No. 08-61093 (and consolidated cases)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NATIONAL PORK PRODUCERS COUNCIL, *et al.*

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*

Respondents.

Petitions for Review of a Final Rule Promulgated by the United States Environmental Protection Agency

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FINAL BRIEF OF RESPONDENT UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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STATEMENT REGARDING ORAL ARGUMENT

Respondent United States Environmental Protection Agency ("EPA") requests oral argument. EPA believes oral argument would be useful to the Court.

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JURISDICTION

In this case, nine petitioners ("Petitioners") seek judicial review of a final rule issued by Respondent the United States Environmental Protection Agency ("EPA" or "the Agency") pursuant to the Clean Water Act ("CWA" or "the Act"), 33 U.S.C. §§ 1251-1387. The rule, entitled "Revised National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines for Concentrated Animal Feeding Operations in Response to the Waterkeeper Decision; Final Rule" ("Rule," "Final Rule," or "2008 Rule"), was published in the Federal Register on November 20, 2008. 73 Fed. Reg. 70,418-86. This Court has subject-matter jurisdiction over petitions challenging the Final Rule pursuant to CWA section 509(b)(1), 33 U.S.C. § 1369(b)(1). All petitions were timely filed during the 120-day period for seeking judicial review of the Final Rule under section 509(b)(1), although certain challenges seeking review of pre-existing regulations are untimely. See Argument III.A. Under 28 U.S.C. § 2112(a)(3), the petitions were consolidated in this Court for purposes of review.

Two parties, National Chicken Council and U.S. Poultry and Egg Association ("Poultry Petitioners") also challenge three letters authored by EPA officials (the "EPA Letters"). The Court lacks subject-matter jurisdiction over challenges to the EPA Letters. See Argument IV.

STATEMENT OF ISSUES

1. Did EPA act within the scope of its authority under CWA sections 308 and 402, and consistently with section 301's prohibition on point source discharges that are not authorized by a National Pollutant Discharge Elimination System ("NPDES") permit, when it required concentrated animal feeding operations ("CAFOs") that are designed, constructed, operated or maintained such that a pollutant discharge "will" occur to apply for NPDES permits?

2. Was it reasonable for EPA to clarify that in an enforcement proceeding for failure to seek permit coverage that arises from an unpermitted discharge, a CAFO must meet its ordinary burden of rebuttal once the enforcing party has presented prima facie evidence of liability, except for those unpermitted CAFOs that make such a showing in advance under EPA's voluntary certification option?

3. Are Petitioners time-barred in their attempt to challenge the nutrient management plan ("NMP") requirements for discharges from a permitted CAFO's land application areas? Alternatively, did EPA act reasonably in requiring that the terms of the NMP be submitted with the permit application and incorporated in the permit, consistent with the holding in Waterkeeper Alliance, Inc. v. EPA, 399 F.3d 486 (2d Cir. 2005)?

4. Does the Court lack subject-matter jurisdiction over challenges to the EPA Letters? Alternatively, even if the Court has jurisdiction to review the letters,

should they be upheld as a reasonable interpretation of EPA's regulations governing CAFOs?

STATEMENT OF THE CASE

Industrial animal farms that have large numbers of confined animals are one of the major sources of water pollution in this country. For this reason, Congress long ago directed that discharges from concentrated animal feeding operations, or "CAFOs," be regulated as "point source" discharges by EPA and the States under the Clean Water Act's NPDES program. EPA promulgated its first CAFO regulations in the mid-1970s. Since then, EPA and the States have gained substantial experience with CAFOs, and EPA has worked with the States and the United States Department of Agriculture to analyze ways in which regulation of CAFOs can be improved to keep pace with changes in the industry. See 66 Fed. Reg. 2960, 2970 (Jan. 12, 2001); 71 Fed. Reg. 37,744 (June 30, 2006).

In 2003, EPA promulgated a comprehensive nationwide rule updating the regulation of pollutant discharges to the waters of the United States from CAFOs. The Second Circuit reviewed the 2003 Rule in Waterkeeper, upholding much of the rule but also finding some provisions unlawful as discussed in more detail below. The instant rule, promulgated in 2008, represents EPA's response to that decision, and its effort in particular to ensure: (a) that only CAFOs that discharge, or will discharge, pollutants to waters of the United States need apply for NPDES

permits; (b) that CAFOs be afforded an option to certify voluntarily that they do not, and will not, discharge pollutants, in which case the new regulation presumes that if an unpermitted discharge from such a CAFO *does* occur, the CAFO is not liable for failure to apply for a permit; and (c) that the terms of NMPs, which govern land application (and other) practices at CAFOs, be included in any permits issued to CAFOs that land apply manure.

The 2008 Rule does *not*, in any of these provisions, re-adopt the 2003 Rule's "potential to discharge" standard for defining those CAFOs required to apply for permits, which was vacated by Waterkeeper. Rather, the 2008 Rule is squarely within the scope of EPA's statutory mandate to prevent unauthorized discharges of pollutants by requiring "point source" dischargers to obtain NPDES permits.

The remainder of this case concerns certain letters authored by EPA officials, describing aspects of EPA's regulations that may apply to poultry CAFOs. These letters make no new substantive law, but rather summarize certain requirements imposed by the existing regulations, as well as the Act itself.

STATEMENT OF FACTS

I. STATUTORY BACKGROUND

A. Statutory Prohibition on Unauthorized Pollutant Discharges

Congress established an ambitious objective in the CWA: "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."

33 U.S.C. § 1251(a). To meet this objective, Congress declared a national goal of not just reducing, but in fact eliminating, the discharge of pollutants into the Nation's waters. Id. §§ 1251(a)(1), 1314(b)(3), 1316(a).

The Act prohibits the "discharge of any pollutant" to waters of the United States "by any person," "[e]xcept as in compliance with [33 U.S.C. § 1311] and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title." Id. § 1311(a). The discharge of a pollutant is defined as "any addition of any pollutant to navigable waters[1] from any point source." Id. § 1362(12)(A). "Point source," in turn, is 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.*" Id. § 1362(14) (emphasis added). The term "point source" expressly does not include "agricultural stormwater discharges and return flows from irrigated agriculture." Id.

B. NPDES Permits

Chief among the statutory provisions governing discharges and with which "compliance" is required under 33 U.S.C. § 1311(a) is section 402, under which point source discharges may be authorized by an NPDES permit. Id. § 1342(a);

[1] "Navigable waters" means "the waters of the United States, including the territorial seas." Id. § 1362(7); see also 40 C.F.R. § 122.2.

see, e.g., Sierra Club, Lone Star Chap. v. Cedar Point Oil. Co., 73 F.3d 546, 559 (5th Cir. 1996) ("[T]he discharge of any pollutant without a NPDES permit is an unlawful act under § 1311(a)."). NPDES permits must include effluent limitations to restrict the "quantities, rates, and concentrations of chemical, physical, biological, and other constituents." 33 U.S.C. §§ 1362(11), 1311; see Arkansas v. Oklahoma, 503 U.S. 91, 101 (1992). The Act requires EPA to establish technology-based limitations on point source discharges into waters of the United States. P.U.D. No. 1 of Jefferson County v. Wash. Dep't of Ecology, 511 U.S. 700, 704 (1994); 33 U.S.C. §§ 1311, 1314. Where these technology-based limitations prove insufficient to attain or maintain applicable water quality standards, NPDES permits must contain more stringent limitations representing that level of control necessary to ensure that receiving waters meet applicable water quality standards. See id. § 1311(b), (e).

Congress required EPA to establish a comprehensive NPDES permit program. Id. § 1342(a)(1), (3) and (b). States may also seek authority to administer their own NPDES programs and issue permits. Id. § 1342(b). Section 402(b) requires the permit program to, inter alia, "issue permits which apply and insure compliance with" applicable effluent limitations and standards, and which can be terminated or modified, including a "change in any condition that requires either a temporary or permanent reduction or elimination of the permitted

discharge." Id. § 1342(b)(1). Section 304(i) authorizes EPA to establish uniform application forms and other minimum requirements for collection of information for such State programs. Id. § 1314(i).

C. Authority to Require Information Under Section 308

Another provision of the Act, section 308, provides that EPA "shall require the owner and operator of any point source" to provide information "whenever required to carry out the objective of this chapter, including but not limited to":

> (1) developing or assisting in the development of any effluent limitation, or other limitation, prohibition, or effluent standard, pretreatment standard, or standard of performance . . .;
> (2) determining whether any person is in violation of any such effluent limitation, or other limitation, prohibition or effluent standard, pretreatment standard, or standard of performance; (3) any requirement established under this section; or (4) carrying out sections 1315, 1321, 1342, 1344 . . . 1345, and 1365 of this title."

33 U.S.C. § 1318(a). NPDES permits must "apply, and insure compliance with, all applicable requirements of" section 308. Id. § 1342(b)(2)(A).

II. REGULATORY BACKGROUND AND RULEMAKING HISTORY

A. Overview of the CAFO Industry

As of 2003, EPA estimated that there were over 1.3 million farms in the United States with livestock, of which 238,000 were considered "animal feeding operations" or "AFOs" – i.e., feedlots or other facilities that confine animals for 45 days or more in the course of a year in a lot that does not sustain crop growth. See

68 Fed. Reg. 7176, 7179 (Feb. 12, 2003); 40 C.F.R. § 122.23(b)(1). The largest AFOs – those exceeding threshold numbers of animals confined within the facility (e.g., 700 dairy cows, 1000 beef cattle, 82,000 laying hens, or 125,000 chickens other than laying hens) – are defined as *concentrated* animal feeding operations or "CAFOs." Id. § 122.23(b)(2). Some CAFOs may confine far more animals than these threshold amounts.

AFOs produce a tremendous amount of manure – about 500 million tons every year, by USDA estimates. 68 Fed. Reg. at 7180. By way of comparison, EPA has estimated that confined animals in this country generate three times more raw waste than do all humans in the United States. Id.

CAFOs handle these wastes in a variety of ways, but the predominant method is to collect the wastes and spread them on fields as fertilizer. See id. at 7196-97. However, before the wastes can be land applied, they must be stored. Dairy, swine, and cattle CAFOs generally produce solid and liquid wastes, or slurries, which are often stored in large open containment structures called "lagoons." 66 Fed. Reg. at 2987-91. Some hog operations store wastes under confinement houses in deep pits, which are then flushed out and stored in lagoons or tanks, or land applied directly. Id. at 2991. Poultry operations primarily use "dry" manure handling processes, in which manure and litter are stored initially in the confinement houses and then in stockpiles before being spread on fields. Id. at

2991-93. Discharges to waters of the United States may occur due to spills from lagoons from a variety of causes, including leaks, overflows and retaining wall breaks. Id. at 2979-80.

Using animal wastes as fertilizer for crops when appropriately applied to fields is a part of responsible agricultural operations; however, this practice can cause water pollution when manure and other wastes are applied in a manner that exceeds the nutrient needs of crops. 68 Fed. Reg. at 7196. As courts have recognized, manure that is imprudently land-applied can, and often does, run off into adjacent waterways. See id. at 7181; see also, e.g., Waterkeeper, 399 F.3d. at 492-94; Community Ass'n For Restoration of the Env't v. Henry Bosma Dairy, 305 F.3d 943, 955-56 (9th Cir. 2002).

B. The 2003 Rule

On February 12, 2003, EPA promulgated a comprehensive revision of its then-existing CAFO regulations (the "2003 Rule"). See 68 Fed. Reg. 7176. The 2003 Rule, required, inter alia, that all CAFOs apply for permits unless the owner or operator demonstrated to the permitting authority that the facility had no potential to discharge manure, litter (i.e., bedding plus manure), or process wastewater. This requirement derived from EPA's finding, based on an extensive administrative record, that virtually all CAFOs have a "potential to discharge." Id. at 7201. The 2003 Rule also included discharges from CAFO land application

areas as discharges "from the CAFO" subject to permit requirements; required development and implementation of site-specific nutrient management plans ("NMPs"); and updated the effluent limitations guidelines and new source performance standards applicable to CAFOs.

Two groups of petitioners (environmental advocates and farm industry trade associations) collectively challenged several aspects of the 2003 Rule, including, inter alia, the requirement that all CAFOs seek a permit unless they could demonstrate no potential to discharge. See Waterkeeper, 399 F.3d 486. The Second Circuit held that EPA did not have authority under the Act to regulate "potential discharges," and therefore vacated this requirement. Id. at 504-06.

Waterkeeper also involved challenges to EPA's treatment of land application discharges and NMP requirements. The Second Circuit upheld EPA's determination regarding which land application discharges were "discharges from a CAFO" subject to permit requirements, and which were exempt agricultural stormwater. Id. at 506-11. However, the court found that the 2003 Rule unlawfully allowed permitting authorities to issue permits without reviewing the terms of NMPs, incorporating them into the terms of the permit, and making the NMPs available for public comment. Id. at 498-504.

C. The 2008 Rule

1. Proposed Rule

On June 30, 2006, EPA published a proposed rule setting forth its response to Waterkeeper. See 71 Fed. Reg. 37,744 ("Proposed Rule" or "proposal"). In particular, EPA proposed to require permit applications only from those CAFOs that "discharge or propose to discharge," thus making CAFOs subject to the same permit application requirement as already exists for all point source dischargers under 40 C.F.R. § 122.21(a)(1). 71 Fed. Reg. at 37,748-50. Additionally, EPA responded to the Second Circuit's holdings regarding the treatment of NMPs. The Proposed Rule identified a number of factors that are necessary to the development of an NMP, discussed how the terms of the NMP could be incorporated into the proposed and final permit, and solicited comment on the degree of flexibility that should be allowed in NMPs. Id. at 37,753-55; see also 73 Fed. Reg. 12,321, 12,328-36 (Mar. 7, 2008) (further discussing and seeking additional comments on NMP requirements).

2. Supplemental Proposal

Recognizing that CAFOs may be uncertain whether they will discharge, while also mindful that the Act establishes a strict liability scheme, EPA also sought to clarify how CAFOs could determine whether they "propose to discharge." Accordingly, March 7, 2008, EPA published a supplemental notice of

proposed rulemaking ("Supplemental Proposal"), "proposing a voluntary option for CAFOs to certify to the [permitting authority] that the CAFO does not discharge or propose to discharge based on an objective assessment of the CAFO's design, construction, operation, and maintenance." 73 Fed. Reg. at 12,324; see generally id. at 12,324-28.

EPA proposed specific eligibility criteria for certification and explained that "[m]eeting these criteria would establish that the CAFO does not 'discharge or propose to discharge' for purposes of proposed § 122.23(d), for as long as the certification is valid." Id. at 12,324. EPA further explained that "[i]n the unlikely event of a discharge from a certified CAFO, the CAFO operator, although subject to liability for the discharge itself, would not be liable for a violation of the duty to apply in § 122.23(d), but the certification would cease to be valid." Id. at 12,327. If a CAFO's certification became invalid due to a discharge or because the CAFO failed "to continue to be designed, constructed, operated and maintained in accordance with the eligibility criteria and certification statement," that would "put the CAFO in the same position as any other unpermitted and uncertified CAFO." Id. EPA made clear that certification is "entirely voluntary," and that its purpose is "to provide a mechanism by which a CAFO can document that it does not discharge or propose to discharge and be assured that even if the CAFO does

discharge in the future, it would not face an enforcement action for failure to apply for a permit." Id. at 12,328.

3. Final Rule

On November 20, 2008, EPA published the Final Rule, which, among other things: establishes which CAFOs must apply for NPDES permit coverage and when they must do so; provides an option for voluntary certification as discussed in the Supplemental Proposal, along with clarification regarding the effect of certification; and establishes procedures for incorporating the terms of NMPs into permits.

Like the proposal, the Final Rule eliminates the 2003 Rule's categorical requirement that all CAFOs apply for permits unless they demonstrate that they have "no potential to discharge," and instead requires only those CAFOs that "discharge or propose to discharge" to apply. 40 C.F.R. § 122.23(d). To address concerns raised in public comments, EPA further defined "propose to discharge" to explain that only CAFOs that discharge or "will" discharge are required to seek permit coverage; i.e., a CAFO "proposes to discharge" if it is "designed, constructed, operated, or maintained such that a discharge *will* occur." 40 C.F.R. §122.23(d) (emphasis added); see 73 Fed. Reg. at 70,423. The Final Rule preamble also explains that each CAFO is responsible for making an objective case-by-case assessment of whether it discharges or proposes to discharge,

considering, among other things, climate, hydrology, topography, and the man-made aspects of the CAFO. Id. at 70,423.

The Final Rule also adopted a provision incorporating the "voluntary no-discharge certification" process discussed in the Supplemental Proposal. See generally id. at 70,426-34. This provision specifies criteria for determining whether the CAFO "proposes to discharge." See 40 C.F.R. § 122.23(i). The Final Rule clarifies that any unpermitted discharge (other than agricultural stormwater) violates the Act, but that a properly certified CAFO has made an upfront showing that it did not "propose to discharge":

> An unpermitted CAFO certified in accordance with paragraph (i) of this section is presumed not to propose to discharge. If such a CAFO does discharge, it is not in violation of the requirement that CAFOs that propose to discharge seek permit coverage pursuant to paragraphs (d)(1) and (f) of this section, with respect to that discharge. In all instances, the discharge of a pollutant without a permit is a violation of the [CWA] section 301(a) prohibition against unauthorized discharges from point sources.

Id. § 122.23(j)(1).

The Final Rule also explains that CAFOs electing not to make the up-front showing that they do not propose to discharge will have to make such a showing later, should they become subject to an enforcement action arising from an unpermitted discharge:

> In any enforcement proceeding for failure to seek permit coverage . . . that is related to a discharge from an unpermitted CAFO, the burden is on the CAFO to establish that it did not propose to discharge prior to the discharge when the CAFO either did not submit certification documentation . . . within at least five years prior to the discharge, or withdrew its certification in accordance with paragraph (i)(5) of this section.

Id. § 122.23(j)(2). The provision further states that "[d]esign, construction, operation, and maintenance in accordance with the criteria of paragraph (i)(2) of this section satisfies this burden." Id.

With respect to NMP requirements, EPA promulgated 40 C.F.R. § 122.42(e)(5) "in order to specify the minimum terms of the [NMP] that must be enforceable requirements of a CAFO's NPDES permit." 73 Fed. Reg. at 70,443. EPA made clear, however, "[a]s discussed in the preambles to both the 2006 proposed rule and 2008 supplemental proposal," that it "[was] not revisiting the decisions the Agency made in 2003 with respect to the *contents* of the [NMP] because the Waterkeeper decision did not affect these requirements." Id. Accordingly, the Final Rule "requires that, *based on the provisions promulgated in 2003* that define [NMPs] (40 C.F.R. 122.42(e)(1) and 412.4(c)), the 'terms' of the [NMP] become terms and conditions of the permit, as required by the Second Circuit decision." Id. (emphasis added). EPA also noted that neither the Proposed Rule nor the Supplemental Proposal had reevaluated or solicited comment on 40

C.F.R. § 122.23(e) – the 2003 Rule provision interpreting the Act's "point source" definition and "agricultural stormwater" exemption – which makes reference to the NMP provisions at 40 C.F.R. § 122.42(e)(1)(vi)-(ix). See 73 Fed. Reg. at 70,434/3 ("EPA did not propose to amend the existing agricultural stormwater discharge exemption in § 122.23(e), nor has EPA otherwise reopened the provision.").

