WHEN THE "PLAIN TEXT" ISN'T SO PLAIN: HOW *NATIONAL PORK PRODUCERS COUNCIL* RESTRICTS THE CLEAN WATER ACT'S PURPOSE AND IMPAIRS ITS ENFORCEMENT AGAINST FACTORY FARMS[*]

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I. WHEN IN DOUBT, LOOK TO THE OVERRIDING STATUTORY PURPOSE

Any court charged with defining the scope of the Environmental Protection Agency's (EPA's) authority to enforce the Clean Water Act (CWA) should do so in light of the Act's ultimate purpose: to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[1] In fact, the United States Supreme Court held that clear congressional intent can trump otherwise accepted rules of statutory interpretation that would lead to an absurd result: the frustration of congressional intent.[2] So much is certain in statutory construction: if a possible statutory construction would frustrate the purpose of the statute ac-

1. 33 U.S.C. § 1251(a) (2006).

2. "[W]e are departing from the rule of construction that prefers ordinary meaning . . . . But this is exactly what ought to happen when the ordinary meaning fails to fit the text and when the realization of clear congressional policy (here, favoring the ability to impose supervised release) is in tension with the result that customary interpretive rules would deliver." Johnson v. United States, 529 U.S. 694, 707 n.9 (2000) (citing Commissioner v. Brown, 380 U.S. 563, 571 (1965) ("recognizing some 'scope for adopting a restricted rather than a literal or usual meaning of its words where acceptance of that meaning . . . would thwart the obvious purpose of the statute' ") (quoting Helvering v. Hammel, 311 U.S. 504, 510–511 (1941); *In re* Chapman, 166 U.S. 661, 667 (1897) ("[N]othing is better settled, than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion")).

cording to its own terms, one should go back to the drawing board. This article evaluates the legal reasoning of a recent decision by the United States Court of Appeals for the Fifth Circuit in light of its impact on achieving the overriding objectives of the CWA: *National Pork Producers Council v. EPA*, decided in March 2011.[3]

Pork Producers—and *Waterkeeper Alliance, Inc. v. EPA* before it—invalidated critical portions of the nation's regulations to prevent water pollution discharged from confined animal feeding operations (CAFOs) from entering the nation's waters.[4] Specifically, *Pork Producers* held that the EPA exceeded its authority under the CWA when it enacted the 2008 rules—which required a CAFO to apply for a water quality permit or an exemption therefrom *before* it had actually discharged water pollutants into protected water bodies.[5] *Pork Producers* based this conclusion on what the Second Circuit had employed earlier in *Waterkeeper Alliance*—which purportedly rested on the plain meaning of the term "discharge" in the CWA, as applied to facilities like CAFOs.[6] Both courts concluded that the CWA's plain text precluded any prospective, pre-discharge regulation.[7] *Pork Producers* adopted the reasoning expressed earlier in *Waterkeeper Alliance*: "The Second Circuit explained that the plain language of the CWA 'gives the EPA the jurisdiction to regulate and control only actual discharges–not potential discharges . . . .'"[8] Speaking through the language of *Waterkeeper Alliance*, *Pork Producers* reasoned further:

> [I]n the absence of the 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 [sic] NPDES permit in the first instance.[9]

Strikingly, two federal courts of appeals—in decisions that consolidated appeals on the same issue from federal circuits throughout the United States[10]—have now concluded that the self-evident meaning of the CWA precludes the regulation of CAFOs through pre-discharge permitting requirements and have

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3. *See generally* Nat'l Pork Producers Council v. U.S. Envtl. Prot. Agency, 635 F.3d 738 (5th Cir. 2011) (invalidating EPA action, as *ultra vires*, taken to prevent water contamination before such contamination occurred).

4. *Id.* at 756; Waterkeeper Alliance, Inc. v. U.S. Envtl. Prot. Agency, 399 F.3d 486, 524 (2d Cir. 2005).

5. *Pork Producers*, 635 F.3d at 753.

6. *Id.* at 749–50 (citing *Waterkeeper Alliance*, 399 F.3d at 504–05)

7. *Id.*, 635 F.3d at 751; *Waterkeeper Alliance* 399 F.3d at 505.

8. *Pork Producers*, 635 F.3d at 744 (quoting *Waterkeeper Alliance* 399 F.3d at 505).

9. *Id.*, 635 F.3d at 750 (quoting *Waterkeeper Alliance*, 399 F.3d at 504–05).

10. *Id.*, 635 F.3d at 747 nn. 22–26.

rejected both the 2003 and 2008 formulations of EPA rules, which imposed a duty on CAFOs to seek such permits prior to any actual discharge of water pollution.[11]

Given the magnitude of pollution emanating from the country's CAFOs, pre-discharge permitting and monitoring would appear to further, rather than violate the purposes of the CWA. One conservative estimate produced a stunning figure: taken together, CAFOs produce more than three times the solid waste than the entire human population of the United States—excluding sewage treatment plants—and have discharged vast amounts of untreated wastewater into the nation's surface waters.[12] Taken together, CAFOs constitute a chief source of pollutants that impair American rivers and lakes.[13] Affirming that fact, the EPA's *2000 National Water Quality Inventory* identified agriculture—a category that includes CAFOs—as the chief source of pollutants that impaired water quality in rivers and lakes.[14] Twenty-nine states have reported that CAFOs contributed to water quality impairment.[15] These statistics alone indicate that few recent decisions merit greater scrutiny than *Pork Producers* if one is concerned with the EPA's continued ability to improve water quality in this country.

Another disturbing statistic helps one to comprehend why pre-discharge permitting requirements are critical. As of 2001, EPA estimated that only twenty percent of CAFOs—in the United States and with more than 1000 animal units—had secured National Pollution Discharge Elimination System (NPDES) permits.[16] Because many CAFOs remain unpermitted, neither the EPA nor states with delegated programs, know the full extent of their damage to American wa-

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11. *Id.* at 751; *Waterkeeper Alliance* 399 F.3d at 505.

12. *Compliance and Enforcement National Priority: Concentrated Animal Feeding Operations (CAFOs)*, U.S. ENVTL. PROT. AGENCY 1 (2009), http://www.epa.gov/compliance/resources/publications/data/planning/priorities/fy2008prioritycwacafo.pdf [hereinafter EPA NATIONAL PRIORITY]; *see also* DOUG GURIAN-SHERMAN, UNION OF CONCERNED SCIENTISTS, CAFOS UNCOVERED: THE UNTOLD COSTS OF CONFINED ANIMAL FEEDING OPERATIONS 3–4 (2008), *available at* http://www.ucsusa.org/assets/documents/food_and_agriculture/cafos-uncovered.pdf (estimating CAFOs produce more than two times the amount of sanitary waste of the United States' population).

13. *See* U.S. ENVTL. PROT. AGENCY, NATIONAL WATER QUALITY INVENTORY, 2000 REPORT 13–14 (2002) [hereinafter EPA WATER QUALITY INVENTORY], *available at* http://water.epa.gov/lawsregs/guidance/cwa/305b/upload/2002_09_10_305b_2000report_chp2.pdf (animal feeding operations degrade 24,616 stream miles).

14. *Id.*

15. CLAUDIA COPELAND, CONG. RESEARCH SERV., RL 31851, ANIMAL WASTE AND WATER QUALITY: EPA REGULATION OF CONCENTRATED ANIMAL FEEDING OPERATIONS (CAFOS) 4 (2010), *available at* http://www.nationalaglawcenter.org/assets/crs/RL31851.pdf.

16. *See* National Pollution Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines and Standards for Concentrated Animal Feeding Operations, 66 Fed. Reg. 2960, 2969–68 (proposed Jan.12, 2001) [hereinafter 2001 Proposed CAFO Rules].

ters. Further, these agencies have no permits in place for many of these facilities to regulate the causes of their discharges.[17] This is the reality the EPA confronted when it enacted its ill-fated 2003 and 2008 CAFO rules.[18] Although the two sets of rules created different permitting regimes, they both relied on the fundamental principle that the EPA and delegated state programs needed to increase CAFO permit coverage if pollutant discharges from CAFOs were to be reduced.[19] Subsequent sections of this article describe how each set of rules attempted to fulfill this fundamental principal.

On first consideration, one might conclude that the impact of *Pork Producers* is limited by the delegation of the NPDES permitting program in many states because the federal environmental law forms the floor rather than the ceiling for state environmental regulation and states, in theory, will surely maintain higher standards. The reality at the state level, however, is less than encouraging. In 2004, Andrew Hecht documented twenty-seven states that had enacted what he termed "no more stringent" statutes that made federal law the ceiling for state regulation, as well as twenty states that had enacted "private property rights" statutes that rendered the passage of laws or enactment of regulations protecting water quality extremely difficult.[20] These state provisions include prohibitions against enforcement of permits, statutes, or rules in a manner more stringent than federal law authorizes. [21] Further, as six states have no delegated program of their own, federal standards apply directly to their CAFO facilities.[22] Indeed, only states that currently impose universal permitting requirements on CAFO facilities—regardless of whether they have actually discharged pollutants and

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17. *See* Revised National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines for Concentrated Animal Feeding Operations in Response to the Waterkeeper Decision, 73 Fed. Reg. 70,418, 70,469 (Nov. 20, 2008) [hereinafter 2008 CAFO Rules] (codified at 40 C.F.R. pts. 9, 122, 412) (estimating that twenty-five percent of large CAFO owners and operators were not subject to NPDES permitting requirements).

18. *See* National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations (CAFOs), 68 Fed. Reg. 7176 (Feb. 12, 2003) [hereinafter 2003 CAFO Rules] (to be codified at 40 C.F.R. pts. 9, 122, 123, 412); 2008 CAFO Rules, 73 Fed. Reg. 70,418.

19. EPA NATIONAL PRIORITY, *supra* note 12, at 1.

20. *See* Andrew Hecht, *Obstacles to the Devolution of Environmental Protection: States' Self Imposed Limitations on Rulemaking*, 15 DUKE ENVTL. L. & POL'Y F. 105, 116, 138 (2004).

21. *See id.* at 112–15.

22. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-944, CONCENTRATED ANIMAL FEEDING OPERATIONS: EPA NEEDS MORE INFORMATION AND A CLEARLY DEFINED STRATEGY TO PROTECT AIR AND WATER QUALITY FROM POLLUTANTS OF CONCERN 10 n.7 (2008), *available at* http://www.g ao.gov/new.items/d08944.pdf ("EPA has retained program authority for Alaska, Idaho, Massachusetts, New Hampshire, and New Mexico. Oklahoma has been authorized to issue permits for most sources but not for CAFOs.").

will retain those rules in the aftermath of *Pork Producers*, will feel no direct impact from the decision.[23]

The 2003 and 2008 CAFO rules took different approaches to permitting requirements for facilities that had not yet discharged, but both predicated pre-discharge requirements on characteristics of a facility that suggested a high probability for discharges in the future. Under the 2003 rules, an inspector from EPA or the relevant state agency inspected the facility to determine whether its characteristics suggested a potential to discharge.[24] Under the 2008 rules, an owner or operator first evaluated the characteristics of its facility to determine whether its design, construction, operation, or maintenance suggested a discharge would occur, which case the facility "proposed to discharge" and was required to seek a permit.[25] The EPA drafted its 2008 rules to include pre-discharge requirements based, in part, on the expectation that the increased permitting requirements would enable EPA to increase the percentage of such facilities it regulated: approximately seventy-five percent of CAFOs that the EPA even knows to exist discharge intermittently into the waters of the United States.[26] In order to reduce or prevent water pollution where many facilities discharge on an intermittent basis, the EPA saw pre-operation inspection and permitting—or exempting—as necessary.

A subsequent section of this article discusses a rule now pending before the EPA that would enable the agency to gather crucial information from CAFOs regardless of their permitting status.[27] The courts in both *Waterkeeper Alliance* and *Pork Producers* concluded that any agency rule that enabled the EPA to use a pre-discharge permitting requirement as a means of gathering crucial information about facilities was *ultra vires.*[28] Neither court ruled out the possibility that the EPA might enact a rule that would enable the agency to gather infor-

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23. Texas, for example, imposes the duty to obtain authorization under a general or individual permit on all CAFO facilities regardless of discharges. 30 TEX. ADMIN. CODE § 321.33 (2011).

24. *See* 40 C.F.R. § 122.23(d)(2) (2003) (a large CAFO need not seek coverage under a NPDES permit if the owner or operator secures a determination from the director of the relevant permitting authority that the large CAFO has "no potential to discharge" manure, litter or process wastewater); *see also id.* § 122.23(f) (describing the process by which a large CAFO may secure a determination that it has "no potential to discharge").

25. 40 C.F.R. §122.23(d)(1) (2009).

26. *See* 2008 CAFO Rules, 73 Fed. Reg. 70,418, 70,469 (Nov. 20, 2008) (estimating that twenty-five percent of the owners and operators of large CAFOs do not "discharge" and are not subject to the NPDES permit program—the rest being intermittent dischargers).

27. *See infra* Part V.

28. Nat'l Pork Producers Council v. U.S. Envtl. Prot. Agency, 635 F.3d 738 (5th Cir. 2011); Waterkeeper Alliance, Inc. v. U.S. Envtl. Prot. Agency, 399 F.3d 486, 524 (2d Cir. 2005).

mation from CAFOs *without* a pre-discharge permit requirement.[29] However, this article will urge that, while useful, such information gathering in the absence of a pre-discharge permitting requirement cannot cure the fundamental flaws of the *Pork Producers* decision: it frustrates efforts to achieve the overriding purpose of the Clean Water Act and misconstrues the statute's permitting provisions.

The opposite perspective is that *Pork Producers* was a victory for faithful adherence to congressional intent. By its own terms, the decision adhered to a strict textual interpretation of the CWA and rejected result-driven reasoning based on water quality concerns or unwarranted *Chevron* deference to agency interpretation.[30]

Even if one interprets *Pork Producers* in this light, the victory was clearly a Pyrrhic one. As this article explains, in order for our efforts to prevent surface water pollution to have any hope of success, the EPA must be able to require CAFOs to apply for permits or exemptions from permitting before they actually discharge. Even knowing that a given CAFO exists—much less whether its specific traits would make it likely to discharge polluted water—depends on the power to gather basic information when the facility is constructed and becomes operational. Further, once the agency gathers such information, it needs to assess the risk for discharges from a given facility and take action to prevent those discharges. Not only is information gathering necessary, but also permitting requirements prior to discharge are necessary to achieve the primary objectives of the CWA.[31]

As this article discusses the ability to premise permitting requirements on the degree of risk that a discharge will occur pervades the NPDES permitting program. If one accepts the reasoning of *Pork Producers* and *Waterkeeper Alliance*, however, one must accept that the plain text of the CWA precludes us from doing precisely what Congress intended when it enacted the statute: to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[32] With regard to its conclusion in *Pork Producers*, the Fifth Circuit might well respond that its decision was the product of the same dilemma the United

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29. The agency would enact such a rule pursuant to its authority under the CWA. 33 U.S.C. § 1318 (2006). EPA has proposed two options to gathering basic information from CAFOs prior to discharge. *See* National Pollution Discharge Elimination System (NPDES) Concentrated Animal Feeding Operation (CAFO) Reporting Rule, 76 Fed. Reg. 65,431 (Oct. 21, 2011) [hereinafter 2011 Proposed Rule] (to be codified at 40 C.F.R. pts. 9, 122).

30. *See* Pork Producers, 635 F.3d at 753 (narrowly construing the text of the CWA).

31. 33 U.S.C. § 1251(a) (2006) (stating that the overall objective of the CWA "is to restore and maintain the chemical, physical, and biological integrity of the nation's water" by eliminating the "discharge of pollutants into the navigable waters.").

32. *Compare* 33 U.S.C. § 1251 (2006), *and Waterkeeper Alliance* 399 F.3d at 524, *with Pork Producers*, 635 F.3d at 763.

