on evidence purportedly showing that CAFOs are substantial contributors to U.S. water pollution. Even if true, this fact would not support EPA's presumption that all Large CAFOs discharge into U.S. waters. And in any event, the Agency's chief source for this assertion has been thoroughly discredited for its unreliability and systematic statistical bias. None of the other studies that EPA now identifies to make the same point, alone or together, in fact identify CAFOs as significant or important sources of nutrient pollution in U.S. waters.

3. Evidence Of Individual CAFO Discharges Does Not Support A Presumption That All Large CAFOs Pollute U.S. Waters

EPA also peppers its brief with references to specific reports of CAFO discharges. See EPA Br. at 87 ("A literature survey conducted for the proposed rule identified over 150 reports of discharges to surface waters from hog, poultry,

dairy, and cattle operations"); *id.* ("Fish kills or other environmental impacts have also been reported by other State agencies, including those in Nebraska, Maryland, Ohio, Michigan, and North Carolina"); *id.* at 88 ("EPA received many accounts of site-specific cases of water quality impairment from CAFOs"). The Environmental Petitioners take the same tack, observing that "[t]he Environmental Assessment includes over 100 case studies of documented discharges from CAFOs." Env. Pet. Br. at 11.

But these reports do not support EPA's presumption that all Large CAFOs discharge nutrients into U.S. waters. Both the "100 case studies" cited by the Environmental Petitioners and the "150 reports of discharges" on which EPA relies appear to be references to the lists of incidents compiled as exhibits to the Environmental Assessment. *See* JA941-52, 955-62, 965-70.[8] We have already addressed these lists. As we explained in our opening brief (at 28-29), these figures come from a survey of incidents that occurred over a protracted period and amount to very few incidents per year nationwide. Evidence of such sporadic

[8] The Agency cites these same exhibits when it refers to reports from "State agencies, including those in Nebraska, Maryland, Ohio, Michigan, and North Carolina." EPA Br. at 87.

discharges—by AFOs of all different sizes—does not support the inference that all Large CAFOs will discharge into U.S. waters.[9]

Other "site-specific cases" and regional discharge reports on which EPA relies in its brief likewise show only small numbers of discharges and say nothing about the likelihood that a Large CAFO will discharge into U.S. waters. EPA Br. at 87-89; *see* JoAnn M. Burkholder *et al.*, *Impacts to a Coastal River and Estuary from Rupture of a Large Swine Waste Holding Lagoon*, 26 J. Envt'l Quality 1451 (1997) (studying effects of single, June 1995 North Carolina lagoon spill), JA1174-89; Clean Water Action Alliance, *Minnesota Manure Spills and Runoff* (1998) (2-page chart listing 45 incidents from various sized CAFOs over 7-year period,

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[9] Environmental Petitioners also assert that "[t]he prevalence of major problems associated with CAFO pollution is breathtaking," citing a report that "major livestock producing states generally experience 20 to 30 serious water pollution problems per year involving lagoon spills or contaminated runoff." Env. Pet. Br. at 11. Environmental Petitioners try to give this statistic shock value by taking it out of context. In fact, this number originates in a 1999 study the very next sentence of which concedes the reality that, "[c]ompared to the several thousands of feedlots in most states, the number of water quality pollution problems causing documented fish kills from lagoon and basin manure spills and feedlot runoff is typically *a small fraction of the total number of operations*." David J. Mulla *et al.*, Generic Environmental Impact Statement on Animal Agriculture: A Summary of the Literature Related to the Effects of Animal Agriculture on Water Resources, at G-6 (1999), JA535 (emphasis added). The study goes on to say that "[l]ined manure storage basins and lagoons which are properly constructed, engineered, and managed are generally not a serious [water quality] threat." *Id.*

averaging fewer than 7 incidents per year), JA505-06;[10] Iowa Dep't of Natural Resources, *Prohibited Discharges at Iowa Livestock Operations Resulting in Monetary Penalties and/or Restitution for Fish Kill Being Proposed, Collected or Pending 1992 to Present* (June 3, 1998) (reporting incidents over 6-year period, averaging few incidents per year), JA525-33; USEPA, Memo to Record, *Chronic Discharge Data from Region 6* (Oct. 30, 2001) (chart listing roughly 30 discharges over 4 years in 3 states, averaging fewer than 3 discharges per year per state), JA1119-27; USEPA Region 9, Conversation Record & Press Release, Ponderosa Dairy CWA Violation (Apr. 27, 1999) (discussing single discharge incident), JA41-45; USEPA Region 10, Correspondence re: Dairy Heifer Operations (Nov. 30, 1999) (discussing "heifer operations," not discharges), JA150-51; USEPA, Office of Inspector General, Region 7's Efforts to Address Water Pollution from Livestock Waste 11 (Sept. 30, 1996) (noting that 4 states in region reported "14 livestock waste spills" in 1995, an average of between 3 and 4 spills per state in that year), JA70.

Equally misplaced is EPA's reliance on "compliance orders, discharge penalties imposed, and discharge data contained in the record," as well as "judicial decisions . . . involving such violations." EPA Br. at 94. For this, EPA

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[10] This calculation omits a reference in the chart to problems at one particular facility that took place over a ten-year period, 1985-1994.

invokes just two judicial opinions, *Community Ass'n for Restoration of the Environment v. Henry Bosma Dairy*, 305 F.3d 943 (9th Cir. 2002), and *Concerned Area Residents for the Environment* v. *Southview Farm*, 34 F.3d 114 (2d Cir. 1994), and just two secondary sources, Craig Simons, *Dry Weather Discharges from AFOs* (Memo to V. Kibler Aug. 25, 2000), JA597-98, and *Virginia Environmental Compliance Update* (Feb. 1998), JA1054. EPA Br. at 94 & n.43. Each of the opinions involves discharge from a single operation. The Simons memo actually predicts *few* dry weather discharges from animal farms: "With the exception of milking parlor effluent from small dairies . . . with no control mechanisms, the potential for dry weather discharges would be relatively small, as low as 2 percent for beef, other dairy, and swine AFOs. Dry weather discharges would be near zero for poultry AFOs (excluding wet layer operations)." JA598. For its part, the *Virginia Environmental Compliance Update* merely lists state environmental bills, including one that "[m]odifies permitting requirements for confined animal feeding operations," without any reference to actual discharges or enforcement actions. JA1054.

Finally, the Agency claims to be basing its presumption on information gleaned from 116 site visits to "various types of AFOs, many of which qualify as Large CAFOs under the Final Rule." EPA Br. at 89. EPA's site visits are documented in a plethora of informal notes and reports, draft reports and

literature placed in the administrative record, including just 35 *Final* Site Visit Reports in support of the rule. EPA admits in its brief that these materials merely summarize "the CAFOs' *potential* to discharge," *id.* (emphasis added), in some cases documenting each site's proximity to nearby waterways, its animal waste management practices, and available wastewater discharge permit information. However, these materials offer scant evidence of actual discharges at the sites under study. Reviewing the site visit materials in the record, we count no more than five Final Site Visit Reports that actually mention incidents that may have been discharges by feeding operations and a handful of other notations of such discharges. And neither in the record, the rule, nor its brief does EPA make any effort whatever to enumerate or describe discharges that may have been documented in a few site visits. In short, the record demonstrates that the Agency is attempting to leverage evidence of very few discharges over many years into a presumption that all CAFOs pose a discharge threat. If anything, these site visit reports support the opposite presumption—that CAFO discharges are improbable.

To the EPA's site-specific discharge data, Environmental Petitioners add material that is equally unavailing: "A study conducted by Iowa State University

reported that all lagoons should be expected to leak." Env. Pet. Br. at 11.[11] As we pointed out in our opening brief (at 29), this Iowa study is far less alarming than EPA (and now the Environmental Petitioners) would have it. The study concludes that on the whole "[t]here do not seem to be general contamination zones around [earthen waste storage structures]." T.D. Glanville *et al.*, *Measurement of Seepage from Earthen Waste Storage Structures in Iowa*, at iii (Aug. 1999), JA187. Indeed, "[t]he majority of soil cores" obtained in the study "did not exhibit increased concentrations of contaminants from waste materials, and they represented only localized migration of contaminants around the structure." *Id.* Accordingly, the study found "minimal impact of [earthen waste storage structures] on the surficial aquifers in the immediate vicinity of the structures." JA188.[12]

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[11] The Environmental Petitioners also cite "[a] survey of lagoons in the Carolinas" purportedly showing "that nearly two-thirds of the 36 sampled lagoons had leaked into groundwater." Env. Pet. Br. at 11. This statistic comes from a reference in an article to a 1994 doctoral thesis. JA916 (citing Livestock Legacy, Focus, Dec. 1995 (in turn citing thesis of Maolin Zheng of Clemson University)). The student thesis is 10 years old, and the article's passing reference to it does not explain the study's method of site selection or other factors needed to gauge its meaning or credibility.

[12] Moreover, the study did not account for evaporation, and its authors thus conceded that its "estimates . . . probably are slightly higher than true seepage rates of the structures." JA186.

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In short, EPA collects reports showing sporadic discharges from CAFOs of all sizes. There are many thousands of operations satisfying the definition of "Large CAFOs" nationwide, and no basis in these relatively few reports to conclude—as the Court must to sustain the new rule's presumption—that EPA acted reasonably in assuming that all Large CAFOs are more likely than not to pollute U.S. waters.

4. EPA Draws Erroneous Conclusions From Evidence Of Localized AFO Concentrations And Purported Nutrient Excesses

Finally, the Agency cites evidence purportedly showing that CAFOs have become too concentrated in certain areas, making surface water pollution more likely. EPA Br. at 86 ("manure nutrients (such as nitrogen and phosphorus) and other animal waste constituents have become more concentrated within some geographic areas"); *see* Kristin Michel *et al.*, *Nutrient Management by Delmarva Poultry Growers: A Survey of Attitudes and Practices* 3 (Aug. 1996), JA240 (describing high numbers of poultry in Delmarva Peninsula, which includes parts of Delaware, Maryland, and Virginia, and predicting future excess poultry waste in area) (cited in EPA Br. at 86 n.35); Robert L. Kellogg *et al.*, *Manure Nutrients Relative to the Capacity of Cropland and Pastureland to Assimilate Nutrients: Spatial and Temporal Trends for the United States* 1, 17, 28-29, 77-79 (Dec. 2000),

Supplemental Joint Appendix ("Supp. JA") 30, 34-36, 40-42 (documenting trend toward fewer, larger AFOs and identifying counties with excess manure nutrients) (hereinafter "USDA").

The Agency claims, specifically, that "[i]n 1997, over 165 counties in the United States were estimated to have insufficient land area to accommodate recoverable nitrogen from produced manure, while 374 counties had a similar problem for phosphorus." EPA Br. at 95-96 (citing 68 Fed. Reg. 7181). This misstates the record. As explained on the very page of the Federal Register on which EPA relies, these figures represent all counties in which locally produced manure nitrogen and phosphorus would satisfy *at least half* of the county's nutrient needs. *See* 69 Fed. Reg. 7181; *see also* Supp. JA43. Far fewer counties were found to lack the assimilative capacity to absorb all locally produced manure nutrients—73 counties with "excess manure nitrogen" and 160 counties with "excess manure phosphorus." Supp. JA46; *see also* Farm Pet. Br. at 32. This amounts to only 2.3% and 5.1% of U.S. counties, respectively.

Environmental Petitioners overstate the evidence even more grossly when they claim that "insufficient land exists in 485 counties across the country to land

apply manure without exceeding crops' nitrogen needs." Env. Pet. Br. at 6.[13] First, the Environmental Assessment states that 485 mainland U.S. counties had excess *phosphorus* (many fewer counties had excess nitrogen). *See* JA932. Second, and far more importantly, this statistic comes from a 1998 Natural Resources Conservation Service study that itself shows that this figure is artificially inflated. The study found 485 counties where phosphorus production exceeded current crop needs only by limiting its analysis to each county's "non-legume crops and hay." Charles H. Lander *et al.*, *Nutrients Available from Livestock Manure Relative to Crop Growth Requirements* 2 (USDA NRCS Feb. 1998) ("NRCS Study"), JA221. When pasture plantings were also considered—as they must to assess current crop needs realistically—the number of counties with

[13] Environmental Petitioners also contend that, "[i]n Nebraska," specifically, "the amount of phosphorus contained in livestock waste exceeds the assimilative capacity of all agricultural fields statewide." Env. Pet. Br. at 6. This claim, however, originates in a United States Fish and Wildlife Service regional report that describes it as no more than an "estimat[e]" conveyed during a personal communication. *See* Department of U.S. Fish and Wildlife Service, Region 6, *Environmental Contaminants Associated with Confined Animal Feeding Operations and Their Impacts to a Service Waterfowl Production Area* 5 (June 2000), JA584 (cited at JA898). The hard data are conclusively to the contrary. The USDA's 2000 study of manure nutrients does not show even a single county in Nebraska with an excess of either phosphorus or nitrogen. *See* Supp. JA44-45.

excess phosphorus dropped precipitously to 134 (with only 50 of these counties producing excess nitrogen). *Id.*[14]

Nor do these studies support the conclusion that even this tiny fraction of U.S. counties will experience *any* water pollution from manure nutrients. Among other things, neither the USDA report nor the NRCS Study accounts for soil's potential to absorb nutrients that exceed immediate crop needs. Looking at crop uptake, as these studies do, yields the number of counties where soil nutrients should remain constant, not the number whose soil can assimilate excess nutrients without runoff. *See* Supp. JA37 ("assimilative capacity (or land application capacity) is an estimate of the amount of nutrients that could be applied to land available for manure application without building up nutrient levels in the soil over time"). Whether manure nutrients actually pose a danger of runoff depends on a whole host of factors—not only "the crop being grown," and "the expected crop yield," but also "the soil types, and soil concentration of nutrients (especially phosphorus)." 66 Fed. Reg. 3053.

