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## A Case for Cooperation Between the Environmental Protection Agency and the United States Department of Agriculture in Order to Achieve Federal Environmental Quality Goals. National Pork Producers' Council v. EPA

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**A Case for Cooperation between the Environmental Protection Agency and the United States Department of Agriculture in Order to Achieve Federal Environmental Quality Goals**

*National Pork Producers' Council v. EPA*<sup>1</sup>

I. INTRODUCTION

Animal feeding operations are lots without vegetation where animals are housed, fed, or maintained for at least 45 days in any 12-month period.<sup>2</sup> These animal feeding operations qualify as concentrated animal feeding operations (“CAFOs”) based upon the number of animals maintained on the lot.<sup>3</sup> CAFOs produce tons of animal waste every year,<sup>4</sup>

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<sup>1</sup> 635 F.3d 738 (5th Cir. 2011).

<sup>2</sup> 40 C.F.R. § 122.23(b) (2012).

<sup>3</sup> *Id.* To qualify as a medium sized CAFO, a CAFO can house 200-600 mature dairy cows, 300-999 veal calves, 300-999 cattle other than mature dairy cows or veal calves, 750-2,499 swine weighing 55 pounds or more, 3,000-9,999 swine weighing 55 pounds or less, 150-499 horses, 3,000-9,999 sheep or lambs, 16,500-54,999 turkeys, 9,000-29,999 laying hens or broilers, 37,500-124,999 chickens (other than laying hens), 25,000-81,000 laying hens, 10,000-29,999 ducks (if the AFO uses other than a liquid manure handling system), and 1,500-4,99 ducks (if AFO uses a liquid manure handling system). *Id.* Anything over this limit and the CAFO will qualify as a large CAFO. *Id.* Anything under these limits and the CAFO will qualify as either a small CAFO or a regular animal feeding operation. *Id.*

<sup>4</sup> “The amount of manure a large farm that raises animals can generate primarily depends on the types and numbers of animals raised on that farm, and the amount of manure produced can range from over 2,800 tons to more than 1.6 million tons a year. To further

and that waste presents a substantial risk to the goals of the Clean Water Act (“CWA”).<sup>5</sup>

The primary goal of the CWA is “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”<sup>6</sup> Water plays an important role in the raising of these animals through feeding, watering, and also in flushing the large amounts of waste they produce. Animal waste presents a substantial risk to the central goal of the CWA and to the health of humans and wild life. Manure contains high levels of nitrates, which can seep into drinking water supplies. Elevated levels of nitrates have been linked to several diseases traced caused by bacteria and viruses from the waste.<sup>7</sup> Moreover, the high levels of phosphorus in animal manure can lead to algae blooms once the effluent reaches the water.<sup>8</sup> Algae blooms deplete the amount of oxygen in the water, threatening aquatic wildlife.<sup>9</sup> Animal manure can also contain various toxic organisms, as well as antibiotics used to treat and protect

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put this in perspective, the amount of manure produced by large farms that raise animals can exceed the amount of waste produced by some large U.S. cities.” U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-08-944, CONCENTRATED ANIMAL FEEDING OPERATIONS: THE EPA NEEDS MORE INFORMATION AND CLEARLY DEFINED STRATEGY TO PROTECT AIR AND WATER QUALITY FROM POLLUTANTS OF CONCERN (2008), *available at* <http://www.gao.gov/new.items/d08944.pdf>.

<sup>5</sup> 33 U.S.C. § 1251(a) (2006).

<sup>6</sup> *Id.*

<sup>7</sup> NATURAL RESOURCES DEFENSE COUNCIL, *Pollution from Giant Livestock Farms Threatens Public Health* (July 15, 2005), <http://www.nrdc.org/water/pollution/nspills.asp>

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

<sup>9</sup> *Id.*

animals from disease.<sup>10</sup> For example, one such toxic organism, *Pfiesteria piscicida*, is thought to be responsible for killing one billion fish off the coast of North Carolina.<sup>11</sup>

Pollution caused by CAFOs, as well as other polluters, necessitated the passage of the CWA.<sup>12</sup> Congress charged the Environmental Protection Agency (“EPA”) with the task of implementing the policies of the CWA.<sup>13</sup> The EPA passed regulations regarding CAFOs in 2003, and both environmental and agricultural interests challenged them.<sup>14</sup> In 2008, the EPA redrafted many of these rules, and various livestock and poultry producers challenged these regulations in *National Pork Producers Council v. U.S. Environmental Protection Agency*.<sup>15</sup>

## II. FACTS AND HOLDING

In 2008, the EPA promulgated a new series of regulations affecting CAFOs’ obligations to apply for National Pollution Discharge Elimination System (“NPDES”) permits.<sup>16</sup> The petitioners filed for judicial review of

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *See* 33 U.S.C. § 1251(a) (2006).

<sup>13</sup> 33 U.S.C. § 1251(d) (2006).