States Supreme Court described in *Johnson v. United States*, when the clear meaning of the text is squarely at odds with the statute's overriding purpose: "[o]ur obligation is to give effect to congressional purpose so long as the congressional language does not itself bar that result."[33]

This article questions whether the congressional intent and the explicit statutory language posed such a dilemma for the *Pork Producers* court. Alternative interpretations of the CWA form the basis for broader EPA authority over CAFOs and could have avoided both the frustration of the statute's overriding purpose and a regulatory retreat that will arguably harm water quality—both of which *Pork Producers* likely portends.

First, courts have construed the "discharge" language, upon which the *Pork Producers* decision relies, to include the conduct of facility operators that results in the discharge of the pollutant from the point source; in this case the CAFO itself.[34] Further, the violation can occur before the pollutant ever actually reaches the waters of the United States. Rather than focusing on the final result in the sequence of events—the actual, physical discharge into navigable waters—the *Pork Producers* court needed to understand a "discharge" in a broader sense: to include the discharge at the source and the mistakes the facility made that resulted in the discharge. Because of this, it seems that this broader understanding of discharges lends support to the EPA's interpretation of its own authority, as discussed below.

Second, accepted interpretive principles make the overriding purpose of the statute the primary guide in construing the statute's meaning.[35] *Pork Producers* adopted an interpretation that will decrease the number of facilities that apply for a permit, decrease the EPA's ability to regulate these facilities, and likely increase the number of discharges from CAFOs that go undetected. Where an interpretation clearly frustrates the purpose of the statute, however, the Supreme Court has concluded that reasonable but less common interpretations of words in a statute are acceptable.[36]

Third, *Pork Producers* deferred to the EPA's interpretation of its own authority to regulate intermittently or sporadically discharging facilities based on a *Chevron* analysis.[37] Even though the CWA did not state that a facility had the duty to apply for a permit after it discharged, the EPA's rule imposing such a duty is a permissible interpretation because the primary purpose of NPDES per-

33. Johnson v. United States, 529 U.S. 694, 710 n.10 (2000)
34. *See Pork Producers*, 635 F.3d at 751.
35. *Johnson*, 529 U.S. at 707–08, n.9.
36. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 864 (1984).
37. *Pork Producers*, 635 F.3d at 751 (citing *Chevron*, 467 U.S. at 143).

mitting is to control pollution through the regulation of discharges.[38] "It would be counter to [C]ongressional intent for the [C]ourt to hold that requiring a discharging CAFO to obtain a permit is an unreasonable construction of the Act."[39] This interpretation made sense. The specific canon of construction at work here is that the court cannot presume Congress to have done useless or foolish things.[40] To establish a permitting scheme in order to reduce or prevent water pollution without conferring authority on the agency to carry out such a program is absurd. However, the court's *Chevron* deference to rules governing intermittently discharging facilities contradicted its rejection of rules designed to prevent initial discharges into the nation's waters from new facilities, as this article discusses.[41]

Fourth, in order to carry out its statutory mandate to restore the integrity of the nation's water while simultaneously defending itself against federal courts that have largely adopted the CAFO industry's interpretation of the statute, the EPA should consider an administrative presumption that CAFOs discharge pollutants. Such a presumption would not misconstrue CAFOs as facilities "designed to discharge," as with a wastewater treatment plant, for example. Because CAFOs are incidental dischargers, an administrative presumption can take notice of characteristics that CAFOs share with other facilities that make discharges inevitable—even when their design is supposed to prevent discharges altogether. Such a presumption would help focus future CAFO litigation beyond the question of initial, actual discharges as the basis for EPA regulatory authority—the issue that posed an obstacle in both *Waterkeeper Alliance* and *Pork Producers*.[42]

II. CAFOs: AN OVERVIEW

This section explains the EPA's definition of CAFOs. Further, it provides an indication of the impact on water quality that such facilities have. Finally, this part of the article looks at the ongoing changes experts are witnessing in the American factory farm industry: increasing CAFO size and greater numbers of animals on steadily decreasing plots of land. Taken as a whole, this section strongly indicates that water pollution from industrial farming is a tremendous problem now and will increase in the future. The next part of the article will consider how the EPA's response to this industry has evolved over time.

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38. *Pork Producers*, 635 F.3d at 751.

39. *Id.*

40. *Id.*

41. *Compare id.* at 751 (upholding rule regarding discharging facilities), *with id.* at 750 (striking down rule regarding facilities that propose to discharge).

42. *See Pork Producers*, 635 F.3d at 751; Waterkeeper Alliance, Inc. v. U.S. Envtl. Prot. Agency, 399 F.3d 486, 524 (2d Cir. 2005).

A. *CAFOs Defined*

The EPA defines Animal Feeding Operations (AFOs)—of which CAFOs are the largest ("CAFO" in this article)—as "a lot or facility . . . where . . . [a]nimals . . . have been, are, or will be stabled or confined and fed or maintained . . . and [c]rops, vegetation, forage growth or post-harvest residues are not sustained . . . over any portion of the lot or facility."[43] The term "CAFO" applies to approximately 20,700 facilities in the United States and denotes those with the largest number of livestock relative to other similar facilities.[44]

As the Second Circuit Court of Appeals noted in *Waterkeeper Alliance*, the largest-scale CAFOs "raise . . . staggering numbers of livestock—sometimes, raising literally millions of animals in one location."[45] "Economically, these CAFOs generate billions of dollars of revenue every year."[46]

The CAFO model has been applied to a wide variety of agricultural enterprises: cattle, sheep, goats, swine, ducks, turkeys, chickens for slaughter, calves for veal, milking cows for dairy products, and chickens for eggs, for example.[47] Federal CAFO rules establish populations that qualify facilities as either medium or large CAFOs subject to water quality regulation.[48] Furthermore, for AFOs that qualify as medium CAFOs, federal rules do not consider a facility to constitute a CAFO unless one of the following conditions is satisfied:

> (A) Pollutants are discharged into waters of the United States through a man-made ditch, flushing system, or other similar man-made device; or
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> (B) Pollutants are discharged directly into waters of the United States which originate outside of and pass over, across, or through the facility or otherwise come into direct contact with the animals confined in the operation.[49]

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43. 40 C.F.R. § 122.23(b)(1) (2011).

44. 2008 CAFO Rules, 73 Fed. Reg. 70,418, 70,469 (Nov. 20, 2008); *see also* 40 C.F.R. § 122.23(b)(2) (defining CAFO).

45. *Waterkeeper Alliance*, 399 F.3d at 493.

46. *Id.*

47. *See* 40 C.F.R. § 122.23(b)(4) (2011) (using categories of animals to define CAFO classifications).

48. *Id.* The CAFO Rule defines a concentrated animal feeding operation as "an AFO [animal feeding operation] that is defined as a Large CAFO or as a Medium CAFO by the terms of this paragraph, or that is designated as a CAFO in accordance with paragraph (c) of this [S]ection." *Id.* § 122.23(b)(2).

49. *Id.* § 122.23(b)(6)(ii).

The federal rules also provide that either the EPA or a state environmental agency may designate an AFO or CAFO subject to regulation as "a significant contributor of pollutants to the waters of the United States."[50]

A facility that qualifies as a medium or large CAFO must meet CWA requirements, which prohibit the "discharge of a pollutant" from any "point source" to navigable waters except when authorized by a permit issued under a NPDES permit.[51] The EPA furthers the Act's objectives—to eventually eliminate such water pollution.[52] The Act seeks to do this primarily through the use of NPDES permits, which authorize some water pollution, but place important restrictions on the quality and character of those authorized discharges.[53]

CAFOs meet the statutory requirement of "discernable, confined, and discrete" point sources because the EPA has construed the CAFO facility itself and the land it controls as a single discernable source of water pollution.[54] Nevertheless, EPA guidance focuses on particular parts of a CAFO facility as the actual sources of discharges: "animal confinement areas; feed storage areas; manure, litter, process wastewater storage areas; confinement house ventilation fan exhaust; land-applied manure, litter, or process wastewater; and other site specific sources of pollutants, as well as any pathways for pollutants from the CAFO to reach waters of the [United States]."[55] Land-applied pollutant waste products are subject to permitting requirements, only if the facility applies manure in a manner that deviates from accepted practice and causes the discharge of polluted water that exceeds the quantity exempted for agricultural storm water runoff.[56]

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50. *Id.* § 122.23(c).

51. *See* 33 U.S.C. § 1362(12)(A) (2006) ("Discharge of a pollutant" primarily means "any addition of any pollutant to navigable waters from any point source"); *id.* § 1362(5) ("Person" means "an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body"); *see also id.* § 1342 (permitting rules under NPDES program).

52. *Id.* § 1251(a)(1).

53. *Id.* § 1342.

54. 40 C.F.R. § 122.23(a) (2011).

55. ENVTL. PROT. AGENCY, EPA-833-R-1-006, IMPLEMENTATION GUIDANCE ON CAFO REGULATIONS—CAFOS THAT DISCHARGE OR ARE PROPOSING TO DISCHARGE 2 (2010) [hereinafter EPA IMPLEMENTATION GUIDANCE], *available at* http://www.epa.gov/npdes/pubs/cafo_implementation_guidance.pdf.

56. 40 C.F.R. § 122.23(e); *see also* Waterkeeper Alliance, Inc. v. U.S. Envtl. Prot. Agency, 399 F.3d 486, 508 (2d Cir. 2005) (citing Concerned Area Residents for the Env't v. Southview Farms, 34 F.3d 114 (2d Cir. 1994)).

B. *CAFO Pollutants: Categories and Quantity*

Industrial agricultural operations produce an estimated 500 million tons of manure every year—three times the amount of waste produced by the human population of the United States.[57] When CAFO operators place livestock waste in "lagoons" or in dry piles of "litter" and then spread it onto land; no sewage treatment is required.[58] The ratio between untreated animal waste to treated human waste becomes more astounding in the states with the highest concentrations of CAFO operations. For example, dairy cows, beef cattle, and egg laying hens raised on CAFOs in New Mexico produce as much untreated manure as eighty-seven million people—forty-three times the population of the state.[59] Just the dairy cows in Chaves County, New Mexico produce as much untreated solid waste as the cities of Los Angeles and Philadelphia combined.[60]

The EPA has focused on this industry because, when improperly managed, this manure can pose substantial risks to the environment and public health.[61] Manure produced by CAFOs releases a wide range of pollutants—including, but not limited to the following: (1) nutrients like nitrogen and phosphorus; (2) organic matter; (3) solids—including the manure itself and other elements mixed with it, such as spilled feed, bedding and litter materials, hair, feathers and animal corpses; (4) pathogens (disease-causing bacteria and viruses); (5) salts; (6) trace elements such as arsenic; (7) antibiotics; and (8) pesticides and hormones.[62]

In 2000, the EPA released a report on the effects of waste released from CAFOs to surface water, groundwater, soil, and air.[63] The report documented a range of human health and ecological impacts—including the degradation of the nation's surface waters.[64] Such animal waste discharges from CAFOs have also

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57. 2003 CAFO Rules, 68 Fed. Reg. 7176, 7180 (Feb. 12, 2003).

58. *See* MICHELE M. MERKEL, ENVTL. INTEGRITY PROJECT, EPA AND STATE FAILURES TO REGULATE CAFOS UNDER FEDERAL ENVIRONMENTAL LAWS 1 (2006), *available at* http://www.environmentalintegrity.org/pdf/publications/EPA_State_Failures_Regulate_CAFO.pdf.

59. *Factory Farm Map: New Mexico Facts*, FOOD & WATER WATCH, http://www.factoryfarmmap.org/states/nm (last visited Mar. 6, 2012).

60. *Id.*

61. 2003 CAFO Rules, 68 Fed. Reg., at 7180.

62. *See* ENVTL. PROT. AGENCY, EPA-600-R-04-042, RISK ASSESSMENT EVALUATIONS FOR CONCENTRATED ANIMAL FEEDING OPERATIONS 24 (2004) [hereinafter EPA RISK ASSESSMENT], *available at* http://nepis.epa.gov/ (search 600R04042; then follow "Risk Evaluation for Concentrated Animal Feeding Operations" hyperlink).

63. EPA WATER QUALITY INVENTORY, *supra* note 13, at 10–15.

64. *Id.* at 11–12.

produced massive fish kills in locations throughout the United States.[65] Animal waste contaminants also polluted drinking water sources, according to the report.[66] The report identified agriculture—including CAFOs—as the chief source of pollutants impairing water quality in rivers and lakes.[67] Thirty states and tribes reported that agriculture contributed to water quality impairment.[68]

Animal-contaminated water can reach larger water bodies through a number of avenues: surface soil runoff and erosion; direct discharges to surface waters; spills; discharges; leaching into soil and groundwater; and releases to air, including subsequent deposition back to land and surface waters. Pollutants associated with animal waste now find their way to the nation's waters through these diverse conduits in large part because of the way that CAFOs use land and dispose of the waste associated with their operations.

C. *CAFO Pollutants in the Future: More Animals per Acre, More Polluted Water*

Over the last few decades, American agriculture has changed dramatically. Large-scale livestock facilities operate in a number of states and generate billions of dollars of revenue every year.[69] These industrial-sized facilities have increasingly replaced small farms and confined thousands of animals to small areas.[70] The amount of land per animal unit (AU) has declined significantly, as the number of hog farms in 1997 was about one-third of that in 1982 while the number of hogs produced per farm more than tripled.[71] Larger operations focus primarily on animal production, which means such facilities have less land on which to spread the increasing amounts of manure—the major source of pollutants from CAFOs.[72] The increased rate of animal waste production, without adequate land to dispose of it, transmits pollutants from animal waste to surface water. The increased production on smaller quantities of land also results in the leaching of nitrogen and pathogens to groundwater and volatilization of gases

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65. *See id.* at 12 (thirty-four percent of assessed miles only partially support or cannot support aquatic life); *see also Water Sentinels: Factory Farms*, SIERRA CLUB, http://www.sierraclub.org/watersentinels/factoryfarms.aspx (last visited Mar. 26, 2012).

66. EPA WATER QUALITY INVENTORY, *supra* note 13, at 60.

67. *Id.* at 13.

68. *Id.*

69. *See* Waterkeeper Alliance, Inc. v. U.S. Envtl. Prot. Agency, 399 F.3d 486, 593 (2d Cir. 2005) (describing economic and environmental impact of CAFO industry).

70. WILLIAM D. MCBRIDE & NIGEL KEY, USDA, AER-818, ECONOMIC AND STRUCTURAL RELATIONSHIPS IN U.S. HOG PRODUCTION 15 (2003), *available at* http://www.ers.usda.gov/publications/aer818/aer818.pdf.

71. *Id.*

72. *Id.* at 7.

and odors to the atmosphere.[73] Pollutants may originate at production houses and feedlots where animals are kept, at manure storage facilities such as tanks, ponds and lagoons, or on land where the manure collects or is applied.[74]

As early as 1997, animal feeding operations controlled cropland and permanent pastures with the capacity to assimilate only forty percent of the nitrogen and seventy percent of the phosphorous in the manure produced.[75] Large farms—those handling over 1 million pounds of live weight—accounted for only two percent of the total number of farms, but almost half of the excess onsite nutrients.[76] Experts observe that CAFOs continue to increase in size and use smaller units of land for the number of livestock raised,[77] which suggests federal and state authorities need to enforce their regulations more stringently to keep pace.

D. *CAFOs: Corporate Consolidation Means Larger Accidents*

1. *The Trends*

Agricultural economists have documented the increasing corporate and geographical concentration of CAFOs and the concerns these changes have produced.[78] Increasingly sophisticated technology has made larger facilities possible; even larger facilities result, in turn, from economies of scale. Vertical integration and production contract agreements between large meat, dairy, and poultry corporations and smaller CAFO producers have proliferated and further decreased the number of competitors in the industry. Multistate operations are now predominant and are concentrated in specific regions of the country.[79]

The consolidation of livestock corporations and vertical integration with individual producers has resulted in fewer farms with confined animals but a steadily increasing number of confined animals produced.[80] Smaller operations are being replaced by larger and larger ones.[81]

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73. *Id.* at 34, 37.

