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**Hogtied to Precedent: The Need for a Statutory Definition of  
“Agricultural Stormwater Discharge” in the Clean Water Act**

*Alt v. U.S. E.P.A., 2013 WL 5744778*

Allison Tungate

I. INTRODUCTION

The issue of water pollution has been problematic since the time of our ancestors, and the increase in human population has exacerbated the problem by opening the door to more bacteria and disease.<sup>1</sup> Water pollution has plagued the United States since the 1800s. Despite gradual improvements in sanitary living conditions,<sup>2</sup> it was not until 1948 that Congress passed the Federal Water Pollution Control Act (“FWPCA”).<sup>3</sup> Due to various issues with the FWPCA,<sup>4</sup> in 1972 Congress enacted the Clean Water Act (“CWA”), which significantly broadened and restructured existing water regulations.<sup>5</sup> Congress passed the CWA with the objective of restoring and maintaining the “chemical, physical and biological integrity of the Nation’s waters.”<sup>6</sup>

Generally, the CWA has been lauded as a success because the National Pollutant Discharge Elimination System (“NPDES”)<sup>7</sup> has dramatically reduced the amount of pollution from point sources, and in turn, has significantly improved the Nation’s water quality.<sup>8</sup> Notwithstanding this

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<sup>1</sup> *Nonpoint Source Pollution: A Brief History of Pollution*, NOAA Ocean Serv. Educ. (last modified March 25, 2008), <http://oceanservice.noaa.gov/education/kits/pollution/02history.html>.

<sup>2</sup> *Id.*

<sup>3</sup> *See infra* note 41.

<sup>4</sup> *See infra* note 41.

<sup>5</sup> *Summary of the Clean Water Act*, EPA (last updated July 26, 2013), <http://www2.epa.gov/laws-regulations/summary-clean-water-act>

<sup>6</sup> 33 U.S.C. § 1251(a) (2006).

<sup>7</sup> *Overview of the National Pollutant Discharge Elimination System*, EPA (last modified Mar. 12, 2009), <http://water.epa.gov/polwaste/npdes/>.

<sup>8</sup> *Id.*

accomplishment, many sources of water pollution remain outside the purview of the CWA because very little attention has been given to nonpoint sources—particularly “runoff from privately owned farmlands and its cumulative effects on water quality and aquatic health.”<sup>9</sup> While the CWA vests the Environmental Protection Agency (“EPA”) with the responsibility of regulating “the discharge of any pollutant”<sup>10</sup> via the issuance of “pollution-limiting, technology-based permits,”<sup>11</sup> the CWA unambiguously exempts all “return flows from irrigated agriculture”<sup>12</sup> and agricultural stormwater discharges from the NPDES permit program.<sup>13</sup> Instead, the burden is delegated to the states to establish Best Management Practices (“BMPs”) in order to control nonpoint sources, such as agriculture.<sup>14</sup> However, the CWA merely directs—not requires—states to establish BMPs.<sup>15</sup> The EPA has identified agriculture operations as being responsible for a majority of nonpoint source pollution in the United States, so these exemptions and lack of federal oversight are significant.<sup>16</sup>

The following comment explores *Alt v. U.S. E.P.A.*,<sup>17</sup> in which the United States District Court for the Northern District of West Virginia addressed whether precipitation-caused runoff of litter and manure from a farmyard was agricultural stormwater discharge and thus exempt from the CWA’s permit requirement. The main issue was whether the litter originating from a concentrated animal feeding operation (“CAFO”), which is considered a point source, requires an NPDES permit, regardless of whether the runoff was caused by precipitation. By correctly holding that

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<sup>9</sup> Lara D. Guercio, *The Struggle Between Man and Nature-Agriculture, Nonpoint Source Pollution, and Clean Water: How to Implement the State of Vermont's Phosphorous Tmdl Within the Lake Champlain Basin*, 12 VT. J. ENVTL. L. 455, 457 (2011).

<sup>10</sup> 33 U.S.C. § 1342(a)(1) (2006).

<sup>11</sup> Jan G. Laitos & Heidi Ruckriegle, *The Clean Water Act and the Challenge of Agricultural Pollution*, 37 VT. L. REV. 1033 (2013).

<sup>12</sup> 33 U.S.C. § 1342(l)(1) (2006).

<sup>13</sup> See *infra* note 50.

<sup>14</sup> Laitos & Ruckriegle, *supra* note 11, at 1034.

<sup>15</sup> *Id.*; see 33 U.S.C. § 1329(a)(1)(C)-(D).

<sup>16</sup> *Nonpoint Source Pollution: Agricultural Operations*, NOAA Ocean Serv. Educ. (last revised Mar. 25, 2008),

<http://oceanservice.noaa.gov/education/kits/pollution/06operations.html>.

<sup>17</sup> 979 F. Supp. 2d 701 (N.D. W. Va. 2013).

## HOGTIED TO PRECEDENT

based on the plain language of the CWA, the precipitation-caused run-off of litter and manure from Petitioner's CAFO was agricultural stormwater discharge and thus exempt from the NPDES permit program, the court has maintained consistency in how the term "agricultural stormwater discharge" is applied to CAFOs. In doing so, the Court has thus taken an appropriate step in providing clarity for an ambiguous area of the CWA.

## II. FACTS & HOLDING

Plaintiff Lois Alt ("Plaintiff") and Plaintiff Intervenors American Farm Bureau and West Virginia Farm Bureau ("Plaintiff Intervenors") sought a declaratory judgment and other relief after the EPA found Plaintiff in violation of the CWA and EPA's implementing regulations.<sup>18</sup> Subsequently, the Potomac Riverkeeper, West Virginia Coalition, Waterkeeper Alliance, Center for Food Safety, and Food & Water Watch ("Defendant Intervenors") intervened as defendants.

Plaintiff operated Eight is Enough Farm, a CAFO in Old Fields, West Virginia.<sup>19</sup> The CAFO consisted of eight poultry confinement houses, which were equipped with ventilation fans, a litter storage shed, compost shed, and feed storage bins. Plaintiff's CAFO activity, which consisted of a poultry growing operation and the storage of manure, litter, and raw materials, occurred under one roof.<sup>20</sup>

Plaintiff implemented management practices and procedures to minimize the amount of manure and litter exposed to precipitation in her farmyard.<sup>21</sup> Specifically, Plaintiff took the following precautionary measures: raised poultry in confined poultry houses; stored manure, litter, and composted mortalities in covered sheds; stored feed in covered bins; and cleaned ventilation fans and shutters in such a way as to prevent the collection of dust from being deposited in the farmyard.<sup>22</sup> During transfer operations, which involved loading trucks to haul away litter or moving litter

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<sup>18</sup> *Id.* at 703.

<sup>19</sup> *Id.* at 704.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 704-705.

out of the confinement houses to the storage shed, Plaintiff exercised reasonable care in cleaning up any manure or litter that may have spilled from the trucks.<sup>23</sup> Plaintiff conducted litter transfers and loading operations only during dry weather, and scraped and swept the loading areas at the confinement houses and storage sheds both during and after the litter transfers.<sup>24</sup>

Despite these precautionary measures taken by Plaintiff, some particles of manure and litter from the confinement houses were tracked or spilled onto Plaintiff's farmland.<sup>25</sup> Additionally, the ventilation fans from the confinement houses blew dust composed of manure, litter and dander, as well as feathers, onto the farmyard.<sup>26</sup> When fallen precipitation made contact with the particles, dust, and feathers from the confinement houses, runoff containing the materials flowed across a neighboring green pasture and into the Mudlick Run.<sup>27</sup> Plaintiff did not have a permit pursuant to the CWA or corresponding West Virginia state law authorizing discharges into the Mudlick Run.<sup>28</sup>