III. ADDITIONAL BACKGROUND REGARDING THE EPA LETTERS

As noted above, Poultry Petitioners seek review not only of the Final Rule, but also of three letters (the "EPA Letters") that substantially post-date the Rule: (1) a January 16, 2009, letter from Benjamin H. Grumbles, Assistant Administrator for EPA's Office of Water, to the Honorable Thomas R. Carper, United States Senate; (2) an identical letter of the same date from Mr. Grumbles to the Honorable Michael N. Castle, United States House of Representatives; and (3) a March 4, 2009, letter from James D. Giattina, Director of the Water Protection Division for Region 4, to Jeff Smith, Corporate Environmental Manager for Perdue Farms Inc. See Poultry Pet. Exs. A-C (JA 395-404). EPA moved to dismiss the challenge to the EPA Letters for lack of jurisdiction on May 15, 2009. The Court ordered that the motion would be carried with the case. July 9, 2009 Order.

A. EPA Regulations Governing Discharges from Poultry CAFOs

In the 2003 Rule, EPA "revis[ed] the CAFO definition to include chicken operations that use manure handling systems other than liquid manure handling

systems," – i.e., "dry litter poultry operations" or "dry manure and litter handling systems." 68 Fed. Reg. at 7191-92. EPA explained that this revision was appropriate because dry manure and litter handling systems were used at most egg layer operations and almost all broiler operations, and "dry poultry operations continue to contaminate surface water and ground water because of rainfall coming in contact with dry manure and litter . . . ." Id. at 7192. Poultry litter contains a number of contaminants, including "high concentrations of water soluble phosphorous."[2] Other contaminants of concern include arsenic, which is readily soluble in water, and nitrogen.[3] Thus, discharges from dry litter poultry CAFOs (the focus of Poultry Petitioners' challenges, see Poultry Br. at 5), have been regulated since 2003. Neither Waterkeeper nor the 2008 Rule altered this aspect of EPA's preexisting regulations.

B. Content of the Three Challenged EPA Letters

Two of the EPA Letters are identical, and respond to a joint letter to EPA from Delaware's Congressional Representative and one of its Senators concerning "the status of EPA's authorization of Delaware's [CAFO] program." Poultry Pet.

[2] Treating Poultry Litter with Aluminum Sulfate, Doc. ID EPA-HQ-OW-2005-0037-0943 (JA 391).

[3] See Research Findings on Arsenic from Land Applied Chicken Litter, Doc. ID EPA-HQ-OW-2005-0037-0969 (JA 393-94); Chicken Poop and Arsenic, Doc. ID EPA-HQ-OW-2005-0037-0965 (JA 388-90).

Ex. A & B at 1 (JA 395, 398). In response, EPA official Benjamin Grumbles identified several issues to be resolved before EPA could approve Delaware's CAFO regulations, and proposed a "process to move forward." Id. at 1-2 (JA 395-96). While explaining EPA's concerns with Delaware's CAFO program, Mr. Grumbles discussed the requirements of the Act and the federal CAFO regulations:

> The CWA prohibits the discharge of "pollutants" through a "point source" into a "water of the United States" except where authorized by an NPDES permit. CAFOS are defined as a point source under Section 502 of the CWA and are further defined in 40 CFR 122.23. The term pollutant is defined very broadly in the CWA and associated regulations. See 40 CFR 122.2. For example, in the case of CAFOs, pollutants include raw materials, products, or byproducts, including manure, litter, and feed. Potential sources of such pollutants at a CAFO could include . . . litter released through confinement house ventilation fans. For CAFOs, 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 . . . NPDES permit.

Id. at 2 (JA 396, 399). These two letters also note that a CAFO that discharges without a permit "is exposing itself to [the] risk of citizen suit and/or federal/state enforcement." Id. (JA 396, 399). These are the parts of the letters that Poultry Petitioners challenge, specifically focusing on the idea that litter released from confinement house ventilation fans is a pollutant that may not be discharged without a permit. See Poultry Br. at 11-12.

The third letter was written by a Region 4 official, James D. Giattina, in response to an informal inquiry from a corporate manager for Perdue Farms Inc. The Perdue manager had posed questions about Region 4's implementation of the 2008 Rule; in particular, he sought clarification regarding when CAFOs need to apply for NPDES permits. Poultry Pet. Ex. C at 1 (JA 401). Mr. Giattina responded by discussing portions of the 2008 Rule and its preamble. See id. at 1-3 (JA 401-03). Similar to Mr. Grumbles' letters, the Giattina letter explains that CAFOs must have permits prior to discharging pollutants, and that "pollutant" is defined broadly by the Act and the regulations and could include litter released through confinement house ventilation fans. Id. at 3 (JA 403). The Giattina letter also discusses 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." Id. (JA 403) (citing 73 Fed. Reg. at 70,458). For further guidance, Mr. Giattina refers the reader to the regulations and EPA's website. Id. (JA 403).

STANDARD OF REVIEW

This Court's review is governed by the deferential standard set forth in the Administrative Procedure Act, 5 U.S.C. § 706, under which agency action is valid

unless, inter alia, it is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Id. § 706(2)(A). This standard "is a narrow one," under which the Court is not "to substitute its judgment for that of the agency." Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971). "If the agency's reasons and policy choices conform to minimal standards of rationality, then its actions are reasonable and must be upheld." Texas Oil & Gas Ass'n v. EPA, 161 F.3d 923, 934 (5th Cir. 1998).

Judicial deference also extends to EPA's interpretation of a statute it administers, particularly in a notice and comment rulemaking context such as this one. United States v. Mead Corp., 533 U.S. 218, 226-27 (2001); Chevron, U.S.A., Inc. v. NRDC, 467 U.S. 837, 842-45 (1984). In reviewing an agency's statutory interpretation, the Court must first decide "whether Congress has directly spoken to the precise question at issue." Chevron, 467 U.S. at 842. Where "Congress has explicitly left a gap" to be filled, the agency's regulation is "given controlling weight unless . . . arbitrary, capricious, or manifestly contrary to the statute." Id. at 843-44. "[I]f the statute is silent or ambiguous with respect to the specific issue, the question . . . is whether the agency's answer is based on a permissible construction of the statute." Id. at 843. EPA need not articulate "the best" interpretation, only a reasonable one. Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735, 744-45 (1996).

Finally, where the issue presented is a challenge to the agency's interpretation of its own regulation, that interpretation must be given "controlling" weight "unless plainly erroneous or inconsistent with the regulation." Auer v. Robbins, 519 U.S. 452, 461 (1997) (internal quotation and citation omitted); Belt v. Emcare, Inc., 444 F.3d 403, 415 (5th Cir. 2006); see also id. at 415 (same degree of deference where the interpretation is first provided in the agency's brief).

SUMMARY OF ARGUMENT

Petitioners' attack on EPA's authority to implement the NPDES permit program for CAFOs reflects an extreme and wholly unjustified interpretation of the Act that, if followed, would greatly undermine the regulatory and enforcement scheme that the Act mandates EPA to implement. The Final Rule carries out the Act's charge to prevent unauthorized discharges from point sources, such as CAFOs, through the NPDES permit program by requiring CAFOs to obtain permits when they discharge or propose to discharge. The Rule does not single out CAFOs for more rigorous treatment than any other point source category; *all* point source dischargers are required to apply for a permit before they discharge so that the permitting authority can determine what specific effluent limitations should apply to the point source and comply with the public notice requirements for proposed permits. Contrary to Petitioners' assertions, permits are not "voluntary" under the Act, because without permits and the effluent limitations they apply,

States and EPA cannot ensure appropriate control of pollutant discharges and prevent unauthorized discharges as the Act requires.

This Rule ensures that CAFOs that discharge (or will actually discharge) seek permits by requiring that they objectively assess whether they are designed, constructed, operated, or maintained such that a discharge *will* occur. Accordingly, the Rule does not, as Petitioners argue, require permits from every CAFO with a mere "potential" to discharge – unlike the 2003 Rule provision vacated by Waterkeeper – but rather is appropriately limited to CAFOs that discharge or, based on an objective assessment, *will* discharge. Even if *some* CAFOs do not discharge or propose to discharge, the Act authorizes EPA to require permit applications from those that do.

Petitioners also challenge 40 C.F.R. § 122.23(j)(2), a provision which does nothing more than describe evidence that may be used to rebut an enforcement claim that an unpermitted CAFO, having discharged pollutants, is liable for its failure to seek permit coverage. Because the applicability of this section is expressly limited to unpermitted CAFOs that have *discharged*, by definition it does not (as Petitioners claim) rely on the old "*potential* to discharge" standard. Nor does it "shift" the evidentiary burden that ordinarily would apply in the enforcement context, as Petitioners would have it. The Act imposes strict liability on unauthorized pollutant dischargers, and it is well established that once the

enforcing party makes out a prima facie case of liability, the defendant must prove an affirmative defense. Accordingly, consistent with the Act's enforcement scheme, section 122.23(j)(2) reasonably describes how an affirmative defense may be proven in the context of an action alleging liability for failure to seek permit coverage.

In their remaining challenge to the Final Rule, Petitioners attempt to reargue issues decided in Waterkeeper, namely whether EPA may regulate the land application area of a CAFO (which Petitioners claim is "an un-regulated nonpoint source," Pet. Br. at 82) and require submission of an NMP addressing that area when a CAFO applies for a permit. The very premise underlying this challenge is flawed, because under 40 C.F.R. § 122.23(e), discharges from land application areas are considered point source discharges "from a CAFO," and qualify as exempt "agricultural stormwater" *only* where the CAFO implements an NMP to control discharges from land application areas under its control. Because section 122.23(e) was promulgated in 2003, and was not revised by this Rule, Petitioners' challenge is time-barred. Moreover, EPA's NMP requirements are reasonable and consistent with Waterkeeper, which held that the terms of the NMP are "effluent limitations" under the Act, and thus are required to be submitted with a CAFO's permit application and incorporated in the terms of the permit. This Court should reject Petitioners' attempt to seek a second bite at the apple regarding this issue.

Poultry Petitioners' separate challenge to the EPA Letters must also fail, both for lack of jurisdiction and on the merits. First, the Court lacks jurisdiction because the Letters are not a type of agency action that section 509 of the Act authorizes this Court to review and, in any event, they are not final action. Thus, the Letters are not "rules" of any sort. Second, even if the Letters could be considered "rules," they would at most be interpretive rules because they do not set forth new legal requirements but rather merely summarize and interpret the CWA and the CAFO regulations. Thus, they are not subject to APA notice and comment requirements. Third, because the requirements described and interpreted in the Letters were established years ago, Poultry Petitioners' challenge would be time-barred even if review was available under section 509. Finally, if the Court reaches the merits, it should uphold the Letters because, contrary to Poultry Petitioners' assertions, they neither narrow the scope of the agricultural stormwater exemption, which simply does not apply here, nor impose new permit requirements on previously "unregulated" discharges.

ARGUMENT

I. THE DUTY TO APPLY IS AUTHORIZED BY THE ACT.

The Rule requires CAFOs that discharge or propose to discharge to apply for an NPDES permit. 40 C.F.R. § 122.23(d). This requirement, or "duty to apply,"

implements the cornerstone of the Act's regulatory regime – the NPDES permit program. EPA's authority to require point sources – including CAFOs – to seek NPDES permit coverage before they discharge is provided for by sections 308 and 402. Simply put, permit application requirements are intrinsic to, and necessary for, the implementation of the section 402 permit program. Consonant with EPA's responsibilities under the Act and with the Second Circuit's direction in Waterkeeper, the permit application requirement applies only to actual dischargers, that is, those CAFOs that discharge or are designed, constructed, operated, or maintained such that a discharge *will* occur. See 40 C.F.R. §122.23(d); 73 Fed. Reg. at 70,423.[4]

The crux of Petitioners' challenge to this requirement is premised on their mistaken belief that EPA can never require *any* point sources – including CAFOs that actually discharge – to obtain NPDES permits. See Pet. Br. at 29, 47. Instead, they believe EPA must wait for a discharge to occur and then penalize the point source for the discharge. In the alternative, Petitioners also suggest that if the Act authorizes EPA to establish a permit application requirement – in any circumstances – it may only do so when the discharge is occurring, not before or

[4] Although the Second Circuit's analysis of EPA's authority to regulate "potential dischargers" is not binding on this Court, the Rule's permit application requirement is consistent with Waterkeeper as shown below.

after. See Pet. Br. at 42, 41-44. Neither of these theories is supported by the text of the Act or the structure of the regulatory regime Congress created.

As is explained in more detail below, the duty to apply established in this Rule is entirely consistent with the text and purpose of the Act, and is necessary to implement its goal of preventing unauthorized discharges through NPDES permits and the effluent limitations they apply. Because after-the-fact enforcement alone cannot prevent unauthorized discharges, the Rule utilizes EPA's authority under sections 308 and 402 to require permit applications from CAFOs before they discharge. Consistent with the Second Circuit's direction in Waterkeeper and decades of regulatory practice, the Rule requires permits for CAFOs when they discharge or are designed, constructed, operated or maintained such that a discharge *will* occur, and not from CAFOs where a discharge simply *might* occur. See 73 Fed. Reg. at 70,423/2.

A. The Permit Requirement for Discharging CAFOs is Consistent With And Authorized By The Act, And Necessary for the Act's Implementation.

Petitioners attempt to escape altogether the scrutiny of the permitting process and the effluent limitations it applies by adopting the extreme view that EPA may *never* require NPDES permit applications – not even from point sources that discharge. See Pet. Br. at 29. Waterkeeper did not so hold, and such a reading would render the permit program under section 402 entirely voluntary. As this

Court has long recognized, permits issued under section 402 bring the Act's protections to life; they are the means by which the discharge prohibitions and effluent limitations are effectuated, and are essential for the enforcement of the Act. See Carr v. Alta Verde Indus., 931 F.2d 1055, 1058-60 (5th Cir. 1991). To function, the Act must require that permits be obtained before a discharge commences or occurs, and section 308 gives EPA the enforceable authority to require permit applications from CAFOs that discharge or propose to discharge. See 73 Fed. Reg. at 70,424.

Indeed, even if the Court concludes that EPA's authority to require permit applications from CAFOs that discharge or propose to discharge is not clear under the plain language of the Act, EPA's interpretation of the Act to provide such authority is clearly reasonable in light of the Act's goal to prevent discharges through the NPDES permit program, id., and thus is entitled to deference and should be upheld. Chevron, 467 U.S. at 844.

1. Permit application requirements are necessary for the implementation of section 402 and the development and application of effluent limitations.

Charged with the "ambitious goal that water pollution be not only reduced, but eliminated," the 1972 CWA amendments established a new approach to fight water pollution that relies first and foremost on the NPDES permit program. Waterkeeper, 399 F.3d at 491; see Carr, 931 F.2d at 1058. Under this regulatory

regime, rather than focusing solely on the quality of the receiving waters, Congress also took steps to assure that all point sources used appropriate controls to reduce and eliminate pollutants in their discharges before they ever reached receiving waters. The NPDES permit serves as the linchpin of this system; Congress included a strict prohibition in section 301 that makes it unlawful for any person to discharge any pollutant into waters of the United States except in conformity with the effluent limitations and permits required by other sections, most notably section 402. 33 U.S.C. § 1311(a).[5]

In section 402(a)(1) and (3), Congress directed EPA to establish a comprehensive permit program, subject to the requirements in section 402(b), and to "issue a permit for the discharge of any pollutant . . . upon the condition that such discharge will meet . . . all applicable requirements under sections 301, 302, 306, 307, 308, and 403" of the Act. But before discharge requirements or effluent limitations can be applied, point sources must be first identified and then studied and assessed to develop the standards and guidelines that may be used to establish such requirements for each permit. See 73 Fed. Reg. at 70,424. With respect to CAFOs, Congress took the first step and defined the term "point source" to include

[5] Although the section 402 NPDES permit system is most relevant here, Congress also created a separate permit system under section 404 of the Act, id. § 1344, for discharges of dredged or fill material.

any "concentrated animal feeding operation . . . from which pollutants are or *may* be discharged." 33 U.S.C. § 1362(14) (emphasis added).

As point sources, CAFOs are subject to two types of limitations to control discharges: technology-based effluent limitations and, where needed to meet state water quality standards, more stringent water quality-based effluent limitations. Id. § 1311(b). However, it is important to understand that neither the technology-based controls nor the water-quality based requirements are self-executing under the Act. See, e.g., EPA v. California ex rel. State Water Resources Control Bd., 426 U.S. 200, 204-05 (1976); Texas Oil, 161 F.3d at 928. Instead, NPDES permits are required to give effect and action to Congress' goals. See City of Milwaukee v. Illinois, 451 U.S. 304, 311 (1981); International Paper Co. v. Ouellette, 479 U.S. 481, 489 (1987). In sum, "[t]he individual point sources fulfill their obligations under the Act by complying with the conditions incorporated by the permit grantors into the permits." NRDC v. EPA, 537 F.2d 642, 644 (2d Cir. 1976). And without permits, EPA cannot ensure point source compliance with the Act and its technology-based and water quality-based requirements. Texas Oil, 161 F.3d at 928 (effluent limitations "achieve their bite only after they have been incorporated into NPDES permits").

As one court has observed, "water quality standards by themselves have no effect on pollution; the rubber hits the road when the state-created standards are

used as the basis for specific effluent limitations in NPDES permits." American Paper Inst., Inc. v. EPA, 996 F.2d 346, 350 (D.C. Cir. 1993). Here, however, Petitioners argue that EPA cannot even leave the garage, asserting that no point source – even a *discharging* point source – can be required to apply for a permit. Pet. Br. at 29, 47. Congress did not direct EPA to develop effluent limitations so that they may be ignored. Instead, it required their application and enforcement through the permit program. See Train v. Colorado Public Interest Research Group, Inc., 426 U.S. 1, 7 (1976).

Given the Act's primary reliance on the permit program to control pollution, the Act logically *must* authorize EPA to require a permit application from CAFOs that discharge or propose to discharge. See NRDC v. Train, 510 F.2d 692, 696 (D.C. Cir. 1975) (because section 402 is the means by which effluent limitations are achieved, "a person must obtain a permit and comply with its terms in order to discharge any pollutant"); see also 66 Fed. Reg. at 3009; EPA Response to Comments ("RTC") at 4929-34 (JA 364-69). To argue, as Petitioners do, that the Act does not authorize EPA to require point source dischargers to apply for NPDES permits contradicts both the letter and the spirit of the Act.