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[14] Adding legume crops to the analysis leaves only 107 counties with excess phosphorus, 35 of which had excess nitrogen. And even these figures fail to account for crop needs that the study ignored entirely. *See* JA222 ("Vegetable, citrus, and nut crops were not included in the evaluation, thus, this study could underestimate nutrient use potential in counties with large amounts of such production acreage (e.g., counties in lower California show excess nutrient availability although they contain large areas of cropland in fruit and vegetable production)").

Moreover, both EPA and the Environmental Petitioners wrongly assume that nutrient levels in animal waste are fixed. *See* JA223-36; Supp. JA37 ("A single set of parameters for manure characteristics was used for all census years, all farm sizes, and all regions of the country. * * * [C]hanges in breeding stock and feed characteristics would have resulted in differences in manure characteristics over the period"). The truth is that CAFOs continue to improve animal food rations to decrease the concentrations of nitrogen and phosphorus in manure. *See* Farm Pet. Br. at 6; *see also* USDA/EPA, *Unified National Strategy for Animal Feeding Operations* § 3.3 (Mar. 1999), JA49-51 ("Animal diets and feed may be modified to reduce the amounts of nutrients in manure").[15] Farmers are also using advances in biological, physical, and chemical treatment processes to reduce manure nutrient levels. Farm Pet. Br. at 6. To ignore these trends is to overstate the likelihood that certain areas will have excess nutrients.

It is also essential to recognize that any excess manure has potential market value. "Agricultural wastes may be used as a source of energy, bedding, animal feed, mulch, organic matter, or plant nutrients. Properly treated, they can be

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[15] The Department of Agriculture's Natural Resources Conservation Service held "a national dialogue on feed management and diet manipulation in confined livestock production" just last year. NRCS, *National Animal Agriculture Conservation Framework* 26 (Dec. 2003) (available at http://www.nrcs.usda.gov/programs/afo/pdf/NAACF_Final.pdf).

marketable."[16] U.S. Department of Agriculture, Soil Conservation Service, *Agricultural Waste Management Field Handbook* 9-4 (1992), JA1622. One Department of Agriculture study notes, for example, that "West Virginia sends turkey litter to Ohio for mushroom production, and 100,000 tons of poultry litter are exported from Arkansas to rice growing areas in the delta region each year." Supp. JA38; *see also* Comments on Proposed Rule by National Chicken Council, July 30, 2001, at 27, JA1231 (reporting survey results that "33% of manure from the poultry sector is sold offsite"). If a farm does find itself with an excess of manure nutrients, it may well market them to other farms.

The fact that excess nutrients are marketable also undermines Environmental Petitioners' claim that some large operations commonly "over-appl[y] animal waste to land that is not even used to grow crops." Env. Pet. Br. at 10. These Petitioners contend that "CAFOs have incentives that other farms do not have to over-apply waste," and that "[o]ften, plants, such as Bermuda grass, are grown on the land application areas merely to justify disposing of large quantities of waste." *Id.* (citing public comments by National Resources Defense Council and Southern Environmental Law Center). These

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[16] "Manure is valued at approximately $50 per acre when applied to crops at agronomic rates." Comments on Proposed Rule by National Chicken Council, July 30, 2001, at 27, JA1231; *see also* National Pork Producers Council Comments at 59, JA1346.

statements are inconsistent with record evidence of off-farm manure sales. Not surprisingly, Environmental Petitioners make these assertions without any supporting authority. The brief lifts these contentions nearly verbatim from public comments submitted by petitioner National Resources Defense Council, which likewise failed to identify a single source for its sweeping allegations.

It is especially baffling that Environmental Petitioners would criticize the cultivation of Bermuda grass. Bermuda grass absorbs comparatively high levels of manure nutrients. *See* U.S. Department of Agriculture, *Agricultural Waste Management Field Handbook* 6-1 (1992), JA1621 ("Perennial grasses tend to be more efficient in nutrient uptake than row crops. They grow during most of the year, and actively grow during the period of waste application, which maximizes the nutrient removal from the applied waste product"). As such, it is recommended as an environmentally beneficial crop. Jesus Garcia, USDA, Agricultural Research Service, *Managing Forage for Best Use of Manure* (May 9, 2001) (studying Bermuda grass, specifically, and concluding that "managing forage plants for growth and maturity and then harvesting them as hay for selling off-farm would maximize nutrient removal and lessen the impact that excess nutrients have on the

environment").[17] Far from posing an environmental hazard, Bermuda grass and similar crops can play an important role in preventing the buildup of manure nutrients in soil.

5. The New Rule's Presumption That All Large CAFOs Discharge Is Effectively Irrebuttable

EPA concedes Farm Petitioners' point that irrebuttable presumptions violate the Due Process Clause. *See* EPA Br. at 98; *see also* Farm Pet. Br. at 62 (citing *USDA v. Murry*, 413 U.S. 508 (1973), and *Vlandis v. Kline*, 412 U.S. 441 (1973)).[18] But it claims that the Rule's provision allowing CAFOs to prove that they have no potential to discharge makes the presumption rebuttable. Although

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[17] Available at http://www.ars.usda.gov/is/pr/2001/010509.htm.

[18] The Farm Petitioners cited *Universal Restoration, Inc. v. United States*, 798 F.2d 1400, 1406 (Fed. Cir. 1986), for the unsurprising fact that it treated a presumption that is extremely difficult to rebut in practice as tantamount to an "irrebuttable" presumption. *See* Farm Pet. Br. at 62. EPA purports to distinguish *Universal Restoration* because the court in that case "held that the appellant had rebutted a presumption as a matter of fact, and not because the presumption was extremely difficult to rebut." EPA Br. at 98 n.48. Farm Petitioners do not understand the Agency's argument. The *Universal Restoration* court did find that the appellant had rebutted the presumption at issue in that case, but only after rejecting the United States' much stricter interpretation of the showing needed to do so. 798 F.2d at 1406. It was in the course of that discussion that the court equated a presumption that is "effectively" irrebuttable in practice with the irrebuttable presumptions that due process proscribes. *Id.* Farm Petitioners' point is simply that presumptions that are nearly impossible to rebut in practice are "irrebuttable" for due process purposes.

EPA believes that few Large CAFOs will be able to make this showing, EPA cites the preamble to the final rule for its hypothetical examples of cases in which a large operation will be able to do so. EPA Br. at 98-99.

In fact, both the rule itself and the accompanying commentary make clear that the presumption will be irrebuttable (or virtually so) in practice, even for those Large CAFOs that have not and will not discharge pollutants. The preamble does include the hypothetical examples that EPA cites in its brief, but it makes clear that even the most isolated operation with a myriad of safeguards still may fail to rebut the presumption of discharge. The preamble hypothesizes an ideal CAFO—one "[l]ocated in an arid or semi-arid environment," that "stores all its manure or litter in a permanent covered containment structure that prevents wind dispersal and precipitation from contacting the manure or litter," that "has sufficient containment to hold all process wastewater and contaminated storm water," *and* that "does not land apply CAFO manure or litter because, for example, the CAFO sends all its manure or litter to a regulated, offsite fertilizer plant or composting facility"—but provides no assurance that even this operation could rebut the discharge presumption; the preamble notes that such a CAFO

"*might* be able to demonstrate no potential to discharge." 68 Fed. Reg. 7202 (emphasis added). [19]

EPA is only being realistic when it fails to give any assurances on this score. The rule requires Large CAFOs to prove "that there is no *potential* for *any* [of its] manure, litter or process wastewater to be added to waters of the United States *under any circumstance or climatic condition.*" 40 C.F.R. § 122.23(f)(1) (emphasis added). The rule is categorical. It contemplates "any" "climatic condition," no matter how unlikely, and separately accounts for "any circumstance," an apparent reference to the universe of non-climactic contingencies, from the everyday to the most remote. The preamble is to the same effect. It explains that "[t]he term 'no potential to discharge' means that there is no

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[19] EPA also claims that its "no potential to discharge" request form "lists the information that will serve as the primary basis for determining whether [a] facility meets the 'no potential to discharge' standard." EPA Br. at 97 n.46. That such a form exists, however, does not establish that any Large CAFO will actually be able to rebut the discharge presumption. Nor is the form helpful in delineating what factors the Agency will consider in evaluating submissions. In addition to an array of required information, the form directs CAFO operators to include "any additional information [they] determine necessary to demonstrate that there will not be, under any circumstances, any discharge from either the production or land application areas of [their] operation." (The form is available as Appendix E to the *NPDES Permit Writers' Guidance Manual and Example NPDES Permit for Concentrated Animal Feeding Operations* (Dec. 2003), at http://www.epa.gov/npdes/pubs/cafo_permit_guidance_appendixe.pdf) And the Director may also consider any "data gathered by the permitting authority." 40 C.F.R. § 122.23(f)(3).

potential for any CAFO manure, litter, or wastewater to be added to waters of the United States . . . *without qualification*," and Large CAFO's must make this showing "to a degree of certainty." 68 Fed. Reg. 7202 (emphasis added).

And even the CAFO that somehow can make this truly extraordinary showing has no guarantees. The rule provides that the Director "*may* make a case-specific determination that a Large CAFO has 'no potential to discharge' pollutants to waters of the United States. 40 C.F.R. § 122.23(f)(1) (emphasis added). "The Director retains authority to require a permit" in any case and "to subsequently require NPDES permit coverage" for a CAFO that has shown no potential to discharge. *Id.* § 122.23(f)(6).

In short, both the rule and its commentary make clear that the presumption is effectively irrebuttable in practice. And even if a CAFO could make the required, categorical showing, the Director in his or her discretion could still deny the CAFO's request outright. In those circumstances the discharge presumption violates Due Process as surely as any presumption that is irrebuttable even in theory.

II. THE CAFO RULE UNLAWFULLY REGULATES STORM RUNOFF FROM LAND APPLICATION AREAS THROUGH THE NPDES PERMIT SYSTEM

The CAFO Rule unlawfully extends the NPDES permit program to both *uncollected* and *collected* stormwater from land application areas associated with

CAFOs. 68 Fed. Reg. 7196, 7267. EPA's broad, indiscriminate assertion of regulatory power over fields fertilized with manure exceeds its statutory authority and should be set aside.

Section 502(14) of the Clean Water Act defines the term "point source." The first sentence of Section 502(14) provides that a point source is a "discernible, confined and discrete conveyance" and lists CAFOs as examples of such conveyances. *Uncollected* stormwater from land application areas is not covered by this definition because it is not discharged through a discrete conveyance (the fertilized croplands are not, by EPA's own admission, part of CAFOs).

The second sentence of Section 502(14) provides that "agricultural stormwater discharges" are not point sources. Accordingly, even when stormwater from land application areas is *collected*, the statute is clear that such discharges are nonetheless not "point sources" and thus cannot be regulated under the NPDES program.

In its response, EPA distorts the Farm Petitioners' position, tortures the statutory text, and evades the conclusions that are compelled by straightforward analysis of the Act's structure and legislative history. The Agency tries to override the basic rules of Clean Water Act jurisdiction that apply to land application areas by wrapping itself in a cloak of "reasonableness" and arguing that, because EPA believes comprehensive regulation of farming activity is the right thing to do, Congress must have intended to authorize it. EPA essentially argues that Congress

wanted to give EPA complete federal control of every conceivable avenue by which CAFO wastes might reach navigable waters. EPA Br. at 23. As Farm Petitioners demonstrated in their opening brief, Congress did no such thing. Farm Pet. Br. at 64-90.

A. The Clean Water Act Does Not Confer Authority to Regulate Uncollected Stormwater Simply Because It Flows Over Land Application Areas Associated with CAFOs

The statutory text, the legislative history, and the structure and purposes of other provisions of the Act all confirm that uncollected storm runoff does not constitute a "discharge" from a "point source" and therefore cannot be subjected to the NPDES permit program.

1. EPA Has Distorted The Issue

Farm Petitioners challenge the Agency's authority to require NPDES permits for *uncollected* storm runoff from fields fertilized by manure. Farm Pet. Br. at 64. When rainfall generates runoff it may wash some soil, fertilizers and organic material from farm fields. When this storm runoff reaches surface waters via sheet flow over the contours of the land, and is not discharged through man-made ditches or other conveyances, it is a nonpoint source of pollution. The NPDES program does not apply to nonpoint pollution from land application areas (or from anywhere else). Congress intended for the States to address such

nonpoint sources through a variety of programs and mechanisms authorized by the Act, not through the point source discharge permit system.

EPA mischaracterizes Farm Petitioners' position on this issue. We do not contend that the addition of pollutants to navigable waters from CAFO land application areas can *never* be considered a discharge from a point source. *See* EPA Br. at 23. Discharges from land application areas can be regulated pursuant to NPDES permits where the discharge (1) is from a conveyance, and (2) is not caused by precipitation. Discharges would clearly be subject to regulation where, for example, animal waste flows directly into navigable waters through conveyances such as man-made ditches or pipes. Discharges would also be subject to regulation where animal waste is applied to the land via pipes, vehicles or other conveyances and thereafter flows, either in a ditch *or* in an unconfined manner, into navigable waters without the *causal intervention* of rainfall. *See* Part II.B.3, *infra*. These were the types of discharges addressed in *Concerned Area Residents for the Environment v. Southview Farm*, 34 F.3d 114 (2d Cir. 1994) ("*Southview Farm*"). Nothing in the record supports EPA's repeated assertion that Farm Petitioners' position would enable such "sham" land application (EPA Br. at 33) or undermine the Act's purposes by creating rural dumping grounds for animal wastes (EPA Br. at 44).

Moreover it is apparent that Congress made a conscious decision not to subject agricultural *nonpoint* source pollution, such as unconfined storm runoff, to

the Act's permit system even where agriculturally applied wastes from CAFOs may be a component of that pollution – as EPA itself has recognized. 68 Fed. Reg. at 7197. Instead, Congress created nonpoint source control programs specifically to address water quality impacts caused by diffuse runoff of pollutants, including agricultural pollutants.

