IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
Elkins

LOIS ALT, d/b/a Eight is Enough,

Plaintiff,

AMERICAN FARM BUREAU and
WEST VIRGINIA FARM BUREAU,

Plaintiff-Intervenors,

v.

Civil Action No. 2:12-CV-42
Judge Bailey

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Defendant.

ORDER DENYING MOTION TO DISMISS, PERMITTING INTERVENTION, AND ESTABLISHING BRIEFING SCHEDULE

Pending before this Court are the Motion to Intervene filed by The Potomac Riverkeeper, West Virginia Rivers Coalition, Waterkeeper Alliance, Center for Food Safety and Food & Water Watch (Doc. 31), a Joint Motion to Stay Summary Judgment Briefing (Doc. 60), and the Motion to Dismiss filed by the defendant (Doc. 68). The earlier filed Motions have not been addressed previously due to the suggestion that this action may be moot, thereby depriving this Court of jurisdiction. All Motions have now been fully briefed and are ripe for decision.

Background

Lois Alt filed this action on June 14, 2012 seeking a declaratory judgment that a compliance order issued to her by the United States Environmental Protection Agency

("EPA") was invalid because it required her to obtain a permit under the federal Clean Water Act ("CWA") for discharges that she believes are exempt from the CWA's permitting process. By order entered October 9, 2012 the American Farm Bureau and the West Virginia Farm Bureau (collectively, "the Farm Bureaus") were allowed to intervene for purposes of representing the interests of thousands of Farm Bureau members that could be affected by EPA's position on agricultural stormwater. On October 10, 2012, the Farm Bureaus filed their Complaint (Doc. 29).

Lois Alt is the owner of Eight is Enough Farm in Old Field, West Virginia. On June 17, 2011, the farm was inspected by, among others, Ashley Toy and Garth Connor of EPA. Under cover of a letter dated August 18, 2011 Mrs. Alt was advised by Mrs. Toy of the results of the inspection ("the Toy Inspection Report"), which contained the following Summary of Concerns:

1) Stormwater runoff can come into contact with spilled manure and ventilation dust. There were several man made ditches with culverts that help facilitate stormwater away from the poultry houses and towards Mudlick Run.

2) Stormwater runoff from the northern end of the concrete pad in-front of the compost shed can drain to the Unnamed Tributary of Mudlick Run.

(Doc. 1-2, at 6).

In the cover letter, Mrs. Alt was advised of the requirements of the Clean Water Act,[1] but was not ordered to obtain a National Pollutant Discharge Elimination System ("NPDES")

[1] The August 18, 2011 letter from Ashley Toy stated that "CAFOs are strictly prohibited from discharging any pollutants to a water of the United States, except when in compliance with a National Pollutant Discharge Elimination System (NPDES) permit. A discharge may include, but not be limited to, stormwater runoff that has come into contact with manure, litter, feed and dust from ventilation fans." EPA has never withdrawn this statement of its position on agricultural stormwater.

permit.[2]

On November 13, 2011, Mrs. Alt was issued a Findings of Violation and Order for Compliance ("the Compliance Order") because she was determined by EPA to be the owner of a point source discharge of pollutants to waters of the United States. (Doc. 1-1, at p. 4, Section IV).

In the Factual Background section of the Order there were two sources of pollutants that were cited as the basis for the order: dust (feathers and fine particulate of dander and manure) from the ventilation exhaust fans that settled on the ground, and manure at the south end of the poultry houses. (Id. at p. 3).

EPA alleged that the dust and manure was exposed to precipitation, generating process wastewater that would be carried to waters of the United States. These were essentially the same conditions that were noted in the Summary of Concerns in the Toy Inspection Report.

Mrs. Alt initially said that she would obtain an NPDES permit from the West Virginia Department of Environmental Protection, but later decided she would not, as explained in a letter of February 13, 2012, from Mrs. Alt's counsel to Mr. Andrew Duchovnay, counsel for EPA ("the Alt Response"). (Doc. 77-1). While the Alt Response stressed the cleanliness at Mrs. Alt's farm, there was no representation that there would be no chicken litter, feathers or manure outside the poultry houses. Rather, the letter stated Mrs. Alt's

[2] Section 402 of the CWA (33 U.S.C. § 1342) establishes the National Pollutant Discharge Elimination System, or NPDES system, which generally requires permits for point source discharges of pollutants to waters of the United States. Federal NPDES regulations and State NPDES program requirements are found at 40 CFR Parts 122-125 and 47 C.S.R. 10, respectively.

position that "the incidental presence of insignificant amounts of chicken litter, feed, or similar material on the ground in the barnyard at a farm does not give rise to a regulated discharge. Instead, the only possible discharge of such areas would be unregulated agricultural stormwater."

