

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS )  
)  
Complainant, )  
)  
v. ) PCB 10-84  
) (Enforcement – Land)  
PROFESSIONAL SWINE )  
MANAGEMENT, LLC, HILLTOP )  
VIEW, LLC, WILDCAT FARMS, LLC, )  
HIGH-POWER PORK, LLC, EAGLE )  
POINT, LLC, LONE HOLLOW, LLC, )  
TIMBERLINE, LLC, PRAIRIE )  
STATE GILTS, LTD, NORTH FORK )  
PORK, LLC, and LITTLE TIMBER, LLC, )  
)  
Respondents. )

**NOTICE OF FILING**

TO: Mr. John T. Therriault Carol Webb, Esq.  
Assistant Clerk of the Board Hearing Officer  
Illinois Pollution Control Board Illinois Pollution Control Board  
100 West Randolph Street 1021 North Grand Avenue East  
Suite 11-500 Post Office Box 19274  
Chicago, Illinois 60601 Springfield, Illinois 62794-9276  
(VIA ELECTRONIC MAIL) (VIA U.S. MAIL)

**(PLEASE SEE ATTACHED SERVICE LIST)**

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board MOTION FOR LEAVE TO SUPPLEMENT REPLY TO COMPLAINANT'S RESPONSE TO RESPONDENTS' MOTION FOR PARTIAL DISMISSAL, a copy of which is herewith served upon you.

Respectfully submitted,

HILLTOP VIEW, LLC, EAGLE POINT FARMS  
LLC, LONE HOLLOW, LLC, TIMBERLINE, LLC,  
PRAIRIE STATE GILTS, LTD., and LITTLE  
TIMBER, LLC,

Respondents,

Dated: March 18, 2011  
Edward W. Dwyer, #6197577  
Jennifer M. Martin, #6210218  
HODGE DWYER & DRIVER  
3150 Roland Avenue  
Post Office Box 5776  
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By:                   /s/ Edward W. Dwyer                    
One of Its Attorneys

**THIS FILING SUBMITTED ON RECYCLED PAPER**

**CERTIFICATE OF SERVICE**

I, Edward W. Dwyer, the undersigned, hereby certify that I have served the attached MOTION FOR LEAVE TO SUPPLEMENT REPLY TO COMPLAINANT'S RESPONSE TO RESPONDENTS' MOTION FOR PARTIAL DISMISSAL upon:

Mr. John T. Therriault  
Assistant Clerk of the Board  
Illinois Pollution Control Board  
100 West Randolph Street  
Suite 11-500  
Chicago, Illinois 60601

via electronic mail on March 18, 2011; and upon:

Ms. Carol Webb  
Hearing Officer  
Illinois Pollution Control Board  
1021 North Grand Avenue East  
Post Office Box 19274  
Springfield, Illinois 62794-9274

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by depositing said documents in the United States Mail, postage prepaid, in Springfield, Illinois, on March 18, 2011.

/s/Edward W. Dwyer  
Edward W. Dwyer

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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	)	
Complainant,	)	
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v.	)	PCB 10-84
	)	(Enforcement – Land)
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PORK, LLC, and LITTLE TIMBER, LLC,	)	
	)	
Respondents.	)	

**MOTION FOR LEAVE TO SUPPLEMENT  
REPLY TO COMPLAINANT'S RESPONSE TO  
RESPONDENTS' MOTION FOR PARTIAL DISMISSAL**

NOW COME Respondents HILLTOP VIEW, LLC, EAGLE POINT FARMS, LLC, LONE HOLLOW, LLC, TIMBERLINE, LLC, PRAIRIE STATE GILTS, LTD., and LITTLE TIMBER, LLC (“Respondents”), by and through their attorneys, HODGE DWYER & DRIVER, and pursuant to 35 Ill. Admin. Code § 101.500(e), submit this Motion for Leave to Supplement Their Reply to Complainant’s Response to Respondents’ Motion for Partial Dismissal (“Supplemental Reply”). Respondents submit the following as their Supplemental Reply:

1. On September 9, 2010, Respondents filed a Motion for Partial Dismissal of Complainants’ First Amended Complaint (“Amended Complaint”). The Respondents asserted that contrary to allegations in Complainants’ First Amended Complaint, there is no applicable statute or regulation that requires the Respondents who operate concentrated animal feeding operations (“CAFOs”) in Illinois to apply for a National

Pollutant Discharge Elimination System Permit (“NPDES”). On October 21, 2010, Respondents filed their Reply to Complainant’s Response to Respondents’ Motion for Partial Dismissal. In response, on November 5, 2010, People of the State of Illinois (“Complainant”) filed a Combined Sur-Reply to Respondents’ Motion for Partial Dismissal (“Sur-Reply”).

2. In its Sur-Reply, Complainant contends that the 2008 federal CAFO rule, 73 Fed. Reg. 70418 (Nov. 20, 2008) (“2008 CAFO Rule”), established a “duty to apply” for an NPDES Permit. *See* Sur-Reply at 4, ¶15, (“After December 22, 2008, when the 2008 federal CAFO rule ‘duty to apply’ provision of ‘discharge or propose to discharge’ came into effect. The requirement to obtain a permit became subject to this ‘duty to apply’ provision.”). Complainant implies that this requirement was a new requirement not previously contained in the 2008 CAFO rule. *See* Sur-Reply at 3, ¶11 (“After December 22, 2008, the 2008 federal CAFO rule ‘duty to apply’ provision requiring CAFOs that ‘discharged or proposed to discharge’ came into effect pursuant to federal rule.”).

3. As discussed in detail in Respondents’ Motion for Partial Dismissal, this is incorrect. The 2008 CAFO Rule replaced the “duty to apply” provision with a requirement that only CAFOs that “discharge or propose to discharge” are required to obtain an NPDES Permit. *See* 73 Fed. Reg. 70418, 70423.

4. There is no “duty to apply” provision newly established by the 2008 CAFO Rule, and there is no duty for every CAFO owner or operator in Illinois to apply for an NPDES Permit.

5. The Director of the Illinois Environmental Protection Agency (“Illinois EPA”) Doug Scott, by letter dated November 1, 2010, presented Illinois EPA’s Response (“Response”) to the United States Environmental Protection Agency’s Initial Results of an Informal Investigation of the NPDES Program for CAFOs in the State of Illinois dated September 2010. In the Response, the Illinois EPA stated “Since there is no ‘duty to apply’ for all CAFOs in the federal 2008 CAFO rule and Illinois has no separate state program, the Illinois EPA has no statutory authority to require all CAFOs to apply for a CAFO permit.” *See* Response at 2, attached as Exhibit A, which can also be accessed electronically at: <http://epa.gov/region5/illinoiscafo/iepafinalresponse.pdf>.

6. Additionally, on March 15, 2011, the United States Court of Appeals for the Fifth Circuit issued an opinion which vacated the provisions of the 2008 CAFO rule that required CAFOs that propose to discharge to apply for an NPDES permit, and also vacated the provisions that create liability for failing to apply for an NPDES permit. *See Nat'l Pork Producers Council v. United States EPA*, 2011 U.S. App. LEXIS 5018 \*46-47 (5th Cir. Mar. 15, 2011), attached as Exhibit B. The Fifth Circuit case consolidated various petitions for review of the 2008 CAFO Rule which were filed in the Seventh, Eighth, Ninth, Tenth and District of Columbia Circuits. *Id.* at \*2. The Fifth Circuit held that requiring CAFOs who were not presently discharging into navigable waters of the United States to apply for an NPDES permit went beyond the authority granted by the CWA. *Id.* at \*28-29. However, the court also stated that those CAFOs who were discharging could be required to obtain an NPDES permit because such a requirement was consistent with the CWA’s regulations of discharges. *Id.* at \*32. Thus, the Fifth

Circuit concluded: “We hereby vacate those provisions of the 2008 Rule that require CAFOs that propose to discharge to apply for an NPDES permit, but we uphold the provisions of the 2008 Rule that impose a duty to apply on CAFOs that are discharging.” *Id.* at \*46-47. An existing discharge (or, presumably, a present intent to cause a discharge in the future) is required before the obligation to apply for and obtain a permit arises. *See id.* at \*28. Viewed in light of the factual allegations of the First Amended Complaint, there has never been a valid requirement, then, that any of the Respondents apply for or obtain an NPDES permit.

7. The Illinois EPA is the relevant implementing agency for the federal Clean Water Act, 33 U.S.C. § 1251, *et seq.*, and is tasked with administering the Illinois NPDES Permit Program and issuing and enforcing permits. *See* 415 ILCS 5/4(g) and (l). Complainant, on behalf of the People of the State of Illinois, is making an argument that directly conflicts with 1) applicable regulations; 2) the position taken by the Illinois EPA, the relevant permitting authority for the State of Illinois, tasked with implementing the CAFO NPDES Permit Program in Illinois; and 3) the above-referenced Fifth Circuit Opinion. The attached exhibits are extremely relevant to the Illinois Pollution Control Board’s (“Board”) consideration of pending motions in this proceeding, and indeed may be dispositive on the question of whether Count IV, Count V, Count VI, Count VII, and Count IX in Complainant’s Amended Complaint, all alleging that Respondents, by causing or allowing the discharge of livestock wastewater to waters of the State, violated Section 12(f) of the Act, i.e. did not have NPDES permits, should be dismissed. (*See*

Amended Complaint, Count IV ¶20, Count V ¶22, Count VI ¶22, Count VII ¶27, and Count IX ¶33.)

8. Respondents respectfully request that the Board take this information into consideration when considering the Motions to Dismiss and Responses thereto, now pending in this case.

9. Based upon conversations with counsel for co-Respondent Professional Swine Management, LLC, the undersigned also advises the Board that co-Respondent Professional Swine Management joins in support of this Motion to Supplement.

WHEREFORE, for the reasons stated above and because Respondents, HILLTOP VIEW, LLC, EAGLE POINT FARMS, LLC, LONE HOLLOW, LLC, TIMBERLINE, LLC, PRAIRIE STATE GILTS, LTD., and LITTLE TIMBER, LLC, believe this additional and timely information to be directly relevant to this case, appropriate for the Board to consider regarding the pending Motions of Respondents and Complainants

Responses thereto and therefore be included in the record, Respondents respectfully request that the Board accept this Motion for Leave to Supplement its previously filed Response.

