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An Agricultural Law Research Article

**Concerned Area Residents for the  
Environment v. Southview Farm: Just  
What is a Concentrated Animal Feeding  
Operation under the Clean Water Act?**

by

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## NOTE

### **CONCERNED AREA RESIDENTS FOR THE ENVIRONMENT V. SOUTHVIEW FARM: JUST WHAT IS A CONCENTRATED ANIMAL FEEDING OPERATION UNDER THE CLEAN WATER ACT?**

On September 2, 1994, the United States Court of Appeals for the Second Circuit decided *Concerned Area Residents for the Environment v. Southview Farm*,<sup>1</sup> a citizen suit brought under the Clean Water Act.<sup>2</sup> At issue in the case was the regulatory treatment of liquid manure disposal practices on a 2000 cow dairy farm in New York State.<sup>3</sup> The court concluded that Southview Farm was "a concentrated animal feeding operation" and, therefore, a point source subject to the permit requirements of the Clean Water Act.<sup>4</sup>

The holding of this case is of vital importance to New York State because it has the potential to affect dairy farmers, consumers of dairy products and the state's economy in general. Agriculture is one of the leading industries in New York.<sup>5</sup> In fact, New York is the third highest milk producing state in the country and "the largest milk producing state in the Northeast."<sup>6</sup> In 1990, there were 11,272 dairy farms in New York which produced over 11 billion pounds of milk and dairy products.<sup>7</sup> The Northeast Dairy Producers Association has said that "New York's agricultural economy is critically

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<sup>1</sup> 34 F.3d 114 (2d Cir. 1994), cert. denied, 115 S. Ct. 1793 (1995).

<sup>2</sup> 33 U.S.C. §§ 1251-1387 (1994).

<sup>3</sup> See *Southview Farm*, 34 F.3d at 115.

<sup>4</sup> See *id.*; see also *infra* notes 55-69 and accompanying text (discussing the treatment of point sources under the Clean Water Act).

<sup>5</sup> See Brief Amicus Curiae of the Joint Legislative Commission on the Dairy Industry in Support of Petitioners at 2, *Southview Farm* (No. 94-1316).

<sup>6</sup> NEW YORK STATE LEGIS. COMM'N OF DAIRY INDUS. DEV., REVIEW OF DAIRY REGULATION—STATE MILK CONTROL IN N.Y. AND CONTIGUOUS STATES at iii (1988) [hereinafter REVIEW OF DAIRY REGULATION].

<sup>7</sup> See DEPARTMENT OF AGRIC. & MKTS, N.Y. STATE DAIRY STATISTICS—1990 ANNUAL SUMMARY at 2 (1990) [hereinafter N.Y. STATE DAIRY STATISTICS].

dependent upon the dairy industry.<sup>8</sup> As the most populous state in the northeast,<sup>9</sup> New York is a major market for milk and dairy products.<sup>10</sup> Quite simply, dairy farming is extremely important to New York State's economy, as is any federal legislation affecting the dairy industry.

The Second Circuit's decision in *Southview Farm* is also important for agricultural "producers concerned with agriculture's role in maintaining environmental quality,"<sup>11</sup> especially in light of the rapid and dramatic changes occurring in the character of livestock production.<sup>12</sup> Until recently, most livestock operations involved "relatively small numbers of animals in a pastoral or nomadic setting."<sup>13</sup> However, "[e]conomies of scale, specialization, and regional concentration in all major livestock production sectors have fueled a trend toward fewer, larger operations that confine thousands of animals on limited acreage."<sup>14</sup>

One obvious problem such large livestock production facilities, or rather "industrial farms," encounter involves disposal of the large amounts of manure and other animal wastes generated on-site in a productive, cost-effective and environmentally protective manner. Animal waste produced at such industrial farms is "remarkable in terms of both quantity and pollutant content."<sup>15</sup> For example, an average dairy cow produces approximately eighty-two pounds of manure per day,<sup>16</sup> an amount equivalent to between seven and eight percent of its weight.<sup>17</sup> Pollutants such as fecal coliform

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<sup>8</sup> Brief Amicus Curiae of the Northeast Dairy Producers Association in Support of Petitioners at 4, *Southview Farm* (No. 94-1316) [hereinafter Brief of Northeast Dairy Producers Ass'n] (citing NEW YORK AGRIC. STATISTICS SERV. (N.Y. STATE DEPT OF AGRIC. & MKTS WITH U.S. DEPT OF AGRIC.), N.Y. AGRIC. STATISTICS 1993-94, at 12 (1994)).

<sup>9</sup> See U.S. DEPT OF COM., 1990 CENSUS OF POPULATION, GENERAL POPULATION CHARACTERISTICS, UNITED STATES (Nov. 1992) 321.

<sup>10</sup> See REVIEW OF DAIRY REGULATION, *supra* note 6, at iii.

<sup>11</sup> Larry C. Frarey, Staci J. Pratt & Ron Jones, *The 2d Circuit's Southview Farm Decision Represents a Reasonable Approach to the Regulatory Treatment of Liquid Manure Disposal Practices of Livestock Farms*, NAT'L L.J., Mar. 6, 1995, at B5, B8.

<sup>12</sup> See Larry C. Frarey & Staci J. Pratt, *Environmental Regulation of Livestock Production Operations*, 9 NAT. RESOURCES & ENV'T, Winter 1995, at 8, 8.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* "For example, in 1980, only 2 percent of beef feedlots in the Great Plains region of the United States contained more than 1,000 head. By 1991, however, 32 percent of feedlots in the region confined more than 32,000 head." *Id.* Furthermore, "[t]he dairy and poultry sectors of the livestock industry reflect an analogous trend toward fewer, larger operations located in close regional proximity." *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> See *id.*

<sup>17</sup> See RAYMOND C. LOEHR, POLLUTION CONTROL FOR AGRICULTURE 85 (1977).

bacteria, nitrates and nitrogen, phosphorus, ammonia and methane are commonly found in manure and other animal waste.<sup>18</sup> Livestock waste is now recognized as "one of the major contributors to water quality problems in many watersheds across the nation."<sup>19</sup>

It is common practice for large livestock operations to have complex systems involving holding ponds or lagoons where manure is liquefied and stored until such time as it is applied to land as fertilizer.<sup>20</sup> Land application of liquid and solid manure, the most common method of animal waste disposal,<sup>21</sup> "may result in water quality impairment without diligence and careful management of the time, rate, and location of application."<sup>22</sup> The farmer must take care to avoid excessive application which may occur when the ground is frozen or over-saturated either due to rain or previous manure application.<sup>23</sup>

Some "industrial farms" are classified as "concentrated animal feeding operations" (CAFOs) based on the number of animals confined, where the animals are confined and how the manure is discharged from the confinement facility.<sup>24</sup> CAFOs are subject to regulation as point sources under the Clean Water Act<sup>25</sup> and, therefore, must comply with the Act's permit requirement that each individual polluter obtain a permit which sets limits on the type and content of pollutants the polluter may discharge into water bodies.<sup>26</sup> Although CAFO regulations were first promulgated by the U.S. Environmental Protection Agency (EPA) in 1974, until recently CAFOs have been treated "as a relatively low priority when contrasted with industrial and municipal point source dischargers

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<sup>18</sup> See Martha L. Noble & J.W. Looney, *The Emerging Legal Framework for Animal Agricultural Waste Management in Arkansas*, 47 ARK. L. REV. 159, 164-66 (1994).

<sup>19</sup> National Pollutant Discharge Elimination System General Permit and Reporting Requirements for Discharges From Concentrated Animal Feeding Operations, 58 Fed. Reg. 7610, 7612 (1993). "A 1989 summary of state water quality assessments conducted under section 319 of the [Clean Water Act] revealed that over one-third of all water impairments attributed to agricultural pollution were caused by livestock waste." Frarey & Pratt, *supra* note 12, at 8.

<sup>20</sup> See Frarey & Pratt, *supra* note 12, at 8.

<sup>21</sup> See Noble & Looney, *supra* note 18, at 162.

<sup>22</sup> Frarey & Pratt, *supra* note 12, at 8.

<sup>23</sup> See Noble & Looney, *supra* note 18, at 186.

<sup>24</sup> See *infra* notes 93-109 and accompanying text (explaining the criteria for classification as a CAFO).

<sup>25</sup> See 33 U.S.C. § 1362(14) (1994).

<sup>26</sup> See *infra* notes 55-69 and accompanying text (discussing the treatment of point sources under the Clean Water Act).

and thus [regulatory agencies] have failed to vigorously pursue CAFO permitting."<sup>27</sup>

*Southview Farm* is the first case in New York and one of the few cases in the country to address the problem of CAFO pollution.<sup>28</sup> Part I of this Note provides the facts and background information that gave rise to the *Southview Farm* litigation, as well as the procedural history of the case. Part II details the relevant statutory framework--the Clean Water Act and corresponding regulations. Part III defines the term "concentrated animal feeding operation" and sets forth relevant regulations. Part IV of this Note explains why the Second Circuit's decision is correct and why it represents a reasonable interpretation of the Clean Water Act and EPA regulations. Part V concludes with a brief look at the implications of the *Southview Farm* decision.