<sup>14</sup> *See Waterkeeper Alliance, Inc., v. EPA*, 399 F.3d 486 (2d Cir. 2005).

<sup>15</sup> 635 F.3d 738 (5th Cir. 2011).

<sup>16</sup> *Id.* at 745.

the new regulations in the Fifth, Seventh, Eighth, Ninth, Tenth, and D.C. Circuits.<sup>17</sup> “These petitions for review were consolidated by the Judicial Panel on Multi-district Litigation (JPML), pursuant to 28 U.S.C. § 2112(a)(3), and [the Fifth Circuit Court of Appeals] was randomly selected to review the parties’ challenges.”<sup>18</sup> The Circuit Courts of Appeals have original jurisdiction over these claims under section 1369 of the CWA.<sup>19</sup>

The petitioners in *National Pork Producers* brought their claim directly before the Fifth Circuit Court of Appeals.<sup>20</sup> The petitioners were divided into two groups: the farm petitioners<sup>21</sup> and the poultry petitioners.<sup>22</sup> The respondent was the EPA.<sup>23</sup> The Natural Resources Defense Council, Inc., the Sierra Club, and the Waterkeeper Alliance

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<sup>17</sup> *Id.* at 741.

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

<sup>19</sup> “Review of the Administrator’s action . . . in promulgating any effluent standard, prohibition, or pretreatment standard under section 1317 of this title . . . may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts business which is directly affected by such action upon application by such person.” 33 U.S.C. § 1369(b)(1) (2006).

<sup>20</sup> *Nat’l Pork Producers*, 635 F.3d at 747.

<sup>21</sup> The National Pork Producers Council, the American Farm Bureau Federation, United Egg Producers, the North Carolina Pork Council, the National Milk Producers Federation, the Dairy Business Association, Inc., the Oklahoma Pork Council, the National Chicken Council, and the U.S. Poultry and Egg Association. *Nat’l Pork Producers Council v. U.S. Envtl. Prot. Agency*, 635 F.3d 738, 741 n.1 (5th Cir. 2011).

<sup>22</sup> The National Chicken Council and the U.S. Poultry and Egg Association. *Id.* at 741 n.2.

<sup>23</sup> *Id.* at 738.

intervened on behalf of the respondent.<sup>24</sup> First, the farm petitioners in *National Pork Producers* claimed the portions of the EPA’s rule that required all CAFOs who “propose to discharge” wastewater to apply for NPDES permits, regardless of whether or not they actually do in fact discharge wastewater, exceeds the authority given to the EPA by Congress.<sup>25</sup> Second, the farm petitioners claimed the portion of the same rule that forced CAFOs to address the land application of animal manure in their Nutrient Management Plans (“NMPs”) also exceeded the EPA’s statutory authority.<sup>26</sup> The poultry petitioners joined all of the farm petitioners’ claims. Additionally, they claimed three EPA guidance letters concerning the dispersion of dry litter into the outside environment through ventilation fans in large poultry CAFOs invalidly created new rules because the rules were not subjected to a public notice and comment period as required by the Administrative Procedures Act.<sup>27</sup> In the letters, the EPA stated that any dry litter disbursed from poultry barns through ventilation fans was a discharge that required an NPDES permit, and such discharges did not fit within the agricultural storm water exception in the CWA.<sup>28</sup>

The Fifth Circuit first held in *National Pork Producers* that the EPA exceeded its authority by requiring CAFOs who are “proposing to discharge” to apply for an NPDES permit because the EPA was only

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<sup>24</sup> *Id.* at 741.

<sup>25</sup> *Id.* at 749.

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

<sup>27</sup> *Nat’l Pork Producers Council v. U.S. Env’tl. Prot. Agency*, 635 F.3d 738, 754-55 (5th Cir. 2011).

<sup>28</sup> *Id.* at 748.

granted authority to govern the actual discharge of pollutants, not the potential or proposal to discharge.<sup>29</sup> The EPA's definition of "propose to discharge" was overly broad, and because of this, the court held the regulation effectively required CAFOs to apply for an NPDES permit before there was any discharge to regulate.<sup>30</sup> In other words, the EPA regulation attempted to regulate a broader scope of CAFOs than they actually had regulatory authority over.

Second, the court held the farm petitioners could not challenge the portion of the EPA's rule that required all of the terms of a CAFO's NMP be incorporated as enforceable terms under that CAFO's NPDES permit.<sup>31</sup> The court held this rule was originally promulgated under the 2003 rule changes, and because the farm petitioners did not challenge them at that point in time, the court currently had no jurisdiction to decide the issue.<sup>32</sup> Under 33 U.S.C. § 1369(b)(1), a challenge to a newly promulgated rule under the CWA must be made within 120 days of its enactment in order for a Federal Circuit Court of Appeals to have original jurisdiction over the claim.<sup>33</sup>

Third, regarding the poultry respondent's additional claim, the Fifth Circuit held the EPA's letters did not constitute a final agency action "from which rights or obligations have been determined" or from which "legal consequences [would] flow," and the court therefore did not have

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<sup>29</sup> *Id.* 749-50.