Respectfully submitted,

HILLTOP VIEW, LLC, EAGLE POINT FARMS, LLC, LONE HOLLOW, LLC, TIMBERLINE, LLC, PRAIRIE STATE GILTS, LTD., and LITTLE TIMBER, LLC, Respondents,

Dated: March 18, 2011

By: /s/ Edward W. Dwyer

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Jennifer M. Martin, #6210218  
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HOGS:004/Fil/Mtn for Leave to Sup Reply to Comp. Resp.



EXHIBIT A

Illinois EPA Response to USEPA, Region 5's September 2010  
*"Initial Results of an Informal Investigation of the National Pollutant  
Discharge Elimination System Program for Concentrated Animal  
Feeding Operations in the State of Illinois"*  
November 1, 2010

This document contains the Illinois Environmental Protection Agency (Illinois EPA or Agency) responses to the findings, required actions and recommendations made by Region 5 of the United States Environmental Protection Agency (USEPA-Region 5 or Region 5) in *"Initial Results of an Informal Investigation of the National Pollutant Discharge Elimination System Program for Concentrated Animal Feeding Operations in the State of Illinois."* The Initial Results Report reflects a review of Illinois EPA's Concentrated Animal Feeding Operation (CAFO) program activities and statistics for the period of December 2008 to September 2009. The responses below provide evidence of progress in administering the CAFO program, as well as our commitments for continued improvements in CAFO permitting, inspection and enforcement programs.

**Permitting**

As of November 1, 2010, the Illinois EPA has issued 14 NPDES permits for CAFOs, and two additional CAFO permit applications are on public notice.

The Initial Report reflected 76 CAFO applications filed with the Agency. At the time Region 5 queried the Illinois EPA's files, there were approximately 40 newer applications, most of which were incomplete, plus an additional 45 older applications that the Agency had determined to be from facilities that were no longer in service or did not require permits.

• Current Applications

To compel additional information from applicants who had failed to submit complete applications, Illinois EPA has requested that Region 5 issue Administrative Orders (AO) under Sections 308 and 309 of the Clean Water Act (CWA). This process began in July 2010. In addition, the Agency is using Violations Notices to compel applicants to respond with complete applications.

Illinois EPA has made significant progress on the 40 incomplete applications. Under the FY10-11 Performance Partnership Agreement (the PPA is an agreement that contains work items for all Agency programs to be performed as part of the grant agreement between Illinois EPA and USEPA); Illinois EPA has until September 30, 2011 to complete the review and issuance of these 40 applications. Of those 40 applications:

- Nine have been referred to Region 5 for issuance of administrative orders seeking necessary documents to complete those applications.
- Two have been issued Violation Notices (VNs) for the same reason.
- 18 are under review (several of those applications were received within the last 60 days),
- Two are now on public notice.
- Nine have completed for public notice and are in the process of being issued permits.

Illinois EPA expects to receive six new applications in December 2010 and 13 more in March 2011, all from a single livestock producer. Illinois EPA intends to address these 19 new applications with existing staff, completing each review within 60 days of receipt.

Illinois EPA will seek an amendment to the EPAct in the next legislative session for administrative order authority to enforce against facilities that fail to apply or fail to submit complete applications. Until administrative order authority is enacted, the Illinois EPA must continue to rely on the EPAct's Section 31 process for enforcement purposes and on referrals to Region 5 for issuance of administrative orders, as appropriate.

Currently, Illinois EPA is following the schedule outlined in the FY 2010—2011 PPA. Illinois EPA is willing to adjust the time frame for permit issuance in consultation with Region 5.

The Illinois EPA will use criteria established in USEPA's CAFO guidance in determining whether an NPDES permit is required. CAFOs that meet these criteria will be required to seek a permit from Illinois EPA.

In order to increase the number of permits issued and the efficiency with which permit applications will be reviewed, Illinois EPA will seek approval to hire three new permit staff. As is currently the practice, USEPA and Illinois EPA will hold conferences calls at frequent intervals to review the status of CAFO applications.

The Initial Report recommends that Illinois EPA consider establishing an unambiguous requirement for CAFOs to apply for a permit. Currently, Illinois EPA is constrained by Section 11 of the EPAct to issue an NPDES permit for only those circumstances for which USEPA would issue an NPDES permit. Since there is no "duty to apply" for all CAFOs in the federal 2008 CAFO rule and Illinois has no separate state program, the Illinois EPA has no statutory authority to require all CAFOs to apply for a CAFO permit. However, Illinois EPA will attempt to amend the EPAct to add such a requirement.

- Old Applications

Illinois EPA has investigated and identified the 45 old applications as facilities that are no longer in existence or in need of a permit. Of those 45, we have inspected approximately 40 between 2007 and 2009, finding that nine no longer needed permits and were subsequently issued letters to that effect, five were abandoned or did not exist and two were never built.

The Initial Results report requires Illinois EPA to either issue or deny permit for these 45 applications. Illinois EPA does not believe responding to these applications with a permit denial for a facility that does not now exist or that does not need a permit is appropriate and is consistent with Section 39(a) of the Illinois Environmental Protection Act (EPAct or Act). Under this section, the Agency cannot issue or deny a permit if such permit is not required by the EPAct or the Illinois Pollution Control Board regulations.

Illinois EPA cannot lawfully deny permits unless the application in some fashion violates a provision of the EPA Act or the Illinois Pollution Control Board regulations (see 415 ILCS 5/1 *et seq.*). To confirm our initial findings, Illinois EPA is committing to re-investigate these 45 facilities. Illinois EPA will by August 1, 2011: 1) provide documentation of those facilities that no longer exist, 2) attempt to re-contact existing facilities that do not propose to discharge and advise them that withdrawing their application is an option, and 3), in those cases in which Region 5 argues that permits might be required under the 2008 CAFO rule, advise owners to obtain an NPDES permit, including filing a complete application within a specified period of time of Illinois EPA's notification.

### **Compliance Evaluation/Inspection Program**

- Inventory

The Illinois EPA will meet the commitment in the FY 2010—2011 PPA to complete the final CAFO inventory within 12 to 18 months of finalizing the pilot.

In the interim, by May 1, 2011, Illinois EPA will develop an interim list of CAFOs using currently available resources, such as the current permit application list, the list of facilities for which complaints were received, IDOA approved facilities and IDPH approved/inspected sites. From this interim list, the Agency will develop a prioritized inspection strategy.

In order to have a complete, uniform inventory, Illinois EPA has contracted with Western Illinois University (WIU) to provide a seven (7) county pilot survey that can be updated as necessary. The inventory now in development by WIU will provide readily updateable, Geographic Information System (GIS)-based documents (e.g., maps and photos) of each site. This GIS-based methodology will use shape files from IDOA livestock facilities' and Illinois Department of Public Health (IDPH) dairy facilities' data. The initial pilot of the GIS-based inventory will be ready for field verification by January 31, 2011. Illinois EPA will seek assistance from Region 5 in the funding and review of the statewide inventory.

Further, Illinois EPA will propose a revision in the state livestock regulations (a draft of which will be sent to Region 5 by December 1, 2010) so that livestock producers are required to file basic information with the Illinois EPA. The proposed revisions to Subtitle E will allow Illinois EPA to populate a statewide inventory, which then can be used for prioritization of inspections and permitting decisions.

- Inspection SOPs

Illinois EPA is committed to developing standard operating procedures (SOPs) for inspections and reports. However, the Agency believes the underlying problems associated with CAFO inspections (i.e., lack of resources and an adequate, centralized inventory) have little to do with the lack of SOPs for inspections and report drafting. The Agency's CAFO inspections are rigorous and complete. The Initial Results report assumes that all Illinois EPA inspections were conducted for purposes of determining NPDES compliance. Many inspections conducted by the Agency staff were for more targeted reasons, often based on citizen complaints regarding specific incidents or were in response to emergencies at livestock facilities. Because of the specific scope of these inspections, they should not be compared to routine monitoring and compliance inspections at permitted facilities.

By August 1, 2011, Illinois EPA will develop and train staff in the use of SOPs for CAFO inspections. The SOP will be provided to Region 5.

By August 1, 2011, Illinois EPA will develop and train staff in the use of an inspection checklist that aligns with the requirements of the CAFO general permit. The checklist will be provided to Region 5.

In the past, only NPDES permitted facilities were loaded into ICIS. Illinois EPA has the capability to load past and future CAFO inspections, whether permitted or not. By May 1, 2011, Illinois EPA will enter all CAFO inspections into ICIS.

- Citizen's Complaints

The Initial Results report found that "it is not clear that they [Illinois EPA] consistently provide a timely response to the complainant." A further review of the Illinois EPA's complaint logs and, more importantly, follow up discussions with the staff who investigate these complaints would have addressed the matter. While no log is kept of the follow up and written response is not always given, staff do follow up with the complainants via phone and email. As each investigation is subject to its own complexity and timeframe, the staff follows up with the complainants when the investigation has been concluded.

By February 1, 2011, Illinois EPA will establish a process for providing written responses when requested by complainants to describe actions taken by the Illinois EPA in response to that complaint.

By February 1, 2011, Illinois EPA will establish appropriate procedures for responding to complainants.

### **Enforcement Program**

- Enforcement Response Guide

Illinois EPA must take timely and effective enforcement and therefore must revise its Enforcement Management System (EMS), specifically, the Bureau of Water's Enforcement Response Guide, to include a time frame for making enforcement decisions.

In order to address these concerns, by January 1, 2011, the Illinois EPA will modify our Enforcement Response Guidance (ERG) to assure that escalation of CAFO enforcement is consistent with enforcement responses for other, similar NPDES violations. In addition, the ERG will require that where a CAFO has a discharge or is designed, constructed, operated and maintained to have a discharge, a permit will be required. This modified ERG will assure that all CAFO violations are evaluated against set criteria so that consistent, timely and appropriate enforcement actions are taken. This ERG will include a requirement that all CAFOs which had a discharge or are designed, constructed, maintained or operated to have a discharge, will be required to apply for and obtain an NPDES permit.