I. CONCERNED AREA RESIDENTS FOR THE ENVIRONMENT V.  
*SOUTHVIEW FARM: FACTS GIVING RISE TO THE LITIGATION AND THE  
PROCEDURAL HISTORY*

Southview Farm, located in the Town of Castile, in Wyoming County, "is one of the largest dairy farms in the State of New York."<sup>29</sup> Within Wyoming County, as in most upstate New York counties, "dairying is the dominant industry."<sup>30</sup> Wyoming County is the highest milk producing county in New York State, with the second highest number of milk cows.<sup>31</sup> For over a hundred years, farming and dairy activities have taken place in Castile.<sup>32</sup>

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<sup>27</sup> Frarey & Pratt, *supra* note 12, at 9. "Consequently, in 1992, less than 10 percent of the estimated 10,000 livestock operations sufficiently large [and meeting the other criteria] to be classified as CAFO held NPDES permits." *Id.*

<sup>28</sup> See, e.g., Carr v. Alta Verde Indus., 931 F.2d 1055, 1062 (5th Cir. 1991) (holding that post-discharge improvements to a cattle feedlot's wastewater disposal system does not moot plaintiff's action or exempt cattle feedlots from the National Pollutant Discharge Elimination System requirements); Higbee v. Starr, 598 F. Supp. 323, 331 (E.D. Ark. 1984) (finding no violation of the Clean Water Act where plaintiff did not establish any credible evidence of a discharge from a CAFO (hog farm) into a navigable waterway).

<sup>29</sup> Concerned Area Residents for the Env't v. Southview Farm, 34 F.3d 114, 116 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 1793 (1995).

<sup>30</sup> Brief of Northeast Dairy Producers Ass'n, *supra* note 8, at 4.

<sup>31</sup> See 1994 NEW YORK STATE STATISTICAL YEARBOOK, 479-80 (19th ed. 1994). In 1993, Wyoming County had 37,500 milk cows, second only to St. Lawrence County with 42,500 milk cows. See *id.* at 479.

<sup>32</sup> See Brief for Defendants-Appellees at 4, *Southview Farm* (No. 93-9229).

The plaintiffs, Concerned Area Residents for the Environment (CARE), were a group of land owners living near Southview Farm.<sup>33</sup> The defendants were the farm itself and Richard H. Popp, the operating partner and manager of the farm's dairy operations since 1964.<sup>34</sup> At the time the action was brought, Southview owned approximately 1100 total acres of land and had approximately 1290 mature milking cows along with 900 calves and heifers.<sup>35</sup> The cows were confined in barns except for three times a day during the milking procedure; they were not pastured.<sup>36</sup>

Southview's sizable manure operations involved a manure separation storage system, the use of storage lagoons and the subsequent application of the liquid cow manure to Southview's fields.<sup>37</sup> Five storage lagoons were located on the main farm property in addition to a piping system, which ran under both a state highway and a town road to lagoons off of the main farm, used to transport manure to various locations without the use of vehicles.<sup>38</sup> Eventually, the liquid manure was pumped out of the lagoons into tanker trucks, tank spreaders or the center pivot irrigation system for application to the Southview land as fertilizer.<sup>39</sup> The court emphasized that "Southview's manure spreading record reflects the application of millions of gallons of manure to its fields."<sup>40</sup> Although for most agricultural feeding operations, land application is "[t]he most common method of animal waste disposal,"<sup>41</sup> Southview's operation was a far cry from old-fashioned dairying where cows were set out to pasture. Rather, Southview was more of an "industrial farm," with waste disposal concerns similar to those of industrial and municipal sources, that typically generate large amounts of liquid waste.

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<sup>33</sup> See *Southview Farm*, 34 F.3d at 115.

<sup>34</sup> See Brief for Defendants-Appellees, *supra* note 32, at 4.

<sup>35</sup> See *Southview Farm*, 34 F.3d at 116.

<sup>36</sup> See *id.*

<sup>37</sup> See *id.*

<sup>38</sup> See *id.* In connection with one four-acre storage lagoon, which had a storage capacity of six to eight million gallons of liquid cow manure, Southview installed a liquid/solid separator through which the manure was filtered when it first exited the barn; the liquid manure that remained ran by gravity through a pipe to the four acre lagoon. See *id.*

<sup>39</sup> See *id.* The center pivot system, which is directly connected to a lagoon by a series of pipes, sprays a stream of liquid manure in an arc, the height of which is between twelve and thirty feet. See *id.*

<sup>40</sup> *Id.*

<sup>41</sup> Noble & Looney, *supra* note 18, at 162. The authors further state that "[e]nvironmental problems arise when animal producers do not have control of or access to land with the requisite amount or type of vegetation and soil to absorb and utilize the applied waste." *Id.*

Application of manure on multiple occasions, allegedly in violation of the Clean Water Act, prompted CARE to bring a citizen suit against Southview.<sup>42</sup> CARE alleged that liquid cow manure from Southview's dairy operation was spread over adjacent fields and migrated into a tributary of the Genesee River, thus causing a violation of the Clean Water Act because it constituted discharge of a pollutant from a point source into navigable waters.<sup>43</sup> At trial in the Western District of New York, the jury found for the plaintiffs on five of the eleven Clean Water Act claims.<sup>44</sup> However, the district court granted the defendants' motion for judgment as a matter of law as to these five violations.<sup>45</sup> Thereupon, the plaintiffs appealed to the United States Court of Appeals for the Second Circuit, which ultimately reversed the district court's ruling by holding that the application of manure on five separate dates constituted discharge of a pollutant from a point source and that the Clean Water Act had been violated.<sup>46</sup>

The basis of CARE's appeal was that Clean Water Act violations, consisting, *inter alia*, of improper manure application, occurred on five separate dates ranging from July 1989 to April 1991.<sup>47</sup> The first three violations, related to observations by the plaintiffs of liquid manure running into and through a swale<sup>48</sup> into a drain tile

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<sup>42</sup> See 33 U.S.C. § 1365 (1994). The citizen suit provision of the Clean Water Act authorizes "any citizen" to commence an action against "any person" alleged to be in violation of the laws. See *id.* § 1365(a). For a discussion of citizen suits, see MICHAEL D. AXLINE, ENVIRONMENTAL CITIZEN SUITS (1991); JEFFREY G. MILLER, CITIZEN SUITS: PRIVATE ENFORCEMENT OF FEDERAL POLLUTION CONTROL LAWS (1987); Beverley M. Smith, *Recent Developments in Citizens' Suits Under Selected Federal Environmental Statutes*, C981 ALI-ABA 701 (1995).

<sup>43</sup> See *Southview Farm*, 34 F.3d at 117; see also *infra* notes 55-69 and accompanying text (discussing the treatment of point sources under the Clean Water Act).

<sup>44</sup> See *Southview Farm*, 34 F.3d at 115. In addition to the Clean Water Act claims, the plaintiffs also brought "several supplemental state claims including negligence, nuisance and trespass" claims. See *Concerned Area Residents for the Env't v. Southview Farm*, 834 F. Supp. 1422, 1423 (W.D.N.Y. 1993), *rev'd*, 34 F.3d 114 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 1793 (1995). The jury held no cause of action on all of the negligence and nuisance claims, but did hold that the defendants had committed a trespass against each plaintiff. See *id.* This verdict was left standing by the district court and was not raised on appeal. See *Southview Farm*, 34 F.3d at 115. For a discussion of nuisance and trespass actions regarding animal feeding operations, see J. Walter Sinclair, *The Laws of Nuisance and Trespass as They Impact Animal Containment Operations in Idaho*, 30 IDAHO L. REV. 485 (1993-94).

<sup>45</sup> See *Southview Farm*, 34 F.3d at 116-17.

<sup>46</sup> See *id.* at 115; see also *infra* notes 55-69 (discussing the treatment of point sources under the Clean Water Act) & 131-81 (explaining the Second Circuit's decision in *Southview Farm*) and accompanying text.

<sup>47</sup> See *Southview Farm*, 34 F.3d at 117.

