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NEWS & ANALYSIS

Waterkeeper Alliance, Inc. v. EPA: Why It Is Important

by John C. Becker

Editors' Summary: On February 28, 2005, the U.S. Court of Appeals for the Second Circuit vacated and remanded portions of EPA's concentrated animal feeding operations (CAFO) rule. The ruling was not a win for either side of the debate, as it requires permitting authorities to review and incorporate nutrient management plans into their permits, but prevents EPA from requiring CAFOs to apply for permits based solely on their potential to discharge pollutants to U.S. waters. EPA, per the court's remand order, is working on a new version of the rule, and environmental groups, the farm industry, and other interested stakeholders are monitoring the issue closely. In this Article, Prof. John C. Becker analyzes the court's decision, focusing not only on how the ruling impacts parties directly involved in the case, but also on its implications for environmental law generally.

I. Introduction

It is not often that a major industry association, such as the American Farm Bureau Federation, takes sides with environmental groups such as the Sierra Club and the Natural Resources Defense Council to challenge action by the U.S. Environmental Protection Agency (EPA). But in *Waterkeeper Alliance, Inc. v. EPA*,¹ the least likely of comrades turned out to be comrades after all. In this case, environmental groups (environmental petitioners) and industry (farm petitioners) challenged various aspects of EPA's concentrated animal feeding operation (CAFO) regulations.² Despite the appearance of being the least likely of comrades, all petitioners shared a common goal: to overturn EPA's 2003 CAFO regulations.

Although *Waterkeeper* concerns the interpretation of the Clean Water Act (CWA),³ the decision has significant potential to change the way people view the statutory and regulatory structure of environmental law generally, a structure that has been more in place for more than 30 years. Calls for

review have originated from many circles, as there is concern about the impact environmental laws have on the economy as well as their effectiveness in solving the problems for which they were created. As is the case with CAFOs and the CWA, the conditions that gave rise to environmental measures have changed. Should the laws change with them? Perhaps the change that some advocates want can actually be found by revisiting the statutes themselves and by applying fundamental and well recognized concepts of statutory interpretation that gives plain meaning to the words the U.S. Congress used. This Article examines the CAFO rule and the *Waterkeeper* decision in detail, and then provides some insight as to what the decision may entail for the future of environmental regulation.

II. The CAFO Rule

CAFOs are large-scale animal production operations that raise extraordinary numbers of livestock under conditions in which the animals are confined in for at least 45 days in a 12-month period with no grass or vegetation growing in the confinement area.⁴ CAFOs are further categorized as either "medium"⁵ or "large."⁶ Medium CAFOs, for example, may raise as many as 9,999 sheep, 54,999 turkeys, or 124,999 chickens (other than laying hens).⁷ Large CAFOs raise even more livestock, and may contain as many as millions of animals in just one location.⁸ These CAFOs generate billions of

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1. 399 F.3d 486, 35 ELR 20049 (2d Cir. 2005).

2. EPA's first set of CAFO-related regulations were introduced in 1974 and 1976. 39 Fed. Reg. 5704 (Feb. 14, 1974); 41 Fed. Reg. 11458 (Mar. 18, 1976). As a result of a consent decree that was filed to resolve a suit brought by the Natural Resources Defense Council and Public Citizen, *Natural Resources Defense Council v. Reilly, modified sub nom. Natural Resources Defense Council v. Whitman*, No. 89-2980 (D.D.C. Dec. 31, 1992), EPA agreed to propose new effluent limitation guidelines for the swine, poultry, beef, and dairy sub-categories of CAFOs. These proposed modifications to the rule were proposed in 2001. 66 Fed. Reg. 2960 (Jan. 12, 2001).

3. 33 U.S.C. §§1251-1387, ELR STAT. FWPCA §§101-607.

4. 40 C.F.R. §122.23(b)(1).

5. *Id.* §122.23(b)(6).

6. *Id.* §122(b)(3).

7. *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 492, 35 ELR 20049 (2d Cir. 2005).

8. *Id.* at 492-93.

dollars of revenue each year.⁹ They also generate millions of tons of manure, which, if improperly managed, could pose severe risks to the environment and public health.¹⁰

The CAFO rule regulates the emissions of water pollutants under the CWA from such operations. The CWA prohibits the “discharge of a pollutant” by “any person” from any “point source” to navigable waters except when authorized under a national pollutant discharge elimination system (NPDES) permit.¹¹ The specific limitations provided in an NPDES permit are set forth in effluent limitation guidelines (ELGs).¹² In addition, the Act specifically includes “CAFO” as an example of a point source.¹³ Thus, the rules of the game appear quite simple and straight forward, or at least people thought they were.

In January 2001, following a series of reviews of the CWA as it applied to livestock production facilities, EPA proposed changes to its regulatory definition of a CAFO for the first time in more than 20 years.¹⁴ By February 2003, the amended rules were promulgated as final.¹⁵ Generally speaking, the revised regulations expanded the number of operations covered by the CAFO regulations to an estimated 15,500 and included requirements to address the land application of manure from CAFOs.¹⁶

Under the revised rule, all CAFOs are required to apply for an NPDES permit, as such enterprises meet the definition of a point source under the applicable regulatory definition. Large CAFOs, however, are exempt from this requirement if they can demonstrate that the facility has no potential to discharge from either its production area or its land application area.¹⁷ “Production area” refers to that part of an animal feeding operation that includes the confinement area, manure storage area, raw material storage area, and waste containment area.¹⁸ “Land application area” refers to the land under the animal feeding operation to which manure, litter, or process waste water is or may be applied.¹⁹ If the permitting authority agrees with the CAFO’s demonstration of no potential to discharge from either of these areas, the large CAFO operation need not obtain a permit.