On March 29, 2012, Andrew Duchovnay replied to the Alt Response on behalf of EPA ("the Duchovnay Letter"). (Doc. 77-2). In his response Mr. Duchovnay disagreed with Mrs. Alt's assertion that runoff from the "incidental presence of insignificant amounts of litter, feed, or similar material" was exempt from regulation, stating that "Section 301 of the Clean Water Act does not include a de minimis discharge defense . . . ." Furthermore, the Duchovnay Letter categorically rejected Mrs. Alt's contention that the runoff from that litter, feed or similar material was agricultural stormwater and exempt from regulation under CWA Section 301, stating:

> The agricultural stormwater exemption applies to the land application area and does not extend to other areas of the CAFO. The CAFO includes the animal confinement houses and manure storage areas and the spaces between them. Specifically, . . .the poultry houses have ventilation fans which deposit manure, dust and dander on the ground between the poultry houses . . .. [M]anure was observed on the ground near the end doors of the poultry houses which had not been collected during any clean-up procedures . . .. The areas in between and around the poultry houses are open to the environment and precipitation, resulting in the generation of "process wastewater" which is defined in 40 CFR § 412.2(d) . . . The resulting process wastewater which is collected and discharged by the CAFO's man-made

drainage system is a regulated discharge, contrary to your assertion.

(Doc. 77-2).

It was abundantly clear from the Duchovnay Letter that EPA takes the position that any precipitation that contacts the fan-blown dust and small amounts of manure at the Alt farm produces a discharge for which a permit was required, and that there is no agricultural stormwater exemption for such a discharge. The Duchovnay Letter has not been withdrawn by EPA.

EPA conducted a follow-up inspection of the Eight is Enough farm on May 23, 2012, which was performed by Kyle Zieba. Before receiving the results of that report, Mrs. Alt filed this lawsuit on June 14, 2012. Mrs. Alt had three principal claims for relief:

1. Declare that any stormwater that might come into contact with dust, feathers, or dander from poultry house ventilation fans deposited on the ground outside of the production areas constitutes agricultural stormwater that is expressly exempt from NPDES permitting requirements.

2. Declare that any stormwater that might come into contact with small amounts of manure incidentally present on the ground outside of the production areas as a result of normal poultry farming operations constitutes agricultural stormwater that is expressly exempt from NPDES permitting requirements.

3. Declare that Defendant's Order, requiring Mrs. Alt to obtain an NPDES permit for the farm, is arbitrary, capricious, not in accordance with law, and in excess of EPA's jurisdiction and authority, and set aside such Order.

(Doc. 1).

On October 9, 2012, this Court allowed the Farm Bureaus to intervene in this lawsuit to protect the interests of farmers who were in a position similar to Mrs. Alt, and who sought a resolution of the same issues. (Doc. 27).

On December 14, 2012, Jon M. Capacasa, Director of EPA Region III's Water Protection Division, wrote to inform Mrs. Alt's counsel that EPA was withdrawing its Compliance Order ("the Withdrawal Letter"). The Withdrawal Letter stated, in part:

> In light of actions Mrs. Alt has taken since the issuance of the administrative compliance order to remedy and prevent environmental harm caused by her operation, EPA believes that continued pursuit of this action is no longer warranted and hereby withdraws the November 14, 2011 order. Barring a significant change in circumstances or operations at Mrs. Alt's facility, EPA will not issue a similar order to Mrs. Alt in the future.

(Doc. 77-3).

The Withdrawal Letter attached an inspection report by Mrs. Zieba (the "Zieba Inspection Report") (Doc. 77-4).

The plaintiff's claim that the Zieba Inspection Report did not address the fact that the conditions that led to issuance of the Compliance Order in 2011 were also found to be present by Mrs. Zieba in 2012. Mrs. Zieba noted that ditches between the poultry houses had standing water in them or the ground was saturated, and that there were dust and feathers on the ground below the ventilation fans on the poultry houses. (Doc. 77-4, at p. 5). Mrs. Zieba also "observed some stains and manure on the area of the concrete pad

in front of the compost shed. . . ." (Id. at p. 4).[3] The plaintiffs contend that these are essentially the same conditions that were referred to as the only concerns in the Compliance Order, and that were characterized as agricultural stormwater in the Alt Response.