<sup>30</sup> *Id.* at 751.

<sup>31</sup> *Id.* at 754.

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

<sup>33</sup> 33 U.S.C. § 1369(b)(1) (2006).

jurisdiction to hear the petition.<sup>34</sup> The court held that this was a matter for the district court under the CWA's bifurcated jurisdictional scheme.<sup>35</sup>

### III. LEGAL BACKGROUND

The EPA first began regulating CAFOs under the CWA in 1974.<sup>36</sup> One provision of the CWA provides that the EPA must review and establish effluent limitation guidelines ("ELGs") within one year of February 4, 1987, and that the EPA must also establish a schedule for continuous review of ELGs by this time.<sup>37</sup> The EPA did not meet this schedule, and upon being sued, it entered into a consent decree. In the consent decree the EPA agreed to overhaul many of the rules regarding CAFOs.<sup>38</sup> These new rules were eventually promulgated in 2003 and promptly challenged on numerous grounds by both environmental and agricultural interests in a case before the Second Circuit Court of Appeals captioned *Waterkeeper Alliance, Inc. v. United States E.P.A.*<sup>39</sup> The Second Circuit vacated those rules that did not require a CAFO's NMP to be included as enforceable terms of its NPDES permit and that required all CAFOs to apply for an NPDES permit unless the CAFOs demonstrated

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<sup>34</sup> Nat'l Pork Producers Council v. U.S. Env'tl. Prot. Agency, 635 F.3d 738, 755-56 (5th Cir. 2011).

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

<sup>36</sup> *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 494 (2d Cir. 2005).

<sup>37</sup> 33 U.S.C. § 1314(m) (1976).

<sup>38</sup> *Waterkeeper*, 399 F.3d at 494, n.12.

<sup>39</sup> *Id.* at 495.

that they had no potential to discharge.<sup>40</sup> This forced the EPA to redraft many of their 2003 rules.<sup>41</sup> The agency promulgated the redrafted rules in 2008, and the petitioners in *National Pork Producers* challenged those rules.<sup>42</sup>

### A. *The Duty to Apply for an NPDES Permit*

NPDES permits are issued either by individual states having jurisdiction over the waters into which effluent is discharged or by the EPA if the state has not chosen to issue such permits.<sup>43</sup> The EPA's 2003 regulation provided that all CAFOs must either apply for an NPDES permit allowing them to discharge pollutants or secure a letter from their state's regulatory agency stating that their CAFO has no potential to discharge.<sup>44</sup> In *Waterkeeper*, a number of CAFO operators challenged the requirement that they must apply for NPDES permits regardless of whether they actually discharged.<sup>45</sup> The Second Circuit sided with the CAFOs.<sup>46</sup> The language of the CWA provides that "the discharge of any

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<sup>40</sup> *Id.* at 524.

<sup>41</sup> *Nat'l Pork Producers Council v. U.S. Env'tl. Prot. Agency*, 635 F.3d 738, 745 (5th Cir. 2011).

<sup>42</sup> *Id.* at 745.

<sup>43</sup> 33 U.S.C. § 1342(a)(5) (1972).

<sup>44</sup> *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 495 (2d Cir. 2005).

<sup>45</sup> *Id.* at 504.

<sup>46</sup> *Id.*

pollutant by any person shall be unlawful.”<sup>47</sup> This language narrowly construes the EPA’s authority as being authorized to regulate actual discharges only not the potential to discharge.<sup>48</sup> The Second Circuit held that since the 2003 EPA regulations required CAFOs to apply for permits or seek “no potential to discharge” letters before there was any actual discharge, the EPA overstepped their congressionally delegated authority that allowed them to regulate discharges only.<sup>49</sup> The court thus struck down the EPA’s 2003 rule.

In response to the Second Circuit’s ruling, the EPA proposed a new set of revised rules in 2008.<sup>50</sup> The new rules slightly changed the wording of the requirement to apply for a permit by providing that any CAFO that “discharges or proposes to discharge pollutants” must apply for a NPDES permit.<sup>51</sup> The rule explained this “discharge or propose to discharge” language providing, “a CAFO does not discharge or propose to discharge if ‘based on an objective assessment of the conditions at the CAFO that the CAFO is designed, constructed, operated, and maintained in a manner such that the CAFO will not discharge.’”<sup>52</sup> The new 2008 rule also increased a CAFO’s liability for discharging if they had not applied for a permit by providing that any CAFO that did discharge pollutants without an NPDES permit would be held liable for both their

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<sup>47</sup> 33 U.S.C. § 1311(a) (1972).

<sup>48</sup> *Waterkeeper*, 399 F.3d at 504.

<sup>49</sup> *Id.* at 504-05.

<sup>50</sup> *Nat’l Pork Producers Council v. U.S. Env’tl. Prot. Agency*, 635 F.3d 738, 745 (5th Cir. 2011)

<sup>51</sup> *Id.* at 746.