Consequently, on November 14, 2011, the EPA asserted its regulatory authority over stormwater runoff stemming from Plaintiff's farmyard.<sup>29</sup> The EPA issued a "Findings of Violation and Order for Compliance," finding Plaintiff's poultry production is a CAFO that "has discharged pollutants from man-made ditches via sheet flow to Mudlick Run during rain events generating runoff without having obtained a National Pollutant Discharge Elimination System (NPDES) permit."<sup>30</sup> The EPA concluded that Plaintiff was in violation of the CWA and EPA's implementing regulations.<sup>31</sup> As a result, EPA informed Plaintiff that the organization could bring both a civil

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<sup>23</sup> *Id.* at 705.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 704.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 705.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

and criminal action against her for her illegal discharges and ordered Plaintiff to apply for a permit.<sup>32</sup>

In response, Plaintiff and Plaintiff Intervenors moved for summary judgment, arguing any precipitation related discharges containing manure and litter emanating from Plaintiff's farmyard are exempt from the CWA since they qualified as agricultural stormwater discharge.<sup>33</sup> The EPA argued the Court lacked jurisdiction since the issue had been addressed by the EPA in its 2003 CAFO Rule, which was affirmed in *Waterkeeper Alliance, Inc. v. USEPA*.<sup>34</sup> The EPA also argued the agricultural stormwater exemption applies only to discharges from land application areas under the control of the CAFO.<sup>35</sup>

The District Court held that because Plaintiff and Plaintiff Intervenors did not challenge the 2003 CAFO Rules pertaining to discharges from land application areas, the action was not barred by *Waterkeeper*<sup>36</sup> or 33 U.S.C. section 1369(b).<sup>37</sup> The Court applied the "arbitrary and capricious" standard promulgated by the Administrative Procedure Act, and held the runoff from Plaintiff's CAFO operation was exempt from regulation by the EPA because it was agricultural stormwater discharge.<sup>38</sup> Accordingly, when there is precipitation-caused runoff of litter and manure from a farmyard, such runoff is considered agricultural stormwater discharge and is thus exempted from the CWA's permit requirement.<sup>39</sup>

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*; *see infra* note 36.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*; *see also, Waterkeeper Alliance, Inc. v. U.S. E.P.A.*, 399 F.3d 486 (2nd Cir. 2005).

<sup>37</sup> Plaintiff and Plaintiff Intervenors did not challenge the validity of the regulations as written, so § 1369(b) was not a jurisdictional bar to the suit; *see also, Alt v. U.S. E.P.A.*, 979 F. Supp. 2d at 705.

<sup>38</sup> *Alt*, 970 F. Supp. 2d at 706, 715; *see 5 U.S.C. § 706* (1966).

<sup>39</sup> *Alt*, 979 F. Supp. 2d at 715.

III. LEGAL BACKGROUND

A. *History of CWA*

In 1948, Congress enacted the FWPCA, the primary predecessor of the CWA, in an effort to combat water pollution caused by increased post-World War II industrial activity and “lower expenditures on wastewater treatment.”<sup>40</sup> Recognizing water pollution control was primarily the responsibility of state and local governments, Congress assigned the states the task of developing water quality standards and implementation plans.<sup>41</sup> Additionally, the FWPCA encouraged states to enact uniform laws and interstate compacts.<sup>42</sup> The federal government was given the secondary role of bolstering local pollution control programs by funding research on water pollution and providing loans and federal grants to help the financing of treatment facilities and water pollution control programs.<sup>43</sup>

Although a federal statute, the FWPCA gave the federal government limited jurisdiction and any enforcement that was created was “awkward and time consuming.”<sup>44</sup> The FWPCA was fraught with enforcement issues, and so in 1972, Congress amended the Act to relieve the states of the requirement of instituting their own individual water pollution discharge regulations.<sup>45</sup> Instead, Congress established the federally mandated National Pollutant

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<sup>40</sup> William L. Andreen, *The Evolution of Water Pollution Control in the United States-State, Local, and Federal Efforts, 1789-1972: Part II*, 22 STAN. ENVTL. L.J. 215, 235 (2003).

<sup>41</sup> Kenneth M. Murchison, *Learning from More Than Five-and-A-Half Decades of Federal Water Pollution Control Legislation: Twenty Lessons for the Future*, 32 B.C. ENVTL. AFF. L. REV. 527, 531-32 (2005).

<sup>42</sup> *Id.* at 530-31.

<sup>43</sup> *Id.* at 530.

<sup>44</sup> “Federal enforcement power was . . . limited . . . to cases where interstate pollution actually endangered the health or welfare of persons in a neighboring state. Polluters were immune to federal action as long as they only endangered local residents or refrained from activities that actually threatened public health . . . . The government could only seek an injunction after completing a lengthy, three-step process.” *Andreen, supra* note 40, at 238; *see Murchison, supra* note 41, at 531 (“ . . . [T]he federal government could proceed only with the approval of state officials in the state where the discharge originated and after a complicated series of notices, warnings, hearings, and conference recommendations.”).

<sup>45</sup> *Nat'l Pork Producers Council v. U.S. E.P.A.*, 635 F.3d 738, 742 (5th Cir. 2011).

Discharge Elimination System (“NPDES”)<sup>46</sup> permit program, which effectively transformed the FWCPA into what is today known as the “Clean Water Act.”<sup>47</sup> As the heart and soul of the CWA, the NPDES permit program does not focus on the effect of the discharge but instead concentrates on non-compliance with the specific limits in the permits.<sup>48</sup> In doing so, the permit program aims to improve the identification and enforcement of pollution requirements.<sup>49</sup>

Substantively, the NPDES permit program authorizes the discharge of pollutants,<sup>50</sup> which would otherwise be illegal under section 301(a)<sup>51</sup> of the CWA.<sup>52</sup> Applying exclusively to the “discharge of pollutants,”<sup>53</sup> the NPDES permit program requires any facility that adds new pollutants from its industrial process through a point source into a stream or lake to have a permit,<sup>54</sup> which is issued by the EPA or one of the forty-six states authorized to do so.<sup>55</sup> A point source is defined as “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel,

<sup>46</sup> 33 U.S.C. § 1342 (2014).

<sup>47</sup> *Nat'l Pork Producers Council*, 635 F.3d at 742-43; “Clean Water Act” was not formally acknowledged until the amendments of 1977. *Murchison*, *supra* note 41, at 536.

<sup>48</sup> See CWA § 309, 33 U.S.C. § 1319 (establishing administrative, civil and criminal penalties for violations of substantive restrictions and limitations provided in an NPDES permit).

<sup>49</sup> Jeffrey M. Gaba, *Generally Illegal: NPDES General Permits Under the Clean Water Act*, 31 HARV. ENVTL. L. REV. 409, 413 (2007).

<sup>50</sup> “The term ‘discharge of a pollutant’ and the term ‘discharge of pollutants’ each means . . . any addition of any pollutant to navigable waters from any point source, . . . any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or floating craft.” CWA § 502(12), 33 U.S.C. § 1362(12) (2014).

<sup>51</sup> The discharge of a pollutant is unlawful unless in compliance with various sections of the Act. See CWA § 301(a), 33 U.S.C. § 1311(a)(1).

<sup>52</sup> Gaba, *supra* note 49, at 413.

<sup>53</sup> CWA § 301(a), 33 U.S.C. § 1311(a).

<sup>54</sup> Gaba, *supra* note 49, at 415.

<sup>55</sup> These 46 states are authorized to administer permits for the discharge of pollutants into navigable waters instead of the NPDES program. If authorized to oversee its own program, a state will become its own NPDES permit-issuing agency, as opposed to the EPA. However, the EPA still retains authority to oversee the issuance of such permits. The EPA also preserves the right to veto any issuance of a permit as well as enforce any violation of the CWA or of a state-issued discharge permit. *Nat'l Pork Producers Council*, 635 F.3d at 743; see also, 33 U.S.C. § 1342(c), (d), and (i) (2014).