In addition, a permitted facility is required to submit an annual performance report to EPA and to develop and follow a plan, known as a comprehensive nutrient management plan, for handling manure and wastewater. This plan addresses the science and management issues involved with the land application of nutrients produced in the livestock operation. It addresses matters of soil science, soil fertility, soil and manure testing, and crop production.²⁰

The CAFO rule also generally requires that discharges from a production or land application area are subject to the

CWA.²¹ Discharges of pollutants from land application areas must comply with the facility operator’s obligation to adopt best management practices, including the adoption of setback limits from surface waters or potential conduits to surface water or, alternatively, the implementation of a vegetative buffer strip to minimize the risk of potential nutrients or pollutants from leaving the field and reaching surface waters.²² There are exceptions, however. As noted above, the CWA’s definition of a point source specifically describes a CAFO as an example of a point source. But the definition also states that “[t]his term does not include agricultural [stormwater] discharges.”²³ The revised CAFO rule classified agricultural stormwater as “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.”²⁴ Therefore, the new CAFO rule would not treat as a discharge from a point source any stormwater-related discharge of manure from land application areas if the manure has been applied in accordance with the nutrient management plan.²⁵

In conjunction with the CAFO amendments, EPA promulgated ELGs for CAFOs.²⁶ As touched on earlier, the ELGs provide regulated entities, technical service providers, consultants, and permit authorities guidance on how to carry out EPA’s requirements for issuing NPDES permits to CAFOs.²⁷ ELGs are technology based and vary depending on the type of pollutant, the type of discharge, and whether the point source is new or existing.²⁸ For existing facilities, ELGs are based on the best available technology (BAT) economically achievable, best conventional pollution control technology (BCT), and the best practicable control technology currently available (BPT).²⁹ For new facilities, the ELGs are based on new source performance standards that apply the best available demonstrated control technology.³⁰

EPA established nonnumerical ELGs for the production areas of CAFOs on a sub-category by sub-category basis, two of which are relevant to the *Waterkeeper* case: the sub-category for dairy cows and cattle (other than veal calves) (Subpart C CAFOs), and the subcategory for swine, poultry, and veal calves (Subpart D CAFOs).³¹ EPA, which was required to set BAT, BPT, and BCT standards for the production areas of Subpart C and Subpart D CAFOs, determined that identical technologies satisfied both these standards; thus, it promulgated ELGs based on those same technolo-

9. *Id.* at 493.

10. *Id.* 493-94.

11. 33 U.S.C. §1311(a).

12. *Id.* §1311.

13. *Id.* §1362(14).

14. 66 Fed. Reg. 2960 (Jan. 12, 2001).

15. 68 Fed. Reg. 7175 (Feb. 12, 2003), *codified at* 40 C.F.R. pts. 9, 122, 123, and 412.

16. U.S. EPA, 2005 Second Circuit Decision on CAFOs, <http://cfpub.epa.gov/npdes/afo/caforulechanges.cfm> (last visited May 19, 2006).

17. 40 C.F.R. §122.23(b)(2); *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 495, 35 ELR 20049 (2d Cir. 2005).

18. 40 C.F.R. §412.2(h).

19. *Id.* §412.2(e).

20. 68 Fed. Reg. at 7212-13.

21. 40 C.F.R. §122.23(e).

22. *Id.* §412.31(b), incorporating by reference 40 C.F.R. §412.4.

23. 33 U.S.C. §1362(14).

24. 40 C.F.R. §122.23(e).

25. *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 496, 35 ELR 20049 (2d Cir. 2005).

26. 40 C.F.R. pt. 412.

27. U.S. EPA, *MANAGING MANURE GUIDANCE FOR CONCENTRATED ANIMAL FEEDING OPERATIONS (CAFOs)* (No. 821-B004-009) (2004), available at <http://cfpub.epa.gov/npdes/afo/info.cfm#manure>.

28. *Waterkeeper*, 399 F.3d at 511.

29. *Id.* (citing 33 U.S.C. §1311(b)(2)(A) (for BAT), §1314(b)(2)(A) (for BCT), and §1314(b)(1)(A) (for BPT)).

30. 399 F.3d at 511-12 (citing 33 U.S.C. §1316).

31. *Id.*; 40 C.F.R. §412.30-37 (Subpart C CAFOs); 40 C.F.R. §412.40-47 (Subpart D CAFOs).

gies.³² The CAFO ELGs, whether based on BAT, BCT, or BPT standards, prohibit discharges from a CAFO's production area (unless it is caused by precipitation), require best management practices for the production areas and land application areas, and provide an opportunity for alternative performance standards based on "site-specific alternative technologies."³³

Under the ELGs' application to facilities that raise dairy cows and cattle, point sources covered by the CWA are prohibited from operating the facility in such a way that discharges of manure, litter, or process wastewater pollutants enter waters of the United States.³⁴ A similar provision applies to swine, poultry, and veal calve production facilities.³⁵ If precipitation causes an overflow of these pollutants, however, the discharge will not trigger a violation as long as the facility is designed, constructed, operated, and maintained to contain all manure, litter, and process wastewater, including runoff, from a 25-year, 24-hour rainfall event.

Many states have water quality programs of their own that coordinate with federal water quality programs.³⁶ Under the CWA, states have authority to adopt or enforce standards respecting the discharge of pollutants that are at least as stringent as the standards set by the CWA.³⁷ Thus, any changes in the federal rules dramatically impact state programs as well.

III. The Challenges

Dissatisfied with various aspects of the new CAFO rule, several environmental and farm petitioners challenged the rule before several courts. Their claims were ultimately consolidated before the U.S. Court of Appeals for the Second Circuit. Despite their inherent differences, the parties all shared a common interest—seeking judicial review of a rule they believed included serious deficiencies. The Second Circuit summarized the challenges as falling into three categories: (1) challenges to the permitting scheme established by the rule; (2) challenges to the types of discharges that were subject to regulation under the rule; and (3) challenges to the ELGs that are established by the CAFO rule.³⁸ Each of these general challenges is explained below.

A. The Permitting Scheme

The environmental petitioners argued that the CAFO rule violated the CWA by allowing NPDES permits to be issued to CAFOs without requiring the permitting agency to review the CAFOs' nutrient management plans.³⁹ They also argued that the CAFO rule violated the Act because it did not require nutrient management plans to be included in the NPDES permits and that the rule failed to provide for public participation.⁴⁰ Meanwhile, the farm petitioners charged

that EPA exceeded its authority by requiring all large CAFOs to apply for a CWA permit unless the CAFO could demonstrate that it has no potential to discharge.⁴¹

B. Discharges Subject to Regulation

Under the revised CAFO rule, stormwater discharges of manure from land application areas would not be treated as a discharge from a point source if the manure has been applied to the fields in accordance with the CAFO's nutrient management plan. Environmental petitioners argued that this aspect of the rule violated the CWA requirement that all CAFO discharges must be regulated as discharges from a point source, as CAFOs are specifically deemed a point source under the CWA.⁴²

The farm petitioners argued that the CAFO rule violated the CWA because it would regulate runoff from crop fields where manure had been applied without requiring that the runoff first be "collected" or "channeled" to a single location prior to its discharge to waters of the United States.