<sup>48</sup> A "swale" is defined as "a low place in a tract of land, usually moister and often having ranker vegetation than the adjacent higher land." THE RANDOM HOUSE DICTIONARY OF THE

leading directly to a stream, a tributary of the Genesee River, which flows through Letchworth State Park.<sup>49</sup> Plaintiffs also testified that on various occasions they observed manure tanker trucks and manure spreaders operating on the same field and that they noticed a heavy spreading of manure.<sup>50</sup> The remaining two violations occurred after heavy rains: one plaintiff testified that "after a rain . . . [the manure] was literally running off everywhere."<sup>51</sup> The district court held that the first three violations did not constitute discharges from a point source; that the last two violations were agricultural stormwater discharges<sup>52</sup> and, therefore, were not Clean Water Act violations; and, that Southview Farm was not a CAFO.<sup>53</sup> The Second Circuit held that Southview Farm was a CAFO and therefore a point source, not subject to any agricultural exemptions, including the agricultural stormwater discharge exemption.<sup>54</sup>

## II. THE CLEAN WATER ACT: THE STATUTORY FRAMEWORK

Current federal water pollution legislation is based on the Federal Water Pollution Control Act Amendments of 1972, renamed the Clean Water Act in 1977,<sup>55</sup> which "adopted a goal of no pollution discharges and mandated a system of technology-based, state-of-the-art, effluent limitations."<sup>56</sup> The objective of the Clean Water Act is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" and to eliminate the discharge of pollutants into navigable waters.<sup>57</sup> The Clean Water

ENGLISH LANGUAGE 1918 (2d ed. 1987).

<sup>49</sup> See *Southview Farm*, 34 F.3d at 117.

<sup>50</sup> See *id.* at 119.

<sup>51</sup> *Id.* at 121 (quoting testimony of witness) (brackets in original).

<sup>52</sup> See *infra* notes 85-88 (explaining agriculture stormwater discharges) & 173-81 (discussing Second Circuit's decision concerning agriculture stormwater discharges) and accompanying text.

<sup>53</sup> See *Concerned Area Residents for the Env't v. Southview Farm*, 834 F. Supp. 1422 (W.D.N.Y. 1993), *rev'd*, 34 F.3d 114 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 1793 (1995); see also *infra* notes 93-130 and accompanying text (discussing CAFOs under the Clean Water Act).

<sup>54</sup> See *Southview Farm*, 34 F.3d at 115; see also *infra* notes 131-81 and accompanying text (discussing the Second Circuit's decision in *Southview Farm*). The alternate holding that the manure spreaders themselves are point sources is not included because it is beyond the scope of this Note. For a discussion of this holding, see *Southview Farm*, 34 F.3d at 119.

<sup>55</sup> Pub. L. No. 95-217, sec. 2, § 518, 91 Stat. 1566, 1566 (1977).

<sup>56</sup> John H. Davidson, *Thinking About Nonpoint Sources of Water Pollution and South Dakota Agriculture*, 34 S.D. L. REV. 20, 20 (1989).

<sup>57</sup> 33 U.S.C. § 1251(a) (1994). Section 1251(a)(1) of the Clean Water Act states that "it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985." *Id.* See S. REP. NO. 92-414, at 7 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3674

Act makes it unlawful to discharge any pollutant from a point source into navigable waters absent a permit.<sup>58</sup>

The Clean Water Act establishes two categories of discharges for purposes of pollution control regulation: point sources and nonpoint sources.<sup>59</sup> As a general rule, the Clean Water Act only regulates discharges from point sources.<sup>60</sup> A point source is defined as any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, *concentrated animal feeding operation*, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.<sup>61</sup>

This definition is not exclusive and is intended to be construed broadly.<sup>62</sup> In implementing the Clean Water Act, Congress primarily targeted industrial and municipal sources of pollution for regulation as point sources because they "were the worst and most obvious offenders of surface water quality"<sup>63</sup> and because "[t]hey were also the easiest to address because their [discharges] emerge from a discrete point such as the end of a pipe."<sup>64</sup> The element of human intervention, either in the form of man-made conveyances that discharge pollutants or disposal systems engineered to gather,

(defining the objectives of the Clean Water Act).

<sup>58</sup> See 33 U.S.C. § 1311(a). The term "navigable water" is defined as "the waters of the United States, including the territorial seas." *Id.* § 1362(7). See also *United States v. Pozsgai*, 999 F.2d 719, 724 (3d Cir. 1993) (construing the definition of "navigable waters"). The term "discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12).

<sup>59</sup> See 33 U.S.C. § 1362(14); see also Davidson, *supra* note 56, at 21.

<sup>60</sup> See Davidson, *supra* note 56, at 21.

<sup>61</sup> 33 U.S.C. § 1362(14) (emphasis added).

<sup>62</sup> See *Dague v. City of Burlington*, 935 F.2d 1343, 1354 (2d Cir. 1991) (holding that "[t]he touchstone of the [Clean Water Act] regulatory scheme is that those needing to use the waters for waste distribution must seek and obtain a permit to discharge that waste" (quoting *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1979))), *rev'd on other grounds*, 505 U.S. 557 (1992). See also *Concerned Area Residents for the Env't v. Southview Farm*, 34 F.3d 114, 118 (2d Cir. 1994) (stating that "the definition of a point source is to be broadly interpreted"), *cert. denied*, 115 S. Ct. 1793 (1995); *Earth Sciences, Inc.*, 599 F.2d at 373 (stating that "[t]he concept of a point source was designed to further [the Clean Water Act regulatory] scheme by embracing the broadest possible definition of any identifiable conveyance from which pollutants might enter the waters of the United States").

<sup>63</sup> *United States v. Plaza Health Lab., Inc.*, 3 F.3d 643, 646 (2d Cir. 1993) (quoting David Letson, *Point/Nonpoint Source Pollution Reduction Trading: An Interpretive Survey*, 32 NAT. RESOURCES J. 219, 221 (1992)). In this case, the Second Circuit held that a human being was not a point source under the Clean Water Act. See *id.* at 649.

<sup>64</sup> *Id.* at 646 (citation omitted).

collect or channel water, "can qualify a discharge as a point source and thus subject [it] to regulation."<sup>65</sup>

The Clean Water Act imposes effluent limitations on point source discharges through a federally mandated and supervised permit program, the Nation Pollution Discharge Elimination System (NPDES).<sup>66</sup> A NPDES permit changes what are general effluent limitations and water quality standards into legal obligations for an individual discharger.<sup>67</sup> In addition, the 1972 Amendments to the Clean Water Act "provide for direct administrative and judicial enforcement of [NPDES] permits."<sup>68</sup> In New York State, pursuant to section 402(b) of the Clean Water Act, the EPA has delegated permitting authority to the Department of Environmental Conservation which administers its own permit system, the State Pollution Discharge Elimination System (SPDES).<sup>69</sup>

Nonpoint sources are not subject to NPDES or SPDES permit requirements.<sup>70</sup> A nonpoint source is defined by exclusion and includes all discharges to water not subject to Clean Water Act section 402 NPDES permit requirements.<sup>71</sup> "In practical terms, nonpoint source pollution does not result from a discharge [of a pollutant] at a specific, single location (such as a single pipe) but generally results from land runoff, precipitation, atmospheric deposition, or percolation."<sup>72</sup> A common example of nonpoint source

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<sup>65</sup> Davidson, *supra* note 56, at 31. See *Sierra Club v. Abston Constr. Co.*, 620 F.2d 41, 45 (5th Cir. 1980) (holding that surface runoff from a strip mine is a point source where spoil piles are designed so that it is reasonably likely that pollutants will be discharged through ditches); *Earth Sciences, Inc.*, 599 F.2d at 374 (holding that a system of sump pumps, ditches and hoses involved with a gold leaching operation is a "point source"); *United States v. Frezzo Bros., Inc.*, 602 F.2d 1123, 1128 (3d Cir. 1979) (holding that the discharge of composting materials through a pipe into a tributary of a creek constituted a discharge from a point source); *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1373 (4th Cir. 1976) (distinguishing point sources from "unchanneled and uncollected surface waters"); *Washington Wilderness Coalition v. Hecla Mining Co.*, 870 F. Supp. 983, 988 (E.D. Wash. 1994) (stating that "the discharge is from a point source because the pond or pile acts to collect and channel contaminated water").

<sup>66</sup> See 33 U.S.C. § 1342; see also Davidson, *supra* note 56, 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").

<sup>67</sup> See *Carr v. Alta Verde Indus., Inc.*, 931 F.2d 1055, 1059 (5th Cir. 1991) (citation omitted).

<sup>68</sup> *Id.* (citation omitted).

<sup>69</sup> See N.Y. ENVTL. CONSERV. LAW § 17-801 (McKinney 1984); see also NEW YORK ENVIRONMENTAL LAW HANDBOOK § 4.88 (Nicholas A. Robinson ed. 1988) (stating that the "EPA has delegated NPDES permitting authority in New York State to the State Department of Environmental Conservation").

<sup>70</sup> See 33 U.S.C. § 1342; see also Davidson, *supra* note 56, at 31.

<sup>71</sup> See *National Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 582 (6th Cir. 1988).