74. NOEL GOLLEHON ET AL., USDA, AIB-771, CONFINED ANIMAL PRODUCTION AND MANURE NUTRIENTS 8 (2001), *available at* http://www.ers.usda.gov/publications/aib771/aib771.pdf.

75. *Id.* at 18–19.

76. *Id.* at 18.

77. *Id.* at 32.

78. *See, e.g.*, *id.*

79. MARC RIBAUDO & NOEL GOLLEHON, ANIMAL AGRICULTURE AND THE ENVIRONMENT, AGRICULTURAL RESOURCES AND ENVIRONMENTAL INDICATORS 147–56 (Keith Wiebe & Noel Gollehon, eds., 2007).

80. GOLLEHON ET AL., *supra* note 74, at 31.

81. MCBRIDE & KEY, *supra* note 70, at 5.

The regions with the greatest number of CAFOs have also changed since the early 1980s.[82] The number of animals in CAFOs increased forty percent in the Prairie Gateway region (consisting of Texas, Oklahoma, Kansas, and surrounding areas) and seventy percent in the Southern Seaboard Region (which includes most of Virginia, Alabama and Georgia, as well as North and South Carolina).[83] The areas that have seen significant declines are Northern Crescent (Maryland and northward) as well as the Heartland (Northern Missouri, Iowa, Indiana, Illinois, Ohio, and surrounding areas).[84] This indicates a migration of operations into the Southeastern Coast and to the Southern Great Plains.[85]

2. *The Increased Potential for Major Environmental Damage*

The trends just discussed suggest that the impact of environmental harms from major factory farms can be immense. Unfortunately, EPA enforcement actions—as well as EPA and citizen litigation against CAFOs—demonstrate the unprecedented potential for water pollution that such facilities possess. A handful of incidents at facilities owned by some of the largest meat producing corporations—Seaboard Farms, Smithfield Foods, Tyson, Cargill, and Swift/ConAgra—provide striking examples.[86]

Cargill/Excel, a meat corporation with facilities in dozens of countries, has faced several lawsuits for environmental violations at its American CAFO facilities.[87] Further, Cargill plead guilty to violating the CWA by discharging hog waste into the Loutre River, killing approximately 53,000 fish.[88] The company paid over one-million dollars in fines and other restitution for these violations.[89]

Swift/ConAgra/Armour—the second largest food corporation in the United States—also operates CAFO facilities with repeated large-scale CWA violations.[90] In 1998, one such CAFO entered into a consent decree with the EPA agreeing to injunctive relief, facility upgrades, and supplemental environ-

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82. *Id.* at 19.
83. GOLLEHON ET AL., *supra* note 74, at 11–12.
84. *Id.* at 11.
85. RIBAUDO & GOLLENHON, *supra* note 79, at 148–49.
86. *See* SIERRA CLUB, THE RAPSHEET ON ANIMAL FACTORIES 7, 8, 13–15 (2002), *available at* http://www.midwestadvocates.org/archive/dvorakbeef/rapsheet.pdf.
87. *Id.* at 7.
88. *Id.*
89. Press Release, Envtl. Prot. Agency, Missouri Company to Pay over $1.5 Million in Fines, Costs, Restitution, (Feb. 28, 2002) (on file with author).
90. SIERRA CLUB, *supra* note 86, at 8.

mental projects collectively worth one million dollars.[91] Further, the Missouri Department of Natural Resources reported a ConAgra CAFO that committed repeated and serious water quality violations.[92] The CAFO—a poultry facility—committed at least fourteen violations of its operating permit, "involving either [spills] of animal waste, animal remains, blood and grease, or fat and skin."[93] A lagoon located at the ConAgra CAFO also leaked one million gallons of waste per month for four years despite issuance, by state officials, of six written requests to the corporation to close the facility.[94]

Seaboard Farms—the third largest pork producer in the United States, which operates in twenty countries—also exhibits a history of water quality violations.[95] In 2000, Seaboard's 25,000 swine CAFO in Beaver County, Oklahoma, paid the state for three separate episodes of pig effluent spills; especially critical because the CAFO abutted a wildlife management area.[96] The fines totaled $20,250 and Seaboard agreed to pay an additional $10,000 because of its lack of odor abatement equipment.[97] In 2001, the Sierra Club filed suit against the corporation for violations at the same facility—which resulted in a settlement in which Seaboard paid $30,000 to Oklahoma to restore contaminated wetlands, $15,000 to the state in other fines, and $100,000 to the Sierra Club.[98] Seaboard also agreed to nitrogen reduction measures, facility improvements to eliminate spills, and annual inspections by Sierra Club experts.[99] The estimate for refurbishing the facility comprehensively to prevent spills was three million dollars; how much renovation that actually occurred is unknown.[100]

Tyson Chicken—which operates CAFO facilities in twenty-nine states and generates approximately twenty-six billion dollars per year in revenue[101]—has also been accused or convicted of untreated wastewater discharges in several states.[102] Particularly, the Oklahoma Department of Agriculture cited Tyson on

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91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.* at 13.
96. *Seaboard Agrees to $30,250 in Fines Over October Spills*, AMARILLO.COM (Feb. 18, 2000), http://amarillo.com/stories/021800/new_agrees.shtml.
97. *Id.*
98. *See Seaboard Farms Pays Steep Price for Lack of NGO Savy*, INT'L FOUND. FOR CONSERVATION NAT. RESOURCES (Jan. 8, 2003), http://www.ifcnr.com/agecology/article.cfm?NewsID=272.
99. *Id.*
100. *Id.*
101. *Tyson Foods*, GREEN AMERICA, http://www.greenamerica.org/programs/responsibleshopper/company.cfm?id=301 (last updated July 6, 2010).
102. SIERRA CLUB, *supra* note 86, at 15.

four different occasions for spills, mishandling of hog corpses, and fish kills in 1999.[103] In a Missouri federal district court, Tyson pleaded guilty to twenty felony violations of the CWA for repeated discharges of untreated and undertreated wastewater into streams in and around Sedalia, Missouri, paying $7.5 million in fines.[104] In 2004, Tyson—along with five other companies paid a $7.3 million dollar settlement to the city of Tulsa, Oklahoma, and the utility authority for wastewater discharges into creeks and streams feeding into two major area lakes.[105]

Premium Standard Farms and its parent corporation, Smithfield Foods, have also faced legal challenges for violating the CWA.[106] In Missouri state court, the corporation entered a consent judgment for illegal water discharges from CAFOs in which it agreed to conduct cooperative research with the state to improve standards for its industry.[107] In a federal suit in Saint Joseph, Missouri, Premium Standard Farms entered a consent decree for violations of the CWA; the Clean Air Act (CAA); the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA); and the Emergency Planning and Community Right-to-Know Act (EPCRA).[108] Under the decree, Premium Standard Farms was ordered to pay the State of Missouri $650,000 and the Citizen's Legal and Environmental Action Network (CLEAN) $350,000.[109]

None of these incidents speak directly to the long and heavily disputed question at issue in this article: whether the CWA authorizes the EPA to require a CAFO facility to apply for a NPDES permit or an exemption therefrom *before* it actually discharges pollutants into the waters of the United States. One must consider, however, these accidents in light of the other realities discussed in this part of the article: the vast quantity of untreated animal waste, the wide range of chemical, bacterial, and hormonal pollutants, the tremendous number and size of facilities, and the trend toward land use practices that inevitably increase runoff.

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103. *Id.*

104. Press Release, Dep't of Justice, Tyson Pleads Guilty to Twenty Felonies and Agrees to Pay $7.5 Million for CWA Violations (June 25, 2003), http://www.justice.gov/opa/pr/2003/June/03_enrd_383.htm.

105. P.J. Lassek, *Judge OKs Lawyer Fees in Water Suit*, TULSA WORLD, Feb. 5, 2005, http://www.tulsaworld.com/news/article.aspx?articleID=050205_Ne_A16_Judge1746.

106. SIERRA CLUB, *supra* note 86, at 14 (Smithfield Foods has received 178 Notices of Violation in North Carolina, has dumped a documented 1.7 million gallons of waste into water sources in Missouri, and has been fined $12.6 million in Virginia for chronic dumping of waste into a tributary of the Chesapeake Bay).

107. Missouri *ex rel.* Nixon v. Premium Standard Farms, Inc., No. CV99-0745, slip op. at 2 (Mo. Cir. Ct. Aug. 3, 1999).

108. Consent Decree, Citizens' Legal Envtl. Action Network, Inc. v. Premium Standard Farms, Inc., No. 97-6073-CV-SJ-6, 2000 WL 220464 at 5 (W.D. Mo. 2000).

109. *Id.* at 16.

All speak to the need for effective enforcement. For each violation recounted here in which federal and state agencies ultimately sought enforcement for large-scale violations, we do not know how many violations went undetected or, once detected, enforced against. Eliminating the EPA's ability to assess a facility and permit it before it operates only exacerbates this problem.

3. *Vertical Integration Exacerbates the Problem*

Another development in the CAFO industry complicates enforcement of the CWA. As the incidents previously discussed illustrate, large meat-producing corporations operate CAFOs under their own name: Seaboard Farms, Premium Standard, Tyson, Cargill, Nippon Meatpackers, and Swift/ConAgra. Increasingly, however, such corporations are becoming vertically integrated with smaller scale CAFOs that actually produce the meat, poultry, eggs, or dairy products. The corporation then processes these products for sale:

> [L]arge corporations, typically large producers or processors, enter into contracts with smaller producers to raise animals to market weight. The corporation often provides the contract farmer with the animals and instructs them on how they must be housed and fed, and the types of antibiotics that will be administered to the animals. The contract farmer provides the land, facilities and labor, and retains ownership of and responsibility for the proper disposal of animal waste. As a result, the large corporations have no incentive to ensure that their contractors are capable of properly disposing of the waste.[110]

The larger firms often dictate what kinds of facilities and management techniques the contracting facilities should use.[111] A growing number of courts have recognized that CWA violations by small facilities that operate according to specifications dictated by a corporation should give rise to liability for both the smaller facility and the corporation.[112]

As the number of smaller CAFOs increases and these facilities contract with the major meat, poultry, egg and dairy producing organizations, the EPA or state environmental agencies face a difficult permitting and enforcement situation. The proliferating facilities that actually raise the livestock and create the risk of pollution apply for NPDES permits but run their facilities according to the

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110. KARLA A. RAETTIG, ENVTL. INTEGRITY PROJECT, IMPROVEMENTS NEEDED IN PERMITTING CAFOS UNDER THE CWA 8 (2007), *available at* http://www.environmentalintegrity.org/pdf/publications/NPDES_permitting.pdf.

111. Josh Marks, *Regulating Agricultural Pollution in Georgia: Recent Trends and the Debate Over Integrator Liability*, 18 GA. ST. U. L. REV. 1031, 1044 (2002).

112. *E.g.*, Assateague Coastkeeper v. Hudson Farm, 727 F. Supp. 2d 433, 442 (D. Md. 2010) (quoting United States v. Lambert, 915 F. Supp. 797, 802 (S.D. W. Va. 1996)).

corporation's specifications.[113] If the EPA's authority to permit and enforce is only applicable against the individual facilities, the larger corporation will assume no liability for factors that may have led to the discharge: facility design, management practices, and production practices, for example.[114]

A number of federal courts have recognized that neither the CWA nor federal regulation precludes holding integrator corporations liable for illegal discharges.[115] Some courts have concluded that integrators—corporations that contractually bind livestock producers to fulfill their demand—are jointly liable for the producers' waste water discharge violations.[116] Other courts, however, have gone beyond joint liability.[117] If the integrator exercises sufficient control over the producer's operations, the integrator can become a part owner, operator, or both, which would require the integrator to join the existing permit or obtain a permit itself.[118] Some commentators have pointed out that this interpretation runs counter to the standard interpretation of "owner or operator."[119] Such an approach becomes more plausible than on first reading, however, when one considers, for example, producers who raise chickens owned by the integrator, in facilities that must conform to the integrator's specifications, using operating procedures the integrator specifies.[120]

The question remains how the partial invalidation of the 2008 CAFO rules in *Pork Producers* affects the problem of vertical integration and liability

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113. Marks, *supra* note 111, at 1044–46.

114. RAETTIG, *supra* note 110, at 8.

115. *See Lambert*, 915 F. Supp. at 802 (holding person who hired contractor liable for violation of exceeding permit limitations); United States v. Avatar Holdings, Inc., No. 93-281, 1995 WL 871260, at *14 (M.D. Fla. Nov. 22, 1995) (holding that where a subsidiary that holds a NPDES permit violates Section 309(d) of the CWA, a parent corporation is liable if it exercised sufficient control over the subsidiary such that "it may be considered a 'person who violates'"); United States v. Bd. of Tr. of Fla. Keys Cmty. Coll., 531 F. Supp. 267, 274 (S.D. Fla. 1981) (holding contractor liable for violations of CWA despite his belief that the contracting college had obtained the requisite permit).

116. *Avatar Holdings, Inc.*, 1995 WL 871260, at *14.

117. *See Fla. Keys Cmty. Coll.*, 531 F. Supp. at 274 (providing for civil liability for those in "control over performance of the work . . . .").

118. *Avatar Holdings, Inc.*, 1995 WL 871260, at *14.

119. William N. Sinclair & Nessa E. Horewitch, *Who Rules the Roost? CWA After Maryland Ruling: CAFO Industry Faces Potential Expansion of CWA Liability in Wake of Maryland Decision*, BEAVERIDGE & DIAMOND, PC (Sept. 17, 2010), http://www.bdlaw.com/news-958.html.

120. *See, e.g.*, Assateague Coastkeeper v. Alan & Kristin Hudson Farm, 727 F. Supp. 2d 433, 442 (D. Md. 2010).

for the corporation that contracts with an individual CAFO.[121] First, if the individual CAFO has no legal duty either to seek a permit based on a "proposal to discharge" or an exemption from permitting requirements, EPA will not be able to assess the features of the facility and assess its risk to discharge.[122] Even the existence of the facility and pollutants it may discharge may go undetected.

In the vertical integration context, this also means that even if the co-permitting concept gains more widespread acceptance, the larger corporation will have no duty to submit its design, production, and management specifications to the EPA for scrutiny.[123] This has serious implications because the specifications a corporation requires from one facility are likely similar to those it requires from similar facilities in other parts of the country. If the EPA could require applications for permits or exemptions before production started, the Agency would have the opportunity to influence corporate policy over all integrated facilities of that type.

On a more basic level, if co-permitting becomes the norm, undetected discharges at individual CAFOs could translate into a lack of enforcement against the meat-producing corporations discussed in the last section.

III. CAFO REGULATION

This section explains the evolution of the EPA's efforts to regulate CAFOs—especially the comprehensive CAFO rules that the EPA promulgated in 2003, the resulting *Waterkeeper Alliance* decision, and the 2008 rules that resulted in the *Pork Producers* decision.[124]

A. *Rules from the 1970s through 2003*

The point source discharge rules the EPA enacted in the 1970s remained essentially unrevised until the late 1990s, when the EPA initiated a review of its CAFO rules.[125] In 2001, the EPA presented proposed CAFO rule revisions to the public, which provoked comments from industrial agriculture as well as envi-

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121. *See* Nat'l Pork Producers Council v. U.S. Envtl. Prot. Agency, 635 F.3d 738, 756 (5th Cir. 2011) (invalidating the 2008 Rule a requiring facility to obtain permit if it proposes to discharge).

122. 40 C.F.R. § 122.21 (2011).

123. *See* RAETTIG, *supra* note 110, at 8 (indicating larger corporations may control how a contract farmer raises the animals but are not required to report the corporation's influence over the farmer's facilities).

124. *See generally*, *Pork Producers*, 635 F.3d 738 (5th Cir. 2011); Waterkeeper Alliance, Inc. v. U.S. Envtl. Prot. Agency, 399 F.3d 486, 524 (2d Cir. 2005).

