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Environmental Law—Regulation of Concentrated Animal Feeding Operations—Reducing the Nuisance: How Arkansas Can Use Its Right-To-Farm Statute to Protect Against the Destruction of CAFOs

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ENVIRONMENTAL LAW—REGULATION OF CONCENTRATED ANIMAL FEEDING OPERATIONS—REDUCING THE NUISANCE: HOW ARKANSAS CAN USE ITS RIGHT-TO-FARM STATUTE TO PROTECT AGAINST THE DESTRUCTION OF CAFOS

No one has a right to use America's rivers and America's waterways that belong to all the people as a sewer. The banks of a river may belong to one man or one industry or one State, but the waters [that] flow between those banks should belong to all the people.

*President Lyndon B. Johnson*¹

I. INTRODUCTION

Although President Johnson made clear his view on water pollution, it was not until pollution caused Ohio's Cuyahoga River to catch fire in 1969² that Congress decided to take a more forceful step towards national water pollution abatement.³ Passed in 1972, the Clean Water Act (CWA) was a response to the nearly unrestrained dumping of pollution into the waterways of the United States.⁴ At the time, two-thirds of the country's lakes, rivers,

1. President Lyndon B. Johnson, Remarks at the Signing of the Water Quality Act of 1965 (October 2, 1965), in Gerhard Peters and John T. Woolley, *Lyndon B. Johnson*, THE AMERICAN PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=27289> (last visited April 19, 2015).

2. Although the exact cause of the fire was never determined, investigations in the days following the blaze pointed to a “discharge of highly volatile petroleum derivatives with a sufficiently low flash point to be ignited by a chance occurrence”—such as a spark from a passing train. Democratic Staff of the Committee on Transportation and Infrastructure, *The Clean Water Act: 30 Years of Success in Peril*, 2-3 (Oct. 18, 2002), available at http://lobby.la.psu.edu/_107th/117_Effluent_Limitation/Congressional_Statements/House/Success_In_Peril.pdf.

3. *Id.* (explaining how the brief fire on the Cuyahoga River sparked a lasting focus on the poor state of the waters of the United States).

4. See Hannah Connor, *Comprehensive Regulatory Review: Concentrated Animal Feeding Operations Under the Clean Water Act from 1972 to the Present*, 12 VT. J. ENVTL. L. 275, 284 (2011) (“Congress made the important decision to prioritize the abatement of water pollution to ensure the security and continuing vitality of the waters in this country.”); Tyler Moore, *Defining “Waters of the United States”: Canals, Ditches, and Drains*, 41 IDAHO L. REV. 37, 40 (2004) (“The Federal Water Pollution Control Act of 1972 (FWPCA)—also referred as the Clean Water Act (CWA)—was Congress’[s] attempt to comprehensively control water pollution of the nation’s waters.”); William L. Andreen, *The Evolution of Water Pollution Control in the United States—State, Local, and Federal Efforts, 1789-1972: Part I*, 22 STAN. ENVTL. L.J. 145, 157 (2003) (“The growing blight of water pollution had, in short, offended the conscience of the nation, and such a national problem demanded a national solution.”). See also S. REP. NO. 92-414, at 3 (1971), reprinted in 1972 U.S.C.C.A.N. 3668,

and coastal waters had become unsafe for fishing or swimming.⁵ Untreated sewage was being dumped into open water.⁶ The goal of the CWA was to completely eliminate “the discharge of pollutants into navigable waters . . . by 1985.”⁷ Although this lofty goal has not yet been accomplished, neither has it been abrogated.⁸

A major culprit of water pollution is agricultural waste.⁹ Although many types of agricultural pollution escape environmental regulation through exemptions or structural loopholes,¹⁰ the CWA purports to regulate one section of the livestock farming industry known as Animal Feeding Operations (AFO) or Concentrated Animal Feeding Operations (CAFO).¹¹

Over the past several decades, CAFOs have decreased in number of facilities but increased considerably in size.¹² Increased numbers of animals at each facility result in the generation of greater amounts of waste and the

3709 (“[T]his legislation would clearly establish that no one has the right to pollute—that pollution continues because of technological limits, not because of any inherent right to use the nation’s waterways for the purpose of disposing of wastes.”).

5. William K. Reilly, *Keep the Clean Water Act Strong*, Op-Ed, N.Y. TIMES, Nov. 28, 2011.

6. *Id.*

7. 33 U.S.C. § 1251(a)(1) (2012).

8. *Id.*

9. Carrie Hribar, *National Association of Local Boards of Health, Understanding Concentrated Animal Feeding Operations and Their Impact on Communities*, NAT’L ASS’N OF LOCAL BDS. OF HEALTH 4 (2010), http://www.cdc.gov/nceh/ehs/docs/understanding_cafos_nalboh.pdf (“The agriculture sector, including CAFOs, is the leading contributor of pollutants to lakes, rivers, and reservoirs.”)[hereinafter IMPACT ON COMMUNITIES].

10. CLAUDIA COPELAND, CONG. RESEARCH SERV., RL31851, ANIMAL WASTE AND WATER QUALITY: EPA REGULATION OF CONCENTRATED ANIMAL FEEDING OPERATIONS (CAFOs) 1 (2010), available at <http://nationalaglawcenter.org/wp-content/uploads/assets/crs/RL31851.pdf> (quoting J.B. Ruhl, *Farms, Their Environmental Harms, and Environmental Law*, 27 ECOLOGY LAW QUARTERLY 263, 265 (2000)).

11. See 40 C.F.R. § 122.23(a)(1) (2012). An AFO is a facility in which livestock or poultry is raised in confinement for at least 45 days in a 12-month period and crops are not raised on the facility. *Id.* An AFO is defined as a CAFO if it meets minimum size thresholds (AFOs with more than 1,000 animals are CAFOs; those with 300-999 animals may be CAFOs, depending on discharge characteristics; and those with fewer than 300 may be CAFOs in some cases) and meet either one of two discharge requirements. 40 C.F.R. § 122.23(a)(4).

12. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-08-944, CONCENTRATED ANIMAL FEEDING OPERATION: EPA NEEDS MORE INFORMATION AND A CLEARLY DEFINED STRATEGY TO PROTECT AIR AND WATER QUALITY FROM POLLUTANTS OF CONCERN 4–5 (2008), available at <http://www.gao.gov/new.items/d08944.pdf> [hereinafter EPA NEEDS MORE INFORMATION] (“No federal agency collects accurate and consistent data on the number, size, and location of CAFOs. However, according to USDA officials, the data USDA collects for large farms . . . can serve as a proxy in estimating trends in CAFOs nationwide from 1982 through 2002. Using these data, we found that the number of large farms that raise animals has increased 234 percent, from about 3,600 in 1982 to almost 12,000 in 2002. We found that the number of animals raised on these farms had also increased.”).

need to dispose of that waste. In order to fully appreciate this problem, one must understand the shocking quantity of waste being produced annually.

In one estimate, the United States Department of Agriculture (USDA) found that around 500 million tons of manure are produced annually by operations that confine livestock and poultry.¹³ Based on this estimate, it is reasonable to presume that CAFOs produce roughly three times the United States Environmental Protection Agency (EPA) estimate of 150 million tons of human sanitary waste produced annually in the U.S. As such, confined animals produced at least forty times the 7.6 million tons of human biosolids that are generated and disposed of by publicly owned treatment works.¹⁴ In contrast to human sanitary waste, which is required by the CWA to be treated before release,¹⁵ CAFO waste is typically collected and stored in a waste pit or pile where it receives minimal or no treatment before it is spread or sprayed onto land as “fertilizer,” a process called “land application.”¹⁶

Originally promulgated in the 1970s, the existing regulations regarding CAFOs do not reflect the rapidly evolving components of the livestock production sector. Furthermore, attempts to amend the outdated regulations have been challenged and subsequently overruled.¹⁷ As a result of recent litigation, the EPA has been precluded from regulating CAFOs before they discharge waste.¹⁸ As a result, every CAFO will produce pollutants before the EPA has the authority to actually regulate the CAFO’s actions. In order for the EPA’s 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 actually discharging.

