

**THE AFTERMATH OF *ALT V. EPA*:  
UNRESOLVED TENSIONS IN POULTRY FARM  
POLLUTION CONTROL**

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I. INTRODUCTION

On October 2, 2014, the Environmental Protection Agency (“EPA”) withdrew its appeal to the Fourth Circuit in *Alt v. EPA*,<sup>1</sup> a case that highlighted the tension between common poultry farming practices in the mid-Atlantic region and attempts by environmental groups and regulators to clean up the Chesapeake Bay. The EPA’s withdrawal of its appeal leaves uncertain, in most districts, whether the EPA can pursue enforcement of what it still contends are unpermitted discharges of pollutants under the Clean Water Act (“CWA”) against poultry farmers when poultry house fans scatter litter, dander, and debris in the surrounding area. The uncertainty raises stakes for both interests:

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<sup>1</sup> Motion to Voluntarily Dismiss Appeal, *Alt v. EPA*, No. 13-2527 (4th Cir. Sept. 22, 2014).

Poultry farmers face potential liability for standard production practices that are difficult to alter; at the same time, nutrient runoff from poultry production continues to pollute the Bay, as well as other critical watersheds.

In *Alt*, the EPA unsuccessfully attempted to enforce the CWA in the Chesapeake Bay watershed<sup>2</sup> against poultry farmyard pollution—that is, runoff of manure, litter, and dander released from poultry houses through ventilation fans into the surrounding yard.<sup>3</sup> In granting summary judgment for the plaintiff, the District Court for the Northern District of West Virginia held that the EPA could not require a poultry farmer in Hardy County, West Virginia, to obtain a permit under Section 402 of the CWA.<sup>4</sup> The key issue in *Alt* was whether the discharges of litter, manure, and dander that escaped from the enclosed parts of the facility qualified as agricultural stormwater, which is exempt from the CWA requirement that concentrated animal feeding operations (“CAFOs”) obtain permits to discharge.<sup>5</sup> The court held that the discharges were exempt.<sup>6</sup>

The EPA initially appealed the case,<sup>7</sup> but voluntarily withdrew the appeal a few months later.<sup>8</sup> In a public statement, the EPA cited limited resources and higher priorities,<sup>9</sup> but also noted that the “EPA remains committed to working with the agricultural community to ensure compliance with this legal requirement and to pursue enforcement when necessary.”<sup>10</sup>

This Article considers the stakes of uncertainty resulting from the EPA’s withdrawal of its appeal in the Fourth Circuit combined with its continued position that it has authority to require permitting in these cases. Both the Chesapeake Bay (and those who rely on it) and poultry farmers face substantial costs and risks as long as this category of pollution continues and

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<sup>2</sup> The farm, located in Hardy County, West Virginia, is part of the Potomac Headwaters in the Chesapeake Bay Watershed. See *West Virginia Chesapeake Bay*, NAT. RESOURCES CONSERVATION SERV., <http://www.nrcs.usda.gov/wps/portal/nrcs/main/wv/water/> (last visited Mar. 30, 2016).

<sup>3</sup> See *Alt v. EPA*, 979 F. Supp. 2d 701 (N.D.W. Va. 2013).

<sup>4</sup> See 33 U.S.C. § 1342 (2014).

<sup>5</sup> *Alt*, 979 F. Supp. 2d at 711.

<sup>6</sup> *Id.*

<sup>7</sup> See Letter from Patricia S. Connor, Clerk, to Counsel, *Alt v. EPA*, No. 13-2527 (4th Cir. July 22, 2014); Briefing Order—Civil, *Alt v. EPA*, No. 13-2527 (4th Cir. July 23, 2014); Order Amending Briefing Schedule, *Alt v. EPA*, No. 13-2527 (L) (4th Cir. Aug. 18, 2014).

<sup>8</sup> See Motion to Voluntarily Dismiss Appeal, *Alt v. EPA*, No. 13-2527 (4th Cir. Sept. 22, 2014); Order, *Alt v. EPA*, No. 13-2527 (4th Cir. Sept. 24, 2014) (granting EPA motion to dismiss appeal); Memorandum in Support of Motion for Leave to File Brief of Amici Curiae at 4, *Rose Acre Farms v. N.C. Dep’t of Env’t & Nat. Res.*, No. 5:14-CV-147 (E.D.N.C. Dec. 12, 2014), ECF No. 78.

<sup>9</sup> See Cynthia Giles, *A Commitment to Keep Our Waters Clean and Safe*, EPA CONNECT (Sept. 19, 2014, 7:58 PM), <http://blog.epa.gov/blog/2014/09/a-commitment-to-keep-our-waters-clean-and-safe/>.