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.”<sup>56</sup> Facilities with a permit may only discharge pollutants pursuant to several substantive restrictions.<sup>57</sup>

*B. Agricultural Stormwater Discharge Exemption*

In response to the NPDES permit program, the EPA promulgated regulations exempting certain classes of point sources from the permit requirements.<sup>58</sup> These exemptions included all CAFOs below a certain size; all non-feedlot, non-irrigation agricultural point sources; and separate storm sewers containing only storm runoff uncontaminated by an industrial or commercial activity.<sup>59</sup> The EPA rationalized, “In order to conserve the [EPA’s] enforcement resources for more significant point sources of pollution, it [was] necessary to exclude these smaller sources of pollutant discharges from the permit program.”<sup>60</sup> In *Natural Resources Def. Council v. Train*,<sup>61</sup> the District of Columbia Circuit Court was faced with the issue of whether these promulgated exemptions were within the purview of the EPA Administrator. Based on the definition of “point source” at the time,<sup>62</sup> the court held that “the EPA Administrator lacked the authority to exempt point

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<sup>56</sup> CWA § 502(14), 33 U.S.C. § 1362(14) (2014); *see supra* note 23.

<sup>57</sup> Effluent limitations outlined in the NPDES permit stipulate the amount of specific pollutants that may be discharged from a point source. All point sources must meet technology-based limitations, which are determined by what is considered technologically and economically achievable based on existing technology. Point sources are also subject to water quality based effluent limitations, which are implemented to ensure attainment of state water quality standards. Gaba, *supra* note 49, at 416.

<sup>58</sup> *Natural Res. Def. Council, Inc. v. Costle*, 568 F.2d 1369, 1372 (D.C. Cir. 1977).

<sup>59</sup> *Id.*; *see*, 40 C.F.R. § 125.4 (1975) (listing of all the exempted point sources).

<sup>60</sup> *Costle*, 568 F.2d at 1372-73.

<sup>61</sup> 396 F. Supp. 1393 (D.D.C. 1975).

<sup>62</sup> Originally, the term “point source” was defined as “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.” *Costle*, 568 F.2d at 1372; *see also* 33 U.S.C. § 1362 (2014).

source discharging pollutants from regulation,” thus voiding the regulations.<sup>63</sup>

In response to *Natural Resources Def. Council v. Train*, in 1987 Congress amended section 1362(14) by adding an exemption to the statutory definition of a point source.<sup>64</sup> Supplementing the original definition of “point source,” the new definition clarified that the “term does not include agricultural stormwater discharges and return flows from irrigated agriculture.”<sup>65</sup> Despite the addition of the exemption, Congress did not explicitly define “agricultural stormwater discharge.”<sup>66</sup>

In subsequent years the term was interpreted according to its plain meaning. For instance, in *Concerned Area Residents for the Environment v. Southview Farm*,<sup>67</sup> the Second Circuit determined the “agricultural stormwater discharge” exemption applied to any discharges that were the result of precipitation, and nothing in the language of the statute indicated the exemption only applied to stormwater that was discharged where it would naturally flow.<sup>68</sup> Similarly, in *Fishermen Against the Destruction of the Environment v. Closter Farms, Inc.*, the Eleventh Circuit determined regardless of whether stormwater was being pumped into a lake or flowing naturally, the exemption still applied.<sup>69</sup>

### C. CAFOs’ Regulatory Background

At roughly the same time the EPA was establishing the NPDES permit program generally and its exemptions, the agency adopted the first set

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<sup>63</sup> *Alt, supra* note 17, at 707.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*; “The term ‘point source’ means 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.*; *see also* 33 U.S.C. § 1362(14) (2014).

<sup>66</sup> *Alt, supra* note 17, at 707.

<sup>67</sup> 34 F.3d 114, 115 (2d Cir. 1994).

<sup>68</sup> *Id.* at 120-21.

<sup>69</sup> 300 F.3d 1294, 1297 (11th Cir. 2002).

of NPDES regulations addressing CAFOs in 1976.<sup>70</sup> Animal feeding operations are facilities that house, raise, and feed animals until they are ready for transport to processing facilities that prepare meat for shipment and consumption.<sup>71</sup> Because CAFOs house such a large population of animals, this collectively leads to the production of millions of tons of animal manure every year,<sup>72</sup> which in turn pose major risks to the environment and public health.<sup>73</sup> Animal waste pollutes navigable waters by adding “excess nutrients, organic matter, and pathogens,”<sup>74</sup> which poses serious health risks to humans.<sup>75</sup>

Because of the substantial risk of water pollution, the EPA’s 1976 regulations required that CAFOs wanting to permissibly emit discharges would have to obtain a permit largely based on the number of animals housed at the facility.<sup>76</sup> Failure to obtain a permit for a CAFO would result in civil or criminal liability.<sup>77</sup>

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<sup>70</sup> Nat’l Pork Producers Council v. U.S. E.P.A., 635 F.3d 738, 742-43 (5th Cir. 2011).

<sup>71</sup> Sara R. Reichenauer, Note, *Issuing Violations Without Tangible Evidence: Computer Modeling for Clean Water Act Enforcement*, 95 Iowa L. Rev. 1011, 1019 (2010).

<sup>72</sup> *Id.* at 1019-20.

<sup>73</sup> *Id.* at 1020; see EPA Preamble to the Final Rule, National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations, 68 Fed. Reg. 7176, 7179 (estimating that AFO facilities create approximately five hundred million tons of manure annually, which the EPA estimates to be more than three times more than humans generate in the United States).

<sup>74</sup> U.S. Gen. Accounting Office, *Animal Agriculture: Information on Waste Management and Water Quality Issues 1* (1995), <http://www.gao.gov/archive/1995/rc95200b.pdf>; see National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines and Standards for Concentrated Animal Feeding Operations, 66 Fed. Reg. 2960, 2976-79 (proposed Jan. 12, 2001) (detailing the pollutants associated with CAFO waste).

<sup>75</sup> Charles Duhigg, *Health Ills Abound as Farm Runoff Fouls Wells*, N.Y. Times, Sept. 17, 2009, <http://www.nytimes.com/2009/09/18/us/18dairy.html?scp=1&sq=clean%20water%20act%20agriculture&st=cse> (noting that animal waste pollution can cause human ailments such as diarrhea).

<sup>76</sup> *Nat’l Pork Producers Council*, 635 F.3d at 743-44 (specifying that “large” CAFOs—those with 1,000 animals or more—were required to have an NPDES permit to discharge pollutants; “medium” CAFOs—those with 300 to 1,000 animals—were required to have a permit if they emitted a certain types of discharges; and most “small” CAFOs—300 animals

1. *The 2003 Rule & Waterkeeper*

After the promulgation of the 1976 regulations, which clarified the type of operations that would be considered CAFOs, the NPDES requirements, and the effluent limitation guidelines, the EPA was sued in 1989 for “failing to publish a plan to revise existing effluent limitations for the industry pursuant [to the CWA].”<sup>78</sup> The court in *Natural Resource Defense Council v. Reilly*<sup>79</sup> mandated that the EPA update and enforce its CAFO regulations in order to comply with section 1314(m) of the CWA.<sup>80</sup> As a result of the litigation, on January 21, 2001, the EPA “proposed to ‘revise and update’ the first set of CAFO regulations.”<sup>81</sup> The proposed revisions sought to remedy inadequate compliance with already-existing policy and adapt the new rules to reflect changes in the animal production industries.<sup>82</sup> Specifically, the EPA aimed to modify the regulations to reflect the “trend toward fewer but larger operations,” which consequently resulted in “large-scale discharges from the facilities” and “continued run-off.”<sup>83</sup>

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or less—typically were not required to have a permit, but possibly would have to if the small CAFO emitted certain discharges after an onsite inspection and notice); *see also* 41 Fed. Reg. 11458 (Mar. 18, 1976).

<sup>77</sup> *Nat’l Pork Producers Council*, 635 F.3d at 744.