2. The Act Limits NPDES Permit Requirements to Discharges Reaching Navigable Waters Through Point Sources

Except as authorized by an NPDES permit, the Act prohibits the "discharge" of any pollutant. 33 U.S.C. § 1311(a). The term "discharge" means the "addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12).[20] A "point source" is defined as:

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[20] As pertinent here, EPA regulations define "discharge of a pollutant" to mean "[a]ny addition of any 'pollutant' or combination of pollutants to 'waters of the United States' from any 'point source' . . . ." The regulation also provides that "[t]his definition includes additions of pollutants to waters of the United States from: *surface runoff which is collected or channeled by man* . . . ." 40 C.F.R. § 122.2 (emphasis added).

In its response, EPA fixes on the term "include" to assert that "other types of discharges" could be covered by the definition. EPA Br. at 38. Whatever those "other types" might be, the definition clearly demonstrates EPA's intent to exclude one type: surface runoff, which is *not* collected or channeled by man. To read the definition any other way suggests that the emphasized phrase serves no purpose whatsoever and is inconsistent with the statutory requirement of a "discharge" from a "point source." If EPA's response is meant to imply that uncollected or unchanneled surface runoff is defined as the "discharge of a pollutant," it is astonishing that the Agency never even proposed or discussed such a result in issuing this section of the regulation.

> Any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

Id. § 1362(14). This statutory text unambiguously limits the application of EPA's NPDES permit authority to discharges from "discernible, confined and discrete conveyances." The words "including but not limited to" make clear that the list of items following this phrase in the statutory definition are examples of such *conveyances*. They are not additional subcategories of "point sources" unless they also serve as "discernable, confined and discrete conveyances." Thus, Congress considered concentrated animal confinement areas to be sufficiently discernible, confined and discrete to justify explicitly including CAFOs among the types of conveyances that must acquire NPDES permits if they discharge to navigable waters.

Just as clearly, EPA has defined a CAFO as a type of "animal feeding operation" ("AFO"), which term is limited to "a lot or facility" where: (i) animals are confined and fed or maintained; and (ii) vegetation is not sustained during the normal growing season. 40 C.F.R. §122.23(b). Such a "lot or facility" is a discrete location bounded by physical confinement structures (such as fences or walls). It is the place where animal feeding and maintenance occurs, and is without vegetation.

Land application areas clearly do not fall within the Act's definition of a "point source," including EPA's definition of a CAFO. Land application areas are used for growing crops or grazing livestock. Animals are not confined in such areas, and vegetation obviously is sustained there. Land application areas are the opposite of "confined and discrete conveyances." EPA acknowledges that land application areas are not part of the CAFO itself, and EPA's regulatory definition of CAFO admits of no other interpretation. EPA Br. at 24-25. While land application areas may contain certain types of point sources, such as man-made drainage ditches where runoff is "collected or channeled by man," this is not always the case. In the absence of such conveyances, the uncollected storm runoff containing pollutants from these areas cannot be regulated pursuant to the NPDES permitting program.

EPA appears to agree with much of this analysis. Nowhere in its response does the Agency contend that land application areas are point sources. Nowhere in its response or its regulations does EPA state that uncollected storm runoff constitutes a point-source discharge. Faced with this textual dilemma, EPA nonetheless advances two semantic arguments for regulating uncollected storm runoff from land application areas.

a. Storm Runoff From Land Application Areas Is Not A Discharge From a CAFO

First, EPA contends that the addition of pollutants to navigable waters due to storm runoff is not "from" the land application area at all, but instead is "from" the CAFO. EPA Br. at 25-27. The foundation for this argument is a dictionary definition of "from," meaning a "starting point" or "a source, cause, agent, or instrument." *Id.* at 26. EPA contends that, because animal wastes are *generated at* a CAFO, any subsequent addition of such wastes to navigable waters at any location, and by any means, constitutes a point source discharge "from" the CAFO that must be authorized by an NPDES permit.

Established law is precisely the opposite of EPA's position. The federal courts consistently have held, in applying the plain meaning of the statutory text, that discharges of pollutants are subject to NPDES permitting only if they reach navigable waters through a confined and discrete conveyance.[21] The Supreme

[21] For this reason, the Environmental Petitioners cannot prevail in arguing that discharge permits for storm runoff from land application areas must incorporate water quality based effluent limitations ("WQBELs"). *See* Env. Pet. Br. at 60-70. As the Environmental Petitioners acknowledge, WQBELs apply only to point-source discharges that require an NPDES permit. *Id.* at 61-62. Because land applications areas are not part of the CAFO, *see* 40 C.F.R. § 122.23(b), and are not themselves confined and discrete conveyances, uncollected storm runoff from such areas cannot be regulated through an NPDES permit, and WQBELs are not relevant. In addition, as discussed below in Section II.B, even *collected* stormwater runoff from land application areas is excluded from the definition of "point source," the NPDES permit program, and the application of WQBELs.

Court recently articulated precisely this point, emphasizing that the definition of "point source" "makes plain that a point source need not be the original source of the pollutant; it *need only convey the pollutant to 'navigable waters'* . . . ." *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 124 S. Ct. 1537, 1543 (2004) (emphasis added). EPA plainly is wrong in asserting the opposite position – that a point source need only be the original source of the pollutants, and need not be the means by which pollutants are conveyed to navigable waters in order to be subject to NPDES permitting.

This Court's precedent is squarely in line with *Miccosukee*. In *Catskill Mountains Chapter of Trout Unlimited v. City of New York*, 273 F.3d 481(2d Cir. 2001), the Court explained that "the term 'point source' . . . does not necessarily refer to the place where the pollutant was created but rather refers *only* to the *proximate source from which the pollutant is directly introduced* to the destination water body." *Id.* at 493 (emphasis added). The Court found this conclusion to be "clear from the text of the Act." *Id.*

This Court's decision in *Southview Farm* is in accord. There, this Court found that the addition of *liquid manure* to navigable waters is a point source discharge either: where it was conveyed to a waterway by point sources such as

ditches and pipes; or where it ran off from land application areas after being applied by other point sources, including pipes, hoses and vehicle-mounted containers. *Southview Farm*, 34 F.3d at 114-118.[22]

EPA's response misrepresents the holding in *Southview Farm*. This Court did not conclude, as EPA claims, that "discharges from land application areas should be considered discharges from the CAFO . . . because even if the run-off was considered to be 'diffuse' and not channeled, it still could be considered a point source discharge." EPA Br. at 29-30. The Court clearly found that the discharges at issue in the case were *not* diffuse, as they were conveyed to a water body by pipes, ditches and vehicles. *Southview Farm*, 34 F.3d at 118 ("We believe that the swale coupled with the pipe under the stonewall leading into the ditch that leads into the stream was in and of itself a point source"). Examining other caselaw, the Court pointed to similar fact patterns involving "ditches," a "break in

[22] The Court's discussion in *Southview Farm* of the agricultural stormwater exemption is addressed below in the next section.

a berm," and "manure spreading vehicles." *Id.* at 118-119. *Southview Farm* does not hold that uncollected storm runoff is a point source discharge.[23]

Moreover, the absurdity of EPA's contention – that uncollected runoff containing CAFO wastes is always a discharge "from" the CAFO – is apparent on its face. Wastes generated by animals located at CAFOs can reach navigable waters in many different ways. In all cases, these *pollutants* obviously are "from" the CAFO, but it does not follow that the *discharge* – *i.e.* the actual addition of pollutants to navigable waters – is always "from" the CAFO. For example, air emissions of pollutants occur at CAFOs, but EPA does not contend that, when these pollutants reach navigable waters through rain-induced atmospheric

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[23] On one issue, Farm Petitioners and EPA agree that the decision in *Southview Farm* is not correct. The Court concluded that "the farm itself falls within the definition of a [CAFO] . . . ." 34 F.3d at 115. EPA has taken the position that a significant portion of typical farming operations – land application areas – are *not* part of the CAFO. 68 Fed. Reg. at 7196. As amicus curiae in *Southview Farm*, the United States did not support the proposition that land application areas are part of the CAFO. Indeed, the regulatory definition of CAFO could not possibly be read to include land application areas. *See* 40 C.F.R. § 122.23(b).

Farm Petitioners agree with EPA on this point. Farm fields on which crops are grown obviously could not fall within the definition of a CAFO because animals are not confined or fed there, and because vegetation is grown there. *See* 40 C.F.R. §122.23(b). In *Southview Farm*, the Court considered whether or not the *entire farm* was a CAFO. Under the statute and EPA's regulations, however, there must be a distinction between some portions of a farm that fit the definition of a CAFO and other portions that do not.

deposition, they amount to unpermitted discharges "from" the CAFO. There is no principled distinction between the release of CAFO pollutants into the air and the placement of CAFO pollutants on agricultural lands. In both cases, a CAFO is the generating source of the pollutants, and all of the factors giving rise to the release are part of the same overall farming operation. EPA Br. at 26. In both cases, the pollutants have been physically separated from the CAFO by means of lawful activities. And in both cases, the subsequent addition of those pollutants to navigable waters during rainfall events cannot be deemed a point-source discharge under the Act because there is no discernable, confined and discrete conveyance.

This fundamental point – that the discharge must be "from" a point source – is not unique to CAFOs. The list of conveyances under the statutory definition of "point source" includes, in addition to CAFOs, any "container, rolling stock . . . or vessel or other floating craft." 33 U.S.C. § 1362(14). Virtually every pollutant at some time is generated, stored, and/or transported in such structures. If EPA's position is correct, then all water pollutants except naturally occurring substances such as sediment would be subject to NPDES permitting, regardless of how they may come into contact with navigable waters, because at one time they were contained in and then emitted from a structure. Commercial fertilizers and pesticides, for example, are applied routinely to public and private agricultural, commercial and residential lands. All of these chemicals originated "from"

containers, which are included as types of conveyances within the definition of point source, and yet there is no hint in the statute, its legislative history or EPA's regulations that the unconfined storm runoff of these substances into navigable waters should constitute a "point source" discharge.

The reason for this is obvious: "containers" (like CAFOs) are listed in the statutory definition of "point sources" as examples of a "discernible, confined and discrete conveyance." If pollutants are *conveyed* to navigable waters from these containers, then a regulable "discharge" from a "point source" has occurred. The release of substances from containers into the air or onto the land, however, does not give rise to a "point source" discharge merely because the winds or rains may eventually transport the substances into waters.

b. EPA Has No Authority to Regulate Uncollected Runoff As Though It Were Discharged From the CAFO

EPA's second contention appears to be that, even if uncollected storm runoff from land application areas is not a point-source discharge, it "should be" regulated as though it is. EPA advances this fiction throughout its response: "land application discharges should be regulated as discharges from the CAFO itself" (EPA Br. at 22); "discharges from CAFO land application areas should be considered discharges from the associated CAFO" (*id.* at 23); EPA made a "basic

decision to treat discharges . . . from CAFO land application areas as discharges from the CAFO itself" (*id.* at 24).[24]

EPA's heavy reliance on this fiction underscores the unlawfulness of its action. The statute does not authorize EPA to regulate farming activity, or any other activity, whenever the Agency concludes that it "should" do so. "Regardless of how serious the problem an administrative agency seeks to address . . . it may not exercise its authority in a manner that is inconsistent with the administrative structure that Congress enacted into law." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000). The statutory text confines EPA's permitting program to discharges that actually are conveyed to navigable waters by point sources.

There is no textual ambiguity that would allow EPA to adopt any approach it deems "reasonable." As noted above, the judicial decisions interpreting the definition of "point source" uniformly hold that a point source must be the discrete means of conveyance by which pollutants are added to navigable waters. It is not

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[24] Elsewhere, EPA asserts that runoff from land application areas is: "considered to be discharges from the CAFO" (EPA Br. at 24, n. 11); "can reasonably be considered discharges 'from' the CAFO itself" (*id.* at 25); and is being "treat[ed] . . . as discharges from the CAFO itself" (*id.* at 28). The issue here should not be whether storm runoff from areas outside the CAFO "should" be regulated as though it came from the CAFO. That is a question for Congress to answer. Farm Petitioners contend that Congress clearly answered the question in the negative by enacting statutory provisions that run directly counter to EPA's current ambitions.

enough that a CAFO is the location at which those pollutants were generated. Where CAFO-generated pollutants are conveyed to navigable waters directly or through a confined and discrete conveyance,[25] they must be permitted, but where those pollutants are but a component of uncollected storm runoff from land application areas, there is no point source discharge to be regulated. Rather, as discussed below, it is clear from the legislative history, as well as the context provided by other statutory programs, that Congress intended for such runoff events to be addressed, not as EPA may believe they "should" be, but for what they are in fact: nonpoint sources of pollutants.

3. The Legislative History Confirms That Uncollected Storm Runoff is Not a Point Source Discharge

The relevant legislative history confirms that unconfined storm runoff from land applications associated with CAFOs is not a regulated point source discharge. Where the legislative history and statutory language are consistent, they are

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[25] EPA's regulation prescribing the conditions under which a small AFO may be designated as a CAFO describes such direct-discharge scenarios:

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

40 C.F.R. § 122.23(c)(3).

controlling. *See E.I. DuPont de Nemours & Co. v. Train*, 430 U.S. 112, 130-32 & n.21 (1977).

As discussed at length in Farm Petitioners' opening brief, the legislative history underscores Congressional intent to draw a bright line between point and nonpoint sources. In the 1971 Senate Report on S.2770, it was emphasized that Congress defined the term "point source" in order to "distinguish between control requirements where there are *specific confined conveyances, such as pipes*, and control requirements which are imposed to control runoff." S. Rep. No. 92-414 at 78 (emphasis added), JA2753. With respect to runoff, the Report made clear that "the authority resides in the State or other local agency." *Id.*

In discussing the House's analogous definition of "point source" on the House floor, Congressman Henderson inquired specifically about the application of this definition to CAFOs and associated lands. He proposed to Congressman Wright, a member of the committee that developed the House bill, the following interpretation: "It is my understanding that only those [CAFOs] which would collect and concentrate waste for discharge through a definite point source outlet are covered under this definition and that it does not apply to nonpoint source discharge, associated with a feedlot operation." CWA Legislative History, vol. 1 at 645-46, JA2729-30. Congressman Wright responded: "the gentleman is exactly correct." JA2729.