<sup>52</sup> *Id.* (quoting, 73 Fed. Reg. 12321, 12,339 (Mar. 7, 2008)).

actual discharge as well as their failure to apply for the proper permit.<sup>53</sup> However, if a CAFO determined that it does not “propose to discharge,” it could become certified as a non-discharging CAFO in which case it would only be held liable for the discharge alone and not a failure to apply for the NPDES permit.<sup>54</sup>

*B. Nutrient Management Plans and Land Application of Animal Waste*

When outlining the requirements of an NPDES permit, the 2003 rule provided that a CAFO must develop a NMP.<sup>55</sup> The NMP required a CAFO develop and institute a series of qualitative practices, termed best management practices, designed to eliminate or reduce the amount of manure effluent discharged by a CAFO.<sup>56</sup> The application of animal waste to crop land as fertilizer (“land application”) is specifically required to be included in a CAFO’s best management practices. Subsequently, therefore, plans regarding land application are also required in their NMP.<sup>57</sup> Though the earlier 2003 rule required a CAFO develop a NMP to obtain an NPDES permit, it did not require the provisions of a CAFO’s NMP become enforceable ELGs under its NPDES.<sup>58</sup> In fact, the 2003 rule

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<sup>53</sup> *Id.* at 749.

<sup>54</sup> *Id.* at 746.

<sup>55</sup> *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 495-96 (2d Cir. 2005).

<sup>56</sup> *Id.* at 496.

<sup>57</sup> *Id.* at 499.

<sup>58</sup> *Id.* at 498.

did not even require a CAFO to submit their NMP to obtain an NPDES permit.<sup>59</sup> In *Waterkeeper*, the Second Circuit held the EPA is required to assure compliance with all ELGs.<sup>60</sup> The court went on to hold that by requiring CAFOs to implement NMPs the EPA was establishing those NMPs as ELGs that must be considered conditions of a CAFO's NPDES permit.<sup>61</sup> Moreover, because the EPA failed to review CAFOs' NMPs, their implementation was arbitrary and capricious under the Administrative Procedures Act as there was no meaningful review of those NMPs.<sup>62</sup>

The revised 2008 rule requires all NMPs to be submitted with a CAFO's application for an NPDES permit, and upon grant of that permit, that all provisions of an NMP will become enforceable ELGs under the permit.<sup>63</sup> The rule also requires that all provisions relevant to land application be addressed in the NMP.<sup>64</sup>

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<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 498 (2d Cir. 2005).

<sup>62</sup> *Id.* at 498-99.

<sup>63</sup> 40 C.F.R. § 122.21(i)(1)(x) (2008).

<sup>64</sup> 40 C.F.R. § 122.42(e)(1)(viii) (2008).

C. *EPA Guidance Letters*

The EPA issued three guidance letters explaining how they would interpret the new 2008 regulations.<sup>65</sup> The EPA interpreted the terms pollutant and agricultural storm water runoff very broadly.<sup>66</sup> In these letters, the EPA stated that poultry farms dispersing dry litter through ventilation fans would need to apply for NPDES permits due to the potential for runoff from the poultry production areas into navigable waters of the United States.<sup>67</sup> The EPA moved for a dismissal of this portion of the poultry petitioners' claim, arguing that the Circuit Court lacked jurisdiction to hear the claim because the letter does not constitute a final agency action that would be subject to a notice and comment period under the Administrative Procedures Act.<sup>68</sup>

Under the CWA, a petitioner can challenge an EPA regulation directly in a Circuit Court of Appeals so long as the decision is considered a "final action" either "approving or promulgating certain effluent regulations" or "issuing or denying certain permits."<sup>69</sup> In order to

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<sup>65</sup> *Nat'l Pork Producers Council v. U.S. Env'tl. Prot. Agency*, 635 F.3d 738, 478 (5th Cir. 2011)

<sup>66</sup> *Id.* at 748.

<sup>67</sup> *Id.*

<sup>68</sup> Final Brief of Petitioners National Chicken Council and U.S. Poultry and Egg Ass'n, 2010 WL 3693598 P.1 (2010).

<sup>69</sup> *Nat'l Pork Producers*, 635 F.3d at 755 (citing 33 USC § 1369(b)(1)).

determine whether an agency action constitutes a “final action,” the Supreme Court established a two-part test in *Bennett v. Spear*.<sup>70</sup> “First, the action must mark the ‘consummation’ of the agency’s decision making process... [s]econd, the action must be one by which ‘rights and obligations have been determined’ or from which ‘legal consequences will flow.’”<sup>71</sup> While guidance letters may constitute such final agency actions, they will not be sufficient for review unless they make a substantive change in the agency’s regulations.<sup>72</sup>

#### IV. INSTANT DECISION

##### *A. The Duty to Apply for NPDES permits*

In *National Pork Producers*, the Fifth Circuit first addressed the question of whether the EPA has the statutory authority to promulgate a regulation requiring CAFOs who “propose to discharge [pollutants]” to apply for NPDES permits.<sup>73</sup> The court held that the EPA’s definition of

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<sup>70</sup> *Id.*

<sup>71</sup> *Nat’l Pork Producers Council v. U.S. Env’tl. Prot. Agency*, 635 F.3d 738, 755 (5th Cir. 2011) (citing *Bennett v. Spear*, 520 U.S. 154, 179 (1997)).