<sup>78</sup> *Waterkeeper Alliance, Inc. v. U.S. E.P.A.*, 399 F.3d 486, 495 (2d Cir. 2005); *see* 33 U.S.C. § 1314(m) (1987) (establishing that the EPA Administrator must publish in the Federal Register a plan outlining the schedule for the annual review and revision of promulgated effluent guidelines); *see also* Consent Decree, as amended, *NRDC v. Reilly*, *modified sub nom.*, *NRDC v. Whitman*, No. 89-2980 (D.D.C. 1/31/1992) (resolving the suit by “a consent decree in which the EPA agreed to propose new effluent limitation guidelines for the swine, poultry, beef and dairy subcategories of CAFOs.”).

<sup>79</sup> 983 F.2d 259 (D.C. Cir. 1993).

<sup>80</sup> *Waterkeeper Alliance, Inc.*, 399 F.3d at 494; *see* 66 Fed. Reg. 2960, 2976-79 (proposed Jan. 12, 2001); *see also* Preamble to the Final Rule at 68 Fed. Reg. 7181.

<sup>81</sup> *Waterkeeper Alliance, Inc.*, 399 F.3d at 494.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* (citing National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines and Standards for Concentrated Animal Feeding Operations, 66 Fed. Reg. 2960, 2972 (proposed Jan. 12, 2001)).

After the Notice and Comment period,<sup>84</sup> the EPA promulgated its Final CAFO Rule (“2003 Rule”) on February 12, 2003.<sup>85</sup> The 2003 Rule reflected the revised permitting requirements and effluent limitations of CAFOs by broadening the number of animal feeding operations subject to the NPDES permit program as CAFOs.<sup>86</sup> The 2003 Rule required all CAFOs to apply for an NPDES requirement, regardless of whether or not they discharged.<sup>87</sup> However, the 2003 Rule allowed for CAFOs to request from the EPA a “no potential discharge” determination if they could prove so, thereby exempting them from the NPDES permit program.<sup>88</sup> The 2003 Rule also required CAFOs applying for a NPDES permit to develop and implement a site-specific Management Plan (“NMP”), which required a determination of “best management practices” (“BMPs”) in order “to ensure adequate storage of manure and wastewater, proper management of mortalities and chemicals, and appropriate site-specific protocols for land application.”<sup>89</sup>

Additionally, the 2003 Rule added requirements applicable to land application of manure.<sup>90</sup> In section 122.23(e), the 2003 Rule provided that:

The discharge of manure, litter or process wastewater to [navigable waters] from a CAFO as a result of the application of manure, litter or process wastewater by the CAFO to land areas under its control is a discharge...and subject to NPDES permit requirements, except where it is an agricultural stormwater discharge as provided in 33 U.S.C. Section 1362(14).<sup>91</sup>

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<sup>84</sup>“The EPA received approximately 11,000 public comments on the proposed rule...as well as an additional 450 or so comments following the publication, in November 2001 and July 2002, of Notices of Data Availability.” *Id.* at 495.

<sup>85</sup> *Waterkeeper Alliance, Inc.*, 399 F.3d at 495; see 40 C.F.R. §§ 9, 122, 123, 412.

<sup>86</sup> *Laitos & Ruckriegle*, *supra* note 11, at 1059.

<sup>87</sup> *Alt*, 979 F. Supp. 2d at 708.

<sup>88</sup> *Id.*

<sup>89</sup> *Nat’l Pork Producers Council*, 635 F.3d at 744 (citing 68 Fed. Reg. 7176, 7176 (Feb. 12, 2003)).

<sup>90</sup> *Id.*

<sup>91</sup> 40 C.F.R. § 122.23(e) (2003).

However, if CAFOs land-applied waste was done “in accordance with site-specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in that waste,”<sup>92</sup> a precipitation-related discharge of manure, litter, or process wastewater from land areas under the control of a CAFO was an agricultural stormwater discharge.<sup>93</sup> Thus, the 2003 Rule “expanded the definition of exempt ‘agricultural stormwater discharge.’”<sup>94</sup>

Consequently, various aspects of the 2003 Rule were challenged in court.<sup>95</sup> In *Waterkeeper Alliance, Inc. v. U.S. E.P.A.*,<sup>96</sup> petitioners<sup>97</sup> requested the Second Circuit “vacate the 2003 Rule’s ‘duty to apply,’” contending it was outside the scope of the EPA’s authority.<sup>98</sup> Agreeing with the petitioners, the Second Circuit held that the EPA impermissibly required CAFOs to apply for a permit based merely on the potential of discharging pollutants<sup>99</sup> and ordered the EPA to remove the requirement that all CAFOs apply for NPDES permits.<sup>100</sup> The Second Circuit rationalized that the plain language of the CWA did not give the EPA authority to impose obligations on CAFOs to show “no potential to discharge.”<sup>101</sup>

The Second Circuit rejected the petitioners’ contention that the 2003 Rule’s exclusion of agricultural stormwater discharge resulting from land application violated the CWA’s definition of “point source.”<sup>102</sup> Petitioners argued that according to the language of the CWA, all discharges originating from a CAFO, which is a point source under the Act, require a NPDES permit “notwithstanding the fact that agricultural stormwater discharges are

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<sup>92</sup> *Waterkeeper Alliance, Inc.*, 399 F.3d at 495-96.

<sup>93</sup> 40 C.F.R. § 122.23(e) (2003); *see*, 33 U.S.C. § 1362(14) (2014).

<sup>94</sup> *Alt*, 979 F. Supp. 2d at 708.

<sup>95</sup> Laitos & Ruckriegle, *supra* note 11, at 1059.

<sup>96</sup> 399 F.3d 486 (2nd Cir. 2005).

<sup>97</sup> There were both “environmental” and “farm” parties who either petitioned or intervened in *Waterkeeper*. For a complete list of the petitioners, *see Nat’l Pork Producers Council*, 635 F.3d at 744.

<sup>98</sup> *Alt*, 979 F. Supp. 2d at 708.

<sup>99</sup> *Id.* (citing *Waterkeeper Alliance, Inc.*, 399 F.3d at 505).

<sup>100</sup> Laitos & Ruckriegle, *supra* note 11, at 1059.

<sup>101</sup> *Waterkeeper Alliance, Inc.*, 399 F.3d at 506.

<sup>102</sup> *Id.* at 507; *Alt*, 979 F. Supp. 2d at 704.

otherwise deemed exempt from regulation.”<sup>103</sup> The Second Circuit disagreed, stating despite the ambiguity in the CWA as to whether CAFO discharges could ever constitute agricultural stormwater, the congressional intent and precedent buttressed the EPA’s argument that excluding agricultural stormwater discharge resulting from land application as a point source was a permissible construction of the CWA.<sup>104</sup>

## 2. The 2008 Rule & Guidance Letters

On June 30, 2006, in response to the Second Circuit’s decision in *Waterkeeper Alliance, Inc.*,<sup>105</sup> the EPA proposed a new rule requiring a CAFO owner or operator to apply for a permit only if the CAFO actually discharged or proposed to discharge pollutants.<sup>106</sup> On November 20, 2008, the Final 2008 Rule (“2008 Rule”) was published.<sup>107</sup> The 2008 Rule clarified the term “duty to apply,” determining that each CAFO operator had to make a case-by-case decision as to whether there would be discharges due to their operations.<sup>108</sup>

As is customary after promulgating a new and complex regulation, the EPA issued three guidance letters.<sup>109</sup> Benjamin H. Grumbles, Assistant Administrator for the EPA’s Office of Water, sent a guidance letter to Senator Thomas R. Carper of Delaware and another to then-congressperson Michael N. Castle of Delaware.<sup>110</sup> James D. Giattina, Director of the Water Protection Division for Region 4, sent a letter to Jeff Smith, an executive for Perdue Farms, Inc.<sup>111</sup> The guidance letters sent to the Delaware Congress members explained the CWA prohibited the discharge of pollutants from a CAFO without a permit.<sup>112</sup> The guidance letters further stated, “[t]he term

<sup>103</sup> *Waterkeeper Alliance, Inc.*, 399 F.3d at 507.

