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An Agricultural Law Research Article

***Waterkeeper Alliance v. EPA: A Demonstration  
in Regulating the Regulators***

by

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# **WATERKEEPER ALLIANCE V. EPA: A DEMONSTRATION IN REGULATING THE REGULATORS**

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## I. INTRODUCTION

Factory farms, also known as contained animal feeding operations (CAFOs), are known for noxious odors, mass production of livestock, and their potential to devastate aquatic life as well as compromise the integrity of nearby water bodies. CAFOs can also significantly reduce neighboring property values.<sup>1</sup> CAFOs are big businesses<sup>2</sup> that are getting bigger and generating billions of dollars in revenue each year. The days of the family farm are waning, and the corporate animal production

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1. Richard C. Ready & Charles W. Abdalla, *The Amenity and Disamenity Impacts of Agriculture: Estimates From Hedonic Pricing Model*, AM. J. AGRIC. ECON., May 1, 2005 at 314. “Single animal production facility decreases nearby property values by up to 6.4%.” *Id.*

2. In 2003, the CAFO dominated livestock industry generated approximately \$98.3 billion. National Cattlemen’s Beef Association, Industry statistics, *available at* [http://www.beefusa.org/uDocs/Beef\\_Industry\\_Facts\\_\(12.16.04\).doc](http://www.beefusa.org/uDocs/Beef_Industry_Facts_(12.16.04).doc) (last visited October 12, 2005).

machines are taking over.<sup>3</sup> CAFOs are huge industrial scale operations which raise an astonishing number of livestock. Some large CAFOs raise millions of livestock in one location. These animals produce hundreds of millions of tons of manure yearly.<sup>4</sup> If the manure is not properly managed it can have devastating effects on aquatic life as well as drinking water. Due to environmental threats that the mishandling of the manure has presented, the Environmental Protection Agency (EPA) promulgated regulations for CAFOs in 1974 and 1976.<sup>5</sup>

In 1989, the EPA was sued for failing to publish revised regulations on CAFOs, as the 1987 amendment to the Clean Water Act (CWA) required.<sup>6</sup> The litigation concluded by a consent decree in which the EPA promised to promulgate stricter and easily adaptable standards creating new effluent limitation guidelines (ELG) for different categories of the CAFO industry by 2002.<sup>7</sup> In 2003, the EPA promulgated the Final Rule regulating CAFOs.<sup>8</sup> The Final Rule was immediately challenged as unlawful in the Second Circuit Court of Appeals case of *Waterkeeper Alliance et al. v. EPA (Waterkeeper)*.<sup>9</sup>

In *Waterkeeper*, the court considered various challenges to the Final Rule from environmentalists and farmers, who deemed it too restrictive and too lenient respectively.<sup>10</sup> The court determined that, in fact, the Final Rule was too restrictive in some sections and too lenient in others.<sup>11</sup> The court held that various sections of the Final Rule violated the CWA including public participation requirements, the requirement to set water quality based effluent limitations (WQBEL), allowing National Pollutant Discharge Elimination System (NPDES) permits to be issued without proper review of nutrient management plan, failing to initiate standards for the reduction of pathogens, and for exceeding EPA authority by mandating that all CAFOs apply for NPDES permits.<sup>12</sup>

This casenote will examine *Waterkeeper's* facts and procedural history. The background will consider the history of the CWA and particularly the regulation of animal feeding operations (AFO) will be discussed. The analysis will focus on the Final Rule's violations of the CWA and the reasoning employed by the Second Circuit Court of Appeals. This note will conclude that the court correctly decided all of the violations. The outcome will provide more protection to our nation's water, although, subsections of the holding actually foster the continued complacent

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3. Research indicates that while small production farms are disappearing larger CAFO are taking over. While overall operations have continued to drop, the production of livestock has substantially increased. Environmental Petitioner's Opening Brief at 7, *Waterkeeper Alliance et al. v. EPA*, 399 F.3d 486 (2d Cir. 2005) (hereinafter Environmental Brief) (citing *Final Rule Development Document* at 4-2, 4-4); see also *Waterkeeper Alliance et al. v. EPA*, 399 F.3d 486, 495 (2d Cir. 2005) (recognizing a trend to fewer but larger animal feeding operations).

4. *Waterkeeper*, 399 F.3d at 493 n.10 (USDA estimates that operations that confine livestock and poultry produce approximately 500 million tons of animal manure) (citation omitted).

5. *Id.* at 494 (citations omitted).

6. *Id.* (citations omitted).

7. *Id.* at 494 n.12 (citations omitted).

8. *Id.* at 495 (citations omitted).

9. *Waterkeeper*, 399 F.3d 486 (2d Cir. 2005).

10. *Id.*

11. *Id.*

12. *Id.*

behavior of polluting CAFOs. Finally, the conclusion will propose a nominal alteration in the semantics of the EPA's argument, which may result in circumventing one of the Final Rule's violations and also provide more thorough regulations for CAFOs.

## II. FACTS

There is no specific factual scenario for which the opinion of *Waterkeeper* relies. The crux of the controversy is over the lawfulness of a new regulation published to regulate pollution discharges of CAFOs.<sup>13</sup> On February 12, 2003, the EPA published the Final Rule which regulated pollution discharges of CAFOs.<sup>14</sup> The Final Rule "revises two sections of the Code of Federal Regulations (CFR), the NPDES permitting requirements for CAFOs (Sec. 122) and the Effluent Limitations Guidelines and Standards (ELGs) for CAFOs (Sec. 412)."<sup>15</sup> The Final Rule endeavored to mandate that all CAFOs acquire NPDES discharge permits,<sup>16</sup> or alternatively demonstrate the CAFO has "no potential to discharge" pollutants.<sup>17</sup> Prior to this rule, CAFOs were not required to apply for a permit if they only discharged pollutants during specific large storms.<sup>18</sup>

The Final Rule also required that Nutrient Management Plans (NMPs) be developed by CAFOs to identify site specific actions to ensure proper manure management and field application.<sup>19</sup> Manure that is applied to fields in concert with a CAFO's site specific NMP would be considered "agricultural stormwater"<sup>20</sup> and would be exempt from any NPDES regulation.<sup>21</sup> Prior CAFO regulations only addressed pollution "discharges emanating directly from the feedlots and other production areas of the farm" but did not discuss land application discharges.<sup>22</sup> The Final Rule sought to clarify whether a CAFO's land application discharges of waste is considered a component of the CAFO, and therefore a regulated point source, or whether the land application discharge is exempt from regulation as an "agricultural stormwater discharge."<sup>23</sup> The Final Rule maintains a three tiered categorization of

13. *Id.*

14. National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations, 68 Fed. Reg. 7176, (Feb. 12, 2003) (codified at 40 C.F.R. pts. 9, 122, 123, and 412) (hereinafter Effluent Limitation Guidelines I).

15. *Id.*

16. *Id.*

17. 40 C.F.R. § 122.23(f) (2005).

18. National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines and Standards for Concentrated Animal Feeding Operations, 66 Fed. Reg. 2960, 3029-32 (proposed January 12, 2001) (hereinafter Effluent Limitation Guidelines II). These storm events were called 25 year, 24 hour storms, based on the worst storm that would on average happen once every 25 years. *Id.*

19. 40 C.F.R. § 412.4(c) (2005). However, agricultural stormwater discharges were expressly exempted from point source regulation. 33 U.S.C. § 1362(14) (2005). There will be more discussion on this topic *infra*.

20. 33 U.S.C. § 1362(14).

21. Effluent Limitation Guidelines II, *supra* note 18, at 3029-32.

22. Brief of the United States Environmental Protection Agency at 10, *Waterkeeper Alliance et al. v. EPA*, 399 F.3d 486 (2d Cir. 2005) (hereinafter EPA Brief) (Effluent Limitation Guidelines II, *supra* note 18, at 3008-09).

23. 40 C.F.R. § 122.23(e).

CAFOs based on size,<sup>24</sup> and sets technology based ELGs designed for diverse subcategories within the industry.<sup>25</sup>

For years, parties have debated the issue of where exactly a CAFO (point source) ends and where an agricultural stormwater discharge begins. Prior decisions went so far as to define a CAFO as including “any manure spreading vehicles, as well as manure storing fields, and ditches used to store or transfer the waste.”<sup>26</sup> The Final Rule states generally, that all land application discharges from land under the control of the CAFO are point source discharges from the CAFO, unless, the manure was appropriately applied to the land in concert with the CAFO site specific NMP.<sup>27</sup>

As stated above, the Final Rule was challenged as being both too lenient and too restrictive.<sup>28</sup> The Environmentalist petitioners<sup>29</sup> challenged the Final Rule as being too lenient<sup>30</sup> and Farm petitioners<sup>31</sup> were challenging the Final Rule as being too restrictive.<sup>32</sup> The Environmental petitioners challenged multiple sections of the Final Rule,<sup>33</sup> alleging that because certain types of discharges were exempt, or inadequately regulated by the rule, the rule’s ELGs were unlawful.<sup>34</sup> The Farm petitioners challenged, *inter alia*, the EPA’s authority to mandate that all statutorily defined CAFOs apply for a NPDES permit or prove that they have no potential to discharge pollutants.<sup>35</sup> The four challenged sections of the Final Rule that are discussed in this casenote concern: 1) the duty to apply for an NPDES permit; 2) NPDES permit requirements; 3) the discharges subject to NPDES requirements; and 4) effluent limitation guidelines.<sup>36</sup>

### III. BACKGROUND

#### A. HISTORY OF THE CLEAN WATER ACT AND CAFOS

Congress enacted the CWA in 1972 with the ambitious goal “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”<sup>37</sup> Furthermore, the CWA specifically set 1985 as the deadline to eliminate *all* pollution discharges.<sup>38</sup> The CWA creates two categories of pollution sources: non-point

24. 40 C.F.R. § 122.23.

25. 40 C.F.R. §§ 412.10-412.47 (2004).

26. *CARE v. Henry Bosma Dairy*, 305 F.3d 943, 955 (9th Cir. 2002) (citations omitted).

27. Effluent Limitation Guidelines I, *supra* note 14, at 7196.

28. *Waterkeeper Alliance et al. v. EPA*, 399 F.3d 486, 497 (2d Cir. 2005).