125. COPELAND, *supra* note 15, at 1.

ronmental citizen groups in the following two years.[126] Industry groups opposed the proposed permitting requirements as costly and unnecessary; environmental groups urged the creation of more stringent national standards, including improved control technology such as Best Control Technology to limit the release of pathogens from CAFO facilities.[127] The EPA revised the 2001 proposals and, in early 2003, the EPA issued its final revisions to the 1970s rules, which became effective on April 14, 2003.[128]

The 2003 rules revised the way the EPA would regulate discharges of manure, wastewater, and other process wastes from CAFOs and would modify permit requirements and applicable effluent limitation guidelines.[129] Most importantly, the rules created two new requirements: that all CAFOs would have to apply for a discharge permit based, in part, on an assessment of their "potential to discharge,"[130] and that all CAFOs would have to develop and implement a so-called nutrient management plan—in part to ensure that the facilities would apply manure to land at rates that minimized water pollution.[131]

B. *Waterkeeper Alliance: Scrutiny of 2003 CAFO Rules and a Narrow Construction of "Discharges"*

As with the 2001 proposals, the final 2003 rules met opposition—which culminated in litigation from both agricultural and environmental interests. On February 28, 2005, the Second Circuit Court of Appeals issued its decision in *Waterkeeper Alliance, Inc. v. EPA*.[132] It is worthwhile to consider the *Waterkeeper Alliance* decision because it resulted in the promulgation of revised CAFO rules by the EPA in 2008.[133] Some larger issues, addressed in *Waterkeeper Alliance*, serve to illustrate CAFO's water pollution problems and how the EPA sought to address them.[134] The court addressed a wide range of issues per-

126. *See* 2001 Proposed CAFO Rules, 66 Fed. Reg. 2960 (proposed Jan. 12, 2001).

127. COPELAND, *supra* note 15, at 9–10.

128. 2003 CAFO Rules, 68 Fed. Reg. 7176 (Feb. 12, 2003) (codified at 40 C.F.R. pts. 9, 122, 123, 412).

129. *See id.*

130. 40 C.F.R. § 122.23(a) (2003).

131. *Id.* § 122.42(e)(1) (a nutrient management plan establishes the requirements that a facility must satisfy with regard to storage of manure and litter, and management of treated wastewater, taking into account levels of pollutants like nitrogen and phosphorous).

132. Waterkeeper Alliance, Inc. v. Envtl. Prot. Agency, 399 F.3d 486, 486 (2d Cir. 2005).

133. *See* 2008 CAFO Rules, 73 Fed. Reg. 70,418, 70,422–23 (Nov. 20, 2008) (explaining rule changes pursuant to *Waterkeeper Alliance*).

134. *See Waterkeeper Alliance*, 399 F.3d at 494 (describing environmental issues with CAFOs and how the EPA attempted to address them).

taining to CAFO regulation that the 2003 rules changed;[135] this discussion will focus on those issues of most direct relevance to the *Pork Producers* decision and its implications.

1. *No Duty to Apply Based on "Potential to Discharge"*

Most importantly, *Waterkeeper Alliance* agreed with the agricultural appellants that the EPA's 2003 rules exceeded the agency's authority under the CWA by imposing a "duty to apply" for an NPDES point-source permit on all CAFOs.[136] The court also upheld the EPA's limited agricultural storm water exemption over the contentions of both the agricultural and environmental petitioners.[137] If the facility had a "potential to discharge" point source pollutants, the rules required a permit—even if a new facility did not anticipate discharges or, with respect to an existing permit, no such discharges had ever occurred.[138] Because *Waterkeeper Alliance* rejected the universal duty to apply for a permit, the 2008 revised rules require a NPDES permit and storm water exemption only if a facility discharged or "proposed to discharge" such wastewater.[139] The fate of the revised 2008 language—as discussed later—was similar to the "potential discharge."

One should remember that any actual discharge from a point source—even one that is unplanned or accidental—is illegal unless it is authorized by the terms of a permit.[140] NPDES permits require a nutrient management plan and qualitative effluent limitations.[141] The specific discharge limitations in the permit are derived from effluent limitation guidelines and standards (ELGs) that EPA promulgates; in the case of CAFOs, these take the form of "Best Management Practices"—qualitative requirements for managing a CAFO rather than numerical guidelines.[142] Although effluent limitation guidelines take the form of qualitative management requirements, they carry with them technology requirements the CWA itself dictates.[143] For existing facilities, the standards are Best Conven-

135. *Id.* at 497.
136. *Id.* at 504–05.
137. *Id.* at 509, 511.
138. *Id.* at 505 (citing 40 C.F.R. § 122.23(d), (f) (2003)).
139. *See* 40 C.F.R. § 122.23(a) (2011) (requiring CAFOs to seek permit if they proposed to discharge); *see also* 2008 CAFO Rules, 73 Fed. Reg. 70,418, 70,422–23 (Nov. 20, 2008) (explaining rule changes in response to *Waterkeeper Alliance*).
140. 33 U.S.C. § 1311(a) (2006).
141. *Waterkeeper Alliance*, 399 F.3d at 495–96 (citing 40 C.F.R. § 122.42(e)(1)(i)–(ix) (2003)).
142. *Id.* at 496–97 (citing 40 C.F.R. §§ 122.44(k), 412.4 (2003)).
143. *Id.* (citing 40 C.F.R. §§ 122.44(k), 412.4 (2003)).

tional Control Technology (BCT), Best Practicable Control Technology (BPT), Best Control Technology Economically Achievable (BAT), and the technology required to reduce discharges according to the ELG standards is generally Best Practicable Control Technology (BPT).[144] New facilities must satisfy New Source Performance Standards (NSPS), in this context the Best Demonstrated Control Technology.[145]

Two practical consequences flow from these technology standards. First, EPA applies different standards to different types of CAFOs based on their location— for example, topography, climate, distance to surface water, the number of animals, the quantity of manure, and the adequacy of storage facilities and application fields to handle the quantity of manure.[146] Clearly, in order to assess these variables and determine whether a facility is at risk for discharges, the agency needs extensive, specific information *before* a facility starts operation in order to have any chance of minimizing initial discharges from a facility. Without such information, the EPA cannot make the right decisions regarding the technological requirements described above. If a corporation constructs and operates a facility without being required to comply with EPA guidelines, the agency gathers little of the information that would be necessary to formulate pollution-preventing requirements. *Waterkeeper Alliance* deprived the EPA of the authority to gather this critical information and fashion such requirements.[147]

2. *Public Notice and Comment on the Nutrient Management Plan*

The court agreed with environmental organizations that the 2003 rules provided no guarantee that the agency would make the application and supporting documents for a facility available for public inspection.[148] Environmental organizations objected that this approach violated the CWA and Administrative Procedures Act (APA) because it removed critical provisions of CAFO management from the public notice and comment process.[149]

This holding emphasizes a further consequence of empowering the EPA to evaluate and possibly permit a facility before it discharges.[150] The permit application and supporting materials should become a matter of public record and

144. *Id.* at 511–12 (citing 33 U.S.C. §§ 1311(b)(2(A), 1314(b)(1)(A), (2)(A) (2000)).

145. *Id.* (citing 33 U.S.C. § 1316 (2000)).

146. EPA IMPLEMENTATION GUIDANCE, *supra* note 55, at 4.

147. *See Waterkeeper Alliance*, 399 F.3d at 506 (holding the EPA does not have the authority to require potential discharges to apply for a permit).

148. *Id.* at 503.

149. *Id.* at 502–03.

150. *See id.* at 503 (holding the rules provided no assurance that the information regarding nutrient management plans would be open to the public).

provide individuals with the opportunity to learn that a new facility is proposed or is up for renewal.[151] The specifics of the facility's operation—such as its nutrient management plan—should be subject to public scrutiny.[152]

3. *Public Scrutiny of the Nutrient Management Plan*

The Court concluded that the EPA erred when it failed to require a facility to include the specific requirements of its nutrient management plan in its permit.[153] Nutrient management plans establish requirements for the storage of manure, litter, and process wastewater, as well as nutrients associated with livestock operations such as nitrogen and phosphorous.[154] The 2003 rules left the creation and maintenance of these plans to individual CAFOs.[155] The court found that the EPA did not require nutrient management plans to form part of the NPDES permit.[156] Such a site-specific nutrient management plan should be subject to public inspection and comment before a facility could gain authorization under the general permit.[157]

4. *An Important Concept for CAFO Regulation: The "No Discharge" Standard*

The court also agreed with the environmental appellants that the 2003 rule created an arbitrary and capricious standard for storm water runoff from new CAFO facilities.[158] New Source Performance Standards apply to those facilities qualifying as new sources of pollution.[159] For such facilities, the technology standard to decrease the discharge of polluted water is the most stringent the CWA contemplates—requiring use of the "best available demonstrated control technology, processes, operating methods, or other alternatives, including, where practicable, a standard permitting no discharge of pollutants."[160] The appeal pertained to types of CAFO facilities for which EPA had allegedly violated the New Source Performance Standards, including CAFO facilities raising swine, poultry, and veal.[161]

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151. *Id.* (citing 33 U.S.C. § 1342(j) (2000)).
152. *Id.* (citing 33 U.S.C. § 1251(e) (2000)).
153. *Id.*
154. *Id.* at 499 (citing 40 C.F.R. § 412(c)(2) (2003)).
155. *Id.* at 495 (citing 40 C.F.R. § 122(e)(1)(i)–(ix) (2003)).
156. *Id.* at 503.
157. *Id.* at 503–04 (citing 33 U.S.C. §§ 1251(e), 1342(j) (2000)).
158. *Id.* at 520.
159. *Id.* (citing 33 U.S.C. § 1316 (2000)).
160. *Id.* (citing 33 U.S.C. § 1316(a)(1) (2000)).
161. *Id.*

The 2003 rules had created two standards under which a new facility could claim a "no discharge" exemption despite a release of manure runoff.[162] In general, a new facility was prohibited from any discharges except those that result from a "100-year, twenty-four-hour rainfall event."[163] Alternatively, a new facility could discharge if it meets alternative performance standards as long as the discharges are accompanied by a reduction of pollutants released in other media at least equivalent to the discharge.[164] *Waterkeeper Alliance* concluded that the EPA had failed to justify this dual standard under the Act.[165] As a result, the 2008 rules struck the rainfall event "no discharge" and the alternative performance exemptions and instead, simply required no discharges.[166]

A more detailed consideration of this holding would suggest that the court's logic supports the assessment of a facility to determine its risk to discharge, one of the assumptions underlying the 2008 rule requiring either a permit application or an exemption based on the finding that the facility would not discharge. More generally, this holding accepts the premise that permitting obligations rest on the level of risk a facility poses to water quality, based on its design, management, and so on.

5. *Storm Water Runoff: Proper Application Rate, No Channelization Required*

The *Waterkeeper Alliance* holding bears relevance because it undermines the logic of prohibiting pre-discharge permitting: the idea that the actual, physical point source cannot be identified until an actual discharge occurs.[167] *Waterkeeper Alliance* found the EPA's 2003 rules reasonable in important respects. One example: the court deferred to the EPA's choice of the Best Available Technology (BAT) economically achievable for water monitoring at CAFO facilities—as well as the agency's conclusion that the competing choice would impose prohibitive costs on the industry.[168]

Waterkeeper Alliance disagreed with the agricultural appellants' assertion that all storm water discharges from land-applied waste should be exempt from permitting requirements unless the polluted water passed through an identi-

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162. *Id.* (citing 40 C.F.R. § 412.46 (2003)).
163. *Id.* (citing 40 C.F.R. § 412.46 (2003)).
164. *Id.* (citing 40 C.F.R. § 412.46 (2003)).
165. *Id.* at 521.
166. 40 C.F.R. § 412.46 (2011) (removing reference to 100-year twenty-four-hour rainfall event containment structure and to alternative voluntary superior performance New Source Performance Standard); *see* 2008 CAFO Rules, 73 Fed. Reg. 70,418, 70659–60 (Nov. 20, 2008) (explaining removal of exemptions in 2008 rules).
167. *See Waterkeeper Alliance*, 399 F.3d 486 (2d Cir. 2005).
168. *Id.* at 512–15.

fiable channel.[169] The court pointed to evidence that ninety percent of all CAFO waste is applied to land; applying the agricultural storm water exemption to all discharges given this percentage could largely defeat CAFO water quality regulation.[170] Further, the court agreed with earlier decisions that had faced this same issue: excessive application of manure and other waste increases the discharge of pollutants during a rain.[171] Limited application, by contrast, minimizes pollutant discharge.[172] The court recognized the storm water exception, but agreed with the EPA that a facility's manure application practice should be regulated so that one could apply the storm water discharge exception only to the quantity of runoff consistent with sound agricultural practices.[173]

The court agreed with the EPA's definition of land-application practices that would enable a CAFO to claim the storm water exemption if a rainfall resulted in runoff:[174] ''manure, litter or process wastewater [that] has been applied in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter or process wastewater . . . .''[175] Wastewater that would fall under permitting requirements would result from the EPA rule describing discharges that result from the excessive application of waste to land as a "discharge of manure, litter or process wastewater . . . by the CAFO to land areas under its control . . . ."[176]

Although there are other issues within the *Waterkeeper Alliance* holding which are not addressed in this Article, these holdings point to important aspects of CAFO regulation that require ongoing EPA oversight, largely frustrated if no permit is in place.[177] Paramount, however, is *Waterkeeper Alliance's* holding with regard to the "duty to apply" for a permit.[178] As previously discussed,[179] the 2003 rules imposed a duty to apply for an NPDES point-source permit on all facilities that possessed the potential to discharge into the waters of the United

169. *Id.* at 510.
170. *Id.* at 511.
171. *Id.* at 508 (citing Concerned Area Residents for the Env't v. Southview Farm, 34 F.3d 114, 121 (2d Cir. 1994) (stating that a discharge could be regulated where "the run-off was primarily caused by the over-saturation of the fields rather than the rain and that sufficient quantities of manure were present so that the run-off could not be classified as 'stormwater.'")).
172. *Id.* at 509.
173. *Id.* at 510
174. *Id.* at 508.
175. 40 C.F.R § 122.23(e) (2011).
176. *Id.*
177. *See generally* Waterkeeper Alliance, 399 F.3d 486 (2d Cir. 2005) (for a detailed discussion of the court's interpretation of various other aspects of the CWA).
178. *See id.* at 506 (holding there was no "duty to apply" for potential dischargers).
179. *See supra* Part III.A.

