The National Agricultural Law Center

University of Arkansas
System Division of Agriculture

NatAgLaw@uark.edu | (479) 575-7646

An Agricultural Law Research Article

Clarifying NPDES Requirements for Concentrated Animal Feeding Operations

by

Terence J. Centner

Originally published in PENN STATE ENVIRONMENTAL LAW REVIEW
14 PENN ST. ENVTL. L. REV. 361 (2006)

www.NationalAgLawCenter.org

Articles

Clarifying NPDES Requirements for Concentrated Animal Feeding Operations

Terence J. Centner*

* Professor, The University of Georgia, 301 Conner Hall, Athens, GA 30602, Tel.: (706) 542-0756; Email: tcentner@agecon.uga.edu. This research is based on work supported by the U.S. Department of Agriculture's Cooperative State Research, Education, and Extension Service Project No. GEO00890.

I. Introduction

The Clean Water Act of 1972 sought to restore and maintain the chemical, physical, and biological integrity of our nation's waters.[1] Central to achieving the act's goals was a permitting system prohibiting discharges of pollutants from point sources into navigable waters except as authorized by a National Pollutant Discharge Elimination System (NPDES) permit.[2] Permits issued by the U.S. Environmental Protection Agency (EPA)[3] or an authorized state[4] regulate the type and quantity of discharges that are permitted from point sources.[5] Point sources are defined to include discernible, confined, and discrete conveyances including concentrated animal feeding operations (CAFOs).[6]

Although CAFOs have been regulated for years,[7] many have not secured permits,[8] and there is evidence that a lack of permits has contributed to the impairment of our nation's waters.[9] As the result of

1. 33 U.S.C. § 1251(a) (2000); *see e.g..*, Arkansas v. Oklahoma, 503 U.S. 91, 106 (1992) (noting that the achievement of state water quality standards was a major objective of the Clean Water Act); S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, 102 (2004) (noting the objective of the Clean Water Act is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters").

2. 33 U.S.C. §§ 1311(a), 1342 (2000) (precluding the discharge of some pollutants and requiring permits for the discharge of others); *see, e.g.*, Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., 528 U.S. 167, 174 (2000) (noting that NPDES permits impose limitations on the discharge of pollutants to improve the cleanliness and safety of the nation's waters); Waterkeeper Alliance, Inc. v. EPA, 399 F.3d 486, 491 (2d Cir. 2005) (noting the use of permits to set restrictions on the quality and character of water pollution); *see also* N. Plains Res. Council v. Fid. Exploration & Dev. Co., 325 F.3d 1155 (9th Cir. 2003) (noting the requirement of a permit).

3. 33 U.S.C. § 1342(a) (2000) (authorizing the administrator to issue permits).

4. *Id.* § 1342(b)(1) (authorizing states with approved programs to issue permits).

5. *See S. Fla. Water Mgmt. Dist.*, 541 U.S. at 102 (noting the limitation on discharges).

6. 33 U.S.C. § 1362(14) (2000).

7. In 1974, effluent regulations had been adopted to address discharges from CAFOs. National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines and Standards for Concentrated Animal Feeding Operations (CAFOs), 68 Fed. Reg. 7176, 7186 (2003) (preamble) [hereinafter EPA Final Rule]. The CAFO Rule is codified at 40 C.F.R. pts. 122, 412 (effective Apr. 14, 2003) and included a preamble with a lengthy explanation of considerations taken into account with the adoption of the rule.

8. EPA Final Rule, *supra* note 7, at 7201 (preamble).

9. National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines and Standards for Concentrated Animal Feeding Operations, Proposed CAFO Regulations, 66 Fed. Reg. 2960, 3080 (proposed Jan. 12, 2001) (preamble) [hereinafter EPA Proposed Rule]. Data from 1997 suggested that only about 20% of the nation's CAFOs had secured permits. *Id.* (preamble). *See, e.g.*, Cmty. Ass'n for Restoration of the Env't v. Henry Bosma Dairy, 305 F.3d 943, 949 (9th Cir. 2002) (noting penalties imposed on a CAFO for discharging pollutants).

litigation,[10] the EPA entered a consent decree whereby a new CAFO Rule would be adopted.[11] The new CAFO Rule became effective on April 14, 2003[12] after extensive input from environmental and agricultural groups.[13] During consideration of the proposed rule, public input expressed strong feelings that regulators were not doing enough to abate agricultural pollution, but also that additional governmental oversight could impose significant costs on the livestock industry.[14] The final CAFO Rule contained provisions that were objectionable to both environmental and farm groups, and organizations from both groups challenged EPA's regulations in *Waterkeeper Alliance, Inc. v. Environmental Protection Agency*.[15]

The petitioners challenged several aspects of the CAFO Rule.[16] For the Environmental Petitioners,[17] flaws in provisions regarding governmental oversight included allegations of deficiencies in the NPDES permits,[18] the absence of a review of permits by a permitting authority,[19] and the lack of public participation.[20] Both the Farm[21] and Environmental Petitioners challenged the provisions on agricultural stormwater discharges.[22] The Farm Petitioners challenged the permitting scheme whereby CAFOs have a duty to either apply for NPDES permits

10. Natural Res. Def. Council v. Reilly, *modified sub. nom*., Natural Res. Def. Council v. Whitman, No. 89-2980 (D.D.C. 1992) (requiring EPA to develop new effluent limitation guidelines for some CAFOs).

11. EPA Final Rule, *supra* note 7, at 7186 (preamble).

12. 40 C.F.R. pts. 122, 412 (2004). While the rule became effective in 2003, certain provisions were to take effect at later dates. *Id.* §§ 122.21(a)(1)(x), 122.23(g)(2), 122.23(g)(3)(iii), 122.42(e)(1), 412.31(b)(3), 412.43(b)(2). Moreover, due to the judicial ruling in Waterkeeper Alliance, Inc. v. EPA, 399 F.3d 486 (2d Cir. 2005), some provisions were vacated so they do not apply.

13. EPA Final Rule, *supra* note 7, at 7178 (preamble). The government received 11,000 comments. *Id*.

14. *Id.* at 7178-89 (preamble).

15. 399 F.3d 486 (2d Cir. 2005).

16. *Id.*

17. These include Waterkeeper Alliance, Inc., Am. Littoral Soc'y, Sierra Club, Inc., and the Natural Res. Def. Council, Inc. Brief for the Environmental Petitioners at 1, *Waterkeeper Alliance*, 399 F.3d 486 (2d Cir. 2005) [hereinafter Brief for the Environmental Petitioners].

18. *Waterkeeper Alliance*, 399 F.3d at 502-03. *See infra* notes 43-65 and accompanying text.

19. *Waterkeeper Alliance*, 399 F.3d at 498-502. *See infra* notes 66-89 and accompanying text.

20. *Waterkeeper Alliance*, 399 F.3d at 503-04. *See infra* notes 90-106 and accompanying text.

21. These included the Am. Farm Bureau Fed'n, Nat'l Chicken Council, and the Nat'l Pork Producers Council. Brief for the Farm Petitioners at 1, Waterkeeper Alliance, Inc. v. EPA, 399 F.3d 486 (2d Cir. 2005) [hereinafter Brief for the Farm Petitioners].

22. *Waterkeeper Alliance*, 399 F.3d at 506-11. *See infra* notes 107-175 and accompanying text.

or otherwise demonstrate that they have no potential to discharge.[23] The Second Circuit Court of Appeals found merit in some of the challenges from both sets of petitioners.[24] It vacated selected provisions of the CAFO Rule and remanded other aspects to EPA for further clarification and analysis.[25]

The findings by the Second Circuit constitute important guidelines regarding the Clean Water Act's regulations for CAFOs.[26] Pursuant to *Waterkeeper Alliance*, owners and operators of CAFOs that only have a potential to pollute need not apply for permits.[27] In the absence of a duty for an owner or operator of a CAFO to apply for a permit, fewer permit applications are expected to be submitted to permitting agencies,[28] which suggests that the government's cost estimates of the CAFO Rule are inaccurate.[29] The decision to allow EPA to regulate land application discharges by CAFOs, except those qualifying as agricultural stormwater discharges, means that CAFOs need to be concerned about runoff from

23. *Waterkeeper Alliance*, 399 F.3d at 504-06. *See infra* notes 176-234 and accompanying text.

24. *Waterkeeper Alliance*, 399 F.3d at 524.

25. *Id.*

26. EPA was directed to revise its regulations to conform with the findings of the court. *Id.* Some states will also find it necessary to revise their water quality regulations for CAFOs due to the need to require nutrient management plans in permit applications. *See infra* notes 57-65 and accompanying text. States may also have to delete provisions that require CAFOs with a potential to pollute to apply for permits. *See infra* notes 176-200 and accompanying text.

27. The *Waterkeeper Alliance* ruling removes the regulatory duty to apply for a permit and requires nutrient management plans be a part of a permit. *Waterkeeper Alliance*, 399 F.3d at 499, 506. This may lead to fewer CAFO owners and operators applying for permits due to the expense and the difficulties involved in defining nutrient management plans that would withstand public scrutiny. Moreover, because permits subject applicants to public oversight and present opportunities for allegations of violations of conditions set forth in the permit under a citizen suit, owners and operators often are not keen in applying. For other owners and operators, the Second Circuit's decision may encourage them to use greater care in applying manure to avoid discharges that would require them to apply for a permit.

28. Securing permits is time-consuming and costly. If owners and operators can avoid these costs, they improve their financial well-being. One of the criticisms of the CAFO Rule was that it was foisting expenses on firms based upon their potential to pollute rather than actual pollution. *See* Terence J. Centner, *Developing Institutions to Encourage the Use of Animal Wastes as Production Inputs*, 21 AGRIC. & HUMAN VALUES 367, 372 (2004) (noting that governmental expenses directed at potential pollution may be misdirected and advocating strategies to use manure as a production input); *see also* Terence J. Centner, *Regulating Concentrated Animal Feeding Operations to Enhance the Environment*, 6 ENV'T SCI. & POL'Y 433, 437 (2003) (noting the shortcoming of regulating potential pollution and advocating controls that regulate polluters and champion small-scale operations and activities). The *Waterkeeper Alliance* decision precludes EPA from regulating potential pollution from CAFOs. *Waterkeeper Alliance*, 399 F.3d at 506.

29. In the absence of a duty, fewer operations will be required to secure permits so the estimated costs delineated in the preamble of the CAFO Rule are probably too high. EPA Final Rule, *supra* note 7, at 7242-52.

the application of manure, litter, or process wastewater.[30] Simultaneously, nutrient management plans are required and permitting authorities must review them.[31]

II. NPDES Permit Requirements

Congress established an NPDES permitting system with technology-based discharge limits for water pollution from point sources to reduce discharges and improve water quality.[32] Permits issued by the federal government and authorized states[33] allow some discharges, but the NPDES system has drastically curtailed the amounts of pollutants entering the nation's waterbodies.[34] However, the permitting regulations for CAFOs developed in the 1970s were not sufficiently addressing the impairment of water quality by animal feeding operations.[35] Dissatisfaction with efforts to meet water quality goals led to the

30. Under earlier CAFO regulations, many owners and operators believed that the land application of manure was not regulated by the point-source provisions of the Clean Water Act. While the Second Circuit Court of Appeals found in *Concerned Area Residents for the Env't v. Southview Farm*, 34 F.3d 114, 118 (2d Cir. 1994), that manure application could result in a discharge for which an NPDES permit was required, the fact that most CAFOs did not secure permits underscores a belief that owners and operators felt they were excepted from the permitting regulations. Furthermore, a storm event exemption under earlier federal regulations led some owners and operators to believe they did not need permits. *See* Terence J. Centner, *Enforcing Environmental Regulations: Concentrated Animal Feeding Operations*, 69 MO. L. REV. 697, 712 (2004) (discussing the possible explanations for the lack of permits by CAFO owners and operators); *see also* Water Keeper Alliance, Inc. v. Smithfield Foods, Inc., 2001 U.S. Dist. LEXIS 21314, at *7-8 (E.D. N.C. Sept. 20, 2001) (denying defendants' assertion that the storm event exception meant defendants did not need an NPDES permit).

31. 40 C.F.R. § 122.42(e)(1) (2004) (requiring a permit to include a nutrient management plan); *see also* 40 C.F.R. § 412.4(c)(1) (requiring a nutrient management plan for effluent limitations). Some authorized states will need to start reviewing nutrient management plans submitted as part of the NPDES permit. *See infra* notes 57-61 and accompanying text.

32. 33 U.S.C. § 1342 (2000); *see also* EPA v. Nat'l Crushed Stone Ass'n, 499 U.S. 64, 71 (1980) (noting discharge requirements under the permitting system); Tex. Oil & Gas Ass'n v. EPA, 161 F.3d 923, 927 (5th Cir. 1998) (noting the use of permits and effluent limitation guidelines to reduce pollution).