Because the federal regulations form the floor rather than the ceiling for state environmental regulation, one may conclude that states would maintain higher standards. The reality, however, particularly in Arkansas, is

13. U.S. ENVTL. PROT. AGENCY, AGRICULTURAL NONPOINT SOURCE FACT SHEET, http://water.epa.gov/polwaste/nps/agriculture_facts.cfm.

14. ELLEN SILBERGELD ET AL., PEW COMM’N ON INDUS. FARM ANIMALS PROD., ANTIMICROBIAL RESISTANCE AND HUMAN HEALTH 31, *available at* http://www.ncifap.org/_images/212-2_AntbioRprt_FIN_web%206.7.10%202.pdf (citing *FY-2005 Annual Report Manure and Byproduct Utilization: National Program 206*, U.S. Dep’t Agric., http://www.ars.usda.gov/research/programs/programs.htm?np_code=206&docid=13337 (last modified Oct. 28, 2008)).

15. 33 U.S.C. § 1311(b)(1)(A) (2006).

16. EPA NEEDS MORE INFORMATION, *supra* note 12, at 1 (“Generally . . . these operations retain the manure [and other process wastes] that they produce in storage facilities on-site and periodically dispose of it by spreading [or spraying] it on nearby or adjacent cropland as fertilizer.”).

17. *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 490 (2d Cir. 2005); *Nat’l Pork Producers Council v. EPA*, 635 F.3d 738, 741 (5th Cir. 2011).

18. *Id.*

that the state regulations are no more stringent than the federal regulations.¹⁹ Hence, this article makes evident the deficiencies in federal regulations that cause CAFOs to practically escape liability for their pollution and detrimental effect on local economies, thus necessitating state regulations to protect Arkansas's environment and economy.

One such solution, as seen in Minnesota,²⁰ is the use of right-to-farm statutes to discourage the construction of CAFOs. Right-to-farm statutes were originally promulgated in all states to offer protection from nuisance suits resulting from impending urbanization.²¹ More recently, however, scholars are noting that right-to-farm statutes are no longer effective for the purposes originally intended.²² Minnesota has a similar right-to-farm statute to Arkansas, but has included a provision excluding farms with greater than 1,000 animals.²³ To more effectively regulate CAFOs, this article recommends that Arkansas alter its right-to-farm statute to exclude operations containing more than 1,000 animals.

Part II of this note provides the background of how CAFOs are regulated, both at the federal and state level.²⁴ Part III then relates these regulations to Arkansas, by explaining how the first hog CAFO in Arkansas was approved and why it has so many people and organizations concerned.²⁵ Finally, Part IV analyzes Arkansas's current right-to-farm statute and recommends that Arkansas implement a size limitation for protection from nuisance suits in order to form a compromise between environmental protection and industrialized farms.²⁶

19. See 014-04-006 ARK. CODE R. § 1 (Lexis Nexis 2013) (incorporating “line for line and word for word” the federal regulations); see also Andrew Hecht, *Obstacles to the Devolution of Environmental Protection: States' Self Imposed Limitations on Rulemaking*, 15 DUKE ENVTL. L. & POL'Y F. 105, 116 (2004), for a discussion of states with “no more stringent rules” with regard to water quality.

20. MINN. STAT. ANN. § 561.19(2)(c)(1) (West 2000 & Supp. 2005).

21. See ARK. CODE ANN. § 2-4-101 (2008) (defining the purpose of the statute); see also Terence J. Centner, *Governments and Unconstitutional Takings: When Do Right-to-Farm Laws Go Too Far?*, 33 B.C. ENVTL. AFF. L. REV. 87, 87–88 (2006), available at http://nationalaglawcenter.org/wp-content/uploads/assets/articles/centner_righttofarm.pdf; Nicholas Clark Buttino, *An Empirical Analysis of Agricultural Preservation Statutes in New York, Nebraska, and Minnesota*, 39 B.C. ENVTL. AFF. L. REV. 99, 102–03 (2012).

22. See Centner, *supra* note 21, at 87–88 (noting that right-to-farm laws have been amended to provide too much protection for agricultural pursuits at the expense of surrounding landowners); Neil D. Hamilton, *Right-to-Farm Laws Reconsidered: Ten Reasons Why Legislative Efforts to Resolve Agricultural Nuisances May Be Ineffective*, 3 DRAKE J. AGRIC. L. 103, 118 (1998) (arguing that right-to-farm statutes disproportionately favor agricultural land uses and must be more comprehensive to be effective and fair).

23. MINN. STAT. ANN. § 561.19(2)(c)(1); ARK. CODE ANN. § 2-4-101.

24. See *infra* Part II.

25. See *infra* Part III.

26. See *infra* Part IV.

II. BACKGROUND

At the federal level, CAFOs are regulated almost solely under the CWA.²⁷ Originally promulgated in 1972, the CWA faced no substantive review until 1989, when the Natural Resources Defense Council (NRDC) brought a lawsuit against the EPA.²⁸ This lawsuit resulted in an agreement for the EPA to review and revise certain guidelines affecting CAFOs.²⁹ This agreement resulted in a finalized rule in 2003 establishing new regulatory guidelines for CAFOs.³⁰

In 2005, the Waterkeeper Alliance challenged the new guidelines, claiming the EPA exceeded its statutory authority in forming the new regulations.³¹ In *Waterkeeper Alliance, Inc. v. EPA*, the court held that the EPA did not have authority to issue the new regulations, and that they would need to be reviewed again.³² In response to the *Waterkeeper Alliance* decision, the EPA formulated new regulations in 2008, revising the overruled portions of the 2003 rule.³³ Like the 2003 rule, these new regulations were challenged and eventually overturned on the same basis of the EPA's overreaching its statutory authority.³⁴

A. The Interrelation of the CWA and CAFOs

Agriculture, as a major contributor of nutrient pollution,³⁵ is a primary source of pathogen presence in rivers and streams, thereby causing significant water-quality degradation throughout the country.³⁶ Recognizing this

27. See 33 U.S.C. §§ 1251–1274 (2012).

28. *Natural Resources Defense Council, Inc. v. Reilly*, 1991 U.S. Dist. LEXIS 5334 (D.D.C. 1991).

29. See *id.* at 18.

30. National Pollution Discharge Elimination System Permit Regulations and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations (CAFOs), 68 Fed. Reg. 7176, 7235 (Feb. 12, 2003) (to be codified at 40 C.F.R. pts. 9, 122, 123, 412) [hereinafter 2003 Final Rule].

31. *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 504 (2d Cir. 2005).

32. *Id.* at 504–06.

33. Revised National Pollution Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines for Concentrated Animal Feeding Operations in Response to the *Waterkeeper* Decision; Final Rule, 73 Fed. Reg. 70,418, 70,419 (Nov. 20, 2008) (to be codified at 40 C.F.R. pts. 9, 122, 412) [hereinafter 2008 Final Rule].

34. *Nat'l Pork Producers Council v. EPA*, 635 F.3d 738, 749–50 (5th Cir. 2011).

35. ENVTL. PROT. AGENCY, *Coming Together for Clean Water: EPA's Strategy for Achieving Clean Water*, Public Discussion Draft 2, <https://blog.epa.gov/waterforum/wp-content/uploads/2010/08/Coming-Together-for-Clean-Water-Disc-Draft-Aug-2010-FINAL.pdf> (Aug. 2010) (recognizing agriculture as one of six “main national sources of water degradation”).