States, which encompassed all facilities that qualified as CAFOs.[180] *Waterkeeper Alliance* rejected this requirement as exceeding the scope of the CWA.[181]

C. *The 2008 Rules*

After *Waterkeeper Alliance*, the EPA reformulated the conditions under which a CAFO owner must apply for a permit.[182] The Preamble to the 2008 Rules provides tremendous insight into the way EPA comprehends past violations of the CWA with respect to current permitting decisions.[183] Instead of requiring all CAFOs to obtain a permit if they have the potential to discharge,[184] the EPA requires a CAFO owner to apply if the facility "discharges or proposes to discharge."[185] Note that a proposal to discharge is not what one might think: authorization to make intentional discharges of a given quantity, something akin to treated wastewater from a treatment plant that is "designed to discharge."[186] In fact, the EPA described proposals to discharge as occurring "whether within the CAFO owner/operator's control or not."[187] Instead, the CAFO owner is required to seek a permit if the design, construction, operation, or maintenance of the existing or proposed facility is such that a discharge "will occur," a phrase that suggested a high likelihood such that the event was foreseeable.[188]

In order to understand this rule, a good deal of parsing is necessary. Before anything else, one must keep two fundamental facts firmly in mind: (1) under the 2008 rules, although a CAFO owner or operator is the one who decides whether a permit is necessary,[189] the agency performs the permitting function and decides on what terms to issue the permit,[190] or penalize a facility for failing to apply for one,[191] and (2) any unexempted discharge whatsoever without a permit is illegal.[192] This means—for a CAFO owner or operator who is weighing the

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180. 40 C.F.R. § 122.23(d) (2003).
181. *Waterkeeper Alliance*, 399 F.3d at 505.
182. 40 C.F.R. § 122.23(d)(1) (2011); *see* 2008 CAFO Rules, 73 Fed. Reg. 70,418, 70,422–23 (Nov. 20, 2008).
183. 2008 CAFO Rules, 73 Fed. Reg. at 70,423.
184. 40 C.F.R § 122.23(a) (2003)
185. 40 C.F.R. § 122.23(d)(1) (2011).
186. *See* 40 C.F.R. § 122.23(f) (not requiring intentional conduct in order to propose to discharge).
187. EPA IMPLEMENTATION GUIDANCE, *supra* note 55, at 5.
188. 40 C.F.R. § 122.23(d)(1).
189. *Id.*
190. *Id.* § 122.23(h) (outlining the procedures for a CAFO to seek a permit).
191. *Id.* § 122.23(j)(2) (explaining EPA's enforcement mechanisms if a qualified CAFO fails to apply for a permit).
192. *Id.* § 122.23(j)(1).

decision whether to seek a permit—the threshold for the "discharge or proposal to discharge" is zero. Anything in the design, construction, operation, or maintenance that would indicate *any discharge could occur* triggers the requirement that a CAFO owner or operator seek an individual permit or authorization under a general permit.[193] "Discharge" in the rule is singular.[194] As such, the phrase "proposes to discharge" renders the new rule almost, but not quite, equivalent to "potential to discharge" under the old rule.[195] Further, it means an unpermitted facility that makes an unauthorized discharge is a violator.[196] This is true without regard to the owner or operator's assessment of the risk before the fact.[197]

One must not fall prey to the assumption, however logical, that a "propos[al] to discharge" pertains solely to a new facility the CAFO owner or operator proposes to construct. The rule does not restrict "proposal to construct" to new facilities.[198] This means that an existing facility whose design, construction, operation, or maintenance indicated a discharge would occur has to obtain a permit—even if "discharges" in the past had not happened.[199] The rule clearly contemplates that present design, construction, operation, or maintenance indicates what would happen in the future.[200] The terms "design" and "construction" provide one example. A rejected provision in EPA's 2003 CAFO rules applied a 100-year, twenty-four-hour rainfall event standard to define illegal CAFO discharges and a twenty-five-year, twenty-four-hour rainfall event standard for CAFOs that adopted advanced technologies.[201] The 2008 rules adopt a "no discharge" standard, without respect to rainfall events.[202] If an existing CAFO was not designed to withstand discharges beyond the precipitation of a twenty-five-year rainfall event, the new rule would require the facility owner to obtain a permit because its design demonstrated an implicit proposal to discharge.[203]

In its guidance document for the 2008 CAFO rules, the EPA suggests other design or construction factors that could lead an owner or operator to apply for a permit: whether the plant is near waters of the United States, whether production areas are exposed to precipitation, whether precipitation exceeds evaporation, and whether the construction and volume of a manure and wastewater

193. *Id.* § 122.23(d)(1).
194. *Id.*
195. *Compare* 40 C.F.R. § 122.23(d)(1) (2011), *with* 40 C.F.R. § 122.23(a) (2003).
196. 40 C.F.R. § 122.23(j)(1) (2011).
197. *Id.*
198. *Id.* § 122.23 (f)(3)(i)–(ii).
199. *Id.* § 122.23(d)(1).
200. *Id.*
201. 2003 CAFO Rules, 68 Fed. Reg. 7176, 7183 (Feb. 12, 2003).
202. 40 C.F.R. § 122.23(d)(1) (2011).
203. *Id.*

storage facility is adequate during critical storage periods.[204] In each instance, the design or construction of the facility—including its physical location—suggests whether an unauthorized discharge is likely.[205]

With respect to the "propos[al] to discharge," the EPA also provides examples of "operation and/or maintenance" issues that a CAFO owner/operator should consider: whether the facility manages animal carcasses effectively, whether the facility's operating procedures and quality of maintenance satisfy accepted protocols, whether the facility keeps the production area drained, and whether the facility applies waste to land in accordance with nutrient management planning and technical standards approved by the EPA.[206]

The EPA's guidelines for determining whether to apply for a permit based on future "proposals to discharge" lead one to a practical conclusion: the factors the EPA instructs a CAFO owner or operator to consider encompass each aspect of the CAFO's operation and whether they conform to the EPA guidelines.[207] The CAFO is faced with the choice of applying for a permit, applying for a no-discharge certificate, or proceeding to operate with neither.[208] If an unauthorized discharge does occur, the CAFO would be in violation of the CWA for discharging without an NPDES permit.[209]

The discussion thus far demonstrates that, to the extent possible after *Waterkeeper Alliance*, EPA sought to maintain a universal permitting requirement similar to the prior "duty to apply." The real key to EPA's understanding of the new permit rule, however, is in the relationship between future "proposals to discharge" and past or current "discharges."[210] The extensive assessment of a facility just discussed—whether a new facility or an existing one that had not yet discharged—presupposed that EPA's duties under the CWA includes the evaluation of risk for pollutant discharges to prevent them before they occurred.

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204. EPA IMPLEMENTATION GUIDANCE, *supra* note 55, at 4–6.

205. *Id.* at 5–7.

206. *Id.* at 13.

207. *Id.* at 7–13.

208. 40 C.F.R. § 122.23(f)(1).

209. 33 U.S.C. § 1311(a) (2006); *see* 2008 CAFO Rules, 73 Fed. Reg. 70,418, 70,426 (Nov. 20, 2008).

210. *See* 2008 CAFO Rules, 73 Fed. Reg. at 70,423; EPA IMPLEMENTATION GUIDANCE, *supra* note 55, at 5.

The Preamble to the 2008 rules created in response to *Waterkeeper Alliance*—as well as the guidance documents the agency has released to interpret the new rules—emphasize that past or present discharges constitute a factor in determining whether to obtain a permit.[211] The EPA derived its approach to this issue from *Gwaltney v. Chesapeake Bay Foundation*, in which the Supreme Court construed language from Section 505(a) of the CWA, which allows for civil suits against CWA violators.[212] The provision at issue in *Gwaltney* conferred standing on private citizens to bring suit for injunctive relief or civil penalties against any person alleged to be "in violation" of an NPDES permit.[213] The parties disagreed as to how a court should construe illegal discharges in the past when determining whether a defendant was "in violation" of Section 505(a).[214] The defendant at issue discharged wastewater in violation of its permit repeatedly from 1981 until 1984.[215] In May 1984, the last known discharge occurred.[216] In June 1984, the plaintiff filed its citizen suit.[217]

The Supreme Court reasoned that the Section 505(a) phrase "in violation" applied to continuous or intermittent violations, which could be sporadic but not wholly in the past.[218] The proximity in time between the last discharge and filing of suit did not persuade the Court that the discharges in this case could fall into the "wholly past" category, but remanded the case to determine whether the plaintiff had a good-faith basis to allege that the violations were of a continuous nature.[219] That fact the EPA could recover civil penalties for wholly past discharges in violation of NPDES permits under the CWA did not change the Court's conclusion.[220] The Court reasoned that EPA's enforcement actions serve both to punish past violations and to make facilities comply in the present.[221]

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211. *See* 2008 CAFO Rules, 73 Fed. Reg. at 70,423 (stating intermittent discharges are discharges that require a permit); EPA IMPLEMENTATION GUIDANCE, *supra* note 55, at 5 (indicating that past discharges are a factor for CAFOs to consider in determining whether to apply for a permit).

212. *See* 2008 CAFO Rules, 73 Fed. Reg. at 70,423 (citing Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., 484 U.S. 49 (1987)).

213. *Gwaltney*, 484 U.S. at 53 (citing 33 U.S.C. § 1365(a)(1) (1982)).

214. *Id.* at 54–55.

215. *Id.* at 53.

216. *Id.* at 54.

217. *Id.* at 54.

218. *Id.* at 64–65.

219. *Id.* at 64.

220. *Id.* at 58 (citing 33 U.S.C. § 1319(b) (1982)).

221. *See id.* at 58–59 (citing 33 U.S.C § 1319) (authorizing civil penalties separate from injunctive relief).

Citizen suits under Section 505(a), by contrast, serve only to bring dischargers into compliance, which apparently happened here.[222]

In the Preamble to its 2008 rules, the EPA borrowed concepts from *Gwaltney* to explain how past or present discharges could influence a CAFO owner or operator's decision to apply for a permit.[223] *Gwaltney*, however, did not address situations where there is a need for a permit because illegal discharges are presently occurring.[224] In such a situation the answer is clear: the facility currently violating the Act, is subject to penalties for those discharges, and must apply for a permit.[225] One might argue that the permit application serves as a kind of amnesty to allow the facility to come into compliance. As discussed below, the corrective measures must greatly diminish the likelihood that further violations will occur.

But discharges in the past—whether continuous, intermittent, or sporadic—also affect the "proposal to discharge" analysis. Here, the EPA embraces the reasoning of the later Fourth Circuit decision in the same case: "Intermittent or sporadic violations do not cease to be ongoing until the date when there is no real likelihood of repetition . . . ."[226] As the Preamble to the 2008 rules reasons:

> Such intermittent, sporadic, even occasional, discharges may in fact be the norm for many CAFOs, but they are nonetheless "discharges" under the CWA and are prohibited unless authorized under the terms of an NPDES permit. CAFOs that have had such intermittent or sporadic discharges in the past would generally be expected to have such discharges in the future, and therefore be expected to obtain a permit, unless they have modified their design, construction, operation, or maintenance in such a way as to prevent all discharges from occurring.[227]

The EPA's reasoning bears emphasis because it demonstrates the central role that compliance history plays in the entire NPDES permitting process for CAFOs. The EPA declares that, absent clear modifications in design, construction, operation, or maintenance, illegal discharges in the past should be construed as continuous, intermittent, or occasional discharges in the future.[228] Past per-

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222. *See id.* at 58–59 (citing 33 U.S.C § 1365 (a) (authorizing civil penalties and injunctive relief in the same provision)).

223. 2008 CAFO Rules, 73 Fed. Reg. 70,418, 70,423 (Nov. 20, 2008).

224. *See generally* Gwaltney, 484 U.S. 49 (failing to address necessity of permit when present discharges are occurring).

225. *See* 2008 CAFO Rules, 73 Fed. Reg. at 70,423 (explaining that a CAFO that discharges without a permit violates both 33 U.S.C. § 1311(a) and the 40 C.F.R. § 122.23(d)(1) duty to apply for a permit).

226. *Id.* (citing Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd., 890 F.2d 690, 693 (4th Cir. 1989).

227. *Id.*

228. *Id.*

formance does not simply make future violations more or less likely.[229] Instead, the Preamble to the 2008 rules indicate that a presumption exists that past violations translate into current and future violations absent demonstrated changes to the facility.[230]

This reasoning obviously carries implications for both the EPA and the CAFO owner or operator. As the Supreme Court pointed out in *Gwaltney*, Section 309(b) of the CWA empowers EPA to bring enforcement actions for wholly past violations.[231] Continuous, intermittent, or occasional violations that have apparently ceased are subject to such enforcement.[232] The CAFO owner or operator whose facility has committed such violations must take these into account when deciding to apply for a permit. If the facility has taken the kind of remedial measures that would render future violations basically impossible, seeking a permit would nevertheless mitigate the severity of the EPA enforcement actions for past violations.[233] If the facility has not taken such remedial measures, it falls under the "discharge or propose to discharge" language and must apply for a permit.[234] Either way, the EPA's approach to past discharges likely results in permit applications from past violators; the EPA can then determine appropriate terms for the permit to help bring the facility into compliance. It is clear that a CAFO's continuous, intermittent, or sporadic discharges in the past influence not only the EPA's initial decision to permit, but subsequent decisions as well—including the termination of a permit for noncompliance.[235]

The reasoning EPA adopted from *Gwaltney* bears relevance to the *Pork Producers* decision.[236] As the subsequent discussion demonstrates, *Pork Producers* accepted, on the basis of *Chevron* deference,[237] the EPA's interpretation that its authority to regulate a facility and enforce its permit continued until no risk of a repeat discharge remained.[238] That is, even though the prior discharge has concluded and the enforcement action completed, EPA jurisdiction presumably continues until the risk of another discharge from the same facility disappears. As

229. *See id.*

230. *Id.*

231. *See Gwaltney*, 484 U.S. at 58 (citing 33 U.S.C. § 1319(b) (1982)).

232. *Id.*

233. *See* 2008 CAFO Rules, 73 Fed. Reg. 70,418, 70,423 (Nov. 20, 2008) (indicating that corrected past violations may eliminate duty to seek permit).

234. *See id.* (indicating that uncorrected past violations give rise to a duty to apply).

235. 40 C.F.R § 122.64 (2011) (if fact is undisclosed in permit application).

236. *See Gwaltney*, 484 U.S. 49; Nat'l Pork Producers Council v. U.S. Envtl. Prot. Agency, 635 F.3d 738 (5th Cir. 2011).

237. *See* Chevron U.S.A., Inc. v. Nat'l Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984) (explaining Chevron deference analysis).

238. *See Pork Producers*, 653 F.3d at 751 (upholding duty to apply for discharging CAFOs).

the subsequent discussion argues, if the court premises EPA's authority to enforce permit requirements on the presence of increased risk, it has departed from its own logic: that only actual, discrete, physical discharges into the waters of the United States can empower EPA to regulate CAFOs.[239]

The 2008 rules also demonstrate the EPA's effort to define its own authority so it can carry out the purposes of the CWA.[240] The EPA must know certain basic information to make ongoing decisions when regulating CAFOs: obviously, that a facility even exists, and whether it has discharged water pollution in the past or violated its permit conditions.[241] The ability to gather such information depends on universal permitting. No one can document an unknown CAFO that discharges unknown water pollutants.

Unlike the *Waterkeeper Alliance* decision previously discussed, *Pork Producers* focused on a narrower range of issues concerning CAFO regulation.[242] Chief among these was the new provision in the 2008 rules that required a facility either to apply for a permit or opt to be certified before it had actually discharged water pollution.[243] In the language of the rules, a facility that applied for a permit before discharging was making a "proposal to discharge."[244] As with the "potential to discharge" in the 2003 rules, CAFOs challenged these requirements as *ultra vires*.[245]

IV. *PORK PRODUCERS*: THE VALIDITY AND CONSEQUENCES OF ITS ANALYSIS

This section analyzes the fundamental issue this article has already considered from a number of directions. As already explained, *Pork Producers* concluded that, like the "potential to discharge" provisions in the 2003 rules, the "proposal to discharge" rules in the 2008 rules imposed a duty on CAFOs to apply for a water quality permit before they had actually discharged contaminated water.[246] *Pork Producers* concluded that the EPA had overreached its statutory authority in its 2008 attempt to impose such a duty to apply, just as it had in the 2003 rules.[247] This section asks how *Pork Producers* interpreted the specific words authorizing the EPA to regulate releases of contaminated water from fac-

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239. *See id.* (holding that the EPA cannot impose a duty on a CAFO that proposes to discharge until there is an actual discharge).
240. 2008 CAFO Rules, 73 Fed. Reg. 70,418 (Nov. 20, 2008).
241. *See id.* at 70,423 (indicating past discharges trigger duty to apply).
242. *See generally Pork Producers*, 635 F.3d 738.
243. 40 C.F.R. § 122.23(d), (j) (2011).
244. *Id.* §§ 122.23(d)(1).
245. *Pork Producers*, 635 F.3d at 749.
246. *Id.* at 749–50.
247. *Id.* at 751.

tory farms, and whether the court's interpretation really is self-evident from the text of the Act.