<sup>72</sup> George A. Gould, *Agriculture, Nonpoint Source Pollution, and Federal Law*, 23 U.C. DAVIS L. REV. 461, 472 (1990) (quoting OFFICE OF WATER, U.S. ENVIRONMENTAL PROTECTION AGENCY,

pollution is stormwater runoff from highways, construction sites or industrial complexes.<sup>73</sup>

Because of factors such as "the number and variety of nonpoint source pollution sources, the site-specific nature of such pollution, the lack of known control technologies, and the perception that many problems could be addressed only through land use controls, a traditional state role,"<sup>74</sup> Congress decided that nonpoint source pollution required an approach different from the NPDES program for point sources.<sup>75</sup> Thus, Congress chose to regulate nonpoint sources under the planning processes set forth in sections 208 and 319 of the Clean Water Act which place primary responsibility on the states.<sup>76</sup> The purpose of section 319, which was added in 1987, is "to encourage states to identify nonpoint source pollution problems, identify [best management practices], and establish management programs to achieve water quality standards."<sup>77</sup>

Today, "agricultural practices are the principal source of nonpoint source pollution."<sup>78</sup> When enacting the Federal Water Pollution Control Act, Congress chose to address the problem of agricultural pollution under the nonpoint source control provision of section 208.<sup>79</sup> It is appropriate that agricultural pollution be treated as nonpoint pollution because "most agricultural pollution consists largely of precipitation-induced surface runoff or leaching through

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NONPOINT SOURCE GUIDANCE 3 (1987)). See *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1979) ("The legislative history indicates . . . Congress was classifying nonpoint source pollution as disparate runoff caused primarily by rainfall around activities that employ or cause pollutants.").

<sup>73</sup> See *Friends of Santa Fe County v. LAC Minerals, Inc.*, 892 F. Supp. 1333, 1358-59 (D.N.M. 1995). See also *Earth Sciences, Inc.*, 599 F.2d at 373 (noting that impermeable surfaces such as highways, buildings and parking lots accelerate rainwater runoff and often include oil, rubber particles, lead and asbestos).

<sup>74</sup> Gould, *supra* note 72, at 462.

<sup>75</sup> See *id.*

<sup>76</sup> See *id.* at 462-63; Clean Water Act, § 208, 33 U.S.C. § 1288 (1994); Clean Water Act, § 319, 33 U.S.C. § 1329 (1994).

<sup>77</sup> Karen R. Hansen, Comment, *Agricultural Nonpoint Source Pollution: The Need for an American Farm Policy Based on an Integrated Systems Approach Recoupled to Ecological Stewardship*, 15 *HAMLIN J. PUB. L. & POL'Y* 303, 310 (1994) (citation omitted).

<sup>78</sup> Davidson, *supra* note 56, at 21.

<sup>79</sup> Clean Water Act § 208, 33 U.S.C. § 1288(b)(2)(F). Congress also regulates agricultural pollution under the Coastal Zone Management Act (CZMA). See Noble & Looney, *supra* note 18, at 160 ("In 1990, Congress added provisions to the . . . CZMA to deal with agricultural water pollution as a preliminary step to addressing agricultural pollution in the reauthorization of the Clean Water Act."). For a discussion of the CZMA, see U.S. ENVIRONMENTAL PROTECTION AGENCY, GUIDANCE MANUAL ON NPDES REGULATIONS FOR CONCENTRATED ANIMAL FEEDING OPERATIONS 24-29 (draft 1993) [hereinafter CAFO GUIDANCE MANUAL].

soil layers<sup>80</sup> rather than pollution entering a waterway from a discrete point. Most discharges from agricultural and silvicultural<sup>81</sup> activities are treated as nonpoint source pollution.<sup>82</sup> A CAFO is the only type of agricultural operation specifically included as a point source in the statutory definition.<sup>83</sup> Both return flows from irrigated agriculture<sup>84</sup> and agricultural stormwater discharges are explicitly excluded from the point source definition.<sup>85</sup> These two types of agricultural runoff were excluded from the definition of a point source because "these sources [are] practically indistinguishable from any other agricultural runoff, which may or may not involve a similar discrete point of entry into a watercourse . . . . [Thus, they] are more appropriately treated under the requirements of section 208(b)(2)(F)."<sup>86</sup>

The phrase "agricultural stormwater discharge" is not defined in either the statute itself, or in the implementing regulations. However, "storm water" has been defined as "storm water runoff, snow melt runoff, and surface runoff and drainage."<sup>87</sup> The EPA has defined "storm water discharge" as "runoff caused by rainfall,

<sup>80</sup> Frarey & Pratt, *supra* note 12, at 9.

<sup>81</sup> "Silviculture" is defined as "the cultivation of forest trees." THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1782 (2d ed. 1987).

<sup>82</sup> See National Resources Defense Council, Inc. v. Costle, 568 F.2d 1369, 1372-73 (D.C. Cir. 1977). According to the Code of Federal Regulations,

[t]he following discharges do not require NPDES permits: . . . (e) Any introduction of pollutants from non point-source agricultural and silvicultural activities, including storm water runoff from orchards, cultivated crops, pastures, range lands, and forest lands, but not discharges from concentrated animal feeding operations as defined in § 122.23 . . . [and] (f) Return flows from irrigated agriculture.

40 C.F.R. § 122.3(e)-(f) (1995).

<sup>83</sup> See 33 U.S.C. § 1362(14).

<sup>84</sup> Irrigation return flows are a significant source of water pollution:

Water to be used in irrigation is typically collected behind a dam or other diversion work from which it is transported by open ditch to the irrigation project. From there it is diverted to smaller canals which carry the water to the high side of fields where it is introduced to individual crop rows. By force of gravity the water moves down the row to the low end of the field where it is . . . used again on other fields. Water that survives this process of use and reuse is returned to a watercourse in the form of irrigation return flows.

Davidson, *supra* note 56, at 35-36 (citation omitted).

<sup>85</sup> See 33 U.S.C. § 1362(14). The agricultural stormwater exemption was added by the Water Quality Act of 1987. Pub. L. No. 100-4, 101 Stat. 75 (1987). "Because Congress mandated comprehensive regulations of certain forms of industrial and municipal stormwater run-off under 33 U.S.C. § 1342(p), one can infer that Congress wanted to make it clear that agriculture was not included in this new program." Concerned Area Residents for the Env't v. Southview Farm, 34 F.3d 114, 120 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 1793 (1995).

<sup>86</sup> S. REP. NO. 95-370, at 35 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4326, 4360.

<sup>87</sup> 40 C.F.R. § 122.26(b)(13) (1995).

snowmelt, or drainage which flows overland instead of percolation into the soils due to saturation.<sup>88</sup>

The United States Court of Appeals for the Second Circuit ultimately decided that Southview Farm met the requirements for designation as a CAFO.<sup>89</sup> Because Southview Farm is a CAFO, it is by definition a point source under the Clean Water Act.<sup>90</sup> The court further held that because Southview Farm discharged pollutants into navigable waters, it had violated the Clean Water Act.<sup>91</sup> Moreover, the court concluded that CAFOs are not subject to the agricultural stormwater discharge exemption.<sup>92</sup>

### III. CONCENTRATED ANIMAL FEEDING OPERATIONS UNDER THE CLEAN WATER ACT

#### A. *What Is a Concentrated Animal Feeding Operation?*

There are two major groups of animal feeding operations: "(1) confined or concentrated feeding operations where animals are kept in enclosed facilities throughout most or all of their lives; and (2) unconfined operations where animals are maintained on pastures and allowed to forage at will or are provided feed in relatively open settings."<sup>93</sup> Animal operations in the second category are generally not subject to regulation as point sources.<sup>94</sup> However, Congress explicitly included only "concentrated animal feeding operations," a subset of category one above, in the point source definition.<sup>95</sup>

Although the statutory definition of a "point source" explicitly includes "concentrated animal feeding operation," it does not define

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<sup>88</sup> National Pollutant Discharge Elimination System General Permit and Reporting Requirements for Discharges From Concentrated Animal Feeding Operations, 58 Fed. Reg. 7610, 7614 (1993).

<sup>89</sup> See *Southview Farm*, 34 F.3d at 123; see also *infra* notes 131-51 and accompanying text (discussing the Second Circuit's decision that Southview Farm was a CAFO).

<sup>90</sup> See 33 U.S.C. § 1362(14); see also *supra* note 62 and accompanying text (discussing the statutory definition of point source).

<sup>91</sup> See *Southview Farm*, 34 F.3d at 119.

<sup>92</sup> See *id.* at 118-23; see also *infra* notes 173-81 and accompanying text (discussing the Second Circuit's decision that CAFOs are not subject to the agricultural stormwater discharge).

<sup>93</sup> Noble & Looney, *supra* note 18, at 161-62.

<sup>94</sup> Discharges from non-CAFOs may constitute nonpoint source pollution regulated by the state or may be exempted under the agricultural storm water runoff exception. See CAFO GUIDANCE MANUAL, *supra* note 79, at 4-5, 13. However, if discharges occur from a manure disposal system or a lagoon, it may be considered point source pollution from a man-made conveyance. See *id.* at 13.

