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**Environmental Law: The Clean Water Act –
Understanding When a Concentrated Animal
Feeding Operation Should Obtain
an NPDES Permit**

by

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COMMENT

Environmental Law: The Clean Water Act — Understanding When a Concentrated Animal Feeding Operation Should Obtain an NPDES Permit

I. Introduction

Traditionally, the thought of livestock production conjured visions of cattle grazing on wide-open ranch land and family farms that utilized dairy cows, pigs, and chickens to provide a subsistent way of life. However, as the United States' population has grown and developed, the demand for a more productive and cost-efficient way to produce livestock has risen. Consequently, the methods of livestock production have shifted primarily to a mass production form of raising animals.

Today, livestock production means high-tech specialized facilities which operate with the goal of producing quality animals fit for consumption in the most efficient time frame possible. In addition, a trend towards larger facilities that confine animals on a limited amount of acreage has begun to emerge.¹ Large cattle feedlots serve as a prime example. In these large facilities hundreds and even thousands of cattle are fattened in relatively small pens to encourage the maximum weight gain possible. A recent government study has estimated that 71% of cattle contained in feedlots are confined in operations that hold over one thousand animals.² These are startling figures when one realizes that the top thirteen beef producing states alone fatten over 9.4 million head of cattle in feedlots.³ Other sectors of the livestock production community, such as the hog and poultry industries, have experienced a similar shift toward mass production.⁴

As one might expect, vast numbers of confined animals in small facilities produced an exorbitant amount of waste. Runoff rain water mixed with waste from the confined facilities and logically began to take a toll on nearby water sources. Waste from the facilities would mix with precipitation and drain into nearby streams and rivers. When combined with other sources of pollution around the country, contamination of a large portion of the United States' water supply was threatened. As a result, Congress took action by passing the Clean Water Act in 1972.⁵ As part

1. See Larry C. Frarey & Staci J. Pratt, *Environmental Regulation of Livestock Production Operations*, 9 NAT. RESOURCES & ENV'T 8 (1995).

2. See U.S. GENERAL ACCOUNTING OFFICE, PUB. NO. GAO/RCED-95-200BR, ANIMAL AGRICULTURE: INFORMATION ON WASTE MANAGEMENT AND WATER QUALITY ISSUES 60 (1995) [hereinafter GAO].

3. See *United States Department of Agriculture Quarterly Report*, SATURDAY OKLAHOMAN (Oklahoma City), Oct. 21, 1995, at 28.

4. See GAO, *supra* note 2, at 60.

5. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816

of the Act, Congress sought to regulate water pollution caused by concentrated animal feeding operations (CAFOs). CAFOs were required to obtain permits which set conditions and standards to prevent CAFO waste from entering waters of the United States.

While seemingly clear, the term CAFO is actually a nebulous term.⁶ Rather than declaring all operations that confined animals as CAFOs, the Clean Water Act's regulations established a formula that considered not only the number of animals confined but also the risk of discharge of waste into waters of the United States. Because the regulations failed to clearly and unequivocally define the term CAFO, many livestock facilities that should have obtained a permit did not. As of 1995, only 1987 permits had been issued nationwide while several hundred thousand facilities confine animals.⁷ In Oklahoma, only 193 CAFOs have obtained permits pursuant to the Clean Water Act.

The primary concern of this comment is to provide information and advice to livestock operators and their attorneys in determining when a permit pursuant to the Clean Water Act should be obtained.⁸ In order to fully comprehend the complexity and breadth of this issue, one must first understand when a livestock operation qualifies as a CAFO. The type and number of animals confined must also be determined. More importantly, the risk of discharge of waste into waters of the United States must be seriously weighed when determining whether or not a permit is required. Once it is determined that a permit should be obtained, the appropriate permitting authority should be contacted.⁹

The issue of whether an Oklahoma livestock operator should obtain a license under the Oklahoma Feed Yards Act is also discussed. Most states that have a strong agricultural base utilize similar legislation that not only strengthens the federal Clean Water Act but also provides additional requirements, standards, and criteria. Consequently, one must also consider whether a state license or permit is necessary.

II. The Clean Water Act

Congress declared that the primary objective of the Clean Water Act is "to restore and maintain the chemical, physical and biological integrity of the Nation's waters."¹⁰ In Congress' opinion, the problem of water pollution had reached epidemic proportions in America.¹¹ Thus, Congress recognized that a clean water

(codified as amended at 33 U.S.C. §§ 1251-1387 (1994)) (commonly referred to as the Clean Water Act).

6. It is important to distinguish a CAFO from an animal feeding operation. All CAFOs are animal feeding operations, but not all animal feeding operations are CAFOs.

7. See GAO, *supra* note 2, at 60.

8. While other issues of interest are broached throughout this paper, these issues will not be discussed in depth. For example, the argument over the classification of point source versus nonpoint source pollution is mentioned, but the arguments for and against such classifications are left for another time. In addition, the precise requirements and standards of the NPDES permit are not discussed in great detail.

9. Region VI of the EPA, located in Dallas, Texas, administers the NPDES permitting process in Louisiana, New Mexico, Oklahoma, and Texas.

10. 33 U.S.C. § 1251(a) (1994).

11. See Deborah E. Niehuus, Note, *Diluting the Clean Water Act: Will Muddy Water Flow from*

supply represented a vital national interest and that action had to be taken to correct the problem. As a result, Congress prohibited the discharge of pollutants into navigable waters.¹²

The Clean Water Act imposed strict liability on any entity that causes the discharge of pollutants into navigable waters.¹³ However, the Act conceded that the successful regulation of every source of pollution was impossible. In an attempt to make the Act manageable and enforceable, the term "discharge of pollutants" was restricted to mean "any addition of any pollutant to navigable water"¹⁴ from any *point source*.¹⁵ A point source was defined as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, *concentrated animal feeding operation*, or vessel or other floating craft, from which pollutants are or may be discharged."¹⁶ Congress determined that the best regulation method for point source discharges was via a mandatory permit program regulated by the National Pollutant Discharge Elimination System (NPDES).¹⁷ The NPDES program mandates that every point source which discharges pollutants into waters of the United States obtain a permit. The permit program imposes conditions and standards of quality to insure that all point sources comply with the Clean Water Act.¹⁸

Nonpoint source activities, on the other hand, were excluded from the regulatory scheme of the Clean Water Act. Contrary to point sources, nonpoint source pollution

United States v. Plaza Health Laboratories, Inc., 11 T.M. COOLEY L. REV. 911, 914 (1994).

12. See 33 U.S.C. § 1311(a) (1994).

13. See *id.* The Act provided exceptions for liability if the discharge was "in compliance with [section 1311] and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title." *Id.*

14. "The term 'navigable waters' means the waters of the United States, including the territorial seas." *Id.* § 1362(7). "[T]he term ['navigable waters'] should be given the broadest possible constitutional interpretation." United States v. Earth Sciences, Inc., 599 F.2d 368, 375 (10th Cir. 1979) (quoting S. REP. NO. 92-1236, at 118 (1972), reprinted in 1972 U.S.C.C.A.N. 3776, 3822); see also Village of Oconomowoc Lake v. Dayton Hudson Corp., 24 F.3d 962, 964 (7th Cir. 1994) (holding that the Clean Water Act is "a broad statute, reaching waters and wetlands that are not navigable or even directly connected to navigable waters"); United States v. Byrd, 609 F.2d 1204, 1209 (7th Cir. 1979) (holding that the "legislative history of the [Clean Water Act] establishe[d] that Congress wanted to give the term 'navigable waters' the 'broadest possible Constitutional interpretation'"); United States v. Weisman, 489 F. Supp. 1331, 1340 (M.D. Fla. 1980) (holding that tidal creeks connected to river were navigable waters). Congress' broad interpretation of "navigable waters" probably encompasses most rural sources of water including wetlands, draws, dry creeks, streams, etc. *But see* Washington Wilderness Coalition v. Hecla Mining Co., 870 F. Supp. 983, 989 n.3 (E.D. Wash. 1994) (holding that manmade ponds did not constitute "navigable water" within meaning of Clean Water Act but that "navigable waters" included "natural" ponds); Kelley *ex rel.* Michigan v. United States, 618 F. Supp. 1103, 1107 (W.D. Mich. 1985) (holding that the term "navigable waters," as used in the Clean Water Act's definition of "discharge of pollutant" did not include groundwater).

15. 33 U.S.C. § 1362(12)(A) (1994) (emphasis added).

16. *Id.* § 1362(14) (emphasis added).

17. See *id.* § 1342.

18. See generally Kristy A. Niehaus, *Clean Water Act Permitting: The NPDES Program at Fifteen*, 2 NAT. RESOURCES & ENV'T 16 (1987) (explaining the NPDES permitting process and relevant terminology).

is difficult to trace to a single conveyance.¹⁹ Although the Clean Water Act and the corresponding regulations both refer to nonpoint source activities, a definition of the term is not provided.²⁰ Generally, a nonpoint source conveyance is described as "any source of water pollution or pollutants not associated with a discrete conveyance" or any source that does not meet the qualifications of a point source.²¹ Accordingly, nonpoint pollution sources are outside the scope of NPDES permit requirements.²²

Congress vested the Environmental Protection Agency (EPA) with the authority to administer the NPDES program.²³ Upon approval by the EPA, state pollution control agencies may alternatively administer the NPDES permits.²⁴ CAFOs are the only agricultural activity expressly designated as point sources subject to NPDES permit requirements.²⁵ All other agricultural activities presumably fall into the nonpoint source category. Following complaints from the agriculture industry, Congress limited the scope of the point source definition, excluding two types of pollution, "agricultural stormwater discharges and return flows from irrigated agriculture," from coverage.²⁶

A. What is a CAFO?

In order to be classified as a CAFO, an operation must first qualify as an animal feeding operation.²⁷ Two conditions are required for an operation to qualify as an animal feeding operation. First, animals must be confined or maintained for a minimum of forty-five days in a twelve month period. Second, because of the confinement, "[c]rops, vegetation forage growth . . . are not sustained in the normal growing season over any portion of the lot or facility."²⁸

19. See Niehuus, *supra* note 11, at 918.

20. See S. REP. NO. 92-414, at 212 (1972), reprinted in 1972 U.S.C.C.A.N. 3668, 3760 (statement of Sen. Dole) ("[A] non-point source of pollution [was] one that does not confine its polluting discharge to one fairly specific outlet . . .").