36. *Id.*

concern, in 1972 Congress passed the CWA to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”³⁷

The CWA establishes a comprehensive program for protecting and restoring our Nation’s waters.³⁸ Among its core provisions, the CWA prohibits the discharge of all pollutants³⁹ from a point source to United States waters except as authorized by a National Pollutant Discharge Elimination System (NPDES) permit.⁴⁰ When originally promulgating the CWA in 1972, Congress recognized the impracticality of halting all pollution immediately,⁴¹ and therefore included a few key provisions to help guide compliance with the zero discharge objective.⁴²

1. The Role of CAFOs as Point Sources Under the CWA

The CWA establishes two categories of discharges for purposes of water pollution control: point sources and nonpoint sources.⁴³ Most agricultural activities are considered to be nonpoint sources because the pollution generated from these activities occurs in conjunction with soil erosion caused by water and surface runoff.⁴⁴ The CWA, however, specifically defines point sources of pollution to include CAFOs,⁴⁵ which simply means that under the CWA, CAFOs that discharge into federally regulated waters are required to obtain an NPDES permit⁴⁶

37. 33 U.S.C. § 1251(a) (2012).

38. *See* 33 U.S.C. §§ 1251–1274.

39. The CWA defined “pollutant” very broadly to include “dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.” 33 U.S.C. § 1362(6) (2012).

40. 33 U.S.C. § 1342(a)(1) (2012).

41. S. REP. NO. 92-414, at 42 (1972), *reproduced in* 1972 U.S.C.C.A.N. 3668, 3709.

42. 33 U.S.C. § 1342; *see also* S. REP. NO. 92-414, at 8 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3676 (“Progress toward the national goal is to be assisted through the following steps: The legal basis for use of Federal permits to regulate the discharge of pollutants is reinforced and improved. The scope of the 1899 Refuse Act is broadened; the administrative capacity is strengthened. Where the Administrator can identify a direct link between a discharge source and water quality, the Administrator is authorized to tighten controls on the polluter.”).

43. 33 U.S.C. § 1362(14).

44. *See* John H. Davidson, *Thinking About Nonpoint Sources of Water Pollution and South Dakota Agriculture*, 34 S.D. L. REV. 20, 21 (1989).

45. 33 U.S.C. § 1362(14).

46. *See* 33 U.S.C. § 1342 (l)(3)(A); *see also* Davidson, *supra* note 44, at 21 (noting that “[p]oint sources are subject to specific regulations through effluent limitations, ambient water quality standards, and a system of pollution control permits”).

In the CWA, Congress provided a broad definition of the term point sources.⁴⁷ Congress abstained from recognizing any specific industrial point sources—except concentrated animal feeding operations.⁴⁸ Thus, in doing so, Congress expressly recognized CAFOs as dischargers of concern under the CWA.⁴⁹

2. *The Changing Face of the NPDES Permitting System*

One of the main components guiding regulation under the CWA is the NPDES permit program.⁵⁰ The NPDES program was designed to lessen and eventually cease the discharge of pollutants from point sources to United States waters by requiring each source to acquire a permit containing specific “effluent limitations.”⁵¹ These limitations emphasized strength of implementation, compliance, and enforcement as three means by which to realize the CWA’s pollution abatement goals.⁵² Shortly after the implementation of the CWA in 1972, one court stated,

[The NPDES program was created] as a means of achieving and enforcing the effluent limitations. Under the NPDES program, it is unlawful for any person to discharge a pollutant without obtaining a permit and complying with its terms. An NPDES permit serves to transform generally applicable effluent limitations and other standards including those based on water quality into the obligations (including a timetable for compliance) of the individual discharger, and the Amendments provide for direct administrative and judicial enforcement of permits. . . . In short, the permit

47. *Id.*

48. *Id.*

49. *Id.*; see also Connor, *supra* note 4, at 286 (explaining why the express inclusion of CAFOs and express exclusion of agricultural stormwater discharges and return flows from irrigated agriculture signify Congress’s intent to recognize the potential harm from CAFOs and the importance of regulating discharges into navigable waters).

50. See 33 U.S.C. § 1342 (2012).

51. See 33 U.S.C. § 1342(a); see also S. REP. NO. 92-414, at 7–8 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3675 (“Under this Act the basis for pollution prevention and elimination will be the application of effluent limitations. . . . The permit system establishes a direct link between the Federal government and each industrial source of discharge into the navigable waters. . . . The Permit system, as restated by this legislation, prohibits the discharge of pollutants into the navigable waters.”).

52. See, e.g., S. REP. NO. 92-414, at 8 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3676; see also *id.* at 6, *reprinted in* 1972 U.S.C.C.A.N. at 3729 (“When EPA discovers a violation of any effluent limitation, it must provide notice to the polluter and the State. Unless the State initiates the enforcement action within 30 days, EPA shall issue an order requiring compliance or bring a civil suit against the polluter.”).

defines, and facilitates compliance with, and enforcement of, a preponderance of a discharger's obligations under the Amendments.⁵³

Despite these promising guidelines, CAFOs remained highly unregulated for the decades following the implementation of the CWA.⁵⁴ A major change began in 1989 when the NRDC brought a lawsuit against the EPA.⁵⁵ This lawsuit was based on the provision of the CWA that provided that the EPA must not only set standards for the discharge of pollutants, but it also must review and revise those standards as necessary.⁵⁶ As of 1989, the CAFO standards had faced no substantive review or revision. As a result of that lawsuit, on January 31, 1992, a settlement was signed that required the EPA to review and revise the effluent limitation guidelines for several point source categories, including CAFOs, within a certain timeframe.⁵⁷

In 2001, in accordance with the timeline established in the lawsuit between the EPA and NRDC, and in response to a multitude of reports indicating that CAFOs posed a significant threat to water quality and human health, the EPA issued its first new proposed CAFO regulations in twenty-five years ("2001 Proposed Rule").⁵⁸ In 2003, the EPA finalized a significant portion of the 2001 Proposed Rule in the National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines and Standards for CAFOs ("2003 Rule").⁵⁹

a. The 2003 NPDES permit regulation and effluent limitation

Recognizing that nearly forty percent of the Nation's assessed waters show impairments, with improper management of manure from CAFOs as one of the main contributors to the remaining water quality problems, the

53. *EPA v. California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 205 (1976) (citations and footnotes omitted).

54. U.S. Gov't Accountability Office, GAO-03-285, *LIVESTOCK AGRICULTURE: INCREASED EPA OVERSIGHT WILL IMPROVE ENVIRONMENTAL PROGRAM FOR CONCENTRATED ANIMAL FEEDING OPERATIONS 3* (2003), available at <http://www.gao.gov/new.items/d03285.pdf> ("Until the mid-1990s, EPA placed little emphasis on and had directed few resources to its animal feeding operations permit program because it gave higher priority to other sources of water pollution.")

55. *See* *Natural Res. Def. Council, Inc. v. Reilly*, 1991 U.S. Dist. LEXIS 5334 (D.D.C. 1991).

56. 33 U.S.C. §§ 1314(b) (West 2015), (m)(1); 33 U.S.C. § 1311(d) (2012).

57. National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations, 66 Fed. Reg. 2960, 2962 (proposed Jan. 12, 2001) (to be codified at 40 C.F.R. pts. 122, 412).

58. *Id.*; National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines and Standards for Concentrated Animal Feeding Operations, 66 Fed. Reg. 58,556 (proposed Nov. 21, 2001) (to be codified at 40 C.F.R. pts. 122, 412).