<sup>104</sup> *Alt*, 979 F.Supp.2d at 709 (citing *Waterkeeper Alliance, Inc.*, 399 F.3d at 507-09; *Nat’l Pork Producers Council*, 635 F.3d at 745).

<sup>105</sup> See supra notes 61-7.

<sup>106</sup> *Nat’l Pork Producers Council*, 635 F.3d at 745-46 (citing 71 Fed. Reg. at 37,744).

<sup>107</sup> *Alt*, 979 F.Supp.2d at 709.

<sup>108</sup> *Nat’l Pork Producers Council*, 635 F.3d at 746.

<sup>109</sup> *Id.* at 747.

<sup>110</sup> *Id.* at 747-48.

<sup>111</sup> *Id.* at 748.

<sup>112</sup> *Id.*

pollutant is defined very broadly in the CWA...Potential sources of such pollutants at a CAFO could include...litter released through confinement house ventilation fans...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 permit.”<sup>113</sup>

The letter sent to Smith by Giattina was in response to Smith’s question regarding “whether operators of dry litter farms need to apply for a permit ‘because of potential runoff from the production area, [and if] so, are there examples of dry poultry litter operations having a discharge?’”<sup>114</sup> The guidance letter explained that because the term “pollutant” is defined broadly, theoretically CWA regulations could apply to litter released through house ventilations fans. The guidance letter addressed the agricultural stormwater exemption, stating it “applies only to precipitation-related discharges from land application areas...where application of manure, litter, or process wastewater is in accordance with appropriate nutrient management practices...and not to discharges from the CAFO production area.”<sup>115</sup>

As a result of these guidance letters, the Fifth Circuit was asked to decide if these guidance letters constituted final agency action in *National Pork Producers Council v. U.S. E.P.A.*<sup>116</sup> Applying the *Bennett* two-prong test,<sup>117</sup> the Court held that the guidance letters did not constitute final agency action because the letters were merely restating the prohibition against discharging pollutants without an NPDES permit, thus giving advice or “guidance” to a question posed to the EPA.<sup>118</sup> First, the court reasoned that although “guidance letters can mark the ‘consummation’ of an agency’s decision-making process...[t]here must also be evidence that the guidance

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<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *See Bennett v. Spear*, 520 U.S. 154 (1997) (citing the two-prong test established by the Supreme Court, which is used to in determining whether an agency action is final; first the action must mark the “consummation” of the agency’s decision-making process—it cannot be interlocutory, and second the action must be one by which “rights or obligations have been determined” or from which there will be legal consequences.)

<sup>118</sup> *Nat’l Pork Producers Council*, 635 F.3d at 756.



letters have made a substantive change in the regulation of CAFOs.”<sup>119</sup> Further, the court stated the second prong of the *Bennett* test states that in order to constitute final agency action, guidance letters must also affect rights or obligations or create new legal consequences.<sup>120</sup> Applying this second prong, the court reasoned despite the fact the letters put an obligation on petitioners to obtain a permit if they discharged manure or litter through ventilation fans, the letters neither created any new legal consequences nor affected their rights.<sup>121</sup>

#### IV. INSTANT DECISION

The *Alt* court first began its analysis by determining the appropriate standard of review to be whether the EPA’s decision was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law,” as set forth by the Administrative Procedure Act.<sup>122</sup> Because the standard is narrow, the court deferred only to the administrative record that was compiled by the EPA.<sup>123</sup> After establishing the appropriate legal standard, the court began by resoundingly rejecting what appeared to be the central assumption of EPA’s position: the agricultural stormwater discharge exemption had no meaning at all from the time it was added to the CWA in 1987 until the promulgation of new regulations in 2003.<sup>124</sup> The court stated, “It is a basic tenet that ‘regulations,’ in order to be valid, must be consistent with the statute under which they are promulgated.”<sup>125</sup> The court showed the inconsistency of the EPA’s assumption with the CWA by engaging in statutory deconstruction of the term “agricultural stormwater discharge.”

First, the court noted the CWA never defined the term “agricultural stormwater discharge.”<sup>126</sup> Accordingly, the Court stated the term should be given its ordinary meaning as Congress found it unnecessary to define it.<sup>127</sup>

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<sup>119</sup> *Id.* at 755-56 (internal citations omitted).

<sup>120</sup> *Id.* at 756.

<sup>121</sup> *Id.*

<sup>122</sup> 5 U.S.C. § 706(2)(A) (2006).

<sup>123</sup> *Alt v. EPA*, 979 F. Supp. 2d 701, 706 (N.D. W. Va. 2013).

<sup>124</sup> *Id.* at 710.

<sup>125</sup> *Id.* (citing *Decker v. Northwest Environmental Defense Center*, --- U.S. ----, 133 S.Ct. 1326, 1334 (2013), quoting *United States v. Larionoff*, 431 U.S. 864 (1977)).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

## HOGTIED TO PRECEDENT

Next, the court looked at the term “discharge of a pollutant,” which is defined by the CWA as “any addition of any pollutant to navigable waters from any point source.”<sup>128</sup> Thus, the court acknowledged that the general prohibition in section 1311(a)<sup>129</sup> and the requirement to obtain an NPDES permit in accordance with section 1342<sup>130</sup> only applies to discharges from a point source.<sup>131</sup>

Because the NPDES permit requirement hinges on whether a discharge comes from a point source, the court next looked to the meaning of “point source,” defined by the CWA as:

[A]ny 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.<sup>132</sup>

The court recognized CAFOs are generally considered a point source, but the CWA specifically excludes “agricultural stormwater discharges,” regardless of whether they are associated with a CAFO or any other type of point source.<sup>133</sup> Therefore, the court concluded the discharge of pollutants from a CAFO required an NPDES permit *unless* the discharge is considered an “agricultural stormwater discharge.”<sup>134</sup>

Consequently, the court determined that because neither the CWA nor the EPA’s implementing regulations defined “agricultural stormwater discharges” in relation to CAFO farmyard runoff, the onus of interpreting the

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<sup>128</sup> *Id.*; 33 U.S.C. § 1362(12)(A) (2014).

<sup>129</sup> 33 U.S.C. § 1311(a) (2008) states that the discharge of pollutants is illegal except when in compliance with effluent limitations; *see* 33 U.S.C. § 1362(11) (defining “effluent limitations”).

<sup>130</sup> 33 U.S.C. § 1342 outlines the NPDES permit system.

<sup>131</sup> *Alt.*, 979 F. Supp. 2d at 710.

<sup>132</sup> *Id.*; 33 U.S.C. § 1362(14) (emphasis added).

<sup>133</sup> *Alt.*, 979 F. Supp. 2d at 710.

<sup>134</sup> *Id.*

statutory term fell to the court.<sup>135</sup> Relying on precedent, the court determined the terms “agricultural” and “stormwater” should be given their ordinary meanings in accordance with their common usage.<sup>136</sup> Additionally, the court looked to the Fourth Circuit, which established the two principles of statutory construction are “plain English and common sense.”<sup>137</sup> Applying these two principles, the court was led to the “inescapable conclusion that Ms. Alt’s poultry operation is ‘agricultural’ in nature and that the precipitation-caused runoff from her farmyard is ‘stormwater.’”<sup>138</sup>

In support of defining the terms by their ordinary meaning, the court relied on similar decisions made by other jurisdictions. First the court cited *Waterkeeper Alliance, Inc. v. EPA*,<sup>139</sup> a Second Circuit case which took the same approach when reviewing the EPA’s general interpretation of the agricultural stormwater exception in the context of CAFO land application areas.<sup>140</sup> In *Waterkeeper Alliance, Inc.*, the Second Circuit held that “dictionaries from the period in which the agricultural stormwater exception was adopted defined ‘agriculture’ or ‘agricultural’ in a way that can permissibly be construed to encompass CAFOs.”<sup>141</sup> Regarding “stormwater,” the Second Circuit agreed with the EPA that the term should be defined as “precipitation-related discharge[s].”<sup>142</sup> As a result of this similar analysis conducted by the Second Circuit, the court established that contrary to the EPA’s position, the agricultural stormwater discharge exemption clearly existed prior to the promulgation of the 2003 regulations.<sup>143</sup>

Furthermore, the court in the instant case looked to another Second Circuit case, *Concerned Area Residents for the Env’t v. Southview Farm*,<sup>144</sup> which entailed a citizen suit against a large dairy farm that spread manure

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<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 710-11 (citing *BP v. Burton*, 549 U.S. 84, 91 (2006); *Perrin v. U.S.*, 444 U.S. 37, 42 (1979)).