EPA cannot square its position with this explicit legislative history and the unambiguous statutory text to which it refers. Nowhere does EPA offer any explanation for how the Agency's view of its authority could be consistent with the Henderson-Wright colloquy. Instead, EPA attempts to confuse the issue by offering three responses that are plainly wrong and misleading.

First, EPA wrongly asserts that Farm Petitioners rely on this 1971-72 legislative history solely to inform the meaning of other statutory language (the agricultural stormwater exemption) that was added in 1987. EPA Br. at 57. That is incorrect. We quoted the colloquy in full to demonstrate the fundamental point that, *in the 1972 Act*, Congress meant to distinguish between CAFO discharges that occur "through a definite point source outlet," which would fall under the definition of "point source," and nonpoint source runoff "associated with a feedlot operation," which would not. Farm Pet. Br. at 73-74.

Uncollected storm runoff from a land application area associated with a CAFO is precisely the kind of nonpoint source to which the Congressmen referred. As this Court observed in discussing the 1987 amendment in *Southview Farm*, "agricultural stormwater run-off has always been considered nonpoint source pollution exempt from the Act." 34 F.3d at 120. The forcefulness of this 1972 legislative history is only strengthened by Congress's addition, in 1987, of an

explicit exemption for agricultural stormwater discharges that are *either* uncollected *or* collected, as discussed below in the next section.

Second, EPA asserts that this explicit 1972 legislative history is somehow rendered obsolete by the 1987 addition to the statute of the agricultural stormwater exemption because, in the 1987 amendment, Congress distinguished between point source CAFO discharges and "nonpoint source CAFO discharges." EPA Br. at 60. This is plainly wrong. The 1987 agricultural stormwater exemption does not distinguish between confined discharges and unconfined runoff. It exempts both confined discharges *and* unconfined runoff where they are caused by storm events.

As noted above, the Henderson-Wright exchange made a fundamentally different distinction between CAFO discharges, which reach navigable waters directly *from the CAFO* itself, and nonpoint source runoff "associated with" the CAFO, which would not be covered by the definition of "point source." Storm runoff from land application areas falls squarely within the latter category.

Third, EPA apparently claims that the Congressmen's exchange was about nothing at all since other provisions of the "point source" definition already referred to "ditches," "pipes" and other definite outlets. EPA Br. at 60. Again, the Henderson-Wright colloquy did not purport to address point and nonpoint source discharges *from the CAFO*; it drew the important distinction between point source discharges from the CAFO and nonpoint source runoff from *other areas*

"associated with" the CAFO, such as land application areas. Non-storm runoff from the CAFO is a point source discharge because discharges from the CAFO will always reach navigable waters through a definite outlet, such as a ditch, pipe, or leak from a storage lagoon, and the CAFO therefore functions as a "discernible, confined and discrete conveyance." The same cannot be said of storm runoff from land application areas; in some instances it will be conveyed in a discrete manner, such as through ditches where it has been "collected or channeled by man," but in many instances it will not.

4. The Structure of the Act Confirms That EPA Lacks the Authority to Require NPDES Permits for Unconfined Storm Runoff from Land Application Areas

As explained in Farm Petitioners' opening brief, Sections 208 and 319 of the Act confirm that Congress intended for uncollected storm runoff to be addressed by States and local agencies through a variety of means other than the NPDES permit mechanism. Farm Pet. Br. at 83-88. Likewise, Section 405 of the Act demonstrates that Congress created a specific program to control runoff from the application of human wastes to the land, but did not authorize the equally detailed program EPA now puts forward under the CAFO Rule to control runoff from agricultural lands receiving animal wastes. *Id.* at 88-90.

The text and legislative history of Section 208 specifically list "runoff from manure disposal areas" among the "nonpoint sources of pollution" to be addressed

by states and area wide waste management agencies. 33 U.S.C. §1288(b)(2)(F); S. Rep. No. 92-414 at 39 (1971), JA2752. EPA responds merely by observing that Section 502 of the Act defines "point source" to include CAFOs, and asserting that it would have made little sense for Congress to simultaneously reserve authority to the states to address "runoff from CAFOs" under Section 208. EPA Br. at 65. This response misses the point entirely. Runoff from CAFOs themselves may be regulated as a "discharge" because the CAFO is an example of a discrete conveyance. Section 208 makes clear that "runoff from manure disposal areas" is a nonpoint source to be addressed under other mechanisms. "Manure disposal areas" are not part of the CAFO, as defined by EPA, but may be associated with a farming operation that includes a CAFO. This is precisely the distinction made in the Wright-Henderson colloquy, discussed above.

Similarly, Section 319 of the Act was added in 1987 to further direct and assist the State's efforts to address nonpoint source pollution. 33 U.S.C. § 1329. The legislative history of this amendment identifies as among its objectives "controlling agricultural runoff" and "improved management of animal wastes and feedlots." S. Rep. No. 98-282, at 1 (1983), JA2765. EPA responds by asserting, without citation to any authority, that Section 319 must have been intended to complement the NPDES program by addressing only *exempt* storm runoff from land application areas and discharges from small farms that EPA has chosen not to

regulate. In light of the broad concepts expressed in the legislative history of Section 319, EPA's theory is implausible, especially in the absence of any textual support or even a suggestion in the legislative history that Congress had in mind for Section 319 such a limited role.

Section 405 demonstrates that Congress created a detailed and specific program for regulating, among other things, the land application of human wastes in order to control runoff into navigable waters, and yet provided no corresponding authority for EPA to construct, as it has in the CAFO Rule, essentially the same type of regulatory program for animal wastes. *See* Farm Pet. Br. at 88-90. Created in 1972 and strengthened in 1987, the Section 405 program includes technical requirements and standards for land application of sewage sludge, including management practices such as a requirement to apply sludge at a "rate that is equal to or less than the agronomic rate." 40 C.F.R. § 503.14(d). These requirements are implemented through the permit system.

In short, Congress authorized the approach EPA has created in the CAFO Rule, but only for sewage sludge, not for CAFO wastes. Congress was well aware of the potential for animal wastes to contribute to water pollution, but at the same time it created and modified the Section 405 program in 1972 and 1987, Congress deliberately chose to empower the States, through Sections 208 and 319, to address runoff from land application areas.

EPA's response is nonsensical. First, the Agency broadly asserts that Congress expressly authorized EPA to regulate "CAFO discharges" as a type of point source discharge. EPA Br. at 37. What Congress did was list CAFOs as a type of "discernible confined and discrete conveyance" which, *if* they convey pollutants to a water body, can be regulated as a point source. Congress did not authorize EPA to regulate *land application* of CAFO wastes where the only addition (if any) of such wastes to surface waters occurs via uncollected storm runoff. By contrast, this is precisely what Congress did in Section 405 with respect to human waste.

Second, EPA implies that, because Section 405 does not expressly refer to land application, the Agency has for many years merely inferred that it has authority to regulate land application of sewage sludge under that provision, and can do the same for CAFO wastes pursuant to Section 502(14). EPA Br. at 37. Congress could not have been clearer in Section 405, which directs EPA to "identify uses for sludge, including disposal," and then develop technical regulations for "each such use or disposal" and enforce those regulations through permits. 33 U.S.C. § 1345(d)(1). In meeting this challenge, EPA is authorized to "conduct . . . scientific studies . . . to promote the safe and beneficial management or *use* of sewage sludge for such purposes as aiding the restoration of abandoned mine sites, conditioning soil for parks and recreation areas, agricultural and

horticultural *uses*, and other beneficial purposes." *Id.* § 1345(g)(1) (emphasis added). These "uses," in a nutshell, are land application. Congress provided no such authority with respect to CAFO wastes.

B. Runoff From Land Application Areas That is Caused by a Storm is Exempt from the NPDES Program as Agricultural Stormwater

Though it is difficult to tell because of EPA's overheated rhetoric, EPA and the Farm Petitioners agree on most aspects of the agricultural stormwater exemption. EPA and the Farm Petitioners agree, for example, that when Congress added the agricultural stormwater exemption to the definition of "point source," it intended to make the exemption available to all types of discrete conveyances, including CAFOs. EPA Br. at 39-42. Second, EPA and Farm Petitioners agree that this Court's decision in *Southview Farm* establishes a "causation" test for determining when a discharge is agricultural stormwater, so that the exemption applies if the discharge results from a precipitation event. EPA Br. at 41-43; Farm Pet. Br. at 81-83. Third, as a corollary to the causation test, EPA and Farm Petitioners agree that a farmer who over applies CAFO wastes to his fields without any regard to the agronomic needs of the land is unlikely to qualify for the agricultural stormwater exemption because, in such a case, it is the farmer's imprudent over-application rather than a storm event that "causes" the discharge of CAFO wastes. EPA Br. at 43.

The Farm Petitioners and EPA part company only on the narrow, but important, question of the Agency's authority to re-interpret the stormwater exemption, 16 years after it was enacted, so that the statutory exemption's availability depends not just on the cause of the discharge but also upon compliance with EPA's newly-minted specifications for nutrient management plans ("NMPs"). Because EPA's position on this issue conflicts with the plain language of the Clean Water Act and this Court's established precedent, the CAFO Rule's restrictions on the availability of the agricultural stormwater exemption must be invalidated.

1. The Agricultural Stormwater Exemption is Not Restricted to Certain Point Sources

Congress added the agricultural stormwater exemption in 1987, at the same time as it strengthened the CWA's stormwater program. *See* Pub. L. No. 100-4 § 502, 403, 101 Stat. 7, 75 Pub. L. No. 100-4 §§ 401-405, 101 Stat. 65, 65-69 (1987), JA2770-78. Rather than merely exempting agricultural stormwater from the enhanced storm water program, Congress placed the new exemption in section 502(14), within the definition of point source. 33 U.S.C. § 1362(14); *see Nusselle v. Willette*, 224 F.3d 95 (2d Cir. 2000) (court must keep in mind context and the structure of the statute as a whole when interpreting a statute's plain meaning), *rev'd sub nom. on other grounds*, *Porter v. Nussle*, 534 U.S. 516 (2002). Accordingly, the plain language of the statute first refers to CAFOs in the definition of point source, and then, in the very next sentence, exempts agricultural

stormwater from the point source definition. Notwithstanding claims by the Environmental Petitioners to the contrary, nothing in the statutory language limits the applicability of the agricultural stormwater exemption to certain kinds of conveyances. Construing the statute as the Environmental Petitioners urge requires the Court to assume that the exemption applies to all point sources except for CAFOs – the type of conveyance that is most likely to discharge agricultural stormwater. There is nothing in the plain language of the statute or the legislative history that suggests Congress intended such an absurd result. *See* EPA Br. at 40.[26]

2. The *Southview Farm* Decision Adopts a Causation Test in Applying the Agricultural Stormwater Exemption

In *Southview Farm*, this Court held that in evaluating the applicability of the agricultural stormwater exemption to particular discharges, the "real issue is not whether the discharges occurred during rainfall or were mixed with rain water runoff, but rather, whether the discharges were *the result of* precipitation."

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[26] In claiming that the agricultural stormwater exemption is unavailable to CAFOs, Environmental Petitioners have so twisted the meaning of the exemption that they end up struggling to identify any circumstance in which the exemption might apply. They conclude by arguing that the exemption was designed only to exempt small-scale "purely agricultural operations . . . [that] are generally regulated under the less rigorous non-point pollution program." Env. Pet. Br. at 56-58. While Congressional intent is not always clear, it is difficult to fathom that Congress would have gone out of its way to amend a key definition of the Clean Water Act for the sole purpose of exempting from the NPDES program non-point sources who were never subject to it in the first place.

Southview Farm 34 F.3d at 120-21 (emphasis added). Both the Farm Petitioners and EPA cited this key language with approval and italicized the words "the result of" in their opening briefs in order to emphasize the *Southview* Court's causation test. *See* Farm Pet. Br. at 81; EPA Br. at 42.[27]

This Court's causation test has a number of virtues. Chief among them is that the test tracks the plain meaning of the statute: agricultural "stormwater" is a discharge at a farm that is caused by a storm (*i.e.*, a precipitation event). *See Kruman v. Christie's Int'l PLC*, 284 F.3d 384 (2d Cir. 2002) (barring exceptional circumstances, where the terms of a statute are unambiguous, judicial review begins and ends with a review of the statute's terms). The causation test is faithful to the obvious purpose of the stormwater exemption, which is to ensure that farmers fertilizing their fields are not held responsible for discharges that result from the weather. Moreover, the causation test assigns to the fact-finder in each case the responsibility for assessing the relative importance of a multitude of factors that may be associated in some way with a discharge of pollutants. This is precisely the kind

[27] The Government's claim that the Farm Petitioners seek to exempt runoff that is "in any way related to a precipitation event" (EPA Br. at 43) badly distorts our position. The words "in any way related to a precipitation event" are the Government's. They never appear in the Farm Petitioner's Brief, which instead refers repeatedly to and embraces the "causation test" adopted by the *Southview Farm* Court.

of inquiry at which fact-finders excel.[28] And, of course, the causation test draws upon an enormous body of well-developed case-law as to what it means to "cause" something to happen. The end result is that the courts and EPA are spared the impossible task of devising a one-size-fits-all rule that anticipates every possible set of circumstances in which a discharge of pollutants could occur and tries to decide in advance which circumstances suggest that a discharge was caused by a storm and which circumstances suggest otherwise. For these reasons, the *Southview Farm* Court was correct to adopt a causation test and both EPA and Farm Petitioners are right to ask this Court to rely on that holding here.

3. The Causation Test Does Not Permit Gross Over-Application of Manure

EPA's chief concern in interpreting the agricultural stormwater exemption is to ensure that it not be interpreted in a manner that permits a CAFO "to utilize its

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[28] *See e.g., Lombard v. Booz-Allen & Hamilton, Inc.*, 280 F.3d 209 (2d Cir. 2002) (under New York law, foreseeability and causation are issues generally and more suitably entrusted to fact finder adjudication); *Marchica v. Long Island R. Co.*, 31 F.3d 1197 (2d Cir. 1994) (under FELA, right of jury to decide issue of causation must be liberally viewed); *Oxley v. City of New York*, 923 F.2d 22 (2d Cir. 1991 (in Jones Act cases, right of jury to pass upon question of fault and causation must be most liberally viewed); *Burgert v. Tietjens*, 499 F.2d 1 (10th Cir. 1974) (proximate cause is to be determined on the facts of each case, is to be answered in accordance with common sense and common understanding, and is normally a question of fact for the jury).

land application areas as a dumping ground, without any regard to the nutrient needs of the crop or the water pollution problems that might be caused by the disposal." EPA Br. at 44. Farm Petitioners share this concern and believe that the "causation test" precludes the result EPA fears.