The Illinois EPA must adhere to the statutory deadline requirements of Section 31 of the Act as described below. However, the Illinois EPA anticipates referring more cases to USEPA

for prosecution. In addition, Illinois EPA will seek administrative order authority that will include penalties. Should the Illinois EPA be successful in obtaining this authority, much more timely enforcement actions will be achieved.

Section 31 of the EPAct sets the basic framework for environmental compliance assurance/enforcement in Illinois. Illinois EPA in pursuing enforcement cases must adhere to the Section 31 process as outlined below.

Within 180 days of the Agency becoming aware of a violation of the Act, a regulation or a permit, it issues a VN informing the person of the facts related to the alleged violation. The person has the opportunity to meet with the Illinois EPA and explain the violation. The person may also submit a written proposed Compliance Commitment Agreement (CCA) which sets forth time lines for returning to compliance with the EPAct and correcting any environmental harm. The individual may also meet with the Illinois EPA compliance and inspection staff. No penalties are sought at this stage and environmental compliance is expected to be promptly achieved.

If the Illinois EPA determines that the CCA is inadequate (e.g., the alleged violation is not sufficiently addressed or a civil penalty is needed) or that the environmental harm is significant, the Illinois EPA may reject the CCA and proceed to formal enforcement by issuing a Notice of Intent to Pursue Legal Action (NIPLA) letter to the person. The person is given another opportunity to meet with the Illinois EPA personnel and discuss in detail mechanisms for resolving the violation short of referral to the Attorney General's Office (AGO) or the appropriate State's Attorney's Office (SAO). Several matters are resolved at this stage.

If the person does not reach resolution after the NIPLA meeting, the matter is referred to the Attorney General's office or the SAO for litigation, penalties, and an enforceable order. The only exception in this procedure is set forth in Section 43 of the EPAct. Specifically, if there is a substantial danger to the environment or public health, an immediate referral of the matter to the AGO or SAO is allowed without need of a VN or NIPLA.

In addition, the Initial Report requires the Illinois EPA to maintain a Compliance Monitoring Strategy (CMS) consistent with current regulatory policy. By November 1, 2011, the Illinois EPA will develop a state-specific CMS for Region 5's approval.

- Penalties

In addressing CAFO violations in 2008 and 2009, Illinois EPA sent 54 Noncompliance Advisories (NCAs), issued 39 VNs, issued 10 NIPLAs and referred 23 cases to the Attorney General.

The Initial Results report cites (page 27) that "62.5% of the Violation Notices reviewed did not, or will not, return the facility to compliance." VNs alone—without implementation of an acceptable CCA or further action via a NIPLA or referral to the Attorney General or SAO—are not expected to resolve all violations. Illinois EPA must follow enforcement procedures as outlined above.

Currently, Illinois EPA considers a CCA completed and resolved when information is obtained and the agreed upon actions have been taken. A "completed" CCA means that the alleged violation has been satisfactorily resolved pursuant to the Act. However, USEPA does not recognize this current procedure as formal enforcement action resolving the violations. Illinois EPA will require a signed certification be submitted from the VN recipient certifying that all CCA milestones have been completed and that the facility has returned to compliance. This additional documentation will be placed in the paper files. In cases when the CCA is accepted, Illinois EPA will conduct follow-up inspections on a portion of these facilities to ensure that compliance has actually been achieved. The failure of a facility to be in compliance with the CCA will result in immediate escalated enforcement, and providing false information to Illinois EPA (e.g., a fraudulent certification) is now a felony offense.

USEPA has concerns that the penalty amount recovered is not achieving deterrence and that an insufficient number of agricultural pollution matters are being referred, and that the penalty amount recovered is too low. Illinois EPA does not have authority to impose and collect penalties; it makes a penalty recommendation to the prosecuting authority. As the Illinois EPA does not assess penalties, it will continue to urge the prosecuting authority to assess penalties which will obtain deterrence.

Illinois EPA will revise the ERG as necessary to ensure that penalty recommendations to the Illinois Attorney General are appropriate and consistent, but in general, will continue to follow the USEPA guidance and State law factors on penalty calculation. In addition, the Illinois EPA will continue to maintain documentation of its calculations and worksheets.

- Response to Citizen Requests for Information  
The Illinois EPA currently administers the Illinois Freedom of Information Act (FOIA) under rules adopted on April 15, 2002 and more recently amended in response to changes made to the FOIA. The rules may be found in 2 Ill Adm Code, Subtitle E, Parts 1825 and 1828 (see attachment). These rules establish the procedures by which the Illinois EPA responds to public requests for its documents. In addition, the Illinois EPA uses an internal Document Screening Manual (March 2005) (see attachment) that addresses the issues of exemptions from FOIA, document screening processes and procedures. Illinois EPA believes these rules and the Manual adequately address the question of how and when Illinois EPA provides documents, including NPDES applications, to the public.

Since the Illinois EPA has existing and up-to-date FOIA rules and procedures, we propose to take no further actions in this matter.

#### **Compliance with the Performance Partnership Agreement**

Since the signing of the FY 2010--2011 PPA in November 2009, Illinois EPA has made significant progress in issuing permits, completing review of applications and acquiring additional information for incomplete applications through Illinois EPA/Region 5 cooperative efforts, and through inspections to determine if facilities existed and needed CAFO permits. For further details, please refer to the Agency's response to 1.

The Illinois EPA believes that it has been closely following the milestones outlined in the PPA. Illinois EPA is 1) requiring nutrient management plans (NMPs) (including stormwater and emergency management plans and controls), 2) posting the notices of applications and intent to issue coverage under the CAFO general permit, and 3) Illinois EPA will share the complete draft of the CAFO rule with Region 5 by December 1, 2010.

#### **Organization and resources**

In 2008 and 2009, Illinois EPA inspectors surveyed a total of 312 livestock facilities of which 118 facilities were contacted for the first time. The total number of on-site visits conducted during 2008 and 2009 was 542 (this includes multiple visits to the same sites). The inspections included livestock facilities that housed beef, dairy, swine, poultry, sheep and horses. These inspections covered livestock facilities that had animal units less than 50 and as many as 5000. For more details on the livestock inspection program for the last decade, please refer to the Illinois EPA Livestock Facility Investigation Annual Reports at <http://www.epa.state.il.us/water/cafo/reports/index.html>.

The Illinois EPA currently uses approximately five full time employees (FTEs) for the CAFO program. These FTEs are responsible for the inspections and CAFO permit applications. They are also responsible for responding to citizen complaints involving CAFOs. While these FTEs spend most of their time on the CAFO program, they also are responsible for other NPDES related inspections and responding to non-CAFO complaints.

In the interim, all CAFO staff will be responsible for reviewing permit applications, conducting CAFO inspections and responding to citizen complaints. The interim list (as described in 2(A) above) will be used by the CAFO staff prior to the actual development of a GIS-based inventory. New inspections will be used to populate the list and inventory.

By May 1, 2011 Illinois EPA will prepare a workload assessment consistent that will address the use of the interim list and the GIS-based inventory for purposes of inspection and permitting prioritization. As new FTEs are added, both new and current staff will be required to attend training via available resources through the internet (web-based USEPA training) and through classroom type training sessions with Region 5 staff. Illinois EPA will also use USEPA contractual assistance in setting up necessary training.

#### **Legal authority**

The Illinois EPA has been working with a stakeholder group (CAFO Workgroup) to revise Illinois CAFO rules to ensure consistency with the 2008 federal CAFO rule. The Illinois EPA first met with various stakeholders in December 2009. The CAFO Workgroup is comprised of representatives from the several livestock sectors, citizens and environmental interest groups, National Resources Conservation Service (NRCS), the University of Illinois-Cooperative Extension Service and the IDOA. The objective of forming the CAFO Workgroup was to seek complete and thorough input of stakeholders on key issues early in the rule development process.

Illinois EPA sent out a complete initial draft on October 15, 2010, to the CAFO workgroup for review and comment. The CAFO Workgroup has been asked to provide comments by

November 10, 2010. After reviewing comments from these stakeholders, by December 1, 2010 the Illinois EPA will send a revised draft of Illinois' CAFO rules to Region 5 for its review. On October 15, 2010 Illinois EPA sent a draft of the Subtitle E revisions to the CAFO Workgroup for their review and comment. The Illinois EPA believes that the draft revisions to Subtitle E ensure that Illinois CAFO rules are consistent with the federal 2008 rule. The CAFO Workgroup's comments are due to Illinois EPA by November 10, 2010. Illinois EPA will revise the draft rule, if necessary, prior to sending the revised rule to Region 5 by December 1, 2010. Following any comments and revisions by Region 5's review, Illinois EPA will submit the Subtitle E revisions to the Illinois Pollution Control Board for consideration and adoption.





1 of 1 DOCUMENT

**NATIONAL PORK PRODUCERS COUNCIL; AMERICAN FARM BUREAU  
FEDERATION; OKLAHOMA PORK COUNCIL; UNITED EGG PRODUCERS;  
NORTH CAROLINA PORK COUNCIL; NATIONAL CHICKEN COUNCIL; U.S.  
POULTRY & EGG ASSOCIATION; DAIRY BUSINESS ASSOCIATION INC;  
NATIONAL MILK PRODUCERS FEDERATION, Petitioners v. UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY, Respondent, NATURAL  
RESOURCES DEFENSE COUNCIL, INC; SIERRA CLUB; WATERKEEPER  
ALLIANCE, Intervenors**

**No. 08-61093**

**UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

*2011 U.S. App. LEXIS 5018*

**March 15, 2011, Filed**

**PRIOR HISTORY:** [\*1]

Transferred from the Judicial Panel on Multi-District  
Litigation.

**COUNSEL:** For **NATIONAL PORK PRODUCERS  
COUNCIL**, Petitioner: Richard Edward Schwartz, Esq.,  
Kirsten Louise Nathanson, Esq., Crowell & Moring,  
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For **AMERICAN FARM BUREAU FEDERATION**,  
Petitioner: Richard Edward Schwartz, Esq., Kirsten  
Louise Nathanson, Esq., Crowell & Moring, L.L.P.,  
Washington, DC; Ellen Steen, American Farm Bureau  
Federation, General Counsel, Washington, DC.