<sup>95</sup> See 33 U.S.C. § 1362(14).

the term.<sup>96</sup> However, the implementing regulation defines a CAFO as “an ‘animal feeding operation’ which meets the criteria in appendix B of this part [of the regulation], or which the Director designates under paragraph (c) of this section [of the regulation].”<sup>97</sup> To understand this definition, one must know that an animal feeding operation is:

a lot or facility . . . where the following conditions are met:

(i) Animals . . . have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period, and

(ii) Crops, vegetation forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility.<sup>98</sup>

The first part of this definition means that animals must be kept on the lot or in the facility for at least 45 days. According to the EPA, “it does not mean that the same animals must remain on the lot for 45 days or more; only that some animals are fed or maintained on the lot 45 days out of any 12-month period.”<sup>99</sup> Animals are “maintained” when they are “confined in an area where waste is generated and/or concentrated” or are “watered, cleaned, groomed or medicated” in a confined area.<sup>100</sup> “Maintained” does not mean “fed.” This interpretation is important because it “allows the permitting authority to regulate animal operations such as dairy farms, stockyards, and auction houses where animals may not be fed, but are confined temporarily. The important consideration . . . is that waste is generated in an area where animals are concentrated.”<sup>101</sup>

The second part of the definition, the lack of vegetation requirement, separates feedlots from traditional pastures, which are not subject to permitting requirements.<sup>102</sup> Feedlots with concrete or metal floors and open-dirt feedlots satisfy this part of the

<sup>96</sup> See *supra* note 61 and accompanying text (providing the statutory definition of point source).

<sup>97</sup> 40 C.F.R. § 122.23(b)(3) (1995).

<sup>98</sup> *Id.* § 122.23(b)(1). The regulations also provide that “[t]wo or more animal feeding operations under common ownership are considered, for the purposes of these regulations, to be a single animal feeding operation if they adjoin each other or if they use a common area or system for the disposal of wastes.” *Id.* § 122.23(b)(2).

<sup>99</sup> CAFO GUIDANCE MANUAL, *supra* note 79, at 3-4.

<sup>100</sup> *Id.* at 4.

<sup>101</sup> *Id.*

<sup>102</sup> See *id.*

definition.<sup>103</sup> According to the EPA's interpretation of the regulations, "if a facility maintains animals in an area without vegetation, including dirt-floored lots, the facility meets the second part of the definition."<sup>104</sup>

Certain animal feeding operations are classified as CAFOs depending on the number and type of animals confined and, in some cases, the manner in which the manure is discharged. The Code of Federal Regulations sets out numerical limits for various types of animals.<sup>105</sup> If more than the set number of animals are confined, then the feeding operation is automatically classified as a CAFO.<sup>106</sup> For example, if more than 700 mature dairy cattle are confined, then the feeding operation is automatically classified as a CAFO.<sup>107</sup> The Code of Federal Regulations also provides that animal feeding operations with fewer animals can also be classified CAFOs if the animal wastes and waste water are discharged directly into navigable waters.<sup>108</sup>

<sup>103</sup> See *id.*

<sup>104</sup> *Id.*

<sup>105</sup> See 40 C.F.R. § 122 app. B(a) (1995). Subsection (a) to Appendix B reads in full:

An animal feeding operation is a CAFO for purposes of § 122.23 if either of the following criteria are met.

(a) More than the numbers of animals specified in any of the following categories are confined:

- (1) 1,000 slaughter and feeder cattle,
- (2) 700 mature dairy cattle (whether milked or dry cows),
- (3) 2,500 swine each weighing over 25 kilograms (approximately 55 pounds),
- (4) 500 horses,
- (5) 10,000 sheep or lambs,
- (6) 55,000 turkeys,
- (7) 100,000 laying hens or broilers (if the facility has continuous overflow watering),
- (8) 30,000 laying hens or broilers (if the facility has a liquid manure system),
- (9) 5,000 ducks, or
- (10) 1,000 animal units.

*Id.*

<sup>106</sup> See *id.*

<sup>107</sup> See *id.*

<sup>108</sup> See 40 C.F.R. § 122 app. B(b). Subsection (b) reads in part:

(b) More than the following number and types of animals are confined:

- (1) 300 slaughter or feeder cattle,
- (2) 200 mature dairy cattle (whether milked or dry cows),
- (3) 750 swine each weighing over 25 kilograms (approximately 55 pounds),
- (4) 150 horses,
- (5) 3,000 sheep or lambs,
- (6) 16,500 turkeys,
- (7) 30,000 laying hens or broilers (if the facility has continuous overflow watering),
- (8) 9,000 laying hens or broilers (if the facility has a liquid manure handling system),
- (9) 1,500 ducks, or

A third way to classify an animal operation as a CAFO is designation by the Director of the EPA "upon determining that it is a significant contributor of pollution to the waters of the United States."<sup>109</sup>

*B. Effluent Limitations Guidelines and NPDES Permit Conditions for CAFOs*

The effluent limitations guidelines for CAFOs allow "no discharges to waters of the United States, except when chronic or catastrophic storm events cause an overflow from a facility designed, constructed, and operated to hold process wastewater plus runoff from a 25-year, 24-hour storm event."<sup>110</sup> The National Weather Service statistically calculates a 25-year, 24-hour storm event as "the number of inches of rainfall in a 24-hour period that is expected to occur only once every 25 years."<sup>111</sup> In other words, waste retention facilities must be able to hold the animal waste and process wastewater plus the excess rainfall equivalent to a 25-year, 24-hour event, without overflowing.<sup>112</sup> In addition, the guidelines provide that CAFOs

(10) 300 animal units;

and either one of the following conditions are met: pollutants are discharged into navigable waters through a manmade ditch, flushing system or other similar man-made device; or 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.

*Id.* If an animal feeding operation has more than one type of animal, the total "animal units" must be calculated to determine if it is a CAFO. *See id.*

The term *animal unit* means a unit of measurement for any animal feeding operation calculated by adding the following numbers: the number of slaughter and feeder cattle multiplied by 1.0, plus the number of mature dairy cattle multiplied by 1.4, plus the number of swine weighing over 25 kilograms . . . multiplied by 0.4, plus the number of sheep multiplied by 0.1, plus the number of horses multiplied by 2.0.

*Id.*

<sup>109</sup> *Id.* § 122.23(c)(1). If a state has been granted the authority to implement its own permit system, then the head of the analogous state agency makes this designation. *See id.* § 122.26(a)(1)(v).

<sup>110</sup> CAFO GUIDANCE MANUAL, *supra* note 79, at 18 (construing 40 C.F.R. § 412.13(a), (b)). Catastrophic events include a 25-year, 24-hour storm event, tornadoes or hurricanes that would cause the retention facility to overflow. *See id.* at 21. "A chronic rainfall is a series of wet weather conditions that preclude dewatering of properly maintained waste retention structures." *Id.* (citation omitted).

<sup>111</sup> *Id.* "Maps published by the National Weather Service (NWS) show the amount of rainfall that constitutes the 25-year, 24-hour storm event for every location in the United States." *Id.*

<sup>112</sup> *See id.* at 22.

monitor their facilities and report the results at least annually to the applicable regulatory body.<sup>113</sup>

Discharges from animal feeding operations that occur because of a 25-year, 24-hour rainfall event are subject to a narrow exemption from the permitting requirements of the Clean Water Act.<sup>114</sup> The exemption becomes significant in two different situations. The first involves animal feeding operations that only discharge pollutants in the event of a 25-year, 24-hour storm. The current regulations provide that for the purpose of permit requirements, "no animal feeding operation is a concentrated animal feeding operation . . . if [it] discharges only in the event of a 25 year, 24-hour storm event."<sup>115</sup> In the second situation under this narrow exemption to the current effluent limitations, a CAFO with a permit that discharges pollutants because of a catastrophic event or chronic rainfall is also not held to be in violation of the Clean Water Act.<sup>116</sup> This exemption from the effluent limitation guidelines is not discussed in *Southview Farm*, because there was no allegation that the discharges complained of resulted from a 25-year, 24-hour storm event.

Under the Clean Water Act, effluent limitations are transformed into permit obligations for each discharger.<sup>117</sup> As discussed above, the effluent limitations guidelines for CAFOs do not establish numeric limitations; rather, no discharge is permitted except in the event of a catastrophic or chronic rainfall event.<sup>118</sup> In this

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<sup>113</sup> See 40 C.F.R. § 122.44(i)(2), (3) (stating that monitoring and reporting requirements shall be established on a case-by-case basis). "Monitoring requirements can consist of visual inspection of overflow or potential discharge points at specified intervals and/or after storms of a certain size. Permits may also require installation of a sensor or collection device that will detect any discharge from the retention structure." CAFO GUIDANCE MANUAL, *supra* note 79, at 19.

<sup>114</sup> See 40 C.F.R. §§ 122 app. B, 412.13(b).