According to the plaintiffs, rather than explain the basis for EPA's change of heart, the Withdrawal Letter merely recounted the same best management practices ("BMPs") that had been referred to in the Alt Response. Of those BMPs, the only new practice was that of using a conveyor and tarps for the loadout, which had no effect on the fan-blown dust or the presence of incidental manure anywhere other than in the small loadout area. No mention was made by Mr. Capacasa of the March 29, 2012 Duchovnay Letter, in which EPA had ignored those same best management practices and, focusing instead on the dust and manure that was admittedly present at the farm, concluded that Mrs. Alt was violating the CWA. There was no mention, or retraction, of EPA's legal analysis, which led EPA to order Mrs. Alt to apply for an NPDES permit. Mr. Capacasa did not explain what would constitute a "significant change in circumstances or operations at Mrs. Alt's facility."

On March 12, 2013, the defendant filed a Motion to Dismiss (Doc. 68), contending that the withdrawal of the Compliance Order rendered this proceeding moot. All parties, including the environmental parties seeking leave to intervene, have participated in the briefing of the Motion.

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[3] Mrs. Alt disagrees with the statement that there was manure present on the concrete pad in front of the compost shed, which is cleaned and swept after each loading, and disagrees that the photo in the Zieba Inspection Report that purportedly shows the manure does so. However, for purposes of this response, we are assuming that the allegation is true.

Discussion

I. Mootness

"Article III of the Constitution grants the Judicial Branch authority to adjudicate 'Cases' and 'Controversies.' In our system of government, courts have 'no business' deciding legal disputes or expounding on law in the absence of such a case or controversy. ***DaimlerChrysler Corp. v. Cuno***, 547 U.S. 332, 341 (2006). That limitation requires those who invoke the power of a federal court to demonstrate standing - a 'personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.' ***Allen v. Wright***, 468 U.S. 737, 751 (1984)." ***Already, LLC v. Nike, Inc.***, ___ U.S. ___, 133 S.Ct. 721, 726 (2013).

"We have repeatedly held that an 'actual controversy' must exist not only 'at the time the complaint is filed,' but through 'all stages' of the litigation. ***Alvarez v. Smith***, 558 U.S. 87, 92 (2009) (internal quotation marks omitted); ***Arizonans for Official English v. Arizona***, 520 U.S. 43, 67 (1997) ('To qualify as a case fit for federal-court adjudication, "an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed"' (quoting ***Preiser v. Newkirk***, 422 U.S. 395, 401 (1975)))." ***Id.***

"A case becomes moot - and therefore no longer a 'Case' or 'Controversy' for purposes of Article III - 'when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.' ***Murphy v. Hunt***, 455 U.S. 478, 481 (1982) (*per curiam*) (some internal quotation marks omitted). No matter how vehemently the parties continue to dispute the lawfulness of the conduct that precipitated the lawsuit, the case is moot if the dispute 'is no longer embedded in any actual controversy about the

plaintiffs' particular legal rights.' ***Alvarez****, supra,* at 93." ***Id.*** at 726-27.

"To qualify as a case fit for federal-court adjudication, an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." ***White Tail Park, Inc. v. Stroube***, 413 F.3d 451, 457 (4th Cir. 2005), quoting ***Arizonians for Official English v. Arizona***, 520 U.S. 43, 67 (1997).

The EPA contends that the withdrawal of the Compliance Order moots this action, mandating its dismissal. In response, the plaintiff's argue that under the voluntary cessation doctrine, this case is not moot and should continue.[4]

In ***Already***, the Supreme Court noted that "[w]e have recognized, however, that a defendant cannot automatically moot a case simply by ending its unlawful conduct once sued. ***City of Mesquite v. Aladdin's Castle, Inc.,*** 455 U.S. 283, 289 (1982). Otherwise, a defendant could engage in unlawful conduct, stop when sued to have the case declared moot, then pick up where he left off, repeating this cycle until he achieves all his unlawful ends. Given this concern, our cases have explained that 'a defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is

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[4] "Whether, when, and to what degree mootness can boast of being a constitutional command, a true jurisdictional limit on the federal courts, has taxed great minds. *Compare* ***Honig v. Doe****,* 484 U.S. 305, 329-32 (1988) (Rehnquist, J., concurring) (arguing mootness is exclusively prudential), *with* ***id.*** at 339-42 (Scalia, J., dissenting) (arguing mootness has a constitutional component); *see also* Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness,* 105 Harv. L.Rev. 603 (1992)." ***Winzler v. Toyota Motor Sales***, 681 F.3d 1208, 1209-10 (10th Cir. 2012).