C. ELGs

The environmental petitioners also challenged several aspects of the ELGs.⁴³ Specifically, they challenged the BAT-based ELGs, the BCT-based ELGs for pathogens, and the new source performance standard adopted for Subpart D CAFOs.⁴⁴ They also argued that the CWA requires EPA (or the states) to establish technology-based effluent limitations as well as additional water-quality based effluent limitations "where discharges of pollutants from a point source or a group of point sources would interfere with the attainment or maintenance of that water quality in a specific portion of the navigable waters" in order to "assure protection of public health, public water supplies, agricultural and industrial uses, and the protection and propagation of a balanced population of shellfish, fish and wildlife, and allow recreational activities in and on the water."⁴⁵ In failing to promulgate water quality-based effluent limits, such as those found in total maximum daily load determinations for impaired stream segments, and in barring states from doing so, they argued that EPA violated the Act.⁴⁶ The farm petitioners raised no claims concerning ELGs.

IV. The Decision

On February 28, 2005, the Second Circuit issued its decision in *Waterkeeper*, concluding that a number of provisions of the CAFO rule violated the CWA or were arbitrary and capricious under the Administrative Procedure Act (APA).⁴⁷

A. Standard of Review—The APA and Agency Discretion

In addition to determining whether the CAFO rule complied with the CWA, the *Waterkeeper* court also had to decide

32. 399 F.3d at 512.

33. *Id.*

34. 40 C.F.R. §412.31(a).

35. *Id.* §412.43(a).

36. See Clean Streams Law, 35 PA. CONS. STAT. ANN. §§691.1 et seq. (West 1993).

37. 33 U.S.C. §1370.

38. *Waterkeeper*, 399 F.3d at 497.

39. *Id.* at 498.

40. *Id.*

41. *Id.* at 504.

42. *Id.* at 507; 40 C.F.R. §122.23(e).

43. *Waterkeeper*, 399 F.3d at 511.

44. *Id.* at 512.

45. 33 U.S.C. §§1312(a), 1314(1) (2004); *Waterkeeper*, 399 F.3d at 522.

46. *Waterkeeper*, 399 F.3d at 522.

47. 5 U.S.C. §551, available in ELR STAT. ADMIN. PROC.

whether EPA acted arbitrary, capricious, or otherwise contrary to law under the APA. When administrative agencies act, two legal issues arise in just about every case. First, is the agency given authority to take the action it proposed to take? The second issue concerns the power of the judicial system to review agency action—once an agency takes action, the courts can review that action under established standards, including the U.S. Constitution, prior case law, applicable statutes and regulations, and the APA.

The APA establishes the basic procedural requirements federal agencies must follow in conducting rulemaking.⁴⁸ In general, all agency action is subject to review by a court, unless Congress withholds that authority or the agency has been given discretion to make a decision and it is the exercise of this discretion that is being challenged.⁴⁹ The APA grants courts authority to interpret questions of law, the Constitution, and the law under which an agency is operating when it takes action. A court can hold agency action unlawful and set it aside when it concludes that the action is arbitrary, capricious, or an abuse of discretion given to the agency.⁵⁰

Under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,⁵¹ when a court reviews an agency's construction of a statute that it administers, it first asks whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter, for the court as well as the agency must give effect to the unambiguously expressed intent of Congress.⁵² If, however, the court determines Congress has not directly addressed the precise question at issue, then it must determine whether Congress has explicitly left a gap for the agency to fill, essentially an express delegation of authority to the agency to address a specific provision of the statute by regulation.⁵³ Alternatively, if the statute is silent or ambiguous with respect to the specific issue, and Congress has not specifically directed the agency to address the issue, the court must determine whether the agency's action is based on a permissible construction of the statute.⁵⁴ Agency action is to be given controlling effect unless it is arbitrary, capricious, or clearly contrary to the terms of the statute being applied.⁵⁵ Under *Chevron*, therefore, an agency has broad authority to interpret a statute, but it cannot change it.

B. The Merits

Oftentimes, when agency action draws fire from both sides of a debate, it is a signal that the agency must be doing something right. Yet in *Waterkeeper*, the Second Circuit ruled both for and against the Agency, resulting in a decision that

can both be pleasing and threatening to those interested in the case.

1. The Permitting Scheme

□ *Environmental Petitioners' Claims.* The court agreed with the environmental groups, holding that failing to provide for permitting authority review of nutrient management plans plainly violated the Act's requirements and was arbitrary and capricious under the APA.⁵⁶ Issuance of a permit under the Act must occur only where the permits ensure that every discharge of pollutants will comply with applicable effluent limitations and standards. Since the nutrient management plan requirement is subject to its own set of requirements and conditions, some determination must be made that the plan prepared will satisfy those requirements.⁵⁷

By failing to require agency review of the associated nutrient management plans, the revised CAFO rule violated the Act's mandate that agency-issued permits ensure that every discharge of a pollutant will comply with applicable effluent limitations and standards.⁵⁸ The nutrient management plan must address the form, source, amount, timing, and method of application of nutrients on each field to achieve a realistic production goal while minimizing the movement of phosphorous and nitrogen to surface waters.⁵⁹ Without reviewing the nutrient management plans, it is impossible to ensure that a CAFO comply with these requirements.⁶⁰ The court noted:

As presently constituted, the CAFO Rule does nothing to ensure that each Large CAFO has, in fact, developed a nutrient management plan that satisfies the [statutory] requirements. The CAFO Rule does nothing to ensure, in other words, that each Large CAFO will comply with all applicable effluent limitations and standards. This is because, most glaringly, the CAFO Rule fails to require that permitting authorities review the nutrient management plans developed by Large CAFOs before issuing a permit that authorizes land application discharges.⁶¹

EPA argued that the nutrient management plan does not, itself, constitute an ELG but is, instead, "simply a planning tool" to help CAFOs comply with the effluent limitations.⁶² Because NPDES permits need only include effluent limitations, the nutrient management plan need not be included. The court disagreed. The court reasoned that the terms of the nutrient management plans are themselves effluent limitations.⁶³ The CAFO rule thus allows permits to issue that do not assure compliance with all applicable effluent limitations.⁶⁴ And even if a nutrient management plan is not an effluent limitation, EPA's argument still fails. As even

48. ROBERT V. PERCIVAL, ENVIRONMENTAL LAW, STATUTORY SUPPLEMENT AND INTERNET GUIDE 25 (Aspen Publishers 2002).

49. 5 U.S.C. §§701(a), 702.