The *Southview Farm* Court's opinion provides the best evidence that the causation test is not, as EPA fears, an invitation to farmers to adopt careless land application practices. In *Southview Farm* itself, a jury considered the very type of behavior of which EPA complains, and had no trouble finding that the agricultural stormwater exemption was unavailable. *Southview Farm*, 34 F.3d at 121. Other courts have also easily come to the same result. Indeed, EPA's own brief cites *Community Ass'n For Restoration of the Env't v. Sid Koopman Dairy*, 54 F. Supp. 2d 976, 981(E.D.Wash. 1999) for the proposition that "the agricultural stormwater exemption does not apply to runoff from 'over applications and misapplications of CAFO animal wastes to fields.'" Accordingly, there is no evidence that the causation test will lead to reckless CAFO disposal practices; to the contrary, under the causation test, a farmer who used his land application areas as a dumping ground would have the impossible burden of convincing a jury that discharges were caused by a storm and not by irresponsible practices.

4. EPA Lacks Authority to Narrow the Agricultural Stormwater Exemption by Regulation

When it added the agricultural stormwater exemption to the Clean Water Act, Congress established no prerequisites for meeting the exemption. Under the CAFO Rule, however, a CAFO forfeits its ability to claim the exemption unless it adopts and continuously and completely implements a nutrient management plan that meets the very specific NMP requirements in the CAFO Rule. For example, a CAFO cannot claim the agricultural stormwater exemption if it fails to adopt a proper testing protocol or fails to maintain certain records. 68 Fed. Reg. 7267 (adding new § 122.23(e)).

As Farm Petitioners clearly illustrated in our opening brief, the effect of the CAFO Rule is that a farmer who violates an NMP is ineligible for the agricultural stormwater exemption even if the discharge in question was caused by a precipitation event. Farm Pet. Br. at 78. EPA has chosen not to respond to Farm Petitioners on this point.

EPA attempts to justify its effort to restrict the agricultural stormwater exemption with two main arguments. First, EPA contends that by requiring farmers who claim the exemption to follow "appropriate" agricultural practices (*i.e.*, NMPs) it is merely giving some substance to the word "agricultural" in "agricultural stormwater." EPA Br. at 44. Second, EPA contends that the NMP compliance requirement "provides a practical, scientific basis for determining

when discharges are caused primarily by over-application of manure rather than precipitation . . . ." EPA Br. at 44. The first argument fails as a matter of law, the second as a matter of fact and logic.

As to the first point, there is nothing in the CWA to suggest that Congress meant anything as specific as EPA's NMP requirements when it used the word "agricultural." *See Greenery Rehabilitation Group, Inc. v. Hammon*, 150 F.3d 226 (2d Cir. 1998) (when interpreting a statute, unless otherwise defined, individual statutory words are assumed to carry their ordinary, contemporary, common meaning). Certainly, it never occurred to the *Southview Farm* Court, when confronted with gross over-application of manure, to reject the applicability of the agricultural stormwater exemption on the grounds that the farmer was not truly engaged in "agriculture." Moreover, even if Congress had somehow authorized EPA to depart from the plain meaning of the word "agricultural," the notion that compliance with EPA's NMPs distinguishes "true" agriculture from "imitation" agriculture is utter nonsense. In fact, EPA's own permit writers' guidance, which provides EPA's interpretations of the CAFO Rule to state and federal permit writers and the regulated community, notes that EPA's NMP requirements *differ* in several respects from the "CNMP [Comprehensive Nutrient Management Plan] Technical Guidance" published by the United States Department of Agriculture. USEPA, Office of Water, "NPDES Permit-Writers' Guidance Manual and Example NPDES

Permit for Concentrated Animal Feeding Operations," (Dec. 31, 2003) (available at http://www.epa.gov/npdes/pubs/cafo_permit_guidance_chapters.pdf) at 4-16. Indeed, according to EPA, "[t]here are some situations where the CNMP may not fully address all of the EPA NPDES minimum practices." *Id.* This means that, according to the CAFO Rule, a farmer that complies with the Department of Agriculture's published guidance on nutrient management plans may not be sufficiently "agricultural" to qualify for agricultural stormwater exemption.

The idea that compliance with the NMP requirement merely provides an easy way to measure "causation" is equally untenable. Under the CAFO Rule, the agricultural stormwater exemption can be voided for a whole host of deviations from the NMP requirement that will never have anything to do with causing discharges (*e.g.*, failure to maintain records, failure to develop testing protocols). Farm Pet. Br. at 76. EPA continues to assert that the NMP requirement is some kind of "stalking horse" for the causation test, but it has made no attempt to explain how these record-keeping violations and other similar deviations from the NMP requirement would in any imaginable scenario "cause" a discharge.

Finally, EPA's position that Farm Petitioners must object to specific NMP requirements for the CAFO Rule to be invalid misses the point. Even if EPA has the authority to adopt NMP requirements under the NPDES program, it is nonetheless unlawful to condition the availability of congressionally enacted

exemption on compliance with such requirements. EPA simply does not have the authority to subject to regulation the very discharges Congress chose to exempt. Because the CAFO Rule does just that, it must be invalidated.

III. THERE IS NO MERIT TO THE ENVIRONMENTAL PETITIONERS' CLAIMS REGARDING THE CAFO RULE'S NUTRIENT MANAGEMENT PLAN ("NMP") REQUIREMENTS

A. There Is No CWA Requirement That CAFO NMPs Be Reviewed by the Permitting Agency or Available to the Public

Much of the Environmental Petitioners' challenge to the CAFO Rule (Sections I and II of their brief) hinges on the Ninth Circuit's decision in *Environmental Defense Center v. EPA*, 344 F.3d 832 (9th Cir. 2003) ("*EDC*"). In that case, the Ninth Circuit remanded an EPA regulation that required operators of small municipal separate storm sewer systems ("MS4s") to develop and implement individualized pollution control programs that were not subject to agency review or public participation. *Id.* at 853-58. The court held that MS4 pollution control programs must be reviewed by the permitting agency and subject to public comment, in part because those permittee-prepared programs – not the general permits issued to MS4 operators – would contain the substantive requirements that operators must implement to reduce discharges to the "maximum extent practicable." *Id.* at 855, 857. The Environmental Petitioners claim that the same

reasoning applies to the CAFO Rule's requirement that CAFO operators develop and implement an NMP.

The Environmental Petitioners' reliance on the *EDC* decision is misplaced. First, as EPA explains (EPA Br. at 119-24), unlike the rule at issue in *EDC*, the CAFO Rule itself sets forth the substantive measures required of Large CAFO operators, and these requirements must be included as non-numeric effluent limitations in CAFO NPDES permits. *See* 40 C.F.R. § 412.4. Consequently, if a CAFO operator implemented a defective NMP and over-applied manure while following that NMP, that excessive application would still constitute a violation of the CAFO Rule requirement that application rates minimize transport of nitrogen and phosphorus to waters in accordance with State-specified technical standards. *See id.* § 412.4(c)(2).

Second, unlike the rule at issue in *EDC*, nothing in the CAFO Rule provides that compliance with an NMP alone "constitutes compliance" with the CWA's technical standards. *Cf. EDC*, 344 F.3d at 853; *see* EPA Br. at 109-110 and 121. Instead, only compliance with the *effluent limitations* specified for Large CAFOs in the ELG – or, for Small and Medium CAFOs, compliance with effluent limits established by permit writers using "best professional judgment" – will constitute compliance with the applicable technical standards. Because the effluent limitations themselves will specify the practices required of CAFO operators, there

is no legal or practical basis for requiring that each operator's NMP also be reviewed by the permitting agency and the public.[29]

The requirements of the CAFO Rule also contrast sharply with the "self-regulatory system" addressed by the *EDC* court, which authorized each MS4 operator to "decide for itself what reduction in discharges would be the maximum practicable reduction." 344 F.3d at 855. With respect to Small and Medium CAFOs, federal and State permitting authorities will "decide" which measures are required when they establish effluent limitations on a case-by-case basis in CAFO permits. With regard to Large CAFOs, the ELG establishes specific requirements to ensure land application at agriculturally appropriate rates in accordance with technical standards established by the State. 40 C.F.R. §§ 412.4(c)(2) (ELG requirement that application rates "minimize phosphorus and nitrogen transport from the field to surface waters in compliance with the technical standards for nutrient management established [by State authorities]"). The specified management practices, combined with the technical standards to be established by

[29] The Environmental Petitioners have asserted separate challenges (at 70-110) to the adequacy of the effluent limitations required for Large CAFOs under the ELG. Because effluent limitations for Small and Medium CAFOs will be set on a case-by-case basis, any challenge to those limits must await the issuance of permits to those CAFOs.

the States, dictate with ample precision the ways in which Large CAFOs must control pollutant discharges from land application areas. For EPA to venture further, requiring agency approval of the specific activities and protocols at each CAFO operation – *e.g.* cropping plans, calculations of land application rates based on field-specific data, etc. – would far exceed the limits on its authority to prescribe *how* permittees must manage their operations to comply with effluent limits. *See* Farm Pet. Br. at 44-45; EPA Br. at 101-04.

B. Requiring Operator-Designed Pollution-Control Plans Is Consistent with EPA's Long-Standing Practice with "Industrial" Dischargers and Is Good Policy

Aside from their misplaced reliance on the *EDC* decision, the Environmental Petitioners mislead the Court when they characterize the site-specific NMP requirement as "an unprecedented departure from longstanding agency practice." Env. Pet. Br. at 33. Indeed, NPDES permitting of countless non-agricultural storm water discharges – including industrial and construction-related storm water sources regulated for the past decade under EPA's storm water program – have typically authorized such individualized pollution control decisions. EPA explained the importance and value of this flexible approach in its Report to Congress regarding the so-called "Phase I" storm water program, which regulates industrial and certain large municipal storm water discharges. *See* Report to Congress on the Phase I Storm Water Regulations (EPA 2000) (herein "Phase I

Report") (available at http://cfpub.epa.gov/npdes/pubs.cfm?program_id=6).

According to EPA:

> The fundamental approach for addressing storm water discharges under the Phase I program involves the use of site-specific storm water pollution prevention plans (SWPPPs) and best management practices (BMPs).... The *flexible nature of the program has encouraged innovation* on the part of municipalities, construction operators, and industrial facilities and *allowed them to tailor control programs to their own unique circumstances*.

Phase I Report at ES-1 (emphasis added).

The use of broadly applicable general permits to authorize and guide such site-specific permittee-designed pollution control plans has been essential to permitting agencies themselves, as well as to the regulated businesses whose permit applications might otherwise languish awaiting agency review and approval. With respect to construction activities, for example, EPA "acknowledged the administrative burden on EPA and States . . . to provide permit coverage for a large number of sites." Phase I Report at 4-2. Accordingly, "EPA and authorized States have primarily relied on the use of general permits to provide permit coverage." *Id.* at 4-2 – 4-3. "The primary permit condition [in such permits] is the requirement to develop an SWPPP that . . . must include a description of appropriate control measures (*i.e.*, best management practices) that will be implemented . . ." *Id.* at 4-3.

EPA correctly recognized that the policy reasons for requiring operator-designed, flexible plans apply equally to CAFOs. In particular, the utility of NMPs as a planning and compliance tool would be drastically undermined by deeming the plans to be part of NPDES permits so that any modification would require agency review and approval. *See* 40 C.F.R. § 122.62 and 124.5 (grounds and procedures for permit modification). These procedural delays would turn the NMPs into straitjackets.

Inflexibility in NMPs also would be contrary to sound environmental practices, because new information or changed conditions at any time may require prompt modification of land application protocols, crops grown, or soil and manure analysis. Far from creating incentives for "woefully inadequate" NMPs (Env. Pet. Br. at 31), the EPA's approach is the *only* way to facilitate useful management plans that actually enhance compliance.

IV. EPA PROPERLY DECLINED TO ISSUE NATIONAL STANDARDS FOR GROUNDWATER PROTECTION

Environmental Petitioners (at 97) chide EPA for failing to protect groundwater resources in its consideration of BAT standards for CAFOs. They contend that EPA's "significant program" for groundwater protection under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901 *et seq.*, provides compelling evidence that EPA's rejection of groundwater controls under the Clean Water Act is arbitrary and capricious. Their argument is chimerical.

In stark contrast to the broad authority that Congress gave to EPA under RCRA, Congress restricted EPA's authority to regulate groundwater under the Clean Water Act. As many courts have explained, Congress addressed groundwater in a variety of contexts in the Clean Water Act, but it did not do so in Title III or Title IV, the provisions that govern effluent limitations and permitting, respectively, and that provide the statutory authority for the CAFO Rule. *See, e.g.*, *Exxon Corp. v. Train*, 554 F.2d 1310, 1318-31 (5th Cir. 1977) ("[w]hat we have found belies an intention to impose direct federal control over any phase of pollution of subsurface waters. Instead, the congressional plan was to leave control over subsurface pollution to the states . . . . [T]he legislative history demonstrates conclusively that Congress believed it was not granting the Administrator any power to control disposals into groundwater"); *Wademan v. Concra*, 13 F. Supp. 2d 295, 303 (N.D.N.Y. 1998) ("the legislative history of the CWA specifically excludes groundwater"); *Kelley v. United States*, 618 F. Supp. 1103, 1107 (W.D. Mich. 1985) ("Congress did not intend the Clean Water Act to extend federal regulatory and enforcement authority over groundwater contamination").