<sup>10</sup> *Id.*

the EPA's enforcement intentions and options remain unclear. Part II evaluates the potential impact on the Chesapeake Bay from poultry farm pollution, where excessive nutrient runoff from decades of intensive poultry production has contributed to crisis pollution levels, and existing strategies and goals for mitigation of existing pollution and prevention of future damage. Part III looks at the other side of the story: What is the impact of uncertainty on poultry farmers? Nearly all poultry production is conducted under production contracts with large integrators like Tyson Foods, Pilgrim's Pride, and Perdue Farms, but to date the environmental liability has remained largely with the individual growers, who often lack sufficient capital to make substantial changes to poultry house ventilation systems. Part IV examines the district court decision in *Alt* and the strength of the EPA's claim for enforcement under the CWA regime for CAFOs. This Part concludes that the EPA might prevail in other courts based on a different interpretation of the scope of the agricultural stormwater exemption for CAFOs. Part V reviews the EPA's withdrawal of its appeal in the Fourth Circuit and analyzes the likelihood—based on both legal and political considerations—that the EPA will pursue and prevail in future enforcement actions. The Article concludes that the EPA has sufficient grounds for liability to make poultry farmers nervous, but lacks sufficient legal and political muscle to assure its success, potentially leaving the Bay and other critical watersheds unprotected from this type of poultry farm pollution. The Article considers the EPA's options for resolving the tension while bearing in mind the risk to poultry farmers and suggests avenues for further research.

## II. UNCERTAINTY FOR THE CHESAPEAKE BAY: THE EFFECTS OF NUTRIENT RUNOFF FROM AGRICULTURE IN THE MID-ATLANTIC REGION

The poultry industry in the United States is an enormous business, involving hundreds of thousands of farms.<sup>11</sup> Poultry production, which was concentrated in the Delmarva Peninsula<sup>12</sup> prior to World War II, has since become more concentrated across the South, from Eastern Texas to Georgia and North Carolina.<sup>13</sup> Poultry production within Mid-Atlantic states remains

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<sup>11</sup> The USDA reported that in 2012, hundreds of thousands of farms produced layers (198,272 farms); pullets for laying flock replacement (26,749 farms); broilers or other meat chickens (42,226 farms); and turkeys (19,956 farms). USDA, NAT'L AGRIC. STATISTICS SERVS., 2012 CENSUS OF AGRICULTURE: UNITED STATES SUMMARY AND STATE DATA 25 tbl. 32 (May 2014), [http://www.agcensus.usda.gov/Publications/2012/Full\\_Report/Volume\\_1,\\_Chapter\\_1\\_US/st99\\_1\\_032\\_033.pdf](http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_US/st99_1_032_033.pdf).

<sup>12</sup> The Delmarva Peninsula is located to the east of the Chesapeake Bay and is occupied by parts of Delaware, Maryland, and Virginia. See *The Delmarva Peninsula*, DELMARVA USA, <http://www.delmarvausa.com> (last visited Mar. 30, 2016).

<sup>13</sup> See MICHAEL OLLINGER ET AL., USDA, ECON. RESEARCH SERV., REP. NO. 787, STRUCTURAL CHANGE IN U.S. CHICKEN AND TURKEY SLAUGHTER 1516 (Sept. 2000), [http://www.ers.usda.gov/media/491092/aer787\\_1\\_.pdf](http://www.ers.usda.gov/media/491092/aer787_1_.pdf). The Chesapeake Bay watershed includes parts of these four poultry-producing states, plus parts of Pennsylvania and New York, and all of

high, however, with Maryland, Delaware, Virginia, and West Virginia all among the top 16 broiler-producing states.<sup>14</sup>

Pollution from poultry production remains an especially critical environmental concern for the Chesapeake Bay region for two reasons. First, the ecological integrity of the Bay is highly impaired from years of pollution. Samples taken from streams and rivers within the watershed between 2000 and 2010 showed that 15% of streams and rivers were rated poor and 42% were rated very poor for overall water quality.<sup>15</sup> Data gathered by the Chesapeake Bay Program<sup>16</sup> showed that, from 2010 to 2012, only 29% of the Chesapeake Bay attained acceptable water quality standards for dissolved oxygen, water clarity/underwater bay grasses, and chlorophyll a.<sup>17</sup>

Second, manure from poultry litter operations is less useful as a fertilizer for local cropland in the Bay region than in other states with substantial poultry production. Poultry litter, which includes manure, contains many valuable nutrients—including nitrogen, phosphorus, potassium, and calcium—that can be used to fertilize cropland.<sup>18</sup> “Nearly 40 percent of contract broiler growers have no cropland,” however, “and many others do not have enough to absorb all of the nutrients from” the farm’s poultry manure production.<sup>19</sup> Consequently, over two-thirds of all the litter produced from contract broiler grow-out operations must be removed from the grower’s farm.<sup>20</sup> In states where manure production is especially high in relation to available local cropland, such as Maryland and Delaware, management of poultry litter is a challenge.<sup>21</sup> For example, the 568 million chickens raised on the Delmarva Peninsula produce approximately 1.1 billion pounds of chicken

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the District of Columbia, according to the website of a public-private program devoted to restoring the Bay. *See Facts and Figures*, CHESAPEAKE BAY PROGRAM, <http://www.chesapeakebay.net/discover/bay101/facts> (last visited Mar. 30, 2016).

<sup>14</sup> *See* PEW CHARITABLE TRS., *THE BUSINESS OF BROILERS: HIDDEN COSTS OF PUTTING A CHICKEN ON EVERY GRILL 12* (2013). According to data from the USDA National Agricultural Statistics Service, Maryland was the eighth largest broiler-producing state in 2012, producing 304 million of the 8.4 billion broilers produced that year. *Id.* Virginia was tenth with 241 million; Delaware was twelfth with 212 million; and West Virginia was sixteenth with 94 million. *Id.*

<sup>15</sup> *See Water Quality: TMDL Tracking*, CHESAPEAKEBAY.NET, [http://stat.chesapeakebay.net/?q=node/130&quicktabs\\_10=1](http://stat.chesapeakebay.net/?q=node/130&quicktabs_10=1) (last visited Mar. 30, 2016). ChesapeakeStat is a tracking system established by the partnership of the Chesapeake Bay Program. *See Overview*, CHESAPEAKESTAT, <http://www.chesapeakestat.com/overview> (last visited Mar. 30, 2016).