<sup>72</sup> *Nat’l Pork Producers*, 635 F.3d at 755 (citing *Her Majesty the Queen in Right of Ontario v. Env’tl. Prot. Agency*, 912 F.2d 1525, 1532 (D.C. Cir. 1990); *Ciba-Geigy Corp. v. Env’tl. Prot. Agency*, 801 F.2d 430, 437 (D.C. Cir. 1986)).

<sup>73</sup> *Nat’l Pork Producers*, 635 F.3d at 749.

“propose” is not the common-usage definition of “propose.”<sup>74</sup> Rather, the EPA’s regulations define CAFOs who “propose to discharge” as CAFOs that are “designed, constructed, and maintained in such a manner that the CAFO will discharge.”<sup>75</sup> Because the rule would require CAFOs who are not actually discharging and who have no intent to actually discharge to still apply for a permit, the Fifth Circuit held that the rule violated the Second Circuit’s decision in *Waterkeeper*, which held that the EPA has no statutory authority over those CAFOs that do not actually discharge pollutants.<sup>76</sup> In other words, because the CWA requires effluent-discharging CAFOs to obtain permits, the EPA must have the authority to control discharges of pollutants, but the CWA does not give the EPA the authority to regulate the potential discharge of pollutants.<sup>77</sup>

Second, the court addressed the issue of whether the EPA has the statutory authority to hold those CAFOs that did not apply for a permit liable for their failure to apply.<sup>78</sup> The court held that the statutory language in the CWA very strictly regulates when the EPA can issue compliance orders or bring civil and criminal suits.<sup>79</sup> The court held that the EPA could only bring an action after a discharge of pollutants has actually occurred. The court held that the EPA’s attachment of penalties to

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<sup>74</sup> *Id.* at 750.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Nat’l Pork Producers Council v. U.S. Envtl. Prot. Agency*, 635 F.3d 738, (5th Cir. 2011).

<sup>78</sup> *Id.* at 751-52.

<sup>79</sup> *Id.* at 752.

a failure to apply for the proper permit was therefore outside the scope of their congressionally conferred authority.<sup>80</sup>

### B. *Land Application*

Third, the court quickly dismissed the farm petitioners' challenge to the EPA's requirement that land application principle be included in a CAFO's NMPs, making them enforceable terms of a CAFO's NPDES permit.<sup>81</sup> The Fifth Circuit held that the petitioners' challenges were not brought within the 120-day time limit for challenging the EPA's clean water rules.<sup>82</sup> The court then held this portion of the rule was promulgated in the 2003 version of the rule that was earlier challenged in *Waterkeeper*.<sup>83</sup> In *Waterkeeper*, opposing parties argued land application discharges were a part of a CAFO's NMP, and all portions of these NMPs became enforceable terms of the CAFO's NPDES permit.<sup>84</sup> The court accepted this argument.<sup>85</sup> As such this requirement is actually a part of the

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<sup>80</sup> *Id.* at 752-53.

<sup>81</sup> *Id.* at 754.

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

<sup>83</sup> Nat'l Pork Producers Council v. U.S. Env'tl. Prot. Agency, 635 F.3d 738, 754 (5th Cir. 2011).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 754.

2003 rule not the 2008 rule, and the Farm Petitioners lost their opportunity to challenge it.<sup>86</sup>

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<sup>86</sup> *Id.*

### C. *The EPA Guidance Letters*

Fourth, the *National Pork Producers* court addressed the poultry petitioners' arguments that the EPA's guidance letters should be set aside because they did not go through a congressionally mandated notice and comment process.<sup>87</sup> The court dismissed these claims on the grounds that they did not have jurisdiction over them.<sup>88</sup> In order to have jurisdiction over the claim, the guidance letters must have constituted a "final agency action."<sup>89</sup> The court held that the guidance letters did not constitute such an action because they merely provided guidance to the EPA's regulations and did not create "a substantive change in the EPA's regulation of CAFOs" as required by the Supreme Court under *Bennett v. Spear*.<sup>90</sup>

## V. COMMENT

First, this note will briefly address the court's decision regarding the land application of animal manure and the EPA's guidance letters.

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<sup>87</sup> *Id.* at 754-55.

<sup>88</sup> *Id.* at 755.

<sup>89</sup> *Nat'l Pork Producers Council v. U.S. Env'tl. Prot. Agency*, 635 F.3d 738, 755 (5th Cir. 2011).