For **UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY**, Respondent: Brian H. Lynk,  
Esq., Trial Attorney, U.S. Department of Justice,  
Environmental Defense Section, Washington, DC;  
Amanda Shafer Berman, Esq., Jered Joseph Lindsay,  
U.S. Department of Justice, Environment & Natural  
Resources Division, Washington, DC; Scott Fulton,  
Environmental Protection Agency, Washington, DC.

**JUDGES:** Before BARKSDALE, STEWART, and

SOUTHWICK, Circuit Judges.

**OPINION BY:** CARL E. STEWART

**OPINION**

CARL E. STEWART, Circuit Judge:

In 2003, the Environmental Protection Agency (EPA) revised its regulations, implementing the Clean Water Act's (CWA or the Act) oversight of Concentrated Animal Feeding Operations (CAFOs). Several parties challenged the 2003 revisions (hereinafter the 2003 Rule), and the Second [\*2] Circuit reviewed the challenges in *Waterkeeper Alliance, Inc. v. Environmental Protection Agency*, 399 F.3d 486 (2d Cir. 2005). In 2008, the EPA, responding to *Waterkeeper*, revised its regulations (hereinafter the 2008 Rule or the Rule). Subsequently, the Farm Petitioners<sup>1</sup> jointly with the Poultry Petitioners<sup>2</sup> filed petitions for review of the 2008 Rule with this court and the Seventh, Eighth, Ninth, Tenth, and D.C. Circuits. Shortly after the issuance of the 2008 Rule, the EPA sent guidance letters to members of Congress and to a CAFO executive (hereinafter the EPA Letters or guidance letters). The Poultry Petitioners filed

a petition for review in this Circuit, challenging the EPA's procedures for issuing rules that the Poultry Petitioners allege were final. These petitions for review were consolidated by the Judicial Panel on Multi-district Litigation (JPML), pursuant to 28 U.S.C. § 2112(a)(3), and this court was randomly selected to review the parties' challenges. Subsequently, the Environmental Intervenors<sup>3</sup> filed a motion to intervene in support of the EPA's position. Also, the EPA filed a motion to dismiss the Poultry Petitioners' challenges to the guidance letters. We GRANT [\*3] the petitions in part, DENY the petitions in part, and GRANT the EPA's motion to dismiss.

1 The "Farm Petitioners" are the **National Pork Producers Council**, **American Farm Bureau Federation**, **United Egg Producers**, **North Carolina Pork Council**, **National Milk Producers Federation**, **Dairy Business Association, Inc.**, **Oklahoma Pork Council**, **National Chicken Council**, and **U.S. Poultry & Egg Association**.

2 The "Poultry Petitioners" are the **National Chicken Council**, and **U.S. Poultry & Egg Association**. Although these parties are also "Farm Petitioners," the arguments made in the Poultry Petitioners' brief apply only to them and not the other Farm Petitioners.

3 The "Environmental Intervenors" are the **Natural Resource Defense Council**, **Sierra Club**, and **Waterkeeper Alliance**.

## I. BACKGROUND

At issue here is the EPA's regulation of animal feeding operations (AFOs). AFOs are facilities that house, raise, and feed animals until they are ready for transport to processing facilities that prepare meat for shipment and, eventually, consumption. Because these facilities house hundreds and sometimes thousands of animals in confined spaces, they produce millions of tons of animal manure every year.<sup>4</sup> The management of [\*4] this manure involves the collection, storage, and eventual use of the manure's nutrients as fertilizer.<sup>5</sup> Following its collection, the manure is typically transported to an on-farm storage or treatment system.<sup>6</sup> Treated manure effluent or dry litter (chicken waste) is typically applied to cropland as fertilizer.<sup>7</sup> This fertilizing process is called land application.<sup>8</sup>

4 Sara R. Reichenauer, *Issuing Violations Without Tangible Evidence: Computer Modeling*

*for Clean Water Act Enforcement*, 95 IOWA L. REV. 1011, 1019 (2010).

5 Thomas R. Head, III, *Local Regulation of Animal Feeding Operations: Concerns, Limits, and Options for Southeastern States*, 6 ENVTL. LAW. 503, 515 (Feb. 2000) ("In particular, animal waste must be stored while awaiting disposal. Waste typically is stored in large open-air tanks or anaerobic lagoons, which can be used to treat as well as store waste.").

6 *Id.*

7 *Id.* at 515-16.

8 *Id.* at 516.

Because the improper management of this waste can pose a significant hazard to the environment, the EPA focuses much of its attention on regulating certain AFOs that meet the EPA's definition of a CAFO.<sup>9</sup> According to EPA regulations, CAFOs are facilities where "[a]nimals . . . have been, are, [\*5] or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period . . ." 40 C.F.R. § 122.23(b)(1)(i). Our analysis of the petitioners' challenges to the 2008 Rule necessitates a discussion of the statutory and regulatory scheme underlying the EPA's oversight of CAFOs.

9 Reichenauer, 95 IOWA L. REV. at 1019-20 ("Data suggests that agriculture is the most harmful source to our nation's waters, causing the EPA to focus much of its attention on agriculture entities, specifically CAFOs and potential CAFOs.").

### A. Statutory Background

In 1948, Congress enacted the Federal Water Pollution Control Act (FWPCA).<sup>10</sup> FWPCA encouraged states to enact uniform laws to combat water pollution, recognizing "that water pollution control was primarily the responsibility of state and local governments."<sup>11</sup> The state-run regulation of discharges "involved a complex process in which the government was required to trace in-stream pollution back to specific discharges, and, given the difficulty of this task, enforcement was largely nonexistent."<sup>12</sup> The federal government's power to curtail water pollution was also limited under FWPCA. Thus, federal action against a discharger [\*6] could only proceed "with the approval of state officials in the state where the discharge originated and after a complicated series of notices, warnings, hearings, and conference recommendations."<sup>13</sup> In 1972, FWPCA was amended to

replace the state-run regulation of discharges with an obligation to obtain and comply with a federally-mandated National Pollutant Discharge Elimination System (NPDES) permit program.<sup>14</sup> These amendments also transformed FWPCA into what is known today as the CWA.<sup>15</sup>

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

11 Kenneth M. Murchison, *Learning from More than Five-and-a-Half Decades of Federal Water Pollution Control Legislation: Twenty Lessons for the Future*, 32 *B.C. ENVTL. AFF. L. REV.* 527, 530-31 (2005).

12 Gaba, 31 *HARV. ENVTL. L. REV.* at 414.

13 Murchison, 32 *B.C. ENVTL. AFF. L. REV.* at 531.

14 *Id.* at 541-42.

15 *Id.* at 536 n.71.

The NPDES permit program, which is primarily articulated in 33 U.S.C. § 1342, allows the EPA to "issue a permit for the discharge of any pollutant, or combination of pollutants . . ." 33 U.S.C. § 1342(a)(1). To be clear, the CWA prohibits the discharge of [\*7] pollutants into navigable waters. 33 U.S.C. § 1311. However, if a facility requests a permit, it can discharge within certain parameters called effluent limitations and will be deemed a point source. 33 U.S.C. §§ 1342, 1362(14). Accordingly, the point source will be regulated pursuant to the NPDES permit issued by the EPA or one of 46 States authorized to issue permits.<sup>16</sup> Relevant here, the definition of point source excludes "agricultural stormwater discharges." *Id.* § 1362(14). This occurs, for example, when rainwater comes in contact with manure and flows into navigable waters. *See, e.g., Fishermen Against Destruction of Env't, Inc. v. Closter Farms, Inc.*, 300 F.3d 1294, 1297 (11th Cir. 2002) (citing *Concerned Area Residents for the Env't v. Southview Farm*, 34 F.3d 114, 121 (2d Cir. 1994) (holding that "agricultural stormwater discharge" exemption applies to any "discharges [that] were the result of precepitation").

16 Currently, 46 states are authorized to administer their own permitting programs for the discharge of pollutants into navigable waters in lieu of the federally administered NPDES program. *See* STATE NPDES PROGRAM AUTHORITY, available at

[http://www.epa.gov/npdes/images/State\\_NPDES\\_Prog\\_Auth.pdf](http://www.epa.gov/npdes/images/State_NPDES_Prog_Auth.pdf). [\*8] Where a state has been authorized to administer its own program, the state becomes the NPDES permit-issuing agency in lieu of the EPA. For these state programs, the EPA retains oversight and veto authority, as well as authority to enforce any violation of the CWA or of a state-issued discharge permit. *See* 33 U.S.C. § 1342(c), (d), and (i). For purposes of this opinion, references to the EPA's implementation of the CWA or the EPA's regulations also refers to authorized states' implementation of the CWA.

If a CAFO discharges without a permit, it is strictly liable for discharging without a permit and subject to severe civil and criminal penalties. 33 U.S.C. § 1319. For example, monetary sanctions can accrue at a rate of up to \$50,000 per violation, per day, for criminally negligent violations, or up to \$100,000 per violation, per day, for repeated, knowing violations. *Id.* Criminal violators may be subject to imprisonment. 40 C.F.R. § 122.41(a)(2).

## B. CAFO's Regulatory Background

The EPA enacted the first set of CAFO regulations in 1976. Since that time, the substance of these regulations, regarding CAFOs, has changed only twice, in 2003 and 2008. We discuss the applicable portions of these [\*9] regulations below.

### 1. 1976 Regulations

The 1976 regulations specified that CAFOs that wanted to discharge were required to have a permit primarily based on the number of animals housed in the facility. All large CAFOs, those with 1,000 or more animals, were required to have an NPDES permit to discharge pollutants. 41 *Fed. Reg.* 11,458, 11,458 (Mar. 18, 1976).<sup>17</sup> Medium CAFOs, those with 300 to 1,000 animals, were required to have a permit if they emitted certain discharges. *Id.* Finally, most small CAFOs, those with 300 animals or less, generally were not required to have a permit. *Id.* However, the EPA could determine that a permit was required on a case-by-case basis if a small CAFO emitted certain discharges after an onsite inspection and notice. *Id.* Under this regulatory scheme, if a discharging CAFO was required to have a permit, but did not have one, it would be subject to civil or criminal liability.