29. *Waterkeeper Alliance, Sierra Club, Inc., and Natural Resources Defense Council, Inc.* will be referred to as Environmental petitioners hereinafter. *Waterkeeper*, 399 F.3d 486 (2d Cir. 2005).

30. *Id.* at 497-523.

31. American Farm Bureau Federation, National Chicken Council, National Pork Producers Council, and American Littoral Society will be referred to as the Farm petitioners hereinafter. *Waterkeeper*, 399 F.3d 486 (2d Cir. 2005).

32. *Id.* at 504.

33. *Id.* at 497-523.

34. *Id.*

35. *Id.* at 504.

36. *Id.* at 495-96.

37. 33 U.S.C. § 1251 (a) (2005).

38. 33 U.S.C. § 1251(a)(1). “A discharge, in general, is the flow of treated or untreated wastewater from a facility to surface water.” United States Environmental Protection Agency Office of Wastewater Management, *Producers’ Compliance Guide for CAFOs: Revised Clean Water Act Regulations for*

sources and point sources of pollutants.<sup>39</sup> The CWA specifically enumerates CAFOs as point sources.<sup>40</sup> Further, the CWA makes it illegal for any person<sup>41</sup> to discharge pollutants from a “point source”<sup>42</sup> into “navigable waters”<sup>43</sup> of the United States without obtaining a permit issued in accordance with the NPDES.<sup>44</sup>

In an effort to provide maximum protection to the nation’s waters, Congress expanded the term ‘navigable waters’ to entail “virtually every component of the hydrologic system.”<sup>45</sup> Exempt from the CWA, and its regulatory permits, are any pollutant discharges that are approved by statute, such as “agricultural stormwater discharges.”<sup>46</sup>

The CWA created the NPDES as a method of regulating and enforcing pollution discharges by recognized point sources.<sup>47</sup> The NPDES permit converts general effluent limitation guidelines into specific requirements for the individual

*Concentrated Animal Feeding Operations (CAFOs)*, at 3 (2003).

39. 33 U.S.C. § 1251(a)(7).

40. 33 U.S.C. § 1362(14).

41. 33 U.S.C. § 1362(5). “The term ‘person’ means an individual, corporation, partnership, association, state, municipality, commission, or political subdivision of a State, or any interstate body.” *Id.*

42. 33 U.S.C. § 1362(14).

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

*Id.* (emphasis added). “A discrete conveyance, in general, is any single identifiable way for pollutants to be carried to transferred to waters, such as a pipe, ditch, or channel.” United States Environmental Protection Agency Office of Wastewater Management, *Producers’ Compliance Guide for CAFOs: Revised Clean Water Act Regulations for Concentrated Animal Feeding Operations (CAFOs)* at 3 (2003) (guidelines may limit the type and quantity of pollutant allowed to be discharged, and management practices of the discharger).

43. 33 U.S.C. § 1362(7). “The term ‘navigable waters’ means the waters of the United States, including the territorial seas.” *Id.* Waters of the United States are defined by federal regulations as:

(a) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide; (b) All interstate waters, including interstate “wetlands;” (c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, “wetlands,” sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce. . . .

40 C.F.R. § 122.2.

44. 33 U.S.C. §§ 1311(a), 1342.

NPDES permits may be issued by EPA or a State, Territory, or Tribe authorized by the EPA to implement the NPDES program. Currently, 45 States and the Virgin Islands are authorized to administer the NPDES program. This means that most CAFOs will obtain NPDES permits from State Governments, not from the EPA. Alaska, Arizona, the District of Columbia, Idaho, Massachusetts, New Hampshire, New Mexico, and Puerto Rico and other territories are not currently authorized to implement the NPDES program.

Effluent Limitation Guidelines I, *supra* note 14, at 7185.

45. John H. Davidson, *Thinking About Nonpoint Sources of Water Pollution and South Dakota Agriculture*, 34 S.D. L. REV. 20, 25 (1989) (citing *United States v. Ashland Oil & Transp. Co.*, 504 F.2d 1317 (6th Cir. 1974); *Natural Resources Defense Council, Inc. v. Callaway*, 392 F. Supp. 685 (D.D.C. 1975); and 33 U.S.C. § 1251(g)).

46. 33 U.S.C. § 1362(14).

47. *South Florida Water Management District v. Miccosukee Tribe of Indians et al.*, 541 U.S. 95, 102 (2004). “Generally speaking, the NPDES requires dischargers to obtain permits that place limits on the type and quantity of pollutants that can be released into the Nation’s water.” *Id.*

discharger.<sup>48</sup> ELGs are federal regulations “based on industrial category and subcategory classifications”<sup>49</sup> of point source discharges; providing minimum requirements<sup>50</sup> for NPDES permits by establishing “[t]echnology- and water quality-based requirements”<sup>51</sup> dependant upon whether the point source is or is not already in existence.<sup>52</sup>

For a point source that is already in existence, there are three different standards that can apply: (1) the best available technology economically achievable (BAT)<sup>53</sup>; (2) the best conventional pollutant control technology (BCT)<sup>54</sup>; and (3) the best practicable control technology currently available (BPT).<sup>55</sup> The most rigorous technological requirements are placed on new point sources.<sup>56</sup> These standards are often referred to as new source performance standards (NSPS) and are based on the best available demonstrated control technology.<sup>57</sup> When the technology-based limitations prove insufficient in attaining certain water quality standards, the CWA “requires NPDES permits to include additional water quality based effluent limitations [WQBEL].”<sup>58</sup> The NPDES permits may also contain best management practices (BMP),<sup>59</sup> such as recordkeeping and maintenance.<sup>60</sup>

#### B. CAFO: DEFINITION

The focus of the *Waterkeeper* opinion deals with the EPA’s Final Rule on CAFOs.<sup>61</sup> CAFOs are a major source of water pollution in the United States.<sup>62</sup> CAFOs represent the “largest of the nations 238,000 or so ‘animal feeding operations’ – ‘agriculture enterprises where animals are kept and raised in confinement.’”<sup>63</sup> AFOs are defined as

[A] lot or facility (other than an aquatic animal production facility) where the following conditions are met: (i) Animals (other than aquatic animals)

48. *EPA et al. v. California ex rel. State Water Resources Control Board et al.*, 426 U.S. 200, 205 (1976) (the permit elaborates the specific discharger’s obligations under effluent limitations, facilitating compliance and enforcement of obligations).

49. Scott Jerger, *EPA’s New CAFO Application Requirements: An Exercise in Unsupervised Self-Monitoring*, 23 STAN. ENVTL. L.J. 91, 113 (2004). For a comprehensive description of the individual ELGs for specific CAFOs set by the EPA’s Final Rule, see 40 C.F.R. §§ 412.10-412.47.

50. United States Environmental Protection Agency Office of Wastewater Management, *Producers’ Compliance Guide for CAFOs Revised Clean Water Act Regulations for Concentrated Animal Feeding Operations (CAFOs)*, at 4 (2003).

51. Effluent Limitation Guidelines I, *supra* note 14, at 7184-7185.

52. *Waterkeeper Alliance et al. v. EPA*, 399 F.3d 486, 491 (2d Cir. 2005).

53. 33 U.S.C. § 1311(b)(2)(A).

54. 33 U.S.C. § 1314(b)(4) (2000).

55. 33 U.S.C. § 1314(b)(1)(A).

56. 33 U.S.C. § 1316 (2005).

57. *Id.*

58. *Waterkeeper Alliance et al. v. EPA*, 399 F.3d 486, 491 (2d Cir. 2005) (citing 33 U.S.C. §§ 1311(b)(1); 1312(a)).

59. 33 U.S.C. § 1314(e).

60. Effluent Limitation Guidelines I, *supra* note 14, at 7185.

61. *Waterkeeper*, 399 F.3d 486 (2d Cir. 2005).

62. Effluent Limitation Guidelines I, *supra* note 14, at 7181 (agriculture is a significant share of water pollution, although no breakdown is conclusive to how much pollution CAFOs contribute to the problem in locations where crops are intensively cultivated and where livestock operations are concentrated water quality concerns appear to be the greatest).

63. *Waterkeeper*, 399 F.3d at 492 (citing Effluent Limitation Guidelines I, *supra* note 14, at 7179).

have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period, and (ii) Crops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility.<sup>64</sup>

A CAFO may have crops, so long as the livestock is not grazing and consuming the vegetation for sustenance.<sup>65</sup> The crops/vegetation criterion when defining a AFO/CAFO applies only as to the actual feeding lot, not to the surrounding adjacent fields.<sup>66</sup> CAFOs are the largest of the AFOs that “raise extraordinary numbers of livestock.”<sup>67</sup> The amount of raw waste excreted by CAFO animals is staggering. For example, a “single hog produces two to four times the amount of waste that a human produces, while a dairy cow produces twenty-three times the waste of a human” per year.<sup>68</sup> Our nation’s large industrialized feedlots generate approximately 500 million<sup>69</sup> to 910 million<sup>70</sup> tons of manure each year. By comparison, the EPA estimates Americans generate one hundred and fifty tons of raw human waste each year.<sup>71</sup> EPA’s estimates recognize that CAFOs produce over three times more raw waste than humans.<sup>72</sup> Other estimates claim American livestock produce an astounding one hundred and thirty times more raw waste than humans.<sup>73</sup>

The recent trend of the meat and dairy producing industry is towards large scale factory farms as small family farms disappear.<sup>74</sup> For example, during the past decade the swine industry’s large confinement operations dominated hog production; the United States’ hog operations plummeted by fifty percent, while domestic hog production increased considerably.<sup>75</sup> This industry takeover of meat production is not unique to swine as, *inter alia*, chicken production from 1982 to 1998 showed a closing of twenty percent of the broiler operations while production increased significantly.<sup>76</sup> Economically in the past, the United States CAFO industry has

64. 40 C.F.R. § 122.23(b)(1).

65. *Id.*

66. *See* Concerned Area Residents for the Environment v. Southview Farm, 34 F.3d 114, (2d Cir. 1994) (holding that the farm, although it produced crops in addition to being a massive dairy industry, was as a matter of law, still a CAFO, because the crops were not grown in the feedlots).

67. *Waterkeeper*, 399 F.3d at 492-94 n.6-8 (citing 40 C.F.R. § 122.23(b)(6) which defines Medium CAFO and 40 C.F.R. § 122.23(b)(3) which defines a large CAFO).