33. 33 U.S.C. § 1342(a)-(b) (2000); *see also* Arkansas v. Oklahoma, 503 U.S. 91, 102 (1992) (discussing the state and federal permitting provisions).

34. *See, e.g.*, ROBERT W. ADLER ET AL., THE CLEAN WATER ACT 20 YEARS LATER 16-17 (1993) (reporting a 99 percent reduction of selected toxic pollutants since 1972 and significant progress in reducing pollutants from specific sources, although problems remain); JACKSON B. BATTLE & MAXINE I. LIPELES, WATER POLLUTION 3 (3d ed. 1998) (reporting the elimination of most of the conspicuous water pollution of the late 1960s); Daniel W. Oberle, *Contaminated Sediment Prevention and Remediation: A Need for Consistent Policy and Sound Science*, 2000 TOL. J. GREAT LAKES' L. SCI. & POL'Y 26, 46 (noting the success of reducing discharges from point sources and a redirection of attention to nonpoint sources).

35. EPA Final Rule, *supra* note 7, at 7176 (preamble).

modifications set forth in the 2003 CAFO Rule.[36]

Although the provisions of the CAFO Rule were expected to enhance water quality,[37] proponents for cleaner water did not feel that the regulations were sufficient to meet the requirements of the Clean Water Act.[38] In *Waterkeeper Alliance*, the Environmental Petitioners argued that the CAFO Rule improperly empowered NPDES authorities to issue permits to owners and operators of "Large CAFOs"[39] without proper review, oversight, and public participation.[40] Due to one or more of these shortcomings, the CAFO Rule provisions were alleged to be arbitrary and capricious.[41] The Second Circuit agreed and vacated the provisions of the CAFO Rule pertaining to the three challenges.[42]

A. Terms Lacking in the NPDES Permits

Section 301 of the Clean Water Act requires that all applicable effluent limitations be included in each NPDES permit.[43] EPA set effluent limitations for CAFOs apart from the NPDES permitting provisions.[44] For CAFO effluent limitations, EPA promulgated best management practices for Large CAFOs as qualitative effluent limitation guidelines that were technology-based restrictions on water pollution.[45] Because numeric effluent limitations were not feasible,[46] best

36. *See* EPA Proposed Rule, *supra* note 9, at 2962 (noting in the preamble that environmental concerns included ecological and human health effects).

37. *See e.g.*, Centner, *supra* note 30, at 728 (suggesting that the removal of exceptions, enumeration of further requirements, and coverage of additional operations should eliminate practices leading to water impairment).

38. *See* Brief for the Environmental Petitioners, *supra* note 17, at 33-39.

39. Large CAFOs are CAFOs with more than an enumerated number of animals as defined by the CAFO Rule. 40 C.F.R. § 122.23(b)(4) (2004) (enumerating minimum numbers of species of animals required at a location for a CAFO to constitute a Large CAFO).

40. *Id*. § 122.23(b)(4); Waterkeeper Alliance, Inc. v. EPA, 399 F.3d 486, 498-502 (2d Cir. 2005).

41. *Waterkeeper Alliance*, 399 F.3d at 498, 502-03. The court's inquiry was guided by the standard set forth in *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983).

42. *Waterkeeper Alliance*, 399 F.3d at 524.

43. 33 U.S.C. § 1311(a)-(b) (2000); *see also id*. § 1342(a) (noting that permits must meet the requirements of other provisions of the Clean Water Act).

44. 40 C.F.R. pt. 412 (2004) (delineating effluent limitations for CAFOs); *see also id.* pt. 122 (delineating NPDES requirements for CAFOs).

45. *Waterkeeper Alliance*, 399 F.3d at 496; *see also* Brief for the Respondents at 105-106, *Waterkeeper Alliance*, 399 F.3d 486 (2d Cir. 2005) (No. 03-4470(L)) [hereinafter Brief for the Respondents].

46. EPA Final Rule, *supra* note 7, at 7212 (noting in the preamble that the amount or rate at which manure can be applied to ensure appropriate agricultural utilization of nutrients varies based on site-specific factors at the CAFO so that reliance on numeric effluent limitation guidelines to control land application discharges was infeasible).

management practices were adopted and the terms of nutrient management plans were not required to be included in the permit applications.[47] The *Waterkeeper Alliance* court disagreed with EPA's argument and held that the CAFO Rule violated the Clean Water Act and the Administrative Procedure Act[48] by failing to require that the terms of the nutrient management plans be included in NPDES permits.[49]

The Second Circuit noted that best management practices are nonnumerical effluent limitations.[50] Under the CAFO Rule, certain Large CAFOs need to develop nutrient management plans that minimize phosphorus and nitrogen transport.[51] Limitations on land discharges exist due to the terms of a nutrient management plan.[52] As the definition of "effluent limitation" means any restriction on quantities, rates, and concentrations of nutrients,[53] nutrient management plans are effluent limitations.[54] Since effluent limitations need to be set forth in permits,[55] a nutrient management plan must be included in an NPDES permit application.[56]

The *Waterkeeper Alliance* holding may require owners and operators to reconsider the role of their nutrient management plan.[57] While such plans were traditionally viewed as documents detailing a farmer's plans for nutrient applications, they now must be written to meet more absolute regulatory dictates.[58] States have adopted different approaches to the inclusion of nutrient management plans in permit

47. Brief for the Respondents, *supra* note 45, at 106-07.

48. 5 U.S.C. § 706(2)(A) (2000).

49. *Waterkeeper Alliance*, 399 F.3d at 502-03.

50. *Id.* at 502. Best management practices are still technology-based because they are derived from standards prescribed by the Clean Water Act. *Id.* at 496.

51. 40 C.F.R. § 412.4(c)(1) (2004). This includes the determination of application rates for manure applied to land, manure and soil sampling, inspection of application equipment, and setback requirements. 40 C.F.R. § 412.4(c)(2)-(6). The provisions on nutrient management plans only apply to Large CAFOs with dairy and beef cattle, swine, poultry, and veal calves. 40 C.F.R. § 412.4(a).

52. 40 C.F.R. §412.4(c). In fact, both EPA and the Second Circuit noted that "the only way to ensure that non-permitted point source discharges of manure, litter, or process wastewaters from CAFOs do not occur is to require . . . [land application] in accordance with site specific nutrient management practices." *Waterkeeper Alliance*, 399 F.3d at 504 (citing the preamble to the final rule).

53. 33 U.S.C. §1362(11) (2000); *see also Waterkeeper Alliance*, 399 F.3d at 502.

54. *Waterkeeper Alliance*, 399 F.3d at 502.

55. 33 U.S.C. §§ 1311(a)-(b) (2000); *Id.* § 1342(a).

56. *Waterkeeper Alliance*, 399 F.3d at 502-03.

57. JOHN LORY, COURT RULING RAISES QUESTIONS ABOUT NUTRIENT MANAGEMENT PLANS IN CAFO PERMITS, ANIMAL MANURE MANAGEMENT (2005) (suggesting a shift in the role of nutrient management plans if they are public documents), *available at* http://www.heartlandwq.iastate.edu/NR/rdonlyres/F7FFCD60-5C34-4B75-95EC-603AC636AF06/24399/HeartlandJuneNewsletter0605.pdf.

58. *Id.* The issue involves flexibility for nutrient management to respond to weather variables.

applications.[59] For example, Georgia requires owners to prepare and implement comprehensive nutrient management plans, but does not require submission of the plans to the Georgia Environmental Protection Division unless the Division makes a request in writing.[60] Thus, Georgia regulations do not seem to meet the prescribed federal requirements that the plans be included in NPDES permits.[61]

Some states have recognized that CAFO permit applications ought to include the CAFO's manure management plan.[62] For example, owners or operators of CAFOs in Wisconsin applying for a Wisconsin Pollutant Discharge Elimination System permit must submit a preliminary manure management plan describing how manure and other types of waste are proposed to be stored and spread on lands.[63] Wisconsin also requires that manure management plans be submitted to the Wisconsin Department of Natural Resources "for review and approval detailing the amounts, timing, locations and other aspects regarding the disposal of manure and other wastes."[64] These Wisconsin requirements appear to be consistent with the finding of the Second Circuit that nutrient management plans need to be a part of a permit application.[65]

B. Absence of A Meaningful Review

Under the effluent limitation provisions of the CAFO Rule, certain Large CAFOs need NPDES permits covering the land application of manure.[66] Under the regulatory provisions, each permit needs to include best management practices that include a nutrient management plan delineating criteria that minimize the movement of nitrogen and phosphorus to surface waters.[67] While the regulations require the development and implementation of nutrient management plans, there is

59. *See, e.g.*, VERMONT AGENCY OF AGRICULTURE, FOOD & MARKETS, LARGE FARM OPERATION subch. 5, 1(a)(5) (1999), *available at* http://www.vermontagriculture.com/lforules.htm#Subchapter%201.

60. GA. COMP. R. & REGS. 391-3-6-.21(10)(c), 391-3-6-.21(11)(c) (2005) (delineating requirements for animal (non-swine) feeding operation permits).

61. *Id.* There is no mandatory requirement that a nutrient management plan be part of the submitted to the regulatory agency, which is contrary to the holding of *Waterkeeper Alliance*, 399 F.3d at 502-03.

62. *See, e.g.*, MINN. R. 7020.0505 subpart 4(A)(10) (2003) (requiring submission of a manure management plan that meets requirements prescribed in rule 7020.2225, subpart 4).

63. WIS. ADMIN. CODE [NR] § 243.12(1)(c)(2) (2002).

64. *Id.* § 243.14(1).

65. *See id.* Minnesota's Rules also appear to comport with the *Waterkeeper Alliance* decision. MINN. R. 7020.0505 subpart 4(A)(10) (2003).

66. 40 C.F.R. §§ 122.23, 412.4 (2003). *See supra* note 51 (noting animal species).

67. 40 C.F.R. § 412.4(c) (2003).

no provision that requires a permitting authority to review the plans before issuing a permit.[68] EPA felt that nutrient management plans were a planning tool.[69] The plans involved state-developed technical standards that delineate adequate effluent limitations.[70]

The Second Circuit found that absence of a meaningful review of nutrient management plans meant the CAFO Rule did not comply with the statutory effluent limitations and standards.[71] The issue involves complying with the NPDES provisions of sections 301 and 402 of the Clean Water Act.[72] Section 402 limits the issuance of permits unless there is compliance with other applicable sections of the Clean Water Act.[73] The section goes on to require that EPA prescribe conditions for permits that assure compliance with sections of the act.[74] Under these requirements, discharge permits may be issued only if they set forth effluent limitations and standards as required by the Clean Water Act.[75]

The provisions of section 402 mean that there is no authority for issuing any permit that does not incorporate appropriate effluent limitations as prescribed by section 301.[76] While the CAFO Rule required the development and implementation of best management plans incorporating nutrient management plans, the rule failed to require that the permitting authority review these plans.[77] In the absence of a meaningful review, there was no way the permitting authority could know whether a permit application was in compliance with mandated effluent limitations.[78]

68. Waterkeeper Alliance, Inc. v. EPA, 399 F.3d 486, 499 (2d Cir. 2005). The court was moved to state that "most glaringly, the CAFO Rule fails to require that permitting authorities review the nutrient management plans developed by Large CAFOs before issuing a permit that authorizes land application discharges."

69. *Id.* at 500-02.

70. *Id.*

71. *Id.* at 501-02.

72. 33 U.S.C. §§ 1311, 1342 (2000).

73. 33 U.S.C. §§ 1342(a)(1), (b)(1) (2000).

74. 33 U.S.C. § 1342(a)(2). "The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate."

75. *Id.* §§ 1311(e), 1342(a)-(b); *see also* Sierra Club v. Shell Oil Co., 817 F.2d 1169, 1173 (5th Cir. 1987) (noting that effluent limitations were required to reduce pollutants discharged into waterways).

76. 33 U.S.C. § 1311 (2000). *See, e.g.*, Am. Paper Inst. v. EPA, 996 F.2d 346, 350 (D.C. Cir. 1993) (noting that once effluent limitations were developed, all permits must incorporate them).

77. Waterkeeper Alliance, Inc. v. EPA, 399 F.3d 486, 499 (2d Cir. 2005).

78. *Id.* The Second Circuit noted that "[t]here may well be reason to fear that Large CAFOs may misunderstand their specific situation and prepare inadequate nutrient management plans as a result. . .," and that there was weighty advice to require manure management plans be prepared by trained and certified specialists. *Id.* at 500 n.19.