21. See Niehuus, *supra* note 11, at 918 (quoting 2 WILLIAM H. RODGERS, JR., HANDBOOK ON ENVIRONMENTAL LAW § 4.4, at 375 (1977)).

22. See 33 U.S.C. § 1329 (1994). "Nonpoint source pollution is addressed principally through state nonpoint source pollution assessments and management plans developed pursuant to CWA § 319 [(33 U.S.C. § 1329)] and state coastal zone management plans." Frarey & Pratt, *supra* note 1, at 9.

23. See 33 U.S.C. § 1251(d) (1994).

24. See *id.* § 1342(b).

25. See 40 C.F.R. § 122.1 (1996).

26. 33 U.S.C. § 1362(14) (1994). A 1977 amendment to the Clean Water Act amended the definition of a "point source" to specifically exclude "return flows from irrigated agriculture." See Clean Water Act of 1977, Pub. L. No. 95-217, § 33, 91 Stat. 1566, 1577. A 1987 amendment added that "agricultural stormwater discharges" were also to be excluded from the definition of a "point source." See Water Quality Act of 1987, Pub. L. No. 100-4, § 503, 101 Stat. 7, 75.

27. This comment will refer to animal feeding operations and livestock operations as synonyms. Both terms are meant to refer to livestock facilities which satisfy the requirements for an animal feeding operation set out in 40 C.F.R. § 122.23 (1996).

28. 40 C.F.R. § 122.23(b)(1)(ii) (1996). In addition, "[t]wo or more animal feeding operations under common ownership are considered, . . . to be a single animal feeding operation if they adjoin each other or if they use a common area or system for the disposal of wastes." *Id.* § 122.23(b)(2).

The applicability of the animal feeding operation definition is very broad. Animals are not required to be confined for consecutive days to satisfy the forty-five-day requirement. A minimum number of animals is not required. As a result, if a farmer confines one animal in a pen for a total of forty-five days throughout a given twelve-month period, this requirement will be satisfied. For example, a person who pens a horse up for twenty days in the spring, a pig for ten days in the summer, and an ostrich for fifteen days in the fall will satisfy the first prong of the qualification.

The second factor requires that grass or other vegetation not be sustained throughout the confinement area. If the pen is too small for the number of confined animals and, consequently, the vegetation in the pen is eliminated or stomped out, this prong will also be satisfied.²⁹ A small lot which contains only one animal for a short period of time will typically result in a stomped out pen. For example, a 4-H member's pig project contained in a small pen will probably be unable to sustain grass. A clear exception to this factor is pasture land. However, because most facilities that handle livestock utilize holding pens, nearly every farm, ranch, or homestead in the country that owns livestock will qualify as an animal feeding operation.

Animal feeding operations must then meet one of three additional requirements to qualify as a CAFO. First, large animal feeding operations qualify if they confine more than 1000 animal units.³⁰ A recent EPA study estimated that nearly 6600 animal feeding operations existed throughout the United States which confined greater than 1000 animal units.³¹ An apparent example is a large cattle feeding operation commonly known as a feedlot. If the feedlot confines the requisite number

29. This qualification differentiates between pasture land, where animal waste is broadly and randomly dispersed over a large area into grass or other vegetation that acts as a filtering system enabling waste to be broken down before entering a water source, and concentrated feeding operations, where mass quantities of waste accumulates in a confined area.

30. If an animal feeding operation contains more numbers of animals than specified in the following categories the animal feeding operation qualifies as a CAFO:

- (1) 1,000 slaughter and feeder cattle,
- (2) 700 mature dairy cattle (whether milked or dry cows),
- (3) 2,500 swine each weighing over 25 kilograms (approximately 55 pounds),
- (4) 500 horses,
- (5) 10,000 sheep or lambs,
- (6) 55,000 turkeys,
- (7) 100,000 laying hens or broilers (if the facility has continuous overflow watering),
- (8) 30,000 laying hens or broilers (if the facility has a liquid manure system),
- (9) 5,000 ducks, or
- (10) 1,000 animal units.

40 C.F.R. pt. 122, app. B(a) (1996).

The term *animal unit* means a unit of measurement for any animal feeding operation calculated by adding the following numbers: the number of slaughter and feeder cattle multiplied by 1.0, plus the number of mature dairy cattle multiplied by 1.4, plus the number of swine weighing over 25 kilograms (approximately 55 pounds) multiplied by 0.4, plus the number of sheep multiplied by 0.1, plus the number of horses multiplied by 2.0.

Id. pt. 122, app. B.

31. See GAO, *supra* note 2, at 2.

of animals, it automatically meets the qualifications of a CAFO.³² In addition, a large poultry facility will likewise satisfy the CAFO qualification merely by its size.³³ Another type of facility not as evident are stockyards or salebarns.³⁴ Typically, these operations will satisfy the requirements of an animal feeding operation.³⁵ If the facility handles more than 1000 animal units on a given sale day, the facility will also meet the qualifications for a CAFO.

Medium sized animal feeding operations, on the other hand, must meet additional requirements above and beyond mere numbers of animal units. A medium sized animal feeding operation may qualify as a CAFO if it confines more than 300 animal units and *either* discharges pollutants into navigable waters through a "man-made ditch, flushing system or other similar man-made device" or discharges pollutants directly into waters of the United States which "pass over, across or through the facility or otherwise come into direct contact" with the confined animals.³⁶ A *direct risk* of pollution must be evident either by introduction through a manmade conveyance or contact by the facility or animals with a water supply.

A medium sized poultry facility which utilizes a liquid manure system³⁷ and flushes its waste through a ditch directly into a stream will clearly qualify as a CAFO. In addition, a medium sized livestock operation which fences around a portion of creek bed will also qualify if the confined animals come into direct contact with the water. Thus, the essential ingredient for a medium sized livestock operation to be classified as a CAFO is the threat of a direct discharge of pollutants into navigable waters.

32. However, merely meeting the qualifications of a CAFO does not mean that a livestock operation is automatically a CAFO. See *infra* text accompanying note 42.

33. See 40 C.F.R. pt. 122, app. B.

34. See also *Weber v. Trinity Meadows Raceway*, No. 4:92-CV-267-Y, 1996 WL 477049, at *10, *18 (N.D. Tex. June 20, 1996) (holding that race horse facility constituted a CAFO and accordingly imposed fine of \$230,000 for Clean Water Act violations).

35. See *supra* text accompanying notes 27-28. But see *infra* text accompanying notes 215-16.

36. To qualify as a medium sized CAFO the animal feeding operation must confine at least:

- (1) 300 slaughter and feeder cattle,
- (2) 200 mature dairy cattle (whether milked or dry cows),
- (3) 750 swine each weighing over 25 kilograms (approximately 55 pounds),
- (4) 150 horses,
- (5) 3,000 sheep or lambs,
- (6) 16,500 turkeys,
- (7) 30,000 laying hens or broilers (if the facility has continuous overflow watering),
- (8) 9,000 laying hens or broilers (if the facility has a liquid manure system),
- (9) 1,500 ducks, or
- (10) 300 animal units.

and either one of the following conditions are [sic] met: pollutants are discharged into navigable waters through a manmade ditch, flushing system or other similar man-made device; or pollutants are discharged directly into waters of the United States which originate outside of and pass over, across, or through the facility or otherwise come into direct contact with the animals confined in the operation.

40 C.F.R. pt. 122, app. B(b) (1996).

37. The regulations distinguish between a poultry facility that utilizes a "continuous overflow watering" versus a "liquid manure system." See *id.* pt. 122, app. B(b)(7), (8).

A livestock operation which otherwise does not meet the elements required for large or medium sized CAFOs may be designated as a point source on a case-by-case basis if the facility represents a "significant contributor of pollution into waters of the United States."³⁸ As a result, any large and medium livestock operations may be designated as a CAFO by the EPA or the comparable state authority and, thus, be required to satisfy the requirements for obtaining an NPDES permit. The EPA regulations list several factors to be considered before designating a livestock operation as a point source. The factors include: (1) the size of the facility; (2) the location of the operation relative to navigable waters; (3) the method by which wastes are discharged into navigable waters; and (4) other relevant factors affecting the likelihood or frequency of discharge of waste into waters of the United States such as slope, vegetation, and rainfall.³⁹

Small livestock operations which contain less than the listed number of animals for medium CAFOs, on the other hand, may only be designated as a CAFO if the facility poses a risk of direct discharge into waters of the United States.⁴⁰ The same elements for direct discharge that are required for medium sized CAFOs are established for designation of small animal feeding operations.⁴¹ As a result, a small horse farm must either directly discharge waste into waters through a manmade conveyance such as a ditch or be situated in an area where the confined animals come into direct contact with the water in order to be designated as a CAFO.

If an animal feeding operation satisfies the elements of a CAFO, the operation does not automatically become a point source subject to NPDES permit requirements. The regulations provide an *exception* for livestock operations from CAFO status. The regulations state that "no animal feeding operation is a concentrated animal feeding operation . . . if such animal feeding operation discharges only in the event of a 25-year, 24-hour storm event."⁴² Thus, if a livestock operation only discharges in a 25-

38. 40 C.F.R. § 122.23(c)(1) (1996).

39. *See id.*

40. The regulations provide two instances for which a small livestock operation may pose a direct risk.

No animal feeding operation with less than the numbers of animals set forth in Appendix B of this part shall be designated as a concentrated animal feeding operation unless: (i) Pollutants are discharged into waters of the United States through a manmade ditch, flushing system, or other similar manmade device; or (ii) Pollutants are discharged directly into waters of the United States which originate outside of the facility and pass over, across, or through the facility or otherwise come into direct contact with the animals confined in the operation.

Id. § 122.23(c)(2).

41. *See supra* text accompanying note 36.

42. 40 C.F.R. pt. 122, app. B (1996).

The term[] . . . 25 year, 24 hour rainfall event shall mean a rainfall event with a probable recurrence interval of once in . . . twenty-five years . . . as defined by the National Weather Service in Technical Paper Number 40, Rainfall Frequency Atlas of the United States, . . . or equivalent regional or state rainfall probability information developed therefrom.