17 For purposes of clarity, we refer to overruled

regulations or regulations being challenged using the Federal Register, as opposed to the Code of Federal Regulations.

The 1976 regulatory scheme was in place for almost thirty years. However, after being sued for failing to revise the effluent [\*10] limitations for CAFO operations, the EPA revised its regulations "to address not only inadequate compliance with existing policy, but also the 'changes that have occurred in the animal production industries.'" *Waterkeeper*, 399 F.3d at 494 (citing 66 Fed. Reg. 2960, 2972 (Jan. 12, 2001)). Subsequently, in the 2003 Rule, the EPA shifted from a regulatory framework that explained what type of CAFO *must have* a permit to a broader regulatory framework that explained what type of CAFO *must apply* for a permit.

## 2. The 2003 Rule & *Waterkeeper*

Under the 2003 Rule, all CAFOs were required to apply for an NPDES permit whether or not they discharged. 68 Fed. Reg. 7176, 7266 (Feb. 12, 2003). Specifically, every CAFO was assumed to have a "potential to discharge" and had to apply for an NPDES permit. *Id.* at 7266-67. However, an option built into the Rule permitted a CAFO to request from the EPA a "no potential to discharge" determination. *Id.* If the CAFO proved that it did not have the potential to discharge, the CAFO was not required to seek a permit. *Id.* The 2003 Rule also expanded the definition of exempt "agricultural stormwater discharge" to include land application discharge, if the land application [\*11] comported with appropriate site-specific nutrient management practices. *Id.* at 7198. However, if the land application was not in compliance with those practices, the land application discharge would be an unpermitted discharge in violation of the CWA. *Id.* at 7197.

Furthermore, the 2003 Rule created a mandatory duty for all CAFOs, applying for a permit, to develop and implement a site-specific Nutrient Management Plan (NMP). *Id.* at 7176. An NMP required a CAFO to establish "best management practices" (BMPs). *Id.* at 7213-14. The BMPs were designed to ensure adequate storage of manure and wastewater, proper management of mortalities and chemicals, and appropriate site-specific protocols for land application. *Id.* at 7176. The BMPs were neither reviewed by the EPA nor were they included in the terms of a CAFO's permit to discharge.

In *Waterkeeper*, the Environmental Petitioners (Waterkeeper Alliance, Inc., Sierra Club, Natural Resources Defense Council, Inc., and the American Littoral Society) and the Farm Petitioners (American Farm Bureau Federation, National Chicken Council, and the National Pork Producers Council), many of whom are petitioners or intervenors in the present matter, challenged [\*12] the 2003 Rule on several grounds. 399 F.3d at 497. Specifically, the petitioners challenged the 2003 Rule's duty to apply and the type of discharges subject to regulation. *Id.* at 504.

The Farm Petitioners asked the Second Circuit to vacate the 2003 Rule's "duty to apply" because it was outside of the EPA's authority. The court agreed and held that the EPA cannot require CAFOs to apply for a permit based on a "potential to discharge." *Id.* at 504-06. The Second Circuit explained that the plain language of the CWA "gives the EPA jurisdiction to regulate and control only actual discharges--not potential discharges, and certainly not point sources themselves." *Id.* at 505. In sum, the Second Circuit held that the CWA "on its face, prevents the EPA from imposing, upon CAFOs, the obligation to seek an NPDES permit or otherwise demonstrate that they have no potential to discharge." *Id.* at 506.

The Environmental Petitioners took issue with the 2003 Rule's exclusion of agricultural stormwater discharge, resulting from land application, from the definition of "point source discharge." They argued that the CWA requires that *all* discharges from a CAFO are point source discharges, "notwithstanding the [\*13] fact that agricultural stormwater discharges are otherwise deemed exempt from regulation." *Id.* at 507. The Second Circuit disagreed. The court explained that the CWA is "ambiguous as to whether CAFO discharges can ever constitute agricultural stormwater." *Id.* Thus, the court examined whether the exemption for certain land application discharges was grounded in a permissible construction of the CWA. *Id.* The Second Circuit determined that congressional intent and its precedent supported the EPA's exclusion of agricultural stormwater discharge, resulting from land application, from designation as a point source. *Id.* at 507-09.

The Environmental Petitioners also argued that the 2003 Rule was unlawful because "(1) it empowers NPDES authorities to issue permits to . . . CAFOs in the absence of any meaningful review of the [NMPs] those

CAFOs have developed; and (2) it fails to require that the terms of the [NMPs] be included in the NPDES permits." *Id.* at 498. The Second Circuit agreed and held that by failing to provide for EPA review of the NMPs, the 2003 Rule violated the statutory commandments that the permitting agency must assure compliance with applicable effluent or discharge limitations. [\*14] *Id.* at 502-03.

The parties also disputed "whether the terms of the [NMPs], themselves, constitute effluent limitations that must be included in the NPDES permits." *Id.* at 502. The Second Circuit held that because the 2003 Rule failed to require that the terms of NMPs be included in NPDES permits, the 2003 Rule violated the CWA. The court explained that the CWA defined effluent limitation as "any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources . . ." *Id.* at 502 (quoting 33 U.S.C. § 1362(11)). Thus, because "the requirement to develop [an NMP] constitutes a restriction on land application discharges only to the extent that the [NMP] actually imposes restrictions on land application discharges[.]" the CWA's definition of effluent limitations encompassed an NMP. *Waterkeeper*, 399 F.3d at 502.

### 3. The Present Petitions for Review: The 2008 Rule

At issue here is the 2008 Rule, the EPA's response to the Second Circuit's decision in *Waterkeeper*. See 71 Fed. Reg. 37,744 (June 30, 2006). Also at issue are three guidance letters issued by the EPA in response [\*15] to questions raised by members of the United States Congress and a farm executive about the 2008 Rule. Below, we discuss in further detail the 2008 Rule and the Farm Petitioners' and Poultry Petitioners' challenges to the 2008 Rule, as well as the Poultry Petitioners' challenge to the EPA's issuance of the guidance letters.

#### a. The 2008 Rule

As required by the Administrative Procedures Act (APA),<sup>18</sup> on June 30, 2006, the EPA published a notice of proposed rulemaking (hereinafter the Proposed Rule) setting forth its response to the Second Circuit's decision in *Waterkeeper*. See 71 Fed. Reg. at 37,744. In place of the 2003 Rule's duty to apply for a permit, the Proposed Rule required that a CAFO owner or operator apply for a permit only if the CAFO "discharges or proposes to

discharge pollutants". *Id.* at 37,747 (internal quotation marks omitted). Furthermore, the Proposed Rule responded to the Second Circuit's holding about the incorporation of NMP requirements into permits. *Id.* at 37,753-55. Specifically, the Proposed Rule required that any NPDES permit issued to a CAFO include the requirement to develop and implement an NMP, including land application requirements. *Id.* at 37,551. Moreover, [\*16] the NMP must be submitted, in its entirety, with the CAFO's permit application, must be reviewed by the agency and the public, and must have its terms incorporated into the applicable permit as enforceable effluent limitations. *Id.*

18 The relevant portion of the APA, 5 U.S.C. § 553, requires that "[g]eneral notice of proposed rule making shall be published in the Federal Register . . ." *Id.* § 553(b).

Furthermore, the Rule requires:

After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.

*Id.* § 553(c).

The EPA received several hundred responses to the Proposed Rule. 73 Fed. Reg. 12,321-02, 12,324 (Mar. 7, 2008). Many of the comments asked the EPA to specify when a CAFO "proposes" to discharge. *Id.* In response, on March 7, 2008, the EPA published a supplemental notice of proposed rulemaking (hereinafter the Supplemental Proposed Rule). See generally 73 Fed. Reg. 12,321-02. [\*17] The Supplemental Proposed Rule provided that a CAFO does not discharge or propose to discharge if "based on an objective assessment of the conditions at the CAFO, that the CAFO is designed, constructed, operated, and maintained in a manner such that the CAFO will not discharge." *Id.* at 12,339.

Furthermore, if a CAFO operator makes this showing, the operator can apply for voluntary certification. *Id.* The benefit of voluntary certification is that, in the event of a discharge, an unpermitted CAFO will not be liable "for violation of the duty to apply," but will still be in violation of the CWA's prohibition against unpermitted discharges. *Id.*

On November 20, 2008, the EPA published the 2008 Rule, which incorporates the proposed regulations in the Proposed Rule and the Supplemental Proposed Rule. *See 73 Fed. Reg. 70,418 (Nov. 20, 2008)*. In sum, the 2008 Rule clarifies the "duty to apply" liability scheme. *Id. at 70,423*. It reiterates that CAFOs "propose to discharge" if they are "designed, constructed, operated, or maintained such that a discharge would occur." *Id.* Furthermore, each CAFO operator is required to make an objective case-by-case assessment of whether it discharges or proposes [\*18] to discharge, considering, among other things, climate, hydrology, topology, and the man-made aspects of the CAFO. *Id. at 70,424*. It further clarifies that a CAFO can be held liable for failing to apply for a permit, in addition to being held liable for the discharge itself. *Id. at 70,426*. The 2008 Rule also reiterates that certification is voluntary, but if a CAFO does not certify, in an enforcement proceeding for failing to apply for a permit, the CAFO would have the burden of proving that it did not propose to discharge. *Id.* Finally, with regard to NMPs, the 2008 Rule restates that NMPs are an enforceable part of an NPDES permit and clarifies that the terms of NMPs would remain the same as the terms articulated in the 2003 Rule. *Id. at 70,443*.

On December 4, 2008, the 2008 Rule became final for purposes of seeking judicial review. *73 Fed. Reg. at 70,418*. As required by 33 U.S.C. § 1369(b),<sup>19</sup> each of the Farm Petitioners and Poultry Petitioners<sup>20</sup> (collectively, the Farm Petitioners) timely filed petitions for review, challenging certain provisions of the 2008 Rule, in various courts of appeals, namely, this court<sup>21</sup> and the Seventh,<sup>22</sup> Eighth,<sup>23</sup> Ninth,<sup>24</sup> Tenth,<sup>25</sup> and District [\*19] of Columbia<sup>26</sup> Circuits.