Nevertheless, as stated by Judge Kent in ***Bradshaw v. Unity Marine Corp., Inc.***, 147 F.Supp.2d 668, 670 (S.D. Tex. 2001), "[w]ith Big Chief tablet readied, thick black pencil in hand, and a devil-may-care laugh in the face of death, life on the razor's edge sense of exhilaration, the Court begins" to address the issue of mootness.

absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur.' ***Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.***, 528 U.S. 167, 190 (2000). *See also* ***United States v. W.T. Grant Co.***, 345 U.S. 629 (1953) and ***Pashby v. Delia***, 709 F.3d 307 (4th Cir. 2013).

As the Supreme Court stated last year, "[s]uch ... maneuvers designed to insulate a decision from review ... must be viewed with a critical eye" and, as a result, "[t]he voluntary cessation of challenged conduct does not ordinarily render a case moot." ***Knox v. Serv. Emps. Int'l Union, Local 1000***, ___ U.S. ___, 132 S.Ct. 2277, 2287 (2012) (citation omitted).

This rule applies to administrative policies as well as statutes and ordinances. ***Doe v. Shalala***, 122 Fed.Appx. 600, *3 (4th Cir. December 7, 2004). "The burden of establishing mootness rests with the party invoking the doctrine." ***ACLU of Mass. v. U.S. Conf. of Catholic Bishops***, 705 F.3d 44, 52 (1st Cir. 2013).

The issue of whether an action is moot under the voluntary cessation doctrine is "highly sensitive to the facts of a given case." ***Id***. at 56, citing ***Already***.

In this case, the EPA has withdrawn the Compliance Order issued against Mrs. Alt, but has reserved the right to issue another such order in the event of a significant change in "circumstances or operations." (Doc. 77-3). Notably, the EPA has not changed its position on whether any stormwater that might come into contact with dust, feathers, or dander from poultry house ventilation fans deposited on the ground outside of the production areas constitutes agricultural stormwater that is expressly exempt from NPDES permitting requirements or whether any stormwater that might come into contact with small

amounts of manure incidentally present on the ground outside of the production areas as a result of normal poultry farming operations constitutes agricultural stormwater that is expressly exempt from NPDES permitting requirements. The EPA has not retracted or altered its position on these issues.

This Court must also take into consideration the complaint filed by the plaintiff-intervenors (Doc. 29). ***White Tail Park, Inc. v. Stroube***, 413 F.3d 451, 457 (4th Cir. 2005). The Farm Bureaus also seek declaratory judgment as to the issue of whether the EPA may issue an order, such as the one issued against Mrs. Alt, given the agricultural stormwater exception contained in the statute.

EPA's adherence to its underlying position, as evidenced by numerous other actions it has taken, demonstrates that the Agency's challenged assertion of authority not only can be "reasonably expected to recur," but in fact is ongoing even now. Mrs. Alt and the Farm Bureaus brought these actions to challenge EPA's assertion of authority and jurisdiction to regulate stormwater runoff from a farmyard, seeking a declaratory judgment that such runoff is statutorily exempt from regulation as an agricultural stormwater discharge.

The "allegedly wrongful behavior" in this case is not merely EPA's command that Mrs. Alt must apply for a permit; it is EPA's underlying assertion of the authority to issue that command, which is based upon the numerous documents EPA provided in the Administrative Record and articulated in EPA correspondence to Mrs. Alt that has not been withdrawn. EPA plainly has not withdrawn, rescinded, repudiated or otherwise altered its legal position that, despite the statutory exemption for agricultural stormwater, farmyard stormwater must be regulated through a federally mandated permit.

The withdrawal letter itself refers to EPA's legal position that a permit is required for

farmyard stormwater discharges. The letter then pointedly relies upon other factors (Mrs. Alt's supposed actions to "remedy and prevent environmental harm") for EPA's withdrawal of the Order even though those actions could not possibly eliminate contact between rainwater and dust feather and manure particles.

Moreover, EPA's actions toward Mrs. Alt are by no means the only instance in which the Agency has ordered a farmer to apply for a permit covering farmyard stormwater runoff. The Farm Bureaus attached to their memorandum two other orders issued to poultry farmers in West Virginia and Virginia during 2010 and 2011 (Doc. 76). Each order is identical in pertinent respects to the Order issued to Mrs. Alt. One of the orders was issued to Mr. Timothy Wilkins of West Virginia, who is a member of the West Virginia Farm Bureau, five minutes before EPA issued the Order to Mrs. Alt. The other is addressed to Mr. Ryan Brady of Virginia, who is a member of the Virginia Farm Bureau which, like West Virginia Farm Bureau, is a member of the American Farm Bureau Federation.

This Court's finding that the EPA's action can reasonably be expected to occur is buttressed by the issuance of the Compliance Order issued in this case. The Toy Inspection Report, contained the following Summary of Concerns:

1) Stormwater runoff can come into contact with spilled manure and ventilation dust. There were several man made ditches with culverts that help facilitate stormwater away from the poultry houses and towards Mudlick Run.