59. 2003 Final Rule, *supra* note 30, at 7235.

legislature sought to strengthen the existing regulatory program for CAFOs.⁶⁰ In order to do so, the legislature revised two sections of the Code of Federal Regulations, the NPDES permitting requirements for CAFOs, and the Effluent Limitations Guidelines and Standards for CAFOs.⁶¹

Arguably, the most consequential revision generated by the 2003 Rule was to the CAFOs' "Duty to Apply" for an NPDES permit.⁶² Finally recognizing the overwhelming evidence concerning the potential of CAFOs to discharge pollutants into waters of the United States,⁶³ the EPA attempted to bring all discharging CAFOs into the NPDES permitting program by mandating that all CAFO owners or operators must seek coverage under an NPDES permit, except in very limited situations where they make an affirmative demonstration of no potential to discharge.⁶⁴ This revised "Duty to Apply" seemingly reached an agreeable compromise as it was designed to "identify and ultimately to prevent actual unauthorized discharges to the waters of the United States, consistent with the intent and goals of the Clean Water Act,"⁶⁵ while also allowing operations without a potential to discharge to remove themselves from the permitting scheme.⁶⁶

b. *Waterkeeper Alliance* decision: a narrow construction of "discharges"

However agreeable the 2003 Rule may have seemed, in 2003 a group of environmental and CAFO industry representatives challenged several provisions of the 2003 Rule.⁶⁷ With respect to the EPA's authority to require a point source to apply for an NPDES permit under the CWA, the court in *Waterkeeper Alliance* found that the EPA exceeded its statutory authority by regulating "potential" discharges.⁶⁸ The court stated that the CWA gives the EPA jurisdiction to regulate and control only actual discharges—not potential discharges.⁶⁹ Thus, the 2003 Rule went too far by "impos[ing] permit-

60. *Id.* at 7176 (specifying that "[i]mproperly managed manure has caused serious acute and chronic water quality problems throughout the United States").

61. *Id.* at 7176.

62. *See id.* at 7200; *see also* Connor, *supra* note 4, at 304.

63. 2003 Final Rule, *supra* note 30, at 7201 ("EPA continue[d] to believe that there is a strong need and a sound basis for adopting this duty to apply . . .").

64. *Id.* at 7200.

65. *Id.* at 7201.

66. An operation can be found to have "no potential for discharge" if, based on technical information submitted to the permitting authority, the permitting authority can determine that there is "no potential for any CAFO manure, litter, or wastewater to be added to waters of the United States from an operation's production or land application areas." *Id.* at 7202.

67. *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486 (2d Cir. 2005).

68. *Id.* at 504–06.

69. *Id.*

ting] obligations on all CAFOs regardless of whether or not they have, in fact, added any pollutants to the navigable waters, i.e. discharged any pollutants.”⁷⁰

The court recognized, however, that the CWA’s main objective is, and always has been, to not only reduce, but completely eliminate water pollution.⁷¹ Recognizing that the record did not reflect the EPA’s determination that large CAFOs may reasonably be presumed to discharge, the court narrowed its holding by stating that:

[T]he EPA has marshaled evidence suggesting that such a prophylactic measure may be necessary to effectively regulate water pollution from Large CAFOs, given that Large CAFOs are important contributors to water pollution and that they have, historically at least, improperly tried to circumvent the permitting process. . . . [Therefore, w]e also note that the EPA has not argued that the administrative record supports a regulatory presumption to the effect that Large CAFOs actually discharge.⁷²

Accordingly, the court arguably left the decision in the hands of the EPA to determine that certain categories of CAFOs, based on a regulatory presumption that all large CAFOs do actually discharge under the CWA, must apply for an NPDES permit under the CWA.

c. 2008 revisions attempted to modify the overruled portions of the 2003 rules

In 2008, responding to *Waterkeeper Alliance*, the EPA once again revised its CAFO regulations.⁷³ As required by *Waterkeeper Alliance*, the 2008 Rule removes the mandatory duty for all large CAFOs to apply for an NPDES permit.⁷⁴ The 2008 Rule replaces the “potential” to discharge language, with a rule stating that CAFOs that “discharge or propose to discharge” from their production area or land application area must seek coverage under a NPDES permit.⁷⁵ Further limiting CAFOs that propose to discharge, the Rule states that it must be “designed, constructed, operated, or maintained such that a discharge will occur.”⁷⁶

In order to better define the word “proposes,” the EPA distinguishes it from the word “potential” by saying that “‘potential’ connotes the possibil-

70. *Id.* at 505.

71. *Id.* at 491.

72. *Id.* at 506.

73. 2008 Final Rule, *supra* note 33, at 70,418.

74. *Id.* at 70,422.

75. *Id.* at 70,423; *see also id.* at 70,425 (failing to establish a categorical presumption that all large CAFOs discharge; instead, it “is evaluating various options for exploring the nature of discharge from Large CAFOs”).

76. *Id.* at 70,423.

ity that there might . . . be a discharge,” whereas an operation “proposes” to discharge if it will have an actual discharge.⁷⁷ This highly fact-specific analysis “requires only CAFOs that actually discharge to seek permit coverage and clarifies that a CAFO proposes to discharge if based on an objective assessment [the operation] . . . will [discharge], not simply . . . that it might [discharge].”⁷⁸ As a result, at the time a CAFO proposes to discharge, it must seek permit coverage.⁷⁹

d. *Pork Producers* limited the 2008 revisions

Like the *Waterkeeper Alliance* court’s conclusion regarding the “potential to discharge” provision of the 2003 Rule, the court in *National Pork Producers Council v. EPA* concluded that the “proposal to discharge” provision in the 2008 rules imposed a duty on CAFOs to apply for a water quality permit before they had actually discharged contaminated water.⁸⁰ Thus, just as it had in the 2003 Rule, the EPA overreached its statutory authority in its 2008 attempt to impose such a duty to apply.⁸¹

Despite the fundamental role permitting plays in normalizing CAFOs within the CWA’s ultimate purpose of “restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation’s waters,”⁸² the rules promulgated in *Waterkeeper Alliance* and *Pork Producers* cause an implicit dilemma in statutory interpretation.⁸³ The only conclusion that can be gathered from these rules leaves interpretation of the CWA in quite the conundrum: because discharges cannot be regulated until they have already occurred, in order to enforce the CWA with any effectiveness, the regulated have to violate it.⁸⁴

B. State Regulatory Process

Currently, forty-six states are authorized to administer their own permitting programs for the discharge of pollutants into navigable waters in lieu

77. *Id.*

78. *Id.*

79. 2008 Final Rule, *supra* note 33, at 70,423.

80. *Nat’l Pork Producers Council v. EPA*, 635 F.3d 738, 749–50 (5th Cir. 2011).

81. *Id.* at 751.

82. 33 U.S.C. § 1251 (2006). *See also*, *EPA v. California ex rel. State Water Res. Control Bd.*, 426 U.S. 200 (1976), for a court’s explanation of the importance of the permitting program.

83. *See Nat’l Pork Producers Council v. EPA*, 635 F.3d 738, 751 (5th Cir. 2011); *see also* Christopher R. Brown, *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*, 16 *DRAKE J. AGRIC. L.* 375, 407–22 (2011).