<sup>137</sup> *Id.* at 711.

<sup>138</sup> *Id.*

<sup>139</sup> 399 F.3d 486 (2d Cir. 2005).

<sup>140</sup> *Alt v. EPA*, 979 F. Supp. 2d 701, 711 (N.D. W. Va. 2013).

<sup>141</sup> *Id.* at 711 (quoting *Waterkeeper Alliance, Inc.*, 399 F.3d at 509).

<sup>142</sup> *Id.* (quoting *Waterkeeper Alliance, Inc.*, 399 F.3d at 508).

<sup>143</sup> *Id.* at 711.

<sup>144</sup> 34 F.3d 114 (2d Cir. 1994).

over its fields, allowing the manure to run off into surface water during periods of both precipitation and non-precipitation.<sup>145</sup> To decide whether this runoff met the statutory exemption for agricultural stormwater, the Second Circuit looked to the legislative history and context of the CWA.<sup>146</sup> In 1987, Congress simultaneously created the CWA’s new stormwater permitting program and the agricultural stormwater exemption. As a result of this legislative history, the Second Circuit deduced that permits would not be required for agricultural stormwater under the new stormwater permit program.<sup>147</sup> The court then interpreted the statutory phrase “agricultural stormwater” by giving the words their common-sense meaning, resulting in the conclusion that “a discharge of liquid manure would not be exempt just because it happened to be raining at the time, but [rather] a discharge of such manure caused by precipitation would be exempt.”<sup>148</sup>

Similarly, the court looked to *Fishermen Against the Destruction of the Environment v. Closter Farmers, Inc.*,<sup>149</sup> an Eleventh Circuit case that determined that water pumped into Lake Okeechobee by Closter Farms was “agricultural stormwater.” Citing the CWA’s specific exemption of “agricultural stormwater discharges and return flows from irrigation agriculture,”<sup>150</sup> the Eleventh Circuit concluded that “[b]ecause these water discharges are not considered to be point sources, there is no requirement that a property owner discharging these waters have an NPDES permit.”<sup>151</sup> Additionally, the court looked to the Fifth Circuit’s decision in *National Pork Producers Council v. U.S. EPA*,<sup>152</sup> which determined “[t]he 2003 Rule also expanded the definition of exempt ‘agricultural stormwater discharge’ to include land application discharge, if the land application comported with

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<sup>145</sup> *Alt*, 979 F. Supp. 2d at 711.

<sup>146</sup> *Id.* (citing *Concerned Area Residents*, 34 F.3d at 120).

<sup>147</sup> *Id.* at 711-12 (writing that “[b]ecause Congress mandated comprehensive regulations of certain forms of industrial and municipal stormwater run-off under 33 U.S.C. § 1342(p), one can infer that Congress wanted to make it clear that agriculture was not included in this new program.” (quoting *Concerned Area Residents for the Env’t v. Southview Farm*, 34 F.3d 114, 120 (2d Cir. 1994))).

<sup>148</sup> *Alt*, 979 F. Supp. 2d at 712.

<sup>149</sup> 300 F.3d 1294 (11th Cir. 2002).

<sup>150</sup> 33 U.S.C. § 1362(14) (2014).

<sup>151</sup> *Alt v. EPA*, 979 F. Supp. 2d 701, 712 (N.D. W. Va. 2013) (citing *Fishermen*, 300 F.3d at 1297; *see also* 33 U.S.C. §§ 1311, 1342).

<sup>152</sup> 635 F.3d 738 (5th Cir. 2011).

appropriate site-specific nutrient management practices.”<sup>153</sup> Using these similar rulings, the court in the instant case further justified its conclusion that the agricultural stormwater exemption existed prior to the 2003 regulations, despite the EPA’s presumed position.<sup>154</sup>

Next, the court considered whether the EPA was entitled to any type of deference.<sup>155</sup> Because Congress never defined the term “agricultural stormwater discharge” and the EPA never promulgated any regulations defining the term other than in reference to land applications, which expanded the preexisting exemption,<sup>156</sup> the court determined that deference was inappropriate under *Chevron, U.S.A. v. NRDC* and *Auer v. Robbins*.<sup>157</sup> The court also determined that limited deference would be given to the guidance letters only to the extent that they had the power to persuade.<sup>158</sup> The court declared that any possible deference was tempered by the fact that the EPA’s position regarding the exclusivity of the land application area regulations changed from its prior position in 2003.<sup>159</sup> Thus, the court concluded “there is more to the agricultural stormwater exemption than as set forth in the 2003 land application area regulations.”<sup>160</sup>

After determining the land application area regulations were not the exclusive source of the agricultural stormwater exemption and limited deference would be given to the EPA, the court then addressed EPA’s

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<sup>153</sup> *Alt*, 979 F. Supp. 2d at 712 (citing Nat’l Council of Pork Producers, 635 F.3d at 744).

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> The Court cited the preamble to the 2003 Rule, in which the EPA stated that “[the] EPA does not intend its discussion of how the scope of point source discharges from a CAFO is limited by the agricultural storm water exemption to apply to the discharges that do not occur as a result of land application of manure, litter, or process wastewater by a CAFO to land areas under its control....” *Id.* (quoting National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines and Standards for CAFOs, 68 Fed. Reg. 7176, 7198 (Feb. 12, 2003)).

<sup>157</sup> *Alt*, 979 F. Supp. 2d at 712 (citing *Chevron, U.S.A. v. NRDC*, 467 U.S. 837 (1984); *Auer v. Robbins*, 519 U.S. 452 (1997)).

<sup>158</sup> *Id.*; see *U.S. Dept. of Labor v. N.C. Growers Ass’n, Inc.*, 377 F.3d 345, 353-54 (4<sup>th</sup> Cir. 2004) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)); see also *Christensen v. Harris County*, 529 U.S. 576, 587 (2000); *U.S. v. Mead Corp.*, 533 U.S. 218, 234 (2001).

<sup>159</sup> *Alt*, 979 F. Supp. 2d at 712-13; see *Decker v. Northwest Environmental Defense Center*, 133 S. Ct. 1326, 1337-38 (2013) (citing *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166-67 (2012)).

<sup>160</sup> *Alt*, 979 F. Supp. 2d at 713.

argument that stormwater from a CAFO’s production area is not entitled to the exemption and Plaintiff’s discharge was industrial in nature rather than agricultural.<sup>161</sup> First, the court agreed with the Respondent and rejected Plaintiff’s argument that the farmyard area of the Alt farm was not part of the CAFO, noting that the grassy areas between the poultry houses were part of the production facility.<sup>162</sup> The CWA defined “facility” to include any “point source...including land or appurtenances thereto.”<sup>163</sup> The court reasoned that Plaintiff’s interpretation of the term “facility” to exclude this area contravened the plain language of the regulatory definition.<sup>164</sup> As a result, the court established that the term “facility” applied to any CAFO and the land appurtenant thereto—including the farmyard.<sup>165</sup> The court noted however that the inquiry could not stop there since the EPA itself had stated that “[n]othing in the statutory language or legislative history indicates that Congress did not mean to include agricultural stormwater discharges from a CAFO in this exclusion.”<sup>166</sup>

As a result, the court next turned to Defendant’s argument that “the production area of a CAFO is ineligible for the agricultural stormwater discharge exemption.”<sup>167</sup> However, the court did not even consider whether this assertion was pertinent because the area at issue was the Alt’s “farmyard,” not a “production area.”<sup>168</sup> Citing the regulatory definition of “production area,”<sup>169</sup> the court reasoned that the areas between Plaintiff’s poultry houses clearly did not qualify as “the animal confinement area, the manure storage area, the raw materials storage area, [or] the waste

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<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* (citing 40 C.F.R. § 122.2 (2013)).