68. Jerger, *supra* note 49, at 94 (citing Robbin Marks, *Natural Res. Defense Council and Clean Water Network, Cesspools of Shame: How Factory Farms Lagoons and Sprayfields Threaten Environmental and Public Health*, at 3 (July 2001)).

69. Effluent Limitation Guidelines I, *supra* note 14, at 7180 (estimates by the United States Department of Agriculture (USDA) estimates 500 million tons of manure annually).

70. Environmental Brief, *supra* note 3, at 6, (citing Robbin Marks, *Natural Res. Defense Council and Clean Water Network, Cesspools of Shame: How Factory Farms Lagoons and Sprayfields Threaten Environmental and Public Health*, at 3 (July 2001)).

71. Effluent Limitation Guidelines I, *supra* note 14, at 7180.

72. *Id.*

73. Environmental Brief, *supra* note 3, at 6, (citing Robbin Marks, *Natural Res. Defense Council and Clean Water Network, Cesspools of Shame: How Factory Farms Lagoons and Sprayfields Threaten Environmental and Public Health*, at 3 (July 2001)).

74. *Id.* at 7 (citing Environmental Protection Agency, *Development Document for the Final Revisions To the National Pollutant Discharge Elimination System regulation and the Effluent Guidelines for the Concentrated Animal Feeding Operations*, at 4-37 (Dec. 2002)).

75. *Id.*

76. *Id.* For an interesting discussion on societies progression to industrialized livestock production, as well as the potential to rethink the nostalgic protection of the American farmer when considering environmental liability, this author recommends reading, Susan M. Brehm, *Comment: From Red Barn to*



“generate[d] billions of dollars in revenue a year.”<sup>77</sup> For example, the poultry production industry exceeded \$21.6 billion dollars in 1997; CAFOs producing over one hundred thousand birds generated much of this revenue.<sup>78</sup> In 2003, the CAFO dominated livestock industry generated approximately \$98.3 billion.<sup>79</sup>

### C. CAFOS ARE A PROBLEM

Manure produced by livestock contain, *inter alia*,

(1) nutrients such as nitrogen and phosphorus; (2) organic matter; (3) solids, including the manure itself and other elements mixed with it such as spilled feed, bedding and litter materials, hair, feathers and animal corpses; (4) pathogens (disease-causing organisms such as bacteria and viruses); (5) salts; (6) trace elements such as arsenic; (7) odorous/volatile compounds such as carbon dioxide, methane, hydrogen sulfide, and ammonia; (8) antibiotics; and (9) pesticides and hormones.<sup>80</sup>

There are more than one hundred and fifty pathogens in livestock manure “including the six human pathogens that account for more than ninety percent of food and water borne diseases in humans.”<sup>81</sup> Potential for transmission of these deadly pathogens is an important concern because of the “relatively low infectious dose in humans.”<sup>82</sup> Furthermore, the use of antibiotics on the animals could potentially generate strains of pathogens that are resistant to antibiotics.<sup>83</sup> Some other studies have detected, *inter alia*,

[A]ntibiotic resistant bacterial beneath swine farms; *E. coli* and fecal *Streptococci* in ground water near hog lagoons; unsafe quantities of fecal coliform in surface waters adjacent to CAFOs; the Utah Department of Environmental Quality detected bacteria in Utah surface waters from cattle feedlots; and USGS found antibiotics in 16 of 31 Iowa stream samples.<sup>84</sup>

Furthermore, EPA analysis indicated that nineteen states reported four million fish have been killed as a result of “both runoff and spills at CAFOs.”<sup>85</sup> These deaths

Facility: *Changing environmental Liability to Fit the Changing Structure of Livestock Production*, 93 CAL. L.R. 797 (2005).

77. *Waterkeeper Alliance et al. v. EPA*, 399 F.3d 486, 493 (2d Cir. 2005) (citing Environmental Protection Agency, *Development Document for the final revisions to the National Pollutant Discharge Elimination System Regulations and the Effluent Guidelines for the Concentrated Animal Feeding Operations*, at 4-45 (Dec. 2002)).

78. *Waterkeeper*, 399 F.3d at 493 n.9 (citing Environmental Protection Agency, *Development Document for the final revisions to the National Pollutant Discharge Elimination System Regulations and the Effluent Guidelines for the Concentrated Animal Feeding Operations*, 4-45 (Dec. 2002)).

79. National Cattlemen’s Beef Association, Industry statistics, available at [http://www.beefusa.org/uDocs/Beef\\_Industry\\_Facts\\_\(12.16.04\).doc](http://www.beefusa.org/uDocs/Beef_Industry_Facts_(12.16.04).doc) (last visited October, 13, 2005).

80. *Waterkeeper*, 399 F.3d at 494 (citing Effluent Limitations Guidelines II, *supra* note 18, at 2976-79).

81. Effluence Limitation Guidelines I, *supra* note 14, at 7236.

82. *Id.*

83. *Id.* at 7236 (widespread use of antibiotics may be contributing to the emergence of more strains of antibiotic-resistant pathogens).

84. Environmental Brief, *supra* note 3, at 15 (citing Environmental Defense Comments, at 4-5 (July 30, 2001)).

85. Effluent Limitation Guidelines I, *supra* note 14, at 7238.

can be attributed to eutrophication<sup>86</sup> and a myriad of other adverse impacts that manure runoff has on surface water.<sup>87</sup> Human health concerns about the multitude of negative impacts the manure from AFO/CAFOs can have on drinking waters include spontaneous abortions, methemoglobinemia<sup>88</sup> in infants, and an increase in stomach and esophageal cancers.<sup>89</sup> The noxious vapors emanating from CAFOs are also a source of green house gases.<sup>90</sup>

#### D. INTRODUCTION OF MANURE INTO OUR WATER SUPPLY

Harmful pollutants from manure produced by CAFOs enter our environment in many ways and forms and impact not only our environment, but also our health. For example, CAFOs often store liquefied manure in large lagoons or storage ponds<sup>91</sup> which commonly leak and contaminate shallow ground water.<sup>92</sup> Surveys taken of thirty-six lagoons in the Carolinas showed that almost two-thirds of them had leaked pollutants into ground water.<sup>93</sup> Furthermore, an Iowa State University study declared that each and every lagoon should be expected to leak waste at sometime.<sup>94</sup> Other concerns pertaining to the lagoons are the potential for the storage units to overflow and spill raw waste.<sup>95</sup> Volatilization, a change of the liquid waste into a vapor,<sup>96</sup> is another way that these pollutants can be distributed through the air and subsequently reach our nation's water supply.<sup>97</sup>

The most common way that raw waste reaches our nation's waterways is through overapplication or improper application of the waste to the land.<sup>98</sup> Land application is a technique applied by CAFOs to dispose of an estimated ninety

86. Eutrophication is the depletion of oxygen in water. "Eutrophication is the most documented impact of nutrient pollution and is a serious concern for coastal and estuarine resources." *Id.* at 7238.

87. *Id.* (listing negative impacts that surface water has on surface waters such as: algae bloom; pathogens; outbreaks of shellfish poisoning and various others).

88. Methemoglobinemia is a blood disorder activated when nitrite interacts with the hemoglobin in red blood cells. It is commonly referred to as Blue-baby syndrome, because of the blue color that the lips and extremities of the infant takes on as a symptom of this disease. Outcome can be impeded breathing and death. Tom Meersman, *Unsafe Water Found in 66 wells Private Wells in Dakota County Were Tested*, STAR TRIB. (Twin Cities, MN), May 10, 2005, at 1B.

89. Effluent Limitation Guidelines I, *supra* note 14, at 7238.

90. *Id.*

91. Lagoons and storage ponds are typically open-air and often unlined storage facilities constructed to hold the liquefied waste of livestock. These lagoons can store as much as "20 to 45 million gallons of wastewater and can be 6 to 7.5 acres in size." Environmental Brief, *supra* note 3, at 9 (citing Robbin Marks, Natural Res. Defense Council and Clean Water Network, Cesspools of Shame: How Factory Farms Lagoons and Sprayfields Threaten Environmental and Public Health at 3 (July 2001)).

92. Effluent Limitation Guidelines I, *supra* note 14, at 7237 (These findings are based on reports from scientific and technical literature).

93. Environmental Brief, *supra* note 3, at 11 (citing *Proposed Rule Environmental Assessment*, at 3-1).

94. *Id.*

95. Effluent Limitation Guidelines I, *supra* note 14, at 7181. *See also* Environmental Brief, *supra* note 3, at 11 (citing *Proposed Rule Environmental Assessment*, at 3-1) (discussing the overflow of approximately 25 million gallons of manure from a single hog farm in 1995).

96. Webster's Universal College Dictionary 879 (1997).

97. Effluent Limitation Guidelines I, *supra* note 14, at 7237 (explaining other ways that the pollutants can reach the air and water is by the wind blowing dust particles, and by the manure be sprayed through irrigation systems, once in the air they can be distributed into streams, rivers, and lakes).

98. *Id.* at 7236.

percent of the raw waste produced by the animals.<sup>99</sup> When the manure is applied appropriately, the nutrients can be very beneficial to vegetation acting as a fertilizer and fostering reuse of nitrogen, phosphorus, and potassium, supplementing crop growth.<sup>100</sup> However, when the manure is overapplied or improperly applied, raw waste can flow directly into waterways.<sup>101</sup> This can happen in a number of ways, such as surface runoff and erosion, overapplication, dry discharges, and the collection of waste in tile drains buried just below the surface routing the raw waste directly into streams.<sup>102</sup>

#### E. HISTORY OF CAFO REGULATIONS

The original CWA listed CAFOs as a point source, yet it failed to define what constituted a CAFO.<sup>103</sup> In 1974 and 1976, the EPA defined the CAFO and “set forth various NPDES permit requirements and established effluent limitation guidelines.”<sup>104</sup> In 1987, Congress amended the CWA, requiring a published review and revision of ELGs every two years and for the EPA to identify and promulgate new ELGs for point sources discharging toxic or nonconventional pollutants that had not been set previously.<sup>105</sup> In October 1989, after the EPA failed to publish revisions of ELGs as required under the 1987 amendment, the Natural Resources Defense Council sued the EPA.<sup>106</sup> The litigation culminated with a consent decree in which the EPA agreed to propose ELGs for the various subcategories of CAFOs by December 15, 2000, and to finalize new regulations by December 15, 2002.<sup>107</sup> On January 12, 2001, the EPA proposed a revised CAFO rule.<sup>108</sup>

The proposed rule was aimed at correcting inadequate compliance as well as promulgating revisions that recognize the trend towards larger CAFOs.<sup>109</sup> After receiving approximately eleven thousand comments and suggestions pertaining to the proposed rule, the EPA, on February 12, 2003, promulgated the Final Rule on CAFO regulations.<sup>110</sup> The Farm petitioners and the Environmental petitioners both challenged the Final Rule, which is what brought about the *Waterkeeper* opinion.<sup>111</sup>

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99. *Waterkeeper Alliance et al. v. EPA*, 399 F.3d 486, 495 n.11 (2d Cir. 2005) (citing EPA, State Compendium: Programs and Regulatory Activities Related to Animal Feeding Operations 13 (May 2002)).