84. *See also* Brown, *supra* note 83, at 407–22.

of the federally administered NPDES program.⁸⁵ Where a state has been authorized to administer its own program, the state becomes the NPDES permit-issuing agency in lieu of the EPA.⁸⁶ For these state programs, the EPA retains oversight and veto authority, as well as authority to enforce any violation of the CWA or of a state-issued discharge permit.⁸⁷ Arkansas follows this procedure, with the Arkansas Department of Environmental Quality (ADEQ) administering the state's permitting program.⁸⁸

1. *Relevant History of Arkansas Water Regulations*

Arkansas facilities had been required since the early 1970s to obtain both a federal NPDES and an Arkansas water permit.⁸⁹ However, Arkansas obtained delegation of the CWA NPDES program in November 1986.⁹⁰ Therefore, since 1986 Arkansas facilities have obtained NPDES permits from the ADEQ as opposed to the EPA.⁹¹

2. *Arkansas NPDES Regulation*

The State of Arkansas has been authorized by the EPA to administer the NPDES Program in Arkansas, including the issuance of general permits to categories of dischargers under the provisions of 40 C.F.R. 122.28, as adopted by reference.⁹² Under this authority, ADEQ may issue a single general permit to a category of point sources located within the same geographic area whose discharges warrant similar pollution control measures.⁹³

The violation of any condition of a general permit constitutes a violation of the Arkansas Water and Air Pollution Control Act⁹⁴ and may sub-

85. See STATE NPDES PROGRAM AUTHORITY, available at http://www.epa.gov/npdes/images/State_NPDES_Prog_Auth.pdf (last visited April 20, 2015).

86. See 33 U.S.C. § 1342(c) (2012).

87. See 33 U.S.C. § 1342(b),(c), (i).

88. 014-04-006 ARK. CODE R. § 6 (LexisNexis 2013).

89. See Walter G. Wright, Jr. & Albert J. Thomas III, *The Federal/Arkansas Water Pollution Control Programs: Past, Present, and Future*, 23 U. ARK. LITTLE ROCK L. REV. 541, 689 (Spring 2001).

90. *Id.*

91. *Id.*

92. 014-04-006 ARK. CODE R. § 1 (LexisNexis 2013).

93. *Id.* Specifically, in accordance with 40 C.F.R. §122.28 (2008), the ADEQ is authorized to issue a general NPDES permit if there are a number of point sources operating in a geographic area that: (a) involve the same or substantially similar types of operations; (b) discharge the same types of wastes; (c) require the same effluent limitations or operating conditions; (d) require the same or similar monitoring requirements; and (e) in the opinion of the Director, are more appropriately controlled under a general permit than under individual permits. *Id.*

94. ARK. CODE ANN. §§ 8-4-101 to -107 (2008).

ject the discharger to the penalties and revocation of coverage under the general permit.⁹⁵ Upon issuance of the final general permit for this type of discharge, operators that are considered qualified for coverage under this general permit must submit a written notice of intent to the Director for coverage under the general permit.⁹⁶

III. CAFO CONCERNS IN ARKANSAS

The ADEQ approved the first swine CAFO in Arkansas in the spring of 2013.⁹⁷ The approval of this hog farm, located in Newton County, caused much concern in nearby communities. Citizens are primarily concerned due to the hog farm's location near the Buffalo River and other town landmarks, such as a local elementary school.⁹⁸ Citizens are also concerned about the lack of notice before the approval of the CAFO.⁹⁹ In order to protect the community and the residents, a coalition of environmental groups have formed and filed a lawsuit against the federal agencies that provided loans to build the CAFO.¹⁰⁰

A. The First Hog CAFO in Arkansas

In the spring of 2013 the ADEQ granted a commercial hog farm, C&H Hog Farm ("C&H"), approval to open in Newton County, Arkansas, near the banks of Big Creek, one of the largest tributaries of the Buffalo National River.¹⁰¹ According to a press release from ADEQ, C&H is the first facility in the state to get a CAFO permit.¹⁰² The permit allows C&H to house 6,503 hogs: 2,500 sows, three boars, and another 4,000 piglets, which at three weeks old will be trucked off to another facility to be fattened for slaughter.¹⁰³ The waste generated by these animals will amount to more than 92,000 pounds of nitrogen and more than 31,000 pounds of phosphorus per

95. 014-04-006 ARK. CODE R. § 106 (LexisNexis 2013).

96. 014-04-006 ARK. CODE R. § 207 (LexisNexis 2013).

97. Complaint at 2, Buffalo River Watershed Alliance v. USDA, No. 4:13-CV-450 DPM (E.D. Ark., Aug. 6, 2013), available at <http://earthjustice.org/sites/default/files/files/Bufferalo-River-Complaint.pdf>.

98. *Id.* at 27.

99. See *infra* note 122.

100. Complaint, *supra* note 97.

101. *Id.* at 2.

102. See Max Brantley, *Lawsuit Filed to Stop Hog Feeding Operation in Buffalo Watershed*, ARK. TIMES, Aug. 6, 2013, available at <http://www.arktimes.com/ArkansasBlog/archives/2013/08/06/lawsuit-filed-to-stop-hog-feeding-operation-in-buffalo-river-watershed#more>.

103. Complaint, *supra* note 97, at 24.

year.¹⁰⁴ The hogs belong to Cargill, by revenue the largest privately held company in the nation and the sole customer for C&H.¹⁰⁵

B. Community Concerns Regarding the Placement of the CAFO

Members of nearby communities, including Mt. Judea, are alarmed by the approval of the hog farm.¹⁰⁶ C&H facility's treatment system consists of in-house shallow pits with a capacity of 759,542 gallons, a settling basin with a capacity of 831,193 gallons, and a holding pond with a capacity of 1,904,730 gallons.¹⁰⁷ The gestation and farrowing barns are built with slatted floors and over shallow pits.¹⁰⁸ The waste collected in these pits drains to the settling basin, then subsequently drains into the holding pond via a pipe and an emergency overflow spillway.¹⁰⁹ The waste from the two storage ponds, referred to as lagoons, is then applied to nearby land.¹¹⁰ In fact, "[a]ll animal wastes generated by [the farm] will be disposed of through land application . . ." ¹¹¹ The waste will be applied on 17 fields, consisting of approximately 630 acres.¹¹²

This type of storage lagoon has been shown to contaminate groundwater. In eastern North Carolina, studies have conclusively shown that swine CAFOs have contaminated shallow groundwater.¹¹³ A study conducted in North Carolina showed that *E. coli*¹¹⁴ was found more frequently in groundwater on swine farms than on crop farms without swine.¹¹⁵ Furthermore,

104. *Id.*; see also DeHaan, Grabs & Associates, LLC, Nutrient Management Plan for C&H Hog Farms, 119, 138 (May 2012), available at http://www.adeq.state.ar.us/ftproot/Pub/WebDatabases/PermitsOnline/NPDES/PermitInformation/arg590001_noi_20120625.pdf.

105. Complaint, *supra* note 97, at 2.

106. See John Eligon, *2,500 Pigs Join Debate Over Farms vs. Scenery*, N.Y. TIMES, Dec. 27, 2013, http://www.nytimes.com/2013/12/28/us/2500-pigs-join-debate-over-farms-vs-scenery.html?pagewanted=1&_r=0 (“‘I was just sick over it—I just couldn’t believe it,’ said Jewell Fowler, 87, who found out about the hog farm after it had been approved, through a notice in a local newspaper.”).

107. Complaint, *supra* note 97, at 25.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. M.E. Anderson & M.D. Sobsey, *Detection and Occurrence Of Antimicrobially Resistant E. Coli in Groundwater on or Near Swine Farms in Eastern North Carolina*, 54 WATER SCIENCE & TECH. 211, 218 (2006), available at <http://www.iwaponline.com/wst/05403/wst054030211.htm>; see also IMPACT ON COMMUNITIES, *supra* note 9, at 3–4.

114. *E. coli* is regularly used to indicate fecal contamination of water, and its presence is regarded as evidence of a public health risk from intestinal pathogens. Anderson & Sobsey, *supra* note 113, at 218.