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

This discussion will be brief because both decisions were made on purely procedural issues, but still might have some impact on future litigation in environmental and agricultural law. This note will then move on to discuss the now twice litigated issue of the EPA's unsuccessful attempt to broaden the scope of CAFOs over which it has regulatory authority to include those CAFOs that do not in fact discharge.

### *A. Land Application*

With regard to the Fifth Circuit's determination of the land application issue, the court made the correct decision. The 2003 rule required the land application of manure to be contemplated as part of an NMP, but it did not require that that NMP become an enforceable term of a CAFO's NPDES permit.<sup>91</sup> The parties in *Waterkeeper* argued over whether the NMP (including land application provisions) must become part of the NPDES permits and the court determined that indeed they must.<sup>92</sup> Thus, the 2003 rule did require that the land application provisions be provided for in the NPDES permits. The farm petitioners already litigated this issue in *Waterkeeper*, lost, and were barred from bringing this claim again.

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<sup>91</sup> *Id.* at 754.

<sup>92</sup> *Id.*

*B. EPA Guidance Letters*

With regard to the poultry petitioners challenge to the EPA guidance letters, the court passed up an ideal opportunity to provide clarity to conflicting federal statutes and regulations by dismissing the poultry petitioners' claim on jurisdictional grounds.<sup>93</sup> The guidance letters stated that dry litter expelled from poultry farms' ventilation system constituted pollution that could be regulated by the EPA.<sup>94</sup> This is not at all clear from the CWA and other EPA regulations. The relevant EPA regulation provides,

“The discharge of manure, litter or process wastewater to waters of the United States from a CAFO as a result of the application of that manure, litter or process wastewater by the CAFO to land areas under its control is a discharge from that CAFO subject to NPDES permit requirements, except where it is an agricultural storm water discharge as provided in 33 U.S.C. 1362(14).”<sup>95</sup>

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<sup>93</sup> *Id.* at 756.

<sup>94</sup> *Id.* at 748.

<sup>95</sup> 40 C.F.R. § 122.23 (2012).

An agricultural storm water discharge is also poorly defined by the CWA as a non point source of pollution.<sup>96</sup> A point source is “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.”<sup>97</sup> Since the EPA’s regulation provides an exception to NPDES requirements for agricultural storm water, it is clear that the EPA considers some discharges from CAFOs to fall within this exception, but the EPA only considers such an exception when contemplating the land application of manure and dry litter. To further complicate things the language of the CWA provides that discharges from CAFOs are point sources, and therefore not subject to an agricultural storm water exception.<sup>98</sup>

By dismissing the poultry petitioners’ claim on jurisdictional grounds, the Fifth Circuit tacitly gave approval an EPA regulation that seems to violate the CWA on its face because it gives two different explanations of what constitutes the agricultural storm water exception. Moreover, the court glosses over this issue by holding that the EPA’s guidance letter merely restates the requirement to have an NPDES permit in order to discharge pollutants.<sup>99</sup> By accepting the EPA’s interpretation of the agricultural storm water exemption (and thereby rejecting Congress’), the court has broadened the EPA’s regulatory scope and has not defined any kind of limit for that scope.

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<sup>96</sup> 33 U.S.C. § 1362(14) (2006)

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> Nat’l Pork Producers Council v. U.S. Env’tl. Prot. Agency, 635 F.3d 738, 756 (5th Cir. 2011).

*C. The “Propose to Discharge” NPDES Permit Application Requirement*

Twice the EPA has attempted to extend its authority to reach the regulation of non-discharging CAFOs, and both times appellate courts have rejected its efforts.<sup>100</sup> The EPA’s proposed regulations would certainly have done more to promote the CWA’s goal, but the court’s limitation of the EPA’s authority is mitigated to by the work of another federal agency, The United States Department of Agriculture (“USDA”). Moreover, the EPA may be able to increase, to a limited extent, the scope of CAFOs it regulates and increase the quality of its monitoring and regulation of CAFOs, if it is willing to work collaboratively with the USDA.

The EPA should issue permits to and monitor CAFOs that actually discharge pollutants, but it also must recognize that the USDA has already established a different, voluntary, and benefits-focused regulatory scheme that is open to both discharging and non-discharging CAFOs. These regulations run through the USDA’s Environmental Quality Incentive Program (“EQIP”) and have a similar though not identical goal of promoting environmentally sustainable and responsible agriculture.<sup>101</sup> The EPA’s regulations penalize CAFOs that discharge pollutants, and EQIP provides both monetary and technical assistance for various agriculturalists, including CAFO operators, to aid them in not running afoul of the EPA’s regulations.

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<sup>100</sup> See *Waterkeeper Alliance, Inc., v. EPA*, 399 F.3d 486 (2d Cir. 2005); *Nat’l Pork Producers Council*, 635 F.3d 738.

<sup>101</sup> 16 U.S.C. § 3839aa (2006).