100. *Id.* at 494 (quoting EPA, State Compendium: Programs and Regulatory Activities Related to Animal Feeding Operations 13 (May 2002)).

101. Effluent Limitation Guidelines I, *supra* note 14, at 7180-81.

102. *Id.* at 7236; *See also* Environmental Brief, *supra* note 3, at 13 (citing *Proposed Rule Environmental Assessment*, at 2-17).

103. 33 U.S.C. § 1362(14).

104. *Waterkeeper*, 399 F.3d at 494 (citing 41 Fed. Reg. 11,458 (Mar. 18, 1976); 39 Fed. Reg. 5704 (Feb. 14, 1974)).

105. 33 U.S.C. § 1314(m).

106. *See* Natural Resources Defense Council, Inc. v. Reilly, 781 F. Supp. 806 (D.D.C. 1992).

107. Environmental Brief, *supra* note 3, at 11, (citing *Id.*).

108. Effluent Limitation Guidelines II, *supra* note 18, at 2960.

109. *Id.* at 2972.

110. Effluent Limitation Guidelines I, *supra* note 14, at 7187-88.

111. *Waterkeeper Alliance et al. v. EPA*, 399 F.3d 486 (2d Cir. 2005).

## F. THE *CHEVRON* ANALYSIS AND THE ADMINISTRATIVE PROCEDURE ACT

When considering challenges to administrative rules, the court is restricted to the standards set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc. (Chevron)*.<sup>112</sup> *Chevron* set forth the standard of review for statute construction based on a two part analysis. Initially, the court must determine if Congress has explicitly “spoken to the precise question at issue.”<sup>113</sup> If the intent of Congress can be unequivocally determined the court, as well as the agency, must give effect to Congress’s “unambiguously expressed intent.”<sup>114</sup> If, however, the court determines Congress has not specifically spoken on the precise question at issue or the language of the statute is ambiguous, the court must abstain from merely constructing its own analysis of the statute.<sup>115</sup> The court is first obligated to ascertain, based on the plain reading of the statute’s text, whether the EPA’s reading/construction of the statute is permissible.<sup>116</sup> When however “Congress has explicitly left a gap for the agency to fill. . .” the EPA is considered to possess an “express delegation of authority” to clarify the porous provision(s) with internally initiated regulations.<sup>117</sup> The court must give the EPA’s regulations controlling deference “unless they are arbitrary, capricious, or manifestly contrary to the statute.”<sup>118</sup> On occasion, the controlling statute may delegate authority implicitly rather than explicitly.<sup>119</sup> In this situation, the court may not provide its own construction for the legislation, but it has an obligation to award deference to the EPA’s tacit authority to interpret the statute, as long as the EPA’s interpretation is reasonable.<sup>120</sup>

When determining whether the Final Rule violates the Administrative Procedure Act (APA), the court analyzes the rule to ascertain whether it is “arbitrary and capricious, an abuse of discretion or otherwise not in accordance with law.”<sup>121</sup> The court must apply the standard set forth in *Motor Vehicle Mfg. Assoc. of the United States, Inc. v. State Farm Mutual Automobile Ins. Co. (State Farm)*.<sup>122</sup> Under the *State Farm* analysis, the court considers whether the agency’s challenged policy is based on factors which Congress did not intend for the agency to rely.<sup>123</sup> If the agency relied on such illicit factors when creating policy regulations, the regulations would be abandoned as arbitrary and capricious.<sup>124</sup> Furthermore, if the agency has entirely failed to consider essential factors when approaching a problem, offered explanations that do not coincide with the evidence, or established a rule that “is so

112. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984). See also *Public Citizen, Inc. v. Mineta*, 340 F.3d 39, 53 (2d Cir. 2003).

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* at 843-44.

118. *Id.*

119. *Id.* at 844.

120. *Id.*

121. 5 U.S.C. § 706(2)(A).

122. *Motor Vehicle Manufacturers’ Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 41-45 (1983). See also *Public Citizen, Inc. v. Mineta*, 340 F.3d 39, 53 (2d Cir. 2003).

123. *Motor Vehicle Manufacturers’ Association*, 463 U.S. at 43.

124. *Id.*

implausible that it could not be ascribed to a difference in view or the product of agency expertise,<sup>125</sup> the agency's regulations are also disposed of as arbitrary and capricious.<sup>126</sup> The court is not permitted to supply its own reasoning for the agency's actions, but is confined merely to the reasoning prescribed by the agency itself.<sup>127</sup> The agency must demonstrate that it has examined the relevant data and has articulated a "satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"<sup>128</sup> When the court considers the Agency's reasoning for its actions, it should determine whether the actions correspond to "the relevant factors and whether there has been a clear error in judgment."<sup>129</sup> The agency is allotted deference in most of its conclusions<sup>130</sup> so long as the EPA is "within the scope of authority delegated" to it by Congress.<sup>131</sup>

#### IV. ANALYSIS

##### A. NO DUTY FOR CAFOS TO APPLY FOR A PERMIT

The CAFO Final Rule attempted to mandate that all large CAFOs apply for a NPDES permit unless they can demonstrate they have "no potential to discharge" pollutants.<sup>132</sup> The *Waterkeeper* court,<sup>133</sup> applying the *Chevron* analysis, struck down

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

129. *Id.* (quoting *Bowman Transp. Inc. v. Arkansas-Best Freight System*, 419 U.S. 281, 285 (1974); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971)).

130. Although the EPA is entitled to deference in its conclusions it is not entitled to a heightened deference. *Waterkeeper et al. v. EPA*, 399 F.3d 486, 516 n.28 (2d Cir. 2005) (cost-benefit analysis methodology undertaken by the EPA, it is entitled to merely deference not a heightened deference).

131. *Motor Vehicle Manufacturers' Association*, 463 U.S. at 42 (1983).

132. 40 C.F.R. § 122.23. "No potential to discharge" exception at 40 C.F.R. § 122.23(d)(2). Originally to prove that the large CAFO had no potential to discharge the required steps were:

(1) you provide evidence to your permitting authority that there is no potential for your operation to discharge manure, litter, or process wastewater to surface waters; (2) your permitting authority agrees; and (3) your permitting authority gives you notice that your CAFO has 'no potential to discharge' manure, litter, or process wastewater. No potential to discharge means that the CAFO must not discharge manure, litter, or process wastewater from either the production areas or any land application areas to surface waters, even by accident or because of human error.

United States Environmental Protection Agency, *Office of Wastewater Management, Producers' Compliance Guide for CAFOs Revised Clean Water Act Regulations for Concentrated Animal Feeding Operations (CAFOs)*, at 17 (2003).

133. The Second Circuit Court of Appeals decision in the *Waterkeeper* case was an original proceeding. Environmental Brief, *supra* note 3, at 1-2. In accordance with 33 U.S.C. § 1369(b)(1), all petitioners filed challenges to the Final Rule within the requisite time period of one hundred and twenty days after the promulgation of the Final Rule. *Id.* (citing 33 U.S.C. § 1369(b)(1) (2005) (setting the time period for 120 days for all petitions for review of promulgated rule)). The petitions for review were also filed within the required two weeks after the publication of the rule. 40 C.F.R. § 23.2 (2005) (setting time period for petitions of review on published rules). The parties all were deemed to have standing under the CWA as "any interested person" who files a timely challenge. 36 U.S.C. § 1369(b)(1)(G) (2005). Because of the multiple parties challenging the rules from various districts a panel on multidistrict litigation randomly selected the Second Circuit to hear the case. 28 U.S.C. § 2112 (2005). Pursuant to 33 U.S.C. § 1369(b)(1)(G) and Federal Rule of Procedure 15 a challenge may be heard in any "... circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts business..." 33 U.S.C. § 1369(b)(1)(G).

this requirement.<sup>134</sup> The court found the provision to be unlawful based on the EPA's lack of authority to regulate the *actual* industry.<sup>135</sup> The threshold of the EPA's regulation authority is restricted to *actual* discharges of pollutants.<sup>136</sup>

Initially it must be determined that the individual large CAFO actually discharged pollutants into navigable water prior to the requirement that they seek a NPDES permit.<sup>137</sup> The court recognized that large CAFOs have a *potential* to discharge, but the CWA which enumerates the EPA's authority "*plainly*" only allows for the regulation of *actual* discharges, "not potential discharges, and certainly not point sources themselves."<sup>138</sup> Moreover, the exception in the rule mandating all large CAFOs to apply for NPDES permits, or alternatively demonstrating that they have no potential to discharge, is also outside of the scope of the EPA's authority.<sup>139</sup> If a particular CAFO has not been shown to actually discharge pollutants, the EPA cannot require that it seek a permit.<sup>140</sup> "[T]he agency is powerless to impose permit conditions unrelated to the discharge itself."<sup>141</sup> The CWA states that NPDES permits shall be applied "to all point sources of *discharge of pollutants*."<sup>142</sup> Finding that Congress had "unambiguously expressed" its intent in the statute, the EPA was allotted no deference in its interpretation of the CWA.<sup>143</sup>

However, in dictum the court stated

EPA has marshaled evidence suggesting that such a prophylactic measure [referring to the duty for all large CAFOs to apply for a NPDES permit] may be necessary to effectively regulate water pollution from large CAFOs, given that large CAFOs are important contributors to water pollution and that they have, historically at least, improperly tried to circumvent the permitting process.<sup>144</sup>

Further, the court proceeded to imply that if the EPA had argued that administrative records supported a regulatory presumption that all CAFOs *actually* discharge pollutants, the duty-to-apply provision may have been acceptable.<sup>145</sup>

Because of the technical argument that CAFOs have the "rebuttable presumption to *potentially* discharge," rather than rebuttable presumption that they *actually* discharge pollutants, the EPA significantly damaged its analysis.<sup>146</sup> The EPA, when forming its argument, did not specifically state that there was a

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134. *Waterkeeper Alliance et al. v. EPA*, 399 F.3d 486, 504 (2d Cir. 2005).