50. *Id.* §706(2)(A).

51. 467 U.S. 837, 14 ELR 20507 (1984).

52. *Id.* at 842, 843.

53. *Id.*

54. *Id.* In *Chevron*, the U.S. Supreme Court noted that the judiciary's role is that of the final authority on issues of statutory construction and it must reject administrative constructions that are contrary to clear congressional intent. In reviewing an agency determination, the court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction the agency was giving the statute.

55. *Id.*

56. *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 499, 35 ELR 20049 (2d Cir. 2005).

57. *Id.* at 499.

58. *Id.* (citing 33 U.S.C. §§1342(a)(1), 1342(a)(2), and 1342(b), each of which contain language that mandates that agency action ensure or assure a described result of some type. The agency has no discretion to disregard these standards where applicable).

59. *Id.* at 499.

60. *Id.*

61. *Id.*

62. *Id.* at 501.

63. *Id.*

64. *Id.*

EPA concedes, the requirement to develop and implement a nutrient management plan *is* an effluent limitation and is one of the “best management practices” required by the CAFO rule.⁶⁵

EPA also argued that there is no *need* for permitting authority review because the rule provides large CAFOs with “little room for discretion—and thus little room for error—in setting their waste application rates.”⁶⁶ But, argued the court, the CAFO rule “fails to adequately prevent large CAFOs from ‘misunderstanding or misrepresenting’ the application rates they must adopt in order to comply with state technical standards.”⁶⁷ Thus, the rule does nothing to ensure that large CAFOs develop plans and waste application rates that comply with applicable effluent limitations and standards.⁶⁸

Aside from the meaningful review question, the environmental petitioners also argued that the rule violated the Act’s public participation requirements.⁶⁹ Again, the court agreed. Under the Act, public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Agency or any state under the Act shall be provided for, encouraged, and assisted by the EPA Administrator and the states.⁷⁰ Before an NPDES permit issues, the public must have notice of the application and an opportunity to respond to it.⁷¹ Permit authority for CAFOs can be obtained through either general permits or individual permits. If general permit authority is used, then the public participation may be in the form of a notice and comment opportunity, rather than a public hearing. If an individual permit route is used, a public hearing is more likely to occur. The CAFO rule violated these requirements.⁷² If NPDES permits were approved under the rule, the public’s role would be limited to requiring the applicant to develop a nutrient management plan without any means to review or enforce the plan.⁷³

The court also agreed with the environmental petitioners’ claim that EPA violated the Act by failing to include the terms of the nutrient management plan in NPDES permits.⁷⁴ The CWA requires NPDES permits to include effluent limitations.⁷⁵ The CAFO rule established nonnumerical effluent limitations in the form of best management practices.⁷⁶ Among these best management practices was the requirement that CAFO prepare nutrient management plans.⁷⁷ EPA argued that while the requirement to create the plans was a nonnumerical effluent limitation, the terms of the plans were not.⁷⁸ Thus, EPA argued, there was no need to include them in the NPDES permits. The Act, however, defines “effluent limitation” as any “restriction” on “quantities,

rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources.”⁷⁹ According to the court, there is “no doubt that under the CAFO Rule, the only restrictions actually imposed on land application discharges are those restrictions imposed by the various terms of the nutrient management plan, including the waste application *rates* developed by the Large CAFOs pursuant to their nutrient management plans.”⁸⁰ Thus, the court concluded, the nutrient management plans constitute effluent limitations and they must be included in NPDES permits.⁸¹ Because the CAFO rule failed to require their inclusion, the CAFO rule was arbitrary and capricious and in violation of the Act.⁸²

□ *Farm Petitioners’ Claims.* Farm petitioners challenged the CAFO rule’s permitting scheme on the grounds that EPA exceeded its jurisdiction by requiring all CAFOs to apply for a CWA permit or otherwise demonstrate that they have no potential to discharge a pollutant.⁸³ The court agreed.⁸⁴ In the court’s view, “unless there is a ‘discharge of a pollutant’ there is no violation . . . , and point sources are, accordingly, neither statutorily obligated to comply with EPA regulations for point source discharges, nor are they statutorily obligated to seek or obtain an NPDES permit.”⁸⁵ By imposing obligations on all CAFOs, regardless of whether they have added any pollutants to the navigable waters, the rule violates the CWA’s statutory scheme. The court made it clear that:

[i]n the absence of an actual addition of any pollutant to navigable waters from any point, there is no point source discharge, no statutory violation, no statutory obligation of point sources to comply with EPA regulations for point source discharges, and no statutory obligation of point sources to seek or obtain an NPDES permit in the first instance.⁸⁶

EPA contended that the “duty to apply” was based on the fact that all CAFOs have the potential to discharge pollutants, thereby requiring regulatory action.⁸⁷ But the court disagreed, stating that the CWA gives EPA authority “to regulate and control only *actual* discharges—not potential discharges, and certainly not point sources themselves.”⁸⁸ Consequently, a CAFO is under a duty to apply for an NPDES permit only if a discharge of a pollutant to waters of the United States will occur from the proposed action.⁸⁹ The

79. 33 U.S.C. §1362(11).

80. *Waterkeeper*, 399 F.3d at 502.

81. *Id.*

82. *Id.*

83. *Id.* at 504.

84. *Id.*

85. *Id.*

86. *Id.* at 505.

87. *Id.* The court also notes EPA’s argument that the statutory definition of a point source as a source from which pollutants “are discharged” should be interpreted to include sources from which pollutants “may be” discharged. This is somewhat reminiscent of the dispute about the meaning of the word “is” from the William J. Clinton presidency. See also *id.* at 506, n.22, regarding whether CAFOs can be presumed to be “potential dischargers.”

88. *Id.* at 505.

89. If you conclude that a duty to apply arises when there is evidence of a discharge, then the discharger would be in violation of CWA §402(a)(1) when that discharge occurs. This presents a dilemma for a producer who believes that the facility will operate without a dis-

65. *Id.*

66. *Id.*

67. *Id.* at 502.

68. *Id.*

69. *Id.* at 503.

70. 33 U.S.C. §1251(e).

71. *Id.* §§1342(a), (b)(3), (j), and 1365(a).