In reaching this decision, the Second Circuit relied on the Ninth Circuit case of *Environmental Defense Center, Inc. v. EPA*.[79] In *Environmental Defense Center*, the court found that regulations whereby a permitting authority did not review individual permits themselves were flawed.[80] EPA had employed a general permitting model under which a discharger applied for a notice of intent whereby the discharger agreed to abide to the terms of the general permit.[81] While general permits have been recognized as a lawful means of authorizing discharges,[82] the permitting scheme for small municipal separate storm sewer systems embraced a requirement whereby discharges of pollutants needed to be reduced "to the maximum extent practicable" through "minimum control measures."[83] This condition by its very nature requires review by a permitting authority.[84] Because the regulations for small municipal separate storm sewer systems omitted oversight of permitted dischargers, there was no assurance that the statutory requirements were being met.[85] This was contrary to Congress' intent that there be a meaningful review by an appropriate regulating entity to assure the required reduction of a discharge of pollutants to the maximum extent practicable.[86]

Following the reasoning of *Environmental Defense Center*, the Second Circuit found that the provision of the CAFO Rule' omitting oversight of nutrient management plans meant that permits could be issued that do not assure compliance with other requirements of the Clean Water Act.[87] By not requiring permitting authorities to review the nutrient management plans, there was no way to ascertain whether the plans would allow the application of nutrients to achieve realistic production goals while minimizing nitrogen and phosphorus movement to surface waters.[88] Therefore, the provisions of the rule that allow

79. Envtl. Def. Ctr. v. EPA, 344 F.3d 832 (9th Cir. 2003), *cert. denied*, Texas Cities Coalition on Stormwater v. EPA, 124 S. Ct. 2811 (2004) (concerning stormwater runoff and municipal separate storm sewer systems).

80. *Envtl. Def. Ctr*., 344 F.3d at 856. (evaluating regulations for stormwater management programs).

81. *Id*. at 853-56. General permits were recognized as a tool for regulating large numbers of similar dischargers. *Id.* at 853.

82. *See, e.g.,* Natural Res. Def. Council v. Costle, 568 F.2d 1369, 1383 (D.C. Cir. 1977) (approving EPA's employment of general and area permits under section 402 of the Clean Water Act).

83. 40 C.F.R. § 122.34(a) (2004).

84. *Envtl. Def. Ctr.*, 344 F.3d at 855 (observing that to reach a determination involving the "maximum extent practicable," a permitting authority needs to review the measures taken to decide if they indeed meet the requirement).

85. *Id.* at 855-56 (referring to 40 C.F.R. § 122.34(a) (2004)).

86. 33 U.S.C. § 1342 (2000); *Envtl. Def. Ctr.*, 344 F.3d at 856.

87. Waterkeeper Alliance, Inc. v. EPA, 399 F.3d 486, 499-502 (2d Cir. 2005) (referring to 33 U.S.C. § 1342(a)(2) (2000)).

88. *Waterkeeper Alliance*, 399 F.3d at 499-502 (referring to 40 C.F.R. § 412.4(c)(1)

permitting authorities to issue permits without reviewing the terms of the nutrient management plans were vacated.[89]

C. Lack of Public Participation

Waterkeeper Alliance's environmental petitioners also argued that the CAFO Rule enumerated a permitting scheme that was contrary to the public participation provisions of section 101 of the Clean Water Act.[90] The act specifically encourages and provides for public participation in the development and revision of effluent limitations.[91] By not requiring the terms of nutrient management plans to be in NPDES permits, and by failing to provide any means of public access to such plans, the CAFO Rule was found to violate the plain dictates of section 101.[92]

The Second Circuit identified three distinct issues concerning the Clean Water Act's public participation requirements and the CAFO Rule.[93] First, because nutrient management plans constitute effluent limitations that need to be in NPDES permits, the absence of review of the plans deprives the public the right to assist in the development, revision, and enforcement of an effluent limitation.[94] Citizens may be entitled to an opportunity for a public hearing prior to the issuance of a permit.[95]

Second, the absence of a public nutrient management plan compromises the ability of persons to bring citizen lawsuits concerning

(2004)).

89. *Waterkeeper Alliance*, 399 F.3d at 524.

90. *Id.* at 503-04; 33 U.S.C. § 1251(e) (2000); *see also* Michael Steeves, *The EPA's Proposed CAFO Regulations Fall Short of Ensuring the Integrity of Our Nation's Waters*, 22 J. LAND RESOURCES & ENVTL. L. 367, 391-92 (2002) (observing the public participation shortcomings of proposed CAFO regulations).

91. 33 U.S.C. § 1251(e) (2000). "Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this Act shall be provided for, encouraged, and assisted by the Administrator and the States."

92. *Waterkeeper Alliance*, 399 F.3d at 504. Furthermore, public participation regulations need to be issued prior to the ratification of a state NPDES program. *See, e.g.*, Citizens for a Better Env't v. EPA, 596 F.2d 720, 725 (7th Cir. 1979).

93. Waterkeeper Alliance, Inc. v. EPA, 399 F.3d 486, 503-04 (2d Cir. 2005).

94. *Id.* at 503; 33 U.S.C. § 1251 (e) (2000).

95. 33 U.S.C. § 1342(a)(1) (2000). Hearings are required before the issuance of a permit. Envtl. Def. Ctr. v. EPA, 344 F.3d 832, 841 (9th Cir. 2004). However, circuit courts have disagreed whether a hearing is necessary with an application for a notice of intent to seek coverage under a general permit. The Ninth Circuit concluded a hearing was required, *id.* at 857, while the Seventh Circuit found that hearings are not required. Texas Indep. Producers & Royalty Owners Ass'n v. EPA, 2005 U.S. App. LEXIS 11064, *37-39 (7th Cir. 2005); *see also* Costle v. Pac. Legal Found., 445 U.S. 198, 220 (1980) (discussing the hearing requirement and concluding that a hearing is not mandated for every permit).

effluent standards.[96] Without a plan to evaluate, the applicable effluent limitations are not available to the public.[97] Moreover, citizens cannot determine whether there exists a deviation from a plan's requirements.[98] Furthermore, the absence of a public plan frustrates an evaluation of governmental diligence in prosecuting violators.[99] The ability of citizens to initiate civil suits against polluters if the government fails to diligently prosecute violations of the Clean Water Act is a significant aspect of public participation.[100] Thus, the CAFO Rule impermissibly compromised rights accorded by the citizen suit provisions of the Clean Water Act.[101]

Finally, nutrient management plans are an indispensable feature of a plan or program to regulate CAFO land application discharges.[102] To detect unpermitted discharges, plans need to be available to the public.[103] The Environmental Petitioners in *Waterkeeper Alliance* were dissatisfied with the failure of the CAFO Rule to require that a nutrient management plan be a part of an NPDES permit.[104] Because the CAFO Rule shielded

96. *Waterkeeper Alliance*, 399 F.3d at 503 (referring to 33 U.S.C. § 1365(a)(1)-(2) (2000)). "[A]ny citizen may commence a civil action . . . against any person . . . who is alleged to be in violation of (A) an effluent standard or limitation under this Act or (B) an order issued by the Administrator or a State with respect to such a standard or limitation. . . ." 33 U.S.C. § 1365(a)(1) (2000)). Citizens may also bring suit against the administrator where there is alleged a failure of the administrator to perform any act or duty under the Clean Water Act. *Id*. § 1365(a)(2).

97. This is contrary to the public participation requirements of sections 101 and 402. 33 U.S.C. §§ 1251(e), 1342(j) (2000).

98. Without the details of the site-specific nutrient management practices that ensure appropriate agricultural utilization of nutrients from manure, citizens would not be able to determine whether the CAFO owner or operator was meeting the effluent limitations required by the CAFO Rule. 40 C.F.R. § 122.23(e) (2004); *see also* Martin A. Miller, *Coping with CAFOs: How Much Notice Must a Citizen Give?*, 68 MO. L. REV. 959, 981 (2003) (examining a citizen suit against a CAFO that suggests increased liability for CAFOs).

99. In the absence of information on nutrient management practices, there would be no way to determine whether the government was diligent in its enforcement actions. *See* Friends of Milwaukee's Rivers v. Milwaukee Metro. Sewerage Dist., 382 F.3d 743, 765 (7th Cir. 2004) (remanding the issue to the district court to determine whether there was a realistic prospect that a stipulation would result in compliance with the Clean Water Act to defeat plaintiffs' citizen suit action).

100. *See, e.g.*, Proffitt v. Rohm & Haas, 850 F.2d 1007, 1011, 1015 (3d Cir. 1988) (noting the role of public participation through citizen suits in reversing summary judgment awarded to a holder of an NPDES permit).

101. Waterkeeper Alliance, Inc. v. EPA, 399 F.3d 486, 503 (2d Cir. 2005).

102. *Id*. at 503; 33 U.S.C. § 1251(e) (2000).

103. *Waterkeeper Alliance*, 399 F.3d 503; 33 U.S.C. § 1251(e) (2000).

104. *Waterkeeper Alliance*, 399 F.3d at 503. By not compelling permit applicants to include their management plan in permit applications, any hearing held prior to the issuance of a permit cannot involve public access to the plan. *See* Costle v. Pac. Legal Found., 445 U.S. 198, 220 (1980) (holding that although a hearing may not be required, the rule failed to provide opportunities for public scrutiny of an integral part of the permit

nutrient management plans from public scrutiny, it forestalled rather than encouraged public participation.[105] Given this shortcoming, the Second Circuit found the rule to be arbitrary and capricious in violation of the Administrative Procedure Act.[106]

III. Agricultural Stormwater and Uncollected Discharges

A major source of disagreement between environmental and industry groups has been the meaning of the agricultural stormwater discharge exemption.[107] This argument involves discharges that occur from the land application of manure from a CAFO.[108] Due to an exemption provided by federal law,[109] agricultural stormwater discharges resulting from precipitation-related events are not discharges from a point source, and thus are not subject to the NPDES permitting requirements.[110] Yet it is unclear that the exception was intended to cover discharges that occur from the land application of manure from a CAFO.[111] As point sources, CAFOs cannot have discharges unless allowed by law or through a permit.[112] To provide meaning to the regulation of discharges originating from CAFO point sources, some type of oversight of the application of CAFO-generated manure seems warranted.[113]

---

application).

105. *Waterkeeper Alliance*, 399 F.3d at 504.

106. *Id*. at 503; 5 U.S.C. § 706(2)(A) (2000).

107. *See, e.g.*, Theodore A. Feitshans & Kelly Zering, *Federal Regulation of Animal and Poultry Production Under the Clean Water Act: Opportunities for Employing Economic Analysis to Improve Societal Results*, 10 PENN ST. ENVTL. L. REV. 193, 201 (2002) (noting that the statutory language concerning agricultural stormwater discharges "has often been erroneously interpreted to exempt livestock and poultry operations from the NPDES program"); Scott Jerger, *EPA's New CAFO Land Application Requirements: An Exercise in Unsupervised Self-Monitoring*, 23 STAN. ENVTL. L.J. 91, 104 (2004) (noting uncertainty regulating applications of manure due to the agricultural stormwater exemption); Steeves, *supra* note 90, at 384-90 (arguing that the CAFO Rule allows too many pollutants to enter the nation's waters).

108. *See, e.g.*, Jerger, *supra* note 107, at 110-28 (discussing the need to regulate the application of manure and the inadequacy of EPA's regulations).

109. 33 U.S.C. § 1362(14) (2000). "The 'term point source' . . . does not include agricultural stormwater discharges and return flows from irrigated agriculture." *Id*.

110. The Clean Water Act requires NPDES permits for discharges from point sources. *See* 33 U.S.C. § 1342(a)-(b) (2000).

111. Some type of limitation is needed so that manure applied to fields does not lead to the impairment of water. EPA noted that the land application of manure leads to the impairment of waters. EPA Final Rule, *supra* note 7, at 7197-98 (preamble); *See also* Jerger, *supra* note 107, at 102-04 (discussing the uncertainties involving the agricultural stormwater exemption for CAFOs).

112. *See* 33 U.S.C. § 1342(a)-(b) (2000).