115. *Id.*

because subsurface flow contributes a considerable portion of the total flow of many rivers, contaminated groundwater can be a source of contamination of surface waters.¹¹⁶ Additionally, runoff from sprayfields, which is the system C&H plans to use, contributes nutrients, suspended solids, and other pollutants to surface waters.¹¹⁷

The waste storage lagoons are also prone to leaks and spills, as well as being vulnerable to inclement weather.¹¹⁸ Over a period of three years, 1,000 spills or pollution incidents occurred at livestock feedlots in ten states and 200 manure-related fish kills resulted in the death of 13 million fish.¹¹⁹ In 1999, Hurricane Floyd hit North Carolina, causing at least five storage lagoons to burst and flooding approximately forty-seven others.¹²⁰

The location of C&H's land application is less than ideal and concerns area residents for a multitude of reasons. First, the fields directly abut several homes and residences.¹²¹ Despite the fact that application for coverage under the state general permit required identification of "separation distance from closest residences, business, [and] churches," C&H did not supply this information.¹²² Because the information is also not located in the environmental assessment, it is impossible to determine exactly what effects the land application will have on surrounding areas in terms of health impacts through particulates, as well as odor.

Second, C&H incorrectly stated the distance between the hog farm and Mount Judea Elementary School, and it did not consider the land application

116. See Michelle B. Nowlin, *Sustainable Production of Swine: Putting Lipstick on A Pig?*, 37 VT. L. REV. 1079, 1088 (2013) (citing Michael Mallin, *Impacts of Industrial Animal Production on Rivers and Estuaries*, 88 AM. SCIENTIST 2, 11 (2000)); see also IMPACT ON COMMUNITIES, *supra* note 9, at 3–4.

117. See PEW COMM'N ON INDUS. FARM ANIMAL PROD., PUTTING MEAT ON THE TABLE: INDUSTRIAL FARM ANIMAL PRODUCTION IN AMERICA 23 (2008), http://www.ncifap.org/_images/pcfifapsmy.pdf [hereinafter PUTTING MEAT ON THE TABLE].

118. See Eligon, *supra* note 106 ("Environmentalists also worry that rain could cause the manure to run off into streams and creeks, especially because of the type of topography in the area. Known as karst, it is essentially a permeable limestone rock with many cracks and caves beneath the surface that water flows through quickly and easily, potentially allowing contaminants from the manure to seep into the ground and settle throughout the watershed.")

119. FACTS ABOUT POLLUTION FROM LIVESTOCK FARMS, <http://www.nrdc.org/water/pollution/ffarms.asp> (last visited April 20, 2015).

120. See *id.* Only one year before this occurred, North Carolina recognized the significant dangers posed by CAFOs by placing a moratorium on the construction of any new CAFOs. H.R. 458, 1997 Gen. Assemb., Reg. Sess., (N.C. 1997), amended by H.R. 188, 1998 Gen. Assemb., Reg. Sess. (N.C. Sess. 1998).

121. Complaint, *supra* note 97, at 28.

122. *Id.* at 27.

fields that directly abut the school.¹²³ Because particulates can be especially harmful to children,¹²⁴ this is a primary concern of area residents.¹²⁵

According to research, residents are justified in their concerns.¹²⁶ Scientists have proven that the odors emanating from swine CAFOs are not merely unpleasant, but that they comprise a myriad of dangerous chemical compounds, including ammonia, hydrogen sulfide (which breaks down to sulfur dioxide), and volatile organic compounds (VOCs).¹²⁷ These compounds have a measurable adverse effect on human health.¹²⁸ For example, ammonia, an irritant that affects the skin, eyes, nose, and throat, can cause respiratory distress, including asthma.¹²⁹ Exposure to low levels of ammonia over a long period of time can lead to respiratory and pulmonary disease.¹³⁰ Another dangerous compound, hydrogen sulfide, is a neurotoxin that can cause rapid unconsciousness and death through respiratory paralysis and asphyxiation.¹³¹ The EPA itself recognizes that CAFO pollution can be detrimental to the health of nearby residents.¹³² More than seventy studies have been published associating CAFO air emissions with harm to public health and welfare.¹³³ Studies also link CAFOs to respiratory symptoms, head-

123. *Id.*

124. IMPACT ON COMMUNITIES, *supra* note 9, at 5 (“While all community members are at risk from lowered air quality, children take in 20-50% more air than adults, making them more susceptible to lung disease and health effects.”); *see also* CAFO AIR POLLUTION AND CHILDREN: A PRESCRIPTION FOR PRECAUTION, http://www.adeq.state.ar.us/ftproot/Pub/WebDatabases/PermitsOnline/NPDES/PermitInformation/ARG590001_Article%20for%20CAFO%20Air%20Pollution%20and%20Children_20130508.pdf (last visited April 20, 2015).

125. Brantley, *supra* note 102 (“A swine facility this large will put children at the Mount Judea School at high risk of health impacts including asthma and other respiratory conditions.”).

126. *See* IMPACT ON COMMUNITIES, *supra* note 9, at 5–7.

127. *See* J. Nicholas Hoover, *Can’t You Smell That Smell? Clean Air Act Fixes for Factory Farm Air Pollution*, 6 STAN. J. ANIMAL L. & POL’Y 1, 5–8 (2013) (citing CLAUDIA COPELAND, CONG. RESEARCH SERV., RL 32948, AIR QUALITY ISSUES AND ANIMAL AGRICULTURE: A PRIMER 3 (2010)); *see also* IMPACT ON COMMUNITIES, *supra* note 9, at 5.

128. CLAUDIA COPELAND, CONG. RESEARCH SERV., RL 32948, AIR QUALITY ISSUES AND ANIMAL AGRICULTURE: A PRIMER 3 (2010).

129. DAVID WALLINGA, INST. FOR AGRIC. AND TRADE POLICY, CONCENTRATED ANIMAL FEEDING OPERATIONS: HEALTH RISKS FROM AIR POLLUTION (2004), *available at* http://www.iatp.org/files/421_2_37388.pdf; *see also* IMPACT ON COMMUNITIES, *supra* note 9, at 5–6.

130. WALLINGA, *supra* note 129.

131. *Id.*; *see also* Nowlin, *supra* note 116, at 1090 (“[W]hen CAFO ventilation systems fail, the confined animals—and even CAFO workers—can quickly be overcome and die from hydrogen sulfide poisoning.”) (citing FRANCIS THICKE, A NEW VISION FOR IOWA FOOD AND AGRICULTURE 33, 46 (2010), *available at* <http://www.markaronson1.com/thicke.pdf>).

132. Animal Feeding Operations Consent Agreement and Final Order, 70 Fed. Reg. 4,959 (Jan. 31, 2005).

133. The Humane Society of the U.S. *et al.*, PETITION TO LIST CONCENTRATED ANIMAL FEEDING OPERATIONS UNDER CLEAN AIR ACT SECTION 111(B)(1)(A) OF THE CLEAN AIR ACT,

aches, nausea, increased incidence of infant mortality, and depression.¹³⁴ In one town in Utah, local hospital visits for respiratory and diarrheal illnesses tripled within five years of the construction of one of the nation's largest hog CAFOs.¹³⁵

Apart from the location and potential health hazards of the hog farm, the lack of notice is of concern to many. Residents are concerned that the lack of notice and planning as to the location could mean more CAFOs being placed in the area.¹³⁶ According to USDA requirements, a finding that a proposed CAFO will not have a significant impact on the area must be published "in the newspaper of general circulation in the vicinity of the proposed action and in any local or community-oriented newspapers within the proposed action's area of environmental impact."¹³⁷ So although the approval of the CAFO was published in the *Arkansas Democrat Gazette*—a newspaper of general circulation in the vicinity—it was not published in any local or community-oriented newspapers.