From the inception of the NPDES program, Congress recognized the role of permit applications in a functioning permit program, and required EPA to promulgate, within 60 days of enactment of the 1972 Act, guidelines for "uniform

application forms and other minimum requirements for the acquisition of information from owners and operators of point sources of discharge" subject to State permitting programs authorized under section 402(b).[6] 33 U.S.C. § 1314(i).[7] Subsequently, in amending the Act in 1987 to require EPA to issue permits to specified point source dischargers of stormwater, Congress again required EPA to "establish regulations setting forth the permit application requirements." Id. §1342(p)(4)(A). Thus, section 402(p)(4)'s permit application requirements for storm water dischargers were not, as Petitioners suggest, the first and only time Congress authorized EPA to "establish requirements to apply for NPDES permit coverage." Pet. Br. at 49-51. Rather, section 402(p)(4) simply extends the Act's

[6] EPA authorizes States to administer the NPDES program pursuant to section 402(b); however, until such a program is authorized, EPA remains the permitting authority.

[7] One of the first actions EPA took to implement the 1972 Act was to propose and promulgate permit application requirements and forms, for both EPA and authorized state programs. 37 Fed. Reg. 25,898 (Dec. 5, 1972); 38 Fed. Reg. 9740 (April 19, 1973); 38 Fed. Reg. 19,894 (July 24, 1973). While section 304(i) is the statutory basis for EPA to require authorized States to require "point sources of discharge" to comply with these application requirements, section 402(a)(3) requires "the permit program of the Administrator" under section 402(a)(1) to be subject to the same requirements as apply to authorized State programs. Moreover, as discussed below, section 308 directly authorizes EPA to require such point sources to comply with permit application requirements. See RTC at 4931 (JA 366).

permit requirements to a newly regulated category of discharger.[8] Indeed, EPA's regulations have contained such a requirement for decades. See 45 Fed. Reg. 33,290, 33,442 (May 19, 1980), now codified at 40 C.F.R. § 122.21(a) (requiring a person who discharges or proposes to discharge to apply for an NPDES permit prior to discharging).

Additionally, permit applications and the permitting process serve the equally crucial role of "ensur[ing] that dischargers are subjected to the scrutiny of the application process." Menzel v. County Utilities Corp., 712 F.2d 91, 95 (4th Cir. 1983). As noted by Petitioners, permitting can be a lengthy process, Pet. Br. at 44-45,[9] but that process serves a critical role. It enables States and EPA – the

[8] Petitioners argue that section 402(p)(4) indicates that when Congress intended to allow EPA to impose a duty to apply, it did so explicitly. See Pet. Br. at 49-51. This argument, however, completely ignores the context and history of section 402(p)(4), which clearly establishes a distinct permitting scheme for "discharges composed entirely of stormwater" and is intended to be an exception to the general stormwater permitting rules and limitations established by section 402(p)(1) & (2). Thus, section 402(p)(4) is a unique provision designed to address a unique issue, and it has no bearing on the more general permitting provisions of the Act, discussed in the text, on which the CAFO rule is premised.

[9] Indeed, the time required to complete the permitting process further demonstrates why it is imperative that CAFOs not wait for a discharge to occur before seeking permit coverage, and why Petitioners' view that a duty to apply only "suddenly arises" when there is "an accidental discharge" is an implausible reading of the Act. Pet. Br. at 45.

expert bodies designated by Congress to regulate water pollution – to assess the public health and environmental consequences of discharges, and after a required public comment process, to require appropriate control of those discharges to protect the Nation's waters, and monitor and ensure compliance with all aspects of the Act. See 33 U.S.C. § 1342(a), (b); 73 Fed. Reg. at 70,424. States and EPA cannot use these tools to prevent or control discharges as required by the Act if CAFOs do not submit permit applications before discharging, or are allowed to ignore the permit process altogether.

2. EPA's authority is not limited to post-discharge enforcement.

The alternative regulatory regime envisioned by the Petitioners is one in which CAFOs (and, presumably, any other point sources) avoid the scrutiny of the permit application process, avoid effluent limitations, avoid public review and participation, and thereby essentially avoid regulation of pollutant discharges altogether. Petitioners seek to turn EPA's administration of the Act into a game of catch-me-if-you-can, in which EPA would rely solely on after-the-fact enforcement actions. But the Act aims to *prevent* unauthorized point source discharges. Moreover, the Act's reliance on the permit program to effectuate its goals makes clear that Congress intended to address discharges *before* they occur and that permits were to be the primary means of ensuring compliance. See 73

Fed. Reg. at 70,424. Accordingly, permits and permit applications are not voluntary, and permitting authorities are not relegated to relying solely on after-the-fact enforcement – after the environmental and human health damage has already occurred – if they are to fulfill the objectives of the Act and "eliminate[]" discharges of pollutants. 33 U.S.C. § 1251(a)(1).

a. Petitioners' enforcement regime thwarts Congress' plan for self-monitoring and simple enforcement.

Given the nature of CAFO operations and their intermittent or sporadic discharges, exclusive reliance on after-the-fact enforcement would be extremely resource-intensive and ineffective. See 66 Fed. Reg. at 3008. It is difficult for States and EPA to identify where and when discharges have occurred, or even where CAFOs are located. Accordingly, one key role of a permit application requirement is to allow States and EPA to identify discharging CAFOs. Id. See also NRDC v. Train, 396 F. Supp. 1393, 1399-1400, (D.D.C. 1975), aff'd sub nom NRDC v. Costle, 568 F.2d 1369 (D.C. Cir. 1977) ("the permit process is indispensable because [ ] the permit application requirement identifies dischargers for EPA and reveals what they are discharging") (internal quotations omitted).

A permitted point source is subject to self-reporting and self-monitoring provisions, but a CAFO that discharges or proposes to discharge and remains outside the permit program can dodge regulation and enforcement by avoiding

reporting their discharges. See 66 Fed. Reg. at 3008.[10] The enforcement authority would be required to expend countless hours and resources to, among other things, perform surveillance to detect discharges (which by their nature are intermittent) and engage in discovery and expert analysis to assess pertinent aspects of the CAFO's operation to determine the source of the discharges. This is a big undertaking and one that States, EPA, and citizen enforcers could only do once in a while. Thus, Petitioners' approach would drastically undercut enforcement of the Act, since many CAFOs would not apply for permits (and hence would not be subject to permit enforcement) and it would be very difficult to pursue systematic enforcement against CAFOs that discharge or propose to discharge but choose not to seek permits.

Congress did not intend such resource-intensive, reactive enforcement actions, but rather designed a permit program to allow for simple enforcement proceedings based on effluent limitations and conditions contained in permits. As one court has observed, "[i]t is axiomatic that Congress intended enforcement of the Act to be 'swift and direct.'" Corn Refiners Ass'n, Inc. v. Costle, 594 F.2d 1223, 1226 (8th Cir. 1979) (internal citation omitted); see also Weyerhaeuser Co. v. Costle, 590 F.2d 1011, 1058 (D.C. Cir. 1978). Through the use of permits and

[10] As noted in Waterkeeper, there is evidence that CAFOs "have improperly tried to circumvent the permitting process." 399 F.3d at 506 n.22.

specific discharge limitations, Congress significantly limited the factual issues for judicial resolution and thereby made cases that would otherwise be technically complicated easier to enforce. "[T]he factual basis for enforcement of requirements would be available at the time enforcement is sought, and the issue before the court would be a factual one of whether there had been compliance." S. Rep. No. 92-414, at 64 (1971), reprinted in 1972 U.S.C.C.A.N. 3668, 3746.

Moreover, Congress' intent for swift and simple enforcement of the Act is demonstrated by the self-monitoring and self-reporting regime contained within the Act: "One purpose of the [monitoring] requirements is to avoid the necessity of lengthy fact finding, investigations, and negotiations at the time of enforcement." United States v. CPS Chemical Co., 779 F. Supp. 437, 442 (E.D. Ark. 1991) (quoting S. Rep. No. 92-414, at 64, reprinted in 1972 U.S.C.C.A.N 3668, 3730); see also Waterkeeper Alliance, Inc. v. Smithfield Foods, Inc., No. 4:01-CV-27-H(3), 2001 WL 1715730 at *2 (E.D.N.C. Sept. 20, 2001) (CAFO decision finding that the NPDES program "provid[es] important enforcement and monitoring mechanisms through the establishment of various inspection, testing, and reporting requirements. Without the authority to require defendants to obtain a permit, the utility of these monitoring and enforcement mechanisms would be greatly compromised.") (citation omitted).

b. The duty to apply for a permit is a separate and enforceable responsibility of point sources that discharge or propose to discharge.

Petitioners' position that a CAFO can never be penalized for failing to apply for a permit in addition to being assessed penalties for the unlawful discharge has been soundly rejected by courts. As this Court and others have recognized, "obtaining a permit is a requirement separate and distinct from the requirement that a discharger comply with any applicable effluent limitations." Cedar Point Oil, 73 F.3d at 562 (collecting cases); see Carr, 931 F.2d at 1062-63; Smithfield Foods, 2001 WL 1715730, at *2; see also Hudson River Fishermen's Ass'n v. City of New York, 751 F. Supp. 1088, 1103 (S.D.N.Y. 1990), aff'd, 940 F.2d 649 (2d Cir. 1991) (table).

In Carr, for example, this Court found that a CAFO's failure to obtain a permit was a separate and continuing violation distinct from the violations likely to occur as result of future discharges. See 931 F.2d at 1062-63. In its analysis, the Court used a framework for assessing continuing violations first employed by the Fourth Circuit in response to the Supreme Court's holding in Gwaltney of Smithfield Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49 (1987) ("Gwaltney I"), that citizens do not have standing to seek civil penalties for wholly past violations of the Act. Chesapeake Bay Found., Inc. v. Gwaltney of

Smithfield, Ltd., 890 F.2d 690, 697-98 (4th Cir. 1989) ("Gwaltney II"). As set forth in Gwaltney II, a violation is ongoing if either: (1) the violation continues on or after the date the complaint is filed; or (2) there is a continuing likelihood of recurrence of intermittent or sporadic discharges. Gwaltney II, 890 F.2d at 697-98.

The Court in Carr found that the Plaintiffs met both prongs of the test for two different reasons. Turning to the first prong of the test, the Court found that a "failure to obtain an NPDES permit was and is a violation of the Act," and was thus a continuing violation. Carr, 931 F.2d at 1063. Next, the Court turned to the second prong of the test, finding that the "plaintiffs *also* proved the continuing likelihood of recurrence in intermittent or sporadic violations," because the district court had made findings that the defendant "may discharge in the event of a future chronic rainfall event which does not reach the 25-year, 24-hour level," and that "a reasonable trier of fact could find a likelihood of a recurrence in intermittent or sporadic discharges from the Feedlot." Id. (emphasis added). Thus, the Court's finding of a separate violation for failure to obtain a NPDES permit was not simply, as Petitioners suggest, "imprecise language." Pet. Br. at 52 n.25. Nor did it arise only in the context of the Court's assessment of the "the continuing likelihood of intermittent future discharges." Id. Instead, the Court made clear that the violation for failure to obtain a permit "met the first prong of the Fourth Circuit's Gwaltney test." Carr, 931 F.2d at 1063. And, separately, the second

prong of the Gwaltney test – requiring the demonstration of the continuing likelihood of intermittent future discharges – was met by a finding that discharges would likely occur in the future. Id. Thus, the CAFO's failure to obtain a permit was separate and continuing violation distinct from the violations likely to occur as a result of future discharges.

Petitioners' citation to cases that "have made clear that EPA is limited to regulating discharges, not point sources themselves based on past or possible future discharges," Pet. Br. at 58-60, is irrelevant because the duty to apply established by the Rule *is* related to preventing unauthorized CAFO discharges and is limited to CAFOs that discharge or will discharge. Petitioners mistakenly rely on NRDC v. EPA, 822 F.2d 104 (D.C. Cir. 1987) ("NRDC I") and NRDC v. EPA, 859 F.2d 156 (D.C. Cir. 1988) ("NRDC II"), a somewhat similar later decision of the D.C. Circuit. Pet. Br. at 58-60.[11] Those holdings – i.e., that EPA may not exercise regulatory authority over facilities that is unrelated to its authority to regulate discharges under the Act – are wholly irrelevant here. This Rule does not,

[11] National Wildlife Fed'n v. Consumers Power Co., 862 F.2d 580 (6th Cir. 1988) is also inapposite. See Pet. Br. at 49. Consumers Power upheld as reasonable EPA's longstanding view that, for purposes of the NPDES permit requirement, water released from a dam (a point source) will not be considered a "discharge of a pollutant" from a point source unless the dam itself adds pollutants "from the outside world" (i.e., as opposed to merely serving as a conveyance for pollutants from other sources). 862 F.2d at 584.

for example, establish a complete construction ban, as did the rule at issue in the portion of NRDC I cited by Petitioners. See NRDC I, 822 F.2d at 127-29. Instead, Petitioners in this case are challenging requirements that are expressly being imposed to ensure development of and compliance with effluent limitations. The D.C. Circuit precedent cited by Petitioners *supports* such a preventive application of EPA's authority under the Act. See id. at 119 (EPA may properly apply its information-gathering authority under section 308 of the Act where it would "assist EPA in its preventive function, namely in prescribing 'best management practices' to prevent or control unintentional spillage, leaks, or drainage from storage of toxic substances which might otherwise result from poor management practices").

Petitioners also quote excerpts from Waterkeeper in an attempt to portray that case as having held that EPA lacks any authority to regulate point sources through the use of pre-discharge permit application requirements. See Pet. Br. at 58 (quoting Waterkeeper, 399 F.3d at 505: "the [Act] gives the EPA jurisdiction to regulate and control only *actual* discharges – not potential discharges, and certainly not point sources themselves") (emphasis in original). However, to suggest that this language prevents EPA from requiring point sources that discharge or will discharge to submit permit applications stretches the holding too far. Waterkeeper did not hold that EPA could not require permit applications from *actual* dischargers before they discharge, and there is no language in the opinion

stating that EPA lacks such authority. See 399 F.3d at 506 n.22. On the contrary, Waterkeeper recognized the importance of public review and the implementation of enforceable effluent limitations, which can only occur through the permitting process. Id. at 499-504. Further, the Act on its face recognizes EPA's authority over point sources prior to discharge. See 33 U.S.C. § 1362(14) (defining "point source" as "from which pollutants are or may be discharged"); id. § 1318 (granting EPA authority to require information from all point sources that discharge or may discharge to, among other things, assist in the development of effluent limitations); id. § 1316(a)(3) (defining "source" for the purposes of establishing standards for "new sources" as "any building, structure, facility, or installation from which there is or may be the discharge of pollutants").

Moreover, the Act's legislative history shows that Congress intended permit applications to be separate and distinct requirements from the prohibition on discharges, with violations subject to enforcement under section 309 of the Act. See S. Rep. No. 92-414, at 64, reprinted in 1972 U.S.C.C.A.N. at 3730. Discussing EPA's enforcement authority in section 309, the Senate Report notes that violations for "unlawful discharge[s]" are distinct from violations for "operating without a required permit under Section 402." Id. The Senate Report's recognition of an enforceable duty to apply is no surprise, because Congress expected section 402 to "provide the statutory basis" for EPA's ability to "control,

on a source by source basis the discharge of pollutants," and without an enforceable "duty to apply," section 402 would be crippled. Id. at 3736.

c. EPA may use rulemaking to establish enforceable permitting requirements.

While the majority of the Petitioners' argument is premised on its broad assertion that the Act does not require dischargers to apply for permit coverage, they do concede in a footnote that EPA can "on a case-specific basis" require a discharger to apply for permit coverage. Pet. Br. at 49 n.23. But, according to Petitioners, this "case-specific" requirement must be imposed by a court in an individualized enforcement action seeking injunctive relief. Id. This insistence that there can be no "blanket regulatory duty to apply" for *any* point sources – even those that discharge or propose to discharge – is refuted by the text of the Act. Congress granted EPA's Administrator broad authority "to prescribe such regulations as are necessary to carry out his functions under [the Act]." 33 U.S.C. § 1361(a); see also 73 Fed. Reg. at 70,424/2. One of the Administrator's functions is to require that point sources provide EPA whatever information is reasonably necessary for EPA to ensure compliance with the permit program. Moreover, as discussed in greater detail below (Argument I.A.3), Congress contemplated in section 308(a)(3) that EPA would promulgate implementing regulations, and section 308(a)(4) gives particular emphasis to "carrying out" the NPDES permit

program under section 402. 33 U.S.C. § 1318(a)(4); see also 73 Fed. Reg. at 70,424/2. EPA's activities to carry out the NPDES permit program require broad-scale information collection that is best effectuated through generally applicable regulations. Furthermore, it would be wholly impractical for EPA to have to seek injunctive relief from a court for each discharging point source so that it could obtain through a permit application the information needed to develop effluent limitations applicable to each point source, not to mention information needed to promulgate effluent limitation guidelines, standards, and other regulations. This is especially true with respect to CAFOs, because historically it has been very difficult for States and EPA to even locate discharging CAFOs to obtain the necessary site-specific information to assess compliance and develop effluent limitations. See 66 Fed. Reg. at 3008. Thus, Petitioners' constricted view of EPA's information gathering and rulemaking authority is wrong both because it ignores the Act's plain language, and because following that view would unnecessarily drain EPA, State, and judicial resources.

3. Section 308 grants EPA enforceable authority to require permit applications before discharges occur.

As set forth above, the Act relies on the NPDES permit program as its means to implement its goals. But the program only works if discharging point sources are subject to the permit system, so that when discharges occur, they are subject to

and comply with appropriate effluent limitations. Allowing point sources to evade the Act's primary means of regulating pollutant discharges and forcing state and federal regulatory agencies to track dischargers down after-the-fact would completely frustrate the Act's goals.

Congress did not view section 402 as an optional program that point sources could forgo if they were willing to pay a penalty after discharging. Accordingly, section 308 gives EPA the essential pre-discharge and pre-permit authority, and the tools needed, to ensure that point sources are subject to scrutiny by permitting authorities and the public before they discharge. See 73 Fed. Reg. at 70,424; RTC at 4930-31 (JA 365-66). Section 308 instructs EPA to require information from all point sources to carry out section 402. Section 308(a) also authorizes EPA to require point sources to submit information for "(1) developing or assisting in the development of any effluent limitation, or other limitation, prohibition or effluent standard, . . . or standard of performance . . . ; (2) determining whether any person is in violation of any such effluent limitation, prohibition or effluent standard, . . . or standard of performance." 33 U.S.C. § 1318(a)(A).

Section 308 and the permit application requirements implemented pursuant to its authority are necessary to carry out section 402 because a permitting authority must obtain information from "all relevant parties and then calibrate[] each individual permit to maintain overall state water quality standards." Piney

Run Preservation Ass'n v. County Com'rs of Carroll County, MD, 268 F.3d 255, 266 (4th Cir. 2001). Because permits are "interdependent" and "the permitting authority must account for the effluent discharge of others in calculating the appropriate levels for an individual permit holder," EPA must use its authority pursuant to section 308 and require permit applications from CAFOs that discharge or propose to discharge to ensure that the standards set for CAFOs and all other point sources achieve their goals. Id.