113. This might involve exempting agricultural stormwater but regulating other land application discharges.

The Clean Water Act defines a discharge as an addition of any pollutant to navigable waters from a point source.[114] Point sources may discharge pollutants if the discharge is allowed in an NPDES permit.[115] For CAFOs, a zero discharge standard was enumerated in the CAFO Rule,[116] a standard that has been employed for other sources of discharges.[117] This means that any addition of manure or other pollutants from a CAFO to navigable waters constitutes an impermissible discharge, unless an exception exists.[118] Agricultural stormwater discharges are exempted from regulation.[119] Exceptions also exist for occasional discharges from permitted CAFOs that occur due to significant storms or unusual precipitation events,[120] and discharges permitted by law.[121]

The *Waterkeeper Alliance* court addressed the confusing exemption for agricultural stormwater discharges by noting that the Clean Water Act's definition of a "point source" does not include agricultural stormwater discharges.[122] Agricultural stormwater is not defined by the act; rather, the CAFO Rule defined this term to include any "precipitation-related discharge of manure, litter, or process wastewater from land areas under the control of a CAFO" where the manure, litter or process wastewater has otherwise been applied in accordance with site-specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients.[123]

The CAFO Rule adopted an interpretation of agricultural stormwater discharges that reconciles the need for agricultural stormwater discharges within the context of the Clean Water Act's goal of reducing pollution.[124] Agricultural stormwater discharges are

114. 33 U.S.C. § 1362(12) (2000).

115. *Id.* § 1342(a).

116. 40 C.F.R. §§ 412.12(a), 412.13(a), 412.15(a), 412.25(a), 412.31(a), 412.46(a) (2004).

117. *See*, *e.g.*, 40 C.F.R. §§ 435.43 (2004) [oil and gas extraction], 435.45 [oil and gas extraction], 455.42 [pesticide chemicals formulating and packaging[, 455.43 [pesticide chemicals formulating and packaging], 455.44[pesticide chemicals formulating and packaging].

118. Waterkeeper Alliance, Inc. v. EPA, 399 F.3d 486, 508-09 (2d Cir. 2005).

119. *Id.*; 33 U.S.C. §1362(14) (2000).

120. 40 C.F.R. §§ 412.13(b) (2004) [chronic or catastrophic rainfall overflows], 412.15(b) [rainfall event overflows], 412.25(b) [rainfall even overflows], 412.26(b) [rainfall event overflows].

121. *See* Fisherman Against Destruction of the Env't, Inc. v. Closter Farms, Inc. 300 F.3d 1294, 1296-97 (11th Cir. 2002) (noting that a legislature may exempt discharges).

122. *Waterkeeper Alliance*, 399 F.3d at 506-11; 33 U.S.C. § 1362(14) (2000).

123. 40 C.F.R. § 122.23(e) (2004) (Stormwater is defined as "storm water runoff, snow melt runoff and drainage"); *Id.* § 122.26(b)(13).

124. EPA Final Rule, *supra* note 7, at 7176, 7179-80 (noting in the preamble that the regulation of nonpoint source pollution was not sufficient to prevent pollutants from the

permitted, but parameters are prescribed to preclude unjustified discharges.[125] For the land application of manure, agricultural stormwater discharges need to be distinguished from unpermitted discharges to preclude the addition of pollutants to waters.[126] Agricultural stormwater discharges retain their status of not being point sources, while discharges that do not meet the conditions of agricultural stormwater discharges are subject to the NPDES permitting system.[127]

A. Petitioners' Arguments

In *Waterkeeper Alliance*, both the Farm Petitioners and the Environmental Petitioners objected to the CAFO Rule's interpretation of the agricultural stormwater exemption, as each group felt that federal law required an alternative definition.[128] The Farm Petitioners argued that all discharges from lands other than the production areas of a CAFO were agricultural stormwater discharges.[129] The Environmental Petitioners argued that all discharges from lands where CAFO manure has been applied violated the provisions of the Clean Water Act.[130]

Since agricultural stormwater discharges are exempted from point sources,[131] the Farm Petitioners argued that NPDES permits should only apply to CAFO production areas.[132] Discharges from lands other than production areas should be viewed as nonpoint source pollution,[133] and pursuant to federal law, the runoff would not be subject to point source pollution provisions.[134] The differentiation of point and nonpoint source pollution was presented as support for a conclusion that CAFOs could only have point source pollution from production areas.[135]

Accompanying this bifurcation of sources of pollution was the

land application of manure from impairing water quality).

125. 40 C.F.R. § 122.23(e) (2004) (delineating the parameters).

126. EPA Final Rule, *supra* note 7, at 7197-98 (preamble).

127. Waterkeeper Alliance, Inc. v. EPA, 399 F.3d 486, 508 (2d Cir. 2005) (citing Concerned Area Residents for the Env't v. Southview Farm, 34 F.3d 114, 118 (2d Cir. 1994)).

128. *Waterkeeper Alliance.* 399 F.3d at 506-511.

129. Brief for the Farm Petitioners, *supra* note 21, at 75 (citing 33 U.S.C. § 1342(14) (2000).

130. Brief for the Environmental Petitioners, *supra* note 17, at 51.

131. 33 U.S.C. § 1362(14) (2000).

132. Brief for the Farm Petitioners, *supra* note 21, at 64-90.

133. *Id.* at 8-9.

134. 33 U.S.C. § 1314(f) (2000) (citing runoff from fields as being potential nonpoint source pollution). The Clean Water Act gives states primary authority for dealing with nonpoint source pollution. *Id.* §§ 1251, 1255; 33 U.S.C.A. § 1329 (West 2001 & Supp. 2005).

135. Brief for the Farm Petitioners, *supra* note 21, at 66-70.

separation in the CAFO Rule of production and land application areas.[136] Since the rule did not define a CAFO to include land application areas, it was argued that discharges from land application areas should not be classified as discharges from point sources.[137] Therefore, the Farm Petitioners reasoned that the land application of manure from a CAFO could not be regulated under the federal point source regulations.[138]

The Farm Petitioners also advanced the argument that the definition of the agricultural stormwater exemption precluded qualifications as set forth in the CAFO Rule.[139] In exempting agricultural stormwater, Congress intended that activities leading to runoff would be exempted from the point source permitting requirements.[140] The exception for agricultural stormwater thereby meant that EPA was without authority to establish nutrient management practices for determining whether runoff was within the definition of an agricultural stormwater discharge.[141] Thus, the Farm Petitioners felt that all discharges from lands where CAFO manure had been applied could not be regulated by the permitting requirements.[142]

To control pollutants from CAFOs, as mandated by the Clean Water Act, the Environmental Petitioners rationalized that discharges resulting from the land application of CAFO manure should not be classified as agricultural stormwater discharge.[143] Because CAFO production and land application areas cannot be meaningfully separated, it was argued that all land application areas should be considered to be part of the CAFO.[144] The Clean Water Act precluded discharges from CAFOs

136. 40 C.F.R. §§ 122.23(b)(3), (8) (2004).

137. Brief for the Farm Petitioners, *supra* note 21, at 65-70.

138. *Id.* at 72-74.

139. *Id.* at 77-80.

140. *Id.* at 77-78.

141. *Id.* at 78.

142. *Id.* at 83-90.

143. Brief for the Environmental Petitioners, *supra* note 17, at 43-60. A district court from North Carolina lends support for this argument. Waterkeeper Alliance, Inc. v. Smithfield Foods, Inc., 2001 U.S. Dist. LEXIS 21314, *10-11 (E.D. N.C. Sept. 20, 2001).

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

Id.

144. Brief for the Environmental Petitioners, *supra* note 17, at 49-50. This argument is consistent with a Wisconsin court decision. Maple Leaf Farms, Inc. v. State Dep't Natural Res., 633 N.W. 2d 720, 728-29 (Wis. Ct. App. 2001).

> [A] CAFO includes not only the ground where the animals are confined, but also the equipment that distributes and/or applies the animal waste produced at

unless authorized under an NPDES permit.[145] Thus, the Environmental Petitioners felt that any discharge from a CAFO land application area required the owner or operator to secure a permit.[146]

B. Evaluation by the Court

The CAFO Rule provides that land application discharges from a CAFO are subject to NPDES requirements.[147] However, to exempt agricultural stormwater discharges as required by statute,[148] the rule differentiates between agricultural stormwater discharges and other discharges:[149]

> [W]here the manure, litter or process wastewater has been applied in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter or process wastewater, as specified in § 122.42(e)(1)(vi)-(ix), a precipitation-related discharge of manure, litter or process wastewater from land areas under the control of a CAFO is an agricultural stormwater discharge.[150]

The *Waterkeeper Alliance* court found that this differentiation neither offended the exemption for agricultural stormwater discharges[151] nor the need to abate pollution accompanying the land application of manure.[152] Thus, the CAFO Rule's exemption for agricultural stormwater discharges was a reasonable interpretation of the Clean Water Act.[153]

In evaluating the rule's provisions, the Second Circuit employed the

---

> the confinement area to fields outside the confinement area. Any over application of manure by Maple Leaf through its landspreading activities would then be a discharge, either because of runoff to surface waters or percolation of pollutants to groundwater. Because the off-site croplands are used by Maple Leaf to dispose of waste produced at its on-site facility, the permit conditions imposed on Maple Leaf to enforce groundwater protection standards are as applicable to Maple Leaf's off-site landspreading operations as they are on-site. Therefore, because a CAFO's over application of manure to fields can be a discharge to groundwater under the statute, we determine that the [Department of Natural Resources] has authority to issue permits regulating Maple Leaf's off-site landspreading operations.

Id.; *see also* Jerger, *supra* note 107, at 108.

145. 33 U.S.C. § 1342 (2000).

146. Brief for the Environmental Petitioners, *supra* note 17, at 49-60.

147. 40 C.F.R. § 122.23 (2004).

148. 33 U.S.C. § 1362(14) (2000).

149. 40 C.F.R. § 122.23(e) (2004).

150. *Id.*

151. *Id*. Agricultural stormwater discharges continue to be exempted so long as they meet the qualifications for such a discharge. *Id.*

152. EPA Final Rule, *supra* note 7, at 7196 (preamble).

153. Waterkeeper Alliance, Inc. v. EPA, 399 F.3d 486, 507-10 (2d Cir. 2005).

"reasonable construction" standard set by the Supreme Court in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[154] Whenever a statute is ambiguous as to an issue, the court should uphold the agency's interpretation if it is permissible.[155] The regulatory provisions on agricultural stormwater discharges accounted for the need to regulate CAFO discharges while deferring to immunity from liability for weather-related discharges.[156] The CAFO Rule's construction of the agricultural stormwater exemption was also consistent with earlier court opinions that looked at the primary cause of the discharge to determine whether the discharge was subject to regulation.[157]

The CAFO Rule enunciates four parameters that must be met before a discharge qualifies as an agricultural stormwater discharge.[158] First, the discharge needs to be the result of a precipitation-related event before it qualifies.[159] Applications of manure that place pollutants in waters without a precipitation event do not qualify as an agricultural stormwater discharge.[160] Second, site-specific conservation practices need to be implemented to control runoff of pollutants before a discharge is exempted.[161] Thereby, any CAFO that fails to adopt appropriate

154. 467 U.S. 837 (1984).

155. *Id.* at 843 (upholding an agency's permissible interpretation of a statute); *see also* Yellow Transp., Inc. v. Michigan, 537 U.S. 36, 45 (2002) (finding that an agency's interpretation of a statute was permissible and should be upheld).

156. *Waterkeeper Alliance*, 399 F.3d at 507.

157. Concerned Area Residents for the Env't v. Southview Farm, 34 F.3d 114, 118 (2d Cir. 1994); Cmty. Ass'n for Restoration of the Env't v. Henry Bosma Dairy, 305 F.3d 943, 953-54 (9th Cir. 2002) (observing evidence of overapplication and misapplication of manure to a field that resulted in a discharge to navigable waters); *see also* Stacey K. Garrett, *Recent Developments, Second Circuit's Holding Limits Scope of Agricultural Exemption under the Clean Water Act*, 4 S.C. ENVTL. L.J. 67, 70 (discussing the possibility of discharges arising from the oversaturation of fields); Kristen E. Mollnow, Note, *Concerned Area Residents for the Environment v. Southview Farm: Just What is a Concentrated Animal Feeding Operation Under the Clean Water Act?*, 60 ALB. L. REV. 239 (1996) (observing that CAFOs need to follow best management practices and the conditions of the permit to avoid unpermitted discharges); Susan E. Schell, Casenote, *The Uncertain Future of Clean Water Act Agricultural Pollution Exemptions After Concerned Area Residents for the Environment v. Southview Farm*, 31 LAND & WATER L. REV. 113, 117 (1996) (analyzing violations from the application of manure).

158. 40 C.F.R. § 122.23(e) (2004).

159. A discharge due to something other than precipitation is not a stormwater discharge. In an earlier Second Circuit case, it was manure application on oversaturated fields. *Concerned Area Residents for the Env't*, 34 F.3d at 121. The Ninth Circuit found that a producer who overapplies or misapplies manure may incur liability for an unpermitted discharge. *Cmty. Ass'n for Restoration of the Env't*, 305 F.3d at 954.