<sup>115</sup> *Id.* § 122, app. B.

<sup>116</sup> See *id.* § 412.13(b). This section reads:

(b) Process waste pollutants in the overflow may be discharged to navigable waters whenever rainfall events, either chronic or catastrophic, cause an overflow of process waste water from a facility designed, constructed and operated to contain all process generated waste waters plus the runoff from a 25-year, 24-hour rainfall event for the location of the point source.

*Id.* See also CAFO GUIDANCE MANUAL, *supra* note 79, at 21 (construing 40 C.F.R. § 412).

<sup>117</sup> See *supra* notes 66-67 and accompanying text (discussing NPDES permits under the Clean Water Act).

<sup>118</sup> See CAFO GUIDANCE MANUAL, *supra* note 79, at 18; *supra* notes 110-12 and accompanying text (discussing effluent limitations guidelines for CAFOs under the Clean Water Act).

situation, non-numeric conditions are appropriate.<sup>119</sup> Thus, “non-numeric conditions . . . [such as] proper land application of wastes, retention structure design requirements, inspection and reporting requirements, best management practices (BMPs), and pollution prevention plans . . . may be included in NPDES permits for CAFOs.”<sup>120</sup>

A final point regarding permits and CAFOs is that a CAFO is “not obligated to have a NPDES permit unless there is an actual discharge.”<sup>121</sup> Thus, an unpermitted CAFO is subject to enforcement under the Clean Water Act only if an actual discharge, not resulting from a 25-year, 24-hour rainfall event, occurs.<sup>122</sup> For example, in *Carr v. Alta Verde Industries*,<sup>123</sup> Alta Verde, a cattle feedlot with between 20,000 and 30,000 head of cattle, operated a wastewater disposal system that consisted of six holding ponds without a NPDES permit.<sup>124</sup> A discharge occurred when Alta Verde cut into the embankment of one of the holding ponds to allow the wastewater to flow into a creek after the holding capacity of the ponds had been exceeded by heavy rains, which did not rise to the level of a 25-year, 24-hour rainfall event.<sup>125</sup> Before this discharge, Alta Verde was not subject to regulation under the Clean Water Act.<sup>126</sup> However, the court held that the fact that “Alta Verde . . . did discharge as the result of rains . . . that did not amount to a 25-year, 24-hour storm event . . . conclusively establishe[d] that Alta Verde was a concentrated animal feeding operation, and thus a point source, at the time of the . . . discharges.”<sup>127</sup>

*Carr* illustrates that once a discharge occurs, the unpermitted facility is considered in violation of the Clean Water Act. Further-

<sup>119</sup> See CAFO GUIDANCE MANUAL, *supra* note 79, at 19. Best management practices (BMPs) as a NPDES permit requirement are authorized when “[n]umeric effluent limitations are infeasible,” and also when “[t]he practices are reasonably necessary to achieve effluent limitations and standards or to carry out the purposes and intent of CWA.” 40 C.F.R. § 122.44(k)(2), (3).

<sup>120</sup> CAFO GUIDANCE MANUAL, *supra* note 79, at 19.

<sup>121</sup> *Id.* at 16.

<sup>122</sup> See *id.* at 22. However, the regulatory authority need not “verify the occurrence of a discharge from an operation prior to designating it as a CAFO.” *Id.* at 16. (citations omitted). A CAFO from which pollutants are or may be discharged is covered under the statutory definition of a point source. See 33 U.S.C. § 1362(14) (1994).

<sup>123</sup> 931 F.2d 1055 (5th Cir. 1991).

<sup>124</sup> See *id.* at 1057.

<sup>125</sup> See *id.* at 1057-60.

<sup>126</sup> See *id.* at 1060-63.

<sup>127</sup> *Id.* at 1060.

more, "[e]ven after the discharge ceases, the operation remains in continuing violation (i.e., for the purpose of citizens' suits under CWA [section] 505) if the discharger does not apply for and obtain a NPDES permit."<sup>128</sup> This was precisely the situation in *Southview Farm*; Southview was an unpermitted CAFO that discharged pollutants into navigable waters not resulting from a 25-year, 24-hour storm event.<sup>129</sup> Since Southview neither possessed nor had applied for a SPDES permit, it remained in continuing violation of the Clean Water Act, giving the plaintiffs standing to bring their citizen suit.<sup>130</sup>

#### IV. THE SECOND CIRCUIT'S APPLICATION OF THE CLEAN WATER ACT AND CAFO REGULATIONS IN *CONCERNED AREA RESIDENTS FOR THE ENVIRONMENT V. SOUTHVIEF FARM*

The Second Circuit's decision in *Southview Farm* is correct and represents a reasonable interpretation of the Clean Water Act's CAFO provisions. The primary question the Second Circuit addressed was whether Southview Farm discharged manure, a pollutant, from any point source into navigable waters.<sup>131</sup> The court correctly held that Southview was a CAFO and, thus, a point source.<sup>132</sup>

Because Southview had more than 700 mature dairy cattle, which were confined for more than 45 days, and there was no claim that the liquid manure runoff was caused by a 25-year, 24-hour storm event, it clearly met part of the criteria for classification as a CAFO.<sup>133</sup> The only disputed requirement for classification as a CAFO was the vegetation criteria requirement set out in 40 C.F.R. § 122.23(b)(1)(ii).<sup>134</sup> The court was faced with the question of "whether the fact that crops are grown on the fields, even though the cattle at Southview are not pastured on those fields, prevents

<sup>128</sup> CAFO GUIDANCE MANUAL, *supra* note 79, at 16 (citing *Carr v. Alta Verde Indus., Inc.*, 931 F.2d 1055 (5th Cir. 1991)).

<sup>129</sup> *See Concerned Area Residents for the Env't v. Southview Farm*, 34 F.3d 114, 122 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 1793 (1995).

<sup>130</sup> *See id.* at 121-22.

<sup>131</sup> *See id.* at 117.

<sup>132</sup> *See id.* at 123.

<sup>133</sup> *See id.* at 122.

<sup>134</sup> *See id.* at 122-23. "Crops, vegetation forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility." 40 C.F.R. § 122.23(b)(1)(ii) (1995).

Southview from being [a CAFO].<sup>135</sup> To decide this question, it was necessary for the court to look at the legislative intent behind this vegetation requirement.<sup>136</sup> In essence, did Congress intend to regulate only animal feeding operations with no farmland at all, such as beef stockyards,<sup>137</sup> thereby exempting from regulation an operation where crops are grown on any part of the farm? Or did Congress also intend to regulate animal feeding operations where the animals are confined in areas where no vegetation is grown, such as a Southview-type dairy operation, but where crops are grown elsewhere on the farm?

The court correctly stated that “[t]he vegetation criterion applies to the lot or facility *in which* the animals are confined.”<sup>138</sup> Whether or not crops are grown in an adjacent field, under the same ownership as the confinement facility, is irrelevant.<sup>139</sup> The court finds support for this interpretation in the definition of “feedlot” found in the regulations setting effluent limitations for CAFOs.<sup>140</sup> Under this regulation, a “feedlot” is defined as “a concentrated, confined animal or poultry growing operation for meat, milk or egg production, or stabling, in pens or houses wherein the animals or poultry are fed at the place of confinement and *crop or forage growth or production is not sustained in the area of confinement.*”<sup>141</sup>

The court reasoned that “lot or facility” in paragraph (ii) of 40 C.F.R. § 122.23(b)(1) should be defined in the same manner as “feedlot” is defined in the CAFO regulations.<sup>142</sup> The rationale for exempting facilities where animals are confined in areas with vegetation was explained in the United States Department of Justice amicus brief in the *Southview Farm* case:

First, the fact that vegetation can be sustained in the area in which the animals are confined suggests a lower density of animals in that area or otherwise they would eat or trample all of the vegetation. Second, the vegetation itself is helpful in absorbing and reducing the amount of pollution. The

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<sup>135</sup> *Southview Farm*, 34 F.3d at 122.

<sup>136</sup> *See id.* at 123.

<sup>137</sup> A stockyard is a holding facility where cattle or other livestock are temporarily housed prior to slaughter or transport. THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1874 (2d ed. 1987).

<sup>138</sup> *Southview Farm*, 34 F.3d at 123.

<sup>139</sup> *See id.*

<sup>140</sup> *See id.*

<sup>141</sup> 40 C.F.R. § 412.11(b) (1995) (emphasis added).

<sup>142</sup> *See Southview Farm*, 34 F.3d at 123.