2) Stormwater runoff from the northern end of the concrete pad in-front of the compost shed can drain to the Unnamed Tributary of Mudlick Run.

The use of the word "can" demonstrates that there was a potential for stormwater runoff containing manure and ventilation dust to enter the waters of the United States. Yet the Compliance Order morphs this finding to a finding that Mrs. Alt "has discharged

pollutants from man-made ditches via sheet flow to Mudlick Run and orders Mrs. Alt to obtain an NPDES permit. (Doc. 1-1).

The above appears to be a way to circumvent the rule announced in ***Waterkeeper Alliance v. USEPA***, 399 F.3d 486 (2nd Cir. 2005), that without an actual discharge the EPA has no authority and there can be no duty to apply for a NPDES permit. *See* ***Nat'l Pork Producers Council v. USEPA***, 635 F.3d 738, 750 (5th Cir. 2011).

A finding that this action is not moot is consistent with other precedent. In ***United States v. W.T. Grant Co.***, 345 U.S. 629 (1953), the Supreme Court found an action seeking to enjoin an interlocking directorate was not moot where the defendant, although having remedied the interlocking directorate, refused to concede that the interlocks were illegal under the statute.

The Fourth Circuit, in ***Pashby v. Delia***, 709 F.3d 307, 316 (4th Cir. 2013), found a challenge to decisions of the North Carolina Department of Health and Human Services was not mooted when the DHHS voluntarily reinstated the claims because "[t]he DMA remains free to reassess the PCS Recipients' needs and cancel their PCS under IHCA Policy 3E at any time. Consequently, it is possible that the DMA will once again terminate their in-home PCS."

In ***Commonwealth of Va. v. Califano***, 631 F.2d 324 (4th Cir. 1980), the Fourth Circuit "applied ordinary mootness principles to a state's challenge to a decision by a federal agency concerning the state's welfare program. Although the federal agency agreed to give the state the relief it sought - a formal hearing on the state's amendment of its welfare program - the agency refused to concede that the state was entitled to that relief

as a matter of right and insisted that it would continue to act as it had in the past. ***Id***. at 326. Under these circumstances, we concluded that the agency had failed to carry its burden of demonstrating that there was 'no reasonable expectation that the wrong [would] be repeated,' and . . . held that the state's challenge was not moot. ***Id.*** at 326-27." ***Doe v. Shalala***, 600 Fed.Appx. 600, *3 (4th Cir. December 7, 2004).

In ***North Carolina Right to Life PAC v. Leake***, 872 F.Supp.2d 466 (E.D. N.C. 2012) (Flanagan, CJ), the District Court stated:

> The court finds the controversy is not moot. Even though the BOE [Board of Elections] has adopted a policy not to enforce the matching funds statutes, the North Carolina General Assembly has not repealed the law and aside from its stated intention not to abide by the matching funds provisions, nothing appears to stop the BOE from changing its policy. Dismissal on mootness grounds is inappropriate if the defendant voluntarily ceases the allegedly improper behavior but is free to return to it at any time. Only if there is no reasonable chance the defendant could resume the offending behavior is a case deemed moot on the basis of the voluntary cessation. ***Friends of the Earth v. Laidlaw,*** 528 U.S. 167, 189-90 (2000). Defendants claiming that voluntary compliance moots a case have a "formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." ***Id.*** at 190. Defendants have not made such a showing, and do not meet the burden. Accordingly, the controversy is a live one, and the court has subject matter jurisdiction to consider it.

872 F.Supp.2d at 471.

In ***American Whitewater v. Tidwell***, 2010 WL 5019879 (D.S.C. December 10, 2010)(Childs, J.), the District Court considered a decision of the U.S. Forest Service ("USFS") closing the portion of the Chattooga River upstream of South Carolina Highway 28 to floating during certain periods. An action was filed challenging the decision. Thereafter, the USFS withdrew its decision notices and moved to dismiss the action. The District Court stated:

> "Courts are understandably reluctant to permit agencies to avoid judicial review, whenever they choose, simply by withdrawing the challenged rule." ***Dow Chemical Co. v. Envtl. Prot. Agency***, 605 F.2d 673, 678 (3rd Cir. 1979). "Where a court is asked to adjudicate the legality of an agency order, it is not compelled to dismiss the case as moot whenever the order expires or is withdrawn." ***Nader v. Volpe***, 475 F.2d 916, 917 (D.C. Cir. 1973) (quoting ***Southern Pacific Terminal Co. v. Interstate Commerce Comm'n***, 219 U.S. 498 (1911)). Furthermore, when an agency withdraws an order while maintaining that the legal position of the order remains justified or is likely to be reinstated, repetition is likely, and the claim should not be considered moot. *See* ***Doe v. Harris***, 696 F.2d 109, 113 (D.C. Cir.1982).
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> Based on the agency history combined with the indication that the agency's decision would probably not deviate dramatically from its previous stance on the issue, there is a "reasonable expectation" that the same controversy or allegedly wrongful behavior will recur and potentially escape

review by this court due to continuous revisions. Therefore, Plaintiffs' claims are not moot simply because the decision notices have been withdrawn.