40 C.F.R. § 412.11(e) (1996). The regulations refer to this term as a storm event or a rainfall event. This comment often refers to the term as merely a storm.

year, 24-hour storm, it will not qualify as a CAFO. If the operation is not a CAFO, it consequently is not a point source.

The Clean Water Act only regulates the discharge of pollutants caused by point sources. CAFOs are point sources under the Act and are required to obtain an NPDES permit. While the regulations attempted to set out specific and clear-cut qualifications for CAFOs, the CAFO exception effectively destroyed any hope the regulations had at clarity and precision. For example, a large cattle feedlot which confines over 1000 animal units may choose not to obtain an NPDES permit based on the determination that the facility will not discharge except possibly due to a 25-year, 24-hour storm. Until the feedlot discharges in a non-25-year, 24-hour storm, the facility is not a CAFO and, consequently, not a point source.⁴³

Accordingly, many CAFO operators installed lagoons adequate to contain runoff from a 25-year, 24-hour storm and considered themselves exempt from the NPDES permit and liability under the Clean Water Act.⁴⁴ In addition, CAFOs developed disposal systems where waste manure could be drained from the lagoons or removed from the facility and applied on fields and pastures as fertilizer. Field application of waste was considered a typical agricultural activity classified as a nonpoint source and not subject to an NPDES permit.⁴⁵

B. NPDES Permit

In order to avoid liability under the Clean Water Act due to the discharge of pollutants caused by a non-25-year, 24-hour storm, a CAFO must possess an NPDES permit.⁴⁶ CAFOs permitted through the NPDES program are subject to a "no discharge" effluent limitation. No discharge of process waste water pollutants⁴⁷ into navigable waters is allowed.⁴⁸ However, a limited exception is established for a CAFO that possesses and complies with an NPDES permit. First, a facility must have a properly designed and constructed overflow system capable of holding all process waste water normally created plus the runoff from a 25-year, 24-hour rainfall event. Second, if the facility is properly operated, overflow of waste water may be discharged in the event of a *chronic or catastrophic* storm.⁴⁹

43. However, a livestock operation could be designated a CAFO if the requisite factors exist. See *supra* text accompanying notes 38-39.

44. See EPA, REGION VI, NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM GENERAL PERMIT AND REPORTING REQUIREMENTS FOR DISCHARGES FROM CONCENTRATED ANIMAL FEEDING OPERATIONS 10 (March 10, 1993) [hereinafter REGION VI PERMIT].

45. See Frarey & Pratt, *supra* note 1, at 9.

46. See 40 C.F.R. § 122.23(a) (1996).

47. The term "process generated waste water" is defined as water directly or indirectly used in the operation of a feedlot for any or all of the following: Spillage or overflow from animal or poultry watering systems; washing, cleaning or flushing pens, barns, manure pits or other feedlot facilities; direct contact swimming, washing or spray cooling of animals; dust control.

40 C.F.R. § 412.11.

48. See 40 C.F.R. § 412.15(a).

49. The terms "chronic" and "catastrophic" refer to events which may result in an overflow of the required retention structure. Catastrophic

While the regulations fail to define a chronic or catastrophic storm, comments to the EPA's Region VI general permit describe a chronic rainfall event as a "series of wet weather conditions which would not provide opportunity for dewatering and which total the volume of a 25-year, 24-hour storm event."⁵⁰ A catastrophic rainfall event is a storm that equals or exceeds a 25-year, 24-hour storm and may "also include tornadoes, hurricanes or other catastrophic conditions which would not provide opportunity for dewatering."⁵¹ Accordingly, the NPDES effluent limitations provide a somewhat more lenient standard if and only if the livestock operation is properly designed, maintained, and operated.

C. The Popular Interpretations of the Clean Water Act Provisions

Most livestock operations accepted the interpretation that merely building lagoons and disposal systems capable of holding wastes up to a 25-year, 24-hour rainfall event would insulate them from CAFO status and from liability under the Clean Water Act. This popular interpretation deduced that if a livestock operation's disposal system could hold runoff from a 25-year, 24-hour storm that the effluent limitations established by the NPDES permit would be satisfied and, therefore, a permit was unnecessary.⁵² An opinion by the United States District Court for the Western District of Arkansas appeared to support this view. In *Higbee v. Starr*,⁵³ the court stated that "[b]ecause the Low Gap Hog Farm is a closed, 'no discharge' system," an NPDES permit was unnecessary.⁵⁴

Compared to industrial and municipal point sources, CAFOs enjoyed a relatively low priority among the EPA and delegated regulatory states.⁵⁵ Furthermore, regulation of the no-discharge limitation was inconsistently enforced.⁵⁶ Together these factors provided a sense of security for livestock operations. Livestock operations took a low profile position and merely took private action to prevent blatant discharges. Building holding lagoons seemed a logical method to combat water pollution. Furthermore, disposal systems actually benefitted livestock

rainfall conditions would mean any single event which total the volume of the 25 year, 24 hour storm event. Catastrophic conditions could also include tornadoes, hurricanes or other catastrophic conditions which could cause overflow due to winds of mechanical damage. Chronic rainfall would be that series of wet weather conditions which would not provide opportunity for dewatering and which total the volume of a 25 year, 24 hour storm event.

REGION VI PERMIT, *supra* note 44, at 14.

50. *Id.*

51. *Id.*

52. See *Carr v. Alta Verde Indus.*, 931 F.2d 1055, 1063 (5th Cir. 1991). The district court holding in *Carr* exemplifies the confusion courts have had on the Clean Water Act legislation especially as it pertains to CAFOs.

53. 598 F. Supp. 323 (W.D. Ark. 1984), *aff'd*, 782 F.2d 1048 (8th Cir. 1985).

54. See *id.* at 331. However, most observers must have overlooked that the *Higbee* court did not automatically exempt the Hog Farm from a CWA violation. The court merely found that a "discharge of pollutants" was not adequately proven. See *id.* Furthermore, the court concluded that "any such discharge . . . must be made pursuant to a [NPDES] permit." *Id.*

55. See *Frarey & Pratt*, *supra* note 1, at 9.

56. See *id.* at 11.

operations by providing needed fertilizer for adjacent fields and pastures. As a result, most large animal feeding operations built lagoons to hold runoff waste. Few livestock operations that contained a sufficient number of animal units to be classified as CAFOs obtained permits.⁵⁷

Two recent United States Courts of Appeals decisions have created uncertainty among many livestock operations on whether they are adequately insulated from liability under the Clean Water Act. Two livestock operations that, based on the popular interpretation of the Clean Water Act requirements, were considered to be in compliance with the Act were held liable for violating the Clean Water Act. As a result, a new standard has surfaced. In order to fully comprehend the breadth of the Clean Water Act, the decisions of *Carr v. Alta Verde Industries*⁵⁸ and *Concerned Area Residents v. Southview Farm*⁵⁹ must be considered.

III. A New Standard — Who Must Obtain an NPDES Permit?

In *Carr*, the Fifth Circuit reviewed a citizens suit brought against a cattle feedlot for discharging pollutants into an unnamed tributary of the Rosita Creek.⁶⁰ The feedlot, Alta Verde, fed between 20,000 and 30,000 head of cattle in confined lots.⁶¹ In order to control the runoff of waste from the feedlot, a system of holding ponds was built and maintained.⁶²

In 1987, due to a series of heavy rains between April and July, Alta Verde's holding ponds reached their total capacity.⁶³ As a result, Alta Verde cut a spillway from one of the ponds and subsequently discharged pollutants into the nearby tributary.⁶⁴ In December 1987, a citizen suit was filed seeking civil penalties and injunctive relief claiming that Alta Verde violated the Clean Water Act.⁶⁵

A. District Court Holding

The holding of the United States District Court for the Western District of Texas in *Carr* exemplified the popular interpretation of the Clean Water Act. The district court held that although Alta Verde did not possess an NPDES permit, the discharge of pollutants by Alta Verde did not violate the Clean Water Act.⁶⁶ The lower court in *Carr* based its decision on the fact that the feedlot maintained a proper wastewater disposal system and was, therefore, in compliance with the EPA effluent limitations for CAFOs.⁶⁷

57. *See id.* at 9.

58. 931 F.2d 1055 (5th Cir. 1991).

59. 34 F.3d 114 (2d Cir. 1994).

60. *See Carr*, 931 F.2d at 1057.

61. *See id.*

62. *See id.* According to the lower court findings, Alta Verde's holding ponds were capable of containing either slightly more or less runoff from a 25-year, 24-hour storm event. *See id.* at 1059

63. *See id.*

64. *See id.* at 1058.

65. *See id.* at 1057-58.

66. *See id.* at 1060. The district court in *Carr* also held that the plaintiffs lacked standing. *See*

67. *See id.* at 1058.

The district court in *Carr* classified the feedlot as a CAFO because Alta Verde's discharge did not result from a 25-year, 24-hour rainfall event.⁶⁸ As a CAFO, Alta Verde qualified as a point source and was subject to an NPDES permit.⁶⁹ However, the district court determined that the EPA effluent limitations allowed for an exception for CAFOs without an NPDES permit.⁷⁰ The effluent guidelines state:

Process waste pollutants in the overflow *may be discharged* to navigable waters whenever rainfall events, either *chronic or catastrophic*, cause an overflow of process waste water from a facility designed, constructed and operated to contain all process generated waste waters plus the runoff from a 25-year, 24-hour rainfall event for the location of the point source.⁷¹

In effect, the district court in *Carr* created a new exception for CAFOs from NPDES permit requirements and from liability under the Clean Water Act.

B. The Fifth Circuit Holding

On appeal, the Fifth Circuit determined that the exception created by the district court in *Carr* for CAFOs did not exist.⁷² While the effluent limitations were "basic criteria for issuing . . . permit[s]," the limitations failed to establish an exemption for CAFOs with properly designed disposal systems.⁷³ The *Carr* court explained that the EPA regulations, which proscribed effluent limitations for CAFOs, lacked the authority "to except categories of *point sources* from the permit requirements."⁷⁴ As soon as a livestock operation is classified as a CAFO, the operation automatically is designated a point source under the Clean Water Act and is required to obtain an NPDES permit.⁷⁵ Effluent limitations apply only to *permitted* CAFOs.⁷⁶

C. Implication

According to the Fifth Circuit opinion in *Carr*, no exemption existed for any CAFOs under the Clean Water Act.⁷⁷ The Clean Water Act expressly included CAFOs in its definition of a point source. In addition, CAFOs operating without an NPDES permit violate the Act. However, the *Carr* court recognized that the true dispute centered upon the exemption of certain animal feeding operations from CAFO status, not CAFOs from permit status.⁷⁸ This exemption states that "no

68. *See id.* at 1060.