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Congress established EQIP, a voluntary conservation program, under the USDA in the Farm Act of 1996.<sup>102</sup> The Natural Resources Conservation Service (“NRCS”) administers the program.<sup>103</sup> “The purposes of the environmental quality incentives program is to promote agricultural production... and environmental quality as compatible goals, and to optimize environmental benefits, by – (1) assisting producers in complying with local, State, and national regulatory requirements concerning -- (A)soil, water, and air quality...”<sup>104</sup> EQIP furthers the goals of the CWA in two ways. First, it provides payments to agriculturists<sup>105</sup> for upgrading their conservation technology.<sup>106</sup> In distributing these payments, EQIP engages in cost sharing with approved agriculturalists for these technological upgrades.<sup>107</sup> EQIP will pay up to 75% of the upgrade costs.<sup>108</sup> EQIP then may provide incentive payments for implementing the technology up to \$300,000 per producer over a six-year period.<sup>109</sup> Second, EQIP provides technical assistance in implementing these technology upgrades through NRCS and state level conservationists.<sup>110</sup> While EQIP

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<sup>102</sup> 7 U.S.C. § 7201 (2006).

<sup>103</sup> EQIP Fact Sheet, *available at* [http://www.nrcs.usda.gov/Internet/FSE\\_DOCUMENTS/nrcs143\\_007742.pdf](http://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/nrcs143_007742.pdf)

<sup>104</sup> 16 U.S.C. § 3839aa (2006).

<sup>105</sup> 7 U.S.C. § 7201 (2006).

<sup>106</sup> EQIP Fact Sheet, *supra* note 103.

<sup>107</sup> **SUSAN A. SCHNEIDER, FOOD, FARMING AND SUSTAINABILITY: READINGS IN AGRICULTURAL LAW** 181 (2011).

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 183.

<sup>110</sup> EQIP Fact Sheet, *supra* note 103.

provides assistance to many different types of agriculturists, its assistance is especially relevant to CAFO operators because 60% of the overall payments under EQIP must go to livestock operations.<sup>111</sup>

In order to be eligible to receive EQIP funds a CAFO must meet one of two requirements. They must either submit a plan to get an air or water quality permit or submit an EQIP “plan of operations.”<sup>112</sup> Either way, the CAFO must be subject to something similar to the NPDES permit requirements the EPA sought to enforce against non-discharging CAFOs in *National Pork Producers*. Obviously, if CAFOs are seeking a water quality permits they would seek an NPDES permit from the EPA, and the EPA retain its opportunity to regulate. However, if a non-discharging CAFO chooses to submit an EQIP “plan of operations,” they will still be subject to requirements similar to those set forth by the EPA in their NPDES permits. The plan of operations must contain a comprehensive nutrient management plan (“CNMP”).<sup>113</sup>

“A CNMP means a conservation system that is unique to an animal feeding operation (AFO). A CNMP is a grouping of conservation practices and management activities which, when implemented as part of a conservation system, will help to ensure that both production and natural resource protection goals are achieved. A CNMP incorporates practices to use animal

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<sup>111</sup> 7 C.F.R. § 1466.8(d) (2012). Moreover, “between 2004 and 2007 65-68% of funds went to livestock related practices.” *SCHNEIDER, supra note 107, at 184.*

<sup>112</sup> 7 C.F.R. § 1466.8(b)(4) (2012).

<sup>113</sup> 7 C.F.R. § 1466.8(d) (2012).

manure and organic by-products as a beneficial resource. A CNMP addresses natural resource concerns dealing with soil erosion, manure, and organic byproducts and their potential impacts on all natural resources including water and air quality, which may derive from an AFO. A CNMP is developed to assist an AFO owner/operator in meeting all applicable local, Tribal, State, and Federal water quality goals or regulations. For nutrient impaired stream segments or water bodies, additional management activities or conservation practices may be required by local, Tribal, State, or Federal water quality goals or regulations.”<sup>114</sup>

Moreover, upon completing a CNMP, the provisions of the plan would become binding contract terms upon the CAFO. Clearly, a CNMP is very similar to the NMP that the EPA requires as enforceable terms of its NPDES permits.<sup>115</sup>

In order to realize its goal of widening the scope of CAFOs, which are subject to its regulations, the EPA should attempt to persuade the USDA to rewrite its rules to require all CAFOs seeking EQIP payments to apply for an NPDES permit, and the USDA should acquiesce. This would be more efficient in carrying out EQIP’s stated goal of aiding agriculturists in not violating EPA regulations because the EPA would itself provide the CAFO with its effluent emission guidelines. There would be one less level of rule and regulation interpretation to confuse CAFO operators and regulators alike. Also, unlike the EPA’s proposed

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<sup>114</sup> 7 C.F.R. § 1466.3 (2012).

<sup>115</sup> It should also be noted that the CNMP includes the land application requirements that the EPA advanced in both *Waterkeeper* and *National Pork Producers*.

rules, the courts should not strike down any such agreement between these because the new rule would not only be consistent with EQIP's enabling legislation, but specifically authorized by it.<sup>116</sup> The statutorily stated goal of EQIP is to "promote agricultural production... and optimize environmental benefits."<sup>117</sup> Clearly, requiring CAFOs attempting to acquire EQIP funding to be subjected to the EPA's permitting regulations would promote this goal. Moreover, another specific power of EQIP is to "carry out conservation or environmental programs as authorized by law."<sup>118</sup> The EPA's NPDES permit program should consider such a program and EQIP should be capable of aiding in its broad enforcement.