Courts have recognized that EPA's authority under section 308 is broad, and is not limited to information regarding actual, known discharges, but also extends to information reasonably necessary to identify and prevent discharges through the imposition of effluent limitations in a permit, as well as to assess compliance with the Act's requirements. See NRDC I, 822 F.2d at 119 ("the statute's sweep is sufficient to justify broad information disclosure requirements"); United States v. Allegheny Ludlum Corp., 366 F.3d 164 (3d Cir. 2004) (recognizing EPA's ability to implement section 308(a) through broad, nationwide regulations).

Petitioners acknowledge that section 309 provides EPA authority to bring an enforcement action against anyone who has violated section 308. See Pet. Br. at 51, 53; 33 U.S.C. § 1319(g)(1)(A). And they do not dispute section 308's role in developing permit programs, establishing effluent limitations, determining whether violations have occurred, requiring monitoring, record keeping, and reporting. Nor

do they question that section 308 applies pre-discharge. See id. §§1318(a)(A), 1362(14) (section 308(a)(A) grants EPA authority over "the owner or operator of any point source," and section 502(14) defines a "point source" to include CAFOs that *may* discharge). Yet, Petitioners argue that section 308 is simply an information gathering provision and, while EPA can use section 308 to accomplish all of the tasks listed above, it cannot utilize permit applications to accomplish those same tasks. See Pet. Br. at 53-54.

This view ignores that section 308 is essential to implementing both the NPDES permit program and section 301's discharge prohibition, and it trivializes section 308's important role in preventing discharges. To achieve its ambitious goal "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," the Act depends on the permitting process. Texas Oil, 161 F.3d at 927. And in turn, the permitting process depends on the collection of information from point sources. "The effectiveness of the permitting process is heavily dependent on permit holder compliance with the CWA's monitoring and reporting requirements" imposed under section 308. Piney Run Preservation Ass'n, 268 F.3d at 266.

Information essential to the permit program is obtained through permit applications. See 73 Fed. Reg. 70,424; RTC at 4929-31 (JA 364-66). Without permit applications and the information they provide, the threats posed by

discharges are unknown and unregulated by the agencies to which Congress gave the duty to regulate such threats and discharges. Accordingly, in order to implement the section 402 permit program, EPA and States must obtain essential information from CAFOs, including information necessary to establish effluent limitations and other permit conditions. And, EPA reasonably requires this essential information pursuant to section 308(a)(A), in the form of a permit application, from CAFOs that discharge or propose to discharge.[12] Further, in construing the Act, which Congress entrusted to EPA to administer, it is EPA's reasonable application of its authority under section 308 that is controlling, not

[12] We note that the Eighth Circuit's recent decision in Service Oil v. EPA addressed EPA's authority to assess penalties for failure to apply for a permit, and found that if a person is not a point source, section 308 cannot be the basis for EPA's authority to require permit applications and assess penalties. 590 F.3d 545 (8th Cir. 2009). In Service Oil, the court was reviewing an Environmental Appeals Board decision assessing penalties for a construction site where the Defendant (Service Oil) failed to apply for a permit 30 days before construction began, as required by the relevant regulation. The court found that Service Oil was not a point source until construction began and thus, Service Oil's "failure to comply with that requirement cannot be a violation of [section 308] because [the CWA's] record-keeping requirements are expressly limited to 'the owner or operator of any point source.'" Id. at 550. Although EPA disagrees with the Eighth Circuit's decision, the government has not yet decided whether to seek rehearing or certiorari. Regardless, however, Service Oil's interpretation of section 308 is irrelevant to the present case even on its own terms, since the CWA clearly defines CAFOs as point sources.

Petitioners' constrained reading of section 308's reach. See Texas Office of Pub. Util. Counsel v. FCC, 265 F.3d 313, 320 (5th Cir. 2001).

B. The Rule's Permit Application Requirement Is Limited to Actual Dischargers And Provides CAFOs With An Objective Test to Assess Their Compliance.

In addition to Petitioners' challenge to EPA's ability to require permits in any circumstances, they appear to argue that, even if EPA can require some limited subset of CAFOs to apply for permits, the Rule's requirement that CAFOs that discharge or propose to discharge apply for a permit unlawfully imposes a duty on "non-discharging CAFOs." See Pet. Br. at 56. The Rule does no such thing. While the Waterkeeper court held that EPA was not authorized to require CAFOs to seek a permit for the mere potential to discharge, it also made clear that *actual* dischargers must have permits. 399 F.3d at 506 n.22. Accordingly, EPA has replaced the duty that categorically required a permit for any CAFO with a "potential to discharge" with the requirement that only imposes permit application requirements for CAFOs that *discharge* or are designed, constructed, operated, or maintained such that a discharge *will* occur, not simply *might* occur. 40 C.F.R. § 122.23(d) (emphasis added); 73 Fed. Reg. at 70,423.

The determination of whether a CAFO "discharges or proposes to discharge" entails an objective assessment by each CAFO to determine whether, due to its individual attributes, it discharges or *will* discharge. Id. at 70,423-24.

This objective assessment is necessary to implement EPA's statutory duty to prevent discharges through the NPDES permit program and to provide sufficient scrutiny of point sources without instituting a blanket duty to apply on all CAFOs, some of which merely have the "potential to discharge." Id. As explained in the Rule, there are number of objective factors that may be determinative of whether a CAFO will discharge, including "the proximity of the production area to waters of the U.S., whether the CAFO is upslope from waters of the U.S., and climatic conditions," "the type of waste storage system, storage capacity, quality of construction," and the standard operating procedures and the level of maintenance at the CAFO. Id. at 70,423-24. By utilizing an objective assessment accounting for man-made characteristics of the CAFO, climatic, hydrological, topographical, and other characteristics, a CAFO can determine whether, given its design, construction, operation and maintenance, it *will* discharge. Id. at 70,424.

To further assist CAFOs in making this objective assessment, and to provide assurance for CAFOs deciding not to seek permit coverage that they are, in fact, not required to obtain permit coverage, the Rule includes a voluntary certification option, which provides a means for a CAFO to certify that it does not discharge or propose to discharge if it meets the certification criteria. Indeed, by including the voluntary certification provision, regardless of whether a CAFO is interested in certifying or not, the certification criteria provide a (nonbinding) basis for making

an objective assessment of whether the CAFO will discharge. See Argument II.C.4 (discussing criteria).

In sum, the regulatory structure enacted by the Rule represents an objective, logical, and reasonable means to require only those CAFOs that are *actual* dischargers to apply for NPDES permits. As we will explain below, Petitioners' challenges on these points are meritless.

1. The Act strictly prohibits all discharges from all non-permitted point sources, and the duty to apply is not obviated by a CAFO's intent.

Petitioners describe scenarios in which CAFOs "rationally choose not to seek NPDES permit coverage" because they "conclude that they can manage their operations to avoid any discharge to navigable waters." Pet. Br. at 39. The Rule and the objective assessment it calls for allows CAFOs to do just that. What the Rule justifiably does *not* allow a CAFO operator do is simply *choose* not to seek a permit based on a subjective *intent* not to discharge. EPA has properly made clear that the subjective intent of a CAFO not to discharge has no bearing because mere intent is not sufficient to prevent discharges. See 73 Fed. Reg. at 70,423. This is consistent with the strict liability regime imposed by the Act, see, e.g., United States v. Earth Sciences, Inc., 599 F.2d 368, 374 (10th Cir. 1979); accord Sierra Club v. Abston Constr. Co., 620 F.2d 41, 46 (5th Cir. 1980), where neither intent nor impossibility is accepted as a valid defense to liability. See United States v.

Saint Bernard Parish, 589 F. Supp. 617, 619 (E.D. La. 1984). Accordingly, the Rule's approach to the concept of "propose to discharge" is logical and entirely consistent with the overall approach and structure of the Act.

To the extent that a self-professed "non-discharging" CAFO feels "coerced" to seek permit coverage based on the fear of "catastrophic future liability," Pet. Br. at 40, the Rule provides it with a reasonable alternative – the facility may choose to utilize the certification process to secure an objectively-based measure of protection from a subsequent "no permit" penalty. However, if a CAFO decides to forego this option and risk a "no permit" penalty and is later found not to have had a sound, objective basis for deciding that it did not need a permit, then it is reasonable for that point source to face the prospect of substantial future liability for that decision. Indeed, that is what Congress intended in creating a strict liability enforcement scheme in the Act. As this Court bluntly put it, "[t]he CWA is strong medicine." Texas Mun. Power Agency v. EPA, 836 F.2d 1482, 1488-89 (5th Cir. 1988). This is because under the Act's strict liability regime, any person who acts on the assumption that his or her activities are in compliance with the Act bears the risk of liability if such assumption is incorrect. See Orleans Audubon Soc'y v. Lee, 742 F.2d 901, 909-10 (5th Cir. 1984) (incorrect assumption that an activity is permitted under a nationwide permit results in liability for discharge).

Accordingly, the compliance pressure felt by CAFOs is inherent in the Act itself. And, despite Petitioners' repeated characterization of the Rule as requiring permits for "possible" discharges or "potential" discharges, the language of the Rule clearly limits its reach to actual discharges, that is for CAFOs that discharge or are designed, constructed, operated, or maintained such that a discharge *will* occur (i.e., propose to discharge), and through the certification process, the Rule also provides a reasonable, objective process by which CAFOs and regulators may make informed decisions regarding whether or not a permit is needed, avoiding the sort of operational uncertainty feared by Petitioners. However, the subjective issue of how CAFO operators *choose* to act, in light of the risk of penalties, is simply irrelevant to the reasonableness and legality of the Rule.

2. The Rule properly requires permits for CAFOs that will discharge, even if they are not discharging at this moment.

Consistent with the Act's charge to prevent unauthorized discharges, the duty to apply is triggered *before* a discharge occurs, and thus prevents *future* discharges. Because development of appropriate effluent limitations is complicated and requires public process, the grant of NPDES permit coverage is not a ministerial act, and to require EPA to wait until a discharge is occurring to require permit applications would thwart the Act's fundamental prohibition of discharges except in compliance with section 402, and the requirement for public

notice and comment prior to permit issuance.[13] Nothing in the Act or the Waterkeeper decision suggests that EPA cannot or should not promulgate rules focused on addressing discharges before they occur. In fact, Waterkeeper specifically recognized the importance of subjecting point sources to the scrutiny and review of permitting authorities and the public *before* a discharge occurs to achieve the goals of the Act. 399 F.3d at 498 ("permits [must] *ensure* that every discharge of pollutants *will* comply with all applicable effluent limitations and standards") (emphasis added).[14] Accordingly, the Waterkeeper court expressly recognized the preventative and forward-looking role of permit program and the Act generally.

Ignoring the regulatory text and preamble statements that make clear that the Rule does not require permits from *potential* dischargers, Petitioners argue that the requirement that CAFOs apply for permits if they "discharge or propose to

[13] See 33 U.S.C. § 1342(b)(3) (requiring the permitting authority to provide notice of the application to the public and any State with waters that may be affected by the authorized discharges and to provide an opportunity for a public hearing on the application "before ruling on each such application").

[14] In its analysis, the Waterkeeper court emphasized that "[t]he Clean Water Act demands regulation in fact, not only in principle." 399 F.3d at 498. And that "[b]y not providing for permitting authority review of the [land] application rates, the [2003] CAFO Rule fail[ed] to adequately prevent Large CAFOs from 'misunderstanding or misrepresenting' the application rates they must adopt in order to comply with state technical standards." Id. at 502.

discharge" is an attempt to circumvent the Waterkeeper decision. According to Petitioners, under the Waterkeeper decision EPA may, at most, require permits when a CAFO is discharging with no possibility that the cause of the discharge will be corrected, and not before or after.[15] To reach this conclusion Petitioners do not argue that EPA's definition of "discharge or propose to discharge" is the same as "potential to discharge," nor do they point to any evidence in the record that EPA intends them to mean the same thing.

Instead, Petitioners describe how they can envision scenarios in which CAFOs would seek permits based on their potential discharge or "an unspecified *likelihood* of discharge." Pet. Br. at 43 (emphasis in original). First, Petitioners argue that because the Rule requires permits from those CAFOs that "discharge," it constitutes an illegal requirement that *any* CAFO with a past discharge must apply for a permit. This is unlawful, Petitioners contend, because circumstances causing discharges in the past might be corrected. Thus, moving forward, a CAFO that

[15] This is true, Petitioners argue, because before a discharge occurs (presumably, even at a facility that is designed or operated such that a discharge *will* occur) there remains a possibility that the CAFO operator will prevent the discharge. And after a discharge has occurred, a CAFO is no longer discharging and the operator might correct the conditions that caused the discharge. Thus, the Petitioners reason, unless a CAFO is in the process of discharging, there is only a risk of future discharge, which they equate to the potential discharge standard vacated by Waterkeeper. See Pet. Br. 41-44.

discharged in the past now has only the "potential to discharge" in the future. Id. at 41-42.

This reading of the Rule and Waterkeeper is without merit. The Rule does not state, nor has EPA suggested, that every past discharge from a CAFO necessarily means the CAFO must apply for a permit. In fact, EPA explicitly stated in the Final Rule preamble that it "agrees not every past discharge from a CAFO necessarily triggers a duty to apply for a permit; however, a past discharge may indicate that the CAFO discharges or proposes to discharge if the conditions that gave rise to the discharge have not changed or been corrected." 73 Fed. Reg. at 70,423.

Indeed, as courts have recognized, and as common sense would dictate, past discharges are not meaningless. CAFOs that have had intermittent or sporadic discharges in the past would generally be expected to have such discharges in the future, unless they have corrected the problem by modifying their design, construction, operation, or maintenance in such a way as to prevent discharges from occurring. See, e.g., Gwaltney I, 484 U.S. at 57; American Canoe Ass'n v. Murphy Farms, Inc., 412 F.3d 536 (4th Cir. 2005). Accordingly, consistent with Waterkeeper's charge to regulate actual discharges, the Rule states that an uncorrected past discharge is *one* indicator that operators should consider in

assessing whether the CAFO discharges or proposes to discharge. See 73 Fed. Reg. at 70,423.

Turning to the Rule's requirement that CAFOs apply for a permit when they are "designed, constructed, operated or maintained such that a discharge will occur" (i.e., "propose to discharge"), Petitioners argue that a CAFO operator can never really know if it will discharge in the future. And a CAFO operator might prevent an actual discharge by "correct[ing] the conditions that would [have] lead to a discharge." Id. at 43. Based on this "you never know" theory, Petitioners argue that any duty to apply based on discharges that *will* occur in the future is no different than requiring all CAFOs with the mere potential to discharge to obtain a permit, and is therefore unlawful. Id. at 42, 44.

It is true that any assessment to determine if a discharge "will" occur requires some analysis of events yet to come. However, the mere fact that a CAFO's assessment as to whether it is "designed constructed, operated or maintained such that a discharge will occur" entails – to some extent – examining the future likelihood of discharge does not mean EPA is regulating based on a mere potential to discharge. Instead, it recognizes that each CAFO is subject to its own particular circumstances and conditions that, when assessed, may lead to a determination that a discharge *will* occur in the future. Obviously, neither CAFO operators nor EPA are omniscient, and it is impossible to predict without

reservation what might occur in the future. But claiming that EPA cannot, through rulemaking, require CAFOs to take any action to obtain a permit before a discharge occurs, even when based on the totality of information a reasonable CAFO operator would determine that a discharge *will* occur, is beyond the pale.

In addition to conforming to the Act's mandate to prevent unauthorized discharges, the conclusion that an operator of a CAFO that "discharges or proposes to discharge" must apply for a permit, even if a discharge is not occurring at that moment, reflects the nature of the environmental and public health dangers posed by CAFOs. See 73 Fed. Reg. at 70,423; 66 Fed. Reg. at 3008. For manufacturing processes that discharge wastewaters on a continuous or nearly continuous basis, it is relatively simple to determine whether the operator of the facility can be characterized as a point source that "discharges or proposes to discharge," and before the facility begins to release the waste stream, it must apply for a permit. 66 Fed. Reg. at 3008. In contrast, CAFOs tend to discharge animal wastes from occasional spills, the mishandling of waste, and when rainstorms cause accumulated animal wastes to spill into nearby waters by overflowing containment lagoons or by running off fields where manure is spread or process wastewater is sprayed.[16] See id.; 68 Fed. Reg. at 7201. Those discharges tend to be intermittent

[16] Petitioners' claim that most CAFOs do not discharge is factually unsupported. See Regulatory Background, supra, at Part A ("Overview of the CAFO Industry").

and unscheduled. See 73 Fed. Reg. at 70,423. If a CAFO could be characterized as a point source that "discharges or proposes to discharge" only on days when a discharge is occurring, its obligation to apply for a permit would change with the weather: during storms that result in a discharge, it would need to apply for a permit, but that obligation would cease immediately after the storm.[17] Such a regulatory regime would be unworkable. It would also plainly conflict with the Congressional charge to prevent discharges through the permit program. And, by defining "point source" to include CAFOs, 33 U.S.C. § 1362(14), Congress expressed its intent that discharges from CAFOs should be governed by NPDES permits. In order to bring CAFOs sensibly within the regulatory framework, EPA must require permits from CAFOs before a discharge occurs, that is, when the CAFO "discharges or proposes to discharge."

In sum, the phrase "discharge or propose to discharge" refers to a CAFO owner or operator whose acts or omissions result in a discharge or will result in a discharge, whether or not discharges are occurring at this moment. The Act does not limit EPA to regulating only at the moment of discharge, or to regulating discharges that are constant. See Carr, 931 F.2d at 1062-63; Gwaltney II, 890 F.2d at 693. As three Justices concurring in Gwaltney I wrote, "[a] good or lucky day is

[17] Just as a person who runs does not have to run 24 hours a day to be a "runner," a discharge need not be occurring right at this moment for a CAFO to be a defined as one that "discharges or proposes to discharge."

not a state of compliance." 484 U.S. at 69 (Scalia, J., concurring). Instead, all point source discharges, even those that are intermittent and sporadic, require permit coverage. And despite Petitioners' creative reliance on timing and insistence that "in reality it can never be said that 'discharge will occur' until a discharge is occurring," Pet. Br. at 42, the Act's permitting requirement is not fleeting, given that its goal is to *prevent* unauthorized discharges. Because, as the Second Circuit stated, permits must include provisions that a CAFO must meet in the future (i.e., those standards they "will" comply with), the Act and the Waterkeeper decision cannot be plausibly read as banning the prevention or regulation of future discharges as suggested by the Petitioners. See 399 F.3d at 498. EPA's interpretation of the Act to authorize it to require CAFOs that discharge or propose to discharge to seek permit coverage is a permissible and reasonable interpretation of the Act.

3. The Rule provides CAFOs with clear and fair notice that if they discharge or propose to discharge they are required to apply for a permit.

Petitioners also argue that the revised permit application requirement "provides no fair warning before imposing severe penalties for 'failure to apply.'" Pet. Br. at 44. Continuing, Petitioners claim that the duty to apply "raises serious due process concerns" and cite cases that stand for the general proposition that due process requires that regulated entities have "fair warning" of their compliance

obligations.[18] These "concerns" are without foundation; nowhere do they refer to the definition of a "proposal" to discharge as it is set forth in the Rule and indicate how it fails to provide notice of what conduct it requires, nor do they address the additional guidance provided to CAFOs in the preamble and other portions of the regulation.