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

73. *Id.* at 503-04.

74. *Id.* at 502.

75. 33 U.S.C. §§1311(a), 1311(b), 1342(a).

76. *Waterkeeper*, 399 F.3d at 502 (citing 40 C.F.R. §412.4).

77. *Id.*

78. *Id.*

court noted that to the extent that policy considerations warrant changing the statutory scheme to include extending regulatory authority to activities that have the potential to discharge, such considerations should be addressed before Congress rather than before the courts.⁹⁰ At the core, an administrative agency's authority is limited by the authority granted to it by Congress. Even if well meaning, an agency cannot act beyond the terms of the law under which it operates.⁹¹

2. Regulated Discharges

□ *Environmental Petitioners' Claims.* In EPA's view, the point source definition plainly exempts from regulation discharges that are considered to be agricultural stormwater.⁹² Yet the environmental petitioners argued that because CAFOs are point sources, any discharge from a CAFO must be regulated under the Act.⁹³ Not surprisingly, the court viewed the issue as "self-evidently ambiguous."⁹⁴ The CWA "expressly defines the term point source to include 'concentrated animal feeding operations'; the Act expressly defines 'point source' to exclude 'agricultural stormwater'; and the Act makes absolutely no attempt to reconcile the two."⁹⁵

Thus, the Second Circuit had to decide whether the CAFO rule's exemption for precipitation-related land application discharges was a permissible construction of the Act.⁹⁶ It concluded that it was.

Looking at the legislative history, the court stated:

[W]hen Congress added the agricultural stormwater exemption to the [CWA], it was affirming the impropriety of imposing, on "any person," liability for agriculture-related discharges triggered not by negligence or malfeasance, but by the weather—even when those discharges came from what would otherwise be point sources. There is no authoritative legislative history to the contrary.⁹⁷

The court also cited its prior decision in *Concerned Area Residents for the Environment v. Southview Farms*⁹⁸ in support of its ruling. In *Southview Farms*, a group of landowners filed a citizen suit against a dairy farm in Wyoming County, New York, arguing that the farm violated the CWA and state law after they observed liquid manure flowing into and through a swale on one of the farm's fields and through a drain pipe under a stone wall leading directly into a stream that ultimately flows into the Genesee River.⁹⁹

The dairy farm contended that the discharge was not a point source discharge because the liquid naturally flowed to and through the lowest areas of the field, and that the pol-

lutants reached the stream that flows into the Genesee River "in too diffuse a manner to create a point source discharge."¹⁰⁰ The landowners countered that even if the liquid manure flowing from the field into the swale could be characterized as "diffuse runoff," the manure pollutant was nevertheless, thereafter *channeled or collected* sufficiently to constitute a discharge by a point source.¹⁰¹ They also argued that the farm's liquid-manure-spreading vehicles were point sources because the CWA defines a point source to include a "container" or "rolling stock."¹⁰²

The court agreed with the landowners, holding that the swale, coupled with the pipe leading to the stream that ultimately reached a navigable water was, in and of itself, a point source.¹⁰³ The court went on to say that the manure spreading vehicles were also point sources.¹⁰⁴ Notably, the *Southview Farms* court also concluded there were no disputed material facts with respect to whether *Southview's* cattle feed lot is a CAFO and, therefore, that it should be regulated as a point source under the CWA rather than as an agricultural nonpoint source operation.¹⁰⁵

A key issue in *Southwest Farms* was the application of the CWA's agricultural stormwater exemption, as the farm argued that the discharges fell under the exemption. The court concluded that the real issue is not whether the discharges occurred during rainfall or were mixed with rainwater runoff, but rather, whether the discharges were caused by precipitation.¹⁰⁶ All discharges eventually mix with precipitation runoff in ditches or streams or navigable waters, so the fact that the discharge might have been mixed with runoff cannot be determinative. Similarly, evidence demonstrated that manure was applied again and again to the same field, such that one could reasonably conclude that it was oversaturation of the field that led to the runoff rather than rainfall. Thus, in determining whether the stormwater exemption applies, one must ask whether the

100. *Id.*

101. *Id.*

102. *Id.* (citing *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 922, 16 ELR 20471 (5th Cir. 1983); *United States v. Tull*, 615 F. Supp. 610, 622 (E.D. Va. 1983), *aff'd*, 769 F.2d 182, 15 ELR 21061 (4th Cir. 1985), *rev'd on other grounds*, 481 U.S. 412, 17 ELR 20667 (1987); *United States v. Weisman*, 489 F. Supp. 1331, 1337, 10 ELR 20698 (M.D. Fla. 1980)).

103. *Id.*

104. *Id.* at 119.

105. *Id.* at 123. This conclusion made the *Southview Farms* case somewhat difficult to understand. On one hand the size of the operation would have led one to consider that the facility could not have avoided the CWA permit requirement, yet it plainly did. The court also spent considerable time and energy addressing issues that would seem to merit far less discussion if the size analysis was given additional attention. What was the basis on which *Southview Farms* concluded it did not need a permit? Did it believe that its operation failed to discharge a pollutant to waters of the United States and, therefore, it did not need to obtain a permit? If that is the basis, *Southview* was ahead of its time, but since there was evidence that it discharged pollutants, that avenue was unavailable. As the *Waterkeeper* case recognized that there is no duty to request a permit if there is no discharge of a pollutant, the court's reasoning of *Southview Farms* only added to the confusion. The pipe running under a fence that transported excess manure from the field to a ditch and eventually to the Genesee River seemed like a perfect place on which to rest the decision. Clearly that pipe could be viewed as meeting the point source definition head on. Curiously, the *Waterkeeper* court failed to see the significance of the pipe and addressed it as an insignificant point in the case.

106. *Id.* at 120, 121.

charge, but is still confronted by the risk that at some point it will result in a discharge.

90. *Id.* (citing *MCI Telecomms. Corp. v. AT&T Co.* 512 U.S. 218, 234 (1994)).

91. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 14 ELR 20507 (1984).

92. *Waterkeeper*, 399 F.3d at 507.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* (citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 14 ELR 20507 (1984)).

97. *Id.*

98. 34 F.3d 114, 24 ELR 21480 (2d Cir. 1994).

99. *Id.* at 118.

rain caused the runoff or whether the livestock operations caused the runoff.