69. Any discharge of pollutants by a point source that lacks an NPDES permit violates the Clean Water Act. *See supra* text accompanying note 46.

70. *See Carr*, 931 F.2d at 1060.

71. 40 C.F.R. § 412.13(b) (1996) (emphasis added).

72. *See Carr*, 931 F.2d at 1060.

73. *See id.*

74. *Id.* (emphasis added).

75. *But see infra* text accompanying note 80.

76. *See* 40 C.F.R. 412.13(a) (1996).

77. *See Carr*, 931 F.2d at 1060.

78. *See id.* at 1059.

animal feeding operation is a concentrated animal feeding operation . . . if such animal feeding operation discharged *only* in the event of a 25-year, 24-hour storm event."⁷⁹ Thus, an exemption from CAFO status is created for a livestock operation that only discharges due to a 25-year, 24-hour storm.

Accordingly, a livestock operation is not necessarily a CAFO even if the operation is the largest cattle feedlot in Oklahoma. The Clean Water Act only regulates the discharge of pollutants from point sources. If an animal feeding operation is not a CAFO, which is the only agricultural point source designated in the Act, it cannot violate the Act. An animal feeding operation is only a CAFO if the facility discharges as a result of a non-25-year, 24-hour rainfall event.⁸⁰

The Fifth Circuit in *Carr* reasoned that because Alta Verde met the size requirements of the Clean Water Act and discharged into navigable waters during a non-25-year, 24-hour storm, the feedlot was a CAFO.⁸¹ Because the storms that caused the discharge were sporadic storms that occurred over a four-month period, the court in *Carr* determined that Alta Verde became a CAFO "as of the time of th[e] discharges."⁸²

Conversely, if Alta Verde had discharged because of rainfall from a 25-year, 24-hour storm, the feedlot would not have violated the Clean Water Act.⁸³ The Fifth Circuit in *Carr* implicitly agreed with this conclusion by declaring that "[t]he dispute turns on whether Alta Verde fits within the *exception* for feedlots that discharge only on the occurrence of a 25-year, 24-hour storm event."⁸⁴ Based on this exception, a livestock operation might meet the size requirements⁸⁵ for a CAFO and still not be a CAFO. If the operation is not a CAFO, it is also not a point source and, thus, not required to obtain an NPDES permit. But, if a livestock operation meets the qualifications of a CAFO and discharges in a non-25-year, 24-hour storm, the operation automatically becomes a CAFO at the moment of the discharge.⁸⁶ In addition, if the operation does not possess an NPDES permit, the facility will be subject to liability under the Clean Water Act.

A CAFO which does possess an NPDES permit will avoid liability under the Clean Water Act if the operation follows effluent limitations established by the EPA.⁸⁷ The effluent limitations initially establish a "no discharge" effluent standard. However, an exception is provided which allows the discharge of waste due to chronic or catastrophic storms. According to the definition of a chronic storm, as defined by Region VI of the EPA, a permitted operation has a duty to dewater its

79. *Id.* (emphasis added) (citing 40 C.F.R. pt. 122, app. B (1988)).

80. *See* 40 C.F.R. pt. 122, app. B (1996).

81. *See Carr*, 931 F.2d at 1059-60.

82. *See id.* at 1060.

83. *See* 40 C.F.R. pt. 122, app. B (1996).

84. *Carr*, 931 F.2d at 1059 (emphasis added).

85. *See supra* notes 26, 30.

86. The term "discharge" includes "additions of pollutants into waters of the United States from: surface runoff which is collected or channeled by man This term does not include an addition of pollutants by any 'indirect discharger.'" 40 C.F.R. § 122.2 (1996).

87. All CAFOs are subject to a "no discharge effluent" standard. *See* 40 C.F.R. § 412.13(a).

holding ponds if the opportunity exists.⁸⁸ Because the rain storms in *Carr* occurred over a four-month period, Alta Verde presumably was capable of lowering the level of waste water in its lagoons between storms.⁸⁹ As a result, even if Alta Verde had possessed an NPDES permit, the feedlot probably still would have violated the Clean Water Act.

The Fifth Circuit's holding in *Carr* served as a wakeup call for livestock operations large enough to qualify as CAFOs but who continued to operate without an NPDES permit. The Fifth Circuit's decision in *Carr* shattered the popular interpretation of the Clean Water Act.⁹⁰ Clearly, the decision in *Carr* put large livestock operations on notice that if they discharged due to a non-25-year, 24-hour storm they could be held liable under the Clean Water Act.

The *Carr* court did explain that some livestock operations were exempt from CAFO status and NPDES permit requirements.⁹¹ First, animal feeding operations that confine less than a certain number of animals are clearly exempt from the permit.⁹² For example, a small dairy that confines only fifty mature cows lacks the numbers to be required to obtain a permit. In addition, a medium sized dairy that confines 450 mature cows and does not stand a risk of direct discharge into a water source fails to qualify as a CAFO. However, if a risk of direct pollution exists for the medium sized facility and a discharge results due to a non-25-year, 24-hour storm, the operation will automatically become a CAFO.⁹³ Next, livestock operations that pose no risk of discharge into navigable waters are exempt from CAFO status no matter their size.⁹⁴ As a result, a large feedlot which contains over 1000 animal units may be exempt from the Clean Water Act if the operation is located in an area where a discharge into navigable waters will not occur.⁹⁵ Finally, the *Carr* court recognized that a livestock operation that discharges only in the event of a 25-year, 24-hour storm also fails to qualify as a CAFO.⁹⁶

Thus, large livestock operations and medium sized operations that pose a threat of direct discharge⁹⁷ must weigh their risk of discharge against the costs of satisfying NPDES permit requirements in order to make a decision on whether to obtain a permit. As in *Carr*, if a nonpermitted feedlot, which otherwise would satisfy the requirements of a CAFO, discharges due to chronic or catastrophic storms, the feedlot will be subject to liability under the Clean Water Act.⁹⁸ On the other hand, if a feedlot has a permit and a discharge results from a chronic rainstorm, the

88. See REGION VI PERMIT, *supra* note 44, at 14.

89. Typically, dewatering the lagoons is accomplished by applying the waste on fields or pastures owned by the operation or selling the waste to farmers or ranchers for field application. See *Southview Farm* analysis *infra* Part IV.C.

90. See *supra* text accompanying note 45.

91. See *Carr*, 931 F.2d at 1060 n.4.

92. See *id.* But see *infra* Part V.D.

93. See *supra* note 36.

94. See *Carr*, 931 F.2d at 1060 n.4.

95. But see *supra* note 14.

96. See *Carr*, 931 F.2d at 1060 n.4.

97. See *supra* note 40 and accompanying text.

98. See *Carr*, 931 F.2d at 1063.

operation will be insulated from liability due to the effluent limitations established by the EPA if no opportunities to dewater the feedlot's holding ponds existed. An example given in the Guidance Manual on NPDES Regulations for Concentrated Animal Feeding Operations supports this conclusion by stating:

An unpermitted facility that could be classified as a CAFO has waste handling facilities to contain the process generated wastewater plus the runoff from a 25-year, 24-hour rainfall event plus three inches of runoff from accumulation of winter precipitation. It rains heavily for three weeks, but the rainfall in any 24-hour period never exceeds the 25-year, 24-hour storm event. The facility's waste handling facilities reaches capacity and overflows, discharging to waters of the United States. The facility violated the . . . [Clean Water Act]. If the facility had had a permit, it would not have been in violation of the . . . [Act].⁹⁹

D. Continuing Violation

The *Carr* court further concluded that "[a] concentrated animal feeding operation that violates the Clean Water Act by discharging without a permit, . . . remains in a continuing state of violation until it either obtains a permit or no longer meets the definition of a point source."¹⁰⁰ After the initial discharge, Alta Verde failed to obtain an NPDES permit. Alta Verde did, however, make substantial improvements to the holding ponds to insure that the ponds would sustain a future 25-year, 24-hour storm. The court in *Carr* determined that even with the improvements, Alta Verde continued to pose a risk of continued discharges. The *Carr* court based this determination on the district court's finding that Alta Verde "may discharge in the event of a future chronic rainfall event which does not reach a 25-year, 24-hour level."¹⁰¹ As a result, Alta Verde "continue[d] to be a point source because it [could] continue to discharge."¹⁰² As a point source, Alta Verde's only alternative was to obtain an NPDES permit.¹⁰³

Consequently, a livestock operation which discharges and becomes a CAFO has two options in order to "get back" in compliance with the Clean Water Act. First, the CAFO can obtain an NPDES permit. Once the facility meets the EPA requirements and successfully obtains a permit, it will then qualify for the effluent limitations that accompany an NPDES permit. Under the safety of a permit, a properly operated CAFO does not have to worry about liability for a discharge caused by a chronic or catastrophic storm. The effluent limitations allow an NPDES permit holder to

99. Proposed General NPDES Permit for Concentrated Animal Feeding Operations (CAFO) in Idaho, 60 Fed. Reg. 44,489, at IV.D (1995); see also REGION VI PERMIT, *supra* note 44, at 32-34 (stating that permitted facility must possess "equipment capable of dewatering the wastewater retention structures of waste and/or wastewater . . . whenever needed to . . . accommodate the rainfall and runoff resulting from . . . [a] 25-year rainfall event").

100. *Carr*, 931 F.2d at 1063.

101. See *id.*

102. *Id.* at 1064.