<sup>19</sup> Section 1369 provides in relevant part:

(b) Review of Administrator's actions; selection of court; fees

(1) Review of the Administrator's action . . . in making any determination as to a

State permit program submitted under section 1342(b) of this title, [i]n approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title, [or] in issuing or denying any permit under section 1342 of this title . . . may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts business which is directly affected by such action upon application by such person. Any such application shall be made within 120 days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such 120th day.

33 U.S.C. § 1369(b) (emphasis added).

<sup>20</sup> Although the Poultry Petitioners challenge certain provisions of the 2008 Rule jointly with the Farm Petitioners, they also filed a separate challenge to the EPA Letters. Thus, for purposes [\*20] of clarity, hereinafter, references to the Farm Petitioners refer to the Farm Petitioners' and Poultry Petitioners' challenges to provisions of the 2008 Rule. References to the Poultry Petitioners refer to the Poultry Petitioners' separate challenge to the EPA Letters.

<sup>21</sup> *Nat'l Pork Producers Council v. Env'tl. Prot. Agency*, No. 08-61093 (5th Cir. 2008).

<sup>22</sup> *Dairy Bus. Ass'n Inc v. Env'tl. Prot. Agency*, No. 09-1574 (7th Cir. 2009); *Nat'l Milk Producers Fed'n v. Env'tl. Prot. Agency*, 08-4166 (7th Cir. 2008).

<sup>23</sup> *United Egg Producers v. Env'tl. Prot. Agency*, No. 08-3870 (8th Cir. 2008).

<sup>24</sup> *Natural Res. v. Nat'l Pork*, No. 08-75023 (9th Cir. 2008).

<sup>25</sup> *Nat'l Pork Producers v. Env'tl. Prot. Agency*, No. 08-9584 (10th Cir. 2008).

<sup>26</sup> *N.C. Pork v. Env'tl. Prot. Agency*, No. 08-1387 (D.C. Cir. 2008).

Because an agency is required to notify the Judicial Panel on Multi-district Litigation (JPML) if two or more petitions for review are filed that challenge an agency's promulgation of regulations, the EPA notified the JPML of the various challenges. 28 U.S.C. § 2112(a)(3). Subsequently, per section 2112, this court was randomly selected by the JPML, from the courts of appeals in which petitions for review were filed, [\*21] to address the parties' challenges. *Id.* Accordingly, the petitions were consolidated and transferred to this court from our sister circuits.

On appeal, the Farm Petitioners primarily challenge the EPA's "duty to apply" for an NPDES permit, imposition of liability for failing to apply for a permit, and the EPA's regulation of a permitted CAFO's land application.

#### b. The EPA Letters

Shortly after the EPA issued the 2008 Rule, it issued three guidance letters, a common practice following the issuance of complex regulations. *See generally Appalachian Power Co. v. Env'tl. Prot. Agency*, 208 F.3d 1015, 1020, 341 U.S. App. D.C. 46 (D.C. Cir. 2000). On January 16, 2009, Benjamin H. Grumbles, Assistant Administrator for the EPA's Office of Water, sent a letter to Senator Thomas R. Carper of Delaware; on the same day, Grumbles sent an identical letter to then-congressperson Michael N. Castle of Delaware; and on March 4, 2009, James D. Giattina, Director of the Water Protection Division for Region 4, sent a letter to Jeff Smith, an executive for Perdue Farms, Inc.

The guidance letters sent to the Delaware Congress members were in response to their joint letter to the EPA concerning "the status of EPA's authorization of Delaware's [\*22] [state-run CAFO] program." Grumbles explained that Delaware's CAFO program was denied status because it did not comply with the CWA. Notably, the Delaware program requires a permit only if "a CAFO meets the numerical animal limit, has a discharge into waters of the state, and is in non-compliance with Delaware Nutrient Management Regulations." The guidance letters further explained the EPA's requirements for a state-run CAFO program and that these requirements were the national floor for these programs. They also stated that the CWA prohibits the discharge of all pollutants by a CAFO. Moreover, "[t]he term pollutant is defined very broadly in the CWA . . . . Potential sources of such pollutants at a CAFO could include . . .

litter released through confinement house ventilation fans." The guidance letters further explained that "any point source discharge of stormwater that comes into contact with these materials and reaches waters of the United States is a violation of the CWA unless authorized by a [permit]."

The letter sent by Giattina was in response to questions posed by Smith, regarding Smith's concern that certain EPA field offices were incorrectly interpreting the 2008 Rule. [\*23] Relevant here, Smith asked whether operators of dry litter farms need to apply for a permit "because of potential runoff from the production area[, and if] so, are there examples of dry poultry litter operations having a discharge?" The letter explained that all CAFOs must have permits prior to discharging pollutants and that "pollutant" is defined broadly by the CWA and the regulations could include litter released through confinement house ventilation fans. The letter also discussed the agricultural stormwater exemption, explaining that it "applies only to precipitation-related discharges from land application areas . . . where application of manure, litter, or process wastewater is in accordance with appropriate nutrient management practices," and not to "discharges from the CAFO production area."

As required by the APA, on April 12, 2009, within 120 days of the issuance of the guidance letters, the Poultry Petitioners filed their petition for review, challenging the EPA Letters. The Poultry Petitioners argue that the EPA Letters constitute final agency actions subject to judicial review and, among other things, were required to have undergone notice and comment per the rulemaking [\*24] procedures articulated in the APA. *See 5 U.S.C. § 553*. The EPA subsequently filed a motion to dismiss the Poultry Petitioners' claim, arguing that we do not have jurisdiction to hear challenges to guidance letters that are merely articulations of current rules and regulations.

Our analysis of the Farm Petitioners' claims and Poultry Petitioners' claims proceeds as follows. Part II is divided into two parts. In subpart A, we discuss the Farm Petitioners' challenges. We GRANT the petition in part and DENY the petition in part. In subpart B, we address the Poultry Petitioners' challenge to the EPA Letters. We DISMISS their petition for lack of jurisdiction per the EPA's motion.

## II. Analysis

## A. Farm Petitioners' Challenges

The Farm Petitioners' challenges to the 2008 Rule can be sub-divided into two parts. First, they effectively challenge the "duty to apply" liability scheme. Second, they challenge the Rule's regulation of CAFO land application discharges. Below we address each of these challenges in turn.

### 1. Duty to Apply Liability Scheme

The [\*25] duty-to-apply liability scheme has three parts. To begin, the 2008 Rule requires CAFOs that discharge or propose to discharge to apply for an NPDES permit--the duty to apply. If a CAFO discharges and does not have a permit, the CAFO will not only be liable for discharging without a permit, but also prosecuted for failing to apply for a permit--failure to apply liability. However, a CAFO can circumvent this liability if the CAFO operator can establish that the CAFO was designed, constructed, operated, and maintained in a manner such that the CAFO will not discharge. The Farm Petitioners argue that certain parts of the liability scheme are in excess of the EPA's statutory authority and other parts are violations of the APA.

Our review of the Farm Petitioners' challenges rests, for the most part, on the Second Circuit's determination in *Waterkeeper* and whether the EPA's actions are within the scope of its statutory authority. As such, our analysis is guided by the principles enunciated in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). If Congress has "directly spoken to the precise question at issue" and "the intent of Congress is clear, that is the [\*26] end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43 (footnote omitted). If the court determines that the statute is silent or ambiguous with respect to the specific question at issue, then we consider "whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. We use the traditional tools of statutory construction to determine whether Congress has spoken to the precise point at issue. *Tex. Sav. & Cmty. Bankers Ass'n v. Fed. Hous. Bd.*, 201 F.3d 551, 554 (5th Cir. 2000).

We conclude that the CWA provides a comprehensive liability scheme, and the EPA's attempt to supplement this scheme is in excess of its statutory

authority.

### a. Duty to Apply

The 2003 Rule's "duty to apply" required all CAFOs to apply for an NPDES permit or demonstrate that they do not have the potential to discharge. 68 Fed. Reg. at 7266. In *Waterkeeper*, the Second Circuit held that the 2003 Rule's "duty to apply" was *ultra vires* because the EPA exceeded its statutory authority. *Waterkeeper*, 399 F.3d at 504. The court explained that the CWA is clear that the EPA can only regulate the [\*27] discharge of pollutants. To support its interpretation, the Second Circuit examined the text of the Act. The court noted: (1) 33 U.S.C. § 1311(a) of the CWA "provides . . . [that] the discharge of any pollutant by any person shall be unlawful," (2) section 1311(e) of the CWA provides that "[e]ffluent limitations . . . shall be applied to all point sources of discharge of pollutants," and (3) section 1342 of the Act gives NPDES authorities the power to issue permits authorizing the discharge of any pollutant or combination of pollutants." *Waterkeeper*, 399 F.3d at 504. Accordingly, the Second Circuit concluded that

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

*Id.* at 505. The Second Circuit's decision is clear: without a discharge, the EPA has no authority and there can be no duty to apply for a permit.

The EPA's response to this part of the *Waterkeeper* analysis is the 2008 Rule's requirement [\*28] that CAFOs that discharge *and* CAFOs that "propose" to discharge apply for a permit. We address the latter category first.

### i. CAFOs that Propose to Discharge

Because the issues presented in *Waterkeeper* are similar to the issues presented here, we find the Second Circuit's analysis to be instructive and persuasive. Accordingly, we decline to uphold the EPA's requirement that CAFOs that propose to discharge apply for an



NPDES permit.

At first blush it seems that the EPA, by regulating CAFOs that "propose" to discharge, is regulating CAFOs that *want* to discharge. However, as the Farm Petitioners' counsel explained at oral argument, the EPA's use of the term "propose" is not the same as the common understanding of the term--"to form or declare a plan or intention." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1819 (8th ed. 1993). Instead, the EPA's definition of a CAFO that "proposes" to discharge is a CAFO designed, constructed, operated, and maintained in a manner such that the CAFO will discharge. Pursuant to this definition, CAFOs propose to discharge regardless of whether the operator wants to discharge or is presently discharging. This definition thus requires CAFO operators whose facilities [\*29] are not discharging to apply for a permit and, as such, runs afoul of *Waterkeeper*, as well as Supreme Court and other well-established precedent.