160. *See* 40 C.F.R. § 122.23(e) (2004). Such applications might involve spreading manure so close to a stream or waterbody that pollutants enter waters in the absence of precipitation; *see also Concerned Area Residents for the Env't*, 34 F.3d at 121 (observing that evidence showed that some of the runoff was due to oversaturation of the fields by liquid manure and not rain).

161. 40 C.F.R. § 122.23(e) (2004).

conservation practices to control runoff of pollutants may have a discharge that would subject its owner or operator to the permitting requirements.[162]

A third parameter involves the application of manure, litter, or process wastewater in accordance with site-specific nutrient management practices ensuring appropriate agricultural utilization of the nutrients.[163] If a CAFO owner or operator overapplies manure and a discharge occurs, it is regulated under the NPDES provisions of the Clean Water Act.[164] Fourth, because the appropriate utilization of nutrients is based upon a nutrient management plan, the rule identifies a need to maintain records that document the implementation and management of such a plan.[165] In the absence of a management plan with records, there may be little support for showing that the owner or operator meets the requirement of appropriate utilization of nutrients.[166]

C. Uncollected Discharges

The Farm Petitioners argued that the Clean Water Act did not provide any authority for the regulation of uncollected discharges from land areas under the control of a CAFO.[167] By regulating runoff from the application of manure, litter and wastewater, the CAFO Rule was regulating nonpoint source pollution.[168] Because runoff was not from a point source, the CAFO Rule was not authorized by the Clean Water Act.[169] The Petitioners argued that runoff needed to be channeled or collected before it became a point source that might be regulated under the act.[170]

The *Waterkeeper Alliance* court found that the rule's provisions on runoff conformed with the act.[171] Although point sources normally are discrete and discernible, the Second Circuit found that the CAFO itself was a channel under the act.[172] Land application areas were recognized

162. *Id.* This is consistent with the cases holding that manure overapplied, misapplied or applied to saturated fields resulting in a discharge does not qualify as an agricultural stormwater discharge. *See supra* note 159.

163. 40 C.F.R. § 122.23(e) (2004). Provisions on best management practices are also enumerated in the effluent limitation guidelines for CAFOs. *Id.* § 412.4.

164. 40 C.F.R. § 122.23(e) (2004).

165. *Id.*; *see also* 40 C.F.R. § 122.42(e)(2) (2004) (prescribing the maintenance of records).

166. *See* 40 C.F.R. § 122.42(e)(2) (2004).

167. Waterkeeper Alliance, Inc. v. EPA, 399 F.3d 486, 510-11 (2d Cir. 2005); Brief for the Farm Petitioners, *supra* note 21, at 64-75.

168. Brief for the Farm Petitioners, *supra* note 21, at 64.

169. *Id.*

170. *Id.* at 74-75.

171. *Waterkeeper Alliance*, 399 F.3d at 510-11.

172. *Id.* at 510.

as integral and indispensable parts of CAFO operations.[173] Given the fact that the rule only regulates discharges from land application areas under the control of a CAFO owner or operator,[174] it was reasonable for the agency to conclude that runoff from a land application area is runoff from a CAFO.[175]

IV. The Duty to Apply for an NPDES Permit

The 2003 CAFO Rule provided that "[a]ll concentrated animal feeding operations have a duty to seek coverage under an NPDES permit. . . ."[176] Due to the burden this duty placed on CAFO owners and operators, the Farm Petitioners in the *Waterkeeper Alliance* case challenged the permitting provisions, claiming they were not authorized by the provisions of the Clean Water Act.[177] The contention was that there was no authority to require a CAFO to secure a permit in the absence of a discharge of pollutants.[178] EPA argued that the potential to discharge pollutants was sufficient to require CAFO owners and operators to secure a permit.[179] The Second Circuit found that there was no statutory authority for such a requirement and so vacated the provisions.[180]

A. Finding No Authority for a Duty

The *Waterkeeper Alliance* court found that the Clean Water Act grants EPA jurisdiction to regulate and control actual discharges but not potential discharges.[181] This interpretation of the Clean Water Act was supported by three separate provisions.[182] First, section 301 of the act

173. *Id.* at 511; *see also* EPA Final Rule, *supra* note 7, at 7196 (preamble).

174. 40 C.F.R. § 122.23(e) (2004). EPA discussed regulating manure from CAFOs that is applied to lands owned by someone else. EPA Proposed Rule, *supra* note 9, at 2964, 2994-95 (preamble). However, the final regulations only applied to manure applications on lands under control of a CAFO owner or operator. 40 C.F.R. § 122.23(e) (2004).

175. Waterkeeper Alliance, Inc. v. EPA, 399 F.3d 486, 511 (2d Cir. 2005).

176. 40 C.F.R. § 122.21(a)(1) (2004).

177. *Waterkeeper Alliance*, 399 F.3d at 504.

178. An exception existed for owners and operators of qualifying Large CAFOs who receive notification from the director that the CAFO has no potential to discharge manure, litter or process wastewater. 40 C.F.R. § 122.23(d)(2) (2004). However, this provision was vacated by the Second Circuit. *Waterkeeper Alliance*, 399 F.3d at 524.

179. *Waterkeeper Alliance*, 399 F.3d at 501-02; *see also* EPA Final Rule, *supra* note 7, at 7202 (preamble).

180. *Waterkeeper Alliance*, 399 F.3d at 524.

181. *Id.* at 505 (citing Natural Res. Def. Council v. EPA, 859 F.2d 156, 170 (D.C. Cir. 1988)).

182. *Waterkeeper Alliance*, 399 F.3d at 504-06 (2d Cir. 2005) (citing 33 U.S.C. §§ 1311(a), 1342(a), 1362(12) (2000)).

makes it illegal to discharge pollutants.[183] To effect the prohibition on discharges, EPA is directed to promulgate effluent limitations and issue permits for the discharge of pollutants.[184] Congress did not leave room for the regulation of potential pollutants due to the fact that the act defines the term "discharge of any pollutant" to include "any addition of any pollutant to navigable waters from any point source. . . ."[185]

Second, section 402 of the act gives NPDES authorities the power to issue permits for discharges of pollutants.[186] Because states only have authority to issue permits for discharges, section 402 cannot be interpreted to encompass the issuance of permits for potential discharges.[187] Point sources do not need to secure permits; rather, discharges from point sources need to be authorized by the provisions of a permit.[188]

Third, the discharge of any pollutant is defined by section 502 in such a manner that excludes the potential for a discharge.[189] Discharges are limited to the addition of pollutants from any point source to navigable waters or waters of the contiguous zone or the ocean.[190] Given the directives of sections 301, 402, and 502, the Second Circuit concluded that

> [I]n the absence of an actual addition of any pollutant to navigable waters from any point, there is no point source discharge, no statutory violation, no statutory obligation of point sources to comply with EPA regulations for point source discharges, and no statutory obligation of point sources to seek or obtain an NPDES permit in the first instance.[191]

Congress has only authorized EPA to require permits of persons who are discharging pollutants, thus there is no authority to regulate point sources themselves.[192]

183. 33 U.S.C. § 1311(a) (2000). "Except as in compliance with this section and [other] sections, the discharge of any pollutant by any person shall be unlawful." *Id.*

184. *Id.* § 1311(e); *Waterkeeper Alliance*, 399 F.3d at 504.

185. 33 U.S.C. § 1362(12) (2000); *see also Waterkeeper Alliance*, 399 F.3d at 504-05.

186. 33 U.S.C. § 1342(a) (2000); *see also Waterkeeper Alliance*, 399 F.3d at 498, 504.

187. *Waterkeeper Alliance*, 399 F.3d at 504.

188. *Id.*

189. 33 U.S.C. § 1362(12) (2000). "The term 'discharge of a pollutant' and the term 'discharge of pollutants' each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft." *Id.*

190. *Id.*

191. *Waterkeeper Alliance*, 399 F.3d at 505.

192. *Id.*; *see also* Natural Res. Def. Council v. EPA, 859 F.2d 156, 170 (D.C. Cir. 1988) (noting that EPA's jurisdiction under the Clean Water Act is limited to regulating

This ruling is expected to have significant ramifications for CAFO owners and operators.[193] Operations raising large numbers of animals are no longer automatically obligated to apply for a permit.[194] Rather, unless they have had a discharge, or fall within a more specialized provision of the CAFO Rule that requires securing a permit,[195] they are free of the rule's permitting burdens.[196] Due to the costs of securing permits, owners and operators may claim they do not have a discharge and thereby do not need to secure a permit.[197] If owners and operators decline to voluntarily seek permits, permitting authorities will be burdened with establishing evidence of a discharge before a CAFO owner or operator can be required to secure an NPDES permit.[198] Alternatively, some requirement other than the Clean Water Act may serve as a justification for requiring CAFO owners and operators to apply for a permit.[199] State CAFO regulations, state nonpoint source provisions, or evidence of a past violation may obligate a CAFO to apply for a permit.[200]

the discharge of pollutants).

193. CAFO owners and operators have argued that the Clean Water Act did not create a cause of action based on failure to secure a permit. *See, e.g.*, Waterkeeper Alliance, Inc. v. Smithfield Foods, 2001 U.S. Dist. LEXIS 21314, at *3, *6 (E.D. N.C. Sept. 20, 2001) (arguing that the Clean Water Act does not create a cause of action for operating a CAFO without a permit).

194. This may be especially true in arid areas where there is little likelihood of a rain event leading to a discharge.

195. The CAFO regulations allow animal feeding operations to be designated by NPDES authorities as CAFOs. 40 C.F.R. § 122.23(b)(9) (2004). Designation can only occur after an on-site inspection and a finding that the operation is a significant contributor of pollutants to waters. *Id.* § 122.23(c).

196. The Second Circuit concluded that "the Clean Water Act, on its face, prevents EPA from imposing, upon CAFOs, the obligation to seek an NPDES permit or otherwise demonstrate that they have no potential to discharge." Waterkeeper Alliance, Inc. v. EPA, 399 F.3d 486, 506 (2d Cir. 2005) (citing Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842-43 (1984)). Unpermitted CAFOs with agricultural stormwater discharges need to have nutrient management plans. *See supra* notes 158-166 and accompanying text. Moreover, state law may impose requirements on other CAFOs. *See, e.g.*, MINN. STAT. § 116.07, subdivision 7 (Supp. 2005) (authorizing requirements for CAFOs beyond those established by federal law).

197. EPA estimated that the effluent limitations would cost Large CAFOs $283 million per year. EPA Final Rule, *supra* note 7, at 7224 (preamble).

198. It would appear that EPA was attempting to avoid this burden, as the agency lacks the resources to monitor and discover which CAFOs have unpermitted discharges.

199. A state may recognize a need for requiring other animal feeding operations to secure permits. *See, e.g.*, MINN. STAT. § 116.07, subdivision 7(g) (Supp. 2005) (delineating a requirement whereby animal feedlots with fewer than the numbers set forth for NPDES permits need a permit in Minnesota).

200. *Id.* (example of a state regulation requiring a permit).

B. An Overly Strict Interpretation of the Act

In proposing a CAFO Rule and the discussion about the Final Rule, EPA noted difficulties in fitting the problem of pollution from animal feeding operations within the context of statutory requirements.[201] Although CAFO production facilities are clearly point sources,[202] their fields are not.[203] The *Waterkeeper Alliance* court found that manure from these facilities may be regulated so long as it remains under the control of the owner or operator.[204] While the Second Circuit presented a solid argument for finding that the act did not allow the regulation of potential discharges, it neglected to fully consider practicalities in meeting these obligations imposed by the Clean Water Act.[205]

Given the longstanding noncompliance and unjustified impairment of waters by CAFOs,[206] EPA decided it was appropriate to regulate likely sources of discharges.[207] As a practical matter, additional action was

201. *E.g.*, EPA Proposed Rule, *supra* note 9, at 2968-69 (noting in the preamble the inconsistencies of state NPDES programs in regulating CAFOs and failures to issue permits); EPA Final Rule, *supra* note 7, at 7196-98 (discussing in the preamble provisions governing agricultural stormwater discharges).

202. 40 C.F.R. §§ 122.23(b)(8), 412.1(h) (2004) (defining the production areas of CAFOs); *see also* Waterkeeper Alliance, Inc. v. EPA, 399 F.3d 486, 510 (2d Cir. 2005) (observing that a CAFO is a point source).

203. 40 C.F.R. §§ 122.23(a)(3), 412.1(e) (2004) (defining land application areas separate from CAFO production areas); *see also* Brief for the Farm Petitioners, *supra* note 21, at 65-70 (arguing that fields are not point sources).