Rather than address the Rule, Petitioners focus on scenarios in which a CAFO operator is unaware of a problem in his operation that will result in a discharge. While it might be true that a CAFO operator does not "know all circumstances about every aspect of his operation at all times," this lack of knowledge of his operations and/or conditions, "such as a latent equipment defect," does not operate to excuse or exempt the CAFO from regulation. See Pet. Br. at 46 n.21, 47.

[18] The cases cited by Petitioners do not suggest that a CAFO can be excused for its failure to obtain permit coverage, where the requirement has been promulgated and explained but the CAFO is unable or unwilling to assess their facility to ensure or determine compliance before violation. Instead, the cases relied upon by Petitioners arose where agencies attempted to extend regulatory requirements to new situations or in unexpected and impermissible ways. For instance, in Diamond Roofing Co. v. Occupational Safety and Health Review Comm'n, 528 F.2d 645, 648 (5th Cir. 1976), the Court rejected the agency's attempt to enforce a regulation based on an interpretation that could not be squared with the plain text of the regulations (the agency interpreted the term "floor" to include a roof).

In any event, the Due Process Clause requires simply that a regulation provide "a reasonable opportunity to know what is prohibited," Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972), or "fair warning of the conduct it prohibits or requires," General Electric Co. v. EPA, 53 F.3d 1324, 1328 (D.C. Cir. 1995). And a statutorily defined point source such as a CAFO cannot reasonably claim that it did not have adequate notice that its activities were regulated and what conduct is required (i.e., apply for a permit when it discharges or proposes to discharge). Further, such claims are rarely ripe for review until the issue arises in a concrete setting in which the regulation has been applied. Where judicial review proceeds with a facial challenge, Petitioners bear a particularly heavy burden. In such a case, a rule is only unconstitutional on its face if it fails to provide fair warning and is impermissibly vague in all its applications. See Woodruff v. United States Dep't of Labor, 954 F.2d 634, 643 (11th Cir. 1992) (per curiam) (citing Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982)).

Here, the Act and the Rule make perfectly clear that a CAFO must apply for permit coverage when it discharges or proposes to discharge. In the Rule text and preamble, EPA further explains that a CAFO "proposes" to discharge when it is designed, constructed, operated, or maintained such that a discharge *will* occur. Simply put, only a CAFO operator is responsible for the running of its operation and its inability to discover or anticipate conditions that will lead to a discharge is

not the fault of the regulation, nor is the Rule unconstitutional because it might penalize a CAFO for conditions that existed at its operation but of which it was unaware.

II. NOTHING IN 40 C.F.R. § 122.23(j) ALTERS THE EVIDENTIARY BURDEN FOR A CAFO ALLEGED TO HAVE DISCHARGED POLLUTANTS WITHOUT A PERMIT.

In the Final Rule, EPA codified new regulatory text at 40 C.F.R. §122.23(i) to assist in making an assessment of whether a CAFO discharges or proposes to discharge. Section 122.23(i) provides an objective means for owners or operators of unpermitted CAFOs to determine whether the CAFO will discharge and, if a discharge is not expected to occur, voluntarily to certify that they do not "propose to discharge" within the meaning of the Rule.

The Rule recognizes, in 40 C.F.R. § 122.23(j)(1), that such a certified CAFO is presumed to be free of liability for failure to apply in the event that a discharge does occur: "If such a CAFO does discharge, it is not in violation of the requirement that CAFOs that propose to discharge seek permit coverage pursuant to paragraphs (d)(1) and (f) of this section with respect to that discharge.").[19] This provision states the obvious: a CAFO that, based on its design, construction,

[19] The CAFO still faces strict liability for the unauthorized pollutant discharge itself. See id.

operation and maintenance, will not discharge to waters of the United States is not required by the CWA or 40 C.F.R. § 122.23(d) and (f) to apply for an NPDES permit. In the unlikely event that such a CAFO *does* discharge despite the manner in which it was designed, constructed, operated and maintained, there is a rebuttable presumption that the cause of the discharge was not reasonably foreseeable and did not, therefore, trigger a duty to apply for a permit. See 73 Fed. Reg. at 70,427/1.[20] Thus, the certification provision allows the CAFO to establish from the outset that it does not "propose to discharge," and thereby potentially to avoid having to establish that fact later in an enforcement proceeding.

The remaining text of section 122.23(j) then clarifies that uncertified, unpermitted CAFOs will of necessity have to establish that they did not propose to discharge prior to the occurrence of the discharge if an enforcement proceeding for failure to seek permit coverage arising from an alleged unpermitted discharge is brought against them. As the Rule states:

> In any enforcement proceeding for failure to seek permit coverage under paragraphs (d)(1) or (f) of this section that is related to a discharge from an unpermitted CAFO, the burden is on the CAFO to establish that it did not propose to discharge prior to the discharge

[20] EPA made clear that the presumption established by section 122.23(j)(1) is rebuttable. See, e.g.,73 Fed. Reg. at 70,427/1 (describing permitting authority's burden to overcome presumption "if it believes that the CAFO's certification was invalid at the time of the discharge"); 40 C.F.R. § 122.23(i)(4), (5)(ii) (describing circumstances in which a certification may become invalid).

> when the CAFO either did not submit certification documentation . . . within at least five years prior to the discharge, or withdrew its certification . . . . Design, construction, operation and maintenance in accordance with the criteria of paragraph (i)(2) of this section satisfies this burden.

40 C.F.R. § 122.23(j)(2). Thus, where a non-certified CAFO discharges pollutants without a permit, it retains the burden of establishing a defense to liability for failure to apply – i.e., that it was not *required* to apply because it did not "propose to discharge" – just as it bears the burden of establishing a defense (if any) to liability for the unauthorized discharge itself. See infra at Argument II.B.

Petitioners present several challenges to section 122.23(j)(2), all relying on inaccurate characterizations of the Rule. Pet. Br. at 61-79; see also id. at 86 (Petitioners only challenge (j)(2), not (j)(1)). First, the "potential to discharge" standard rejected in Waterkeeper has no relevance to 122.23(j)(2) – a provision that, on its face, *only* applies where a CAFO *has discharged* without a permit. See 40 C.F.R. § 122.23(j)(2) (provision applies "[i]n any enforcement proceeding . . . *that is related to a discharge* from an unpermitted CAFO") (emphasis added).

Second, 122.23(j)(2) is not a "burden-shifting" provision. That is, the Rule does not shift away from the enforcement authority any evidentiary burden that that party ordinarily must meet in an enforcement action arising from alleged unauthorized discharges. Rather, under the Act's strict liability scheme, it is *CAFOs* who typically bear the burden of establishing a defense to liability.

Third, section 122.23(j)(2) does not establish a "presumption." It merely articulates that presenting evidence sufficient to satisfy the certification eligibility criteria is one means of defending against the claim that a CAFO "proposes to discharge."

Finally, Petitioners' procedural challenge lacks merit because section 122.23(j)(2) merely clarifies the limits of the presumption established by 122.23(j)(1). As such, (j)(2) is a "logical outgrowth" of EPA's supplemental proposal.

A. 40 C.F.R. § 122.23(j)(2) Only Applies to Enforcement Proceedings Arising From "Discharges."

As an initial matter, the plain text of section 122.23(j)(2) belies Petitioners' attempt to portray it as contrary to Waterkeeper. Pet. Br. at 72-75. The Waterkeeper court was concerned that the 2003 Rule "impos[ed] obligations on *all* CAFOs *regardless* of whether or not they have, in fact, . . . discharged any pollutants." 399 F.3d at 505 (emphasis added). Here, section 122.23(j)(2) is expressly limited *only* to enforcement proceedings involving CAFOs that *have discharged* without a permit. See 40 C.F.R. § 122.23(j)(2) (provision applies "[i]n any enforcement proceeding for failure to seek permit coverage . . . *that is related to a discharge* from an unpermitted CAFO") (emphasis added); accord 73 Fed. Reg. at 70,427/1. In short, Waterkeeper has no relevance here.

B. Section 122.23(j)(2) Is Not a "Burden-Shifting" Provision, Because the Act Itself Requires Point Sources That Discharge Without A Permit to Prove An Affirmative Defense to Liability.

This Court has long held that a discharge without a permit gives rise to liability under the Act *for the failure to obtain a permit*, as well as for the occurrence of the discharge itself. See supra at Argument I.A.2.b (citing cases). Thus, it is squarely within this Court's precedent for section 122.23(j)(2) to provide a clarification regarding enforcement against an unpermitted CAFO for failure to apply for permit coverage in the context of an actual discharge.

This Rule does not change the way liability for violating the Act ordinarily is determined. In general, under the Act, once the prima facie elements of liability have been established, the defendant bears the burden of proving an affirmative defense. For example, the phrase "discharge of a pollutant" in CWA section 301(a) is defined, inter alia, as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12)(A). "Thus, a 'discharge of a pollutant' occurs when five elements exist: '(1) a pollutant must be (2) added (3) to navigable waters (4) from (5) a point source.'" E.g., U.S. Public Interest Research Group v. Atlantic Salmon of Maine, LLC, 215 F. Supp. 2d 239, 246 (D. Me. 2002); accord National Wildlife Fed'n v. Gorsuch, 693 F.2d 156, 165 (D.C. Cir. 1982); Consumers Power Co., 862 F.2d at 583. Once these prima facie elements of liability for an unauthorized discharge have been established, the

defendant bears the burden of proving an affirmative defense (if any applies). See Atlantic Salmon, 215 F. Supp. 2d at 257-60 (defendant sought unsuccessfully to prove entitlement to an exemption from the zero-discharge standard, or alternatively that laches or equitable estoppel applied).

Similarly, where a CAFO discharges without a permit and is alleged to have violated the statute by failing to seek permit coverage under 40 C.F.R. § 122.23(d) and (f) despite having "proposed to discharge," the State or EPA would need to establish a prima facie case that the CAFO proposed to discharge, i.e., that the unpermitted discharges resulted from the CAFO's design, construction, operation or maintenance. Id. § 122.23(d)(1). The evidentiary burdens that each party would bear in an enforcement proceeding under section 122.23(j)(2) are thus no different than in other CWA enforcement proceedings. Accordingly, the cases Petitioners cite regarding limits on agencies' discretion to "shift" the burden of proof in an enforcement proceeding are inapposite. Pet. Br. at 62-67.

C. 40 C.F.R. § 122.23(j) Reasonably Describes the Effect of Certification in the Context of the Act's Liability Scheme.

Petitioners next contend: (1) that EPA failed to articulate a rational basis for section 122.23(j)(2); (2) that EPA unfairly limited the evidence that may be presented to prove an affirmative defense to liability; (3) that EPA effectively has left some CAFOs (those in States that do not adopt the certification process) with a

greater evidentiary burden to prove such a defense than others; and (4) that the specific example of such evidence identified in the Rule (i.e., design, construction, operation and maintenance in accordance with the certification eligibility criteria) was selected arbitrarily. Pet. Br. at 67-72, 79. These challenges are all groundless.

1. 40 C.F.R. § 122.23(j)(2) does not establish a "presumption" that an unpermitted CAFO that discharged "proposed to discharge."

Petitioners' first argument is based on the incorrect premise that section 122.23(j)(2) establishes a regulatory presumption that any non-certifying CAFO that experiences a discharge "proposed to discharge" prior to that discharge. Petitioners then compound their error by inaccurately characterizing this "presumption" as "irrebuttable." Pet. Br. at 30. In fact, as explained above, section 122.23(j)(2) merely clarifies how an unpermitted CAFO may establish a defense to a claim that it proposed to discharge and failed to seek permit coverage. Nothing in this provision removes the obligation of the enforcing party to initially establish a prima facie case of liability.

Petitioners are also mistaken in characterizing the evidentiary showing described in section 122.23(j)(2) as merely a calculation of the odds, based on what was known prior to the discharge, that such a discharge "might" occur. Petitioners seem to believe that if an unpermitted CAFO has discharged, the discharge cannot rationally be attributed to anything other than random chance. See Pet. Br. at 69.

The Rule, however, provides that a CAFO proposes to discharge "if it is designed, constructed, operated, or maintained such that a discharge *will* occur." 40 C.F.R. § 122.23(d)(1) (emphasis added); see 73 Fed. Reg. at 70,423/2 ("[R]evised §122.23(d)(1) requires only CAFOs that actually discharge to seek permit coverage and clarifies that a CAFO proposes to discharge if . . . it is designed, constructed, operated, or maintained such that a discharge will occur, not simply such that it might occur.").

Contrary to Petitioners' assertions, there are number of objective factors that may be determinative of whether a CAFO will discharge, including "the proximity of the production area to waters of the U.S., whether the CAFO is upslope from waters of the U.S., and climatic conditions." Id. at 70,423-24. "Similarly, the type of waste storage system, storage capacity, quality of construction, and presence and extent of built-in safeguards are important factors," as well as standard operating procedures and the level of maintenance at the CAFO. Id. at 70,423-24. Accordingly, this Rule requires CAFO operators to "objectively assess whether a discharge from the CAFO, including from the production area or land application areas under the control of the CAFO, is occurring or will occur for the purposes of determining whether to obtain permit coverage." Id. at 70,423/2.

Under the Act, CAFOs without permits "are not allowed to discharge under *any* conditions (other than discharges of agricultural stormwater [which are exempt])." Id. at 70,427/2 (emphasis added). Accordingly, where an unpermitted CAFO *actually discharges*, the circumstances of the discharge itself may be sufficient to establish a prima facie case that there was something inherent in the design, construction, operation or maintenance of the CAFO which made it inevitable that a discharge of pollutants to waters of the United States would occur. Tellingly, Petitioners do not suggest any other likely explanations for the occurrence of a discharge at an unpermitted CAFO. Pet. Br. at 67-69; see also Chemical Mfrs. Ass'n v. DOT, 105 F.3d 702, 706 (D.C. Cir. 1997) (an agency need only articulate a rational basis for a regulatory presumption, and "[i]s not required to consider the relative likelihood of every possible intervening event" before adopting it).[21] In no instance, however, does section 122.23(j)(2) relieve the enforcing party of its obligation to initially present a prima facie case of liability before the defendant CAFO is required to prove an affirmative defense to liability.

[21] As explained above, section 122.23(j)(2) does not create a presumption – unlike the provision reviewed in Chemical Mfrs. – but merely describes evidence that would satisfy a CAFO's burden to prove an affirmative defense to liability.

2. The Rule does not limit the evidence that an unpermitted CAFO that discharges may present in attempting to prove an affirmative defense to liability for failing to seek permit coverage.

As previously noted, the Rule provides that in an enforcement arising from an unpermitted discharge alleging that the discharging CAFO violated the statute by failing to apply for permit coverage, "the burden is on the CAFO to establish that it did not propose to discharge prior to the discharge." 40 C.F.R. § 122.23(j)(2). The Rule further states that "[d]esign, construction, operation and maintenance in accordance with the criteria of paragraph (i)(2) of this section satisfies this burden." Id.

Petitioners are mistaken in their belief that this provision somehow limits the permissible forms of evidence that such CAFOs may present in their defense. The last sentence of the provision confirms that evidence of "design, construction, operation and maintenance in accordance with the criteria of paragraph (i)(2)" is *sufficient* to show that a CAFO did not propose to discharge prior to the discharge. But it does not state that a CAFO *must* or *shall* present such evidence. See 40 C.F.R. § 122.23(j)(2). The unpermitted CAFO's burden is to "establish," in some fashion, "that it did not propose to discharge prior to the discharge," id., and the Rule on its face does not *preclude* CAFOs from attempting to make this showing using evidence other than that referred to in the last sentence of section

122.23(j)(2). See Chemical Mfrs., 105 F.3d at 708 (deferring to the agency's explanation that the last sentence of a challenged regulation "only provides an example of the types of evidence that [may be] use[d] in rebuttal").[22]

3. The Rule does not require any different evidentiary showing from CAFOs in those States that choose not to adopt the certification process.

Petitioners are also mistaken in their view that CAFOs in States that do not adopt the voluntary certification provision in their authorized NPDES programs are somehow prejudiced because they will not be able to certify. Pet. Br. at 79.[23] Certified CAFOs and uncertified CAFOs are subject to the same burden: to

[22] Although Petitioners attempt to distinguish Chemical Mfrs., Pet. Br. at 71 n.34, the case illustrates that courts accept an agency's explanation of what its own rule means unless the regulatory text plainly contradicts the explanation. See 105 F.3d at 708 (noting that the explanation was "somewhat puzzling" and that the sentence in question "[l]ogically . . . would appear to serve as a limitation on the types of evidence that . . . may [be] introduce[d]," but nonetheless deferring to the agency).

[23] In its Response to Comments, EPA explained that "due to the fact that certification is voluntary and does not create new CWA requirements, authorized States are not required to incorporate certification into State NPDES programs." RTC at 4176 (JA 363). That the certification provision was promulgated as part of 40 C.F.R. § 122.23 does not undermine this explanation (Pet. Br. at 79 n.44). See 40 C.F.R. § 123.25(a) ("All State Programs . . . must have legal authority to implement each of the following provisions . . . except that States are not precluded from omitting or modifying any provisions to impose more stringent requirements."). Since certification does not impose any additional "requirements" on CAFOs – it is strictly voluntary – a State may omit certification from its authorized program.

establish that they did not propose to discharge prior to an unpermitted discharge. Certified CAFOs are those that elect to meet this burden in advance and provide notification to the permitting authority. Uncertified CAFOs without NPDES permits that discharge and face an enforcement action in connection with such discharge that alleges liability for failure to seek permit coverage must meet this burden in response to the enforcing party's prima facie evidence of liability. Indeed, 40 C.F.R. § 122.23(j)(2) expressly recognizes that the certification criteria are equally available and useful to CAFOs that either cannot or do not certify, because evidence meeting those criteria satisfies the burden of proving an affirmative defense to liability for failure to apply for a permit.

CAFOs in States that do not adopt the certification process may do everything that a certified CAFO does, except provide notification to the permitting authority. Notification itself is not germane to establishing whether the CAFO proposed to discharge prior to a discharge; the actual design, construction, operation and maintenance of the CAFO are what matter. As the Final Rule preamble explained, the benefit of certification is that it gives certified CAFOs without NPDES permit coverage peace of mind:

> EPA emphasizes that certification is not a substitute for a permit. Rather, a valid certification simply allows an unpermitted CAFO that is designed, constructed, operated, and maintained not to discharge to establish and document that it does not discharge or propose to discharge, in exchange for the assurance provided by a no discharge

> certification that it is not subject to the regulatory requirement to seek permit coverage in 40 CFR 122.23(d)(1) and (f). It is the CAFO's choice and responsibility to establish and maintain a valid certification or lose the benefits afforded by certification.

73 Fed. Reg. at 70,432/1.

In short, while the certification process has potential value to CAFOs, a State's decision not to adopt the certification process imposes no greater evidentiary burden on CAFOs in that State.

4. EPA adequately explained how evidence of compliance with the certification eligibility criteria relates to whether an unpermitted CAFO "proposed to discharge" prior to the occurrence of a discharge.