<sup>16</sup> The Chesapeake Bay Program is a partnership of federal and state agencies, local government, non-profits organizations, and academic institutions. *See Who We Are*, CHESAPEAKE BAY PROGRAM, <http://www.chesapeakebay.net/about/who> (last visited Mar. 30, 2016).

<sup>17</sup> *See Water Quality: TMDL Tracking*, *supra* note 15.

<sup>18</sup> *See* JAMES M. MACDONALD, USDA, ECON. RESEARCH SERV., *EIB-126, TECHNOLOGY, ORGANIZATION, AND FINANCIAL PERFORMANCE IN U.S. BROILER PRODUCTION 23* (2014).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 23–24.

litter annually.<sup>22</sup> If the litter were spread evenly on the 8.5 million acres of agricultural land in the Bay watershed, each acre would be fertilized with 129 pounds of chicken litter.<sup>23</sup> By way of comparison, Delaware sold 581 chickens per acre of cropland in 2007; Arkansas, the number two broiler-producing state in that year, sold only 140 chickens per acre.<sup>24</sup> The result is not only current overproduction of nutrients for available cropland in the Chesapeake Bay watershed, but also “legacy pollutants,” especially phosphorus, stored in soils and sediments,<sup>25</sup> which impede present efforts to clean up the Bay.

The Chesapeake Bay watershed covers 64,000 square miles of land located within six states and the District of Columbia.<sup>26</sup> Nearly 22% of the land within the watershed is used for agricultural production.<sup>27</sup> There are approximately 87,000 farms operating within the watershed.<sup>28</sup> Agricultural production activities contribute an estimated \$10 billion a year to the region’s economy.<sup>29</sup> Agriculture, however, also puts more nutrients and sediments into the Bay than any source.<sup>30</sup> Agricultural runoff is responsible for approximately 43% of the nitrogen, 50% of the phosphorous, and 60% of the sediment load entering the Bay.<sup>31</sup> Manure accounts for 19% of the total nitrogen and 26% of the total phosphorous load.<sup>32</sup>

Many nutrients—especially nitrogen and phosphorous—are essential for sustaining plant and animal life in the Bay, but an overabundance of any nutrient reduces water quality and poses a threat to all forms of life.<sup>33</sup> Excessive

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<sup>22</sup> See TOM DUTZIK ET AL., CORPORATE AGRIBUSINESS AND AMERICA’S WATERWAYS: THE ROLE OF AMERICA’S BIGGEST AGRIBUSINESS COMPANIES IN THE POLLUTION OF OUR RIVERS, LAKES AND COASTAL WATERS 19 (2010), [http://www.environmentamerica.org/sites/environment/files/reports/EnvAm\\_Ag\\_v6\\_print.pdf](http://www.environmentamerica.org/sites/environment/files/reports/EnvAm_Ag_v6_print.pdf).

<sup>23</sup> *Id.*

<sup>24</sup> See ENV’T GRP., PEW CHARITABLE TRS., BIG CHICKEN: POLLUTION AND INDUSTRIAL POULTRY PRODUCTION IN AMERICA 11 (2011).

<sup>25</sup> See NAT’L RESEARCH COUNCIL OF THE NAT’L ACADS., ACHIEVING NUTRIENT AND SEDIMENT REDUCTION GOALS IN THE CHESAPEAKE BAY: AN EVALUATION OF PROGRAM STRATEGIES AND IMPLEMENTATION 24–26 (2011).

<sup>26</sup> See *Frequently Asked Questions: How Big Is the Chesapeake Bay Watershed?*, CHESAPEAKE BAY PROGRAM, <http://www.chesapeakebay.net/faq> (last visited Mar. 30, 2016).

<sup>27</sup> See USDA, CHESAPEAKE WORKING LANDS CONSERVATION STRATEGY DRAFT 2 (2014), <http://www.chesapeakebay.net/documents/ChesapeakeWorkingLandsConservationStrategy.pdf>.

<sup>28</sup> EPA, EPA 841-R-10-002, GUIDANCE FOR FEDERAL LAND MANAGEMENT IN THE CHESAPEAKE BAY WATERSHED 2 (2010), [http://water.epa.gov/polwaste/nps/upload/chesbay\\_chap02.pdf](http://water.epa.gov/polwaste/nps/upload/chesbay_chap02.pdf).

<sup>29</sup> See USDA, *supra* note 27, at 2.