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* (quoting EPA, NPDES Permit Regulation and Effluent Limitation Guidelines and Standards for CAFOs, 68 Fed. Reg. 7176, 7197 (Feb. 12, 2003) (to be codified at 40 C.F.R. pts. 9, 122, 123, and 412)).

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* (quoting “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. The animal confinement area includes but is 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) (2012)).

containment areas.”<sup>170</sup> The court reasoned a “farmyard” does not include areas where animals are confined.<sup>171</sup> Thus, the Alt “farmyard” was not a “production area.”<sup>172</sup>

To justify this assessment, the court cited the EPA’s 2003 Response to Comments, in which the EPA noted the definition of “production area” does not explicitly include the entire farmyard.<sup>173</sup> Thus, the court argued it was clear the EPA had long interpreted the agricultural stormwater exemption as being inapplicable to runoff occurring *within* a confinement area, manure storage area, and other features deemed as the CAFO “production area.”<sup>174</sup> The Court pointed out that because of this long held interpretation, many farmers like Plaintiff kept their animals under the same roof and maintained covered structures for activities such as manure storage and composting in order to be considered a “farmyard” and not a “production area.”<sup>175</sup>

Further, the EPA argued that although the manure and litter were in the farmyard, they originated from the production area, which would thus render such discharge ineligible for the stormwater exemption.<sup>176</sup> Relying on *Waterkeeper* once again, the court rejected this argument. In *Waterkeeper*, the Second Circuit established that the CWA should be read “as generally authorizing the regulation of CAFO discharges, but exempting such discharges from regulation to the extent that they constitute agricultural stormwater.”<sup>177</sup> The Second Circuit further explained that such discharges are exempt from regulation under the CWA “even when those discharges came from what would otherwise be point sources.”<sup>178</sup> Based upon this rationale, the court reasoned manure and litter in the farmyard would remain

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<sup>170</sup> Alt, 979 F. Supp. 2d at 713.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 713-14 (citing EPA, *2003 Responses to Comments* (EPA-HQ-OW-2002-0025-0060), at 1-661 (Excerpt CAFONODA-600021-1) (May 25, 2005)).

<sup>174</sup> Alt, 979 F. Supp. 2d at 714.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* (quoting *Waterkeeper Alliance, Inc. v. U.S. E.P.A.*, 399 F.3d 486, 507 (2nd Cir. 2005)).

<sup>178</sup> *Id.* (quoting *Waterkeeper Alliance, Inc.*, 399 F.3d at 507).

in place only until stormwater carried the particles to navigable waters, which would then result in the discharge of a pollutant.<sup>179</sup>

After establishing that Plaintiff's farmyard did not meet the regulatory definition of "production area," the court considered Defendant's argument that in order to employ the agricultural stormwater discharge exemption, the discharge must have an agricultural purpose.<sup>180</sup> The court established the only requirement is the discharges be agriculture related.<sup>181</sup> Consequently, the determined that because the incidental manure and litter from Plaintiff's farmyard was related to the raising of poultry, such discharges were related to agriculture.<sup>182</sup> Again, the court referred back to *Waterkeeper*, in which the Second Circuit recognized that by promulgating the agricultural stormwater exemption, "Congress was affirming the impropriety of imposing...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."<sup>183</sup>

Finally, the court rejected Defendant's contention that discharges stemming from Plaintiff's farmyard are industrial as opposed to agricultural, giving three justifications.<sup>184</sup> First, the court looked to the Compliance Order issued by Defendant to Plaintiff and noted the EPA never once mentioned "industrial stormwater." Next, the Court relied on *Waterkeeper*, in which the Second Circuit rejected the proposition that CAFOS should be viewed as industrial, not agricultural.<sup>185</sup> Finally, the Court reiterated that the sole issue is whether the stormwater discharges from Plaintiff's farmyard are exempt as "agricultural stormwater discharges," and if so, exempt from any NPDES permit requirements, including industrial stormwater permit requirements.<sup>186</sup> Citing *Southview Farm*, the court noted that Congress created the stormwater permitting program at the same time as the promulgation of the agricultural

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<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* (citing *Waterkeeper Alliance, Inc.*, 399 F.3d at 507).

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*



stormwater exemption, which suggests the intent to explicitly exclude agricultural operations from regulation under the stormwater program.<sup>187</sup>

V. COMMENT

Although the CWA has been lauded as significantly improving the nation's water quality, a wide range of sources continue to pollute and contaminate water bodies in the United States.<sup>188</sup> Particularly, the EPA has identified CAFOs as being a significant contributor to the remaining water quality problems.<sup>189</sup> Because CAFOs are largely responsible for the remaining water pollution in the United States, there is disagreement between environmental groups and the agricultural industry as to whether the "agricultural stormwater discharge" exemption should apply to CAFOs.<sup>190</sup> Environmental groups argue that because CAFOs are such significant contributors to ongoing water pollution, the agricultural stormwater discharge exemption should not apply to such operations for the sake of furthering the CWA's goal of restoring and maintaining the "chemical, physical and biological integrity of the Nation's waters."<sup>191</sup>

Courts like the District Court in *Alt* have been faced with the task of determining the meaning and breadth of the statutory term "agricultural stormwater discharge." In *Alt*, the court explicitly stated that because neither the CWA nor EPA's implementing regulations had defined "agricultural stormwater discharge," past precedent<sup>192</sup> required the court to interpret the statutory term in accordance with its ordinary meaning and common usage.<sup>193</sup> Based on "plain English and common sense," the court came to the "inescapable conclusion that [Petitioner Alt's] operation was 'agricultural' in

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<sup>187</sup> *Id.* at 714-15 (citing 34 F.3d 114, 120 (2nd Cir. 1994)).

<sup>188</sup> National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations (CAFOs), 68 Fed. Reg. 7176, 7176 (Feb. 12, 2003) (to be codified at 40 C.F.R. pts. 9, 122, 123, and 412).

<sup>189</sup> *Id.*

<sup>190</sup> Terence J. Centner, *Clarifying Npdes Requirements for Concentrated Animal Feeding Operations*, 14 PENN ST. ENVTL. L. REV. 361, 373 (2006).

<sup>191</sup> *Id.* at 362.

<sup>192</sup> *Alt*, 979 F. Supp. 2d at 710-11 (citing *BP America Production Co. v. Burton* (549 U.S. 84, 91 (2006); *Perrin v. United States*, 444 U.S. 37, 42 (1979)).