As previously noted, the Rule provides that evidence of design, construction, operation and maintenance in accordance with the certification eligibility criteria of 40 C.F.R. § 122.23(i)(2) "satisfies" an unpermitted discharger's burden of showing that it did not "propose to discharge." Id. § 122.23(j)(1). In the Final Rule preamble, EPA explained how such evidence is relevant in determining whether, based on an objective assessment of the design, construction, operation and maintenance of the facility, a discharge of pollutants from the CAFO was reasonably foreseeable when the discharge occurred.

In summary, there are three criteria: (1) an objective evaluation which shows that the CAFO's production area is designed, constructed, operated, and maintained so as not to discharge; (2) development and implementation of a

nutrient management plan ("NMP") to ensure no discharge (other than agricultural stormwater discharges), including operation and maintenance practices for the production area and land application areas under the control of the CAFO; and (3) maintenance of the documentation required for certification. See 73 Fed. Reg. at 70,427/3 (providing summary); 40 C.F.R. § 122.23(i)(2). Each criterion is relevant in determining whether or not an unpermitted CAFO that discharges should be considered to have "proposed to discharge" prior to the discharge.

For example, in meeting the first eligibility criterion, an unpermitted CAFO with an open manure containment structure would need to perform a technical evaluation involving, inter alia, the use of computer modeling tools that "can be used to estimate the production of manure, bedding and process water" at a particular CAFO and "determine the size of storage facilities necessary to meet no discharge." 70 Fed. Reg. at 70,428/3. This criterion additionally requires an evaluation of the remainder of the CAFO's production area (i.e., apart from any open manure storage structures), to assess whether the production area is "designed, constructed, operated, and maintained such that there will be no discharge of manure, litter, process wastewater, or raw materials, such as feed, to surface waters." Id. at 70,429/1. This involves analysis of "the amount of manure generated during the storage period, the size of the storage structure, control measures to ensure diversion of clean water, and seasonal restrictions of land

application" of manure, among other factors. Id. All of these factors bear directly on the question of whether a discharge "will occur" at a particular CAFO.

The second eligibility criterion requires the CAFO "to have developed and be implementing an NMP that addresses, at a minimum, the elements set forth in [40 C.F.R. §§ 122.42(e)(1) and 412.37(c)], and all site-specific operation and maintenance practices necessary to ensure that the CAFO will not discharge." 70 Fed. Reg. at 70,429/2-3. The NMP "must include provisions regarding nutrient management in the production area as well as in all land application areas under the control of the CAFO where the CAFO will land-apply manure." Id. at 70,429/3. Understanding how and when a CAFO plans to land-apply is critical information in assessing (among other things) how much manure storage capacity a CAFO may need to have in its production area in order to prevent any discharge of manure to waters of the United States. Additionally, the NMP specifies site-specific operation and maintenance practices, which "are critical to discharge prevention." Id.; see also id. at 70,429-30 (describing how NMP implementation may assist in evaluating whether CAFO will discharge).

The third eligibility criterion requires maintaining the documentation required by the first two criteria. 70 Fed. Reg. at 70,430/2. This reasonably supplements the first two criteria.

Petitioners do not identify any particular aspect of the eligibility criteria that purportedly lacks a "rational nexus" to rebutting an allegation that an unpermitted CAFO "proposed to discharge" prior to an actual discharge; and as shown above, the record more than demonstrates such a connection. Rather, Petitioners complain that the evaluations described above may be "time-consuming" and "costly." Pet. Br. at 68-69. Despite their misgivings, however, all these criteria ultimately require is that the operator of an unpermitted CAFO understand the CAFO's operations and take preventative measures when changes in those operations would otherwise lead to a pollutant discharge – which is hardly an unreasonable expectation, considering the Act prohibits *all* unauthorized point source discharges of pollutants. And as discussed above, an unpermitted CAFO subject to 40 C.F.R. § 122.23(j)(2) is not *precluded* from introducing other evidence to show that it did not propose to discharge. In sum, EPA reasonably explained the basis for section 122.23(j)(2). See Texas Oil, 161 F.3d at 934.

D. The Rule Is a Logical Outgrowth of the Supplemental Proposal.

Aside from their substantive challenges, Petitioners contend that the language in section 122.23(j)(2) was promulgated without notice and the opportunity to comment in violation of the APA. Pet. Br. at 75-77. Principally, they argue that the addition of the "burden-shifting" language in the Final Rule changed what had been a proposal for "voluntary" certification into something

different. Id. But as shown above, it is inaccurate to describe section 122.23(j)(2) as "shifting" an evidentiary burden to the CAFO. Supra at Argument II.B. Moreover, the explanation provided in (j)(2) is an obvious corollary of (j)(1), which presumes that an unpermitted CAFO possessing a certification at the time of the discharge did not "propose to discharge" prior to the discharge – since, by certifying, such a CAFO already has made a sufficient showing to prove an affirmative defense to liability. Supra at Arguments II.B, II.C.3; cf. 73 Fed. Reg. at 12,327 (noting that if a once-certified CAFO no longer has a valid certification, it is "in the same position as any other unpermitted and uncertified CAFO" with respect to liability for failure to seek a permit). Section 122.23(j)(2) simply makes clear that CAFOs which have *not* made such a showing in advance pursuant to the certification process must do so in response to an enforcing party's prima facie evidence that the CAFO is liable for failure to seek permit coverage. A new round of notice and comment was not necessary in order to provide this clarification.

Finally, EPA notes that the Supplemental Proposal setting forth the voluntary certification option was itself a second notice, published in response to comments on the original proposal that expressed concern about whether "accidental" discharges would give rise to liability for failure to apply for a permit. See 73 Fed. Reg. at 70,426/1. Petitioners thus are arguing that a *third* round of notice and comment is necessary, in a rulemaking that already took more than

three years after the Waterkeeper decision to complete, merely because the Agency chose to give additional clarification in the Final Rule. "An agency 'need not subject every incremental change in its conclusion after each round of notice and comment to further public scrutiny before final action.'" Brazos Elec. Power Co-op., Inc. v. SWPA, 819 F.2d 537, 542-43 (5th Cir. 1987). As long as the notice "include[s] either the terms or substance of the proposed rule or a description of the subjects and issues involved . . . [t]he notice need not specifically identify every precise proposal which [the agency] may ultimately adopt as a rule." United Steel Workers of Am. v. Schuylkill Metals Corp., 828 F.2d 314, 317 (5th Cir. 1987) (internal quotations and citations omitted). Because section 122.23(j)(2) is the obvious corollary to EPA's description in the Supplemental Proposal and in section 122.23(j)(1) of the effect of voluntary certification, it is a "logical outgrowth" of the Supplemental Proposal, Brazos, 819 F.2d at 543, and EPA did not err by declining to hold yet another round of notice and comment.

III. PETITIONERS' CHALLENGE TO NMP REQUIREMENTS FOR LAND APPLICATION AREAS IS TIME-BARRED, AND EVEN IF REVIEWABLE, THESE REQUIREMENTS SHOULD BE UPHELD.

Petitioners also contend that the Rule improperly requires NPDES permits for "agricultural stormwater" discharges, by requiring permitted CAFOs to implement NMPs that include procedures and practices for land application of nutrients even if the CAFO does not "propose" to discharge anything other than

agricultural stormwater from the land application area. Pet. Br. at 80-86. This argument must fail for three reasons.

First, the NMP requirement was not established in this rulemaking, but in 2003. To the extent the instant petitions seek further judicial review of the 2003 Rule, they are time-barred.

Second, EPA's regulations do not "define" the land application area as "an un-regulated nonpoint source." Pet. Br. at 82. Instead, under the 2003 Rule, discharges from land application areas under the control of the CAFO are "discharges from that CAFO." 40 C.F.R. § 122.23(e); see Waterkeeper, 399 F.3d at 511 (because "land application areas are, after all, an integral and indeed indispensable part of CAFO operations," and since "only discharges from land application areas under [the] control of a CAFO are subject to regulation . . . the EPA could quite reasonably conclude that runoff from a land application area is runoff from a CAFO"). Thus, EPA has authority under the Act to require that permits control discharges from the land application area.

Finally, Petitioners argue that there is no need to include land application area requirements in a permit because, if a CAFO properly land-applies nutrients, any resulting discharges necessarily are agricultural stormwater. Pet. Br. at 84. But the purpose of the 2003 Rule's NMP requirements for land application areas is to *ensure* that the CAFO's application of manure, litter, and process wastewater on

cropland under its control is conducted such that any precipitation-related discharges will constitute "agricultural stormwater" as the 2003 Rule interprets the term, as opposed to regulated pollutant discharges. In other words, Petitioners seek to put the cart before the horse, by claiming the benefit of the statutory exemption without fulfilling the established regulatory pre-conditions for the exemption to apply. Moreover, Petitioners' suggested approach runs contrary to Waterkeeper 's holding that NMP requirements are "effluent limitations" and, as such, must be included in permits. 399 F.3d at 502-03. The 2008 Rule's requirement to submit the NMP with the permit application and include "the terms of the NMP" in the permit is consistent with the Waterkeeper decision, reasonable, and should be upheld.

A. Petitioners Effectively Seek Review of the 2003 Rule, Which Is Time-Barred.

EPA did not establish its interpretation of how the Act's agricultural stormwater exemption applies to permitted CAFOs in *this* rulemaking, but rather in 2003. See, e.g., 73 Fed. Reg. at 70,438/2 ("EPA is not revising the NMP requirements established in the 2003 CAFO rule that added land application requirements for permitted CAFOs."); id. at 70,434/3 ("EPA did not propose to amend the existing agricultural stormwater discharge exemption provision in

§ 122.23(e), nor has EPA otherwise reopened the provision."). The 2003 Rule interpreted the statute to require that discharges from a CAFO's land application areas be treated as discharges "from that CAFO." Additionally, the 2003 Rule provided that the agricultural stormwater discharges included only those precipitation-related discharges associated with land application in accordance specified NMP requirements. The 2003 regulatory language, which was not revised by the 2008 Rule, provided:

> The discharge of manure, litter or process wastewater to waters of the United States from a CAFO as a result of the application of that manure, litter or process wastewater by the CAFO to land areas under its control is a discharge from that CAFO subject to NPDES permit requirements, except where it is an agricultural storm water discharge . . . [W]here the manure, litter or process wastewater has been applied in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter or process wastewater, as specified in § 122.42(e)(1)(vi)-(ix), a precipitation-related discharge of manure, litter or process wastewater from land areas under the control of a CAFO is an agricultural stormwater discharge.

40 C.F.R. § 122.23(e).

The 2008 Rule, in contrast, only "clarifi[ied] how the agricultural stormwater exemption applies to Large CAFOs that do not have an NPDES permit." 70 Fed. Reg. at 70,435/2. Petitioners, however, do not challenge EPA's interpretation of the agricultural stormwater exemption as it applies to *unpermitted* CAFOs; instead, they seek review of the requirements for permitted CAFOs. See

Pet. Br. at 80-86. Thus, their claim necessarily seeks to reopen the issue of whether 40 C.F.R. § 122.23(e) is consistent with the Act.

Section 509(b) of the Act authorizes petitions for judicial review of certain EPA actions "within 120 days from the date of such [action], 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). Here, the petitions for review were filed nearly *six years* after EPA promulgated the 2003 Rule. As such, the Court should not entertain Petitioners' challenge now.

Petitioners attempt to justify the timing of their challenge by asserting that under the 2003 Rule, EPA "assumed that all CAFO NPDES permits would need to include land application area requirements" under the "potential to discharge" standard. Pet. Br. at 82. Under Petitioners' theory, it was "logical" before Waterkeeper for EPA to require that permits include land application requirements, but that *after* Waterkeeper rejected the "potential to discharge" standard it is now clear that EPA's approach is unlawful. Id. at 82-83. But this assertion makes no sense, considering: (1) those Petitioners who were parties to the Waterkeeper case *did* challenge EPA's application of effluent limitations to the land application area and how EPA interpreted the agricultural stormwater exemption in the context of CAFO permit requirements; and (2) Waterkeeper *upheld* this portion of the 2003 Rule even while separately vacating the "potential to discharge" standard.

Compare Waterkeeper, 399 F.3d at 504-06 (finding "potential to discharge" unlawful), with id. at 506-11 (upholding 40 C.F.R. § 122.23(e)).

In short, Petitioners have provided no valid justification for seeking untimely judicial review of the 2003 Rule (or challenging it a *second* time, as some Petitioners are seeking to do).[24]

B. 40 C.F.R. § 122.23(e) Reasonably Interprets "Point Source" Discharges to Include Certain Discharges From the Land Application Area, While Treating Other Precipitation-Related Discharges as Agricultural Stormwater.

In attempting to challenge how EPA interprets the agricultural stormwater exemption's application to land application discharges from permitted CAFOs, Petitioners conflate two different hypothetical scenarios: (1) one in which "there is *no* discharge from the CAFO land application area to waters of the U.S.," and a second in which "any discharge is statutorily exempt agricultural stormwater discharge." Pet. Br. at 80 (emphasis added). To the extent the first hypothetical describes CAFOs that *do not land-apply* manure, litter or process wastewater, EPA

[24] It makes no difference, with regard to the timeliness of review, that Petitioners claim EPA acted unlawfully. A claim that existing regulatory provisions are unlawful may be raised outside of the statutory time period for judicial review only "by filing a petition for amendment or rescission of the agency's regulation, and challenging the denial of that petition." Environmental Defense v. EPA, 467 F.3d 1329, 1333 (D.C. Cir. 2006); see also Oljato Chapter of Navajo Tribe v. Train, 515 F.2d 654, 659-61 (D.C. Cir. 1975).

made clear that their NMPs need not address land application. Such a requirement would be nonsensical. As EPA explained in response to Petitioners' comments on this issue (cited in Pet. Br. at 83-84): "The NMP provisions at §122.42(e)(1) must be included in a CAFO's NMP 'to the extent applicable.' Thus, if a facility does not land apply manure, litter, or process wastewater, the land application provisions of the regulation would not be applicable." 70 Fed. Reg. at 70,438/2.[25]

If a permitted CAFO *does* land-apply manure, litter or process wastewater, however, the 2003 Rule required development and implementation of an NMP for the land application area. See 40 C.F.R. § 122.42(e)(1)(vi)-(ix). In addition, the 2003 Rule differentiated between point source discharges from the CAFO's land application area and exempt agricultural stormwater discharges, providing that any "precipitation-related discharge of manure, litter, or process wastewater from land areas under the control of a CAFO" where the "manure, litter or process wastewater has [otherwise] been applied in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization" is an agricultural stormwater discharge. Id. §122.23(e); Waterkeeper, 399 F.3d at 507.

[25] Under the 2003 Rule, "land application area" is defined as "land under the control of an AFO [animal feeding operation] owner or operator . . . to which manure, litter or process wastewater from the production area is or may be applied." 40 C.F.R. § 122.23(b)(3). If a CAFO does not land apply nutrients, then in fact it has no "land application area" as EPA has defined the term.

As EPA further explained, in later summarizing the 2003 rulemaking:

> In the 2003 rule, EPA promulgated a definition of agricultural stormwater for CAFO land application areas that referenced 40 CFR 122.42(e)(1)(vi)-(ix). The referenced regulatory text includes requirements for edge-of-field buffers or equivalent measures, testing of manure and soil, land application at site-specific agronomic rates, and recordkeeping.

70 Fed. Reg. at 70,434/2. In addition, the 2003 Rule required NMPs to include "more specific limitations implementing the general requirements at § 122.42(e)(1)(vi)-(ix)." 70 Fed. Reg. at 70,434/2. The 2003 Rule's requirement to develop and implement an NMP is a reasonable interpretation of the Act's "point source" definition because it enables meaningful "differentiat[ion] between discharges from land application areas under the control of the CAFO that are point source discharges and those that are 'agricultural stormwater discharges' exempt from NPDES permit requirements." Id.; see Waterkeeper, 399 F.3d at 508-09 ("[L]ike the [CWA] itself, the [2003] Rule seeks to remove liability for agriculture-related discharges primarily caused by nature, while maintaining liability for other discharges.").

Petitioners assert that in the 2003 Rule, "the land application area [was] defined as an un-regulated nonpoint source," and contend that in 2008, EPA should have "conformed" its regulations to Waterkeeper by eliminating permit requirements in the land application area except for those CAFOs that expressly

"propose to discharge" from the land application area. Pet. Br. at 82-83. Petitioners' characterization, however, is contrary to the plain text of the 2003 Rule, which expressly provides that discharges from land application areas controlled by a CAFO are *point source* discharges "from the CAFO," unless they meet the regulatory preconditions for treatment as agricultural stormwater. 40 C.F.R. § 122.23(e). The Second Circuit recognized these aspects of the 2003 Rule and found it to be reasonable in its imposition of NMP requirements on the land application area. Waterkeeper, 399 F.3d at 511 ("[W]e reject the challenge to the [2003] Rule's *regulation of land application discharges*.") (emphasis added). Moreover, every other court to consider the question has rejected the notion that the statute forbids EPA from regulating pollutant discharges from the land application area. See Bosma Dairy, 305 F.3d at 954-56; Community Ass'n for Restoration of the Env't v. Sid Koopman Dairy, 54 F. Supp. 2d 976, 980-82 (E.D. Wash. 1999); Smithfield Foods, 2001 WL 1715730, at *3-5.[26]

[26] See also Concerned Area Residents for the Env't v. Southview Farm, 34 F.3d 114, 115-19, 122-23 (2d Cir. 1994). EPA knows of no cases to the contrary, and Petitioners have cited none.

C. Permitted CAFOs Cannot Choose Which Discharges Should Be Covered by the Permit.

In their argument that the land application portions of the NMP required by 40 C.F.R. § 122.42(e)(1) do not apply to CAFOs that only discharge agricultural stormwater from their land application areas, Petitioners are asking this Court to adopt a scheme rejected by the Second Circuit. The 2003 Rule established effluent limitations guidelines requiring large CAFOs to employ best management practices for land application of manure, litter and process wastewater. 40 C.F.R. § 412.4. These best management practices included development and implementation of an NMP meeting specific requirements laid out in the rule, with the NMP designed to be a comprehensive document addressing both the production and land application areas. 40 C.F.R. § 122.42(e)(1). However, the 2003 Rule did not require CAFOs to submit their NMPs to the permitting authority, and did not incorporate any specific land application requirements into the permit except to require, as a permit condition, the "development and implementation" of the NMP. Id.

Waterkeeper held that the 2003 Rule "[a]s presently constituted . . . does nothing to *ensure* that each Large CAFO has, in fact, developed a nutrient management plan that satisfies the [effluent limitations guidelines] requirements." Waterkeeper, 399 F.3d at 499. "This is because, most glaringly, the [2003] Rule fails to require that permitting authorities review the [NMPs] developed by Large

CAFOs before issuing a permit that authorizes land application discharges." Id. Furthermore, by failing to require submission of NMPs to permitting authorities, the 2003 Rule "[did] not adequately prevent Large CAFOs from 'misunderstanding or misrepresenting' their specific situation and adopting improper or inappropriate nutrient management plans, with improper or inappropriate waste application rates." Id. at 500. The court went on to hold that the NMP provisions must be included as enforceable terms of an NPDES permit, subject to public review and comment. Id. at 502-04.