135. *Id.* (citing 33 U.S.C. § 1311(a)).

136. *Id.* at 504-05 (citing 33 U.S.C. §§ 1311(a),(e), 1342(a)(1), (b), 1362(12)).

137. *Id.* (citing 33 U.S.C. § 1362(12)).

138. *Id.* at 505 (citing *Natural Resources Defense Council v. EPA*, 859 F.2d 156, 170 (D.C. Cir. 1988)).

139. *Id.* (finding EPA only has authority to regulate the actual discharges not the industry).

140. *Id.*

141. *Natural Resources Defense Council v. EPA*, 859 F.2d 156, 170 (D.C. Cir. 1988).

142. 33 U.S.C. § 1311(e) (emphasis added).

143. *Waterkeeper*, 399 F.3d at 506 (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984)).

144. *Id.* at 506 n.22 (citing *Effluent Limitation Guidelines II*, *supra* note 18, at 2976-77, 3008; *Effluent Limitation Guidelines I*, *supra* note 14, at 7237).

145. *Id.* (citing *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775 (1990); *National Mining Ass'n v. Babbitt*, 172 F.3d 906 (D.C. Cir. 1999)).

146. EPA Brief, *supra* note 22, at 84-95.

rebuttable presumption that large CAFOs *actually* discharge pollutants.<sup>147</sup> However, by the sheer effort the EPA employed in explaining the correlation between CAFOs and water pollution, there should have been a tacit acknowledgement that all CAFOs are presumed to *actually* discharge pollutants.<sup>148</sup> Furthermore, if all CAFOs are to be regulated except those that are able to demonstrate they have no potential to discharge pollutants, this would appear to be a presumption that they all *actually* pollute, no matter how the argument is presented.<sup>149</sup>

## B. CHALLENGE TO THE PERMITTING SCHEME

The Environmental petitioners first challenged the Final Rule by arguing that the rule's permitting scheme is impermissibly self-regulatory in character and unlawful because: (1) the mandated nutrient management plans (NMPs), to be produced by the individual CAFO, have no meaningful review by the NPDES permitting authority; and (2) that the nutrient management plan as an effluent limitation is required to be included in the NPDES permit.<sup>150</sup> The court agreed with both of these arguments, stating "[t]he Clean Water Act demands regulation in fact, not only in principle."<sup>151</sup>

The NMPs required by the Final Rule mandates that the plan include "best management practices (BMP) and procedures necessary to implement applicable effluent limitations and standards."<sup>152</sup> The NMPs must contain, where applicable, nine areas of management and maintenance.<sup>153</sup> For example, NMPs must establish, *inter alia*, protocol for land application of manure, specific recordkeeping, and ensure adequate storage of waste.<sup>154</sup>

The *Waterkeeper* court held that the failure to require permitting authority to review NMPs was a clear violation of the Administrative Procedure Act and was, as a matter of law, "arbitrary and capricious."<sup>155</sup> The court's outcome is based on the conclusion that NMPs are part of the BMP that embody the ELGs<sup>156</sup> which are *required* to be implemented into the CAFO's NPDES permits, authorizing discharge of pollutants.<sup>157</sup> NPDES permits are required to ensure that *any* discharge of pollutants is in compliance with the corresponding effluent limitations and standards.<sup>158</sup> One of the enumerated standards is the development and implementation of a site-specific NMP<sup>159</sup> that conforms to all applicable effluent

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147. *Id.*

148. *Id.*

149. *Id.* at 95-98.

150. *Waterkeeper Alliance et al. v. EPA*, 399 F.3d 486, 489 (2d Cir. 2005).

151. *Id.*

152. 40 C.F.R. § 122.42(e)(1).

153. *Id.*

154. *Id.*

155. *Waterkeeper*, 399 F.3d at 499 (referring to the APA at 5 U.S.C. 706).

156. This reasoning is based on the effluent limitations standards of "best management practices" expressly requiring the development of nutrient management plans. 33 U.S.C. § 412.4(a)(1).

157. *Waterkeeper*, 399 F.3d at 498-99 (citing 33 U.S.C. 1342(a)(1)).

158. 33 U.S.C. § 1342(a)(1).

159. 40 C.F.R. § 412.4(c)(1).

limitations.<sup>160</sup> The CWA also requires that the permit “assure compliance with [all applicable requirements, including effluent limitation].”<sup>161</sup> When the NPDES permits are issued without review of the operator’s NMP, there is no way to “assure compliance” with effluent limitations.<sup>162</sup> Furthermore, the CWA specifically forbids states from distributing NPDES permits without *ensuring* that the permitting programs “*apply, and insure compliance with, any applicable [effluent limitations and standards].*”<sup>163</sup> The Final Rule attempted to allow large CAFOs to unilaterally form its own NMP which would have set “application rates” [of manure] that “*achieve[s] realistic production,*”<sup>164</sup> without any review by the permitting authority.<sup>165</sup>

The court recognized that NMPs can be extremely complicated and comprehensive, yet NMPs are left to the CAFO operators to essentially set their own standards for application and storage of manure without meaningful review.<sup>166</sup> When the CAFO is permitted to essentially write its own application requirements without review by the permitting authority, the “Rule fails to adequately prevent large CAFOs from ‘misunderstanding or misrepresenting’ the application rates they must adopt in order to comply with state technical standards.”<sup>167</sup> The court supported its opinion by analogizing a Ninth Circuit opinion<sup>168</sup> pertaining to a similar situation. In the Ninth Circuit opinion, *Environmental Defense Center, Inc. v. EPA*, the court struck down an EPA rule concerning operator created stormwater management plans, because it failed to require the NPDES authority review the permit prior to its issuance.<sup>169</sup> When a permit is allowed to be issued without the proper assessment by the NPDES authority, there is no verification that the polluter will be complying with the proper effluent limitations standards.<sup>170</sup>

The EPA argued that the actual NMP was not part of the ELG but merely the “requirement to develop and implement” a NMP was part of the BMP required under

160. 33 U.S.C. § 1342(a)(1) (referencing effluent limitations guidelines in 33 U.S.C. § 1311 that the permit must be in compliance with).

161. *Waterkeeper*, 399 F.3d at 498 (quoting 33 U.S.C. § 1342(a)(2)).

162. *Id.* at 499.

163. *Id.* at 498 (quoting 33 U.S.C. § 1342(b) (emphasis added by the court)).

164. The Environmental petitioners also challenged the priority of the rule as based on agricultural production rather than pollution control. The court failed to address this challenge effectively denying it. Environmental Brief, *supra* note 3, at 33 (emphasis added).

165. 40 C.F.R. § 122.42(e)(2)(ii) (Final Rule only requires that the CAFO make available its NMP to the Director “upon request”).

166. *Waterkeeper*, 399 F.3d at 500 n.19.

167. *Id.* at 502.

168. *Environmental Defense Center, Inc. v. EPA*, 344 F.3d 832 (9th Cir. 2003). This case pertained to small storm sewer systems and a rule (phase II) that allowed small storm sewer systems to acquire a permit by merely submitting an individualized set of best management practices designed by the applicant. *Id.* The NPDES authority was not required to review the measures to ensure they in fact reduced discharges. *Id.* The court noted that “nothing prevents the operator . . . from misunderstanding or misrepresenting its own stormwater situations and proposing a set of minimum measures for itself that would reduce discharges by far less than the maximum extent practicable.” *Id.* The court found the rule to be contrary to the clear intent of Congress. *Id.* at 855-56. Furthermore the rule was also determined to fail to provide adequate public participation, as required by the CWA 40 C.F.R. § 122.34(b)(2), because the lack of the potential for a public hearing before issuance of NPDES permit. *Id.* at 856.

169. *Id.* at 855.

170. *Id.*



the CAFO's ELG.<sup>171</sup> The court found that “[t]o accept the EPA’s argument – that requiring a nutrient management plan is itself a restriction on land application discharges – is to allow semantics to torture logic.”<sup>172</sup> The EPA also argued that state technical standards (field-specific assessments)<sup>173</sup> would reduce the discretion of the CAFOs, when creating NMPs.<sup>174</sup> However, the court recognized that while the state standards (“field-specific assessment[s]”) may reduce the discretion of the CAFOs, when determining application rates, the rates are ultimately based on “site-specific assessments” determined by the individual CAFO.<sup>175</sup> The Final Rule’s failure to require NMPs to be implemented into individual NPDES permits was a violation of the CWA and is “otherwise arbitrary and capricious under the APA.”<sup>176</sup>

### C. LACK OF PUBLIC PARTICIPATION WITH PERMITTING SCHEME

The Final Rule’s permitting scheme was also found to be in violation of the CWA’s public participation requirements.<sup>177</sup> Congress enacted the CWA clearly intending the public have a meaningful role in implementation and enforcement of the CWA’s various regulations.<sup>178</sup> The CWA “unequivocally and broadly declares, for example, that ‘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.’”<sup>179</sup> Furthermore, the CWA expressly provides for the opportunity for public hearings prior to the issuance of NPDES permits.<sup>180</sup> The CWA also explicitly enumerates the public’s right to have complete access to a copy of any permit issued.<sup>181</sup> Finally, the CWA establishes standing for “any citizen”<sup>182</sup> to commence a civil action against anyone in violation of the provisions of the CWA.<sup>183</sup> Because the NMPs were not to be implemented within the NPDES permit, the public is deprived of the regulatory participation that the CWA guarantees.<sup>184</sup>

Moreover, the Final Rule provides no way for the public to access the NMPs.<sup>185</sup>

171. *Waterkeeper*, 399 F.3d at 502 (citing 40 C.F.R. § 412.4(c)(1); see also EPA Brief, *supra* note 22, at 104.