204. *Waterkeeper Alliance*, 399 F.3d at 508 (approving an earlier decision whereby discharges from areas under the control of a CAFO needed to comply with the Clean Water Act's discharge requirements). This is consistent with regulations whereby an owner remains responsible for the disposal of materials that might cause environmental degradation. *See, e.g.*, United States v. Iverson, 162 F.3d 1015, 1025 (9th Cir. 1998) (finding that liability under the Clean Water Act is not limited to the person with the greatest control but rather that corporate officers could incur liability); *see also* GenCorp, Inc. v. Olin Corp., 390 F.3d 433, 449 (6th Cir. 2004) (finding liability under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) due to the control exercised by the defendant in handling hazardous waste); Croftin Ventures Ltd. P'ship v. G&H P'ship, 258 F.3d 292, 300 (4th Cir. 2001) (finding evidence supporting liability of a former property owner under CERCLA, 42 U.S.C. § 9607(a), unless the former owner did not deposit the hazardous waste and shows it was not leaking into the soil or water).

205. *Waterkeeper Alliance*, 399 F.3d at 508. It allows unpermitted CAFOs to continue with the impairment of water until their illegal discharges are found.

206. OFFICE OF WATER, U.S. ENVTL. PROT. AGENCY, NATIONAL WATER QUALITY INVENTORY: 1998 REPORT TO CONGRESS 65 (2000), *available at* http://www.epa.gov/305b/98report. CAFOs were not separated from other animal operations. Rather, animal feedlots were estimated to contribute to 16 percent of the impaired river and stream miles in the United States. *Id.*

207. *See* EPA Final Rule, *supra* note 7, at 7179 (observing in the preamble that the largest animal feeding operations present the greatest potential for water impairment); Brief for the Respondents, *supra* note 45, at 69-76 (arguing that the provisions were needed to avoid the alternative enforcement action consisting of suits only after a

needed to eliminate discharges from unpermitted CAFOs.[208] EPA was attempting to address a water impairment problem involving owners and operators of CAFOs whom the agency believed were causing pollutants to enter our nation's waterbodies.[209] Therefore, EPA argued that the definition of "point source" supports the conclusion that regulatory provisions might prescribe a duty.[210] Point sources include CAFOs "from which pollutants are or may be discharged."[211] However, the court found this definition only allows point sources to include facilities that pollute and does not allow the government to proceed beyond the regulation of actual pollution.[212] In chastising EPA, the Second Circuit claimed that no provision had been offered that gives operational effect to the "may be discharged" language of the statute.[213]

The operational effect of the court's interpretation of the act suggests that there must be an actual, unpermitted discharge before a permitting agency has the authority to regulate a CAFO through a permit.[214] The legislative history, subsequent regulations, and other provisions of the CAFO Rule do not require the Second Circuit's interpretation.[215] The overriding objectives of the Clean Water Act were to restore and maintain the integrity of waters[216] and to employ NPDES permits to prevent, reduce, and eliminate discharges to the waters of the United States.[217] While the act does not directly regulate point sources,[218] its provisions disclose responses that are intended to prevent future discharges.[219]

violation is discovered).

208. The 2003 Rule was necessitated by legal action asserting that the federal regulations governing CAFOs were insufficient. *See supra* note 10.

209. EPA Proposed Rule, *supra* note 9, at 3080 (reporting data in the preamble suggesting that most CAFOs had not secured permits as required by law).

210. Waterkeeper Alliance, Inc. v. EPA, 399 F.3d 486, 505 (2d Cir. 2005).

211. 33 U.S.C. § 1362(14) (2000); *see also Waterkeeper Alliance*, 399 F.3d at 505.

212. *Waterkeeper Alliance*, 399 F.3d at 505.

213. *Id.*

214. Brief for the Environmental Petitioners' Petition for Panel Rehearing or Clarification at 2, *Waterkeeper Alliance*, 399 F.3d 486 (2d Cir. 2005) (No. 03-4470(L)).

215. With the delineation of provisions for new sources and total maximum daily loads, the act shows concern with future sources of discharges. *See* 33 U.S.C. §§ 1316, 1313(d)-(e) (2000).

216. 33 U.S.C. § 1251(a) (2000).

217. *Id.* § 1251(b); *see also* Oklahoma v. EPA, 908 F.2d 595, 599 (10th Cir. 1990) (observing the purpose of preventing, reducing, and eliminating discharges); Texas Oil & Gas Ass'n v. EPA, 161 F.3d 923, 927 (5th Cir. 1998) (observing the goal of eliminating discharges of pollutants).

218. *See* Natural Res. Def. Council v. EPA, 859 F.2d 156, 170 (D.C. Cir. 1988) (observing that EPA has no authority to regulate point sources themselves).

219. *See, e.g.*, 33 U.S.C. §§ 1313(d)-(e), 1316(a) (2000) (delineating total maximum daily load (TMDL) and new source provisions that concern future pollution).

Provisions on new sources of pollutants[220] and total maximum daily loads (TMDLs)[221] address future discharges. For new sources involving buildings, structures, and facilities that are constructed after the publication of regulations,[222] the act imposes more stringent discharge standards on persons who will have a future discharge.[223] Although the act does not preclude the construction of facilities prior to the issuance of a permit,[224] its provisions were intended to be technology forcing,[225] meaning that the act was concerned about potential pollution.[226] State TMDL requirements reflect a state's designated uses for a water body rather than being dependent solely on discharges from point sources.[227] Thus, EPA is engaged in a permitting system that looks at the potential to pollute and considers nondischarges[228] and future discharges.[229]

While the Second Circuit was correct that the duty imposed in the CAFO Rule was too broad, the court declined to assist EPA in responding to the documented problem of CAFOs failing to secure permits.[230] The new source and TMDL provisions indicate there is an

220. *Id.* § 1316. Corresponding provisions for new sources were incorporated into the CAFO Rule. 40 C.F.R. § 122.23(g)(4) (2004).

221. 33 U.S.C. § 1313(d)-(e) (2000).

222. *Id.* § 1316(a)(2)-(3).

223. *See id.* § 1316(b)(1)(B) (proposing and establishing standards for new sources). Regulatory provisions concerning new sources generally provide that they must adhere to more stringent pretreatment standards than existing sources. *See, e.g.*, S. Holland Metal Finishing Co. v. Browner, 97 F.3d 932, 934 (7th Cir. 1996) (considering whether a company moving to a new location should be subject to more rigorous environmental regulations under new source provisions).

224. Natural Res. Def. Council v. EPA, 822 F.2d 104, 127-28 (D.C. Cir. 1987) (concluding that a construction ban was not authorized by section 511(c)(1) of the Clean Water Act).

225. Oklahoma v. EPA, 908 F.2d 595, 609 (10th Cir. 1990) (delineating multiple objectives of the Clean Water Act).

226. The new source provisions address future pollution, albeit owners and operators who will have a discharge. *See* 33 U.S.C. § 1316(b)(1)(B) (2000) (addressing facilities before they commence a discharge). EPA cannot ban the construction of new source facilities. *See, e.g.*, *Natural Res. Def. Council*, 859 F.2d at 170 (noting that EPA cannot stop the construction of a new facility that may generate a discharge, but can regulate the discharges once the facility commences operation).

227. Pronsolino v. Marcus, 291 F.3d 1123, 1139 (9th Cir. 2002) (allowing consideration of nonpoint source pollution for the development of TMDLs). The TMDL provisions show the Clean Water Act being concerned about pollutant loadings from future sources of pollution. 33 U.S.C. § 1313(d)-(e) (2000); *see also* Jeffrey M. Gaba, *New Sources, New Growth and the Clean Water Act*, 55 ALA. L. REV. 651, 664 (2004) (noting ambiguities in the regulations concerning new sources, TMDL provisions, and waste load allocations).

228. *See Pronsolino*, 291 F.3d at 1139-41 (upholding Clean Water Act TMDL requirements for a river only polluted by nonpoint sources).

229. *See e.g.*, 33 U.S.C. §§ 1313(d)-(e), 1316(a) (2000) (concerning TMDLs and new sources).

230. The agency was responding to documented water impairment and a consent

ambiguity under the act on how to address point sources with expected future discharges.[231] While the Clean Water Act doesn't allow EPA to regulate potential discharges, it permits provisions aimed at preventing future pollution.[232] Was there any basis for a regulation that would enumerate a duty for certain CAFOs to apply for a permit?[233] Given the need to address water impairment from CAFOs, and the ambiguities under the act of how to treat CAFO discharges involving the application of manure, the court might have examined the provisions as mechanisms addressing future discharges.[234]

V. Precluding Water Impairment

As EPA revises the CAFO Rule in response to the provisions vacated by the *Waterkeeper Alliance* decision, one of the key issues is precluding water impairment from owners and operators who apply manure to land.[235] In view of the finding that CAFOs with a potential to discharge cannot be regulated, fewer CAFOs may apply for permits.[236] Moreover, some CAFOs engaged in the land application of manure may claim they only have agricultural stormwater discharges and forgo applying for a permit.[237] Therefore, EPA might reexamine whether additional strategies are necessary to meet the water quality goals set by the Clean Water Act.[238] Two suggestions may be offered. First, EPA

decree. *See* Natural Res. Def. Council v. EPA, 822 F.2d 104, 127-28 (D.C. Cir. 1987).

231. The court suggested that an amendment to the Clean Water Act or a regulatory presumption were possible ways to address potential CAFO pollution. Waterkeeper Alliance, Inc. v. EPA, 399 F.3d 486, 506 (2d Cir. 2005).

232. *See* 33 U.S.C. §§ 1313(d)-(e), 1316(b)(1)(B) (2000).

233. The *Waterkeeper Alliance* court noted that the administrative record did not document a regulatory presumption that Large CAFOs actually discharge, so declined to make further inquiry as to the reasonableness of the CAFO Rule's duty provision. *Waterkeeper Alliance*, 399 F.3d at 506.

234. The issue involves restoring the integrity of U.S. waters through the elimination of discharges from the land application of manure that are not agricultural stormwater discharges. *See* EPA Final Rule, *supra* note 7, at 7196-98 (discussing in the preamble regulation of the land application of manure).

235. Given the zero discharge limitation on CAFO production areas, impairment of waters by CAFOs occurs from other activities including the land application of manure. *See* 40 C.F.R. §§ 412.30(a), 412.43(a)(1), 412.46(a) (2004).

236. The estimated numbers of CAFOs needing permits included CAFOs with a potential to discharge. *See* EPA Final Rule, *supra* note 7, at 7181-82 (noting in the preamble that all CAFOs have a duty to secure a permit). With the *Waterkeeper Alliance* ruling, some of these CAFOs do not need to apply for permits.

237. Because the CAFO Rule's duty provision was vacated in *Waterkeeper Alliance*, 399 F.3d at 524, CAFO owners and operators may claim the exception for agricultural stormwater discharges exempts them from the permitting requirements of the CAFO Rule.

238. The CAFO Rule was justified by calculations of estimated costs. EPA Final Rule, *supra* note 7, at 7242-52 (discussing cost estimates in the preamble). These are now

needs to revise and clarify the provision setting forth an obligation to apply for an NPDES permit.[239] Second, the certification of nutrient management plans should be considered as an option to strengthen oversight of activities connected with the impairment of waters.[240]

A. Reconsidering the Duty to Apply for a Permit

In vacating regulatory provisions that required CAFOs to apply for permits, the Second Circuit excised provisions that EPA deemed necessary to respond to the widespread noncompliance with the permitting provisions.[241] Although the court left open the possibility of establishing a regulatory presumption that a selected segment of CAFOs has discharges, the issue is a response that will be effective in placing a statutory duty on CAFOs with discharges.[242] A rather simple solution exists: all the agency needs to do is insert the phase "with a discharge" to meet the limitation that only owners and operators with discharges can be required to apply for a permit.[243]

Even if EPA were to adopt a new provision setting forth a duty to apply for a permit, there remains a question whether CAFOs with agricultural stormwater discharges accompanying the land application of manure need to apply for permits.[244] The Second Circuit declined to specifically address this issue.[245] Rather, the court differentiated agricultural stormwater discharges from "other" discharges to find that

inaccurate due to the *Waterkeeper Alliance* holding. Waterkeeper Alliance, Inc. v. EPA, 399 F.3d 486, 524 (2d Cir. 2005). Because EPA cannot require CAFOs with potential discharges to secure permits, the number of CAFOs required to secure permits is lower so that costs may be expected to be lower as well.

239. Although the overly broad duty provision of the CAFO Rule was vacated, alternatives exist for establishing a duty for CAFO owners and operators with a discharge to secure an NPDES permit. *See infra* note 243.

240. EPA noted that nutrient management plans were complex documents requiring considerable expertise. EPA Final Rule, *supra* note 7, at 7213 (preamble).

241. *Waterkeeper Alliance*, 399 F.3d at 524.