103. See *id.* at 1058.

discharge as a result of chronic or catastrophic rainfall events.¹⁰⁴ Second, if the CAFO does not obtain a permit, the CAFO must establish that it no longer qualifies as a point source. According to *Carr*, this may be accomplished by proving that a "likelihood of recurrence in intermittent or sporadic violations" no longer exists.¹⁰⁵

In *Carr*, Alta Verde failed to make it "absolutely clear that [a discharge of pollutants] could not reasonably be expected to occur."¹⁰⁶ While substantial improvements of the lagoon and a waste disposal system might insure that another discharge is unlikely, as in *Carr*, this burden of proof will be extremely difficult to overcome because a series of storms can easily produce more runoff than a 25-year, 24-hour storm. Once a livestock operation meets the qualifications of a CAFO and breaches the 25-year, 24-hour storm exception, it automatically becomes a point source and must obtain an NPDES permit.

E. Remaining Questions

The *Carr* decision dispelled much of the confusion over: (1) the definition of a CAFO, (2) when a livestock operation needed to obtain an NPDES permit, and (3) what liability a livestock operation faced if it discharged without a permit. However, questions still remained as to the scope of the Clean Water Act and how it affected the agriculture community. Clearly, the Act only pertains to the discharge of pollutants from point sources.¹⁰⁷ CAFOs are the only specific agricultural activity mentioned in the Act. Consequently, the rest of the agricultural sector considered itself to be outside the scope of the Clean Water Act. In fact, Congress specifically amended the Clean Water Act in 1987 to exclude agricultural storm water discharges from the definition of a point source.¹⁰⁸ Thus, the runoff of fertilizer from a farmer's field due to a rainstorm would not qualify as a point source.

After *Carr*, many animal feeding operations designed their waste disposal systems in order to insure that their holding ponds would never overflow. These systems usually called for removing wastewater from the ponds and applying the waste to fields and pastures. This procedure also served to provide needed nutrients for growing crops. Typically, land-applied manure would only enter a water source due to rainwater runoff. As a result, land application of manure was considered a nonpoint source of pollution exempt from NPDES permit requirements.¹⁰⁹

The *Concerned Area Residents v. Southview Farm*¹¹⁰ decision again drew attention to the Clean Water Act and how the Act could affect the agricultural community. While *Carr* answered several questions related to the Clean Water Act, the scope of the term "CAFO" had not yet been judicially determined. After *Southview Farm*, concerns over how far the Clean Water Act might extend into agricultural activities again came to the forefront.

104. See 40 C.F.R. § 412.13(b) (1996).

105. *Carr*, 931 F.2d at 1064.

106. *Id.* at 1065.

107. See 33 U.S.C. § 1362(12) (1994).

108. See *id.* § 1362(14).

109. See REGION VI PERMIT, *supra* note 44, at 10.

110. 34 F.3d 114 (2d Cir. 1994).

IV. Defining the Scope of the Clean Water Act — What Is a Discharge?

In *Southview Farm*, a group of citizens (CARE) brought suit against a large dairy farm (Southview) in western New York. Southview operated one of the largest dairy operations in New York, utilizing over 1000 acres of crop land and maintaining an animal population totaling 2200 animals.¹¹¹ While Southview did not have an NPDES permit, the dairy did utilize an extensive system of storage lagoons to control wastewater runoff. In order to reduce the volume of waste in the lagoons, wastewater was periodically displaced from the lagoons and applied via a liquid manure spreading operation to Southview's adjacent crop land as fertilizer.¹¹²

CARE brought suit against Southview alleging that the dairy had violated the Clean Water Act when waste that was applied by tank trucks on Southview's crop land discharged into navigable waters.¹¹³ CARE contended that the waste applied by Southview was in such quantities as to cause the pollutants to directly flow across the field into a nearby stream. After a jury verdict against Southview, the United States District Court for the Western District of New York granted Southview's Motion for Judgment as a Matter of Law.¹¹⁴

A. District Court Holding

The district court in *Southview Farm* found that Southview failed to qualify as a CAFO even though the dairy confined the requisite number of cattle. The district court determined that because "crops were sustained over a portion" of the dairy, the second requirement of an animal feeding operation was not satisfied.¹¹⁵ The district court essentially held that the fact that Southview's operation was spread out over a large area prevented Southview from qualifying as a CAFO because vegetation existed over part of the farm.¹¹⁶

The district court in *Southview Farm* also determined that Southview's land application of manure on the dairy's crop land was specifically excluded from point source status in the Clean Water Act.¹¹⁷ Citing Congress' 1987 "stormwater discharge" amendment to the Act, the district court concluded that Congress intended

111. In 1992, Southview's operation maintained 1290 head of mature dairy cows and over 900 head of young calves, heifers and steers. *See id.* at 116.

112. *See id.*

113. Plaintiffs also sued under a common law action for trespass. *See id.* at 115. Livestock operations must also be aware of the potential for liability under state common law theories such as nuisance and trespass. Oklahoma has provided a mechanism for state licensed operations that properly operate their facilities to be insulated from some nuisance claims. *See discussion infra* Part VI.B.

114. *Southview Farm*, 34 F.3d at 116.

115. *See Concerned Area Residents for the Environment v. Southview Farm*, 834 F. Supp. 1410, 1429 n.6 (W.D.N.Y. 1993), *rev'd*, 34 F.3d 114 (2d Cir. 1994).

116. This would make Southview not even an animal feeding operation which is clearly wrong due to the dairies closed confinement of its animals in holding pens. *See discussion supra* Part II.A.

117. *See Southview Farm*, 834 F. Supp. at 1426. While this is an important and controversial holding, this comment is not pursuing the debate over the designation of point source and nonpoint source pollution. The purpose of this comment is to provide insight and advice on when an NPDES permit should be obtained.

that agricultural discharges be completely excluded from the definition of a point source.¹¹⁸ In addition, "[a] discharge of pollutants does not violate the Act unless it emanates from a point source."¹¹⁹ Adding a "specific exception for agricultural stormwater discharges . . . suggests that Congress was not concerned . . . with disparate, random runoff or rain water."¹²⁰ The district court in *Southview Farm* found that the discharges resulted from the natural movement of rainwater over the ground which mixed with the manure applied by Southview and, thus, Southview's activity failed to constitute a point source under the Clean Water Act.¹²¹

Next, the district court in *Southview Farm* found that even if some of the manure runoff from the field was not the result of storm water runoff, the dispersal still lacked the qualifications of a point source.¹²² A point source must be "discrete" and "confined."¹²³ In this case, Southview had dispersed the waste over the ground. Therefore, the pollutants discharged in "too diffuse a manner to create a point source discharge."¹²⁴

B. The Second Circuit Holding

As in *Carr*, the United States Court of Appeals for the Second Circuit in *Southview Farm* reversed the lower court's decision.¹²⁵ The Second Circuit determined that the primary consideration in the case revolved around "whether the discharges were the result of precipitation" or was caused by the overapplication of waste by Southview.¹²⁶ In essence, the question came down to whether Southview overapplied the liquid waste to cause it to run into the nearby water source. Because the jury had a "reasonable basis" to find that the discharges were directly related to Southview's application of waste, the Second Circuit found that the district court erred by granting judgment as a matter of law.

Next, the Second Circuit in *Southview Farm* then noted that "a point source is to be broadly interpreted."¹²⁷ Therefore, the tank trucks which spread Southview's waste onto the fields, which then flowed into navigable waters, represented point

118. *See id.* at 1428.

119. *Id.* at 1430.

120. *Id.* at 1428.

121. *See id.* at 1429.

To hold that a point source discharge exists when rain water flows across a farm field and picks up or mixes with fertilizer . . . [was] precisely what Congress wanted to avoid when it added . . . [the storm water discharge] exception. [The] purpose was clearly to exempt certain farming activities from the reach of the Clean Water Act, either because of the importance of those activities to society, or because of the difficulty of regulating them, or both.

Id.

122. Martha L. Noble & J.W. Looney, *The Emerging Legal Framework for Animal Agricultural Waste Management In Arkansas*, 47 ARK. L. REV. 159, 172 (1994).

123. *See Southview Farm*, 834 F. Supp. at 1431.

124. *Id.* at 1433.

125. *See Southview Farm*, 34 F.3d at 123.

126. *Id.* at 121.

127. *Id.* at 118.

sources subject to an NPDES permit.¹²⁸ The court in *Southview Farm* also found that the ditch which allowed the waste to flow into the stream was also a point source.¹²⁹ Each discharge was caused by the direct spreading of the waste on the fields, not rainwater runoff.

Finally, the *Southview Farm* court corrected the district court's ruling that because crops were sustained on a portion of the facility, Southview failed to qualify as a CAFO.¹³⁰ The court in *Southview Farm* held that the vegetation criteria only applies to lots where the animals are confined, not the entire acreage of the operation.¹³¹ After concluding that the feedlot area where Southview confined its livestock was a CAFO and therefore a point source subject to an NPDES permit, the Second Circuit declared that the facility *as a whole* was included in the CAFO. Thus, the entire area, including the manure applied fields, must be covered by an NPDES permit and are "not subject to any agricultural exemption."¹³²

C. Implication

The *Southview Farm* decision sent shock waves through the agriculture community. Land application of manure represents a prevalent method of waste management for many livestock operations throughout the United States.¹³³ In addition, many animal feeding operations sell manure to neighboring farmers who apply the waste on fields and pastures as fertilizer. The *Southview Farm* decision extended the definition of a point source to include the equipment that disperses the waste. Consequently, if the applied waste discharges into navigable waters of the United States, even the farmers who bought the waste will violate the Clean Water Act.

This extension appears to fly in the face of Congress' express exemption of "agricultural stormwater discharges" from its definition of a point source.¹³⁴ The EPA regulations exclude "any introduction of pollutants from non-point source agricultural . . . activities, including storm water runoff from orchards, cultivated crops, pastures, range lands and forest lands, but not discharges from concentrated animal feeding operations" from NPDES permit requirements.¹³⁵ By holding that Southview's tank trucks were point sources and required to be permitted by the NPDES, the *Southview Farm* decision seems to contradict this exclusion.

However, the *Southview Farm* court did not make land application of waste a per se violation of the Clean Water Act. The primary issue in *Southview Farm* revolved around whether or not the discharge was a result of precipitation or, on the other hand, if the discharge was caused by Southview's overapplication of waste.¹³⁶ Because the Second Circuit found that the jury reasonably determined that

128. *See id.* at 119.

129. *See id.* at 118.

130. *See id.* at 122-23.

131. *See id.* at 123.

132. *Id.*

133. *See* Frarey & Pratt, *supra* note 1, at 11.