2010 WL 5019879 at *5-6.

In ***Feldman v. Pro Football, Inc.***, 579 F.Supp.2d 697 (D. Md. 2008), hearing impaired football fans sued the Washington Redskins for lack of access to information and announcements. After the defendants provided certain captioning services, the defendants asserted that the case was moot. The District Court disagreed and stated "[t]he Court agrees with Plaintiffs, however, that there is nothing to prevent Defendants from returning to their prior practices. While there were correspondences, which included the threat to file suit, it is clear that Defendants provided captioning after being sued." 579 F.Supp.2d at 706.

While this Court recognizes that the "withdrawal or alteration of administrative policies can moot an attack on those policies," ***Bahnmiller v. Derwinski***, 923 F.2d 1085, 1089 (4th Cir. 1991), in this case, there is no indication that the EPA has changed its policies. In fact, the opposite is true.

Based upon the foregoing authorities, this Court finds that this action is not moot.

The EPA also alleges that this Court should apply the doctrine of prudential mootness, which is an alternative to constitutional mootness. ***Id***. "The doctrine of prudential mootness allows a court to determine that, regardless of constitutional mootness, a case is moot because the court cannot provide an effective remedy and because it would be imprudent for the court to hear the case." ***Id.***, citing ***United States v. (Under Seal)***, 757 F.2d 600, 603 (4th Cir. 1985).

"This court can, in its supervisory role, decline to enforce a Board order if the action sought in the order is unnecessary or futile." ***NLRB v. Greensboro News & Record, Inc.***, 843 F.2d 795, 798 (4th Cir. 1988), citing ***NLRB v. Maywood Plant of Grede Plastics***, 628 F.2d 1, 7 (D.C. Cir. 1980). *See also* ***Cagle's Inc. v. NLRB***, 588 F.2d 943, 951 (5th Cir. 1979) and ***Brockway Motor Trucks v. NLRB***, 582 F.2d 720, 740 (3rd Cir.1978).

In determining whether to apply the doctrine of prudential mootness, the Fourth Circuit in the above case applied the standard set forth in ***W.T. Grant***:

> In ***United States v. W.T. Grant Co.***, 345 U.S. 629 (1953), the United States Supreme Court explained that although discontinuance of conduct sought to be enjoined will not usually suffice to prevent injunctive relief, such relief is inappropriate if the defendant can demonstrate that there is no reasonable expectation that the wrong will be repeated in the future. What is more, the party seeking the injunction "must satisfy the court that relief is needed. The necessary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive." 345 U.S. at 633. This threshold showing was never made in this case.

843 F.2d at 798.

Of course, in the present case, this Court has found that the threshold showing has been made.

"The discretionary power to withhold injunctive and declaratory relief for prudential reasons, even in a case not constitutionally moot, is well established. *See* ***United States***

v. W.T. Grant*,* 345 U.S. 629 (1953); ***A.L. Mechling Barge Lines, Inc. v. United States****,* 368 U.S. 324 (1961). *See generally* 13A C. Wright, A. Miller & E. Cooper**, *Federal Practice and Procedure: Jurisdiction*** (2d ed. 1984 & Supp.1987) § 3533.1." ***S-1 v. Spangler***, 832 F.2d 294, 297 (4th Cir. 1987).

In ***Winzler v. Toyota Motor Sales U.S.A., Inc.***, 681 F.3d 1208 (2012), the Tenth Circuit stated:

> [I]f events so overtake a lawsuit that the anticipated benefits of a remedial decree no longer justify the trouble of deciding the case on the merits, equity may demand not decision but dismissal. When it does, we will hold the case "prudentially moot." Even though a flicker of life may be left in it, even though it may still qualify as an Article III "case or controversy," a case can reach the point where prolonging the litigation any longer would itself be inequitable. *See* 13B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3533.1 at 725 (3d ed. 2008); ***S-1 v. Spangler****,* 832 F.2d 294, 297 (4th Cir. 1987) (case prudentially moot because the relief sought "no longer has sufficient utility to justify decision ... on the merits").
>
> Prudential mootness doctrine often makes its appearance in cases where a plaintiff starts off with a vital complaint but then a coordinate branch of government steps in to promise the relief she seeks. Sometimes the plaintiff will seek an injunction against the enforcement of a regulation the relevant agency later offers to withdraw on its own. Sometimes the plaintiff will seek an order forcing a department to take an action that it eventually