172. *Id.* (emphasis in original).

173. 40 C.F.R. § 412.4(c)(2)(i).

174. *Waterkeeper*, 399 F.3d at 501.

175. *Id.* at 501 n.20 (quoting Effluent Limitation Guidelines I, *supra* note 14, at 7209) (“Today’s rule requires large CAFOs to determine and implement *site-specific* nutrient application rates that are consistent with the technical standards for nutrient management established by the permitting authority.”) (emphasis added by the court).

176. *Id.* at 499.

177. *Id.* at 503.

178. 33 U.S.C. § 1251(e).

179. *Waterkeeper*, 399 F.3d at 503 (quoting 33 U.S.C. § 1251(e)).

180. 33 U.S.C. § 1342(a)(1), (b)(3).

181. 33 U.S.C. § 1342(j).

182. “Any citizen” is defined by the statute as being “a person or persons having an interest which is or may be adversely affected.” 33 U.S.C. § 1365(g).

183. 33 U.S.C. § 1365(a).

184. *Waterkeeper*, 399 F.3d at 503.

185. *Id.* (citing 40 C.F.R. § 122.42(e)(2)(ii) (stating that the NMP is only required to be held on the CAFO site and made available upon the request of the Director of the permitting authority).

As noted above, the NMPs are an integral part of the *site specific* effluent limitation standards, and without access to the NMP the public would be precluded from participation in the “development, revision, and enforcement of . . . [an] *effluent limitation*.”<sup>186</sup> As noted earlier, the Final Rule impermissibly does not require the NMP to be implemented with the permit, which effectively denied the public the opportunity for a proper hearing before the issuance of the NPDES permit.<sup>187</sup>

The Final Rule also hinders the public’s ability to enforce effluent limitation standards.<sup>188</sup> As the rule was written, the public would only be able to enforce the requirement to develop a NMP, but the public would lack the means to enforce the actual plan because the Rule does not provide them access to the NMP.<sup>189</sup> Failing to allow the public access to the NMPs contradicts the clear intention of Congress to have the citizens play an active roll in the regulation of water pollution.<sup>190</sup>

#### D. REGULATING PATHOGENS

The CWA specifically enumerates categories of pollutants that the EPA is required to promulgate including “technology standards for achieving the *best* conventional pollutant control.”<sup>191</sup> The pathogen fecal coliform is among the listed pollutants that are statutorily required to have an applied standard.<sup>192</sup> As noted above, the waste produced by animals at CAFOs have “over 150 pathogens . . . associated with risks to humans.”<sup>193</sup> These pathogens, or at the very least fecal coliform, must be specifically dealt with by setting a best conventional pollutant control technology (BCT) to minimize the pollutants discharged into the waters of the United States.<sup>194</sup> BCT is a technological standard set by the administrator.<sup>195</sup> When determining the standard the administrator must consider a cost-benefit analysis between an assortment of control techniques and their relative efficiency of reducing pathogen discharges, as well as their other non-water environmental impacts.<sup>196</sup>

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186. *Id.* (quoting 33 U.S.C. § 1251(e) (emphasis added by the court)).

187. *Id.* at 504 (citing 33 U.S.C. §§ 1342(a), 1342(b)(3)).

188. *Id.* at 503 (citing Clean Water Act Amendments of 1985, Senate Environment and Public Works Comm., S. Rep. No. 50 99th Cong., 1st Sess. 28 (1985) (stating that the public was intended to be a tool of enforcement)).

189. *Id.* at 503-04 (recognizing that the Rule did indicate that “EPA *expects* that the permitting authority” would make the NMP “available to the public upon request,” however, there was no assurances that this would be satisfied).

190. 33 U.S.C. § 1251(e).

191. *Waterkeeper*, 399 F.3d at 518 (citing 33 U.S.C. §§ 1314(a)(4); 1311(b)(2)(E) (emphasis added by the court)).

192. 33 U.S.C. § 1314(a)(4).

193. Effluent Limitation Guidelines II, *supra* note 18, at 2977. Animal waste like human waste contained pathogens similar to those found in human sewer sludge. *Id.* In fact land application of the manure has a comparable to *greater* risk of pathogen contamination as the application of sewage sludge. *Id.* Yet, while sewer sludge pathogens are highly regulated, when land applied, the animal waste applications remained unregulated. Environmental Brief, *supra* note 3, at 102-03 (citing 40 C.F.R. 503.32; Response to Comments at 20-4; Effluent Limitation Guidelines I, *supra* note 14, at 7224).

194. 33 U.S.C. § 1311(b)(2)(E) (2005).

195. *Id.*

196. 33 U.S.C. § 1314(b)(4) (2005).

[C]onsideration of the reasonableness of the relationship between the costs of attaining a reduction in effluents and the effluent reduction benefits derived, and the comparison of

In *Waterkeeper*, the EPA argued that the failure to promulgate BCTs specifically designed to reduce pathogens was “justified” due to the high cost and low results of pathogen reduction methods it evaluated<sup>197</sup> (mostly anaerobic digestion<sup>198</sup>). The EPA also suggested that the ELGs “otherwise adopted by the CAFO Rule *may* ‘incidentally’ achieve *some* reductions of the pathogen in CAFO discharges.”<sup>199</sup> The EPA never promulgated a BCT-based ELG developed specifically for reducing pathogens, nor did the EPA make any affirmative findings that the actual BCTs adopted “*in fact* represent the best conventional pollutant control technology for reducing pathogens.”<sup>200</sup> The court noted that the selected BCT may in fact be the best pollutant control technology for reducing pathogens,<sup>201</sup> but the lack of affirmatively finding that it was or was not is a violation of the CWA.<sup>202</sup> The EPA may not simply assume that the pathogens *may* be *incidentally* reduced; the EPA must actually select and implement the best conventional pollutant control technology for the reduction of pathogens.<sup>203</sup>

#### E. NEW SOURCE PERFORMANCE STANDARDS FOR SWINE, POULTRY, AND VEAL

The CWA requires that “new sources”<sup>204</sup> of pollution in enumerated industrial categories, feedlots included,<sup>205</sup> conform to New Source Performance Standards (NSPS).<sup>206</sup> The administrator is required to set a standard “which reflects the greatest degree of effluent reduction which the administrator determines to be achievable through application of the best available demonstrated control technology . . . including, where practicable, a standard permitting no discharge of pollutants.”<sup>207</sup> In fact, when establishing new source standards the “EPA is statutorily required to give

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the cost and level of reduction of such pollutants from the discharge from publicly owned treatment works to the cost and level of reduction of such pollutants from a class or category of industrial sources, and shall take into account the age of equipment and the facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate.

33 U.S.C. § 1314(b)(4).

197. *Waterkeeper*, 399 F.3d at 519.

198. Anaerobic digestion is a biological process that creates a gas consisting mostly of methane and carbon monoxide, known as biogas. It can happen in nature as well as in a controlled environment. California Energy Commission, Anaerobic Digestion, at <http://www.energy.ca.gov/development/biomass/anaerobic.html> (last updated April 27, 2005).

199. *Waterkeeper*, 399 F.3d at 519 (emphasis added).

200. *Id.* (emphasis in original).

201. *Id.* at 519 n.31 (stating the EPA must compile affirmative findings rejecting other potential BCT guidelines effectively determining the ELGs promulgated are the best conventional pollutant control technologies available for the reduction of pathogens).

202. *Id.* at 519.

203. *Id.*

204. The term “new source is statutorily defined as “any source, the construction of which is commenced after the publication of proposed regulations prescribing a standard of performance under this section which will be applicable to such source, if such standard is thereafter promulgated in accordance with this section.” See 33 U.S.C. § 1316(a)(2).

205. 33 U.S.C. § 1316(b).

206. 33 U.S.C. § 1316.

207. 33 U.S.C. § 1316(a)(1).

serious consideration to a standard permitting *no* discharge of pollutants.”<sup>208</sup> The administrator is to consider the cost of achieving appropriate effluent reductions, and “any non-water quality environmental impact and energy requirements.”<sup>209</sup>

The EPA’s initially proposed CAFO rule provided a NSPS that required total “prohibition of production area discharges,”<sup>210</sup> as well as requiring semi-annual monitoring of ground water for pollutants to demonstrate the new operation’s compliance with the zero discharge standard.<sup>211</sup> However, the CAFO Final Rule regulating new sources for swine, poultry and veal eradicated both of these prior criterions.<sup>212</sup> The groundwater monitoring was eliminated completely and instead of the total prohibition of pollution discharges, a 100-year, 24 hour storm event<sup>213</sup> design standard was substituted.<sup>214</sup> The Final Rule also provided options for CAFOs to apply for more relaxed standards relating to production area discharges.<sup>215</sup> The relaxed standard would have been permitted by a request to substitute one pollutant for another.<sup>216</sup> The Rule essentially tolerated production area discharges as an “alternative NPDES permit” in exchange for a reduction in pollution discharges from air emissions or land applications.<sup>217</sup>

Although the court did not find a violation with the reduction of the groundwater monitoring aspect of the NSPS,<sup>218</sup> the court did find that the EPA violated the APA<sup>219</sup> by *eliminating* NSPS that totally prohibit pollution discharges, without sufficiently substantiating its shift to a lowered standard.<sup>220</sup> Although the EPA claimed that the switch to the 100-year, 24 hour standard provided clarity with protection equal to the formerly proposed zero discharge standard,<sup>221</sup> the EPA has “never modeled the potential overflows and pollutant loads from a system with a 100-year, 24 hour storm event design capacity.”<sup>222</sup> Although some studies indicate

208. *Natural Resources Defense Council v. EPA*, 822 F.2d 104, 123 (D.C. Cir. 1987) (citing 33 U.S.C. § 1316(a)(1) (emphasis in original). *But see* *Riverkeeper, Inc. v. EPA*, 358 F.3d 174, 195 (2d Cir. 2004) (quoting *Nat’l Wildlife Fed’n v. EPA*, 286 F.3d 554, 570 (D.C. Cir. 2002) (stating Appellate courts must allot EPA considerable deference in weighing and balancing various factors required by statute to set NSPS).

209. 33 U.S.C. § 1316(b)(1)(B).