Specifically, the Supreme Court explained:

[T]he National Pollutant Discharge Elimination System [requires] a permit for the 'discharge of any pollutant' into the navigable waters of the United States, 33 U.S.C. § 1342(a). The triggering statutory term here is not the word 'discharge' alone, but 'discharge of a pollutant,' a phrase made narrower by its specific definition requiring an 'addition' of a pollutant to the water.

*S.D. Warren Co. v. Maine Bd. of Envtl. Protection*, 547 U.S. 370, 380-81, 126 S. Ct. 1843, 164 L. Ed. 2d 625 (2006). Likewise, several circuit courts have held that the scope of the EPA's authority under the CWA is strictly limited to the discharge of pollutants into navigable waters.

Notably, in the seminal case *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, 859 F.2d 156, 273 U.S. App. D.C. 180 (D.C. Cir. 1988), the D.C. Circuit explained more than 20 years ago that the CWA "does not empower the agency to regulate point sources themselves; rather, EPA's jurisdiction under the operative statute is limited to regulating the discharge of pollutants." *Id.* at 170. [\*30] In *Waterkeeper*, the Second Circuit echoed this interpretation of the CWA and

explained that "unless there is a discharge of any pollutant, there is no violation of the Act . . ." 399 F.3d at 504. More recently, in *Service Oil, Inc. v. Environmental Protection Agency*, 590 F.3d 545 (8th Cir. 2009), the Eighth Circuit reiterated the scope of the EPA's regulatory authority and concluded that "[b]efore any discharge, there is no point source" and the EPA does not have any authority over a CAFO. *Serv. Oil, Inc.*, 590 F.3d at 550.

These cases leave no doubt that there must be an actual discharge into navigable waters to trigger the CWA's requirements and the EPA's authority. Accordingly, the EPA's authority is limited to the regulation of CAFOs that discharge. Any attempt to do otherwise exceeds the EPA's statutory authority. Accordingly, we conclude that the EPA's requirement that CAFOs that "propose" to discharge apply for an NPDES permit is *ultra vires* and cannot be upheld.

## ii. Discharging CAFOs

Although the CWA forecloses the EPA's regulation of a CAFO before there is a discharge, the question remains: Can the EPA require discharging CAFOs to apply for an NPDES permit? This analysis necessitates [\*31] application of *Chevron's* two-step inquiry. *Chevron* step one requires the court to determine, if Congress, through the CWA, has spoken directly on the issue of whether the EPA can require a discharging CAFO to apply for a permit. *Chevron*, 467 U.S. at 842-43. As there is no language in the CWA that creates a "duty to apply" for an NPDES permit, our analysis centers on *Chevron* step two--whether the regulation "is based on a permissible construction of the statute." *Id.*

We accord "deference to agencies under *Chevron* because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." *Tex. Clinical Labs, Inc. v. Sebelius*, 612 F.3d 771, 775 (5th Cir. 2010). However, a *Chevron* step two analysis depends on "a number of factors. These include: the consistency of the interpretation and the length of adherence to it, undisturbed by Congress; the explicitness of the congressional grant of authority to the agency, with greater deference in cases of more specific [\*32] delegation; and the degree of agency expertise

necessarily drawn upon in reaching its interpretation." *Quarles v. St. Clair*, 711 F.2d 691, 706-07 (5th Cir. 1983).

The primary purpose of the NPDES permitting scheme is to control pollution through the regulation of discharges into navigable waters. *See* 33 U.S.C. § 1342. Therefore, it would be counter to congressional intent for the court to hold that requiring a discharging CAFO to obtain a permit is an unreasonable construction of the Act. In fact, the text of the Act indicates that a discharging CAFO must have a permit. The CWA explains that discharging without a permit is unlawful, 33 U.S.C. § 1311, and punishes such discharge with civil and criminal penalties, 33 U.S.C. § 1319. This has been the well-established statutory mandate since 1972. It logically follows that, at base, a discharging CAFO has a duty to apply for a permit.

In summary, we conclude that the EPA cannot impose a duty to apply for a permit on a CAFO that "proposes to discharge" or any CAFO before there is an actual discharge. However, it is within the EPA's province, as contemplated by the CWA, to impose a duty to apply on CAFOs that are discharging.

#### b. Failure to [\*33] Apply Liability

The 2008 Rule provides that a CAFO can be held liable for failing to apply for a permit. The Farm Petitioners contend that the EPA does not have the authority to create this liability. We agree. As previously noted, if Congress has "directly spoken to the precise question at issue" and "the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43 (footnote omitted). Here, the CWA is clear about when the EPA can issue compliance orders,<sup>27</sup> bring a civil suit for an injunction<sup>28</sup> or penalties,<sup>29</sup> or bring criminal charges for penalties.<sup>30</sup> Specifically, 33 U.S.C. § 1311 allows the EPA to impose liability if it "finds that any person is in violation of any condition or limitation which implements [violations of]": the discharge prohibition,<sup>31</sup> certain water-quality based effluent limitations,<sup>32</sup> national standards of performance for new sources,<sup>33</sup> toxic and pretreatment effluent standards,<sup>34</sup> the EPA's information-gathering authority,<sup>35</sup> provisions permitting the discharge of specific aquaculture pollutants,<sup>36</sup> any permit condition or [\*34] limitation,<sup>37</sup> and provisions governing the disposal or use of sewer sludge.<sup>38</sup> Notably

absent from this list is liability for failing to apply for an NPDES permit.

27 33 U.S.C. § 1319(a).

28 *Id.* § 1319(b).

29 *Id.* § 1319(d).

30 *Id.* § 1319(c).

31 *Id.* § 1311.

32 *Id.* § 1312.

33 *Id.* § 1316.

34 *Id.* § 1317.

35 *Id.* § 1318.

36 *Id.* § 1328.

37 *Id.* § 1342.

38 *Id.* § 1345.

Moreover, *section 1319* is the only provision in the Act to provide for penalties. Assuming that the punishment for failing to apply for a permit are *section 1319's* penalties, the EPA still runs up against the CWA's clear articulation that only certain violations of the Act can be enforced using *section 1319's* penalties. *See* 33 U.S.C. § 1319; *see, e.g., Serv. Oil, Inc.*, 590 F.3d at 550 ("Congress in § 1319(g)(1) granted EPA limited authority to assess administrative monetary penalties for violations of specific statutory provisions related to the core prohibition against discharging without a permit, or contrary to the terms of a permit."); *Colt Indus., Inc. v. United States*, 880 F.2d 1311, 1314 (Fed. Cir. 1989) ("EPA is not authorized under either the Clean Air or Clean Water [A]cts to seek compensatory damages; it is limited to injunctive relief and [\*35] the maximum monetary penalties prescribed by 42 U.S.C. § 7413(b), and 33 U.S.C. § 1319, respectively."). Accordingly, the imposition of "failure to apply" liability is outside the bounds of the CWA's mandate.

The Eighth Circuit's analysis in *Service Oil* is instructive. In that case, the court examined whether the EPA can assess administrative penalties for failing to apply for an NPDES permit. As the EPA argues here, it also argued in *Service Oil* that *section 1318*, which gives the EPA its information-gathering authority, also gives the EPA power to impose liability for failing to apply for an NPDES permit. 590 F.3d at 550. The Eighth Circuit rejected this argument. In concluding that the EPA cannot assess such penalties, the court commented on the scope of the EPA's regulatory authority. The court explained that "the agency's authority to assess monetary penalties by administrative proceeding is limited to unlawful

discharges of pollutants." *Id.*; see also *Envil. Prot. Info. Ctr. v. Pac. Lumber Co.*, 469 F. Supp. 2d 803, 826 (N.D. Cal. 2007) (finding 33 U.S.C. § 1342(p) does not authorize liability for "failure to apply" for NPDES permit coverage, but only for non-compliance with permit [\*36] terms).

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For more than 40 years, the EPA's regulation of CAFOs was limited to CAFOs that discharge. The 2003 Rule marked the first time that the EPA sought to regulate CAFOs that do not discharge. This attempt was wholly rejected by the Second Circuit in *Waterkeeper*, 399 F.3d at 504. Again, with the 2008 Rule, the EPA not only attempts to regulate CAFOs that do not discharge, but also to impose liability that is in excess of its statutory authority. Although *Chevron* makes clear that we must give deference to the agency's interpretation of a statute, "courts are not obliged to stand aside and rubberstamp their affirmance of administrative decisions that they deem inconsistent with the statutory mandate or that frustrate the congressional policy underlying a statute." *Tex. Power & Light Co. v. FCC*, 784 F.2d 1265, 1269 (5th Cir. 1986) (citations and internal quotation marks omitted); see also *Buffalo Crushed Stone, Inc. v. Surface Transp. Bd.*, 194 F. 3d 125, 128-29, 338 U.S. App. D.C. 335 (D.C. Cir. 1999) ("[D]eference is not without limit. We will reject an agency's interpretation if an alternative reading is compelled by the regulations' plain language . . . ." (citation and internal quotation marks omitted)).

To [\*37] this end, the Supreme Court has explained: "Agencies may play the sorcerer's apprentice but not the sorcerer himself." *Alexander v. Sandoval*, 532 U.S. 275, 292, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001). In other words, an agency's authority is limited to what has been authorized by Congress. See *id.* Here, the "duty to apply", as it applies to CAFOs that have not discharged, and the imposition of failure to apply liability is an attempt by the EPA to create from whole cloth new liability provisions. The CWA simply does not authorize this type of supplementation to its comprehensive liability scheme. Nor has Congress been compelled, since the creation of the NPDES permit program, to make any changes to the CWA, requiring a non-discharging CAFO to apply for an NPDES permit or imposing failure to apply liability. Thus, we echo the sentiments of the Second Circuit in *Waterkeeper*:

While we appreciate the policy considerations underlying the EPA's approach in the CAFO Rule, however, we are without authority to permit it because it contravenes the regulatory scheme enacted by Congress . . . . To the extent that policy considerations do warrant changing the statutory scheme, such considerations address themselves to Congress, [\*38] not to the courts.

*Waterkeeper*, 399 F.3d at 505 (citations and internal quotation marks omitted).