A. *The Meaning of "Discharges"*

In order to evaluate the approach *Pork Producers* took to the 2008 rules that imposed on new CAFO facilities a duty to apply for a permit, a few CWA provisions prove especially important. Section 1311(a) of the CWA provides "the discharge of any pollutant by any person shall be unlawful.[248] The CWA provides that "[e]ffluent limitations . . . shall be applied to all point sources of discharge of pollutants" and Section 1342 of the Act gives NPDES authorities the power to issue permits authorizing the discharge of any pollutant or combination of pollutants."[249] Section 1342(12) defines the key phrase "discharge of a pollutant" as: "any addition of any pollutant to navigable waters from any point source, [or] any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft."[250]

Note that in the definition of the term "discharge," Congress included the "addition" of the pollutant: the physical act that placed the pollutant in the water.[251] This indicates that the "discharge" language, upon which *Pork Producers* relied, focuses not only on the actual, physical pollutant entering a navigable water body, but also on the actions that culminated in that discharge.

Based on these provisions that outlaw the discharge of unpermitted effluent from point sources into the nation's waters, the CWA establishes the elements an agency must establish to demonstrate a violation: (1) a person (2) has discharged a pollutant (3) to navigable waters (4) from a point source (5) without authorization.[252] *Pork Producers* focuses on the second element—discharge of a pollutant—as the prerequisite for any regulation of CAFOs.[253] This section argues that the first element—the actions of a person that result in the discharge—should have played an important role in evaluating the 2008 CAFO rules and any future iterations the EPA may adopt.

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248. 33 U.S.C. § 1311(a) (2006).
249. *Id.* §§ 1311(e), 1342.
250. *Id.* § 1362(12).
251. *Id.* § 1362(12)(A).
252. *Id.*§§ 1311(a), (e), 1362(12); *see, e.g.*, Mumford Cove Ass'n v. Town of Groton, 640 F. Supp. 392, 393–94 (D. Conn. 1986).
253. Nat'l Pork Producers Council v. U.S. Envtl. Prot. Agency, 635 F.3d 738, 749 (5th Cir. 2011).

B. *Statutory Interpretations of "Discharges"*

With respect to the second element—discharge of a pollutant—*Pork Producers* relied on the most basic principle of statutory interpretation: if Congress made its intent clear in the plain text of the statute, a court need not look further.[254] In order to ascertain the plain meaning of a statute—when the words of the text fail to provide one abundantly clear meaning without further interpretation—*Pork Producers* acknowledged a second fundamental principle: "We use the traditional tools of statutory construction to determine whether Congress has spoken to the precise point at issue."[255] *Pork Producers* stopped at the first step of statutory interpretation, however.[256] As discussed below, the court concluded that the term "discharge" employed in the statute's provisions—including 33 U.S.C. § 1311(a)—left no doubt as to what Congress intended, a conclusion that yielded no further interpretive principles with respect to CAFOs.[257] For the court, the EPA's authority to enforce the Act does not exist in the absence of an actual discharge event.[258]

The plain meaning of "discharge," upon which *Pork Producers* relied, however, is not so plain. One CWA expert, David Drelich, has questioned whether Congress intended "discharge of a pollutant" to focus strictly on an outcome; that is, when an actual, physical pollutant reaches navigable waters, but instead, whether the term "discharge" includes the conduct that increases the probability of a discharge or must actually results in one.[259] As Professor Drelich observes:

> As the EPA's enforcement program has turned its attention to more elusive wet weather polluters [such as CAFOs], precisely interpreting "discharge of a pollutant" has become more challenging. It may be assumed that the "discharge of a pollutant," defined in the Act as "any addition of any pollutant to navigable waters from any point source," refers to the entry of a pollutant into a navigable water, and it is surely true that if this occurs there has been a discharge. The words of the statute, however, just as easily support an interpretation of "discharge" that is centered on

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254. *Id.* (citing Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984)).

255. *Id.* (citing Tex. Sav. & Cmty. Bankers Ass'n v. Fed. Hous. Bd., 201 F.3d 551, 554 (5th Cir. 2000)).

256. *Id.* at 751 (only applying *Chevron* analysis).

257. *Id.*

258. *Id.*

259. David Drelich, *Restoring the Cornerstone of the CWA*, 34 COLUM. J. ENVTL. L. 267, 301–02 (2009).

> the polluter's conduct, rather than the instances of harm resulting from that conduct.[260]

Professor Drelich starts with the language of the Act in Section 1362(2)(A): a discharge is "any addition of any pollutant to navigable waters from any point source."[261] As he acknowledges, "[t]his is commonly assumed to mean that a pollutant must reach a water of the United States in order for a discharge to occur, and the entry of the pollutant into the water represents the discharge."[262]

Professor Drelich concludes that the statutory language actually supports two different views with equal force: a narrow, result-based understanding of discharge and one that includes the actions that resulted in the discharge.[263] As Professor Drelich points out, the language of 33 U.S.C. § 1362(A) is consistent with either approach: "Addition" can mean either "the result of adding" or "the act or process of adding."[264] One should note, however, that the "act of adding" pollutants from CAFOs into navigable waters would easily include the course of conduct at the CAFO, which the Act defines as a point source,[265] that results in the discharge such as, mismanagement, design flaws left remedied, or manure applied beyond agronomic rates.

Drelich further argues that one can derive equally valid, alternative definitions of the word "to," as in a discharge *to* navigable waters: "The same ambiguity permeates the primary dictionary definition of 'to,' which includes 'in the direction of and reaching,' as well as 'in the direction of; towards.'"[266] Drelich notes, "[T]he competing concepts of 'movement' and 'place, person, or thing reached' for the definition of 'to' reflect the same linguistic duality found in common definitions of 'addition.'"[267]

With that, Drelich constructs two standards based on valid definitions of "addition" and "to:" by choosing one available set of definitions for "addition" and "to," CWA § 502(12)(A) can be construed to define "discharge" as "any [result of adding] any pollutant [in the direction of and reaching] navigable waters from any point source."[268] Alternatively, "[b]y choosing the competing set of definitions for 'addition' and 'to,' § 502(12) (A) can be construed to define 'dis-

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260. *Id.* at 301 (footnotes omitted).
261. *Id.* at 302–03 (citing 33 U.S.C. § 1362(2)(A) (2006)).
262. *Id.* at 303.
263. *See id.*
264. *Id.* at 303 (citations omitted).
265. 33 U.S.C. § 1362(14) (2006).
266. Drelich, *supra* at note 259, at 303.
267. *Id.* at 303 n.189.
268. *Id.* at 302–03.

charge' as 'any [act or process of adding] any pollutant [in the direction of or towards] navigable waters from any point source.'"[269] Once again, the "process of adding pollutants" from a point source "in the direction" of navigable waters encompasses the activities at a CAFO that direct pollutants from the source toward the navigable waters.

Drelich concludes with regard to the statutory language:

> "[D]ischarge of a pollutant" can be interpreted as occurring at the time and place when a pollutant reaches a water of the United States or at the location of the discharger's point source, which can occur before any pollutants reach a water of the United States. These incompatible ideas reside in the same statutory text. Contrary to expectations, there is no plain meaning.[270]

In the absence of a plain meaning for "discharge of a pollutant," Professor Drelich surveys the legislative history and relevant case law to arrive at an understanding of this language.[271] Among the conclusions he derived from the legislative record, Drelich concluded that the CWA seeks to control effluent levels rather than simply requiring specific end-of the pipe technology.[272] On the other hand, the Act seeks to control pollution at its source and impose liability there: "[S]ection 301(e) of the Act provides that '[e]ffluent limitations . . . shall be applied to all point sources of discharges of pollutants,' reflecting legislative intent 'that [the] discharge of pollutants be controlled at the source.'"[273]

Drelich notes that at least "three CWA cases have directly held a "discharge" to occur before a pollutant enters a water of the United States."[274] Further, cases that sought to ascertain the starting point-in-time for calculating the federal statute of limitations, as well as cases involving the enforcement of Discharge Monitoring Reports (DMRs), further demonstrate that courts consider "discharges" under the CWA to have occurred before the pollutant reaches navigable waters, and even presume that a discharge has occurred based on violations at the permitted site without an affirmative demonstration that the pollutant has escaped.

In short, federal courts have consistently concluded that a "discharge" has occurred before the physical pollutants have actually reached navigable wa-

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269. *Id.* (alteration in original).
270. *Id.* at 303–04 (footnote omitted).
271. *Id.* at 304–11.
272. *Id.* at 305 (citations omitted).
273. *Id.* at 307 (citations omitted).
274. *Id.* at 309–10 (citing United States v. Holland, 373 F. Supp. 665 (M.D. Fla. 1974); United States v. Velsicol Chemical Corp., 438 F. Supp. 945 (W.D. Tenn. 1976); In re Larry Richner/Nancy Sheepbouwer & Richway Farms, No. 10-97-0090-CWA/G, 2001 WL 1800839 (Jul. 19, 2001)).

ters, and most federal courts have blessed agency enforcement actions involving DMR-related permit violations that committee by facilities before the agency has demonstrated that any pollutants have even left the point source.[275]

Clearly, the CWA's legislative history and many decisions that have interpreted it take a broad view of the phrase "discharge of a pollutant" to include the permitted entity's actions that led to the discharge. Of course, such a broad interpretation of discharge does not deal with the ultimate question addressed in *Pork Producers*. A broad definition of discharge does not automatically translate into the conclusion that the EPA possesses statutory authority to require new CAFOs to apply for a permit or exemption before a discharge occurs.[276]

Professor Drelich's analysis, however, demonstrates that the statutory language, legislative history, and case law all allow one to interpret "discharge of a pollutant" in a manner that renders the EPA's interpretation in the 2008 rules of its own authority far more reasonable, and it provides a context for examining the validity of the *Pork Producers* decision.[277] The following sections question the statutory basis of that decision and suggest a more plausible approach.

C. *"Discharge:" Statutory Construction and Policy Implications*

Pork Producers recited the most basic principle of statutory interpretation: if Congress made its intent clear in the plain text of the statute, a court may look no further.[278] In order to ascertain the plain meaning when the words of the text fail to provide one abundantly clear meaning without further interpretation, *Pork Producers* acknowledged a second fundamental principle: "We use the traditional tools of statutory construction to determine whether Congress has spoken to the precise point at issue."[279] *Pork Producers* stopped at the first step of statutory interpretation: the court concluded that the term "discharge" employed in the statute's provisions left no doubt as to what Congress intended, a conclusion that yielded any further interpretive principles unnecessary with respect to CAFOs.[280] The EPA's authority to enforce the Act does not exist in the absence of actual, discrete discharge events.[281]

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275. *See, e.g.*, *Holland*, 373 F. Supp. 665; *Velsicol Chem. Corp.*, 438 F. Supp. at 946–47; Save our Bays & Beaches v. City & Cnty. of Honolulu, 904 F. Supp. 1098, 1108 (D. Haw. 1994).

276. Nat'l Pork Producers Council v. U.S. Envtl. Prot. Agency, 635 F.3d 738, 749–50 (5th Cir. 2011).

277. Drelich, *supra* note 259, at 302–12.

278. *Pork Producers*, 635 F.3d at 749.

279. *Id.* (citing Tex. Sav. and Cmty. Bankers Ass'n v. Fed. Hous. Bd., 201 F.3d 551, 554 (5th Cir. 2000)).

280. *Id.* at 751.

281. *Id.*

As the preceding discussion suggested, however, the statutory language itself would support an equally valid alternative to the definition *Pork Producers* adopted to the discharge of pollutants: the "process of adding pollutants" encompasses the activities at a CAFO that direct pollutants from the point source toward the navigable waters. Such a definition includes the actions of the offending facility in the chain of events that led to the discharge, or, with DMRs, the permit violation that gave rise to the presumption that a discharge had occurred. Further, authorities already cited undermine the notion that the violation only occurs when the pollutant reaches navigable waters.[282] This interpretation of the statutory language provides a stronger basis for permitting and regulating CAFOs.

In *United States National Bank of Oregon v. Independent Insurance Agents of America*, the Supreme Court emphatically rejected any statutory interpretation that elevated a word or sentence to the detriment of the statute as a whole:

> Over and over we have stressed that "[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." No more than isolated words or sentences or punctuation alone [can form] a reliable guide for discovery of a statute's meaning. Statutory construction "is a holistic endeavor," and, at a minimum, must account for a statute's full text, language as well as punctuation, structure, and subject matter.[283]

This is a corollary to the principle that the overriding purpose of the statute as a whole should serve as the primary interpretive tool.[284] Where the most common meaning of a statutory term does violence to the purpose of the statute as a whole, the court should adopt a less common but equally plausible meaning in order to effectuate the statute as a whole.[285] Just one version of this concept finds expression in *Johnson v. United States*:

> [W]e are departing from the rule of construction that prefers ordinary meaning . . . But this is exactly what ought to happen when the ordinary meaning fails to fit the text and when the realization of clear congressional policy . . . is in tension with the result that customary interpretive rules would deliver. [286]

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282. *See supra* Part IV.B.

283. U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., 508 U.S. 439, 455 (1993) (citations omitted).

284. Johnson v. United States, 529 U.S. 694, 707–08, n.9 (2000).

285. *Id.*

286. *Id.*

In the present case, the "clear Congressional policy" seeks to restore the chemical, biological, and physical integrity of the nation's waters.[287] By interpreting "discharge of pollutants" narrowly and based on a resultant condition—the physical presence of pollutants in the waters of the United States—the Fifth Circuit rejected other ways of defining discharges that would have been more amenable to the approach taken by the EPA.[288] Without more, adopting a more expansive definition of "discharge of pollutants" would not have conferred authority on the EPA to regulate new CAFOs that had not yet discharged, but such a definition would have been consistent with the agency's argument for its power to do so. In light of the detriment to the statute that would result from a restrictive definition, the principles of interpretation the Supreme Court articulated required a more expansive view: that "discharge of pollutants" included the facility, the actions of the facility that led to the pollution, and the pollutants included those that had not yet reached navigable waters.[289] Indeed, according to Supreme Court precedent, the Fifth Circuit was obligated to adopt this broader interpretation even if the court considered it less common than the restrictive meaning it adopted.[290]

Without question, a broader interpretation of "discharge of a pollutant" furthers the overriding purposes of the CWA. The *Pork Producers*' interpretation, though, created an interpretive framework in which the court wrongly concluded that the EPA's interpretation of its own powers was arbitrary and capricious.[291] *Pork Producers'* restrictive approach to "discharge of pollutants" thwarted the CWA. As Professor David Drelich observes:

> If "discharge of a pollutant" is to be defined as the entrance of a pollutant into a water of the United States, then an owner or operator of a wet weather facility may be subject to discharge violation penalties on only a very few days. This provides the owner or operator little incentive to apply for an NPDES permit. Environmentally, this interpretation is problematic because it offers nothing that would prevent the imminent pollution of a waterway.[292]

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287. 33 U.S.C. § 1251(a) (2006).

288. *See* Nat'l Pork Producers Council v. U.S. Envtl. Prot. Agency, 635 F.3d 738, 751 (5th Cir. 2011) (citing S.D. Warren Co. v. Main Bd. of Envtl. Prot., 547 U.S. 370, 380–81 (2006)).

289. *See U.S. Nat'l Bank of Or.*, 508 U.S. at 455 (quoting United Savings Assn. of Tex. v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 371 (1988) (stressing the importance of holistic statutory construction).

290. *See id.* (requiring courts to look to the provisions of the statute as a whole and to its object and policy).

291. *Compare id.*at 455 (illustrating the broad interpretive view), *with Pork Producers*, 635 F.3d at 751 (illustrating a restrictive interpretive view).