Federal courts are unanimous in the conclusion that the Clean Water Act does not regulate discharges to isolated bodies of groundwater. *See, e.g., Village of Oconomowoc Lake v. Dayton Hudson Corp.* 24 F.3d 962, 965-66 (7th Cir. 1994);

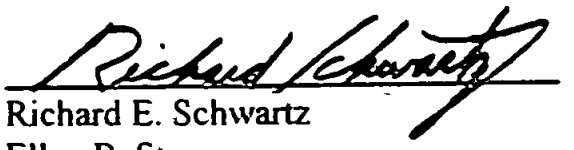
Patterson Farm, Inc. v. City of Britton, 22 F. Supp. 2d 1085, 1091 (D.S.D. 1998); *Friends of Santa Fe County v. LAC Minerals, Inc.*, 892 F. Supp. 1333, 1358 (D.N.M. 1995) ("[t]he Act does not cover isolated, non-tributary groundwater"); *Wash. Wilderness Coalition v. Hecla Mining Co.*, 870 F. Supp. 983, 989 (E.D. Wash. 1994). They are split on whether such regulatory authority extends to discharges to groundwater that travel via a hydrologic connection to surface water. *Compare, e.g., Umatilla Waterquality Protective Ass'n, Inc. v. Smith Frozen Foods*, 962 F. Supp. 1312, 1318-20 (D. Or. 1997), *with Wash. Wilderness Coalition*, 870 F. Supp. at 989-91.

This authority amply supports EPA's decision to treat groundwater monitoring and controls on a case-by-case basis, rather than through a nationwide effluent guideline, so that "site-specific factors" on "the hydrologic relationship between groundwater and surface water" can be appropriately determined in the permit-writing process. EPA Br. at 159. While Environmental Petitioners may wish EPA to transfer RCRA's program for groundwater protection to the Clean Water Act's regulatory regime, their preference is supported by no legal authority.

CONCLUSION

For the foregoing reasons, Petitioners request that the challenged provisions of the CAFO Rule be held unlawful, set aside, and remanded to the agency for further rulemaking proceedings consistent with the Clean Water Act.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

This Reply Brief of Petitioners has been prepared using:

Microsoft Word 2000;

Times New Roman;

14 Point Type Space.

EXCLUSIVE of the Table of Contents; Table of Authorities; Addendum; and the Certificate of Service, and in compliance with this Court's October 29, 2003 Order granting an expanded brief length of no more than 24,000 words, this brief contains 20,005 words.

I understand that a material misrepresentation can result in the Court's striking the brief and imposing sanctions. If the Court so directs, I will provide an electronic version of the Brief and/or a copy of the word or line printout.

Richard Schwartz

Signature of Filing Party

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 18th day of June, 2004, I filed with the Clerk's Office of the United States Court of Appeals for the Second Circuit, via UPS Overnight Delivery, the required number of copies of this Page Proof Reply Brief of Petitioners, and I further certify that I served, via UPS Overnight Delivery, the required copies upon:

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The necessary filing and service upon Counsel were performed in accordance with the instructions given me by counsel in this case.

THE LEX GROUP
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Exhibit 2

barn-yard *n.* *(a)* the enclosure round a barn, a farm-yard; *(b)* *attrib.* of behaviour, language, etc.: characterized by lack of morality or propriety; coarse, indecent, earthy (orig. *U.S.*).

1473 in T. Thomson *Acts Lords Auditors* (1839) 28/1 The wrangwis occupacion of a berne..& a bern3arde.

1491 in *Acts Lords of Council Civil Causes* (1839) I. 184/2 The..awaytakin..out of his barne 3ard & feild..of all the cornez.

1565 *Reg. Privy Council Scotl.* I. 392 To collect and gadder the teind schaves..and place the samyn within the berne yaird.

*c*1600 *Diurnal of Remarkable Occurrents* (1833) 49 Thay brunt tua barny-yairdis in Nether Keith.

1610 *Reg. Magni Sig. Scot.* 106/2 Cum horreo lie barneyaird eorundem.

1683 *Connecticut Probate Rec.* I. 344, I give my Barn Yard equally to my sons.

1805 Scott *Last Minstrel* IV. vi, Barn-yard and dwelling, blazing bright, Served to guide me on my flight.

1840 J. Buel *Farmer's Comp.* 196 A load of barn-yard manure.

1852 H. B. Stowe *Uncle Tom's Cabin* I. vii. 92 A barn-yard belonging to a large farming establishment.

1897 R. Kipling *Capt. Courageous* vi. 129 You barn-yard tramps go hoggin' the road on the high seas with no blame consideration fer your neighbours.

1938 O. Nash *I'm Stranger here Myself* 280 Some people calmly live a barnyard life because they find monogamy dull and arid.

1967 R. K. Massie *Nicholas & Alexandra* xvi. 195 In polite conversation, Rasputin used coarse barnyard expressions.

1977 *Time* 21 Nov. 70/2 A life that is full of the barnyard morality.

1981 W. Safire in *N.Y. Times Mag.* 13 Dec. 16 What copy editors like to call ‘a barnyard epithet’.

Exhibit 3

Consolidated under No. 08-61093

ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NATIONAL PORK PRODUCERS COUNCIL et al.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

ON PETITION FOR REVIEW OF FINAL ACTION OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

FINAL BRIEF OF PETITIONERS NATIONAL CHICKEN COUNCIL AND U.S. POULTRY & EGG ASSOCIATION

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U.S. Poultry & Egg Association

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Fifth Circuit Rules 26.1.1 and 28.2.1, Petitioners National Chicken Council ("NCC") and U.S. Poultry & Egg Association ("USPOULTRY") (collectively "Poultry Petitioners") make the following declarations:

NCC is a non-profit trade association representing companies that produce and process over 95 percent of the broiler/fryer chickens marketed in the United States. NCC promotes the production, marketing and consumption of safe, wholesome and nutritious chicken products both domestically and internationally. NCC serves as an advocate on behalf of its members with regard to the development and implementation of federal and state programs and regulations that affect the chicken industry. NCC has no parent companies, and no publicly held companies have a 10 percent or greater ownership interest in NCC.

USPOULTRY is a non-profit trade association and the world's largest poultry organization, whose membership includes producers of broilers, turkeys, ducks, eggs and breeding stock, as well as allied companies. USPOULTRY focuses on research and education, as well as communications to keep members of the poultry industry current on important issues. USPOULTRY has no parent companies, and no publicly held companies have a 10 percent or greater ownership interest in USPOULTRY.

Pursuant to Fifth Circuit Rules 26.1.1 and 28.2.1, the undersigned counsel of record certifies that the following listed parties to this case, as described in the fourth sentence of Rule 28.2.1, have an interest in the outcome of this case. This Petition seeks review of EPA regulations applicable to a variety of entities in the poultry industry. *See* 73 Fed. Reg. 70,418-19. Any such regulated entities may be affected in their business operations by the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Parties to this case:

American Farm Bureau Federation

James T. Banks

Amanda Shafer Berman

Catherine Louise Campbell

Hannah M. Connor

David A. Crass

Crowell & Moring

Dairy Business Association, Inc.

Jon Devine

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National Chicken Council

National Milk Producers Federation

National Pork Producers Council

Natural Resources Defense Council

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United Egg Producers

United States Department of Justice

United States Environmental Protection Agency

U.S. Poultry & Egg Association

Luke van Houwelingen

Michael E. Wall

Waterkeeper Alliance

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Fed. R. App. P. 34(a)(1) and Fifth Circuit Rule 28.2.3, Poultry Petitioners believe that the legal issues in this case are sufficiently complex that oral argument would be helpful to the Court. Accordingly, Poultry Petitioners request oral argument.

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JURISDICTIONAL STATEMENT

This Court has jurisdiction over Poultry Petitioners' Petition for Review pursuant to Section 509(b)(1) of the Clean Water Act, 33 U.S.C. § 1369(b)(1), and Rule 15(a) of the Federal Rules of Appellate Procedure. Poultry Petitioners seek review of the United States Environmental Protection Agency's ("EPA"): January 16, 2009, letter from Benjamin H. Grumbles, Assistant Administrator, Office of Water, to The Honorable Thomas R. Carper, United States Senate; January 16, 2009, letter from Benjamin H. Grumbles, Assistant Administrator, Office of Water, to The Honorable Michael N. Castle, U.S. House of Representatives; March 4, 2009, letter from James D. Giattina, Director, Water Protection Division, to Jeff Smith, Corporate Environmental Manager, Perdue Farms Incorporated; and the Final Rule issued by EPA entitled "Revised National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines for Concentrated Animal Feeding Operations in Response to the Waterkeeper Decision," 73 Fed. Reg. 70,418-486 ("CAFO Rule" or "Final Rule"), as interpreted by the above-referenced letters.

The CAFO Rule was promulgated as of December 4, 2008, for purposes of judicial review. See 73 Fed. Reg. 70, 418. Poultry Petitioners timely filed their Petition for Review on April 2, 2009, which was within 120 days of EPA's promulgation of the Final Rule and EPA's issuance of the three challenged letters.

See 33 U.S.C. § 1369(b)(1). Because multiple petitions for review of the CAFO Rule were filed, the United States Judicial Panel on Multidistrict Litigation, by Order dated January 16, 2009, consolidated all petitions in the Fifth Circuit. See 28 U.S.C. § 2112(a)(3).

EPA's Final Rule and three interpretive letters constitute judicially reviewable final agency actions because they constitute definitive agency positions that have a direct and immediate impact on the day-to-day business operations of Poultry Petitioners' members. See, e.g., Ciba-Geigy Corp. v. EPA, 801 F.2d 430, 436 (D.C. Cir. 1986). More specifically, EPA's Final Rule and the three interpretive letters satisfy both of the Bennet v. Spear conditions for finality, as the Final Rule and the letters: (1) are definitive and mark the "consummation" of the Agency's decision-making process; and (2) are actions by which "rights or obligations have been determined," or from which "legal consequences will flow." Bennett v. Spear, 520 U.S. 154, 177-78 (1997).

On May 15, 2009, EPA moved for partial dismissal of the Poultry Petitioners' Petition for Review, arguing that the Court lacks jurisdiction to hear challenges to the three interpretive letters. On July 9, 2009, this Court ordered that EPA's motion for partial dismissal would be "carried with the case." See July 9, 2009 Per Curiam Order at 1. Poultry Petitioners incorporate by reference all of the arguments previously set forth in Poultry Petitioners' Response to

EPA's Motion for Partial Dismissal. For these reasons, and all of the reasons previously set forth in Poultry Petitioners' Response, this Court has jurisdiction over Poultry Petitioners' Petition for Review.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Pursuant to this Court's Order dated August 13, 2009, this brief separately addresses Poultry Petitioners' challenge to the three EPA interpretive letters. The issues presented for review with respect to the three interpretive letters are as follows:

1. Whether EPA's interpretive letters, which unlawfully expand the scope and substance of EPA's CAFO Rule, constitute legislative rules which were required to have undergone notice and comment rule making under the Administrative Procedure Act, 5 U.S.C. § 553 ("APA").

2. Whether EPA's interpretive letters are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, because they unlawfully impose a duty on poultry farmers to obtain permits for unregulated stormwater discharges from areas outside of the CAFO production area.

3. Whether EPA's interpretive letters have unlawfully narrowed the scope of the CWA's statutory agricultural stormwater exemption.

STATEMENT OF THE CASE

On April 2, 2009, Poultry Petitioners petitioned for review of three EPA letters interpreting the requirements of EPA's CAFO Rule. Poultry Petitioners also have sought review of the CAFO Rule as interpreted by the three EPA letters. Two of the challenged interpretive letters were issued by the Assistant Administrator for EPA's Office of Water, and sent to both a U.S. Senator and a U.S. Representative from Delaware, a State which falls within EPA Region 3. The third was issued by the Director of EPA Region 4's Water Protection Division. As further discussed below, all three letters set forth a new interpretation of EPA's CAFO Rule that redefines the Rule's legal requirements and liabilities in a manner that has far-reaching consequences for poultry farmers.

STATEMENT OF FACTS

A. The Poultry Industry and Poultry Growing Operations

Poultry Petitioners represent approximately 32,000 small farmers who raise broiler chickens in twenty-one States. 1/ Nearly two-thirds of U.S. broiler

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1/ In addition, USPOULTRY also represents a number of farmers who operate turkey and egg laying operations. For additional background information on the poultry industry and poultry growing operations, including pictures and diagrams of typical poultry grower operations, see Poultry Petitioners' August 5, 2005, Petition to the Environmental Protection Agency, Request for Exemption from EPCRA and CERCLA Release Reporting Requirements for Ammonia Emissions from Poultry Operations at 4-12 ("Poultry EPCRA/CERCLA Petition") (available at:

production takes place in the States covered by EPA Regions 3 and 4. 2/ These poultry growing operations, most of which are family-run farms, generate slim profit margins with little ability to absorb increased regulatory burdens and costs.

Farmers raise broiler chickens indoors in long, narrow barn-like structures called "growout houses" or "confinement houses." Each house totally confines some 20,000 to 25,000 birds, where a "dry litter" system is employed to minimize moisture and potential disease problems. 3/ The floor of the house is covered with bedding material—typically pine shavings, rice hulls, or sawdust—to absorb bird manure. The combination of bedding material and manure is called litter. Turkeys are raised in a similar environment, with an average of 8,000 to 12,000 turkeys per house at maturity.

Poultry litter is replaced periodically. Between flocks (about every six weeks), farmers usually remove the top inch or two of litter and apply a top dressing of new bedding material. Although the frequency may vary slightly, farmers typically replace all litter with fresh bedding once per year. Litter

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http://www.regulations.gov/fdmspublic/component/main?main=AdvancedDocket, document number EPA-HQ-SFUND-2005-0013-0002).

2/ EPA Region 3 includes Delaware, Maryland, Pennsylvania, Virginia, West Virginia, and the District of Columbia. EPA Region 4 includes Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee.

3/ This "dry litter" system differs fundamentally from both outdoor animal production and indoor wet manure systems often used for beef, swine, dairy, and egg layers because the operation is both "dry" and conducted indoors in confinement houses.

removed from a growout house typically is stored in a covered structure, such as a large shed, until it is time to spread the litter on agricultural fields for use as fertilizer. 4/

Whenever a bird dies during the growing period, the carcass is removed promptly. Outside the house, most carcasses are composted in a covered bin, while some are taken offsite for incineration or rendering.