> agrees to take voluntarily. However it comes about though, once the plaintiff has a remedial promise from a coordinate branch in hand, we will generally decline to add the promise of a judicial remedy to the heap. While deciding the lawsuit might once have had practical importance, given the assurances of relief from some other department of government it doesn't any longer. *See, e.g.,* ***S. Utah*** [***Wilderness Alliance v. Smith***], 110 F.3d at 727 (prudential doctrine has "particular applicability ... where the relief sought is an injunction against the government"); ***Bldg. & Constr. Dep't v. Rockwell Int'l Corp.***, 7 F.3d 1487, 1492 (10th Cir. 1993); ***New Mexico ex rel. N.M. State Highway Dep't v. Goldschmidt***, 629 F.2d 665, 669 (10th Cir. 1980); ***Chamber of Commerce v. U.S. Dep't of Energy***, 627 F.2d 289, 291 (D.C. Cir. 1980) ("In some circumstances, a controversy, not actually moot, is so attenuated that considerations of prudence and comity for coordinate branches of government counsel the court to stay its hand").

681 F.3d at 1210.

This Court, in the exercise of its discretion, finds that sufficiently important issues remain in this case such that this Court will not find the same to be prudentially moot.

In its reply brief, the EPA raised issues not discussed before. Accordingly, this Court permitted the plaintiffs to file a sur-reply brief.

EPA now asserts that her claim is moot because "none of her arguments vest the Court with jurisdiction over the withdrawn Order." Once a court has acquired jurisdiction, as EPA concedes is the case here, "a defendant's voluntary cessation of a challenged

practice does not *deprive* a federal court of its power to determine the legality of the practice." ***Friends of the Earth v. Laidlaw Envt'l Servs.***, 528 U.S. 167, 189 (2002) (quoting ***City of Mesquite v. Aladdin's Castle, Inc.***, 455 U.S. 283, 289 (1982)) (emphasis added).

In other words, the *same* controversy persists *despite* the defendant's voluntary cessation.

EPA also contends that, because the agency has complete discretion to withdraw its Order, this Court cannot "review" the exercise of that discretion, and cannot deprive EPA of its prerogative to decide which enforcement efforts should go forward. This Court's denial of EPA's Motion does not interfere with EPA's enforcement prerogative. Ms. Alt's action remains alive, but it has no impact on EPA's exercise of its enforcement power. This Court is not reinstating EPA's Order, thereby forcing EPA to pursue its enforcement action. This Court's ultimate decision on the merits will benefit all parties, including EPA and many thousands of farmers, by clarifying the extent of federal CWA "discharge" liability and permit requirements for ordinary precipitation runoff from a typical farmyard.

In ***Brown v. Herbert***, 2012 WL 3580669 (D. Utah August 17, 2012), the District Court rejected a claim that an action to enjoin enforcement of Utah's anti-bigamy statute was both constitutionally and prudentially mooted. In ***Brown***, there was a "formal declaration, made under the penalty of perjury, that the Utah County Attorney's office had adopted a formal policy of non-prosecution," coupled with a promise to the plaintiffs that "no charges would be filed against them," in the case at hand, and the court held that *even that* could not moot the plaintiffs' challenge to the underlying statute. ***Id***. at *3-4. The District

Court held that the County's non-prosecution policy left open the possibility of prosecution, and it did not reject the County's ability to prosecute. ***Id***. at *3.

Summing up, the court said:

> While it may be the case that [the County] believes that prosecution of Plaintiffs would be inappropriate in this circumstance, there is no reason to believe that such a determination is anything beyond the exercise of prosecutorial discretion that could be easily reversed in the future by a successor Utah County Attorney, or by [the County Attorney] himself, if he should change his mind. As a result, [his] adoption of the non-prosecution policy at issue in this matter is not sufficient to establish that future prosecution of Plaintiffs is unlikely to recur. Because [he] has failed to meet his burden in this respect, the current case continues to be live for purposes of Article III jurisdiction.

Id. at *4.