292. Drelich, *supra* note 259, at 302.

The Fifth Circuit adopted a definition of "discharge of pollutants" that not only undermined the EPA's claimed authority to regulate new CAFOs, but also invalidated the agency's efforts to obtain information on the characteristics of new CAFOs based on its statutory information-gathering authority.[293] Because the agency's ability to gather information on the existence and characteristics of new CAFOs is tied to an initial violation, EPA cannot require facilities to reveal their existence to the agency before they had already discharged pollutants into the nation's waters.[294]

Professor Drelich explains that our interpretation of the term "discharge" carries especially important implications for CAFOs:

> Whether a "discharge" must rely upon an outcome—pollutants entering a navigable water—or simply conduct leading to that outcome, is hardly an academic question. Instead, the resolution of this question has practical importance for the EPA and the owners and operators of certain types of facilities, such as large Concentrated Animal Feeding Operations (CAFOs) that are prone to intermittent instances of unlawful water pollution from production areas or farm fields, often associated with rain storms.[295]

Given the nature of CAFOs, restricting "discharges" to mean the physical entrance of polluted water into a navigable water body reduces a facility's incentive to apply for a permit and seriously limits the EPA's ability to regulate such facilities and prevent the pollution of the nation's waters. The interpretation of the statutory term "discharge" that *Pork Producers* took to invalidate EPA's rules governing new facilities, then, carries profound implications for our ability to regulate CAFOs in a manner that actually prevents water pollution.

D. *Pork Producers: Conflicting Interpretations of EPA Rules, and What These Contradictions Mean*

Pork Producers observed that the CWA contains no provision that explicitly imposes upon a CAFO the duty to apply for a permit after it discharges pollutants, and that the EPA's rules on this issue should receive some deference from the court if they were consistent with the purposes of the Act.[296] The court acknowledged the overriding purpose of the statute as the basis for evaluating the legitimacy of the agency's rule and concluded that the EPA had reached the right

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293. *See* 33 U.S.C. § 1318 (2006) (conferring EPA information gathering authority).

294. *Pork Producers*, 635 F.3d at 752 (holding EPA cannot impose liability for failure to apply for a permit).

295. Drelich, *supra* note 259, at 301–02 (citations omitted).

296. *Pork Producers*, 635 F.3d at 751.

conclusion: after it discharges pollutants into the nation's waters, a CAFO has a duty to apply for a permit.[297] The court reasoned:

> The primary purpose of the NPDES permitting scheme is to control pollution through the regulation of discharges into navigable water. Therefore, it would counter to Congressional intent to hold that requiring a discharging CAFO to obtain a permit is an unreasonable construction of the Act. In fact, the text of the Act indicates that a discharging CAFO must have a permit . . . it logically follows that, at base, a discharging CAFO has a duty to apply for a permit.[298]

Implicit in the court's analysis is a familiar canon of statutory construction: a court cannot presume Congress to have done useless or foolish things.[299] If Congress had conferred authority on the EPA to establish a permitting scheme intended to reduce or prevent water pollution, a court must presume that Congress provided the agency with the authority to enforce that permitting scheme.[300] To confer authority to create a permitting scheme without also empowering the agency to enforce the permits would be futile and absurd. The court concluded that the EPA rules filled a gap in the statute where it was silent in order to create regulatory authority that was plainly consistent with the Act.[301]

A literal reading of the statute, without regard to its overriding purposes, would probably not produce this result with regard to intermittent or sporadic dischargers. The statute provides "[that] the discharge of any pollutant by any person shall be unlawful"[302] and that a discharge is "any addition of any pollutant to navigable waters from any point source."[303]

By upholding the EPA's rules with regard to intermittent dischargers, *Pork Producers* adopted virtually the same justification EPA had offered for its rules regarding new facilities.[304] With an intermittent discharger, a discrete discharge occurs, invoking EPA's authority under the CWA.[305] The EPA considers an intermittent or sporadic discharger as a "CAFO that discharges"—regulated in a manner tantamount to a continuous discharger—subject to ongoing regulation

297. *Id.*
298. *Id.*
299. *Id.*
300. *Accord id.*
301. *Id.*
302. 33 U.S.C. § 1311(a) (2006).
303. *Id.* § 1362(12)(A).
304. *See Pork Producers*, 635 F.3d at 756 (upholding EPA authority to require intermittent dischargers to apply for a permit in order to fulfill EPA's statutory mandate).
305. 2008 CAFO Rules, 73 Fed. Reg. 70,418, 70,423 (Nov. 20, 2008) (stating that intermittent or sporadic discharges are considered "discharges" under the CWA and are prohibited unless authorized by a NPDES permit).

by the EPA.[306] The facility remains a "CAFO that discharges unless the circumstances giving rise to the discharge have changed and the cause of the discharge has been corrected such that the CAFO is not discharging and will not discharge based on the design, construction, operation, and/or maintenance of the facility."[307]

One cannot overemphasize the significance of this rule, which *Pork Producers* blessed: the EPA regulates the intermittent or sporadic discharger *after* the past discharge may have already been resolved.[308] That is, the "addition of any pollutant to navigable waters from a point source" has already occurred, and the civil and/or criminal penalties for that discharge may have already been resolved.[309] But the EPA retains authority to regulate the facility unless and until the facility successfully demonstrates its design, construction, operation, and maintenance will prevent future discharges.[310] In other words, *Pork Producers* acknowledged the necessity of ongoing regulation based on a heightened risk or potential that another discharge would occur because one has already happened in the past.[311]

Pork Producers also approved of the provisions just summarized, despite the clear difference between a continuous and intermittent discharger.[312] The *potential* for another discharge from a facility—even if one is not happening now—confers the EPA authority to regulate an intermittent or sporadic discharger even during times when there has been no new addition of a pollutant to the waters of the nation.[313] This is a logical interpretation. As the court concluded, it would be counter to congressional intent to prevent the EPA from permitting and regulating a facility that discharges.[314]

What is less logical, however, is *Pork Producers*' failure to recognize that the same logic applied to the EPA's rules governing new CAFOs.[315] As an example of the court's illogic, the EPA's Guidance Document to the 2008 rules explains: "Even if it has never previously discharged, the CAFO could be pro-

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306. *Id.*

307. EPA IMPLEMENTATION GUIDANCE, *supra* note 55, at 3.

308. *See Pork Producers*, 635 F.3d at 756.

309. 33 U.S.C. § 1362(12)(A) (2006).

310. 2008 CAFO Rules, 73 Fed. Reg. at 70,423.

311. *See Pork Producers*, 635 F.3d at 751 (upholding duty to apply for dischargers, presumably both continuous and intermittent).

312. *Id.* (not considering continuous and intermittent dischargers separately); *see also*, Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd., 890 F.2d 690, 693 (4th Cir. 1989).

313. *See Pork Producers*, 635 F.3d at 751 (only prohibiting the EPA from imposing duty to apply before there is a discharge).

314. *Id.*

315. *See id.* at 749 (holding the EPA does not have authority to impose duty on CAFOs that propose to discharge).

posing to discharge due to design and construction of the facility, or management practices [among other factors]."[316] Alternatively, an objective assessment under the 2008 Rule that concludes no such features exist that would make discharge likely could have received a no discharge certification would protect the facility from liability for failing to obtain a permit if a discharge does in fact occur.[317]

The facility "proposing to discharge," however, should have a duty to apply for a permit because an objective evaluation of its physical location, proposed volume of production, proximity to water bodies, construction practices, physical design, or proposed management practices suggest a heightened probability for discharges into waters of the United States.[318] The facility that *proposes* to discharge seems to parallel the CAFO that discharges in the rules just discussed: the risk for a discharge from the facility, even if one has not happened, confers authority to regulate, even during times when there has not yet been an actual addition of a pollutant to the waters of the United States.[319]

Both with regard to CAFOs that have discharged intermittently or sporadically and new CAFOs that have not yet discharged, the basis of EPA authority seems to be a heightened risk for a discharge given the characteristics of the specific facility.[320] A CAFO operator must determine if its CAFO design, construction, and management will prevent any discharges in order to be exempted from the permit process.[321] The intermittent discharger has a duty to apply seemingly because its discharge suggests a heightened risk of further discharges in the future: the intermittent discharger must also demonstrate that its design, construction, and management have been corrected to prevent discharges in the future.[322]

Obviously, the difference is that a discharge has already occurred with the intermittent or sporadic discharger. But the EPA indicates that it has ongoing authority to impose permitting requirements on an intermittent discharger does not end unless the facility applies for re-designation on the basis that it has cured the causes for the past discharge.[323] The past discharge, even if the civil or criminal penalties for it have been resolved, confers regulatory authority on the EPA.[324] The past discharge presumably increases the probability of a discharge

316. EPA IMPLEMENTATION GUIDANCE, *supra* note 55, at 3.
317. 2008 CAFO Rules, 73 Fed. Reg. 70,418, 70,423 (Nov. 20, 2008).
318. EPA IMPLEMENTATION GUIDANCE, *supra* note 55, at 6.
319. *See id.* at 4 (indicating factors that increase risk of discharge).
320. *See id.* at 5 (indicating site specific characteristics of CAFOs that discharge or propose to discharge).
321. *Id.* at 4.
322. *Id.* at 5.
323. 2008 CAFO Rules, 73 Fed. Reg. 70,418, 70,423 (Nov. 20, 2008).
324. *See id.*

in the future until the facility cures the defects that caused the discharge.[325] The actions of the facility's owners or operators become the relevant issue in determining whether another discharge will occur.[326] This is precisely the issue discussed in Section IV, which Professor Drelich raised with regard to the definition of discharge: the statute consistently uses language that applies both to the actual pollutant entering navigable waters and the human action at the facility that produced the discharge.[327] Conspicuously, *Pork Producers* embraces this logic by approving of the EPA rules with regard to sporadic or intermittent dischargers.[328] In the interim between two hypothetical intermittent discharges, *Pork Producers* agreed with the EPA that intermittent dischargers should be regulated the same as continuous dischargers even though no new "addition of a pollutant" to navigable waters has occurred.[329]

The same logic that *Pork Producers* embraced applies with equal force to new facilities. *Pork Producers* invalidated agency rules that imposed a duty to apply for a permit or an exemption from permitting based on the following statutory language: "[t]he *discharge of any pollutant* by any person shall be unlawful."[330] From this statutory language the court constructed another sentence, something like this: therefore, until a facility commits this unlawful act, the EPA lacks jurisdiction to prevent the discharge of a pollutant into navigable waters.[331] The second sentence is not a corollary of the first.

Most obviously, the EPA rules that *Pork Producers* invalidated do not penalize a facility for the unlawful act of discharging before they actually discharge.[332] It is true that, after the discharge, the failure to apply for a permit before-the-fact gives rise to an additional penalty.[333] But the EPA would assess no penalty until the unlawful act defined by the statute occurs. Moreover, requiring a facility to apply for a permit does not amount to accusation that the facility has already committed an illegal act when it has not. Instead, permitting or exempt-

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325. *Id.*

326. *See* EPA IMPLEMENTATION GUIDANCE, *supra* note 55, at 4–6 (objective factors describing whether another discharge will occur).

327. Drelich, *supra* note 259, at 290 n.127 ("The difference between a 'state' of noncompliance and an 'act' of noncompliance is the difference between failing to perform an affirmative duty and actively violating a prohibition—in this context, the difference between continually failing to control pollutants and intermittently discharging in violation of § 301(a) of the Act.").

328. *See* Nat'l Pork Producers Council v. U.S. Envtl. Prot. Agency, 635 F.3d 738, 750 (5th Cir. 2011) (upholding duty to apply for discharging CAFOs).

329. *See id.* (not considering continuous and intermittent discharges separately).

330. *Id.* at 749 (quoting 33 U.S.C. § 1311(a) (2006)) (alteration in original).

331. *See id.* at 751 (holding the EPA does not have power to impose duty to seek permit before an actual discharge).

332. *See* 40 C.F.R. § 122.23(d)(1) (2011) (only imposing duty to get permit).

333. 2008 CAFO Rules, 73 Fed. Reg. 70,418, 70,423 (Nov. 20, 2008).

ing new facilities based on the risk factors present for a future discharge serves to improve the integrity of the nation's waters by preventing a discharge before it occurs.

In other words, *Pork Producers* struck down EPA rules that served an obvious and important role in furthering the overriding purpose of the statute.[334] Note that the statute is silent as to how the EPA should go about preventing or regulating discharges into navigable waters from new CAFO facilities.[335] As with the rules pertaining to the duty of intermittent or sporadic dischargers to apply for a permit, the EPA's rules regarding new facilities filled a gap in the statute: how to further the purposes of the Act with regard to a specific type of facility—the type of statutory gap to which *Chevron* applies.[336]

Based on one sentence in the statute that says nothing whatsoever about the scope of EPA authority, but instead addressed the unlawful nature of an individual's act, the *Pork Producers* court concluded that Congress intended to deprive the EPA of any authority to *prevent*—not simply penalize after the fact—discharges that damage the integrity of the nation's waters.[337] In other words, Congress apparently intended to deprive the EPA of the authority to further the overriding purpose of the statute. Without the ability to assess the location, design, construction, and management practices of a facility, the EPA cannot know whether the facility poses a risk for discharging pollutants. Indeed, without a duty to apply for a permit or exemption, the EPA cannot even know that illegal discharges are occurring from facilities that never applied for permits. Both agency actions are necessary to preserve the integrity of the nation's waters.

Pork Producers constructs a strict dichotomy between facilities that discharge and those that do not; this dichotomy may have influenced the court's analysis.[338] One should assume for the sake of argument that CAFOs fall into one of two categories: those that discharge and those that do not. The provisions of the CWA that pertain to the NPDES program contemplate facilities designed to discharge, those with unintended but incidental discharges, and those designed

334. *See Pork Producers*, 635 F.3d at 751 (in striking down provision imposing duty to apply for CAFOs that propose to discharge, the EPA does not have a tool to prevent discharges).

335. *See* 33 U.S.C. §§ 1251–1387 (2006).

336. *See* Chevron USA, Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843, 845 (1984).

337. *See Pork Producers*, 635 F.3d at 751 (citing 33 U.S.C. § 1311(a) (2006)).

338. *Id.* (upholding duty to apply to CAFOs that discharge but not to CAFOs that propose to discharge).

not to discharge at all.[339] CAFOs either fall into the "incidental" or "no discharge" category.

Pork Producers refers to CAFOs that do not discharge and those that discharge, but does not consider how one becomes the other.[340] The invalidated EPA rules were preoccupied with just this question and sought to prevent discharges based on an assessment of risk in the event a non-discharging facility became an incidental one.[341] As stated before, the basic factors that the EPA considered when determining whether a facility "proposes to discharge" were design, construction, maintenance, and management.[342] The EPA's guidance outlines specific factors including the following: proximity to the waters of the United States, production areas exposed to precipitation, open manure storage structures, historic chronic precipitation events, and past discharges.[343] The guidance emphasized that past discharges were only one among these many factors.[344]

These factors underscore that the EPA understood its responsibility to restore the integrity of the nation's waters depended on preventing discharges by assessing the risk a facility posed. That is, the agency focused on "discharges," not only as the discrete event in time when the physical pollutant enters navigable waters, but also the course of human decision making that resulted in the discharge.[345] This approach fits well within Professor Drelich's observation that the statute and case law support a more comprehensive view of the statutory term "discharge."[346] Whereas *Pork Producers*' picture of CAFO discharges depicts only a "before" and "after" rule to classify non-dischargers and dischargers, the EPA's picture depicts a non-discharger at one end, a discharger on the other, and a range of facilities in between at greater or lesser risk for discharging.[347] A new facility or one that simply has not yet discharged may still have features that create a strong likelihood of future discharge. If this is true, some kind of regulation

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339. 33 U.S.C. § 1342 (2006); Drelich, *supra* note 259, at 300, 324 ("A person may receive a permit for a point source designed to discharge, for a point source with incidental discharges, or for a "new source" or other facility designed not to discharge.")

340. *Pork Producers*, 635 F.3d at 751.

341. *See* EPA IMPLEMENTATION GUIDANCE, *supra* note 55, at 4–6 (providing objective risk factors for determining duty to seek permit).

342. *See supra* Part III.C.

343. EPA IMPLEMENTATION GUIDANCE, *supra* note 55, at 2.

344. *Id.* at 3.