A poultry farmer must carefully control the climate within the growout house. The health and growth rate of his flock depend on controlling temperature, moisture, and ammonia concentrations (produced by microbial decomposition of manure). This is accomplished with ventilation fans that remove warm, moist air and draw fresh air into the house.

In summary, poultry production is an indoor operation. Birds are raised in confinement houses; most farmers store litter in covered sheds; and most carcasses are composted in covered bins. Collectively, these structures are referred to as the "production area." 40 C.F.R. § 122.23(b)(8). Litter is taken outside when it is needed for fertilizer. The litter is spread over "land application

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4/ Turkey production operations are similar to broiler operations, with two main exceptions. First, young turkeys—poults or brooders—are raised in one house until about five weeks of age and then transferred to a growout house for finishing (until about 20 weeks for toms, 18 weeks for hens). Second, the rate of replacement litter is more frequent: the brooder house litter is replaced completely between flocks, and the growout house litter is replaced once per year on average. Laying hen operations that use dry litter systems generally store litter below the hens' cages and inside the confinement house.

areas" used for crop production, sometimes on the poultry farmer's land, but often on land farmed by others. That outdoor agricultural activity is separate from the indoor poultry production area.

B. The Clean Water Act

The Clean Water Act ("CWA")—the statute under which EPA promulgated the CAFO Rule—prohibits discharges of pollutants from point sources to navigable waters except when authorized by a permit issued under the National Pollutant Discharge Elimination System ("NPDES"). See 33 U.S.C. §§ 1311(a), 1342; see also Waterkeeper Alliance, Inc. v. EPA, 399 F.3d 486 (2d Cir. 2005). 5/ The CWA defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any *point source*. . . ." 33 U.S.C. § 1362(12)(A) (emphasis added). A "point source" is defined as "any discernible, confined and discrete conveyance, including . . . [a CAFO]. . . from which pollutants are or may be discharged." Id. § 1362(14).

Additionally, the CWA authorizes EPA to require facilities to obtain NPDES permits for stormwater discharges that fall into specific categories (e.g.,

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5/ In Waterkeeper, the Second Circuit addressed challenges by various environmental and farm groups to EPA's original CAFO Rule promulgated on February 12, 2003. See 68 Fed. Reg. 7176 (Feb. 12, 2003). EPA promulgated the CAFO Rule at issue here in response to the Waterkeeper decision.

discharges "associated with industrial activity"). See 33 U.S.C. § 1342(p). 6/ The CWA also authorizes EPA to require permits for any discharge of stormwater that "contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States." See 33 U.S.C. § 1342(p)(2)(E). However, Congress expressly excluded "agricultural stormwater discharges" from regulation as point sources under the CWA. See 33 U.S.C. § 1362(14). 7/

C. CAFO Rule Requirements for Poultry Farmers

EPA's CAFO Rule regulates water pollutant discharges from the two principal areas at animal feeding operations—the production area and the land application area. Only the production area—indeed, only the confinement house—is pertinent to the issues raised in EPA's letters.

The CAFO Rule provides that "there must be no discharge of manure, litter, or process wastewater pollutants into waters of the U.S. from the production area." 40 C.F.R. §§ 412.31(a), 412.43(a)(1). With respect to poultry CAFOs, the Rule defines "production area" to include: (1) the "animal confinement area," i.e.,

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6/ 40 C.F.R. § 122.26(b)(14) defines "storm water discharge associated with industrial activity" as "the discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant."

7/ Congress added the agricultural stormwater exemption at the same time it enacted the stormwater discharge provisions of the CWA. See Water Quality Act of 1987, Pub. L. No. 100-4 § 503, 101 Stat. 7 (1987).

"confinement houses"; and (2) the "manure storage area," i.e., "storage sheds" and "composting piles." Id. § 412.2(h). Each of these areas is covered by a roof, and manure is incorporated into the dry bedding within the enclosed areas.

The CAFO Rule imposes a new duty to apply for a permit on any poultry CAFO that proposes to discharge pollutants into waters of the United States. Id. § 122.23(d)(1). EPA has explained that while "propose to discharge" could be understood to mean "intend" or "plan" to discharge, under the CAFO Rule "[a] CAFO proposes to discharge if it is designed, constructed, operated, or maintained such that a discharge will occur." 73 Fed. Reg. 70424 (Nov. 20, 2008).

To put it simply, a poultry farmer whose operation "will" discharge has violated federal law if that farmer fails to submit a permit application. This violation is committed whether or not a discharge actually has occurred. While the CWA itself prohibits an actual discharge of pollutants without a permit and imposes penalties on any person who causes such an unpermitted discharge, 33 U.S.C. § 1311, Waterkeeper, 399 F.3d at 491, the CAFO Rule creates a new violation of law for the mere failure to apply for a permit if EPA or a State agency determines that a future discharge will occur.

If an actual discharge subsequently occurs from an unpermitted CAFO that "proposes to discharge," the Rule makes that farmer liable for two violations—one for the unpermitted discharge, and one for failing to apply for a permit. In

such circumstances, the new CAFO Rule places an evidentiary burden on the farmer to avoid a penalty for the second violation—failure to apply. 40 C.F.R. § 122.23(j)(2). As pertinent here, the farmer must demonstrate that the production area was not "designed, constructed, operated, or maintained that such a discharge will occur." See id. § 122.23(d) & (j)(2).

So long as the typical poultry farmer places all used litter in the storage shed and all carcasses in the compost bin, and provided the farmer does not haphazardly handle the litter by tracking or spilling it outdoors during movement between structures, there should be no discharge from the poultry CAFO's indoor production area, regardless of the amount of precipitation or the drainage configuration of the farm. 8/ Under EPA's interpretive letters, however, virtually all farmers will find it difficult, if not impossible, to meet EPA's burden because, as further discussed below, the three interpretive letters add a new category of discharge from a different portion of the farm—dust from confinement house ventilation fans washing from the farmyard during rainstorms.

D. EPA's Interpretive Letters

EPA's interpretive letters have a direct and immediate impact on the day-to-day business operations of poultry farmers. First, on January 16, 2009,

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8/ In its 2003 CAFO Rule preamble, EPA recognized that "[n]early all . . . poultry operations confine their animals under roof, avoiding the use of open animal confinement areas that generate large volumes of contaminated storm water runoff." 68 Fed. Reg. at 7209.

Benjamin H. Grumbles, Assistant Administrator for EPA's Office of Water, wrote letters to Senator Thomas R. Carper and Representative Michael N. Castle of Delaware, concerning EPA's interpretation of, and intention to enforce, the new EPA CAFO Rule. Thereafter, on March 4, 2009, James D. Giattina, Director of EPA's Region 4 Water Protection Division, wrote to the Corporate Environmental Manager for Perdue Farms, Inc., similarly asserting EPA's interpretation of, and intention to enforce, EPA's CAFO Rule. 9/

All three letters contain interpretive statements detailing the circumstances under which poultry farmers must obtain permit coverage because they "propose to discharge," as provided in the CAFO Rule. See Poultry Pet. Exhs. A at 2; B at 2; C at 1. EPA's letters also emphasize that poultry farmers who propose to discharge but lack a permit are exposing themselves to risk of citizen suits and/or federal/state enforcement actions. See Poultry Pet. Exhs. A at 2; B at 2; C at 2.

EPA's interpretive letters set forth the types of pollutant sources at poultry CAFOs, stating that "litter released through confinement house ventilation fans" would amount to a source of pollutants. See Poultry Pet. Exhs. A at 2; B at 2; C at 3. The letters then declare that "any point source discharge of stormwater that comes into contact with these materials and reaches waters of the United States is a violation of the CWA unless authorized by a [CWA] permit." See id. A at 2; B

9/ Relevant portions of the Region 4 letter contain language virtually identical to that used by Mr. Grumbles.

at 2; C at 3. This marks the first time EPA has interpreted the CWA or the CAFO Rule to mean that the statutory exclusion of "agricultural stormwater" from the definition of "point source," 33 U.S.C. § 1362(14), does not apply to the farmyard, which is neither the production area nor the land application area.

As noted above, the use of confinement house ventilation fans to maintain bird health is standard industry practice. Any manure released through ventilation fans would be in the form of litter dust particles, which invariably will be exposed to rainwater in the air or on the ground in the farmyard. As a practical matter, therefore, EPA's interpretive letters require every poultry farm to apply for a permit if it releases dust through its ventilation fans.

SUMMARY OF THE ARGUMENT

Because virtually every poultry operation releases dust through ventilation fans and cannot avoid doing so, EPA's interpretive letters, as a practical matter, require all poultry growers to apply for CWA permits or expose themselves to enforcement actions and economically crippling penalties. However, EPA has not properly subjected these new legal requirements to notice and comment rule making under the APA. Moreover, EPA's new legal requirements are arbitrary, capricious, an abuse of discretion, and contrary to law.

As further discussed below, Poultry Petitioners request that this Court hold unlawful and set aside EPA's interpretive letters for the following reasons: First,

EPA's three interpretive letters constitute legislative rules that EPA failed to properly subject to notice and comment rule making procedures. Second, EPA's letters unlawfully impose permit requirements for unregulated stormwater discharges in areas outside of the production area. Third, EPA's letters have unlawfully narrowed the scope of the CWA's statutory agricultural stormwater exemption.

ARGUMENT

STANDARD OF REVIEW

In reviewing challenges under the APA, courts must invalidate agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"; "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right"; or "without observance of procedure required by law." Texas Oil & Gas Ass'n v. EPA, 161 F.3d 923, 933 (5th Cir. 1998) (citing 5 U.S.C. § 706(2)(A), (C)-(D)). When an agency action creates new legal requirements and affects individual rights and obligations, courts must hold unlawful and set aside such actions when the agency fails to comply with proper notice and comment rule making procedures. Shell Offshore Inc. v. Babbit, 238 F.3d 622, 628 (5th Cir. 2001).

In determining whether an agency action violates the APA because it is arbitrary, capricious, an abuse of discretion, or contrary to law, the standard of

review is a deferential one, but "[t]he Court must make a searching and careful review. . . ." Texas Oil & Gas, 161 F.3d at 933 (internal quotations omitted). The Court must ask whether the agency has "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." Waterkeeper, 399 F.3d at 498 (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29, 42 (1983)). Importantly, "the Court must determine whether the agency action 'bears a rational relationship to the statutory purposes' and whether 'there is substantial evidence in the record to support it.'" Texas Oil & Gas, 161 F.3d at 934 (quoting Mercy Hosp. of Laredo v. Heckler, 777 F.2d 1028, 1031 (5th Cir. 1985)).

In considering whether an agency action violates a statute such as the Clean Water Act, the Court's inquiry is governed by the two-step analysis set forth in Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837, 842-43 (1984). Under Chevron step one, if the statute speaks directly "to the precise question at issue," the Court "must give effect to the unambiguously expressed intent of Congress." Chevron, 467 U.S. at 842-43. However, if the statute is silent or ambiguous with respect to the question at issue, then under Chevron step-two the Court must give deference to the agency's interpretation "if it is based on a permissible construction of the statute." Id. at 843. Courts will not defer to agency regulations that are "arbitrary,

capricious, or manifestly contrary to the statute." Wottlin v. Fleming, 136 F.3d 1032, 1035 (5th Cir. 1998) (quoting Chevron, 467 U.S. at 844).

I. EPA's Letters Constitute Legislative Rules That EPA Failed to Properly Subject to Notice and Comment Rule Making

Under the APA, a "rule" is defined as "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes . . . practices bearing on any of the foregoing." 5 U.S.C. § 551(4). The APA defines "rule making" as the "agency process for formulating, amending, or repealing a rule." 5 U.S.C. § 551(5). Federal agencies must provide public notice of proposed rule making and must allow interested parties to comment on proposed rules. 5 U.S.C. § 553(b)-(c). The APA exempts "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice" from the notice and comment requirements. 5 U.S.C. § 553(b)(A); 553(d)(2).

In distinguishing between substantive rules that require public notice and comment, and interpretative rules that are exempt from notice and comment, this Court has recognized that "regulations," "substantive rules," or "legislative rules," are those which "create law" and "*affect individual rights and obligations*." Shell Offshore, 238 F.3d at 628 (emphasis added). By contrast, "interpretive rules are statements as to what the administrative officer thinks the

statute or regulation means." Id.; see also Davidson v. Glickman, 169 F.3d 996, 999 (5th Cir. 1999).

Further, "[i]t is well-established that an agency may not escape the notice and comment requirements . . . by labeling a major substantive legal addition to a rule a mere interpretation." Appalachian Power Co. v. EPA, 208 F.3d 1015, 1024 (D.C. Cir. 2000). As this Court has recognized, in determining the category into which a challenged agency rule falls, "the label that the particular agency puts upon its given exercise of administrative power is not, for [the Court's] purposes, conclusive; rather it is what the agency does in fact." Phillips Petroleum Co. v. Johnson, 22 F.3d 616, 619 (5th Cir. 1994) (quoting Brown Express, Inc. v. United States, 607 F.2d 695, 700 (5th Cir. 1979)).

Here, EPA's letters, which require all poultry growers to apply for CWA permits for releases of dust through confinement house ventilation fans, constitute substantive or "legislative" rules because they create new legal requirements and "affect individual rights and obligations." Shell Offshore, 238 F.3d at 628. Because EPA failed to subject these rules to proper notice and comment rule making, this Court should hold unlawful and set aside the Agency's letters.