The USDA would often be able to enforce the terms of an NPDES more easily than the EPA due to different inspection and monitoring provisions. Because NPDES programs are usually run by individual states, the monitoring requirements under EQIP may be more stringent than they would be under NPDES permits depending on the state where the CAFO is located. In other words, while the Fifth Circuit's decision in *National Pork Producers* would shrink the scope of the EPA's regulation, by cooperating with the USDA, the EPA could potentially increase the quality of regulation of those CAFOs within the EPA's scope in some states. This is only relevant to some states because, though the EPA determines baseline rules and regulations for the issuance of NPDES permits, the actual permitting and inspecting programs are run primarily through state programs.<sup>119</sup> Currently, only six states<sup>120</sup> and the District of

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<sup>116</sup> See 16 U.S.C. § 3839aa (2006).

<sup>117</sup> *Id.*

<sup>118</sup> 15 U.S.C. § 714c(g) (2006).

<sup>119</sup> 33 U.S.C. § 1342(b) (2006).

Columbia do not have any control in implementing NPDES permits.<sup>121</sup> These state programs can create their own rules regarding the monitoring of effluent sources so long as they meet a federal minimum standard.<sup>122</sup> In regards to the monitoring of permits, the federal minimum only provides that permitting authorities have a right of entry onto land where “an effluent source is located.”<sup>123</sup> This right of entry is vague and poorly defined.<sup>124</sup> It could easily lead to disagreements over issues including whether or not an inspector has a right of access to fields where manure is being land applied rather than just barns containing animals and whether or not a CAFO operator has a right to be present during an inspection.<sup>125</sup> Though EQIP heavily involves local governments at the state and county level, the federal EQIP standard those states must adhere to is more clearly defined. The federal EQIP standards grant more broad rights to inspectors and monitors.<sup>126</sup> Under the EQIP regulation, an inspector can enter any portion of land related to an EQIP contract to ensure the terms of the contract are being carried out.<sup>127</sup> Moreover, the inspector need only

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<sup>120</sup> The six states are: Idaho, New Mexico, Alaska, Delaware, New Hampshire, and Massachusetts. *State NPDES Program Authority*, U.S. EPA, available at [http://cfpub.epa.gov/npdes/images/State\\_NPDES\\_Prog\\_Auth.pdf](http://cfpub.epa.gov/npdes/images/State_NPDES_Prog_Auth.pdf) (last visited Jan. 27, 2012).

<sup>121</sup> *Id.* These states have no control in implementing NPDES permits because they have chosen not cede this process over to the EPA.

<sup>122</sup> 33 U.S.C. § 1342(b)(2)(B) (2006).

<sup>123</sup> 33 U.S.C. § 1318 (a)(B)(i) (2006).

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

<sup>125</sup> 7 C.F.R. § 1466.2 (2009); 7 C.F.R. § 1466.32 (2009).

<sup>126</sup> 7 C.F.R. § 1466.2 (2009); 7 C.F.R. § 1466.32 (2009).

<sup>127</sup> 7 C.F.R. § 1466.32 (2009).

attempt to make contact with the CAFO operator before he conducts the inspection.<sup>128</sup> This means that if necessary an inspector need not wait for a CAFO operator to be available. The inspector can go onto the land and inspect almost at will. If an inspector can inspect at will he will be more able to do an accurate and honest analysis of potential violations. If an NPDES permit was a requirement to participate in the EQIP program, the terms of the permit would become binding under the EQIP contract, and the inspector would be able to ensure that CAFO's comply with it.

## VI. CONCLUSION

If the EPA takes no action at all after the court's decision in *National Pork Producers*, EQIP will still act to provide some level of regulation of non-discharging CAFOs. But, if the EPA does successfully persuade the USDA to amend its rules and require CAFOs applying for EQIP payments to also obtain NPDES permits through the EPA, the EPA's scope of enforcement will increase. The EPA's scope of enforcement will increase because more CAFO's will apply for NPDES permits in order to receive EQIP benefits. While the EPA's scope of enforcement will not increase as much as it would have had the courts approved of the EPA's 2008 rule, due to participation in EQIP being purely voluntary, the substantial economic incentives of enrolling EQIP should encourage many CAFO operators to voluntarily enroll. This more limited scope of enforcement is better than not being able to enforce EPA regulations of non-discharging CAFOs at all. Moreover, the USDA has a broader ability to ensure compliance with EQIP contracts, than the EPA

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<sup>128</sup> *Id.*

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has ability to ensure compliance with NPDES permits. If an NPDES permit were a requirement of an EQIP contract, the USDA would be able to monitor these NPDES provisions.

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