## 2. Land Application

The Farm Petitioners argue that the EPA's requirement that all NMPs address protocols for land application exceeds the EPA's statutory authority.<sup>39</sup> Our analysis of this issue necessitates a brief overview of the relevant parts of the 2003 Rule and the Second Circuit's discussion of the 2003 Rule in *Waterkeeper*.

39 As previously explained, treated manure from CAFOs is typically applied to cropland as fertilizer. This fertilizing process is called land application.

As previously noted, the 2003 Rule established a mandatory duty for all CAFOs applying for a permit to develop and implement an NMP, which required a CAFO to establish BMPs. The BMPs were designed to ensure adequate storage of manure and wastewater, proper management of mortalities and chemicals, and relevant here, appropriate site specific protocols for land application. See 68 Fed. Reg. at 7176. However, NMPs (and thus BMPs) were not required to be part of a CAFO's NPDES permit.

In *Waterkeeper*, the parties disputed "whether the terms of the [NMPs], themselves, constitute effluent limitations that must be included [\*39] in the NPDES permits." 399 F.3d at 502. The Second Circuit held that because the 2003 Rule failed to require that the terms of NMPs be included in NPDES permits, the 2003 Rule violated the CWA. The court explained that the CWA defined effluent limitation as "any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point

sources . . ." *Id.* (citing 33 U.S.C. § 1362(11)). Because "the requirement to develop [an NMP] constitutes a restriction on *land application discharges*," the court held, there was no doubt that the CWA's definition of effluent limitation encompassed an NMP. *Waterkeeper*, 399 F.3d at 502 (emphasis added). Thus, the Second Circuit concluded that the EPA must incorporate CAFOs' site-specific NMPs into their permits.

Accordingly, the 2008 Rule requires that "[a] permit issued to a CAFO must include a requirement . . . to develop and implement" an NMP. 73 Fed. Reg. at 70,437. The Farm Petitioners argue that the EPA's response to the Second Circuit's mandate is impermissible because it allows CAFOs to regulate all land application, even if the land [\*40] application is applied pursuant to an NMP. They further contend that, in violation of the CWA's jurisdictional limits and *Waterkeeper*, the EPA requires CAFOs that seek permit coverage only for production area discharges to apply also for coverage for land application areas.

The Farm Petitioners' arguments are problematic because they are challenging a requirement promulgated in the 2003 Rule. Thus, the Farm Petitioners' arguments had to be made within the 120-day time period for challenging rules promulgated by an agency. 33 U.S.C. § 1369(b)(1). The 120-day time limit is well-established, and this court has explained that the limitation is strictly enforced. *See Tex. Mun. Power Agency v. Envtl. Prot. Agency*, 799 F.2d 173, 175 (5th Cir. 1986). The only exception to this limitation is if the grounds for the challenge arose after the 120-day time period. *Id.* It is clear that the grounds for the challenges made by the Farm Petitioners did not arise after the 120-day time period. Notably, the Farm Petitioners, many of whom were parties in *Waterkeeper*, had the opportunity to respond to arguments made by other petitioners in that case, advocating that the NMP terms be included in a CAFO's [\*41] permit. They did not. Thus, the Farm Petitioners' arguments, regarding NMPs and the protocols for land application, brought almost six years after they were promulgated, are time barred.

### B. Poultry Petitioners' Challenges

As previously noted, after the EPA issued the 2008 Rule, it issued three guidance letters. Identical letters were sent to Senator Carper and Representative Castle. The third letter was sent to a farm executive. The Poultry Petitioners' claims center on the substance of the EPA

Letters. The guidance letters state that poultry growers must apply for NPDES permits for the releases of dust through poultry confinement house ventilation fans. The Poultry Petitioners argue that this requirement is a substantive rule because it creates new legal consequences and affects individual rights and obligations. Thus, because the EPA failed to subject this rule to proper notice and comment, as required by the APA, the Poultry Petitioners argue that this court should set aside the EPA Letters' pronouncement as unlawful. The EPA asks that we dismiss the Poultry Petitioners' claim because 33 U.S.C. § 1369(b)(1) governs whether this court has jurisdiction to review an agency action, and [\*42] the EPA Letters do not fit within subsection 1369(b)(1)'s parameters. We agree and, for the following reasons, dismiss the Poultry Petitioners' claims.

The CWA establishes a bifurcated jurisdictional scheme whereby courts of appeals have jurisdiction over some categories of challenges to EPA action, and the district courts retain jurisdiction over other types of complaints. *Chem. Mfrs. Ass'n v. Envtl. Prot. Agency*, 870 F.2d 177, 265 (5th Cir. 1989). Specifically, 33 U.S.C. § 1369(b)(1) authorizes original jurisdiction to courts of appeals to review certain agency "final actions." 40 Relevant to the Poultry Petitioners' claims, this court can review an agency's final action (1) approving or promulgating certain effluent limitations, § 1369(b)(1)(E), and (2) issuing or denying certain permits, § 1369(b)(1)(F).

40 Specifically, *section 1369(b)(1)* grants courts of appeals original jurisdiction to review agency "final actions":

(A) in promulgating any standard of performance under section 1316 of this title,

(B) in making any determination pursuant to section 1316(b)(1)(C) of this title,

(C) in promulgating any effluent standard, prohibition, or pretreatment standard under section 1317 of this [\*43] title,

(D) in making any determination as to a State permit program submitted under *section*

1342(b) of this title,

(E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title,

(F) in issuing or denying any permit under section 1342 of this title, and

(G) in promulgating any individual control strategy under section 1314(l) of this title . . .

As a threshold matter, in order for this court to have jurisdiction, the guidance letters must constitute an agency final action. The Supreme Court explained in *Bennett v. Spear*, 520 U.S. 154, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997), that an agency action is final only if it meets two criteria. *Id.* at 177-78. First, the action must mark the "consummation" of the agency's decision-making process; it cannot be tentative or interlocutory. *Id.* Second, the action must be one by which "rights or obligations have been determined" or from which "legal consequences will flow." *Id.*

In regard to the first *Bennett* prong, we note that guidance letters can mark the "consummation" of an agency's decision-making process. *See Her Majesty the Queen in Right of Ontario v. Envtl. Prot. Agency*, 912 F.2d 1525, 1532, 286 U.S. App. D.C. 171 (D.C. Cir. 1990) (holding [\*44] that the EPA's guidance letters constitute final agency actions because they "serve[d] to confirm a definitive position that has a direct and immediate impact on the parties . . ."); *Ciba-Geigy Corp. v. Envtl. Prot. Agency*, 801 F.2d 430, 437, 255 U.S. App. D.C. 216 (D.C. Cir. 1986) (finding that the EPA's guidance letters constituted final agency actions because there was "no reason to believe that the EPA Director of Pesticide Programs lack[ed] authority to speak for EPA on th[e] issue or that his statement of the agency's position was only the ruling of a subordinate official that could be appealed to a higher level of EPA's hierarchy." (internal quotations omitted)). However, that the guidance letters can meet the first *Bennett* prong is not enough. *See Bennett*, 520 U.S. at 177 ("[T]wo conditions must be satisfied for agency action to be 'final' . . ."). There must also be evidence that the guidance letters

have made a substantive change in the EPA's regulation of CAFOs. *See id.* at 178.

To meet the second *Bennett* prong, the guidance letters must affect the Poultry Petitioners' rights or obligations or create new legal consequences. *Id.* Although the guidance letters do, as the Poultry Petitioners note, [\*45] obligate them to obtain a permit if they discharge manure or litter through ventilation fans or face legal consequences, the EPA Letters neither create new legal consequences nor affect their rights or obligations. Here, the guidance letters merely restate section 1342's prohibition against discharging pollutants without an NPDES permit. Agency actions that have no effect on a party's rights or obligations are not reviewable final actions. *Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs*, 543 F.3d 586, 593-94 (9th Cir. 2008) (explaining that the second *Bennett* prong was not met where "rights and obligations remain unchanged."); *Nat'l Ass'n of Home Builders v. Norton*, 415 F.3d 8, 15, 367 U.S. App. D.C. 240 (D.C. Cir. 2005) ("[I]f the practical effect of the agency action is not a certain change in the legal obligations of a party, the action is non-final for the purpose of judicial review."). Moreover, an agency's actions are not reviewable when they merely reiterate what has already been established. *See, e.g., Am. Paper Inst. v. Envtl. Prot. Agency*, 882 F.2d 287, 289 (7th Cir. 1989) (a policy statement providing the EPA's views concerning tolerances for dioxin in permits for paper mills was not a final [\*46] action, because "telegraphing your punches is not the same as delivering them"); *S. Holland Metal Finishing Co. v. Browner*, 97 F.3d 932, 935-37 (7th Cir. 1996) (interpretative ruling, construing regulations, was not final action); *City of San Diego v. Whitman*, 242 F.3d 1097, 1101-02 (9th Cir. 2001) (letter indicating that the Ocean Pollution Reduction Act of 1994, Pub. L. No. 103-431 §§ 1-2, 108 Stat. 4396-97 (1994), would apply to a city's as-yet-unfiled application to renew its NPDES permit was not a final action). The EPA Letters do not change any rights or obligations and only reiterate what has been well-established since the enactment of the CWA--CAFOs are prohibited from discharging pollutants without a permit. Thus, they do not meet the two-part *Bennett* test and are not reviewable, final agency decisions.

Accordingly, we grant the EPA's motion to dismiss because we lack jurisdiction to consider the Poultry Petitioners' challenge to the EPA Letters.

### III. CONCLUSION

For the foregoing reasons, the petitions are granted in part, denied in part, and dismissed in part. We hereby vacate those provisions of the 2008 Rule that require CAFOs that propose to discharge to apply for an NPDES [\*47] permit, but we uphold the provisions of the 2008 Rule that impose a duty to apply on CAFOs that are discharging. We vacate those provisions of the 2008 Rule

that create liability for failing to apply for an NPDES permit. Additionally, we uphold the provisions of the 2008 Rule that allow permitting authorities to regulate a permitted CAFO's land application and include these requirements in a CAFO's NPDES permit. Finally, we dismiss the Poultry Petitioners' challenge of the guidance letters for lack of jurisdiction.