For the first time in its reply, EPA asserts that this Court lacks jurisdiction to decide a "facial" challenge to EPA's interpretation of the statute because, under Section 509(b) of the Clean Water Act, 33 U.S.C. § 1369(b), that issue could have been addressed only by the Second Circuit Court of Appeals in its review of EPA's 2003 CAFO Rule, and because the Section 509(b) time bar would now prevent any court of appeals from considering the issue. First, the Farm Bureaus do not bring a "facial" challenge to anything; rather they assert that the *statute* deprives EPA of jurisdiction to order Lois Alt to obtain a permit. Second, they do not contest EPA's regulations interpreting the statute; EPA has made no

regulatory interpretation bearing on the precise issue in this case. Third, EPA did not address this situation in its CAFO Rule; indeed, EPA said its Rule does not address this situation.

II. Intervention

The Potomac Riverkeeper, West Virginia Rivers Coalition, Waterkeeper Alliance, Center for Food Safety, and Food & Water Watch ("Environmental Defendants") have moved for leave to intervene in this action (Doc. 31). Ruling on their Motion was delayed pending a determination of whether this action was moot, thereby depriving this Court of jurisdiction.

Pursuant to Rule 24(b), "the court may permit anyone to intervene who: (A) is given a conditional right to intervene by a federal statute; or (B) has a claim or defense that share with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1) (emphasis added). Additionally, in determining whether permissive intervention is proper, "the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). Importantly, this Court possesses substantial discretion whether to grant permissive intervention. *See* ***Shaw v. Hunt***, 154 F.3d 161, 168 (4th Cir. 1998).

"The rule does not specify any particular interest that will suffice for permissive intervention and, as the Supreme Court has said, it 'plainly dispenses with any requirement that the intervenor shall have a direct personal or pecuniary interest in the subject of the litigation.' Indeed, it appears that a permissive intervenor does not even have to be a person who would have been a proper party at the beginning of the suit, since of the two

tests for permissive joinder of parties, a common question of law or fact and some right to relief arising from the same transaction, only the first is stated as a limitation on intervention." Wright & Miller, Federal Practice and Procedure: Civil 3d § 1911.

Further, "[c]lose scrutiny of the kind of interest the intervenor is thought to have seems especially inappropriate under Rule 24 since it makes no mention of interest." Id. "If the would-be intervenor's claim or defense contains no question of law or fact that is raised also by the main action, intervention under this branch of the rule must be denied. If there is a common question of law or fact, the requirement of the rule has been satisfied and it is then discretionary with the court whether to allow intervention." Id.

In this case, the potential intervenors seek to protect certain negative implications which could potentially affect the water quality of the Potomac River and its tributaries. This Court also finds a common question of fact exists sufficient to satisfy permissive intervention. The issue contemplates whether the NPDES permit is required for the Alt's discharges of manure, litter, or other pollutants that originate from their poultry house ventilation fans and which reach a water source. Inasmuch as the Environmental Defendants seek to protect the environmental quality of the Potomac River and its tributaries which could be impacted by this Court's ruling in this case, this Court finds the movants have shown sufficient claims concerning the facts raised by the plaintiff.

Finally, this Court finds permissive intervention in this matter will not "unduly delay or prejudice the adjudication or the original parties rights." Fed. R. Civ. P. 24(b)(3). Accordingly, this Court, in its substantial discretion, will **GRANT** the motion for permissive intervention. *See* ***Shaw***, 154 F.3d at 168.

III. Briefing Schedule

The parties in this case filed a Joint Motion to Stay Summary Judgment Briefing (Doc. 60). This Motion is **GRANTED**. Accordingly, this Court finds it necessary to establish a new briefing schedule:

1. Plaintiff's and Plaintiff-Intervenors' Motions for summary judgment shall be filed on or before June 1, 2013;

2. Defendant's and Environmental Defendants-Intervenors' responses and cross motions for summary judgment shall be filed on or before July 1, 2013;

3. Plaintiff's and Plaintiff-Intervenors' replies and responses to defendant's and Environmental Defendant-Intervenors' motions for summary judgment shall be filed on or before August 1, 2013; and

4. Defendant's and Environmental Defendant-Intervenors' replies shall be filed on or before September 1, 2013.

For the reasons stated above, the Motion to Intervene filed by The Potomac Riverkeeper, West Virginia Rivers Coalition, Waterkeeper Alliance, Center for Food Safety and Food & Water Watch (**Doc. 31**) is **GRANTED**, the Joint Motion to Stay Summary Judgment Briefing (**Doc. 60**) is **GRANTED**, and the Motion to Dismiss filed by the defendant **(Doc. 68**) is **DENIED**.

It is so **ORDERED**.

The Clerk is directed to transmit copies of this Order to all counsel of record herein and to the plaintiff-intervenors and defendant-intervenors.

DATED: April 22, 2013.

JOHN PRESTON BAILEY
UNITED STATES DISTRICT JUDGE