In *Waterkeeper*, the environmental petitioners argued that discharges that occur from an area under the control of a CAFO can never qualify for the agricultural stormwater exemption.¹⁰⁷ The *Waterkeeper* court disagreed, explaining that under *Southview Farms*, a CAFO discharge can be considered either a discharge subject to regulation or an agricultural stormwater discharge not subject to regulation.¹⁰⁸ Determining which of these two outcomes applies depends on the primary cause of the discharge.¹⁰⁹ The *Waterkeeper* court ultimately held that the CAFO rule's exemption for precipitation-related stormwater discharges was proper.¹¹⁰ Because the CAFO rule requires land applications to be made in accordance with site-specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the waste, any subsequent "precipitation-related" discharge is considered to be an "agriculture stormwater discharge" that is exempt from regulation.

□ *Farm Petitioners' Claims.* The farm petitioners argued that the CAFO rule violated the CWA because it regulated "uncollected" discharges of manure runoff from land application areas under the control of a CAFO. They claimed that runoff from land application areas, unless "collected" or "channelized" at the land application area itself, does not constitute a point source discharge.¹¹¹ The court disagreed. Because a CAFO itself is a point source, any discharge from a land area under the control of a CAFO constitutes a discharge from a point source.¹¹² The court found that the Act "not only permits, but demands" that land application discharges be construed as discharges "from" a CAFO.¹¹³ Unless the discharge falls under the stormwater agricultural exemption, it is subject to regulation under the CWA.¹¹⁴

3. ELGs

The environmental petitioners challenged several aspects of the CAFO ELGs. The court upheld some of the challenged provisions and remanded others for further clarification and analysis.

The environmental petitioners argued that EPA did not meet its duty to identify the single CAFO with the best-performing technology when it chose the pollution control technologies on which to base the ELGs for CAFOs.¹¹⁵ The court disagreed, holding that EPA was justified in its selection of BATs on which to base the regulations.¹¹⁶ Among other things, the Agency collected extensive data on existing CAFO waste management systems and considered over 10,000 comments from the public.¹¹⁷ Al-

though the CAFO rule "does not explicitly identify the single, existing best-performing CAFO in each category or subcategory of the rule," it "substantively establishes standards that make 'reference to the best performer in any industrial category'—and nothing in the Act or the legislative history indicates that any more was required of the EPA."¹¹⁸

The petitioners also claimed that EPA improperly abandoned a more suitable option as BAT for Subpart C CAFOs.¹¹⁹ They argued that EPA should have selected an option that included national controls on discharges that reach surface waters through groundwater connections.¹²⁰ But the court held that it was reasonable for the Agency to conclude that controlling groundwater discharges should be evaluated on a case-by-case basis by the permitting agency rather than through a national regulation because such discharges depend on local geology and other site-specific factors.¹²¹

The court also upheld the financial methodologies EPA used in determining whether the technology-based permit requirements for Subpart D CAFOs would be economically achievable by the industry as a whole.¹²² The petitioners were correct that cost is just one factor EPA is to consider in establishing BAT standards, but EPA is given discretion to determine how much weight to give to each factor.¹²³ Here, EPA's determinations were reasonable, and, therefore, worthy of deference.¹²⁴

There were several issues, however, with which the court agreed with the environmental petitioners. It agreed that EPA failed to make an affirmative finding that the "best conventional technology" ELGs for conventional pollutants such as fecal coliform actually represented BCT technology.¹²⁵ EPA believed its failure to impose any BCT-based ELGs specifically designed to achieve pathogen reductions was justified because, among other reasons, the ELGs otherwise adopted by the CAFO rule may "incidentally" achieve some reductions in discharges of pathogens.¹²⁶ The court disagreed, reasoning that although EPA may determine that the other ELGs adopted the CAFO do in fact represent the BCT for reducing pathogens, EPA may not avoid imposing any other pollutant control technology without an express finding.¹²⁷ The court, therefore, remanded the issue so EPA could make such a finding based on the BAT/BPT technologies it did study or establish specific BCT limitations for pathogens based on some other technology.¹²⁸

The environmental petitioners also argued that EPA's new source performance standard for the production areas of swine, poultry, and veal CAFOs was arbitrary and capricious. The court agreed in part.¹²⁹ The CAFO rule set new

107. *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 508, 35 ELR 20049 (2d Cir. 2005).

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 510.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 512.

116. *Id.* at 513.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 513-14.

121. *Id.* at 515.

122. *Id.* at 516.

123. *Id.*

124. *Id.* at 516-18.

125. *Id.* at 519.

126. *Id.*

127. *Id.*

128. *Id.*; see also U.S. EPA, SUMMARY OF THE SECOND CIRCUIT'S DECISION IN THE CAFO LITIGATION 3, available at http://www.epa.gov/npdes/pubs/summary_court_decision.pdf.

129. *Waterkeeper*, 399 F.3d at 520-21.

source performance standards for swine and poultry CAFOs at an “absolute” zero level of discharge. CAFOs, however, may avoid this requirement if they demonstrate that either: (1) its production area was designed to contain all wastewater and precipitation from a 100-year, 24-hour storm; or (2) it would comply with voluntary “superior performance standards” based on innovative technology so long as the discharge was accompanied by an equivalent or greater reduction of pollutants released to other media.¹³⁰ The court found that EPA failed to justify these alternatives in the record. EPA never modeled the potential overflows and pollutant loads from a system with a 100-year, 24-hour storm event design capacity; it modeled only the potential overflows and pollutant loads from a system with a 25-year, 24-hour storm event.¹³¹ And the Agency provided no justification for the voluntary, innovative technology option.¹³² On remand, EPA must clarify the statutory and evidentiary basis for allowing these two alternatives. The court also determined that EPA failed to provide adequate public participation with regard to these two options.¹³³ EPA, therefore, must involve the public during the remand.