Finally, the potential environmental impacts could have serious detrimental effects on the local economy.¹³⁸ In fact, the Buffalo National River is a destination for more than 1,000,000 tourists each year and generates \$38,000,000 for the local economy.¹³⁹ The area surrounding the Buffalo relies heavily on tourism. In the event that excessive runoff from either the hog farm or its land application damages the Buffalo River, or any tributary thereof, the residents that rely on tourism would pay the cost.

AND TO PROMULGATE STANDARDS OF PERFORMANCE UNDER CLEAN AIR ACT SECTIONS 111(B)(1)(B) AND 111(D) (2009), *available at* <http://www.humanesociety.org/assets/pdfs/farm/hsus-et-al-v-epa-cafo-caa-petition-final.pdf>.

134. *See* Environmental Integrity Project *et al.*, PETITION FOR THE REGULATION OF AMMONIA AS A CRITERIA POLLUTANT UNDER CLEAN AIR ACT SECTIONS 108 AND 109 43, 49 (2011), *available at* http://www.centerforfoodsafety.org/files/petitionammonia-as-criteria-pollutant04062011_59802.pdf; *see also* IMPACT ON COMMUNITIES, *supra* note 9, at 6–7.

135. WALLINGA, *supra* note 129.

136. *See* Brantley, *supra* note 102 (“[T]he notice of FSA’s environmental assessment was never published in a local newspaper in Mount Judea. FSA also failed to inform the National Park Service Superintendent of the Buffalo National River of the environmental review as required, and the superintendent did not find out about the environmental assessment and guarantee assistance until well after it had been approved for the C&H operation.”).

137. Complaint, *supra* note 97, at 34.

138. Amended Complaint at 2, Buffalo River Watershed Alliance v. USDA, No. 4:13-CV-450DPM (E.D. Ark., Dec. 23, 2013), *available at* <http://buffaloriveralliance.org/Resources/Documents/18.%20Amended%20complaint%202013-12-23.pdf>; *see also* THE ECONOMIC IMPACT OF TOURISM IN ARKANSAS, <http://www.arkansas.com/userfiles/editor/docs/apt-annual-report-financials-2012.pdf>. This is a Department of Tourism report from 2012 that shows the importance of tourism to the Arkansas economy. *Id.* In Newton County alone, where C&H is located, tourism expenditures were almost \$12,000,000, generating over \$277,000 in local taxes and supporting 138 jobs. *Id.* C&H has stated it would provide 8-10 jobs and generate an estimated \$25,000 in local taxes. *Id.*

139. Amended Complaint, *supra* note 138, at 2.

In addition, although some residents are under the impression that this farm will be a boost to the economy,¹⁴⁰ research shows that CAFOs have the opposite effect on local economies.¹⁴¹ Although CAFOs are brought into communities with the promise of an increase of local jobs and the local tax base, any tax benefits resulting from increased economic activity are more than offset by increasing public expenditures for schools, law enforcement, and social services, in addition to the increased costs of maintaining roads and bridges due to increased truck traffic hauling feed and livestock to and from CAFOs.¹⁴² The few jobs that are created often go to people from outside the community.¹⁴³ Furthermore, most of the promised increases in tax revenues never materialize, as CAFOs spend relatively little for feed or other operating needs within their local communities.¹⁴⁴ Whereas locally owned and controlled farms tend to buy their supplies and services locally, corporate owned facilities are typically under contract with suppliers outside of the community.¹⁴⁵

C. Coalition Formed to Protect the Community

Fortunately, the community members are not the only ones complaining. In early August, a coalition formed by the Buffalo River Watershed Alliance, the Arkansas Canoe Club, the National Parks Conservation Association, and the Ozark Society (collectively referred to as “the Coalition”) sued the two federal agencies that backed the loan to build the facility, claiming the Farm Services Agency (FSA) and the Small Business Administration (SBA) failed to do adequate environmental assessments and failed to provide adequate public notice.¹⁴⁶ The Coalition claims that in guaranteeing a loan to C&H, the FSA and SBA violated the National Environmental Policy Act (NEPA),¹⁴⁷ the Endangered Species Act (ESA),¹⁴⁸ the Adminis-

140. See Eligon, *supra* note 106 (“Many see it as an economic bright spot in Newton County, which has high poverty.”).

141. See IMPACT ON COMMUNITIES, *supra* note 9, at 11 (discussing the evidence showing that CAFOs effect property value). See also Lauren Brooks, *Concentrated Animal Feeding Operations: What Are the Potential Community Costs?* 11–12, <http://buffaloriveralliance.org/Resources/Documents/PG26%20-%20Community%20Costs%20of%20CAFOs.pdf>; John Ikerd, *Impacts of CAFOs on Rural Communities*, http://web.missouri.edu/ikerdj/papers/Indiana%20-%20CAFOs%20%20Communities.htm#_ftn2.

142. See IMPACT ON COMMUNITIES, *supra* note 9, at 11. See also Brooks, *supra* note 141, at 11–12; Ikerd, *supra* note 141.

143. Ikerd, *supra* note 141.

144. *Id.*; see also PUTTING MEAT ON THE TABLE, *supra* note 117, at 41.

145. See PUTTING MEAT ON THE TABLE, *supra* note 117, at 41.

146. Complaint, *supra* note 97, at 2.

147. 42 U.S.C. § 4321 (2006).

148. 16 U.S.C. § 1531 (2006).

trative Procedure Act (APA),¹⁴⁹ and the Buffalo National River Enabling Act.¹⁵⁰

The plaintiffs want the court to invalidate the FSA's environmental assessment and finding of no significant impact.¹⁵¹ They also want to enjoin the FSA's and SBA's guaranteed assistance of about \$3,300,000.¹⁵² The Coalition has also been critical of the ADEQ and the state permitting process that approved the facility, though it has not sued the state so far.¹⁵³

The problems generated by CAFOs—environmental and economic—are perpetuated by the lack of federal regulation. As previously brought to light, however, rules promulgated by federal lawsuits prevent CAFOs from being properly regulated.¹⁵⁴ Thus, the Coalition is attacking the CAFO problem through the only legal avenue possible. By invalidating the CAFO's loan, the Coalition is hoping to shut down the CAFO. While this argument may work to eliminate the one existing CAFO, there is always the possibility of more farms. In order to prevent these same problems, Arkansas needs to look for more long-term statutory solutions.

IV. A SOLUTION FOR ARKANSAS: ALTER RIGHT-TO-FARM STATUTES TO ACCOUNT FOR CAFOs

Agricultural operations in Arkansas have enjoyed protection against nuisance claims ever since state legislators adopted a "right-to-farm" law in 1981.¹⁵⁵ As was the case with most states that enacted similar statutes, the law was designed to protect agricultural operations from impending urbanization and to reduce nuisance actions brought by surrounding property owners.¹⁵⁶ Although right-to-farm laws were intended to protect producers of animals, most legislatures did not consider the possibility that this might involve thousands of animals accompanied by highly offensive odors.¹⁵⁷

As CAFOs have now become a reality in Arkansas, state legislators should reconsider Arkansas's right-to-farm-statute. The current statute pro-

149. 5 U.S.C. § 701 (2006).

150. Pub. L. No. 92-237, 86 Stat. 44 (1972) (codified at 16 U.S.C. §§ 460m-8 to 460m-14).

151. Complaint, *supra* note 97, at 44–45.

152. *Id.*

153. Brantley, *supra* note 102.

154. *See supra* Part II.A.2.

155. ARK. CODE ANN. § 2-4-101 (2008).

156. *See id.* (defining the purpose of the statute); *see also* Centner, *supra* note 21, at 87–88; Buttino, *supra* note 21, at 102–03.