<sup>193</sup> *Id.* at 711.

nature and that the precipitation-caused runoff from her farmyard was “stormwater.”<sup>194</sup>

In support of its conclusion, the court cited the Second Circuit as taking the same approach when reviewing whether the EPA’s interpretation of the “agricultural stormwater discharge” exemption applied to CAFO land application areas.<sup>195</sup> In *Waterkeeper*, the Second Circuit explained that “[d]ictionaries from the period in which the agricultural stormwater exemption was adopted define[d] ‘agriculture’ or ‘agricultural’ in a way that [could] be permissibly construed to encompass CAFOS.”<sup>196</sup> Additionally, the Second Circuit agreed with the EPA’s contention that “stormwater” meant “precipitation-related discharges.”<sup>197</sup> Furthermore, the *Alt* Court’s conclusion that Petitioner’s CAFO is covered by the agricultural stormwater discharge exemption is supported by another Second Circuit decision, in which the court explained that “[b]ecause Congress had created the stormwater permitting program at the same time (1987) that it enacted the agricultural stormwater exception” it should be inferred that “Congress intended that no permits would be required for agricultural stormwater under the new stormwater permit program.”<sup>198</sup>

In view of the precedent defining “agricultural stormwater discharge” by its plain and ordinary meaning and applying that term to CAFOs, the *Alt* court has taken the logical step by further clarifying the breadth of the statutory term. Because CAFOs play such a prominent role in contributing to existing water pollution and given the lack of existing regulations affecting agricultural operations, it is imperative to establish a uniform and consistent definition of “agricultural stormwater discharge” in order to discern what type of activity requires a permit and what type of activity is exempt. Specifically, consistent application of the term “agricultural stormwater discharge” will allow CAFOs the opportunity to formulate appropriate best

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<sup>194</sup> *Id.*

<sup>195</sup> *Id.* (citing *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 509 (2nd Cir. 2005)).

<sup>196</sup> *Id.* (citing *Waterkeeper Alliance, Inc.*, 399 F.3d at 509)).

<sup>197</sup> *Id.* (citing *Waterkeeper Alliance, Inc.*, 399 F.3d at 508).

<sup>198</sup> *Id.* at 711-12 (citing *Concerned Area Residents for the Env’t v. Southview Farm*, 34 F.3d 114 (2nd Cir. 1994)).

management plans and nutrient management plans to significantly reduce, if not eliminate, precipitation-caused discharges.

Although the *Alt* decision is supported by similar decisions and rationale in other jurisdictions, it is worth noting that these courts had their hands tied due to the lack of guidance from either the CWA or the EPA's implementing regulations. As noted in *Alt*, the only guidance the EPA has given with regard to how "agricultural stormwater discharge" should be defined is with respect to land application.<sup>199</sup> In fact, in the preamble to the 2003 Rule, the EPA stated it "does not intend its discussion of how the scope of point sources discharges from a CAFO is limited by the agricultural stormwater exemption to apply to discharges that do not occur as a result of land application of manure, litter, or process wastewater by a CAFO to land areas under its control..."<sup>200</sup> Therefore, despite the meritorious argument that CAFOs should be exempted from the agricultural stormwater discharge exemption because of their significant contribution to water pollution, the *Alt* court was left with no choice but to interpret the law in a way consistent with the implementing statute.<sup>201</sup> Because Congress found it unnecessary to define the term, the court was forced to interpret the term in accordance with its ordinary meaning.

Because the breadth of the "agricultural stormwater discharge" exemption is such a contentious issue between environmental groups and the agricultural industry, *Alt* illuminates the growing need for the EPA to issue an implementing regulation that further clarifies, if not unambiguously defines, the scope of the exemption. Although the 2003 Rule explains the "EPA's longstanding interpretation that the agricultural stormwater discharge exemption is inapplicable to runoff from within a confinement area, manure storage area, and similar features deemed to be the CAFO "production

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<sup>199</sup> *Id.* at 712.

<sup>200</sup> *Id.*; see 40 C.F.R. §§ 9, 122-123, 412 (2014).

<sup>201</sup> *Alt*, 979 F. Supp. 2d at 713; see *Decker v. Nw. Env'tl. Ctr.*, 133 S. Ct. 1326, 1334 (2013) (quoting *United States v. Larionoff*, 431 U.S. 864, 873 (1977) ("It is a basic tenet that 'regulations, in order to be valid, must be consistent with the statute under which they are promulgated.'").

area,”<sup>202</sup> further guidance is needed regarding runoff occurring outside these specified areas—like the farmyard in Plaintiff’s case.

Specifically, the EPA needs to issue a regulation that provides definitive guidance as to the scope of the agricultural stormwater discharge exemption, while also mandating BMPs and NMPs for all CAFO operators to “implement management practices and procedures to reduce the amount of manure and litter that will be exposed to precipitation in farmyards.”<sup>203</sup> By mandating BMPs, the amount of manure and litter in exempted areas of the CAFO would be significantly, if not completely, reduced. In doing so, CAFO operators would be held accountable for ensuring their respective BMPs are not significantly contributing to water quality problems, while being allowed to avoid the NPDES permit program. Additionally, such a regulation would refrain from imposing liability on CAFO operators for uncontrollable events—like the weather—while furthering the over-arching goal of the CWA.

Such definitive guidance would likely result in a greater number of CAFOs being required to apply for an NPDES permit. Under the CWA, permits are issued “after an opportunity for a public hearing” and further states that “permit applications” and the actual permits must be available to the public.<sup>204</sup> The CWA also provides for requirements regarding public notice and public comment, but such hearings are only held if there is a “significant degree of public interest.”<sup>205</sup> Thus, an unambiguous definition of “agriculture stormwater discharge” may broaden the breadth of CAFOs required to apply for an NPDES permit, which in turn would require them to go through the permit application process. The agriculture industry might oppose such a set definition because this would potentially expose more CAFOs to EPA regulations via the NPDES permit program and thus burden

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<sup>202</sup> *Id.*; see EPA, *2003 Response to Comments* (EPA-HQ-OW-2002-0025-0060), at 1-661 (Excerpt CAFONODA-600031-1) (May 25, 2005).

<sup>203</sup> *Alt*, 979 F. Supp. 2d at 704.

<sup>204</sup> Gaba, *supra* note 49, at 417-18; see Clean Water Act, 33 U.S.C. §§ 1342(a)(1), 1342(j) (2014).

<sup>205</sup> Gaba, *supra* note 49, at 418 (citing *Costle v. Pacific Legal Foundation*, 445 U.S. 198, 216 (1980), in which the Court rejected the argument the CWA mandated a public hearing for every NPDES permit application); see also 40 C.F.R. §§ 124.1-.21, 124.51-.66 (citing the EPA regulations governing permit procedures).

and/or temporarily halt agricultural operations. However, CAFOs required to apply for an NPDES permit would only face a small inconvenience of going through the process; the time it takes to get a permit depends on the type of discharge, but typically the review and approval of an application does not take more than a couple of weeks.<sup>206</sup> Additionally, as established in *Costle v. Pacific Legal Foundation*,<sup>207</sup> public hearings regarding the permits are only required when there is a “significant degree of public interest,” which would exclude a majority of CAFOs. Thus, the benefit of improving the nation’s water quality significantly outweighs the small cost CAFOs may face in a set definition of “agricultural stormwater discharge,” which is the slight inconvenience of applying for a permit.

## VI. CONCLUSION

The *Alt* Court’s decision has further invigorated the notion that “agricultural stormwater discharges” are exempt from *all* point source regulations, including CAFOs. Despite the huge amount of pollution stemming from the agricultural industry—especially CAFOs—the agricultural stormwater discharge exemption continues to act as a shield against liability for inadvertent and uncontrollable discharges of pollutants that are weather-related. The *Alt* Court wisely followed other jurisdictions in defining “agricultural stormwater discharge” based upon its plain and ordinary meaning, which in turn maintained consistency in how the exemption is to be applied. However, there is an increasing need for the EPA to promulgate a regulation that unambiguously defines the scope of “agricultural stormwater discharge,” as well as mandates BMPs in order to reduce the amount of discharge originating from CAFOs outside a confinement area, manure storage area, and similar features deemed to be the CAFO production area. In doing so, the EPA would be taking an affirmative step in keeping within the spirit of the CWA by reducing the impact CAFOs have on the nation’s water while also giving guidance to, as well as imposing liability on, CAFO operators only to the degree that they can implement BMPs to control the amount of manure and litter outside the production area.

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<sup>206</sup> SCDHEC, FACT SHEET: GETTING A NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (NPDES) PERMIT (2013), *available at* <http://www.scdhec.gov/environment/PermitCentral/FactSheetsNPDES/>.

<sup>207</sup> 445 U.S. 198, 204 (1980).