210. *Waterkeeper Alliance et al. v. EPA*, 399 F.3d 486, 520 (2d Cir. 2005) (quoting Effluent Limitation Guidelines II, *supra* note 18, at 3144). “There must be no discharge of process wastewater pollutants into U.S. waters, including any pollutants discharged to ground water which have a direct hydrological connection to surface waters.” *Id.*

211. *Id.*

212. 40 C.F.R. § 412.46.

213. A 100-year, 24 hour storm event is defined as a storm that on average only comes about once every 100 years. Effluent Limitation Guidelines I, *supra* note 14, at 7220.

214. 40 C.F.R. § 412.46(a)(1). The EPA argued that the reduction was for the purpose of clarity.

215. 40 C.F.R. § 412.46(d).

216. *Id.*

217. *Id.*

218. *Waterkeeper*, 399 F.3d at 520 (stating the Agency sufficiently expressed its reasoning for the reduction of its original ground water monitoring regulation for new sources).

219. *Motor Vehicle Manufacturers’ Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983).

220. *Waterkeeper*, 399 F.3d at 521.

221. Effluent Limitation Guidelines I, *supra* note 14, at 7220.

222. *Waterkeeper*, 399, F.3d at 521. However, the EPA did model the zero discharge standard finding that if implemented it would not prevent new facilities from entering the industry. Effluent Limitation Guidelines I, *supra* note 14, at 7225-26. Concluding that “NSPS [with no discharge requirement] is affordable and does not present a barrier to entry for new facilities.” *Id.* at 7225. It also determined that there are many economically feasible technologies to choose from that would

that the adopted “CAFO rule would have substantially prevented the production area discharges<sup>223</sup> . . . we think it obvious that *substantially preventing* discharges is not the same as prohibiting them outright.”<sup>224</sup> Furthermore, the decision to allow a CAFO to substitute pollution discharges<sup>225</sup> is “not justified in any way – let alone with adequate support in the record.”<sup>226</sup> These NSPS lowered standards, as promulgated in the EPA’s Final Rule, are in violation of the APA<sup>227</sup> for being arbitrary and capricious for failing to adequately explain its actions with a rational discussion of the justifications for the change.<sup>228</sup> Moreover, the last minute reductions in regulations without public commentary also violated the CWA’s public participation requirements.<sup>229</sup>

#### F. WATER QUALITY BASED EFFLUENT LIMITATIONS

When enacted controls on effluent limitations prove inadequate in attainment and maintenance of water quality that “assures protection of public health, public water supplies, agricultural and industrial uses, and protection and propagation of a balanced population of shellfish, fish and wildlife, and allow recreational activities in and on the water,” the CWA requires additional Water Quality Based Effluent Limitations (WQBEL) be implemented.<sup>230</sup> These WQBELs must be established either by the EPA or the states.<sup>231</sup> The *Waterkeeper* court found that the Final Rule violated the APA by failing to promulgate WQBELs, or at least explain why it chose not to promulgate WQBELs.<sup>232</sup>

Although the court found that stormwater discharges are exempt from application of WQBELs,<sup>233</sup> it also held that the Final Rule failed to promulgate any WQBELs for other discharges relevant to CAFOs.<sup>234</sup> The lack of WQBELs without sufficient explanation for their absence is a violation of the APA as the inaction was “arbitrary and capricious.”<sup>235</sup> Evidence established that the promulgated technology

accomplish the zero discharge standard. *Id.*

223. The court recognized that the 25-year, 24 hour storm event system was modeled for potential overflows and pollutant loads. *Waterkeeper*, 399 F.3d at 520.

224. *Id.* (emphasis in original).

225. 40 C.F.R. § 412.46(d) (allowing production area discharges for new sources if they could show that the quantity of the discharge is equal or less than the reductions of pollutants released to other media, for example air emissions from housing and storage).

226. *Waterkeeper*, 399 F.3d at 521.

227. 5 U.S.C. § 706.

228. *Motor Vehicle Manufacturers’ Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983).

229. *Waterkeeper*, 399 F.3d at 521 (quoting 33 U.S.C. § 1251(e) (“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.”)).

230. 33 U.S.C. § 1312(a).

231. 33 U.S.C. §§ 1312(a); 1314(l).

232. *Waterkeeper*, 399 F.3d at 524.

233. Based on the express exemption from effluent limitations stormwater discharges, defined as precipitation related discharges of land applied nutrients, are exempt from ELGs and also WQBELs. *Waterkeeper*, 399 F.3d at 522 (citing 40 C.F.R. § 122.23(e)).

234. *Id.*

235. *Motor Vehicle Manufacturers’ Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983) (stating that when an agency fails to sufficiently explain

based ELGs may prove insufficient to “assure protection of public health,”<sup>236</sup> the EPA’s failure to sufficiently explain its reasoning for not promulgating QBELs for the CAFO discharges, and for the failure to clarify whether the states were prohibited from fabricating their own QBELs was a violation of the APA.<sup>237</sup> The court elaborated that when the EPA does determine the “propriety of imposing QBELs, that determination must be reasonable and supported in the record.”<sup>238</sup>

## V. CONCLUSION

### A. DUTY-TO-APPLY: EPA HAS A “POTENTIAL” FOR AN ARGUMENT THAT IS “PRESUMED” TO HAVE AN “ACTUAL” IMPACT!

The *Waterkeeper* court determined that it was beyond the EPA’s authority to mandate that CAFOs apply for NPDES permits without first determining whether the CAFO actually discharges pollutants.<sup>239</sup> However, CAFOs have been proven to lack the ability to self-regulate and often cannot be relied upon to actually apply for the required permit if they were discharging pollutants.<sup>240</sup> Absent the CAFO acquiring a NPDES permit, the public has limited opportunity to enforce regulations through citizen suits.<sup>241</sup> A citizen would have had to prove two issues: first, the facility actually was a CAFO as defined by statute,<sup>242</sup> and second, the facility is discharging in violation of the CWA regulations without obtaining a permit.<sup>243</sup> Without mandatory permits, the only way a CAFO can be regulated is if a private citizen or EPA agency catches the operator in the act of discharging pollutants. Because improper land application of waste is a substantial amount of the CAFO’s pollutant discharge,<sup>244</sup> a CAFO should be required to have a publicly scrutinized NMP integrated into a mandatory NPDES permit. Monitoring all CAFO land applications of manure would be difficult, if not impossible for a regular private citizen, or even a trained environmental agent to accomplish. Differentiating between lawful and unlawful land applications is also extremely difficult, if not impossible for an ordinary citizen, or environmental agent to witness and document. Yet, many of the unlawful discharges relating to land application of manure are realized by overapplication or misapplication that allows manure and nutrients to seep into underground drainage tiles which covertly direct the pollutants into nearby streams and waterways.<sup>245</sup> Moreover, the equipment and education required to

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action or inaction on essential policy initiatives its actions are arbitrary and capricious under the APA).

236. *Waterkeeper*, 399 F.3d at 523-24.

237. *Id.* (citing a state that was concerned that the rule forbade the state from fabricating their own QBELs).

238. *Id.* at 523 n.33.

239. *Id.* at 504 (citing 33 U.S.C. § 1311(a)).

240. *Id.* at 506 n.22 (citing Effluent Limitation Guidelines II, *supra* note 18, at 2976-2977).

241. Terence J. Centner, *Enforcing Environmental Regulations: Concentrated Animal Feeding Operations*, 69 MO. L. REV. 697, 717 (2004).

242. 40 C.F.R. § 122.23 (2005).

243. Centner, *supra* note 241, at 717.

244. Effluent Limitation Guidelines I, *supra* note 14, at 7236.

245. *Id.* at 7236; see also Environmental Brief, *supra* note 3, at 13 (citing *Proposed Rule Environmental Assessment* at 2-17).

effectively test the groundwater for pollutants is typically beyond the scope of an ordinary citizen's training.

When regulations are finally initiated, the damage has often already been done to the community's water supply.<sup>246</sup> To exclusively rely on after-the-fact enforcement, when the risk to the environment and to public health is so great, ignores the CWA's prophylactic goal of eliminating *all* pollutant discharges.<sup>247</sup> This sort of policing is akin to the old "one bite" rule, where a dog was allotted one free bite before the owner would become liable for the injury it causes.<sup>248</sup> The first discharge or leak by a CAFO or "bite" to the nation's water may excrete millions of gallons of raw animal waste into a water supply.<sup>249</sup> The notice that most, if not all, CAFOs discharge pollutants should be sufficient to require CAFOs to apply for NPDES permits prior to the first discharge of pollutants that may devastate the nearby waters.

The dictum of the *Waterkeeper* court insinuated if the EPA alters its argument from "presumption that all CAFOs have a potential to discharge"<sup>250</sup> to a presumption that all CAFOs *actually* discharge, the duty-to-apply provision of the Final Rule may well be acceptable.<sup>251</sup> Assuming that the EPA can prove the evidentiary presumption by showing a "sound and rational connection between the proved and inferred facts,"<sup>252</sup> the EPA would be justified in asserting a mandatory provision that all CAFOs must apply for a NPDES permit.<sup>253</sup> Furthermore, "when proof of one fact renders the existence of another fact *so probable* that it is sensible and timesaving to assume the truth [of the inferred] fact . . . until the adversary disproves it" the evidentiary presumption is permissible.<sup>254</sup>

In order to provide a superior argument for the duty-to-apply provision of the Final Rule, the EPA merely has to substitute the word "actually" for "potential" in the pertinent sections of the brief/record.<sup>255</sup> Therefore, the EPA would simply be

246. Confusion and misinterpretation of the rule, especially the storm event exception, allowed CAFOs to refrain from seeking a permit. Centner, *supra* note 241, at 710-719, 728-729.

247. 33 U.S.C. § 1251(a)(1).

248. The "one bite rule" or "first bite rule" is an English common law shielding the dog owner from liability for the dog's first bite. The rule was based on the rationale that domestic dogs weren't injurious, and liability should not be assessed to the owner prior to the owner having knowledge that the particular dog had a propensity to be vicious. Kenneth Morgan Phillips, *Dog Bite Law, The "one bite" rule*, Kenneth Morgan Phillips, available at <http://www.dogbitelaw.com/PAGES/propensity.htm> (updated on 7/26/05).