157. *See* Terence J. Centner, *Nuisances from Animal Feeding Operations: Reconciling Agricultural Production and Neighboring Property Rights*, 11 DRAKE J. AGRIC. L. 5, 8–9 (2006); *see also* IMPACT ON COMMUNITIES, *supra* note 9, at 6–7 (discussing the shift from family farms to industrial farms).

fects even those farms that began as small family farms and have grown into massive industrialized operations. Because the federal regulations governing CAFOs are inadequate, state laws such as those governing nuisances must be used to protect the environment and economy of Arkansas. Implementation of size limitations in Arkansas's right-to-farm statute would benefit the state in three main ways: (1) the risk of overspraying would be reduced, (2) odor would be more properly managed, and (3) negative effects on the economy would be reduced.

A. Arkansas's Current Right-to-Farm Statute

Arkansas's right-to-farm law broadly defines an "agricultural operation" as "an agricultural, silvicultural or aquacultural facility or pursuit conducted, in whole or in part, including . . . the care and production of live-stock and livestock products."¹⁵⁸ Arkansas courts have not yet fully explored the scope of this definition.¹⁵⁹ Further in the statute, however, agricultural operations are excluded from nuisance suits even when there has been a "change in ownership or size, . . . employment of new technology, or change in the type of agricultural product produced."¹⁶⁰ From these statutes, it seems likely that most agricultural operations in Arkansas, including massive CAFOs that started as family farms, are exempt from nuisance suits.

There are, however, two exclusions delineating when the right-to-farm defense would not be available to an agricultural producer. The first exclusion states that the right-to-farm defense cannot be used when there is pollution of or change in the condition to the waters of a stream.¹⁶¹ While this exclusion ensures that CAFOs, or any other agricultural producer, can still be held liable as a nuisance for pollution to the waters of a stream, it does not address the many other problems created by CAFOs, such as odor or the negative effects to the local economy.¹⁶² Furthermore, one of the major concerns with a CAFO is the effect of a major flood in the area causing runoff to rapidly devastate local water sources.¹⁶³ According to this statute, the CAFO could still be held liable as a nuisance, but a major body of water

158. ARK. CODE ANN. § 2-4-102 (2008).

159. See L. Paul Goeringer & H.L. Goodwin, *An Overview of Arkansas' Right-to-Farm Law*, 9 J. FOOD L. & POL'Y 1, 4 (2013) (determining that although Arkansas courts have not tackled the issue, it is likely that traditional agricultural operations, such as livestock and row crops, are covered under Arkansas's right-to-farm statute, but more non-traditional "agricultural operations" would be determined on a case-by-case basis).

160. ARK. CODE ANN. § 2-4-107 (2008).

161. *Id.* at § 106.

162. *See supra* Part III.B.

163. *Id.*

would already have been destroyed. A better statute would prevent this destruction from occurring.

The second exclusion does not exempt agricultural operations from statutory obligations under federal or state laws.¹⁶⁴ Because of the Supremacy Clause of the U.S. Constitution, the right-to-farm statute cannot preempt federal environmental laws, such as those for CAFOs under the CWA.¹⁶⁵ Thus, the right-to-farm statute may provide protection for the nuisance caused by a violation of the CWA, but does not shield an agricultural producer from EPA enforcement of the CWA. In fact, in Arkansas, compliance with a statute such as the CWA would create a “rebuttable presumption that an agricultural operation is not a nuisance.”¹⁶⁶ As previously demonstrated, however, the current state of the CWA does not adequately protect the environment and citizens of Arkansas.¹⁶⁷ Therefore, an agricultural producer that is in compliance with the CWA would automatically be deemed not to be a nuisance, although it is likely producing many nuisance-like effects on surrounding properties.

B. A Size Limitation Would Remedy Many of the Problems

Because the problems stemming from CAFOs are due to the concentration of animals, one solution to Arkansas’s overwhelmingly one-sided statute is to impose size limitations.¹⁶⁸ Under this approach, operations that are too large would not qualify for anti-nuisance protection.¹⁶⁹

Minnesota’s legislature has incorporated a size limitation in its right-to-farm statute.¹⁷⁰ The state’s law specifically excludes animal feedlot facilities “with a swine capacity of 1,000 or more animal units . . . or a cattle capacity of 2,500 animals or more.”¹⁷¹ Although many other provisions could be made to give similar protection,¹⁷² a size limitation such as the one seen in

164. See Goeringer & Goodwin *supra* note 159, at 10–11 (citing Margaret Rosso Grossman & Thomas G. Fischer, *Protecting the Right to Farm: Statutory Limits on Nuisance Actions Against the Farmer*, 1983 WIS. L. REV. 95, 150–57 (1983)).

165. See *id.* The Supremacy Clause of the U.S. Constitution states that the U.S. “Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land[.]” U.S. CONST. art. VI, § 2.

166. ARK. CODE ANN. § 2-4-107(c)(2) (2008).

167. See *supra* Part III.B. (explaining how federal cases overruling certain portions of the permitting requirements of the NPDES permit system leave the CWA in a state that does not sufficiently protect Arkansas waters).

168. See Centner, *supra* note 157, at 14.

169. See *id.*

170. MINN. STAT. ANN. § 561.19(2)(c)(1) (West 2000 & Supp. 2005)

171. *Id.*

172. See IMPACT ON COMMUNITIES, *supra* note 9, at 11 (discussing the states having overturned their strict right-to-farm statutes).

Minnesota would ensure immediate protection for the areas surrounding CAFOs. A size limitation would eliminate or reduce three of the major problems seen with CAFOs: (1) water pollution due to runoff from overspraying, (2) odor and the negative health effects associated with the odor, and (3) harm to the economy. Moreover, this kind of size limitation, as opposed to a flat prohibition, provides the compromise sought by both environmentalists and corporate farmers.

V. CONCLUSION

Regulated primarily, if not solely, under the CWA, CAFOs present a multitude of problems—environmental as well as economic. Unfortunately, however, regulation of CAFOs under the CWA has been excessively limited. The two cases limiting regulation of CAFOs under the CWA eliminated one of the most crucial elements of regulation—the regulation of a CAFOs discharge.¹⁷³ The current state of the law requires CAFOs to discharge before being able to regulate the discharge.¹⁷⁴

This paradox has recently become a problem in Arkansas due to the construction of the first hog CAFO in Arkansas.¹⁷⁵ After members of communities near the hog farm voiced concern regarding the hog CAFO, a coalition of environmental groups sued the federal agencies providing a loan for the hog farm.¹⁷⁶ Because of the lack of federal regulations, the coalition could not attack the CAFO based on the environmental concerns.¹⁷⁷ Instead, the coalition is hoping to close the CAFO by invalidating the loans, thus eliminating the problem.

Moreover, because the federal regulations are inadequate and incapable of being made adequate without major revision, Arkansas state law needs to address the problem. Arkansas's outdated right-to-farm statute needs to be revised to include a size limitation.¹⁷⁸ Currently, the statute includes all farms, regardless of current size or how the farm has expanded since its inception.¹⁷⁹ Because the extreme concentration of animals is the main problem on such farms, a size limitation for the right-to-farm statute would be a compromise that would benefit the areas surrounding the farms. By implementing a size limitation in Arkansas's right-to-farm statute, CAFOs would

173. *See supra* Part II.A.

174. *See supra* Part II.A; *see also* Brown, *supra* note 83, at 407–22.

175. *See supra* Part III.A.

176. *See supra* Part III.C.

177. *See supra* Part III.C.

178. *See supra* Part IV.

179. ARK. CODE ANN. § 2-4-101 (2008).

be forced to either operate in an environmentally sound manner, or build their farms in another location.¹⁸⁰

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180. *See supra* Part IV.

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