<sup>30</sup> See EPA, *supra* note 28, at 2.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> See *Nitrogen & Phosphorus*, CHESAPEAKE BAY FOUND., <http://www.cbf.org/about-the-bay/issues/dead-zones/nitrogen-phosphorus> (last visited Mar. 30, 2016).

levels of nitrogen and phosphorus cause algae blooms that block sunlight to underwater grasses and deplete oxygen levels in the water.<sup>34</sup> Decreasing oxygen levels stress fish and shellfish populations.<sup>35</sup> Algae blooms also trigger spikes in pH levels, which in turn spurs the growth of parasites.<sup>36</sup> Toxic algae, such as some blue-green algae (cyanobacteria), pose serious health risks to animals and humans.<sup>37</sup>

On May 12, 2009, President Barack Obama issued an Executive Order on Chesapeake Bay Protection and Restoration.<sup>38</sup> The Order addressed the failed efforts of federal, state, and local governments to attain existing state water quality standards and the “fishable and swimmable” goals of the Clean Water Act.<sup>39</sup> The Order stated that nitrogen, phosphorus, and sediments were the nutrients most responsible for the Bay’s pollution.<sup>40</sup> The Order noted that current water quality and pollution control methods within the Bay’s watershed would prevent the restoration of the Bay for many years.<sup>41</sup> The Order directed federal agencies to implement pollution control measures with tools from the Clean Water Act and the Food Security Act of 1985.<sup>42</sup>

One of the most comprehensive attempts by federal regulators to enact rules to implement the President’s Order came in December 2010 when the EPA issued the Total Maximum Daily Load (“TMDL”) for nitrogen, phosphorus, and sediment discharges into the Chesapeake Bay.<sup>43</sup> This “pollution diet” aims to restore water quality and overall health to the Bay by 2025.<sup>44</sup> To meet that goal, the TMDL sets Bay watershed limits of 185.9 million pounds of nitrogen, 12.5 million pounds of phosphorus, and 6.45 billion pounds of sediment per year, which represents a 25% reduction in nitrogen, 24% reduction in phosphorus, and 20% reduction in sediment from current levels by 2025.<sup>45</sup>

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<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> Exec. Order No. 13,508, 74 Fed. Reg. 23,099 (May 15, 2009).

<sup>39</sup> *Id.*

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

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> See EPA, CHESAPEAKE BAY TOTAL MAXIMUM DAILY LOAD FOR NITROGEN, PHOSPHORUS AND SEDIMENT (Dec. 29, 2010), [http://www.epa.gov/sites/production/files/2014-12/documents/cbay\\_final\\_tmdl\\_exec\\_sum\\_section\\_1\\_through\\_3\\_final\\_0.pdf](http://www.epa.gov/sites/production/files/2014-12/documents/cbay_final_tmdl_exec_sum_section_1_through_3_final_0.pdf).

<sup>44</sup> See EPA, FACT SHEET, CHESAPEAKE BAY TOTAL MAXIMUM DAILY LOAD (TMDL), [http://www.epa.gov/sites/production/files/2015-07/documents/bay\\_tmdl\\_fact\\_sheet.pdf](http://www.epa.gov/sites/production/files/2015-07/documents/bay_tmdl_fact_sheet.pdf) (last visited Mar. 30, 2016).

<sup>45</sup> *Id.*

The EPA also planned to propose a new Chesapeake Bay CAFO Rule in 2012.<sup>46</sup> In May 2013—while *Alt* was pending before the district court—the EPA withdrew the proposed rule.<sup>47</sup> In a statement issued in July 2013, an EPA spokesperson stated that about one-third of animal manure in the watershed came from CAFOs while the remaining two-thirds came from smaller animal feeding operations (“AFOs”) not subject to the regulations.<sup>48</sup> The spokesperson concluded that EPA resources would be better spent addressing the “whole universe” of the animal producing industry rather than just a “select slice.”<sup>49</sup> The EPA began to work with state regulators in the watershed through creating an inventory of AFOs and CAFOs, and how those various operations manage their manure production.<sup>50</sup> Since manure accounts for 19% of the total nitrogen and 26% of the phosphorous loads in the region, however, such monitoring activity will likely be insufficient to meet the 2025 TMDL goals for the Chesapeake Bay watershed without continued enforcement of existing regulations regarding manure management practices by CAFOs.

### III. UNCERTAINTY FOR POULTRY FARMERS: POULTRY PRODUCTION IN THE MID-ATLANTIC REGION AND NATIONALLY

The EPA’s withdrawal of its appeal in *Alt* leaves thousands of large poultry farmers in the Fourth Circuit and across the country in doubt as to whether they are required to apply for a permit under the Clean Water Act for discharging feathers, dander, and poultry litter through ventilation systems to areas outside the poultry houses and into neighboring waters. The USDA reported that in 2012, hundreds of thousands of farms produced layers (198,272 farms); pullets for laying flock replacement (26,749 farms); broilers or other meat chickens (42,226 farms); and turkeys (19,956 farms).<sup>51</sup> According to the brief of intervenors American Farm Bureau Federation (“AFBF”) and West Virginia Farm Bureau (“WVFB”) in the *Alt* case, “virtually all poultry CAFOs and other types of enclosed animal agricultural operations will emit manure dust particles from their ventilation systems and will occasionally track or spill

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<sup>46</sup> See Karl Blankenship, *EPA, CBF Agree to Not Seek New National CAFO Regulations*, BAY J. (July 4, 2013), [http://www.bayjournal.com/article/epa\\_cbf\\_agree\\_to\\_not\\_seek\\_new\\_national\\_cafo\\_regulations](http://www.bayjournal.com/article/epa_cbf_agree_to_not_seek_new_national_cafo_regulations).