On remand, EPA addressed this holding by requiring CAFOs seeking permit coverage to submit their NMPs with their permit applications. 40 C.F.R. § 122.21(a)(1). In addition, EPA promulgated a new regulatory provision requiring that "[a]ny permit issued to a CAFO" must include NMP requirements. Id. § 122.42(e)(1); see also id. § 122.42(e)(5), (6).

According to Petitioners, the question for judicial review here is whether EPA may require a permit to include NMP requirements for the land application area even for "CAFOs that have no actual discharge (i.e., non-agricultural stormwater discharge) from land application areas and that seek coverage only for production area discharges." Pet. Br. at 81. However, the 2003 Rule distinguishes permitted CAFOs' "point source" land application area discharges from agricultural stormwater on the basis of the CAFO's NMP as required in 40 C.F.R.

§122.42(e)(1)(vi)-(ix). Accordingly, while Petitioners superficially object that EPA "did not conform" its regulations to Waterkeeper, what they actually seek is an endorsement of the very scheme that Waterkeeper rejected – one that would allow a CAFO seeking permit coverage to decide for itself that its NMP is sufficient to meet the Act's requirements and that, accordingly, it need not submit the NMP with its permit application. Therefore, if the Court does not find this challenge time-barred, it should uphold EPA's determination that neither Waterkeeper nor the Act itself required any change in EPA's established interpretation of "point source" and "agricultural stormwater," as well as the 2008 Rule's requirement (consistent with Waterkeeper) to include the terms of the NMP in the permit, which necessitates submitting the NMP with the permit application.

IV. THE CHALLENGE TO THE EPA LETTERS MUST FAIL.

Poultry Petitioners separately challenge three EPA Letters which, in response to questions from legislators and an industry representative, discuss the Act and the CAFO regulations. The Court lacks jurisdiction to hear this challenge because the EPA Letters are not a type of action that the Act authorizes this Court to review, and they are also not final action. And because the EPA Letters do not establish new legally binding requirements and thus are not final action, they are not "rules." But even if the Letters were "rules," they would at most be interpretative rules not subject to the APA's notice and comment requirements

because they merely summarize and interpret the Act and the CAFO regulations in an industry-specific context. Also, because the substance of the Letters was established in 2003, Poultry Petitioners' challenge is time-barred. Finally, even if the Court reaches the merits, the Letters are not arbitrary, capricious, an abuse of discretion, or contrary to law because they neither narrow the scope of the agricultural stormwater exemption – which simply does not apply here – nor impose permit requirements on "unregulated" discharges. Poultry Br. at 20. Rather, in stating that pollutants such as manure and litter released from poultry confinement house ventilation fans that reach waters of the United States are discharges requiring a permit, the Letters only convey a preexisting requirement: that any person, including a CAFO, must have a permit to discharge pollutants. See 33 U.S.C. § 1311(a); 40 C.F.R. § 122.23(d).

A. The Court Lacks Jurisdiction To Review the EPA Letters.

The Court lacks jurisdiction to review the EPA Letters for two reasons. First, they are not a type of EPA action that section 509(b)(1) of the Act gives this Court original jurisdiction to review, and they cannot be reviewed as an exercise of "ancillary" jurisdiction. Second, the Letters are not "final" agency action, and therefore are not subject to judicial review at all. These issues were fully discussed in EPA's Motion for Partial Dismissal of Petition filed by NCC and U.S. Poultry

(May 15, 2009) (the "Motion to Dismiss"), which remains pending before this Court,[27] and which EPA hereby incorporates by reference.

1. 33 U.S.C. § 1369(b)(1) does not authorize review.

Section 509(b)(1) of the Act, 33 U.S.C. §1369(b)(1), authorizes review of only seven specific types of EPA action. As explained in EPA's Motion to Dismiss, the EPA Letters do not fall into any of those seven categories. See Mot. to Dismiss at 10-12.

Petitioners have invoked subsections 509(b)(1)(E) and (F) as possible sources of jurisdiction over the Letters. See Response to Mot. to Dismiss at 15. But the EPA Letters do not "issue or deny a permit," and so cannot be reviewed under section 509(b)(1)(F). See American Paper Inst., Inc. v. EPA, 882 F.2d 287, 289 (7th Cir. 1989) (statement describing "how [EPA] might react to particular proposals" is not reviewable under 509(b)(1) until it "leads to the denial or modification of a permit"); Appalachian Energy Group v. EPA, 33 F.3d 319, 322 (4th Cir. 1994) (rejecting argument that 509(b)(1)(F) applied to an EPA statement that permits were required for construction-related discharges because EPA had not yet issued or denied any permits). Furthermore, the Letters do not "approve" or "promulgate" a limitation, and so cannot be reviewed under 509(b)(1)(E);

[27] See Order of July 9, 2009 (stating that EPA's Motion to Dismiss Poultry Petitioners' challenge to the EPA Letters would be "carried with the case").

rather, as explained in Argument IV.B below, they discuss the general scope of the Act and the *preexisting* CAFO regulations in the context of industry-specific facts. See American Paper, 882 F.2d at 289 (rejecting argument that policy statement describing EPA's "approach to regulation" was subject to review under 509(b)(1)(E)).[28] Accordingly, neither section 509(b)(1)(E) nor 509(b)(1)(F) gives this Court original jurisdiction over the challenge to the EPA Letters.

Furthermore, this challenge to the EPA Letters cannot, as Poultry Petitioners suggest, be entertained pursuant to the Court's jurisdiction over challenges to the Rule itself as an exercise of "ancillary" jurisdiction. The doctrines of "ancillary" and "pendent" jurisdiction were codified by 28 U.S.C. § 1367(a) under the name "supplemental jurisdiction," which only applies in "any civil action [where] the *district court* [has] original jurisdiction" where a claim is "so related to claims in the action . . . that [it] forms part of the same case or controversy" (emphasis added). It does not expand this Court's original jurisdiction under a statute such as the CWA.[29] Moreover, the Letters address an aspect of the CAFO Rule that is

[28] The court noted: "If we were to take jurisdiction . . . we might need to hear challenges to every intra-office memo in which the associate deputy director for 4″ pipes told the deputy associate director for nozzles what he planned to do about 4″ nozzles . . . ." 882 F.2d at 289.

[29] If the Letters were considered to be new substantive rules, then the Court would have jurisdiction to review them directly under section 509(b)(1). In that case,

distinct from the grounds on which Farm Petitioners challenge the Rule itself. Thus, the EPA Letters could only be challenged in a separate APA suit in district court. But such a suit would be barred in any event because the Letters are not "final action."

2. The Letters are not "final action" subject to review.

The Court also lacks jurisdiction to review the EPA Letters because they do not constitute *final* action, and thus cannot be reviewed by any court.

As discussed in EPA's Motion to Dismiss (see Mot. to Dismiss at 12-17), the EPA Letters are not final action subject to review because they do not mark the "consummation" of an agency decision-making process, and they are not actions by which "rights or obligations have been determined" or from which "legal consequences will flow." Bennett v. Spear, 520 U.S. 154, 177-78 (1997); see also Peoples Nat'l Bank v. OCC, 362 F.3d 333, 337 (5th Cir. 2004) (also noting that "a non-final agency order is one that . . . only affects [the petitioner's] rights adversely on the contingency of future administrative action").

Here, rather than marking the consummation of a decision-making process, two of the Letters inform members of Congress about an *ongoing* process: specifically, EPA's authorization of Delaware's CAFO program, which remains

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EPA would agree that the Letters should be reviewed in this consolidated case for reasons of efficiency. However, as explained below, the Letters are not new rules.

pending. See Poultry Pet., Exs. A & B at 1, 3 (JA 395, 397-98, 400). The third letter simply responds to questions about the Act and the CAFO Rule posed by a poultry industry representative, and thus also is not the "consummation" of a decision-making process. See Poultry Pet., Ex. C (JA 401-04). And the tentative nature of the statements in all three Letters – the use of language such as "can" and "could" (see Poultry Pet., Exs. A & B at 2, C at 3 (JA 396, 399, 403)) – further shows that the Letters do not represent a final decision representing the culmination of an agency decision-making process.

Furthermore, the EPA Letters do not establish new "rights and obligations" or result in new "legal consequences," but merely summarize and interpret the Act and the preexisting CAFO regulations. See Mot. to Dismiss at 14-15. The EPA Letters do not order CAFOs to take or refrain from any particular action; they do not order CAFOs to apply for permits; and they do not threaten enforcement action. See Poultry Pet. Exs. A-C (JA 395-404). In fact, the Letters are not even addressed to CAFOs. Id. Therefore, they neither impose new rights or obligations on CAFOS, nor result in new legal consequences for CAFOs. Rather, the Letters could only impact poultry CAFOs' rights if there was a future administrative action based on statements in the Letters, such as an enforcement proceeding.

This Court and others have held that statements in agency letters or memoranda such as those challenged here are *not* final action subject to review.

See Peoples Nat'l Bank, 362 F.3d at 337 (letter stating that administrative appeal would be governed by certain procedures is not final action because it will affect the petitioner adversely only upon future action); Dow Chem. v. EPA, 832 F.2d 319, 323-25 (5th Cir. 1997) (letter attaching EPA's interpretation of a regulation is not final action); Independent Equipment Dealers Ass'n v. EPA, 372 F.3d 420, 426-28 (D.C. Cir. 2004) (letter providing EPA's interpretation of emissions regulations is not final action); General Motors Corp. v. EPA, 363 F.3d 442, 449 (D.C. Cir. 2004) (letter stating that used paint solvents are hazardous waste is not final action); Appalachian Energy, 33 F.3d at 320-22 (memo stating that a permit is required for storm water discharges from construction activities is not final action).[30]

There is simply no final action where a document only "impose[s] upon [the regulated entity] the already-existing burden of complying with the [statute] and its implementing regulations." Acker v. EPA, 290 F.3d 892, 894 (7th Cir. 2002); see AT&T v. EEOC, 270 F.3d 973, 975 (D.C. Cir. 2001) (no final action where "an agency merely expresses its view of what the law requires of a party, even if that

[30] Where courts have found agency letters or memos to be final action, it is because they commanded specific action, backed up by the threat of enforcement. See, e.g., Ciba Geigy Corp. v. EPA, 801 F.2d 430, 440 (D.C. Cir. 1986); Barrick Goldstrike Mines Inc. v. Browner, 215 F.3d 45 (D.C. Cir. 2000). Poultry Petitioners' reliance on those cases (Response to Mot. to Dismiss at 10-12) is thus misplaced.

view is adverse to the party"). And that is exactly what the EPA Letters do here: explain what the Act and the Rule require of poultry CAFOs. Therefore, because the EPA Letters only describe existing requirements under the Act and the CAFO regulations, the Court lacks jurisdiction and must dismiss Poultry Petitioners' challenge without reaching the merits. See Peoples Nat'l Bank, 362 F.3d at 336.

B. The Letters Are Not Subject to APA Notice and Comment Because They Are Interpretative, Not Substantive.

Because the EPA Letters do not establish new legally binding requirements, they are not final action, and they are also not "rules" of any sort. See General Motors, 363 F.3d at 448; Molycorp, Inc. v. EPA, 197 F.3d 543, 545-47 (D.C. Cir. 1999). But even assuming, arguendo, that the Letters are "rules" subject to review, Poultry Petitioners' assertion that Letters should have gone through notice and comment under the Administrative Procedure Act ("APA") (Poultry Br. at 15-20) would still fail because the Letters are not "legislative" or "substantive" rules.[31] Rather, the EPA Letters are *interpretive* because they do not set forth new requirements, but merely restate what the law already requires. Specifically, they describe the scope and effect of the Act and the preexisting CAFO regulations, and interpret those sources in the context of a particular set of facts: the release of

[31] The terms "substantive" and "legislative" are often used interchangeably. Professionals & Patients for Customized Care v. Shalala, 56 F.3d 592, 595 n.12 (5th Cir. 1995).

manure and litter from poultry confinement houses through ventilation fans. Indeed, even Poultry Petitioners characterize the EPA Letters as an "interpretation of EPA's CAFO Rule." Poultry Br. at 4. While notice and comment is required for substantive rules, it is not required for interpretive rules. 5 U.S.C. § 553(b)(A).

As this Court has noted, "the Justice Department defines interpretative rules as rules or statements issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers," and "[t]he courts have given deference to [that] interpretation." Brown Express v. United States, 607 F.2d 695, 700 & n.4 (5th Cir. 1979) (internal quotations omitted). Interpretative rules have also been described as "statements as to what the administrative officer thinks the statute or regulation means." Id. (quoting Gibson Wine Co. v. Snyder, 194 F.2d 329, 331 (D.C. Cir. 1952)). The Supreme Court discussed the distinction between interpretative and substantive rules in Shalala v. Guernsey Memorial Hospital, 514 U.S. 87, 100 (1995), explaining that notice and comment is required where an agency "adopt[s] a new position inconsistent with . . . existing regulation," but not where it "does not . . . effect a substantive change in the regulations." Where a document only "spells out a duty fairly encompassed within the regulation," it is interpretative and notice and comment is not required. Appalachian Power Co. v. EPA, 208 F.3d 1015, 1024 (D.C. Cir. 2000) (internal quotation omitted). Indeed, it would be absurd to require an agency to go through

notice and comment every time it wishes to communicate with the public, regulated entities, or members of Congress.

There are some situations where the distinction between a substantive rule and interpretative rule is a close one, but the EPA Letters do not present a close case. Rather, they simply restate a fundamental provision of the Act – that the unpermitted discharge of a pollutant is unlawful (see 33 U.S.C. § 1311(a)) – and discuss that provision in the context of poultry CAFOs.

More specifically, the parts of the EPA Letters challenged here consist of two types of statements. First, the Letters restate the scope and effect of the Act and its associated regulations. For example, two of the EPA Letters state that the Act "prohibits the discharge of 'pollutants' through a 'point source' into a 'water of the United States' except where authorized by an NPDES permit." Poultry Pet. Exs. A & B at 2 (JA 396, 399). Those letters also note that, under the Act, CAFOs are point sources. Id. The third letter contains similar statements:

> The Clean Water Act (CWA) prohibits the discharge of pollutants into waters of the United States from point sources, including CAFOs, except as authorized by the terms and conditions of a valid national pollutant discharge elimination system (NPDES) Permit. CWA section 301, 33 U.S.C. 1311.

Poultry Pet. Ex. C at 1 (JA 401). All three Letters further explain that "the term pollutant is defined very broadly in the CWA and associated regulations," citing 40 C.F.R. § 122.2. Poultry Pet. Exs. A & B at 2, Ex. C at 3 (JA 396, 399, 403).

These types of statements – summarizing the scope and effect of a statute, and identifying the implementing regulations – are plainly not new substantive rules. See Professionals and Patients for Customized Care, 56 F.3d at 602 (statements that "remind[] parties of existing statutory duties or merely track[] the statutory requirements" are not substantive rules). Indeed, any argument that these statements are substantive rules is belied by the fact that they consist in no small part of quotations from and citations to the Act and its implementing regulations.

Second, the EPA Letters discuss the Act and its implementing regulations in the context of industry-specific factual scenarios. They identify several "example[s]" of pollutants, including "manure, litter, and feed." Poultry Pet. Exs. A & B at 2, Ex. C at 3 (JA 396, 399, 403). They note that "[p]otential sources of such pollutants at a CAFO *could* include . . . litter released through confinement house ventilation fans." Id. (emphasis added). They then spell out the implication of those statements, explaining that, if such pollutants from CAFOs mix with precipitation and "reach[] a water of the United States," there is a violation of the Act unless the discharge is "authorized by an NPDES permit." Id.

These statements flow directly from and are entirely consistent with the Act and the preexisting CAFO regulations. Both the Act and the CAFO regulations provide that CAFOs are "point sources." 33 U.S.C. § 1362(14); 40 C.F.R. § 122.2 (a "point source" is "any discernable, confined, and discrete conveyance,

including, but not limited to, any . . . concentrated animal feeding operation"); id. §122.23(a) ("[c]oncentrated animal feeding operations (CAFOs) . . . are point sources"). The CAFO regulations mandate that "the owner or operator of a CAFO must seek coverage under an NPDES permit if the CAFO discharges or proposes to discharge." Id. § 122.23(d).[32] "Discharge of a pollutant" is defined as "[a]ny addition of any 'pollutant' or combination of pollutants to 'waters of the United States' from any 'point source,'" and "pollutant" is defined to include "solid waste," "biological materials," and "agricultural waste discharged into water." Id. § 122.2. Accordingly, under the Act and the CAFO regulations, a release of poultry manure or litter from a CAFO that reaches waters of the United States would be a discharge requiring an NPDES permit. Thus, the statements in the Letters regarding discharges that may occur when litter is expelled from

[32] Poultry Petitioners confuse this plain application of the Act and the CAFO regulations by citing to the wrong sections: specifically, they identify the core prohibition against discharges as 40 C.F.R. § 412.43 ("no discharge of manure, litter, or process wastewater . . . from the production area"). But that provision addresses the standards that must be incorporated into permits issued to Large CAFOs; it is not the source of the core prohibition against discharging without a permit applicable to all CAFOs under CWA section 301(a) and 40 C.F.R. §122.23(d), which is what the EPA Letters discuss.

confinement house ventilation fans are consistent with – and in fact evident from – the text of the regulations.[33]

This Court has held that statements like these –explaining the regulatory requirements in the context of industry-specific facts – are not new substantive rules, but rather merely interpretative in nature. See, e.g., Professionals and Patients for Customized Care, 56 F.3d at 593-94, 602 (a policy guide that described when, under applicable regulations, the FDA would consider a pharmacy to be "manufacturing" rather than "compounding" drugs, and thus subject to enforcement action, was not a substantive rule because it "explain[s] something the statute already requires" and thus "clarifies, rather than creates, law") (internal quotations omitted); Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897, 907-13 (5th Cir. 1983) (EPA's decision to alter its methodology for making wetlands determinations was an interpretative rule because it "flows from" the text of the regulations); see also Alabama Tissue Ctr. v. Sullivan, 975 F.2d 373, 379

[33] The EPA Letters are also consistent with the CAFO regulations in that they implicitly recognize that not every release of litter through a confinement house ventilation fan necessarily results in a CWA violation. The EPA Letters state only that litter released through confinement house ventilation fans "could" result in a discharge (Poultry Pet. Exs. A & B at 2, Ex. C at 3 (JA 396, 399, 403)), thus recognizing that a poultry CAFO might be constructed or operated so as to prevent such releases from reaching U.S. waters. This is consistent with the definition of "discharge" set forth in the CAFO regulations: the "addition of any pollutant or combination of pollutants to waters of the United States." 40 C.F.R. § 122.2.

(7th Cir. 1992) (a notice stating that certain medical devices were subject to regulation was interpretative, not substantive, because "it simply interprets the [existing] Regulations to apply to heart valve allografts" and "does not change or revoke the original regulations"). Thus, under this Court's prior holdings, statements like those challenged here – that flow from and are consistent with preexisting regulations – are interpretative, not substantive, rules.