249. Approximately 25 million gallons of manure was discharged from a single hog operation in North Carolina in 1995. See also *Murphy Family Farms, Inc. v. North Carolina Department of Environmental and Natural Resources*, 160 S.E.2d 446, 447 (N.C. Ct. App. 2003) (charging a CAFO with discharging "over one million gallons of wastewater into Persimmon Branch of the Cape Fear River Basin").

250. EPA Brief, *supra* note 22, at 82.

251. *Waterkeeper Alliance et al. v. EPA*, 399 F.3d 486, 506 n.22 (2d Cir. 2005) (citing *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775 (1990); *National Mining Ass'n v. Babbitt*, 172 F.3d 906 (D.C. Cir. 1999)).

252. *National Mining Ass'n*, 172 F.3d at 912 (emphasis applied by the court) (citations omitted).

253. "[T]he EPA might properly presume that large CAFOs – or some subset thereof – *actually* discharge." *Waterkeeper*, 399 F.3d at 506 n.22 (emphasis added) (citations omitted).

254. *National Mining Ass'n*, 172 F.3d at 912 (emphasis applied by the court) (citations omitted).

255. EPA Brief, *supra* note 22, at 68-95. However, the alteration/substitution would need to be supported by evidence and essential factors sufficiently explaining the change in terminology. See *Motor Vehicle Manufacturers' Association of United States, Inc. v. State Farm Mutual Automobile*

exercising its congressionally authorized power to regulate point sources that discharge pollutants.<sup>256</sup> It will be interesting to see if the EPA heeds the court's subtle advice when restructuring the Final Rule for public comment.

#### B. NMP – “NUTRIENT MANAGEMENT PLAN” OR “NO MEANINGFUL PROTECTION”

The *Waterkeeper* court correctly decided that the permitting scheme violated the CWA.<sup>257</sup> Holding that NMPs must be implemented into the NPDES permits allows for professional and public scrutiny.<sup>258</sup> Without appropriate review of waste management plans, the NPDES permit process loses its vital review and oversight component.<sup>259</sup> Furthermore, it allows CAFOs to fashion a plan that may be totally unreasonable, yet if the operator applies the waste to the field in accordance with the developed NMP, which the operator/polluter created, any run-off from the field will be considered “stormwater discharge(s),” exempting the CAFO from federal reprimand.<sup>260</sup> If the CAFO is in compliance with the permit application rate determined by the NMP, “a precipitation-related runoff from the land application area is an allowable [stormwater] discharge.”<sup>261</sup>

Based on all of the background information, CAFOs are expanding their production with less space to appropriately and safely apply the produced manure to the land.<sup>262</sup> Moreover, an estimated ninety percent of the raw waste produced by CAFOs is applied to vegetation and crops.<sup>263</sup> Studies show there is not nearly enough land to apply all the CAFO produced manure safely.<sup>264</sup> Indeed, manure applied to land improperly or overapplied is likely the “most common” way for the

Insurance Co., 463 U.S. 29 (1983).

256. See 33 U.S.C. § 1311(e) (permitting regulation by NPDES permit for any point source discharging pollutants).

257. *Waterkeeper*, 399 F.3d at 498.

258. *Id.* at 498-503.

259. *Environmental Defense Center, Inc. v. EPA*, 344 F.3d 832, 855 (9th Cir. 2003) (opining that no review of plan by proper authority may allow for unreasonable or even bad faith decisions made by the operator applying for a permit).

260. Jeger, *supra* note 49, at 112; See also 40 C.F.R. §§ 122.23(e), 412.31(b), and 412.43(b).

261. United States Environmental Protection Agency, Office of Wastewater Management, *Producers' Compliance Guide for CAFOs Revised Clean Water Act Regulations for Concentrated Animal Feeding Operations (CAFOs)*, at 33 (2003).

262. Effluent Limitation Guidelines I, *supra* note 14, at 7180-81 (recognizing a trend towards fewer but larger AFOs with intensive specialized production methods, these large AFOs often do not have sufficient land to safely apply the manure that is produced); see also Effluent Limitation Guidelines II, *supra* note 18, at 2977 (stating a 1992 USDA study found that available manure nitrogen exceeded crop need in 266 counties, and available phosphorus exceeded crop needs in 485 counties). This was a study done by the agricultural department some 11 years prior to the promulgation of the Final Rule. *Id.* The numbers of counties with manure nutrients exceeding the crop needs is surely exponentially greater. Effluent Limitation Guidelines I, *supra* note 14, at 7179. “The continued trend toward fewer but larger operations, coupled with greater emphasis on more intensive production methods and specialization, is concentrating more manure nutrients and other animal waste constituents within some geographic areas. These large operations often do not have sufficient land to effectively use the manure as fertilizer.” *Id.* at 7179. “This trend has coincided with increased reports of large-scale discharges from CAFOs, as well as continued runoff that is contributing to the significant increase in nutrients and resulting impairment of many U.S. water bodies. *Id.*”

263. *Waterkeeper*, 399 F.3d at 495 n.11 (citing EPA, *State Compendium: Programs and Regulatory Activities Related to Animal Feeding Operations*, at 13 (May 2002)).

264. Effluent Limitation Guidelines I, *supra* note 14, at 7180. See also EPA Brief, *supra* note 22, at 83-84 (“[M]ost CAFOs lack the amount of land necessary for land application of manure, litter, and process wastewater.”).



pollutants to reach U.S. surface waters.<sup>265</sup> For this reason, permitting the CAFO to manufacture its own land application rates without a thorough review by the permitting authority and the public could have treacherous results on the integrity of our nation's waters.

Throughout history, CAFOs have demonstrated they will not self-regulate.<sup>266</sup> They have often intentionally failed to comply with current regulations.<sup>267</sup> There is simply no environmentally acceptable reason for the CAFO itself to construct its own NMP without proper oversight.<sup>268</sup> Without the review of NPDES authorities, the CAFO is essentially encouraged to cheat the numbers for land application rates, because if there happens to be a discharge of pollutants from these land applications, and the CAFO is within the self-created NMP, the pollutants will be considered "agricultural stormwater discharge" and expressly immune from EPA regulation of any kind.<sup>269</sup> The court's decision that NMPs must be implemented into a CAFOs actual NPDES permits was the correct decision and should provide for more efficient enforcement of regulations.

### C. THE BIG PICTURE

The cumulative effect of the *Waterkeeper* opinion will result in more protection for our nation's water supply by increasing regulations for the largest animal feeding operations. The Second Circuit Court of Appeals correctly determined that the public participation aspects of the Final Rule need to be strengthened, by implementing the NMPs into the NPDES permits and by not allowing for reduction

265. *Waterkeeper*, 399 F.3d at 494 (quoting EPA, *State Compendium: Programs and Regulatory Activities Related to Animal Feeding Operations*, at 13 (May 2002)).

266. *Id.* at 506 n.22 (recognizing that CAFOs attempt to circumvent the permitting process). See also Effluent Limitation Guidelines II, *supra* note 18, at 2976-77.

267. *Waterkeeper*, 399 F.3d at 506 n.22 (citing Effluent Limitation Guidelines II, *supra* note 18, at 2976-77, 3008; Effluent Limitation Guidelines I, *supra* note I, at 7180-81, 7237) (lamenting that the rise in manure production and the historical attempt by large CAFOs to circumvent the permitting process). See also Centner, *supra* note 241, at 710-719, 728-729 (claiming lack of compliance has always been a problem and will continue to be without proper oversight and enforcement of CAFOs).

268. The only acceptable reason that the EPA would allow for the individual CAFO to construct its own land application rate, and then not require review or implementation of the NMP in the actual permit could possibly be due to the lack of funds available to the state agencies charged with the responsibility of enforcing the individual permit. "For example, Colorado only has two persons administering its CAFO regulations, had only issued 10 permits as of January 16, 2004, and anticipates a need to issue about 390 additional permits . . ." Centner, *supra* note 241, at 711 n.106 (citing Telephone Interview with Ton Jepson, Colorado Department of Public Health & Environmental, Water Quality Control Division, Denver, Colo. (Jan. 16, 2004)). This Article was written prior to the *Waterkeeper* opinion, and the numbers listed may be lessened in part by the duty for all CAFOs to apply for an NPDES permit being struck from the rule. *Waterkeeper*, 399 F.3d at 504-04.

269. 40 C.F.R. §§ 122.23(e), 412.31(b), 412.43(b). See also Effluent Limitation Guidelines I, *supra* note 14, at 7198. *But see, id.* at 7197-98 (stating discharges must be in accordance with appropriate agricultural utilization of nutrients to be defined as a stormwater discharge, as well as dry weather discharges would not be considered stormwater discharges). However, the Final Rule rejected establishing requirements for manure application to "frozen, snow-covered, or saturated ground." Effluent Limitation Guidelines I, *supra* note 14, at 7212. Although, at first glance there may appear to be some limits on land application these limits only amount to what is agriculturally appropriate, and does not consider water quality ramification. Recall this is one of the arguments that the Environmental petitioners made which was not addressed by the *Waterkeeper* court therefore effectively denied. Environmental Brief, *supra* note 3, at 33.

in regulations to NSPS without first providing for public comment.<sup>270</sup> The environmental agencies, state and federal, have proven to lack the resources necessary to enforce regulations without the continued assistance of vigilant citizens. In requiring that the NMP be implemented into the NPDES permit, the public will have improved access to the site specific nutrient management practices of the individual CAFO, allowing for more meaningful policing of it by ordinary citizens. The court also correctly determined that the EPA must identify a BCT which will provide for optimal reduction in the discharge of dangerous pathogens.<sup>271</sup> Further, the court appropriately recognized a need to establish WQBELs, or alternatively, explain why they have been omitted.<sup>272</sup>

Moreover, the *Waterkeeper* court also correctly determined the EPA does not possess the authority to demand all CAFOs apply for an NPDES permit, or in the alternative, demonstrate that the CAFO has no potential to discharge. This determination will no doubt thrust the EPA into enforcing regulations solely by after-the-fact regulations, fostering the continued complacency of CAFOs who fail to seek NPDES permits. The EPA may strengthen its argument for mandatory permits, if it nominally alters the phraseology of its argument, as suggested above.

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270. Referring to the NSPS that were lowered at the last minute without first seeking public comment or even modeling the change. *Waterkeeper*, 399 F.3d at 520.

271. *Id.* at 518.

272. *Id.* at 521.