134. *See* 40 C.F.R. § 122.3 (1996).

135. *Id.*

136. *See Southview Farm*, 34 F.3d at 120-21.

Southview's application directly caused the discharge of pollutants, the *Southview Farm* court held that the "run-off could not be classified as 'stormwater.'"¹³⁷ Once the *Southview Farm* court determined that the discharge was not caused by storm water runoff, the court merely traced the waste back to its source, the trucks. In effect, the *Southview Farm* court compared Southview's overapplication to a truck that pulled up to a stream and dumped waste into the water. The truck represents a point source under the Clean Water Act. Any discharge by a point source must be pursuant to an NPDES permit.¹³⁸

Clearly, after the *Southview Farm* decision, field application of waste is held to a greater level of scrutiny than once thought. The *Southview Farm* decision unequivocally held Southview's application trucks liable under the Clean Water Act. The application of waste does not automatically infer a violation of the Clean Water Act. But, if enough evidence is present to establish that the application directly caused a discharge, the source of the discharge will be held a point source. Only true "agriculture stormwater" runoff is excluded from liability under the Clean Water Act. If it is determined that the discharge was a direct result of overapplication of waste, a court might justifiably determine that the discharge violates the Clean Water Act. The only way livestock operators and farmers, who apply waste to land, can absolutely insure compliance with the provisions of the Clean Water Act is to obtain an NPDES permit.¹³⁹

Even if the Second Circuit in *Southview Farm* had determined that the discharge was storm water runoff, Southview still would have violated the Clean Water Act. The *Southview Farm* court held that the "operation in and of itself is a point source within the Clean Water Act and not subject to any agriculture exemption."¹⁴⁰ The *Southview Farm* court attached Southview's adjacent fields to the definition of a CAFO. As a result, Southview's entire acreage represented a point source. The EPA regulations that establish the "stormwater runoff" exclusion specifically declare that discharges from CAFOs are not included in the exception.¹⁴¹ Because Southview discharged due to overapplication of waste on its fields, not a 25-year, 24-hour storm, the dairy met the qualifications for a CAFO. Consequently, the moment Southview discharged, it violated the Clean Water Act.¹⁴²

As a result, perhaps the most controversial aspect of *Southview Farm* is the Second Circuit's broad interpretation of a CAFO. Because the *Southview Farm* decision ultimately concluded that the definition of a CAFO included not only the area of confinement but also the application fields, the *Southview Farm* court concluded that the discharge from Southview's fields was a point source discharge in violation of the Clean Water Act. In essence, the storm water runoff exemption did not apply because the discharges were from a point source.

137. *Id.* at 121.

138. There are, however, some exceptions. *See supra* note 13.

139. The appropriate permitting authority should be contacted. *See supra* note 9.

140. *Southview Farm*, 34 F.3d at 123.

141. *See supra* text accompanying note 135.

142. *See supra* text accompanying notes 84-86.

A more narrow interpretation of a CAFO would have excluded Southview's waste application to fields from point source status. Under a narrow view, only the pens where the animals were confined would fall under the CAFO definition. Therefore, the other lands connected to the operation would qualify for the storm water runoff exemption like all other agricultural operations.

The Second Circuit in *Southview Farm* adopted the broader interpretation.¹⁴³ The *Southview Farm* court reasonably recognized that such a narrow view might controvert the intent of the Clean Water Act by allowing deferred discharges through practices such as improper land application.¹⁴⁴ A CAFO might avoid liability under the Clean Water Act and get rid of waste by merely moving the waste from the livestock facility and placing it improperly on the ground elsewhere.¹⁴⁵

The view adopted by the *Southview Farm* court makes the entire livestock operation subject to an NPDES permit as a point source. Consequently, a CAFO that removes waste from the facility must continue to police its application to insure that no discharge occurs. Region VI of the EPA has established criteria for land application of waste in its general NPDES permit requirements for CAFOs.¹⁴⁶ The Region VI general permit regulates land application by regulating the rate, the time of year, and the methods by which waste is applied to pasture and farm land.¹⁴⁷

V. Cumulative Effect of Carr and Southview Farm — Navigating the Labyrinth¹⁴⁸

Any discharge of pollutants into navigable waters of the United States is unlawful unless the discharge is made pursuant to an NPDES permit.¹⁴⁹ On its face, the requirements of the Clean Water Act appear simple and precise. Yet, the *Carr* and *Southview Farm* decisions demonstrate that the application of the Act and its regulations can be complicated. The district court judge in *Southview* described the Act as a "complex and largely uncharted labyrinthine statute."¹⁵⁰ This statement exemplifies the difficulty livestock operators and their attorneys have had in determining whether or not they should obtain an NPDES permit.

By closely analyzing the Act's regulations along with the *Carr* and *Southview Farm* decisions, an attorney can develop a good understanding of the scope of the Act. An essential element in determining whether or not a livestock operation needs

143. The regulations definition of "facility" appears to support the Second Circuit's ruling. The regulations state: "facility or activity means any NPDES 'point source' or any other facility or activity (including land or appurtenances thereto) that is subject to regulation under the NPDES program." 40 C.F.R. § 122.2 (1996).

144. *Southview Farm*, 34 F.3d at 120.

145. See Frarey & Pratt, *supra* note 1, at 11.

146. See REGION VI PERMIT, *supra* note 44, at 33-35.

147. See *id.* at 33.

148. "A place constructed of or full of intricate passageways and blind alleys." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 668 (1986).

149. See discussion *supra* Part II.

150. *Concerned Area Residents for the Environment v. Southview Farm*, 834 F. Supp. 1410, 1429-30 (W.D.N.Y. 1993), *rev'd*, 34 F.3d 114 (2d Cir. 1994).

to obtain an NPDES permit is to first understand the type of animals confined in the operation as well as the size and location of the facility. While the Clean Water Act fails to absolutely require every animal feeding operation of a certain size to obtain a permit, these elements are essential when deciding if a facility should obtain a permit.

First, it is vital to understand what type of animals the feeding operation confines. In order to correctly compute the number of animal units¹⁵¹ a facility confines, one must first determine whether the facility feeds cattle, horses, poultry, swine, or sheep.¹⁵² The regulations utilize a scale to determine animal units — giving greater deference to smaller animals such as chickens and turkeys.¹⁵³ In addition, the way an animal is used is also determinative. For example, feeder cattle are distinguished from dairy cattle. Once the number of animal units is determined, the facility can be slotted as a large (1000 animal units), a medium (300 to 999 animal units), or a small (less than 300 animal units) livestock operation.

Next, the size of the facility should be considered. The *Southview Farm* decision found that a facility's entire acreage was part of the animal feeding operation.¹⁵⁴ As a result, it is imperative that an attorney know the size and scope of the facility's operations, at least to the extent of the confinement of animals and the movement of waste throughout the facility. Finally, the location of the livestock operation should be considered when determining whether an NPDES permit should be obtained.¹⁵⁵ The Clean Water Act only regulates the discharge of pollutants into navigable waters.¹⁵⁶ If absolutely no threat of discharge is present, then a permit probably is not required. However, remember that Congress intended that "navigable waters be broadly interpreted."¹⁵⁷

A. Large Facilities

Large animal feeding operations represent the clearest kind of livestock feeding operation that meets the qualifications of a CAFO.¹⁵⁸ The best examples are large cattle feedlots in western Oklahoma and the enormous poultry facilities found in eastern Oklahoma. Other examples include large dairy and swine operations, which are also prevalent throughout Oklahoma. If over 1000 animal units are confined, the facility meets the qualifications of a large livestock operation.¹⁵⁹ However, the mere number of animals confined does not automatically make the operation a CAFO.¹⁶⁰ The EPA regulations exempt an animal feeding operation from CAFO status if the

151. See 40 C.F.R. pt. 122, app. B (1996); see also *supra* note 30.

152. See 40 C.F.R. pt. 122, app. B.

153. See *id.*

154. *Southview Farm*, 34 F.3d at 123.

155. One should consider the proximity of rivers, streams, or other water source to the facility.

156. 33 U.S.C. § 1311(a) (1994).

157. See *supra* note 14.

158. See *supra* text accompanying note 30-35.

159. 40 C.F.R. pt. 122, app. B(a) (1996).

160. See *supra* text accompanying note 42-43.

facility discharges only in a 25-year, 24-hour storm event.¹⁶¹ As a result, even if the feedlot confines 100,000 slaughter cattle, the facility will not be a CAFO if it only discharges in a 25-year, 24-hour storm. Because CAFOs are the only agricultural activity required to obtain an NPDES permit, a large livestock operation which poses no risk of discharge, except in a 25-year, 24-hour storm, will not be required to obtain a permit. However, as in *Carr*, a series of storms might often create more runoff than a 25-year, 24-hour storm. Consequently, a large livestock operation without a permit carries the risk of a discharge under extraordinary circumstances.

In addition, if a large facility disposes of its waste by field application, the risk of discharge from the application must also be considered. The Second Circuit in *Southview Farm* concluded that the "agriculture storm water discharge" exception did not apply to CAFOs.¹⁶² Under this analysis, presumably any detection of discharged waste that enters navigable waters from a CAFO's application fields will violate the Clean Water Act. Consequently, if any risk of discharge exists, a large livestock operation should probably obtain an NPDES permit. Once the minimum number of animals are confined, any discharge, except from a 25-year, 24-hour storm, violates the Clean Water Act.¹⁶³

B. Medium Sized Facility

If a livestock operation confines between 300 and 1000 animal units and poses a direct threat of discharge,¹⁶⁴ the operation will also qualify as a CAFO subject, of course, to the 25-year, 24-hour storm exception. An operation represents a direct threat if it discharges waste through a manmade conveyance or if the confined animals come into direct contact with a water source that passes through the facility.¹⁶⁵ A medium livestock operation should absolutely obtain an NPDES permit if a risk of direct discharge is present. On the other hand, a permit is unnecessary if the factors that constitute a direct discharge are not present because such a medium sized facility would be incapable of qualifying as a CAFO.¹⁶⁶

For example, a swine operation which confines 900 pigs weighing more than twenty-five pounds clearly meets the number requirement for a medium CAFO.¹⁶⁷ If the operation utilizes a manmade ditch that funnels waste into a nearby stream when it rains, the second prong required for medium sized CAFOs is also satisfied.¹⁶⁸ The moment the facility discharges without an NPDES permit, the facility violates the Clean Water Act. Conversely, if the direct threat of discharge as represented by the manmade ditch in this example is not present, the swine operation lacks the elements to qualify as a CAFO. If rain causes waste to discharge into a

161. See *supra* text accompanying note 42.

162. *Southview Farm*, 34 F.3d at 123.