In contrast, the cases Petitioners rely on (see Poultry Br. at 16-18) are inapposite. They address situations where the agency fundamentally changed the regulatory regime, rather than interpreted the governing regulations in an industry-specific context.[34]

In Phillips Petroleum Co. v. Johnson, 22 F.3d 616 (5th Cir. 1994), the agency had imposed a policy that "directly contradicted the text of the regulation at issue." Shell Offshore v. Babbitt, 238 F.3d 622, 628 (5th Cir. 2001) (discussing Phillips Petroleum). Specifically, even though the governing regulation listed

[34] Poultry Petitioners imply that there has been a fundamental "change" in the regulatory regime here because the Letters have a "direct and immediate impact on [] day-to-day business operations." Poultry Br. at 4, 10. But the proper test is *not* the practical impact a document has on regulated entities. American Transfer & Storage Co. v. I.C.C., 719 F.2d 1283, 1285 (5th Cir. 1983) ("[m]erely because a rule has a wide-ranging effect does not mean that it is 'legislative' rather than 'interpretative'") (citation omitted). And any impact the Letters have on poultry CAFOs results from their failure to analyze and apply the Act and the regulations to their operations – not from a change in the Act or the regulations.

multiple factors to be considered in valuing offshore oil production, the agency stated in an internal paper that it would only consider the spot market price. Phillips Petroleum, 22 F.3d at 618. Similarly, in Davidson v. Glickman, 169 F.3d 996, 998 (5th Cir. 1999), the agency stated in a handbook that the revision of acreage reports was prohibited where the producer would benefit, even though the regulations stated that revision was permitted "at any time for all crops and land uses." This Court therefore held that the handbook provision was a substantive rule, not an interpretation of the regulation. Id. at 999.

Here, unlike the documents challenged in Phillips Petroleum and Davidson, the EPA Letters do not conflict with preexisting regulations. Rather, as explained above, the text of the Letters lies well within the framework of the CAFO regulations, and thus the Letters are interpretative.

Section 553 of the APA is clear that interpretive rules are not subject to notice and comment, regardless of whether the interpretation is allegedly "new" or different from prior practice. But even if a rule believed to be interpretive by an agency can, in some unusual circumstances, be deemed substantive due to the extent of its departure from prior agency practice, this is not such a case. Petitioners cite Shell Offshore, 238 F.3d at 624-26, where the Department of the Interior ("DOI") had refused to allow Shell to use a tariff rate approved by the Federal Energy Regulatory Commission ("FERC") to calculate its transportation

costs because it had not first obtained confirmation that FERC had jurisdiction over its pipeline. DOI demanded the confirmation of jurisdiction even though: (a) the governing regulation allowed the use of a FERC-approved tariff rate, with no mention of any prerequisite jurisdictional determination; and (b) for the previous five years, DOI had not interpreted the regulation as requiring a jurisdictional determination. Id. at 625-26 & n.2. The court concluded that DOI's decision was a new substantive rule because "Interior did not apply a general regulation to the specific facts of Shell's case" but rather "established a new policy." Id. at 628.

Here, in contrast, there has been no change regarding how EPA will apply the governing regulation. Poultry Petitioners have identified no prior, conflicting interpretation of the CAFO Rule – no prior indication that litter released from confinement house ventilation fans that is discharged to waters of the United States would somehow be exempt from the permit requirement. Rather, the EPA letters discuss how "a general regulation" (the CAFO Rule) applies to a specific factual situation (discharges resulting from releases of pollutants from confinement houses). 238 F.3d at 628. Therefore, unlike in Shell Offshore, the EPA Letters are interpretative, not substantive.

Because the challenged parts of the EPA Letters consist of interpretative statements regarding the scope and effect of the Act and the application of the

CAFO regulations to a specific industry, they are not new substantive rules subject to notice and comment. To hold otherwise would severely discourage EPA from communicating with the public, regulated entities, and others. In short, Poultry Petitioners' notice and comment challenge is groundless and should be denied.

C. Because the Statements in the EPA Letters Establish Nothing "New," Poultry Petitioners' Challenge Is Time-Barred.

Even if the EPA Letters were a type of action reviewable in this Court under section 509(b), Poultry Petitioners' challenge would be time-barred because the substance of the Letters is not, as they claim (Poultry Br. at 4), "new." Rather, EPA established the requirements addressed by the Letters years ago when it promulgated the 2003 Rule, and then provided its interpretation of those requirements in a 2003 guidance manual. As the opportunity for judicial review under section 509(b) is limited to 120 days, the time for review of those requirements and EPA's interpretation thereof has long since passed.

EPA first established that unpermitted discharges resulting from releases of litter from poultry confinement houses would violate the Act when it promulgated the 2003 Rule, which set forth the relevant prohibitions and definitions. See 68 Fed. Reg. at 7265 (CAFOs "are point sources that require NPDES permits for discharges"), and 7265-66 (defining CAFOs to include dry poultry operations). Also, the preamble to the 2003 Rule explicitly stated that the rule applied to dry

poultry operations. See 68 Fed. Reg. at 7192 (stating that the scope of the regulations was being expanded to address chicken operations with dry litter management because "[n]utrients from large poultry operations continue to contaminate surface waters because of rainfall coming into contact with dry manure").

While the Second Circuit later vacated the part of the 2003 Rule that required CAFOs to obtain permits where they merely had the "potential to discharge," the part of the 2003 Rule prohibiting actual discharges from poultry CAFOs without a permit remained intact. See 399 F.3d at 504-06, 512-18. And that portion of the 2003 Rule was not reconsidered or altered by the 2008 Rule. See 73 Fed. Reg. at 70,420 ("[t]he revisions to the 2003 CAFO rule being published today relate directly to the changes required by the [Waterkeeper] court's decision"). Accordingly, the statutory period for review of that aspect of the CAFO regulations was not reopened when EPA promulgated the 2008 Rule. See West Virginia v. EPA, 362 F.3d 861, 872 (D.C. Cir. 2004) (the statutory time limit for review may only be reopened with respect to issues that the Agency "either explicitly or implicitly reconsider[s]" in a subsequent rulemaking); see also National Mining Ass'n v. DOI, 70 F.3d 1345, 1352 (D.C. Cir. 1995) (agency must undertake a "serious, substantive reconsideration" for reopening to occur).

Furthermore, the statutory time limit was not reopened by the EPA Letters themselves. The D.C. Circuit rejected a similar argument in General Motors, 363 F.3d at 449-50. There, the petitioner argued that, by communicating with industry about nascent enforcement actions and its interpretation of the regulations, EPA had reopened the time for judicial review. Id. The court disagreed, explaining that the purpose of the reopening doctrine "is not to stifle information communications between agencies and the regulated industries," and held that letters discussing EPA's interpretation of the regulations were not new promulgations that reopened the time period for judicial review. Id. Thus, the EPA Letters, which also interpret preexisting regulations, should not be considered to reopen the time for judicial review of the requirements established by 2003 Rule. As section 509(b) sets the period during which a petitioner can seek review of a new rule at 120 days, Poultry Petitioners' opportunity to challenge the requirements established by the 2003 Rule – including that permits are required for discharges resulting from the release of pollutants by poultry CAFOs – has long since expired.

Moreover, even if the prohibition against unpermitted discharges of pollutants such as manure and litter from poultry CAFOs to waters of the United States was not clearly established by the 2003 Rule itself, Poultry Petitioners' challenge would still be time-barred. Poultry Petitioners admit that EPA published a guidance manual in 2003 that interpreted the CAFO regulations in the specific

context of releases of pollutants such as litter and feathers through poultry confinement house ventilation fans. See Poultry Br. at 19, n.10. In that Guidance, EPA identified "pollutants (such as manure, feathers, and feed) which have fallen to the ground downwind from confinement building exhaust ducts and ventilation fans and are carried by storm water runoff to waters of the United States" as an example of a "specific discharge." 2003 Guidance Manual at 4-2 n.2. (JA 386).[35] EPA also identified, as an example of a poultry CAFO that could obtain a "no potential to discharge" determination, an operation where "[n]o pollutants are exhausted from [confinement] houses," again indicating that the release of pollutants from confinement houses could result in a discharge. Id. at 3.20 (JA 385). Even if such interpretative statements were subject to review under CWA

[35] Poultry Petitioners do not claim that this language is meaningfully different from the statements in the EPA Letters, but argue that "unlike the three letters at issue here . . . EPA's 2003 Guidance Manual explicitly stated that it was not binding and did not impose new legal requirements." Poultry Br. at n.10. But as discussed above (Argument IV.A.2), the Letters themselves indicate they are not "binding" by using tentative language. And, in any event, the same statements cannot be both binding and non-binding simply because they were given a label in one document that they were not given in another. Nor is it logical to conclude that statements previously designated as non-binding are the opposite simply because the same label was not included in the later document. In any event, such labels are not determinative. See Brown Express, 607 F.2d at 700.

section 509(b)(1),[36] because the 120-day time period for challenging them has long since passed, Poultry Petitioners' challenge to substantially similar statements in the EPA Letters is untimely. See General Motors, 363 F.3d at 451 (holding that a challenge to a regulatory interpretation was untimely because that interpretation had previously been provided in a policy compendium).

D. The EPA Letters Are Not Arbitrary, Capricious, an Abuse of Discretion, or Contrary to Law.

Finally, even assuming that the Court has jurisdiction to review the EPA Letters and the challenge is timely, the EPA Letters are not arbitrary, capricious, an abuse of discretion or contrary to law, and so the challenge must fail. Poultry Petitioners claim that the Letters should be struck down on their merits as arbitrary, capricious, an abuse of discretion and contrary to law because (a) they "narrow" the agricultural stormwater exemption, and (b) they impose permit requirements on previously "unregulated" discharges from "undesignated" areas. Poultry Br. at 20, 24. However, the EPA Letters do not "narrow" or alter the agricultural stormwater exemption because they do not address discharges from the land application area – the only type of discharge from a CAFO that can fall within the agricultural stormwater exemption (40 C.F.R. § 122.23(e)) – but rather discharges resulting

[36] As shown in Argument IV.A, such interpretative statements are not, in fact, subject to review in this Court under CWA section 509(b), and they are also not "final" action and thus not "rules" subject to review in any court.

from pollutants released from confinement houses coming into contact with precipitation. Furthermore, the Letters do not address "unregulated" discharges, but rather discharges that are plainly covered by the CAFO regulations.

1. The Letters do not "narrow" the agricultural stormwater exemption.

Poultry Petitioners argue that the EPA Letters unlawfully "narrow the scope" of the agricultural stormwater exemption. This argument must fail, as the Letters address discharges that do not fall within the agricultural stormwater exemption because they are not "agricultural stormwater discharges." A regulatory requirement cannot "narrow" the scope of an exemption that does not apply.

Construing the agricultural stormwater exemption as encompassing discharges resulting from the release of manure and litter[37] from confinement house ventilation fans to exterior areas where those pollutants may then mix with

[37] Throughout their brief, Poultry Petitioners characterize the materials released through confinement house ventilation fans as "dust." See, e.g., Poultry Br. at 10, 12. But Poultry Petitioners admit that this "dust" consists of "manure" and "litter" (id. at 12), which is a "combination of bedding material and manure" (id. at 6). Animal manure may contain any number of pollutants, including pathogens, antibiotics, and hormones. 68 Fed. Reg. at 7235-36. Poultry manure in particular contains "both estrogen and testosterone." Id. at 7236. When promulgating the 2003 Rule, EPA explained that one way that "manure constituents" make their way to water bodies is in the form of "dust." Id. at 7237. Thus, just because a pollutant could be characterized as "dust" based on particle size does not mean that it is unworthy of or exempt from regulation.

rain and be carried to waters of the United States is plainly inconsistent with the Act and its implementing regulations. The Act exempts "agricultural stormwater discharges" from NPDES permitting requirements. See 33 U.S.C. § 1362(14) (defining "point source" as not including "agricultural stormwater discharges"). The CAFO regulations define "agricultural stormwater discharges" as "precipitation-related discharge[s] of manure, litter, or process wastewater from land areas under the control of a CAFO" where the "manure, litter or process wastewater has been applied in accordance with site-specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter or process wastewater." 40 C.F.R. § 122.23(e) (emphasis added). The "land . . . to which manure, litter, or process wastewater from the production area is or may be applied" is the "land application area." Id. § 122.23(b)(3).

Thus, the CAFO regulations plainly establish that only precipitation-related discharges *from land application areas* may qualify as "agricultural stormwater discharges" – not discharges of pollutants released from confinement houses,[38] or even discharges of pollutants that have fallen to the ground around the exterior of

[38] This is also evident from the fact that the CAFO regulations identify the "production area," which includes "confinement houses" (40 C.F.R. § 412.2(h)), as separate from the "land application area." The definition of "land application area" identifies the "production area" as an area from which the materials to be land applied may come (see id. § 412.2(e)) – and thus, logically, a *separate* area.

confinement houses. In fact, the regulations make clear that only *some* discharges from land application areas – those precipitation-related discharges from land where manure, litter, or process wastewater has been applied in the right way and the right amounts to enrich the land for agricultural purposes – are exempt as "agricultural stormwater discharges." Id. (stating that discharges of manure or litter from land application areas are "subject to NPDES permitting requirements, *except* where it is an agricultural storm water discharge") (emphasis added).

Here, the discharges addressed by the EPA Letters are indisputably *not* discharges from a "land application area." And Poultry Petitioners make no claim that the litter released from confinement house ventilation fans has been purposefully and strategically applied as fertilizer in accordance with "nutrient management practices that ensure appropriate agricultural utilization." 40 C.F.R. § 122.23(e). In fact, Poultry Petitioners characterize the release of manure and litter through confinement house ventilation fans as something they "cannot avoid doing." Poultry Br. at 12. Thus, discharges resulting from releases of pollutants from confinement house ventilation fans simply do not fall within the definition of "agricultural stormwater discharges," and so requiring a permit for such discharges does not "narrow" the agricultural stormwater exemption.

Waterkeeper does not indicate otherwise. See 399 F.3d at 486. The conclusion Poultry Petitioners would draw from the Second Circuit's decision to

uphold the agricultural stormwater exemption – that all "weather-related" discharges are exempt from regulation (see Poultry Br. at 26) – is unsupported and illogical. While the Court stated that, in enacting the agricultural stormwater exemption, Congress was "affirming the impropriety of imposing . . . liability for agriculture-related discharges triggered not by negligence or malfeasance, but by the weather," 399 F.3d at 507, it then reiterated that only a specific sub-category of "precipitation-related discharges" were exempt under the Congressional scheme:

> Additionally, we note again that the CAFO Rule classifies precipitation-related discharges as agricultural stormwater only where CAFOS have otherwise applied "manure, litter or process wastewater . . . in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization."

Id. at 509 (citing 40 C.F.R. § 122.23(e) (emphasis omitted)). The Waterkeeper court emphasized this limitation on the scope of the agricultural stormwater exemption multiple times. See id. at 507 (defining agricultural stormwater as "precipitation-related discharges . . . where manure [or] litter . . . has [otherwise] been applied in accordance with site specific nutrient management practices") (internal quotations omitted), 508 (same, and citing with approval a decision holding that even discharges from land application areas "could be regulated, and liability imposed" where oversaturation had resulted in runoff) (citation omitted).

To interpret Waterkeeper as Poultry Petitioners suggest would mean that any pollutants that come into contact with rain, wind, or other forces of nature at any

point prior to reaching waters of the United States are not subject to regulation. In addition to being plainly inconsistent with the text of the Act and the CAFO regulations, such a reading (essentially limiting the scope of the Act and regulations to direct discharges) would render them largely without effect, and thus should be avoided. See Lara v. Cinemark USA, 207 F.3d 783 (5th Cir. 2000).

2. The Letters do not impose permit requirements on "unregulated" discharges.

As shown in Argument IV.B above, the Letters discuss discharges that are plainly covered by the text of the Rule: releases of manure and litter from CAFO confinement houses that reach waters of the United States. Thus, the Letters do not impose permit requirements on "unregulated" discharges. Poultry Br. at 20.

Poultry Petitioners attempt to confuse this otherwise straightforward application of the Rule by casting the discharges at issue as from "areas outside the CAFO production area." Id. Specifically, they characterize the discharges as from the "farmer's yard," which they argue is not part of the "production area" and therefore is not regulated. See id. at 23. But Poultry Petitioners' argument that the "farmer's yard" is not part of the "production area" ignores the broader scheme of the Act and its implementing regulations, which prohibit discharges from *any part of a CAFO*, not specifically from one portion (such as the "production area") versus another (such as the "farmyard"). 40 C.F.R. § 122.23(d)(1) ("the owner or

operator of a CAFO must seek coverage under an NPDES permit if *the CAFO* discharges or proposes to discharge") (emphasis added).[39]

Finally, Poultry Petitioners again attempt to avoid the straightforward application of the CAFO Rule by arguing that, in requiring permits where pollutants from CAFOs reach waters of the United States, EPA is relying on "an overly broad interpretation of the definition of 'process wastewater.'" Poultry Br. at 22.[40] But, in referencing "manure" and "litter" as examples of "pollutants" that may not be discharged from CAFOs without a permit, EPA is not relying on any interpretation of the term "process wastewater." Rather, EPA is relying on the text of the CAFO regulations, which requires CAFOs to obtain NPDES permits for "discharges" (40 C.F.R. § 122.23(d)); defines "discharge" as the "addition of any pollutant or combination of pollutants" to waters of the United States (id. § 122.2); and defines "pollutants" to include "biological materials" and "agricultural waste discharged into water" (id.). Thus, whether manure or litter that comes into contact with rain constitutes "process wastewater" is irrelevant.

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[39] In any event, the releases at issue are from "confinement house ventilation fans," and Poultry Petitioners admit that "confinement houses" are part of the "production area." Poultry Br. at 6, 12, 23.

[40] "Process wastewater" is defined to include "any water which comes into contact with any raw materials, products, or byproducts, including manure, litter, feed, milk, eggs or bedding." 40 C.F.R. § 122.23(b)(7).

For all these reasons, even if the Court has jurisdiction and the challenge is timely, Poultry Petitioners' challenge to the EPA Letters is without merit.

CONCLUSION

For the foregoing reasons, the Court should deny the petitions for review.

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on May 7, 2010, I electronically filed the foregoing Respondent EPA's Final Brief with the Clerk's Office of the United States Court of Appeals for the Fifth Circuit. The following participants in the case are registered CM/ECF users and will be electronically served by the appellate CM/ECF system:

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CERTIFICATION OF COMPLIANCE

Pursuant to 5th Cir. R. 32.3, I hereby certify the following in regard to the type-volume limitations, typeface requirements, and type style requirements of Fed. R. App. P. 32(a) and 5th Cir. R. 32:

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CERTIFICATION OF COMPLIANCE WITH 5TH CIR. R. 25.2

Pursuant to 5th Cir. R. 25.2.1, I hereby certify that the electronic submission of the brief is an exact copy of the paper document.

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