E.P.A. regulations probably rely upon confinement in un-vegetated areas as an indicator of the "industrialized" nature of the confinement . . . .<sup>143</sup>

This interpretation of the vegetation requirement is also supported by the decision of the District Court of the Eastern District of Arkansas in *Higbee v. Starr*.<sup>144</sup> In *Higbee*, a hog finishing house operation with more than the requisite number of hogs was classified as a CAFO.<sup>145</sup> As in *Southview Farm*, there was no vegetation grown in the hog houses where the animals were confined, and the application of the hog manure collected from the hog confinement area as fertilizer on land owned by the farm did not prevent it from being classified as a CAFO.<sup>146</sup> Similarly, since the cows are confined in barns at Southview which do not contain vegetation in the normal growing season, application of manure to Southview's land should not prevent Southview from being classified as a CAFO.

Southview Farm argued that the court misconstrued the statutory language relating to the vegetation requirement and stressed that a large livestock farm would be forced to grow crops inside its barn to avoid classification as a CAFO.<sup>147</sup> Apparently, Southview hoped the ridiculous picture of a cornfield growing inside a barn would convince the public that the court was wrong in defining the vegetation requirement in this manner. However, it appears that Congress intended to make a meaningful distinction between confinement in vegetated areas as opposed to confinement in areas with no vegetation.

The vegetation requirement was designed to distinguish feedlots where animals are confined from pasture land, which is not subject to regulation.<sup>148</sup> Because the CAFO legislation is concerned with industrial-type farms which concentrate large numbers of animals in one area,<sup>149</sup> it makes sense that the vegetation requirement applies only to the site where the animals are in fact "concentrated"—the lot or facility itself. According to the EPA, "[t]o conclude otherwise would render the definition of CAFO meaningless because it

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<sup>143</sup> *Id.*

<sup>144</sup> 598 F. Supp. 323 (E.D. Ark. 1984), *aff'd mem.*, 782 F.2d 1048 (8th Cir. 1985).

<sup>145</sup> *See id.* at 325.

<sup>146</sup> *See id.*

<sup>147</sup> *See* Southview's Petition For A Writ Of Certiorari at 13, *Southview Farm* (No. 94-1316), *cert. denied*.

<sup>148</sup> *See* CAFO GUIDANCE MANUAL, *supra* note 79, at 4.

<sup>149</sup> *See* 40 C.F.R. § 122, app. B (1995).

disregards 'concentration' of animals."<sup>150</sup> Furthermore, the court's interpretation coincides with the position of the EPA, which "interprets the regulations to mean that if a facility maintains animals in an area without vegetation . . . the facility meets the [vegetation requirement] of the [CAFO] definition."<sup>151</sup>

In addition to addressing Southview's status as a CAFO, the Second Circuit also addressed the scope of CAFO regulation.<sup>152</sup> It is unclear from the regulations whether the CAFO designation covers only the confinement lot or facility and the manure storage system, or if the CAFO designation covers the entire farming operation including fields where manure is applied. An amicus brief submitted in support of Southview clearly presents the issue with respect to the scope of the CAFO regulations:

Whether Southview Farms [sic] should be regulated as a CAFO misses the point. Even if Southview Farms [sic] was a CAFO, this case does not involve a discharge from a manure lagoon . . . . [Rather,] [t]his case involves runoff from manure land application. Prior to the Second Circuit's decision, land application of manure was not subject to the point source permitting requirements of CAFO's.<sup>153</sup>

In *Southview Farm*, the court was not entirely correct when it held that the manure spreading operations and the manure application fields themselves "are a point source . . . because the farm itself falls within the definition of a concentrated animal feeding operation."<sup>154</sup> According to the EPA, it seems that the CAFO designation is limited to the confinement facility and manure retention facility.<sup>155</sup> However, the EPA goes on to state that "[a]ny time wastewater from areas of the CAFO flow to waters of the United States, the result is a discharge that is subject to the NPDES program."<sup>156</sup>

Furthermore, the manner in which the discharge from the CAFO occurs, whether through a man-made conveyance or through a

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<sup>150</sup> OFFICE OF WATER, U.S. ENVIRONMENTAL PROTECTION AGENCY, PERCEPTIONS ABOUT EPA'S ACTIONS IN THE SOUTHVIEW FARM CASE 4 (Dec. 12, 1994).

<sup>151</sup> CAFO GUIDANCE MANUAL, *supra* note 79, at 4. See *supra* note 104 and accompanying text (discussing the EPA's interpretation of regulations defining CAFOs).

<sup>152</sup> See *Southview Farm*, 34 F.3d at 121-23.

<sup>153</sup> Brief Amicus Curiae of Farmer Cooperatives and National Cattlemen's Association in Support of Petition for Certiorari at 6, *Southview Farm*, (No. 94-1316).

<sup>154</sup> *Southview Farm*, 34 F.3d at 115.

<sup>155</sup> See CAFO GUIDANCE MANUAL, *supra* note 79, at 12.

<sup>156</sup> *Id.*

natural channel, is not important.<sup>157</sup> Therefore, the CAFO regulations cover any discharge of a pollutant, such as animal waste, from a CAFO into the waters of the United States, including discharges of liquid manure into waters after land application. Thus, the court correctly held in *Southview Farm* that the discharges into the Genesee River from manure application fields were violations of the Clean Water Act since the pollutant discharged was animal waste from the CAFO area of Southview Farm.

Defining the scope of the CAFO regulations in this manner is logical and reasonable. If the manure application fields were not also regulated under the Clean Water Act, land application of manure would simply become an escape hatch through which farmers could avoid the "no discharge" effluent standard applying to CAFOs. In effect, "deferred discharge from containment structures [such as storage lagoons] to surface waters could proceed unimpeded as long as liquid wastes were first poured onto agricultural fields."<sup>158</sup> This result would clearly be inconsistent with the Clean Water Act's goal of restoring and maintaining the integrity of the waters by eliminating the discharge of pollutants into the nation's waters.<sup>159</sup> The Department of Justice agrees. In its amicus brief, filed with the Second Circuit in *Southview Farm*, it stated:

The CWA's statutory prohibition on discharges of pollutants from point sources (such as CAFOs) would be of little value if the persons responsible for such discharges could avoid responsibility merely by placing those pollutants onto the ground, where, as here, the discharges are made at such rates, in such quantities, and at times that the pollutants would naturally and foreseeably be washed into the waters of the United States in a matter of hours or days.<sup>160</sup>

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<sup>157</sup> See *id.* The CAFO GUIDANCE MANUAL states:

The categorization of these facilities as CAFOs is not limited by the traditional understanding of the term "point source." The discharge may occur through a man-made conveyance . . . or through a natural channel or gully that transports wastes, for example, from a retention structure to nearby surface waters. Flows from the CAFO over bare ground adjacent to the animal enclosure, for instance, are likely to converge in naturally occurring channels (e.g., surface depressions). Any time wastewater from areas of the CAFO flow [into] waters . . . the result is a discharge that is subject to the NPDES program.

*Id.*

<sup>158</sup> Frarey & Pratt, *supra* note 12, at 11.

<sup>159</sup> See *supra* notes 56-57 and accompanying text (identifying the objectives of the Clean Water Act).

<sup>160</sup> Frarey & Pratt, *supra* note 12, at 11.

Although the ruling in *Southview Farm* that all the discharges were violations of the Clean Water Act precluded addressing whether each discharge occurred from a specific point source, the reasonableness and soundness of the court's decision is supported by the fact that the Second Circuit could have found that each of the five individual discharges was from a point source, even without the designation as a CAFO. For example, concerning the July 13, 1989 violation at Southview Farm, plaintiffs testified that they observed liquid manure running into and through a swale into a ditch leading directly to a stream.<sup>161</sup> The manure did not just naturally flow to the lowest areas of the field. It was collected by human activity into the lagoons, then into the tankers or spreaders, and then applied to the fields, where it was channeled and collected by the swale and drain tile.<sup>162</sup>

This is analogous to the situation in *Sierra Club v. Abston Constr. Co.*,<sup>163</sup> where a strip mine had dredged sediment basins to contain surface runoff from highly erodible spoil piles before it entered a creek.<sup>164</sup> In *Sierra Club*, the court held that surface runoff collected or channeled by the mine operator constitutes a point source discharge and that even if a defendant did not construct the conveyances which channeled or collected runoff, he is liable "so long as [the conveyances] are reasonably likely to be the means by which pollutants are ultimately deposited into a navigable body of water."<sup>165</sup> In *Southview Farm*, the farm collected the manure on the fields where it was channeled into navigable waters through a swale and ditch.<sup>166</sup> The court stated "the swale coupled with the pipe under the stonewall leading into the ditch that leads into the stream was in and of itself a point source."<sup>167</sup> The agricultural stormwater discharge exception did not apply because there was no

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<sup>161</sup> See *Southview Farm*, 34 F.3d at 118.

<sup>162</sup> See *id.*; see also *United States v. Plaza Health Lab., Inc.*, 3 F.3d 643, 651 (2d Cir. 1993), cert. denied, 114 S. Ct. 2764 (1994) (Oakes, J., dissenting) ("[T]he term 'point source' has been broadly construed to apply to a wide range of polluting techniques, so long as the pollutants involved . . . reach the navigable waters by human effort or by leaking from a clear point at which waste water was collected by human effort.")