163. See *Carr*, 931 F.2d at 159-60.

164. See *supra* note 40 and accompanying text.

165. 40 C.F.R. pt. 122, app. B(b) (1996); see *supra* note 36 and accompanying text.

166. See 40 C.F.R. pt. 122, app. B (1996). But see *infra* Part V.C.

167. 40 C.F.R. pt. 122, app. B(b) (1996).

168. *Id.*

nearby creek bed, the operation will not be in violation of the Clean Water Act because it is not a point source.¹⁶⁹

The *Southview Farm* decision points out another instance when a permit might be required. For example, a medium sized cattle feedlot confines 350 head of cattle in its main feedlot that poses no threat of direct discharge. A small holding pen, capable of holding fifty head of cattle, is built in an adjacent pasture. A dry creek bed runs through the small holding pen. A rainstorm, not of the 25-year, 24-hour type, causes the creek bed to flow into adjoining tributaries. Cattle in the holding pen come into direct contact with the water and, consequently, discharge waste into the water. Because the *Southview Farm* court adopted the broad interpretation of a CAFO, the entire acreage owned by the feedlot became a CAFO the moment the discharge occurred.¹⁷⁰ CAFOs are point sources under the Clean Water Act.¹⁷¹ Any discharge made by a point source without an NPDES permit is unlawful.¹⁷²

The risk of liability for field application of waste under *Southview Farm* might be limited in the case of medium sized livestock operations that pose no threat of a direct discharge. Presumably, when waste is applied to a medium sized facility's fields or pastures, the "agriculture storm water" exception is probably retained. The *Southview Farm* decision only declared that the exemption does not apply to CAFOs.¹⁷³ A medium sized livestock operation that lacks the second prong of the regulatory requirement for medium sized CAFOs will not automatically qualify as a CAFO if it discharges. The Clean Water Act only regulates point source discharges.¹⁷⁴ Any discharge by nonpoint sources is outside the Act.¹⁷⁵ The storm water discharge exception merely clarifies this point as it relates to agriculture.¹⁷⁶ However, if the waste is overapplied and causes a direct discharge, a facility's truck could be found to be a point source in and of itself.¹⁷⁷

C. Case-by-Case Designation of Large and Medium Livestock Operations

At any time, the director of the NPDES program may designate any large or medium livestock operation as a CAFO upon determining that the facility is a "significant contributor of pollution."¹⁷⁸ If a large poultry facility that confines over 100,000 laying hens fails to obtain a permit on the basis that it will only discharge in a 25-year, 24-hour storm, the EPA or delegated state authority may designate the facility as a CAFO.¹⁷⁹ In addition, a medium cattle feedlot that confines 400

169. See discussion *supra* Part II.A.

170. See *Southview Farm*, 34 F.3d at 123.

171. See *supra* Part II.A.

172. See 33 U.S.C. § 1311(A) (1994).

173. *Southview Farm*, 34 F.3d at 123.

174. See 33 U.S.C. § 1362(12)(A) (1994).

175. See *id.* § 1362(14).

176. See *Southview Farm*, 34 F.3d at 119.

177. See *supra* text accompanying note 128.

178. 40 C.F.R. § 122.23(c)(1) (1996).

179. See *id.* But, "[a] permit application shall not be required from a [designated CAFO] . . . until the Director has conducted an on-site inspection of the operation . . ." 40 C.F.R. § 122.23(c)(3) (1996).

animals but poses no direct threat of discharge may also be designated. Once designated as a CAFO, the facility must obtain an NPDES permit due to its point source status under the Clean Water Act.¹⁸⁰

D. Designation of Small Livestock Operations

Livestock operations that confine less than 300 animal units may only qualify as a point source under the Clean Water Act by designation.¹⁸¹ In addition, the EPA regulations require more than the determination that the facility is a "significant contributor."¹⁸² A small livestock operation may only be designated as a CAFO if the facility poses a direct threat of discharge.¹⁸³ As with medium CAFOs, a small livestock operation represents a direct threat if it discharges waste through a manmade conveyance or if the confined animals come into direct contact with a water source that passes through the facility.¹⁸⁴ For example, a horse ranch that confines ten horses is incapable of being designated as a CAFO unless waste is discharged from the facility through a manmade conveyance or if a water source passes through the facility and the animals come in contact with the water.

VI. Oklahoma Feed Yards Act

Once a livestock operation determines whether or not it should obtain a federal NPDES permit, the operation should also consider comparative state legislation.¹⁸⁵ Most midwestern and western states have active animal waste control programs.¹⁸⁶ Oklahoma is no exception. In 1969, the Oklahoma legislature passed the Oklahoma Feed Yards Act (Feed Yards Act).¹⁸⁷ The Feed Yards Act designates CAFOs as point sources of pollution that are subject to a state licensing program.¹⁸⁸ In addition, the Oklahoma legislature authorized the Oklahoma Department of Agriculture "to promulgate rules and regulations for the administration, regulation, and enforcement of the [Feed Yards Act]."¹⁸⁹

180. See 33 U.S.C. § 1342 (1994).

181. See 40 C.F.R. § 122.23(c)(2).

182. See *id.*

183. See *id.*

184. See *supra* note 40.

185. See 33 U.S.C. § 1251(g) (1994) ("Federal agencies shall cooperate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.").

186. See generally ENVIRONMENTAL PROTECTION DIV., IOWA DEP'T OF NATURAL RESOURCES, LIVESTOCK WASTE CONTROL PROGRAMS OF TEN MIDWEST AND WESTERN STATES 1 (1990); see also ENVIRONMENTAL PROTECTION DIV., IOWA DEP'T OF NATURAL RESOURCES, LIVESTOCK WASTE CONTROL PROGRAMS OF IOWA AND EIGHT OTHER STATES 1 (1994).

187. Oklahoma Feed Yards Act, ch. 116, 1969 Okla. Sess. Laws 138 (codified as amended at 2 OKLA. STAT. §§ 9-201 to -215 (1991 & Supp. 1995)).

188. See 2 OKLA. STAT. § 9-202(A) (1991).

189. *Id.* § 9-203. "Licensed operations are required to develop a Pollution Prevention Plan to control pollutants with Best Management Practices utilized to prevent or reduce the pollution of surface or groundwater of the state." 35 OKLA. ADMIN. CODE § 30-35-9(e)(1) to -9(e)(2) (forthcoming), printed in OKLAHOMA DEP'T OF AGRIC., OKLAHOMA FEED YARD ACT RULES (1994) [hereinafter FEED YARD ACT

The criteria for determining a CAFO pursuant to the Feed Yards Act virtually mirrors those of the Federal Clean Water Act.¹⁹⁰ The Feed Yards Act similarly differentiates between large CAFOs that qualify by merely confining over 1000 animal units¹⁹¹ and medium CAFOs that confine at least 300 animal units plus pose a threat of direct discharge.¹⁹² A livestock operation may be designated as a CAFO on a case-by-case basis if it is determined to be a "significant contributor of pollution to the waters of the United States."¹⁹³ The Feed Yards Act also provides an exemption for animal feeding operations that otherwise meet the criteria for a CAFO. The legislation states that "no animal feeding operation is a . . . [CAFO] if such animal feeding operation discharges only in the event of a twenty-five year, twenty-four hour storm event."¹⁹⁴ Consequently, a livestock operation that confines over 1000 animal units is not automatically a CAFO and may choose not to obtain a state feed yards license. An unlicensed livestock operation only risks violating the Feed Yards Act if it meets the qualifications for a CAFO and it discharges in a non-25-year, 24-hour storm.¹⁹⁵

A. Protection of State Groundwater

Certain distinctions between the Federal Clean Water Act and the Oklahoma Feed Yards Act are worth noting. First, the feed yards license goes beyond protecting only the surface waters of Oklahoma. The "discharge limitations" set out by the Oklahoma Department of Agriculture specifically state that "[t]here shall be no discharge of process wastewater pollutants to surface or *groundwaters* of the state," except as

RULES].

190. See 2 OKLA. STAT. § 9-202(B) (1991); 40 C.F.R. § 122.23 (1996); 40 C.F.R. pt. 122, app. B (1996). See also *supra* Part II.A.

191. See 2 OKLA. STAT. § 9-202(B) (1991).

192. See *id.* § 9-202(B). The conditions to establish a threat of direct discharge are met when: Pollutants are discharged into waters of the United States through a man-made ditch, flushing system or other similar man-made device; or pollutants are discharged directly into navigable waters which originate outside of and pass over, across or through the facility or otherwise come into direct contact with the animals confined in the operation.

Id. § 9-202(B)(2)(b).

193. *Id.* § 9-202(B)(4)(a). In making this designation the Board shall consider the following factors:

(a) The size of the animal feeding operation and amount of wastes reaching waters of the United States;

(b) The location of the animal feeding operation relative to waters of the United States;

(c) The means of conveyance of animal wastes and process wastewater into waters of the United States;

(d) The slope, vegetation, rainfall and other factors affecting the likelihood or frequency of discharge of animal wastes and process wastewaters into waters of the United States; and

(e) Other such factors relative to the significance of the pollution problem sought to be regulated.

Id. § 9-202(B)(4)(a)(1).

Small animal feeding operations with less than 300 animal units can only be designated if a threat of direct discharge is present. See *id.* § 9-202(B)(4)(a)(2).

194. *Id.* § 9-202(B)(2)(b).