The environmental petitioners also argued that EPA violated the CWA in failing to enact water quality-based effluent limitations in the permits and barring states from establishing such limitations.¹³⁴ As noted above, agricultural stormwater is exempt from NPDES regulation. Agricultural stormwater, therefore, is statutorily exempt from any effluent limitations, including water quality-based limitations.¹³⁵ Yet EPA made no attempt to justify its failure to promulgate water quality-based limitations for discharges not covered by the agricultural stormwater exemption.¹³⁶ On remand, EPA must clarify whether water quality-based limitations are necessary.¹³⁷ And because the rule is ambiguous as to whether states may develop water quality-based limitations on their own, this aspect of the rule was remanded as well so EPA can provide further clarification.¹³⁸

V. Post-Decision Activities

On April 14, 2005, four of the environmental plaintiffs in this case filed a petition for rehearing or clarification with the Second Circuit.¹³⁹ They asked for a rehearing on the “duty to apply” issue on the grounds that the court’s decision overlooked or misapprehended certain arguments, which would result in unintended consequences. These consequences would impact agency procedures, reviews, and decisions that relate to the need to obtain an NPDES permit, the need to develop a nutrient management plan, and the need to determine land application rates for manure that ensure there will be no discharge of pollutants to waters of the

United States. In the petitioners’ mind, the CWA has a clear purpose: to prevent, reduce, or eliminate water pollution.¹⁴⁰ But to hold that an actual discharge was necessary before the duty to obtain a permit would, according to petitioners, contradict the structure of the Act, the intent of Congress, and long-established agency regulatory practice.

In rejecting the CAFO rule’s “potential to discharge” approach, and in holding that CAFOs need not apply for a permit until the fact of a discharge is established, petitioners were concerned that CAFO operators claiming that they did not discharge pollutants to waters of the United States would rely on *Waterkeeper* as support for not being required to obtain a permit. This would result in a “self-regulatory” permitting scheme. CAFOs could make their own determinations regarding whether they need a permit by determining their own rates of manure application to land. If a discharge occurred, a CAFO could argue that meeting the land application rates determined in the comprehensive nutrient management plan results in the discharge being an agricultural stormwater discharge for which no NPDES permit is required. Since the comprehensive nutrient management plan is a key ingredient in the determination of whether runoff is agricultural stormwater runoff, review of the plan to determine its effectiveness becomes an important issue. In the petitioners’ eyes, requiring that a CAFO operation have an actual unpermitted and illegal discharge before EPA or a state regulatory authority would have power to regulate would be an “absurd result [that] frustrates the prophylactic goal of the statute to eliminate discharges of pollutants.”¹⁴¹

If an actual discharge must exist for the duty to apply for a permit to arise, may EPA require “zero discharge” NPDES permits¹⁴² under the *Waterkeeper* ruling? EPA had argued before the *Waterkeeper* court that it had authority to prevent discharges through the issuance of NPDES permits that carried out a “zero discharge” directive to eliminate discharges.¹⁴³ EPA’s authority to promulgate “zero discharge” effluent limitations has been consistently upheld by other circuit courts.¹⁴⁴ The U.S. Supreme Court’s May 15, 2006, decision in *S.D. Warren Co. v. Maine Board of Environmental Protection*,¹⁴⁵ dealing with CWA §401, addresses the interpretation of nondefined terms under the CWA. In *S.D. Warren*, a paper mill tried unsuccessfully to convince the Court to adopt a narrow interpretation of the term “discharge” so that it would only include those discharges that add foreign elements to U.S. waters.¹⁴⁶ But the Court disagreed. As used in §401, the term “discharge” is not defined. The Court therefore held that it should be interpreted in accordance with its ordinary or natural meaning rather than under the narrower meaning attached to “discharge of a pol-

130. *Id.*

131. *Id.* at 521.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.* at 522.

137. *Id.* at 523.

138. *Id.* at 523-24.

139. Environmental Petitioners’ Petition for Panel Rehearing or Clarification, *Waterkeeper Alliance v. EPA*, Nos. 03-4470(L) et al. (2d Cir. Apr. 13, 2005) [hereinafter Petition].

140. *Id.* at 1.

141. *Id.* at 2.

142. Under the CAFO rule prior to 2003, facilities considered to be CAFOs were required to apply for a permit and design their operation to have “zero discharge” from the facility. EPA argued that it has always used this authority and should be able to continue to apply it in the future.

143. 33 U.S.C. §1311(b)(2)(A).

144. Petition, *supra* note 139, at 6 (citing *Texas Oil & Gas Ass’n v. EPA*, 161 F.3d 923, 29 ELR 20397 (5th Cir. 1998); *Kennecott Copper Corp. v. EPA*, 162 F.2d 1232, 1242, 10 ELR 20415 (10th Cir. 1979); *E.I. DuPont de Nemours & Co. v. Train*, 541 F.2d 1018, 1029, 6 ELR 20371 (4th Cir. 1976)).

145. No. 04-1527, 36 ELR 20089 (U.S. May 15, 2006).

146. *Id.*, slip op. at 7.

lutant” or “discharge of pollutants,” which are defined terms under separate sections of the Act.¹⁴⁷

Can a presumption that a facility of a particular type will discharge a pollutant in its typical operation trigger the duty to apply? In its brief to the Second Circuit, EPA cited considerable evidence of actual CAFO discharges as a basis for the revised CAFO rule. Environmental petitioners also argued that considerable evidence existed in the record to support a rebuttable presumption that CAFOs actually discharge pollutants and that such presumptions have been recognized by other circuits.¹⁴⁸ To remedy the self-regulating scheme described above, environmental petitioners urged the court to clarify its decision so that EPA could require large CAFOs that apply land waste to do so pursuant to a nutrient management plan that is incorporated into an NPDES permit. On May 3, 2005, the Second Circuit rejected the petition.

On February 10, 2006, EPA extended the previously set deadlines for complying with the 2003 NPDES permitting requirements in light of the *Waterkeeper* decision.¹⁴⁹ Under the extended deadlines, operations that were defined as CAFOs as of April 14, 2003, but were not defined as CAFOs before that date must seek NPDES permit coverage from February 13, 2006, to July 31, 2007. Operations that are not new sources and that became defined as CAFOs after April 14, 2003, due to operational changes that would not have made them a CAFO prior to that date must seek NPDES permit coverage from April 13, 2006, to July 31, 2007. The deadline for CAFOs to develop and implement comprehensive nutrient management plans was extended from December 31, 2006, to July 31, 2007. EPA has indicated that it plans to issue a proposed CAFO rulemaking for public comment in mid-2006 and a final rulemaking thereafter as expeditiously as possible.¹⁵⁰

VI. Implications of the *Waterkeeper* Decision

Opposition to the 2003 modification of the CWA CAFO rule reflects the varied interests of the parties. What unified their effort was their agreement that the proposed rule should be withdrawn. The proposed rule was not based on significant changes to the statute, but reflected a different way of attacking the issue of which CAFOs should be required to have a CWA permit by using language that had been in place for more than 30 years.