<sup>163</sup> 620 F.2d 41 (5th Cir. 1980).

<sup>164</sup> See *id.* at 43.

<sup>165</sup> *Id.* at 45. See *United States v. Oxford Royal Mushroom Prods., Inc.*, 487 F.Supp. 852, 854 (E.D. Pa. 1980) (holding that the spraying of an excess amount of waste water onto an irrigation field, which ran off into a stream through a break in the berm around the field, constitutes a discharge from a point source).

<sup>166</sup> See *Southview Farm*, 34 F.3d at 118.

<sup>167</sup> *Id.*

rainfall or melting of snowfall which caused the runoff.<sup>168</sup> Here, the discharge of manure into the creek was a result of its egregious over-application to already saturated fields.

Concerning the violations on both July 12, 1989 and August 22, 1989, plaintiffs testified they observed manure tanker trucks and manure spreaders operating on the aforementioned field with the swale, and noticed a heavy spreading of manure.<sup>169</sup> "The district court held that the jury's finding [that] a discharge [occurred on these dates] was 'sheer surmise and conjecture' because the plaintiffs' [sic] offered no direct eyewitness testimony of manure actually leaving Southview property on those dates."<sup>170</sup> The Second Circuit reversed, holding that the district court had applied the wrong standard for ruling on a motion for a judgment as a matter of law and that "the jury was justified in inferring that the same activities that [the plaintiffs] observed in detail on July 13, 1991, probably had the same result on July 12, 1989, and August 22, 1989, namely that they were violations of the Clean Water Act at [this] field. . . ."<sup>171</sup> Thus, the court upheld the jury's verdict that discharges did occur on July 12 and August 22, 1989 in violation of the Clean Water Act because there was a discharge of a pollutant from a point source into a navigable water.<sup>172</sup>

A secondary question that the Second Circuit faced in *Southview Farm* involved the relationship between the designation as a CAFO and the agricultural stormwater discharge exception to the Clean Water Act.<sup>173</sup> The court correctly held that a CAFO and discharges from a CAFO area were not subject to any agricultural stormwater discharge exemption.<sup>174</sup> This makes sense because the effluent limitations for CAFOs only allow a discharge in the case of a 25-year, 24-hour rainfall event.<sup>175</sup> This term, the 25-year, 24-hour rainfall event, is much narrower than run-off that might be covered as an "agricultural stormwater discharge" resulting from a more ordinary storm.<sup>176</sup>

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<sup>168</sup> See *id.* at 115; see also *supra* notes 87-88 and accompanying text (explaining the term "agricultural stormwater discharge").

<sup>169</sup> See *Southview Farm*, 34 F.3d at 119.

<sup>170</sup> *Id.* at 119-20.

<sup>171</sup> *Id.* at 120.

<sup>172</sup> See *id.*

<sup>173</sup> See *id.* at 115.

<sup>174</sup> See *id.*

<sup>175</sup> See *id.* at 122.

<sup>176</sup> See CAFO GUIDANCE MANUAL, *supra* note 79, at 21.

The fact that neither of the remaining violations would have qualified as agricultural stormwater discharges had Southview not been designated as a CAFO, reinforces the reasonableness of the court's interpretation of the relationship between CAFOs and agricultural stormwater discharges. The question concerning the September 26, 1990 and April 15, 1991 violations was whether they were excepted under the Clean Water Act as agricultural stormwater discharges. Although the district court set aside the jury's verdict that the discharges were not the result of rain,<sup>177</sup> the Second Circuit held "there can be no escape from liability for agricultural pollution simply because it occurs on rainy days."<sup>178</sup> As the court phrased it, "the real issue is not whether the discharges occurred during rainfall or were mixed with rain water run-off, but rather, whether the discharges were the result of precipitation."<sup>179</sup>

In light of the testimony presented,<sup>180</sup> the Second Circuit held "the jury could properly find that 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.'"<sup>181</sup> Thus, because the discharge of the manure into the creek was a result of human activity, namely the over-saturation of the fields with manure rather than a result of rain, the court correctly found that the agricultural stormwater discharge exception did not apply to these discharges from Southview Farm.

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<sup>177</sup> See *Southview Farm*, 34 F.3d at 120.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 120-21.

<sup>180</sup> Concerning the violation on September 26, 1990, plaintiff Karcheski testified that "after a rain[] and manure had been applied on the field, [the manure] was literally running off everywhere." *Id.* at 121 (citation omitted). Plaintiff Bly "testified that he 'could see the manure flowing.'" *Id.* (citation omitted). A DEC report, resulting from an investigation at that time, "while indicating that the run-off was attributed to 'heavy rain,' also points out that the [f]ields have been saturated with liquid manure and farm continues to spread in same area." *Id.* (citation omitted). Furthermore, Sally Hunt, a non-party witness, testified that "Southview Farms [sic] had spread the manure which 'had pooled in the corner of their field right next to our property . . . larger than I had seen before . . . and then it rained . . . Then it drizzled into the ditch and through the drainage pipe.'" *Id.* (citation omitted).

Concerning the manure application on April 15, 1991, plaintiff Karcheski testified that "a lot of manure [was] coming off the field through the areas where the banks had fallen away." *Id.* (citation omitted). Plaintiff Bly testified that "he 'observed heavy manure applications, once again, to this field' and 'brown' water runoff flowing off the field towards the fencepost." *Id.* (citation omitted). The DEC Report indicated that there was an "[e]xtra heavy application of manure in fields' and a 'heavy cover of liquid manure.'" *Id.* (citation omitted).

<sup>181</sup> *Id.*

The above analysis of the Southview Farm violations in the field with the swale shows that the Second Circuit would have come to the same result—specifically that Southview Farm had violated the Clean Water Act—regardless of whether it was designated as a CAFO. This only serves to strengthen the court's decision. The court's decision was a correct and reasonable interpretation of the CAFO regulations, in light of Congress' intent to regulate such large, industrial-type farms.

## V. CONCLUSION

The main implication of the Second Circuit's decision in *Concerned Area Residents for the Environment v. Southview Farm* is that owners of "industrial farms" classified as CAFOs must operate their farms in a manner consistent with the objectives of the Clean Water Act. This decision establishes precedent by holding that dairy farms with the requisite number of cows are CAFOs and thus resolves the ambiguity of Clean Water Act compliance with respect to what type of entities the CAFO regulations are intended to regulate. Now, enforcement agencies have clearer standards to apply, and that should expedite their enforcement efforts.

CAFOs must obtain a permit and operate in accordance with that permit. This permit requirement affects only CAFOs; it is not correct to read *Southview Farm* as requiring that every farm in New York must have a permit to apply manure to fields. CAFOs have been singled out for regulation because they confine large numbers of animals, creating a large potential for pollution.

*Southview Farm* does not stand for the proposition that land application of manure is bad or unacceptable. If Southview Farm had applied the manure according to agronomic rates, as is the usual practice among farmers, there would not have been a problem.<sup>182</sup> Instead, they continued to apply heavy amounts of manure to fields that were already over-saturated due to previous applications.<sup>183</sup> Additionally, Southview did not stop applying the manure despite heavy rains.<sup>184</sup> This egregious behavior, in connection with Southview's lack of concern for and failure to comply with both standard agricultural practices and the Clean Water Act, caused the problem

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<sup>182</sup> See Frarey & Pratt, *supra* note 12, at 10. Agronomics for applying manure are rates that are "no greater than the capacity of crops or pasture grass to utilize the readily available nitrogen or phosphorous present in the manure applied." *Id.*

<sup>183</sup> See *Southview Farm*, 34 F.3d at 121.

<sup>184</sup> See *id.*

here, rendering Southview an appropriate target for enforcement litigation.

Perhaps the clearest statement of the implication of the *Southview Farm* decision and advice on how farmers can avoid Clean Water Act litigation comes from an interview with Donald W. O'Brien Jr., the attorney who represented the citizen group:

I know our opponents have portrayed this decision as somehow sounding the death knell for agriculture, and I think that's an exaggeration . . . . It just means farmers who handle livestock and confront a large animal waste problem will have to use best management practices. And the use of best management practices will keep nearby streams and rivers from becoming sewers.<sup>185</sup>

Thus, the Second Circuit correctly held that Southview Farm was a CAFO and therefore a point source, not subject to any agricultural exemptions, including the agricultural stormwater discharge exemption. This decision represents a reasonable interpretation of the CAFO regulations, in light of Congress' intent to regulate such large, industrial-type farms which contribute so significantly to the degradation and pollution of our Nation's waters.

*Kristen E. Mollnow*

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<sup>185</sup> *Appeals Court Rules Manure Discharges Make Farm 'Point Source' Under Water Act*, 25 *Env't Rep. (BNA) No. 20*, at 973 (Sept. 16, 1994).