195. See *id.*

otherwise provided.¹⁹⁶ Conversely, federal case law supports the view that the Federal Clean Water Act does not extend to the protection of groundwater.¹⁹⁷ In this respect, the Feed Yards Act provides broader protection than the Clean Water Act. If a nonlicensed livestock operation that otherwise meets the qualifications of a CAFO utilizes a wastewater retention facility, such as a lagoon, and the wastewater percolates through the ground into a source of groundwater, the operation will be in violation of the Feed Yards Act.¹⁹⁸

B. Tort Protection for Licensed Facilities

Second, the Feed Yards Act establishes tort protection for licensed livestock operations. Animal feeding operations that are "operated in compliance with such standards,"¹⁹⁹ and in compliance with the regulations made and promulgated by the Board, shall be *deemed* prima facie evidence that a nuisance does not exist.²⁰⁰ Furthermore, no licensed livestock operation that is in compliance with the applicable regulations and standards²⁰¹ and "located on land more than three miles outside the incorporated limits of any municipality and which is not located within one mile of ten or more occupied residences shall be deemed a nuisance unless it is shown by a preponderance of the evidence that the operation endangers the health or safety of

196. FEED YARD ACT RULES, *supra* note 189, § 30-35-9(a) (emphasis added). "Surface or groundwaters of the State" means

all streams, lakes, ponds, marshes, watercourses, waterways, wells, springs, irrigation systems, drainage systems, and all other bodies or accumulation of water, surface and underground, natural or artificial, public or private, which are contained within, flow through, or border upon this state or any portion thereof and shall include in all instances waters of the United States. Process wastewater shall not be considered as waters of the state.

Id. § 30-35-2.

197. *See supra* note 14.

198. *See* FEED YARD ACT RULES, *supra* note 189, § 30-35-9(e)(2)(f)(ii)(VIII).

199. The Feed Yard Act provides a list of standards that represent proper maintenance of a livestock facility.

Owners and operators who are granted a feed yards license shall: (1) provide reasonable methods for the disposal of animal excrement; (2) provide chemical and scientific control procedure for prevention and eradication of pests; (3) provide adequate drainage from feed yards premises of surface waters falling upon the area occupied by such feed yards; take such action as may be necessary to avoid pollution of any stream, lake, river or creek; (4) provide adequate veterinarian services for detection, control, and elimination of livestock disease; (5) have available for use at all necessary times mechanical means of scraping, cleaning, and grading feed yards premises; (6) provide weather resistant aprons adjacent to all permanently affixed feed bunks, water tanks and feeding devices; (7) conduct feed yards operations in conformity with established practices in the feed yards industry as approved by regulations made and promulgated by the Board and in accordance with the standards set forth in this act.

2 OKLA. STAT. § 9-210(A) (Supp. 1995).

200. *Id.* § 9-210(B) (emphasis added). However, the operation must be located and operated in accordance with zoning regulations. *See id.*

201. *See supra* note 199.

others.²⁰² Even if an operation decides an NPDES permit is unnecessary, protection from tort liability provides an incentive for livestock operations to obtain an Oklahoma Feed Yard's license.

C. When is a Feed Yards License Required?

Due to the 25-year, 24-hour discharge exception, an Oklahoma livestock operation is only in violation of the Feed Yards Act if it meets the qualifications of a large²⁰³ or medium²⁰⁴ CAFO and discharges in a non-25-year, 24-hour storm. Similar to the NPDES permit, an operator must weigh the risk of such a discharge with the costs and burdens the licensing regulations create. However, if an Oklahoma livestock operation determines that an NPDES permit is necessary and applies for a federal permit, the regulations established pursuant to the Feed Yards Act require that a state feed yard's license also be obtained.²⁰⁵

VII. Proposed Legislation

As exemplified by the *Carr* and *Southview Farm* sagas,²⁰⁶ federal courts have had difficulty interpreting the Clean Water Act, especially as it pertains to CAFOs. While perhaps the Fifth and Second Circuit decisions were reasonable extensions of the Clean Water Act, many in the agricultural community viewed the decisions as an attack on their very existence. In addition, many congressmen thought the decisions were contrary to the true intent and scope of the Act. As a result, a revision of the Clean Water Act, House Bill 961, was put before the 104th Congress.²⁰⁷

House Bill 961, sponsored by Representative Shuster of Pennsylvania, attempted to revise the Clean Water Act in three ways that directly affect CAFOs. Most importantly, House Bill 961 attempted to overturn the holding from *Southview Farm*.²⁰⁸ Section 319 of the bill declared that "any land application of agricultural inputs, including livestock manure, shall *not be considered a point source* and shall be subject to enforcement only . . . [as a nonpoint source]."²⁰⁹ Accordingly, *Southview Farm's* broad interpretation of a CAFO,²¹⁰ which included waste application fields, would be statutorily overturned. Because the Clean Water Act only prohibits discharges from point sources of pollution, livestock operators who apply

202. 2 OKLA. STAT. § 9-210(C) (Supp. 1995).

203. See 2 OKLA. STAT. § 9-202(B) (1991); see also *supra* Part II.A.

204. See 2 OKLA. STAT. § 9-202(B) (1991); see also *supra* Part II.A.

205. See FEED YARD ACT RULES, *supra* note 189, § 30-35-7(a). "No new . . . [CAFO] or expansions requiring license coverage shall be placed into operation after . . . [May 9, 1994], unless in accordance with final design plans and specifications approved by the Board." *Id.* § 30-35-7(b).

206. See *supra* Parts III-IV.

207. H.R. 961, 104th Cong. (1995) available in LEXIS, Legis Library, Bltxt File (titled, "An Act to Amend the Federal Water Pollution Control Act"). House Bill 961 was introduced on February 15, 1995, and passed on May 16, 1995. The Senate did not vote on the revision during the 104th Congress.

208. See *supra* Part IV.B.

209. H.R. 961 § 319(o)(Q) (emphasis added). "[A]nd shall be subject to enforcement only under this section." *Id.*

210. See *supra* note 132 and accompanying text.

waste to fields and farmers who apply fertilizer would be outside the scope of NPDES permit requirements.²¹¹

A second attempt to revise the Clean Water Act as it affects CAFOs was found in section 401 of House Bill 961. This section added a provision that excluded "waste treatment systems, including retention ponds or lagoons, used to meet the requirements of this Act for concentrated animal feeding operations" from coverage under the Clean Water Act.²¹² Presumably, this provision is meant to statutorily support the regulatory definition that expressly excludes animal feeding operations that discharge only in a 25-year, 24-hour storm from the definition of a CAFO.²¹³ Thus, the ambiguous nature of the term "CAFO" would continue. However, the Fifth Circuit in *Carr* did recognize and apply the regulatory definition. While acknowledging that Alta Verde was not necessarily a CAFO before the discharge, the court in *Carr* determined that because the feedlot discharged in a non-25-year, 24-hour storm, it violated the Act.²¹⁴ Consequently, it is unclear how the new provision would have affected the holding in *Carr*.

Thirdly, House Bill 961 also proposed to revise the definition of a CAFO to exclude "intermittent nonproducing livestock operations" such as stockyards or holding and sorting facilities.²¹⁵ However, if a nonproducing livestock operation feeds or maintains animals for a ninety-day period and the number of animal units meets CAFO-size qualifications, the facility will be classified as a CAFO.²¹⁶ In addition, all intermittent nonproducing livestock operations are subject to case-by-case designation as a CAFO.²¹⁷

The 104th Congress failed to take action on House Bill 961, and consequently the bill was not enacted. Thus, *Southview Farm* will probably remain a valid precedent. All livestock operations that apply waste to crop or pasture land should consider obtaining an NPDES permit.²¹⁸

VIII. Conclusion — Do You Need a Permit?

Animal feeding operations that meet the criteria for a CAFO run the greatest risk of operating without an NPDES permit.²¹⁹ But, even if an operation meets the

211. House Bill 961 adds:

The purpose of . . . [the Clean Water Act Section 319 nonpoint source management programs] is to assist states in addressing nonpoint sources of pollution where necessary to achieve the goals and requirements of this Act. It is recognized that state nonpoint programs need to be built upon a foundation that voluntary initiatives represent the approach most likely to succeed in achieving the objectives of this Act.

H.R. 961 § 319(P)(R).

212. H.R. 961 § 401(6).

213. See *supra* note 42 and accompanying text.

214. See *supra* notes 78-82 and accompanying text.

215. See H.R. 961 § 502(14).

216. See *id.*

217. See *id.*

218. See *supra* notes 139-42 and accompanying text.

219. See 40 C.F.R. pt. 122, app. B (1996); see also *supra* text accompanying notes 30-36.

criteria for a CAFO, a permit is never required if the facility discharges only in a 25-year, 24-hour rainfall event.²²⁰ Any discharge of pollutants by a CAFO without a permit violates the Clean Water Act.²²¹ The *Carr* decision demonstrated that merely building lagoons capable of holding runoff from a 25-year, 24-hour storm did not insulate livestock operations from liability.²²² Any discharge not caused by a 25-year, 24-hour storm automatically subjects an operation that meets the criteria for a CAFO to liability under the Clean Water Act as a point source.²²³ In addition, once an operation becomes a CAFO, any future discharge constitutes a continuing violation of the Act until it obtains a permit or no longer poses a threat of continued discharges.²²⁴

The *Southview Farm* decision defined CAFOs to include the entire acreage of the operation.²²⁵ As a result, livestock operations not permitted by the NPDES must not only adequately retain waste water from the confined lots but must also insure that pollutants are not discharged from other areas of the operation. In addition, the Second Circuit in *Southview Farm* determined that the storm water discharge exemption did not apply to CAFOs.²²⁶ Consequently, livestock operations that meet the criteria for a CAFO run a great risk of liability under the Clean Water Act when they apply waste to land where runoff is remotely possible.

In order to best avoid future liability, any livestock operation that meets the criteria of a CAFO should apply for and obtain an NPDES permit. In addition to obtaining a federal NPDES permit, an operation should also recognize that most states also have laws that impact livestock operations.²²⁷ While an NPDES permit is not a license to pollute, once a facility complies with the requirements under the permit, the likelihood of discharge is greatly reduced. Livestock feeding operations must, therefore, weigh the benefits from permit coverage with the cost of compliance and the risk of discharge.

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220. See *supra* text accompanying notes 42, 160-61.

221. See 33 U.S.C. § 1311(a) (1994).

222. See *supra* Part III.

223. See *supra* text accompanying note 86, 99.

224. See *supra* Part III.D.

225. See *Southview Farm*, 34 F.3d at 121; see also *supra* text accompanying note 132.

226. See *Southview Farm*, 34 F.3d at 123; see also *supra* text accompanying note 140-142.

227. See *supra* Part VI.