345. *Id.* at 3–4 (objective factors that allude to design and management decision leading to a discharge).

346. Drelich, *supra* note 259, at 303–11.

347. *Compare* Nat'l Pork Producers Council v. U.S. Envtl. Prot. Agency, 635 F.3d 738, 756 (5th Cir. 2011) (holding rules rescinding permits for CAFOs proposing to discharge invalid), *with* 40 C.F.R § 122.23(d)(1) (2011) (stating CAFOs who discharge and CAFOs proposing to discharge much apply for requisite permits).

that addresses the risk of discharge from such facilities becomes necessary for the agency to fulfill its duty to restore the integrity of the nation's waters.

A court that comprehends these levels of risk based on the specific characteristics of each facility should shift from a view of environmental protection from the assessment of fines after the water is already polluted to corrective action at the point source to prevent the discharge before it occurs. The court's own approval of rules conferring authority on the EPA to regulate intermittent or sporadic dischargers demonstrates some degree of recognition that the agency should play a role in preventing discharges from a high-risk facility.[348]

Further, the logic that *Pork Producers* adopted with regard to intermittent or sporadic dischargers applies here.[349] In that context, EPA retained regulatory authority even after a discharge in the past had been resolved because the past discharge suggested a heightened risk for further dischargers.[350] With respect to the rules for new facilities, EPA evaluated a facility's design, construction, maintenance and so on to determine whether its features make it a discharge risk.[351] In neither case is there an addition of pollutants to the nation's waters that would give rise to regulatory authority, as, for example, with a continuous discharger. Instead, both the intermittent and sporadic discharger rules as well as the new facilities rules focus on the risk of discharge.[352] *Pork Producers* approved one such set of rules and invalidated the other,[353] and in so doing violated the overarching purpose of the CWA and attributed absurdity to the Congress that enacted it.

The court's decision in *Pork Producers* to invalidate EPA's CAFO rules regarding new facilities now creates the unenviable prospect for the EPA of devising new rules. The subsequent section considers that prospect.

E. *CAFOs: A Regulatory Presumption*

The Supreme Court has explained the function of a so-called regulatory or administrative presumption as follows: "presumption[s] . . . must rest on a sound factual connection between [the] prove[n] and inferred facts."[354] Such presumptions limit the issues the fact finder would have to determine on an indi-

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348. *Pork Producers*, 635 F.3d at 751.

349. *See id.* at 756 (upholding EPA authority to require intermittent dischargers to apply for NPDES permits).

350. *See* EPA IMPLEMENTATION GUIDANCE, *supra* note 55, at 3–4.

351. *Id.*

352. *See id.* (objective factors indicating increased risk of discharged, not whether actually discharging).

353. *See Pork Producers*, 635 F.3d at 751.

354. Nat'l Labor Relations Bd. v. Baptist Hosp. Inc., 442 U.S. 773, 787 (1979).

vidual basis. Professor Drelich noted, for example, that discharges in excess of the permitted limits incorporated into a Discharge Management Report gave rise to a presumption that an illegal discharge had occurred without actual physical proof of the discharge.[355]

As discussed, *Waterkeeper Alliance* rejected earlier EPA rules that imposed a duty to apply for an NPDES permit on facilities that had not yet discharged.[356] *Waterkeeper Alliance* noted, however, that if Congress amended the CWA to include such a duty to apply, the agency record contained facts that could require large CAFOs to seek permits even before they had actually discharged.[357] This includes the facts that a small number of larger CAFOs had applied for permits since the 1970s, the increased quantity of excess manure nutrients at CAFOs, the ecological and human health impacts caused by CAFO manure and wastewater, and the pollutants present in manure and other CAFO wastes that impair water quality.[358]

These characteristics of large CAFOs echo some of the issues discussed in the first part of this article.[359] It is one thing to observe the damage to the nation's waters that result from CAFO operations.[360] It is another to suggest that, by their very nature, CAFOs actually discharge water pollutants. If such a presumption withstood judicial scrutiny, it would make no sense to prohibit EPA regulations from preventing discharges before they happen. The EPA could not exceed its authority by regulating facilities that had not yet discharged if, by their very nature, CAFOs were presumed to be actual dischargers.

The Preamble to the 2008 rules indicates that the EPA took such an approach in the absence of an actual administrative presumption to support it.[361] As this article has discussed, the rules imposed the burden to demonstrate that it would not discharge on a CAFO.[362] The rules assume that a facility "proposes to discharge" and requires a permit unless the facility proves otherwise.[363] With regard to new facilities or any other facility that has not yet discharged, an administrative presumption that CAFOs actually discharge would support the agen-

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355. Drelich, *supra* note 259, at 307.

356. Waterkeeper Alliance, Inc. v. Envtl. Prot. Agency, 399 F.3d 486, 505 (2d Cir. 2005).

357. *Id.* at 506 n.22.

358. *Id.*

359. *See supra* Part II.

360. *See supra* Part II.D.2.

361. *See* 2008 CAFO Rules 2008, 73 Fed. Reg. 70,418, 70,422 (Nov. 20, 2008) (indicating a presumption of discharge based on an objective assessment of CAFO's design, construction, operation, or maintenance).

362. 40 C.F.R. § 122.23(j)(2) (2011) (if there is, in fact, a discharge, the unpermitted facility has the burden to establish that it did not propose to discharge).

363. *See id.* § 122.23(d), (j)(2).

cy's authority to require a permit or exemption without a showing that an actual discharge has entered navigable waters.

Other environmental experts support an administrative presumption that CAFOs actually discharge pollutants into navigable waters.[364] In doing so, they note the requirement that CAFO waste storage facilities are required to meet a zero discharge standard for conditions equivalent to the 25-year, 24-hour storm event.[365] Even with these zero discharge requirements, however, the EPA admits that "there are numerous documented instances in the administrative record of actual discharges at unpermitted CAFOs that are not associated with the 25-year, 24-hour stromes."[366] Further, the rules assume that a point source, instead of nonpoint source, discharges of manure can occur in the absence of site-specific management practices.[367] One such practice would be to eliminate the application of manure to land given certain weather conditions, for example: CAFOs routinely apply manure after precipitation events and in the winter months because—due to the size of their operations—they generate such large quantities of waste that such application must continue. But experts know that—especially with regard to manure applied onto snow—discharges of pollutants are inevitable.[368]

VI. AN INFORMATION DISCLOSURE RULE AND WHAT IT MIGHT ACCOMPLISH

EPA faced challenges to its 2008 CAFO rule—other than those raised by the CAFO industry—that culminated in the *Pork Producers* decision.[369] The Natural Resources Defense Council, Sierra Club, and Waterkeeper Alliance (i.e. Environmental Petitioners) also petitioned the Ninth Circuit for review of the

364. *See* RAETTIG, *supra* note 110. It should also be noted that the *Waterkeeper Alliance* court suggested an administrative presumption as one way the EPA might address the regulatory concerns associated with CAFOs: We also note that the EPA has not argued that the administrative record supports a regulatory presumption to the effect that large CAFOs *actually* discharge. As such, we do not now consider whether, under the CWA as it currently exists, the EPA might properly presume that large CAFOs-or some subset thereof-actually discharge. Waterkeeper Alliance, 399 F.3d 486, 506 (2d Cir. 2005).

365. *Id.* at 3 (citing 40 C.F.R. 412.31(a)(1)).

366. 2003 CAFO Rules, 68 Fed. Reg. 7176, 7201 (Feb. 12, 2003).

367. *See* 40 C.F.R. § 122.23(e) (upheld by Waterkeeper Alliance, 399 F.3d 486, 507 (2d Cir. 2005)).

368. RAETTIG, *supra* note 110, at 4.

369. Nat'l Pork Producers Council v. U.S. Envtl. Prot. Agency, 635 F.3d 738 (5th Cir. 2011).

2008 Rule.[370] After the Environmental Petitioners' claims were consolidated with claims of CAFO industry representatives and transferred to the Fifth Circuit, the Environmental Petitioners severed their claims from the other Pork Producers petitions.[371] Upon severance, the Environmental Petitioners agreed to a dismissal of their claims without prejudice, and entered into a settlement agreement with EPA.[372]

The settlement agreement required the EPA to draft a proposed rule that would require CAFOs to produce information about their operations to the EPA, regardless of whether the CAFOs were discharging or not.[373] The settlement agreement stipulated that the proposed rule would derive its enforcement authority from section 308 of the CWA,[374] a different section of the CWA than the enforcement authority at issue in *Pork Producers*.[375] Section 308 of the CWA authorizes the EPA to gather information from all CAFOs—regardless of whether they are discharging or not—given their status as point source polluters under the CWA.[376]

On October 21, 2011, the EPA released their proposed rule (2011 Proposed Rule), stating that the purpose of the 2011 Proposed Rule was to collect "facility-specific information that would improve EPA's ability to effectively implement the NPDES program and to ensure that CAFOs are complying with the requirements of the CWA."[377] The 2011 Proposed Rule goes on to stipulate penalties for those facilities that are unwilling to comply with these information disclosure requirements.[378] Per the settlement agreement,[379] the 2011 Proposed

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370. Settlement Agreement at 1, National Resource Defense Council v. Environmental Protection Agency, (No. 09-60510) [hereinafter Settlement Agreement], *available at* http://www.waterkeeper.org/ht/action/GetDocumentAction/i/17717.

371. *Id.*

372. *Id.*

373. *Id.* at 2–3.

374. *Id.* at 2 (stating that the "EPA will propose a rule under section 308 of the Clean Water Act, 33 U.S.C. § 1318 [(2006)], to require all owners or operators of CAFOs . . . to submit information to the EPA.").

375. *See* Nat'l Pork Producers Council v. U.S. Envtl. Prot. Agency, 635 F.3d 738, 751 (5th Cir. 2011) (stipulating that the EPA could not require CAFOs to apply for NPDES permits—and therefore require the disclosure of information through the permitting process—without an actual discharge by the CAFO).

376. 33 U.S.C. § 1318 (2006).

377. 2011 Proposed Rule, 76 Fed. Reg. 65,431, 65,431 (Oct. 21, 2011) (to be codified at 40 C.F.R. pts. 9, 122).

378. *Id.* at 65,445 (stating that CAFOs who fail to comply with information disclosure requirements under the 2011 Proposed Rule will be subject to administrative, criminal, and civil penalties under the CWA).

379. Settlement Agreement, *supra* note 370, at 2–3.

Rule stipulates (among other things) that CAFOs would be required to provide the following information:

> (1) The name and address of the owner and operator
>
> (2) If the facility produced livestock under contract with a larger corporation, the name and address of the integrator corporation.
>
> (3) The location of the facility.
>
> (4) The type and number of livestock raised.
>
> (5) Information regarding waste, specifically how and where the owner/operator applies animal waste to the land.
>
> (6) Whether the facility had applied for an NPDES permit.[380]

The information required under the Proposed Rule—though less extensive than what a NPDES permit application would produce[381]—would nevertheless mitigate the widespread problem of undetected CAFOs by requiring all CAFO facilities to provide this information, instead of just permitted facilities.[382] This Rule has the potential to provide EPA with valuable information as to the quantity of waste a facility produces, how it disposes of that waste, the proximity of the facility to waters of the United States, and whether a vertical integrator exists that could share in any liability.[383] Such skeletal information would assist the EPA in assessing the degree of risk a facility posed to discharge wastewater.[384] Even if EPA enacts an information disclosure rule, however, the question remains to what extent such a rule would help to reduce water pollution in the absence of an accompanying permit requirement.[385]

Although information disclosure within the CAFO industry is important for identifying dischargers—or operations at risk of discharging—this Rule does not address the on-going enforcement issues that the EPA continues to struggle with. One should keep in mind what any iteration of the information disclosure rule will fail to accomplish when compared with the permit application process. The provisions of either a general or individual NPDES permit will contain far

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380. 2011 Proposed Rule, 76 Fed. Reg. at 65,437.

381. *See generally* 40 C.F.R. § 122.21 (2011) (for an overview of the NPDES permitting requirements).

382. *See* 2011 Proposed Rule, 76 Fed. Reg. at 65,437 (requiring all CAFOs to submit basic information requirements regardless of whether they are discharging or not discharging).

383. *Id.*

384. *Id.*

385. *See generally id.* (not requiring that CAFOs apply for a permit unless they actually discharge).

more specific information and impose ongoing requirements on the facility to comply with the law.[386]

The comparison of the information disclosed under a NPDES permit versus an information disclosure rule underscores the basic problem with an information disclosure rule: there is no requirement under the proposed rule for an operation to seek a permit if the information disclosed suggests a significant risk for discharges.[387] Gathering CAFO information required by the proposed rule would assist the EPA in targeting operations at risk of discharging, but the EPA could not impose NPDES permitting restrictions until a discharge actually occurs.[388] *Pork Producers* frustrates the value of the 2011 Proposed Rule because it rests on the assumption that a permitting requirement depends on an actual discharge, and not the probability of an actual discharge resulting from the characteristics a facility.[389] In short, the 2011 Proposed Rule, if enacted, would gather valuable CAFO information for the EPA, but does not grant the EPA any enforcement authority to mitigate CAFOs at risk of discharging until they actually discharge.[390]

VI. CONCLUSION: *PORK PRODUCER'S* FALSE DILEMMA

Both *Pork Producers* and *Waterkeeper Alliance* posed an implicit dilemma: despite the indispensable role that permitting plays in making the existence of CAFO facilities known and drafting restrictions appropriate to each facility's characteristics, the framers of the CWA employed language that precludes permitting until after a facility has already broken the law.[391] The apparent conclusion: in order to enforce the CWA with any effectiveness, the regulated have to violate it.

This is a false dilemma. This article has insisted that equally valid interpretations of the CWA exist that validate the EPA's authority to require permitting or exemption of CAFOs before an actual, physical discharge of pollutants

386. *See generally* 40 C.F.R. § 122.21 (2011) (for an overview of the NPDES permitting requirements).

387. *Compare* 40 C.F.R. § 122.21 (2011), *with* 2011 Proposed Rule, 76 Fed. Reg. 65,431 (Oct. 21, 2011).

388. *See* Nat'l Pork Producers Council v. U.S. Envtl. Prot. Agency, 635 F.3d 738, 751 (5th Cir. 2011) (mandating that the EPA has no authority to require a NPDES permit until after a facility has actually discharged).

389. *Id.*

390. *See generally* 2011 Proposed Rule, 76 Fed. Reg. 65,431 (not granting the EPA authority to mandate NPDES permits for CAFOs at risk for discharging).

391. *See generally Pork Producers*, 635 F.3d 738; Waterkeeper Alliance, 399 F.3d 486 (2d Cir. 2005).

into navigable waters occurs. *Pork Producers* reached the opposite result.[392] Given that alternative, valid interpretations were available to the *Pork Producers* court, it should have considered them in light of the Act's ultimate purpose: to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[393] The article has detailed the problems with *Pork Producers*' statutory interpretation and the clear manner in which it frustrates the purpose of the statute according to its own terms.

Whether or not one concludes that the *Pork Producers* panel got it right, it may be helpful to consider statements that would result from this decision by parity of reasoning: 1) A state has no authority to register and license a driver until after she has an accident; 2) A health department has no authority to inspect a restaurant's kitchen and issue it a permit until the restaurant serves poisoned food and endangers the public; 3) The Food and Drug Administration has no authority to test a medication for safety until the drug is released and someone dies from taking it.

Appeals to common sense have little avail, however, if the statutory language compels a contrary result. No such barrier to common sense exists here. The language of the CWA did not tie the court's hands in *Pork Producers* to reach the result it did: the statute does not dictate authority to regulate which commences with the first actual, physical discharge into surface waters. Further, the statute defines its overriding purpose as eliminating pollution. We are not compelled to accept the interpretation that *Pork Producers* reached.

392. *Pork Producers*, 635 F.3d at 756.
393. 33 U.S.C. § 1251 (2006).