<sup>47</sup> See *Revised Regulations for Concentrated Animal Feeding Operations (CAFOs) in the Chesapeake Bay Watershed*, EPA, <http://yosemite.epa.gov/opei/RuleGate.nsf/0/664c1b0960cd17a98525795f006f5229!OpenDocument&Click=#1> (last visited Mar. 30, 2016) (describing withdrawal of plan to issue proposed rule).

<sup>48</sup> See Blankenship, *supra* note 46.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* Currently, no body collects data on the number of existing CAFOs or AFOs. EPA data tracks only those CAFOs that actually discharge pollutants into waters of the United States and therefore are required to apply for permits under Section 402 of the CWA.

<sup>51</sup> See USDA, *supra* note 11.

amounts of manure outside” and into waters of the United States.<sup>52</sup> The Farm Bureau intervenors suggested that if the EPA were to prevail in *Alt*, nearly every large CAFO would likely have an obligation to obtain a permit if rains could wash manure and dander into jurisdictional waters.<sup>53</sup>

Because of the unique structure of the poultry industry, poultry growers are in a less advantageous position compared with most other categories of farmers to remedy or compensate the public for environmental harms. Unlike most other agricultural commodity production (with the exception of hogs), poultry production is controlled by a few large integrator companies, and most growers work under contract with an integrator. In 2012, the top 20 integrators accounted for 96% of all broilers produced in the United States.<sup>54</sup> The top three—Tyson Foods, Pilgrim’s Corporation, and Perdue Farms, Inc.—accounted for 50%.<sup>55</sup> Thousands of U.S. farms produced poultry under production contracts, ranging from broilers (15,830 farms); chicken eggs (3,144 farms); layers (2,949 farms); pullets for laying flock replacement (1,384 farms); and turkeys (1,903 farms).<sup>56</sup> The broiler industry relies almost exclusively on production contracts, with 97% of broilers raised on contract operations in 2011.<sup>57</sup>

Under nearly all production contracts, integrators provide the chicks, feed, vaccine, and veterinary and technical assistance.<sup>58</sup> Growers provide housing, labor, and utilities and receive payments for their services, with premiums and discounts tied to the efficiency—the larger the ratio of live-weight broiler to feed, the higher the payment. Although growers are normally required to provide housing, contracts between integrators and growers often provide that growers must build houses according to the integrators’ specifications with respect to features such as house orientation, size per bird, flooring, lighting systems, and ventilation systems.<sup>59</sup>

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<sup>52</sup> American Farm Bureau Federation and West Virginia Farm Bureau’s Reply in Support of Motion to Intervene at 6, *Alt v. EPA*, 979 F. Supp. 2d 701 (N.D.W. Va. Sept. 4, 2012) (No. 2:12-CV-00042), ECF No. 23.

<sup>53</sup> *Id.* at 5.

<sup>54</sup> *Id.* at 4.

<sup>55</sup> *Id.*

<sup>56</sup> USDA, NAT’L AGRIC. STATISTICS SERVS., 2012 CENSUS OF AGRICULTURE: UNITED STATES SUMMARY AND STATE DATA 539 tbl. 39 (May 2014), [http://www.agcensus.usda.gov/Publications/2012/Full\\_Report/Volume\\_1,\\_Chapter\\_2\\_US\\_State\\_Level/usv1.pdf](http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_2_US_State_Level/usv1.pdf).

<sup>57</sup> MACDONALD, *supra* note 18, at iii.

<sup>58</sup> *Id.* at 4.

<sup>59</sup> See, e.g., PILGRIM’S PRIDE BROILER PRODUCTION AGREEMENT G.1 (Nov. 2005), [http://www.sec.gov/Archives/edgar/data/802481/000080248105000093/ex99\\_1broileragreement.htm](http://www.sec.gov/Archives/edgar/data/802481/000080248105000093/ex99_1broileragreement.htm); see also JENNIFER L. RHODES ET AL., *BROILER PRODUCTION MANAGEMENT FOR POTENTIAL AND EXISTING GROWERS* 4 (2011), [http://extension.umd.edu/sites/default/files/\\_docs/POULTRY\\_BroilerProductionManagement\\_final1.pdf](http://extension.umd.edu/sites/default/files/_docs/POULTRY_BroilerProductionManagement_final1.pdf); *Home-Grown Success: Opportunities for Independent Contract Producers*, PERDUE FARMS 3–4 (July 28, 2009), <http://www.perdufarm.com/uploadedFiles/MIS-2694-4446-SinglePages.pdf>.