The substantive and legislative rules established in EPA's letters are similar to the rules at issue in a number of other cases in which this Court has held that various federal agencies improperly failed to subject new substantive rules to

notice and comment. For example, in Shell Offshore, 238 F.3d at 628, this Court addressed whether the Department of the Interior's (DOI) denial of an oil lessee's request to use a particular tariff rate, which created a DOI policy change affecting the tariff rates used by offshore oil and gas lessees, constituted a new substantive rule requiring notice and comment under the APA. This Court held that DOI's new policy, which required oil and gas lessees to petition the Federal Energy Regulatory Commission for jurisdiction rather than automatically approving tariffs filed with FERC, was a substantive rule requiring notice and comment because the "new agency policy represent[ed] a significant departure from long established and consistent practice that substantially affect[ed] the regulated industry. . . ." Id. at 630. Here, as in Shell Offshore, EPA's new policy—requiring permits for dust emitted through confinement house ventilation fans—constitutes a significant departure from long established practices related to the poultry industry.

Similarly, in Phillips Petroleum Co. v. Johnson, 22 F.3d 616 (5th Cir. 1994), at issue was whether an unpublished internal agency "procedure paper" changing the agency's procedure for determining oil and gas royalties constituted a substantive rule subject to notice and comment. This Court, in rejecting the agency's arguments that the procedure paper was an "interpretative rule" or a general statement of policy, held that the paper was a substantive rule that should

have been subjected to notice and comment. Id. at 621. Among other things, the Court noted that the procedure paper had "a substantial impact on those regulated in the industry" and created a "change in valuation technique [that] dramatically affects the royalty values of all oil and gas leases." Id. at 620-21. Here, the new permitting requirements set forth in EPA's letters similarly have a substantial impact on those in the regulated community, and dramatically affect poultry operations nationwide.

Likewise, in Davidson v. Glickman, 169 F.3d 996 (5th Cir. 1999), the plaintiff challenged a provision in a Farm Services Agency (FSA) handbook that prohibited farmers from revising farm acreage reports when the farmer would benefit from the revision. The plaintiff there asserted that the new provision constituted a new rule that was contrary to the agency's regulations and that should have been subjected to notice and comment rule making. Davidson, 169 F.3d at 998-99. This Court agreed, rejecting the FSA's claims that the provision was an interpretive rule, and holding that the provision should have undergone notice and comment rule making because it "imposes conditions on the revision of acreage reports beyond those required by the regulation, thereby qualifying as a legislative rule by 'affecting individual rights' and creating new law." Id. at 999. Here, EPA's letters similarly impose conditions on poultry farmers beyond those required by the CAFO Rule, namely a requirement that farmers apply for permits

when stormwater is expected to wash dust, emitted through confinement house ventilation fans, from the air or the farmyard.

In sum, if EPA intends to impose new and additional permitting requirements on the regulated community, it must do so through a legislative rule making and in accordance with the proper public notice and comment procedures under the APA. Here, EPA's imposition of new permitting requirements for poultry farmers without first undertaking notice and comment rule making violates the APA. 10/

10/ In briefing on its Motion for Partial Dismissal, EPA asserted that Poultry Petitioners' challenge to EPA's letters is untimely because the Agency previously stated in a footnote in a 2003 guidance manual that litter and feathers released through confinement house ventilation fans may require NPDES permits. See EPA's Reply to Poultry Petitioners' Opposition to EPA's Motion for Partial Dismissal at 3-4 (citing 2003 NPDES Permit Writers' Guidance Manual and Example Permit for Concentrated Animal Feeding Operations at 4-2 n.2.). EPA's argument lacks merit because, unlike the three letters at issue here which contain unequivocal and mandatory language imposing new legal requirements, EPA's 2003 Guidance Manual explicitly stated that it was not binding and did not impose new legal requirements. Specifically, the Guidance Manual stated:

> This is a guidance manual and example permit, not a regulation. It does not change or substitute for any legal requirements. While EPA has made every effort to ensure the accuracy of the discussion in this guidance, the obligations of the regulated community are determined by the relevant statutes, regulations, or other legally binding requirements. This guidance manual and example permit *is not a rule, is not legally enforceable, and does not confer legal rights or impose legal obligations* upon any member of the public, EPA, States, or any other agency. In the event of a conflict between the discussion in this document and any statute or regulation, this document would not be controlling. . . .

See Guidance Manual at 1-4 (emphasis added).

II. EPA's Letters Are Arbitrary, Capricious, An Abuse of Discretion, and Contrary to Law

A. EPA's Letters Unlawfully Impose Permit Requirements for Unregulated Stormwater Discharges From Areas Outside of the Production Area

EPA's interpretive letters are arbitrary, capricious, an abuse of discretion, and contrary to law because they impose a duty on farmers to seek permit coverage for "stormwater discharges" containing dust emitted from confinement house ventilation fans—"discharges" that are not currently subject to regulation under the CWA. The fundamental problem with EPA's letters and the new regulatory requirements they impose is that neither the CWA nor EPA's formally published regulations impose a duty on farmers to apply for permits for stormwater discharges from areas outside of the CAFO production area.

Section 402(p) of the CWA and 40 C.F.R. § 122.26 set forth the narrow parameters under which EPA is authorized to regulate stormwater discharges. In particular, Section 122.26 defines "storm water discharge associated with industrial activity" as "the discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant." 40 C.F.R. § 122.26(b)(14). The regulation further states that "[t]he term does not include

discharges from facilities or activities excluded from the NPDES program under [the regulation]." Id.

One of the activities that is excluded from the NPDES permitting program is "agricultural storm water discharge[s]." 40 C.F.R. § 122.23(e). Section 122.26(b)(14), therefore, implicitly acknowledges that "agricultural storm water discharge[s]" do not constitute storm water discharges associated with industrial activity. Additionally, the Second Circuit in Waterkeeper, rejected the environmental petitioners' contention that CAFOs must be viewed as industrial, not agricultural. See Waterkeeper, 399 F.3d at 509. Thus, treating CAFOs as agricultural in character necessarily implies that agricultural operations do not fit within EPA's definition of what constitutes a storm water discharge associated with industrial activity.

Viewing EPA's stormwater regulations in conjunction with EPA's CAFO regulations at 40 C.F.R. § 122.23, which generally describe the areas of a CAFO that are subject to regulation, it is clear that neither Congress nor EPA have specifically designated dust emitted from ventilation fans for regulation as stormwater discharges under the CWA. Indeed, EPA's primary focus in setting forth NPDES permitting requirements for CAFOs is on waste water generated by animal *production* (i.e., the process wastewater, manure, and litter generated by

the confined animals), not on dust from ventilation fans that is carried away by rainwater. See 40 C.F.R. § 122.23.

EPA's letters, however, take the position that rainwater containing dust released from ventilation fans constitutes a discharge of pollutants within the meaning of § 122.23, and that as a result, farmers have a duty to apply for permits when such materials fall on undesignated areas and are subsequently carried into waters of the United States.

EPA's position appears to be based on an overly broad interpretation of the definition of "process wastewater," 40 C.F.R. § 122.23(b)(7), which the regulations define as follows:

> *Process wastewater* means water 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). Thus, under EPA's overly broad reading, rainwater falling on any area where CAFO dust may have been deposited by the wind or other means, no matter how far from the perimeter of the confinement house production area, would constitute a "discharge of pollutants" because that rainwater would come into contact with the dust and thus constitute "process wastewater" even though it has not been used in the operation of the CAFO.

While the regulations contemplate that "process wastewater" could include, for example, spillage or overflow from poultry watering systems, or water that comes into contact with raw materials including manure or litter, nothing in the definition contemplates that rainwater falling on dust in the farmyard outside of the confinement house constitutes "process wastewater."

EPA's position also appears to be based on an overly broad interpretation of the definition of "production area," 40 C.F.R. § 122.23(b)(8), which the regulations define as follows:

> *Production area* means that part of an AFO that includes the animal confinement area, the manure storage area, the raw materials storage area, and the waste containment areas. . . .

40 C.F.R. § 122.23(b)(8). Of the four specific areas listed in the definition of the production area, the animal confinement area is the only one that could arguably be the subject of EPA's concerns with respect to dust emitted from ventilation fans. The regulations further describe the animal confinement area as including, but not limited to:

> . . . open lots, housed lots, feedlots, confinement houses, stall barns, free stall barns, milkrooms, milking centers, cowyards, barnyards, medication pens, walkers, animal walkways, and stables.

40 C.F.R. § 122.23(b)(8). This language clearly contemplates areas where animals are present, and does not include areas, such as a farmer's yard, that are near, but outside of, the confinement house production area.

EPA has never designated these ancillary areas near, but outside of, the confinement house production area for regulation under CWA § 402(p) and 40 C.F.R. § 122.26(a). Moreover, EPA has never assessed in its CAFO rule makings the significant costs associated with capturing stormwater from all areas where CAFO-related dust may be deposited by wind or other means.

In sum, EPA's interpretive letters unlawfully subject farmers to new permit requirements related to air emissions of dust that are not regulated under the CWA or EPA's regulations. Accordingly, this Court should hold unlawful and set aside EPA's letters.

B. EPA's Letters Unlawfully Narrow the Scope of the CWA's Statutory Agricultural Stormwater Exemption

The CWA establishes a specific statutory exemption from NPDES permitting requirements for points sources where the discharge in question is an "agricultural stormwater discharge." 33 U.S.C. § 1362(14). Through prior iterations of the CAFO Rule, EPA has defined and narrowed the statutory exemption for one of the areas at CAFOs—the land application area. However, merely because EPA has interpreted the statutory exemption by prescribing the conditions under which it should apply to one regulated area—CAFO land application areas—has no bearing on whether the statutory exemption applies to other areas of a farm, such as areas near, but outside of, the production area (i.e., the farmyard).

EPA's regulations classify an agricultural stormwater discharge as any "precipitation-related discharge of manure, litter or process wastewater from land areas under the control of a CAFO," where the "manure, litter or process wastewater has been applied in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization." Waterkeeper, 399 F.3d at 507 (quoting 40 C.F.R. § 122.23(e)). The CAFO Rule does not interpret or narrow the statutory agricultural stormwater exemption with respect to any other areas at a CAFO. By imposing new permitting requirements for rainwater containing dust emitted from ventilation fans, EPA's letters have, in practice, unlawfully narrowed the scope of the statutory agricultural stormwater exemption by imposing permit requirements for rainwater carrying dust "emissions" that fall within that exemption.

In Waterkeeper, the precursor to the present case, the Second Circuit addressed a challenge brought by environmental petitioners to EPA's regulatory exemption for agricultural stormwater discharges from land application areas under the control of a CAFO. The Second Circuit initially observed that the CWA provision defining point sources and exempting agricultural stormwater discharges from regulation was "self-evidently ambiguous as to whether CAFO discharges can ever constitute agricultural stormwater." Waterkeeper, 399 F.3d at 507. As a result, the Second Circuit applied the second step under Chevron, and

asked whether EPA's regulatory exemption for stormwater discharges from land application areas was "grounded in a 'permissible construction' of the [CWA]." Waterkeeper, 399 F.3d at 507 (quoting Chevron, 467 U.S. at 843).

The Second Circuit, after examining both the legislative purpose of the agricultural stormwater exemption and Second Circuit precedent, ultimately held that EPA's regulatory exemption for agricultural stormwater discharges from land application areas was "premised on a permissible construction of the Act." Waterkeeper, 399 F.3d at 507-09. As part of its regulation, EPA placed conditions on the exemption that would ensure that farmers would not cause a discharge by overapplying manure to the land. Importantly, the Second Circuit observed that "it is reasonable to conclude that when Congress added the agricultural stormwater exemption to the [CWA], it was affirming the impropriety of imposing, on 'any person,' 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." Id. at 507.

In other words, the Second Circuit in Waterkeeper made clear that it is reasonable to conclude that Congress intended to exempt farmers from liability where the weather is responsible for discharging pollutants into waters of the United States. Dust from ventilation fans that falls to the ground is "discharged" to navigable waters only after the weather—namely rainwater—washes it away.

Thus, requiring NPDES permits for dust emissions from ventilation fans is contrary to the Second Circuit's reasoning in Waterkeeper.

The Second Circuit also emphasized that CAFOs are inherently "agricultural in character," and should not be viewed as industrial. Id. at 509. Specifically, the Second Circuit observed that agriculture includes "work of cultivating the soil, producing crops, and raising livestock." Id. (quoting Webster's New World Dictionary of American English 26 (3rd College Ed. 1988)). Here, raising livestock, such as poultry, clearly constitutes an *agricultural* endeavor, and any "discharges" of rainwater containing dust emitted from ventilation fans occur because of the weather and not because of any negligence or malfeasance. Thus, the requirement in EPA's letters that poultry farmers obtain NPDES permits for dust emissions runs counter to both the purpose of the statutory exemption and to the Second Circuit's ruling in Waterkeeper.

Moreover, it is arbitrary and capricious for EPA to take the position that no amount of dust, which is an inherent part of poultry growing operations and the result of normal ventilation practices, may fall within the statutory exemption for agricultural stormwater discharges. EPA's position is particularly unreasonable in light of EPA's recognition that the statutory exemption applies to land application areas where farmers are allowed to apply, without a permit, quantities

of manure, litter or process wastewaster that exceed any quantities of dust expected to be emitted from poultry houses. At a minimum, EPA should be required to explain this unreasonable disparity through a proper notice and comment rule making process.

In sum, EPA's interpretive letters have unlawfully narrowed the scope of the CWA's statutory agricultural stormwater exemption by requiring poultry farms to obtain permits for dust emissions that are an inherent part of poultry agricultural operations. Moreover, EPA's interpretive letters impose a permitting requirement that represents an unreasonable and impermissible interpretation of the statutory exemption, and that is arbitrary, capricious, and contrary to the CWA. See Chevron, 467 U.S. at 843-44.

CONCLUSION

For all of the foregoing reasons, Poultry Petitioners respectfully request that this Court hold unlawful and set aside the three EPA interpretive letters at issue in this matter.

Respectfully submitted,

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Dated: May 7, 2010

CERTIFICATE OF SERVICE

This is to certify that on May 7, 2010, a true and correct copy of the foregoing Final Brief of Petitioners was filed with the Clerk, U.S. Court of Appeals for the Fifth Circuit, using the Court's CM/ECF system, which will send notification of such filing to the following registered users:

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 5th Cir. R. 32.3 because this brief contains 6,457 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and 5th Cir. R. 32.1, and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

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