The most significant part of the *Waterkeeper* decision is its holding that the duty to apply for a CWA permit is tied to an actual discharge to waters of the United States. If the duty to obtain a permit does not apply until a discharge occurs, then a variety of problems result. There will be no agency review, public comment, or public hearing on the activity before a polluting event occurs. There will be no need to develop a nutrient management plan if the facility does not need a CWA permit. The only type of compliance that Congress or the Agency might expect is that of CAFO operators who volunteer to apply before a discharge event occurs.

These producers would be “buying protection” that having a permit and a reviewed comprehensive nutrient management plan would provide. Would that situation achieve the legislative goals Congress set for the CWA?

In reviewing the purpose and objective of the CWA, there does not seem to be a clear statement that the Act is intended to *prevent* such discharges. Rather, it is intended to remedy their effects or restore the waters of the United States to a describable level or condition.¹⁵¹ Does Congress simply need to revise the purpose and objective of the Act, several key definitions, and the circumstances under which a permit would be required to remedy the deficiency that the court sees? The *Waterkeeper* court seems to think so, as it plainly referred to its limited role in changing the law and directed unsatisfied parties to seek congressional relief.¹⁵²

Giving a facility operator an opportunity to avoid the obligation to apply for a permit on grounds that activity has no potential to discharge might be too tempting for an operator to pass up. Agency officials could argue that without the regulatory structure of the CWA, a livestock production facility’s ability to avoid a discharge is dramatically reduced. Decreased probability, however, is not enough to trigger a duty to apply where the statute has clear language to the contrary. If a facility operator’s obligation to apply for a permit is triggered by a discharge, should a prudent livestock producer operating in this environment take his chances, wait until a discharge occurs, and face the consequence of having no permit, or should the prudent operator apply for a permit to be shielded from some liability if a discharge occurs?¹⁵³

The *Waterkeeper* court’s discussion about public access to nutrient management plans and the need to allow the public to play a meaningful role in shaping the terms of such plans provides some optimism to those who want the public’s role to expand, but EPA will need to refine this process in a manageable way. For example, in Pennsylvania, complaints about access to nutrient management plans prepared under the Nutrient Management Act¹⁵⁴ are often raised by parties who view the plan approval process with skepticism. The *Waterkeeper* holding will give these skeptics some comfort that greater public participation may be coming, but the decision’s lack of detail fails to provide any concrete threshold of access they should expect during the public participation process.

The *Waterkeeper* court’s discussion on “precipitation-related discharges” and the agricultural stormwater exemption presents another challenge. Requiring “causation” to be the determinative factor on which regulation depends likely makes this a contested issue. Although *Southview Farms* supports the court’s causation test, the test may not be as eas-

147. *Id.* at 11.

148. Petition, *supra* note 139, at 7 (citing EPA Brief at 75, 84, 85-89, 92-94; Environmental Petitioners Reply Brief at 98-99; Proposed Revised CAFO Rule, 66 Fed. Reg. at 2959, 3007-08; and the Revised CAFO Rule, 68 Fed. Reg. at 7175, 7201).

149. See 71 Fed. Reg. 6978 (Feb. 10, 2006).

150. *Id.* at 6980.

151. See 33 U.S.C. §1251(a), which states: “The objective of this chapter is to restore and maintain the chemical, physical and biological integrity of the Nation’s waters” The word “prevention” is used in §1251(b) but the context in which it appears refers to “the primary responsibilities and rights of the States to prevent, reduce and eliminate pollution” *Id.* at §1251(b).

152. *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 505, 35 ELR 20049 (2d Cir. 2005).

153. The clearest example of liability that would be avoided by having a permit is the liability that would otherwise attach to agricultural stormwater runoff. Failure to observe the terms and conditions of the permit would not generally be excused, however.

154. See 3 PA. CONS. STAT. ANN. §§501 to 522 (West 2005). Under §506(e), nutrient management plans that are required are submitted to local conservation districts or the State Conservation Commission for review and approval.

ily applied in other situations. Countless other scenarios that involve human and natural factors occurring in proximity to runoff from land areas exist, and the causation emphasis will make this a disputed issue. Whether this approach advances CAFO operator understanding of what they should or should not do in order to structure and operate their facilities in accordance with the CWA remains to be seen.

The *Waterkeeper* decision also implicates other environmental laws' ability to *prevent* polluting events. Those laws that fail to clearly state a purpose to prevent pollution may fall under the same trap seen in *Waterkeeper*. Unless the statute was intended to prevent pollution, it will be difficult to regulate where there is no evidence of a polluting event. According to the *Waterkeeper* court, *Chevron* was meant to prohibit agency action where the plain language of the statute indicates that a discharge is the trigger for regulation.

The CWA has been in place for over 30 years and only now has a fundamental interpretation of its requirements concerning applications for NPDES permits. To those who argued that the Act's language did not apply in the absence of a discharge, vindication has finally come.¹⁵⁵ However,

the outcome in *Waterkeeper* is not the result of an artful interpretation of statutory language, but rather a straightforward interpretation of what the statute says as well as what it does not say. Wider acceptance of this approach to literal interpretation may change the direction of environmental law much quicker than people would have thought possible.¹⁵⁶ You might say that the risk of greater use of literal interpretation is overstated because legislative changes to current law could easily block the impact of its application. Although a legislative solution is possible, there is risk that opening up key laws to any legislative scrutiny runs the risk of opening the door to wider scrutiny and attention than what the proponents actually sought. Will proponents of a legislative solution conclude that prevention of environmental harm is a pillar on which environmental law must be based? EPA is currently considering the direction it wants to take following this decision. In the livestock sector of the agricultural economy there is great interest in this matter. As more than one year has passed since the decision was announced, this delay may indicate the importance that EPA is giving its response to the decision.

155. See L.E. Lanyon & J.C. Becker, *A Commentary on SARA Title III and Its Role in Air Quality Litigation Involving Agriculture*, AGRIC. L. UPDATE, Mar. 2004, at 1-3, 6. This article in point/counterpoint format asks the question whether the Emergency Planning and Community-Right-To-Know Act, 42 U.S.C. §§11001-11050, ELR STAT.

EPCRA §§301-330, was intended to apply to agricultural activities and debates the question whether this law should be applied if Congress did not express the intent that it apply.

156. See the dissent of Justice Clarence Thomas in *Kelo v. City of New London*, 125 S. Ct. 2655, 2686, 35 ELR 20134 (2005).