This industrial production system leads to high concentration of poultry production in small geographic areas to minimize transportation costs as integrators move feed and chicks to the growers, live birds and eggs to processing plants and hatcheries, and chicken products to further processing plants.<sup>60</sup> These business practices illustrate a reoccurring potential environmental threat as manure and other waste products overwhelm the needs of surrounding farms for fertilizer.<sup>61</sup>

The growing of broilers and other poultry products occurs primarily on moderate-size farms without substantial capital. Most broiler production comes from farms with annual sales under \$350,000.<sup>62</sup> Moreover, most of these farms rely almost exclusively on broiler production with little or no diversification into other livestock or crops.<sup>63</sup> The mean and median household incomes from all sources for contract broiler producers is somewhat higher than the mean and median for all U.S. households—\$86,883 (mean) and \$68,445 (median) for broiler producers, compared with \$72,812 (mean) and \$50,504 (median) for all U.S. households.<sup>64</sup> Much of this income, however, comes from other farm and off-farm income. Rates of return for broiler production have been estimated to range from negative returns for farms with one or two houses to 2.7% for operations with six or more houses.<sup>65</sup> By comparison, the average rate of return for farms of all types in 2011 was 11.1% for farms with at least \$1 million in sales, and 5.3% for farms with \$350,000 to \$999,999 in sales.<sup>66</sup> One study noted that the industry produced very wide ranges of financial performance among growers, with many growers earning very low returns and household incomes.<sup>67</sup>

Poultry growers face additional financial risks due to the structure of the integrator-grower contractual relationship. Integrators set a grower's pay and bonuses based on a comparison with that of other growers whose birds are collected by the integrator at around the same time. Inclusion in a group of above-average producers may result in below-average pay to a grower whose production compares favorably with growers as a whole.<sup>68</sup> Moreover, integrators may require growers to make expensive modifications to facilities,

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<sup>60</sup> See RHODES ET AL., *supra* note 59, at 5.

<sup>61</sup> See OLLINGER ET AL., *supra* note 13, at 1–2; see also Ian Urbina, *In Maryland, Focus on Poultry Industry Pollution*, N.Y. TIMES (Nov. 28, 2008), <http://www.nytimes.com/2008/11/29/us/29poultry.html> (quoting poultry farmer describing 650 pounds of annual manure production statewide as “too much of a good thing”).

<sup>62</sup> See OLLINGER ET AL., *supra* note 13, at 1.

<sup>63</sup> *Id.*

<sup>64</sup> See MACDONALD, *supra* note 18, at 41.

<sup>65</sup> *Id.* at 40.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 43.

<sup>68</sup> See also RHODES ET AL., *supra* note 59, at 15.

and may stop delivering birds, cancel contracts, or possibly even deliver inferior quality birds or feed, affecting growth performance and grower compensation.<sup>69</sup>

Despite the fact that integrators developed the contractual model in which integrators own the chicks, control most factors of production, and enter into contracts with growers in a concentrated geographic area, integrators are rarely held liable for environmental violations.<sup>70</sup> Alt contracted with Pilgrim's, but the company did not intervene in the case.<sup>71</sup> Instead, Alt's legal representation was provided by the Farm Bureau intervenors.<sup>72</sup>

#### IV. DOES THE EPA HAVE AUTHORITY TO REQUIRE PERMITS FOR POULTRY FARMYARD DISCHARGES?

In *Alt*, the court considered a challenge to the EPA's enforcement action against a poultry farmer for discharging pollutants through the poultry house ventilation systems. The court granted summary judgment for the plaintiffs and the EPA withdrew its appeal, leaving this type of discharge irremediable by the EPA in that federal district.

How strong was the plaintiffs' case based on the CAFO regulatory regime? If the EPA were to pursue enforcement on similar facts in other districts, as it has indicated its intent to do,<sup>73</sup> would a different court be likely to side with the EPA? This section concludes that another plausible interpretation of the CAFO regulatory regime exists that might support the EPA's view of its authority. Because the EPA might fare better in a different court and has indicated it may pursue such enforcement, uncertainty persists for poultry farmers despite the plaintiffs' success in *Alt*.

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<sup>69</sup> See PEW CHARITABLE TRS., *supra* note 14, at 27–28.

<sup>70</sup> *But see* Assateague Coastkeeper v. Alan & Kristin Hudson Farm, 727 F. Supp. 2d 433, 442–43 (D. Md. 2010) (denying poultry integrator's motion to dismiss allegations that integrator exercised sufficient control over grower's operations to be liable under CWA); Sierra Club, Inc. v. Tyson Foods, Inc., 299 F. Supp. 2d 693, 718 (W.D. Ky. 2003) (holding that poultry integrator was a "person in charge" under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") and an "operator" under the Emergency Planning and Community Right to Know Act ("EPCRA") subject to liability for failure to report ammonia emissions at poultry grower's facility based on extensive control by integrator of house design and ventilation practices).

<sup>71</sup> See Peter Andrey Smith, *Poop in the Coop: Chicken Farmer Battles the EPA*, ALJAZEERA AM. (July 8, 2014, 5:00 AM), <http://america.aljazeera.com/articles/2014/7/8/chicken-farmer-loisaltvsthespa.html>.

<sup>72</sup> *Id.*

<sup>73</sup> See discussion *infra* Part V.A.