242. *Id.* at 506 n.22.

243. The sentence in regulation 122.21(a)(1) could be amended to read "All concentrated animal feeding operations with a discharge have a duty to seek overage under an NPDES permit, as described in § 122.23(d)." *See* 40 C.F.R. § 122.21(a)(1) (2004).

244. Due to the costs of applying for a permit and potential liability under citizen suits, CAFO owners and operators that only have agricultural stormwater discharges may forgo applying for permits. An owner or operator may use the effluent limitation guidelines of 40 C.F.R. pt. 412 for guidance in developing and implementing a nutrient management plan whereby all discharges would be agricultural stormwater discharges. *See* Jerger, *supra* note 107, at 112 (voicing concern about the avoidance of regulation under the Clean Water Act by CAFOs claiming to only have agricultural stormwater discharges).

245. The court found no authority to require potential dischargers to apply for permits. Waterkeeper Alliance, Inc. v. EPA, 399 F.3d 486, 506 n.22 (2d Cir. 2005).

owners and operators with other discharges need to apply for a permit.[246] But what about CAFOs that allegedly only have agricultural stormwater discharges: are they required to apply for a permit?[247] While the Clean Water Act says that agricultural stormwater discharges are not point sources, it does not say they are not discharges.[248] Rather, the *Waterkeeper Alliance* decision suggests that because agricultural stormwater discharges are discharges, owners and operators with such discharges need a permit.[249]

To address the question of whether CAFOs with agricultural stormwater discharges need to apply for a permit, the *Waterkeeper Alliance* court's response to the issue of the inclusion of nutrient management plans in permits is instructive.[250] In requiring plans to be included in the permits, the Second Circuit expressed concern about the absence of oversight.[251] If plans were not included, permitting authorities could not conduct a meaningful review of whether the plans established conditions required by the Clean Water Act.[252] Permitting authorities need to review nutrient management plans in order to ascertain whether an applicant qualifies for a permit.[253] Otherwise, permits might be issued without knowing whether the owner or operator has complied with applicable effluent limitations and standards.[254]

In a similar manner, the only way to determine whether a discharge qualifies for the agricultural stormwater discharge exemption is to have a nutrient management plan included in an NPDES permit application.[255] Unless the owner or operator delineates the provisions of a plan showing

246. *Id.* at 508-09; 40 C.F.R. § 122.23(e) (2004).

247. These owners and operators may claim that the agricultural stormwater exemption means they do not have to secure a permit. Thus, it may be argued that such owners and operators are "outside the jurisdiction of the [Clean Water Act]." Jerger, *supra* note 107, at 98.

248. The CAFO has a discharge so under the Clean Water Act needs a permit. *See* 33 U.S.C. §§ 1311(a), 1342 (2000).

249. Agricultural stormwater discharges are not potential discharges but rather actual discharges that are sanctioned by federal law. *Id.* § 1362(12).

250. *See supra* notes 66-89 and accompanying text.

251. Waterkeeper Alliance, Inc. v. EPA, 399 F.3d 486, 498-500 (2d Cir. 2005).

252. *Id.* The permitting authority could not determine whether an applicant was reducing land application discharges in a way to achieve realistic production goals while minimizing nutrient transport to surface waters. *Id.* at 500 (citing 40 C.F.R. § 412.4(c)(1)).

253. *Waterkeeper Alliance*, 399 F.3d at 502.

254. *Id.* at 498. This caused the court to vacate provisions that allowed permitting authorities to issue permits without reviewing the terms of the nutrient management plans. *Id.* at 524.

255. Without a nutrient management plan, the permitting agency cannot determine whether a discharge qualifies as an agricultural stormwater discharge. In the absence of review by a permitting agency, there is nothing from preventing a CAFO from misunderstanding or misrepresenting their situation. *Id.* at 502.

that the application of nutrients will achieve production goals while minimizing nutrient movement to surface waters,[256] the permitting agency and the public cannot ascertain whether the discharges qualify for the exemption.[257] Given evidence of water impairment from the application of manure, and from the *Waterkeeper Alliance* court's finding that agricultural stormwater discharges are discharges, it may be concluded that CAFOs with agricultural stormwater discharges need to be permitted.[258] The permit applications would establish whether the CAFOs discharges are exempted by the agricultural stormwater exemption.[259]

B. Certification

In its discussion of the CAFO Rule, EPA acknowledged that nutrient management plans were complex documents.[260] Furthermore, EPA admitted that there was considerable support for requiring plans prepared by trained and certified specialists.[261] Certification is a technique that uses independent experts to ascertain that minimum standards are met.[262]

For the CAFO Rule, certification would provide greater oversight of nutrient management plans to assure that the plans are appropriately tailored to the site-specific needs and conditions at each CAFO.[263] However, EPA elected not to include a certification requirement in the CAFO Rule, noting that a short-term scarcity of qualified experts would

256. 40 C.F.R. § 412.4(c)(1) (2004).

257. The only way to determine whether a discharge is an agricultural stormwater discharge is to determine whether the manure was applied according to the site-specific nitrogen- or phosphorus-based rate mandated by the CAFO Rule. Waterkeeper Alliance, Inc. v. EPA, 399 F.3d 486, 501 (2d Cir. 2005); 40 C.F.R. § 412.4(c)(1) (2004).

258. *Waterkeeper Alliance*, 399 F.3d at 511. "[A]ny discharge 'from' a CAFO is already a point source discharge." *Id.*

259. The permits would not preclude agricultural stormwater discharges; rather, they would ascertain that the discharges qualify for the exemption.

260. EPA Final Rule, *supra* note 7, at 7213 (preamble).

261. *Id.*; 33 U.S.C. § 1362(12) (2000).

262. *See, e.g.*, H.R. Barrett, A.W. Browne, P.J.C. Harris, & A. Cadoret, *Organic Certification and the UK Market: Organic Imports from Developing Countries*, 27 FOOD POL'Y 301 (2002) (discussing the meaning of the certification of organic produce); Clyde F. Kiker & Francis E. Putz, *Ecolocical (sic) Certification of Forest Products: Economic Challenges*, 20 ECOLOGICAL ECON. 37 (1996) (discussing the advantages for a certification program for forestry products); Ewald Rametsteiner & Markku Simula, *Forest Certification: An Instrument to Promote Sustainable Forest Management?*, 67 J. ENVTL. MGMT. 87, 88 (2003) (discussing certification with respect to preserving forests and preventing the loss of biodiversity).

263. EPA Final Rule, *supra* note 7, at 7228 (preamble). "The purpose of using certified specialists is to ensure that effective nutrient management plans are developed and/or reviewed and modified by persons who have the requisite knowledge and expertise. . . ." *Id.*

make it difficult to assist CAFOs in the timely preparation of certified nutrient management plans.[264] This was due to an estimate that 11,000 CAFOs would need a plan in order to secure a permit under the CAFO Rule.[265] However, since the adoption of the CAFO Rule, many CAFOs have adopted nutrient management plans and have secured five-year permits.[266] Other CAFOs will not need permits due to the *Waterkeeper Alliance* decision.[267] Therefore, a requirement that future nutrient management plans be prepared or approved by certified specialists may be feasible as it would not overburden the existing infrastructure capacity.[268]

As noted by the *Waterkeeper Alliance* court, the omission of a certification requirement detracts from the enforcement of the water quality control measures of the federal CAFO provisions.[269] Certification serves as an ongoing quality control component to help assure that high-quality plans are being developed.[270] Producers might be expected to develop inferior plans in the absence of certification that will result in more nutrients entering waterbodies.[271] Moreover, certification might reduce the time needed for oversight by state regulators,[272] which could free up resources for other enforcement

264. *Id.* at 7213 (preamble).

265. In announcing the CAFO Rule, EPA estimated that it would apply to 15,500 livestock operations of which 4,500 were covered by permits. EPA AND AGRICULTURE WORKING TOGETHER TO IMPROVE AMERICA'S WATERS (EPA Newsroom, Dec. 16, 2002), http://yosemite.epa.gov/opa/admpress.nsf/b0789fb70f8ff03285257029006e3880/90cd807b5f2798d985256c9100706a22!OpenDocument (last visited May 15, 2006).

266. New York feels that participation of Large CAFOs in the permitting process is 100 percent. Karl Czymmek, et al., *The New York CAFO Program: Successfully Connecting Science, Policy, Regulation, and Implementation*, 35 CLEARWATERS 27 (Spring 2005), *available at* http://www.nywea.org/clearwaters/05-spring/. Wisconsin shows a marked increase in the number of permitted CAFOs since 2000. WIS. DEP'T OF NATURAL RES., STATISTICS ON WISCONSIN CONCENTRATED ANIMAL FEEDING OPERATIONS (CAFOs), http://www.dnr.state.wi.us/org/water/wm/nps/ag/stats.htm (last visited May 15, 2006). EPA anticipated that NPDES permits for CAFOs would be for 5 years and that nutrient management plans would be updated every 5 years. EPA Final Rule, *supra* note 7, at 7253 (preamble).

267. Those owners and operators without a discharge will not need a permit. Waterkeeper Alliance, Inc. v. EPA, 399 F.3d 486, 506, 524 (2d Cir. 2005).

268. EPA referred to "infrastructure capacity" when considering effluent limitations for Large CAFOs. EPA Final Rule, *supra* note 7, at 7213 (preamble).

269. *Waterkeeper Alliance*, 399 F.3d at 501 n.19.

270. JESSICA A. CHITTENDEN, N.Y. STATE DEP'T OF AGRIC. & MKTS., STATE HELPS FARMERS MEET WATER QUALITY OBJECTIVES (2003), *available at* http://www.agmkt.state.ny.us/AD/release.asp?ReleaseID=1270.

271. *Waterkeeper Alliance*, 399 F.3d at 501 n.19.

272. *See, e.g.*, Cary Coglianese & Jennifer Nash, *Policy Options for Improving Environmental Management in the Private Sector*, 44 ENV'T 11, 12 (2002) (noting that environmental management systems encouraging desirable environmental outcomes may assist enforcement agencies with scarce resources).

efforts.[273] The implementation of a certification program for nutrient management plans might reduce the time required by state staff to evaluate permit applications.[274]

Since the federal government has not called for the certification of nutrient management plans, states might initiate such a requirement.[275] New York requires that its comprehensive nutrient management plans be developed or reviewed by a certified agricultural environment planner.[276] Wisconsin includes provisions setting forth competency requirements for persons preparing nutrient management plans.[277] Qualified nutrient management planners have basic training, and persons without qualification can be precluded from preparing plans.[278] By requiring

273. It is argued that states have not been overly active in enforcing water quality regulations. *See, e.g.*, U.S. GEN. ACCOUNTING OFFICE, LIVESTOCK AGRICULTURE: INCREASED EPA OVERSIGHT WILL IMPROVE ENVIRONMENTAL PROGRAM FOR CONCENTRATED ANIMAL FEEDING OPERATIONS (2003) (recommending that EPA increase its oversight of state CAFO regulations); Centner, *supra* note 30, at 710-18 (noting problems in the enforcement of CAFO regulations).

274. Permitting agencies would have assurance that nutrient management plans were prepared by trained professionals. In turn, the plans should be easier to read and would more likely meet regulatory requirements. This may be helpful to permitting authorities that have limited resources. *See, e.g.*, Terence J. Centner, *New Regulations to Minimize Water Impairment from Animals Rely on Management Practices*, 30 ENV'T INT'L 539, 544 (2004) (noting constraints on the enforcement of CAFO regulations due to limited funds in state budgets).

275. EPA noted that certification should be developed by the U.S. Department of Agriculture or the states. EPA Final Rule, *supra* note 7, at 7228 (preamble). Some states have proceeded to implement certification requirements. *See, e.g.* N.Y. DEP'T OF ENVTL. CONSERVATION, STATE POLLUTANT DISCHARGE ELIMINATION SYSTEM (SPDES) GENERAL PERMIT NO. GP-04-02 (2004), *available at* http://www.dec.state.ny.us/website/dow/gp0402permit.pdf [hereinafter N.Y. DEC]; WIS. AGRIC., TRADE & CONSUMER PROT. 50.48 (2004), *available at* http://www.legis.state.wi.us/rsb/code/atcp/atcp050.pdf [hereinafter WIS. ATCP].