A. *The Alt Farm Discharges and the EPA Citation*

In October 2013, the District Court for the Northern District of West Virginia ruled in favor of the plaintiff, Lois Alt, a poultry farmer in Hardy County, West Virginia.<sup>74</sup> According to the court, Alt operates a CAFO,<sup>75</sup> consisting of eight poultry houses equipped with ventilation fans, plus ancillary structures for storing litter and chicken feed and for composting.<sup>76</sup> All poultry growing operations, as well as manure, litter, and raw material storage, are conducted wholly inside the poultry houses.<sup>77</sup>

When precipitation falls on Alt's farmyard, it comes into contact with particles, dust and feathers from the confinement houses, creating runoff into a nearby waterbody that the parties stipulated to be a water of the United States.<sup>78</sup> Alt implements management practices to reduce the amount of manure and litter that will be exposed to precipitation in her farmyard, but she did not obtain a permit to discharge pollutants into waters of the United States under the Clean Water Act or corresponding West Virginia law.<sup>79</sup>

On June 17, 2011, the EPA inspected Alt's chicken farm and cited concerns over manure and dander running off the chicken farm and into tributaries of Mudlick Run, a water of the United States.<sup>80</sup> According to the EPA, inspectors observed that "[d]ust from the ventilation exhaust fans settles on the ground" and "manure and other pollutants [in the dust] would come into contact with precipitation during rain events" and carry pollutants into nearby ditches.<sup>81</sup> The EPA inspector noted that there was manure on the ground near the chicken houses that would come into contact with precipitation during rain events and generate process wastewater and drain into Mudlick Run.<sup>82</sup>

Accordingly, on November 14, 2011, the EPA issued an order stating that Alt was in violation of the CWA, alleging that dust containing feathers, dander, and manure may be carried off by stormwater and eventually reach

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<sup>74</sup> *Alt v. EPA*, 979 F. Supp. 2d 701, 704 (N.D.W. Va. 2013).

<sup>75</sup> Generally speaking, USDA regulations define an animal feeding operation as a lot or facility where animals are confined and fed for 45 days in any 12-month period and where crops or other vegetation are not grown in any part of the lot or facility. *See* 40 C.F.R. § 122.23(b)(1) (2015). USDA regulations further classify operations as concentrated animal feeding operations, both large and small. *See* 40 C.F.R. § 122.23(b)(2)–(6), (c).

<sup>76</sup> *Alt*, 979 F. Supp. 2d at 704.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* Section 402 of the Clean Water Act requires CAFOs that discharge to obtain a permit. 33 U.S.C. § 1342 (2014). With the approval of the EPA, West Virginia authorizes discharge permits for parties in the states that discharge. *See Alt*, 979 F. Supp. 2d at 704.

<sup>80</sup> *See* Complaint, Exhibit A ¶ 18, *Alt*, 979 F. Supp. 2d 701 (No. 2:12-CV-00042).

<sup>81</sup> *Id.* ¶ 23.

<sup>82</sup> *Id.* ¶¶ 24–25.

waters of the United States.<sup>83</sup> The EPA order stated that she needed to obtain a National Pollutant Discharge Elimination System (“NPDES”) permit for her chicken farm or she would be fined up to \$37,500 per day, and possibly face further fines or imprisonment, for violating the CWA.<sup>84</sup> Although the EPA upon a later inspection found Alt’s farm to be in compliance and withdrew the citation,<sup>85</sup> the court denied the EPA’s motion to dismiss and permitted Alt and intervenor plaintiff American Farm Bureau Federation to challenge the EPA’s authority to issue the original citation.<sup>86</sup>

*B. Does the 2003 Rule Exempting Land Applications Define the Only Type of Discharge from a CAFO that May Be Agricultural Stormwater?*

Section 402 of the CWA requires anyone who discharges pollutants from a “point source” into waters of the United States to obtain a permit.<sup>87</sup> The CWA defines a “point source” 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.”<sup>88</sup> In 1987, Congress amended the definition of “point source” by adding an exemption for “agricultural stormwater discharges.”<sup>89</sup> Congress never defined “agricultural stormwater,” leaving ambiguous whether discharges from CAFOs, which are expressly included in the definition of “point source,” may nevertheless be excluded from the definition in some cases as “agricultural stormwater discharges.” The court in *Alt* noted that the Second Circuit in a previous case, *Waterkeeper Alliance, Inc. v. EPA*,<sup>90</sup> had deferred to the EPA’s own argument that some discharges from CAFOs could be

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<sup>83</sup> *Id.*

<sup>84</sup> *Id.* ¶¶ 34–40.

<sup>85</sup> See Memorandum in Support of United States’ Motion to Dismiss, Exhibit A, *Alt*, 979 F. Supp. 2d 701 (No. 2:12-CV-00042).

<sup>86</sup> See Order Denying Motion to Dismiss, Permitting Intervention, and Establishing Briefing Schedule, *Alt*, 979 F. Supp. 2d 701 (No. 2:12-CV-0042), ECF No. 88. The court’s order denying the motion to dismiss was based on *Sackett v. EPA*, 132 S. Ct. 1367 (2012), in which the Supreme Court held that the Administrative Procedure Act requires that immediate judicial review be available for compliance orders under the Clean Water Act. Although the EPA withdrew its citation of the Alt farm, it maintained its legal position that it was entitled to issue citations in such cases. See Order Denying Motion to Dismiss, Permitting Intervention, and Establishing Briefing Schedule, *supra*. The district court held that the EPA’s legal position was reviewable despite the EPA’s withdrawal of the citation. *Id.*

<sup>87</sup> 33 U.S.C. § 1342 (2014).

<sup>88</sup> *Id.* § 1362(14) (emphasis added).

<sup>89</sup> Water Quality Act of 1987, Pub. L. No. 100-4, § 503, 101 Stat. 7 (1987).