276. N.Y. DEC, *supra* note 275.

277. WIS. ATCP, *supra* note 275, at 50.48.

> An individual is considered a qualified nutrient planner under sub. (1), without any action by the department, if all of the following apply: (a) The individual is at least one of the following: 1. Recognized as a certified professional crop consultant by the national alliance of independent crop consultants. 2. Recognized as a certified crop advisor by the American society of agronomy, Wisconsin certified crop advisors board. 3. Registered as a crop scientist, crop specialist, soil scientist, soil specialist or professional agronomist in the American registry of certified professionals in agronomy, crops and soils. 4. The holder of other credentials that the department deems equivalent to those specified under subds. 1. to 3. A landowner is presumptively qualified to prepare a nutrient management plan for his or her farm, but not for others, if the landowner completes a department-approved training course and the course instructor approves the landowner's first annual plan. The landowner shall complete a department-approved training course at least once every 4 years to maintain his or her presumptive qualification.

Id. 50.48(2)(a).

278. The Wisconsin regulations allow the permitting authorities to issue a written

plans to be prepared or reviewed by trained personnel, the permitting agency has an added level of assurance that the plans delineate appropriate conditions for avoiding situations that would impair water quality.[279]

VI. Concluding Comments

As a result of a legal challenge in 1989, EPA was directed to revise the federal effluent guidelines for certain CAFOs by December 15, 2002.[280] The agency needed to comply with the requirements of the Clean Water Act while minimizing regulatory burdens on CAFOs that might interfere with their competitiveness in a global economy.[281] The final regulations, which became effective in 2003, contained provisions that were objectionable to farm and environmental groups, who sought relief from the judiciary.[282] In a well-reasoned opinion, the Second Circuit provided responses to three significant issues concerning the new regulations in the *Waterkeeper Alliance* lawsuit.[283] First, the court vacated provisions that allowed permitting authorities to issue permits without reviewing nutrient management plans.[284] Second, the court upheld provisions on agricultural stormwater discharges that delineated qualifications for these discharges.[285] Third, provisions delineating a duty requirement to apply for a permit regardless of the presence of a discharge were vacated.[286]

In addressing the issue of nutrient management plans, the Second Circuit showed support for assisting permitting authorities and private citizens in upholding water quality controls.[287] Nutrient management

notice of disqualification if a nutrient management planner lacks qualifications. *Id.* 50.48(4).

279. Rametsteiner and Simula, *supra* note 262, at 88 (noting how certification can help assure the quality of forest management); James P. Wilson, Mary Ann T. Walsh, & Kim LaScola Needy, *An Examination of the Economic Benefits of ISO 9000 and the Baldrige Award to Manufacturing Firms*, 15 ENGINEERING MGMT. J. 3, 3 (2003) (noting how certification enhances quality control).

280. EPA Final Rule, *supra* note 7, at 7186 (noting in the preamble the consent decree requiring action to address water impairment by CAFOs).

281. *E.g.*, *see id.* at 7353-54 (listing in the preamble burden and cost estimates), 7354-57 (noting consideration of burdens to small operators). EPA estimated the new provisions might impose costs of $831-925 million annually on livestock producers. EPA Proposed Rule, *supra* note 9, at 3086 (preamble).

282. Waterkeeper Alliance, Inc. v. EPA, 399 F.3d 486, 486-524 (2d Cir. 2005).

283. The court also addressed other issues not covered in this article. *Id.*

284. *Id.* at 524. Pursuant to this directive, owners and operators will be required to submit plans in applications for permits, and permitting agencies will be required to review more detailed permit applications.

285. *Id.* at 509.

286. *Id.* at 524.

287. *See supra* notes 43-106 and accompanying text.

plans need to be submitted to the permitting agency and reviewed prior to the issuance of a permit in order to determine whether the dictates of the Clean Water Act are being followed.[288] It may be expected that CAFO owners and operators will need to take greater efforts in preparing plans due to the possible public scrutiny of these documents.[289] Permitting agencies will need to spend more time reviewing permits to ascertain that they meet the requirements set forth by the federal regulations and the Clean Water Act.[290]

For agricultural stormwater discharges, the court showed flexibility and a willingness to defer to agency discretion.[291] The court found that agricultural stormwater discharges are discharges[292] and that runoff from the land application of manure can be regulated even though fields are not point sources.[293] This holding means that CAFOs applying manure to land can have discharges that need to be permitted under the CAFO Rule.[294]

The Second Circuit was not as supportive of the regulatory provisions imposing a duty to secure NPDES permits on CAFOs without actual discharges.[295] Although the rule provided an exception whereby CAFOs with no potential to discharge are not required to secure a permit,[296] the court felt that the rule imposed obligations on CAFO owners and operators regardless of whether they had discharged any

288. Waterkeeper Alliance, Inc. v. EPA, 399 F.3d 486, 501-02 (2d Cir. 2005).

289. *See supra* note 57 and accompanying text.

290. They need to determine whether the manure application rates are based on a field-specific assessment of the potential for nitrogen and phosphorus transport from the field. 40 C.F.R. § 412.4(c)(1) (2004); *see also Waterkeeper Alliance*, 399 F.3d at 501.

291. *Waterkeeper Alliance*, 399 F.3d at 507-10; *see also supra* notes 147-166 and accompanying text. The court concluded that Congress had not addressed the precise issue so proceeded to determine whether EPA's interpretation was grounded in a permissible construction of the Clean Water Act. *Id.* at 507 (citing Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 843 (1984)). *See, e.g.*, Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, 462 U.S. 87, 104-05 (1983) (observing that if an agency's assumption is within the bounds of reasoned decision-making, it should be respected); Nat'l Wildlife Fed'n v. EPA, 286 F.3d 554, 562-65 (D.C. Cir. 2002) (observing the discretion that should be granted an agency in reviewing an action).

292. Discharges from the land application of manure are discharges from a CAFO. *Waterkeeper Alliance*, 399 F.3d at 510-11.

293. *See* 40 C.F.R. §§ 122.42(e)(1)(iv) [requiring conservation measures to control runoff of pollutants], 412.4(c) [requiring best management practices and determining application rates to minimize nutrient transport from fields] (2004). Due to the fact that land application areas are an integral and indispensable part of CAFO operations, EPA can regulate runoff from these areas as runoff from a CAFO. *Waterkeeper Alliance*, 399 F.3d at 511.

294. The court noted that approximately 90 percent of animal waste from CAFOs was being applied to land. Waterkeeper Alliance, Inc. v. EPA, 399 F.3d 486, 494 n.11. (2d Cir. 2005).

295. *See supra* notes 181-200 and accompanying text.

296. 40 C.F.R. § 122.23(f), (g)(6) (2004).

pollutants to navigable waters.[297] This was contrary to the requirement that permits are required for discharges, not potential discharges.[298]

By vacating the duty provisions, the *Waterkeeper Alliance* decision impedes EPA's efforts to regulate CAFOs employing manure application activities that impair water quality.[299] Because discharges are not allowed from CAFO production areas,[300] EPA concluded that significant impairment of waters comes from the application of CAFO manure on fields.[301] While CAFOs that have discharges must secure permits[302] and CAFOs without any likelihood of a discharge do not need a permit,[303] a more difficult question involves CAFOs with agricultural stormwater discharges.[304] An anticipated result of the *Waterkeeper Alliance* ruling may be that owners and operators of CAFOs with agricultural stormwater discharges will claim they do not need permits.[305] Will the CAFO Rule assist our nation in meeting the legislatively adopted water quality goals if significant numbers of CAFOs decline to secure permits?[306]

CAFOs are classified as point sources of pollution and need permits if they have discharges.[307] Simultaneously, point sources do not include agricultural stormwater discharges, so these discharges are exempted from the NPDES permitting provisions.[308] The Second Circuit reasoned that while agricultural stormwater discharges themselves did not constitute a point source, runoff from CAFOs were "from" a point source.[309] Therefore, the EPA can regulate runoff from CAFO land

297. *Waterkeeper Alliance*, 399 F.3d at 505.

298. 33 U.S.C. § 1311(a) (2000).

299. *See supra* note 9 (showing data whereby few CAFOs were securing NPDES permits).

300. 40 C.F.R. §§ 412.12(a), 412.13(a), 412.15(a), 412.25(a), 412.31(a), 412.46(a) (2004).

301. *See* EPA Final Rule, *supra* note 7, at 7237 (preamble); *Waterkeeper Alliance*, 399 F.3d at 495 (2d Cir. 2005).

302. This would include all medium CAFOs with discharges. 40 C.F.R. § 122.23(b)(6)(ii) (2004); *see also* Save the Valley, Inc. v. EPA, 223 F. Supp. 2d 997, 1007 (S.D. Ind. 2002) (observing that any CAFO that discharges needs a permit).

303. The Clean Water Act requires permits for discharges, not potential discharges. *See* 33 U.S.C. § 1311(a) (2000).

304. *See infra* notes 235-259 (observing that oversight may be necessary to assure compliance).

305. By claiming they only have agricultural stormwater discharges, owners and operators argue they are not under the jurisdiction of the Clean Water Act. *See* Jerger, *supra* note 107, at 112.

306. *See id.* Two years after the implementation of the CAFO Rule, nearly 60 percent of CAFOs still have not been issued permits. OFFICE OF WATER, EPA, CAFO RULE IMPLEMENTATION STATUS – NATIONAL SUMMARY, FIRST QUARTER (2005).

307. 33 U.S.C. §§ 1342(a)-(b), 1362(14) (2000).

308. *Id.* § 1342(a)-(b).

309. Waterkeeper Alliance, Inc. v. EPA, 399 F.3d 486, 511 (2d Cir. 2005).

application areas that is not agricultural stormwater discharge.[310]

Under this interpretation of federal law, EPA should assert its jurisdiction over all CAFOs with discharges and require them to apply for NPDES permits.[311] The permits cannot interfere with agricultural stormwater discharges due to the statutory exemption for these discharges.[312] However, the only way for permitting authorities to determine whether nutrient management plans set forth required effluent limitations to preclude disallowed discharges is to require all CAFOs with any type of runoff to apply for a permit.[313]

Permitting does offer owners and operators some advantages. Owners and operators with permits cannot be penalized for failure to file for a permit.[314] For CAFO production areas, although no discharges are allowed,[315] overflows arising from a precipitation event may be discharged if enumerated conditions are met.[316] CAFOs that experience rainfall events causing an overflow can thereby avoid penalties.[317]

Greater attention should also be given to the certification of nutrient management plans.[318] Given that CAFOs and permitting agencies have had more than two years to implement the provisions of the CAFO Rule, sufficient infrastructure should exist for a certification requirement.[319]

310. *Id.*; 33 U.S.C. § 1362(14) (2000).

311. Jurisdiction exists due to the presence of a discharge. 33 U.S.C. §§ 1311(a), 1342 (2000).

312. *Id.* § 1362(14).

313. *Id.*; 40 C.F.R. pts. 122, 412 (2004) (qualified by *Waterkeeper Alliance*, 399 F.3d at 486).

314. While the duty to apply for a permit was overturned by the *Waterkeeper Alliance* case due to its application to CAFOs without discharges, there still may exist an obligation to apply for a permit if there is a discharge. *See, e.g.*, Waterkeeper Alliance, Inc. v. Smithfield Foods, 2001 U.S. Dist. LEXIS 21314, at *7 (E.D. N.C. Sept. 20, 2001) (observing that a CAFO's failure to have a required permit can constitute an independent violation of the Clean Water Act); Carr v. Alta Verde Indus., 931 F.2d 1055, 1062 (5th Cir. 1991) (observing that a failure to obtain an NPDES permit was a violation of the Clean Water Act).

315. 40 C.F.R. §§ 412.12(a), 412.13(a), 412.15(a), 412.25(a), 412.31(a), 412.46(a) (2004).

316. 40 C.F.R. § 412.31(a) (2004).

317. *Id.*

> Whenever precipitation causes an overflow of manure, litter, or process wastewater, pollutants in the overflow may be discharged into U.S. waters provided: (i) The production area is designed, constructed, operated and maintained to contain all manure, litter, and process wastewater including the runoff and the direct precipitation from a 25-year, 24-hour rainfall event; (ii) The production area is operated in accordance with the additional measures and records required by § 412.37(a) and (b).

Id.

318. This is to help the country attain its water quality goals.

319. When the rule was adopted in December 2002, there was concern about an adequate infrastructure. EPA Final Rule, *supra* note 7, at 7213 (preamble). The same

While a federal certification provision is possible, in its absence, states should proceed with their own provisions.[320] Certification would foster the development of better nutrient management plans that might be expected to reduce the impairment of waters.[321] In turn, certification might reduce the need for the further regulation of additional CAFOs.[322]

concern may no longer exist.

320. N.Y. DEC, *supra* note 275; WIS. ATCP, *supra* note 275, at 50.48.

321. *See supra* notes 275-279 and accompanying text.

322. The proposed CAFO regulation delineated alternative provisions whereby approximately 25,540 operations rather than 12,700 would be required to apply for a permit. EPA Proposed Rule, *supra* note 9, at 2985, 2997 (preamble).