<sup>90</sup> *Waterkeeper All., Inc. v. EPA*, 399 F.3d 486, 507–09 (2d Cir. 2005).

considered exempt “agricultural stormwater.”<sup>91</sup> Thus, the court held, the question in *Alt* was not whether the agricultural stormwater exemption could apply to CAFO discharges, but only whether the discharges at issue in *Alt* qualified for that exemption.

The case turned substantially on two EPA regulations. The first regulatory question was whether a 2003 EPA regulation had defined the entire universe of discharges that may be considered agricultural stormwater, or only one category of discharges entitled to the exemption. The 2003 regulation states that, for unpermitted large CAFOs like the *Alt* farm,

a precipitation-related discharge of manure, litter, or process wastewater from land areas under the control of a CAFO shall be considered an agricultural stormwater discharge *only* where the manure, litter, or process wastewater has been land applied in accordance with site-specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter, or process wastewater, as specified in 122.42(e)(1)(vi) through (ix).<sup>92</sup>

It is helpful to recall that a CAFO may discharge pollutants in at least two ways: First, it may discharge through runoff of direct land application of pollutants—that is, spreading animal waste on adjacent areas to be taken up by crops and soils. Second, because a CAFO itself is defined as a point source, it may discharge pollutants if animal waste from the CAFO enters waters by other means, totally apart from the land application process. With this distinction in mind, the rule is susceptible of two interpretations. On one hand, the rule may focus solely on *land applications* of pollutants by a CAFO, and from that category, define the only type of land application that will be exempt as agricultural stormwater. Re-writing the rule to clarify this interpretation, the rule might state,

a precipitation-related discharge [*after land application*] of manure, litter, or process wastewater from land areas under the control of a CAFO shall be considered an agricultural stormwater discharge only where ~~the~~ [*such land application of*] manure, litter, or process wastewater ~~has been land applied~~ [*is*] in accordance with site-specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter, or process wastewater, as specified in 122.42(e)(1)(vi) through (ix).<sup>93</sup>

On the other hand, the rule may be looking at *all* precipitation-related discharges from a CAFO—from land application of pollutants or otherwise—

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<sup>91</sup> *Alt*, 979 F. Supp. 2d at 709.

<sup>92</sup> 40 C.F.R. § 122.23(e)(1) (2015) (emphasis added).

<sup>93</sup> *Id.* (emphasis added).

and define the only type that can be considered exempt agricultural stormwater.<sup>94</sup> Re-written to clarify this interpretation, the rule might state,

a precipitation-related discharge of manure, litter, or process wastewater from land areas under the control of a CAFO shall be considered an agricultural stormwater discharge only where the manure, litter, or process wastewater has been land applied [*and that land application is*] in accordance with site-specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter, or process wastewater, as specified in § 122.42(e)(1)(vi) through (ix).<sup>95</sup>

In *Alt*, the EPA argued for the second reading—of all precipitation-related CAFO discharges, the only type that may be considered agricultural stormwater are those where there has been a land application of nutrients, and the land application was in accordance with site-specific nutrient management practices for agricultural benefit.<sup>96</sup>

The court disagreed with the EPA's view. Ordinarily, such disagreement would not dictate the outcome of the case, because courts are instructed to grant *Chevron* deference<sup>97</sup> to any reasonable agency interpretation of the statute, or *Auer* deference<sup>98</sup> to any reasonable agency interpretation of its own regulation. The EPA's interpretation in *Alt*—the second example above—is at least as reasonable, and arguably more true to the original language of the regulation, than the first example. In this case, however, the court declined to grant deference to the EPA's interpretation because the court said the EPA had taken the opposite view when it promulgated the rule in 2003.<sup>99</sup> The court noted that in 2003 the EPA had stated that

*EPA does not intend its discussion of how the scope of point source discharges from a CAFO is limited by the agricultural storm water exemption to apply to discharges that do not occur as a result of land application of manure, litter, or process wastewater by a CAFO to land areas under its control . . . .*<sup>100</sup>

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<sup>94</sup> See Memorandum in Support re Cross-Motion for Summary Judgment filed by United States Environmental Protection Agency at 22–26, *Alt*, 979 F. Supp. 2d 701 (No. 2:12-CV-00042), ECF No. 106 (“Put simply, the agricultural stormwater exemption applies *only* in the context of proper land-application of the pollutants.”).

<sup>95</sup> 40 C.F.R. § 122.23(e)(1) (emphasis added).

<sup>96</sup> *Alt*, 979 F. Supp. 2d at 712.

<sup>97</sup> *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

<sup>98</sup> *Auer v. Robbins*, 519 U.S. 452 (1997). *Auer* held that courts will ordinarily grant deference to an agency's interpretation of its own regulation. *Id.* at 461.

<sup>99</sup> *Alt*, 979 F. Supp. 2d at 712.

<sup>100</sup> *Id.* (citing 68 Fed. Reg. 7176, 7198 (Feb. 12, 2003)).

The court interpreted this earlier EPA statement as advocating for the first example above—that the rule only defined which land applications of manure could be considered agricultural stormwater, and said nothing at all about whether other discharges could also fall within the exemption. The court followed recent Supreme Court decisions holding that deference is inappropriate where the agency’s interpretation “represents a change of position.”<sup>101</sup> If the rule only defined which land applications could be agricultural stormwater, and did not attempt to determine whether other types of discharges from CAFOs could also be agricultural stormwater, then the EPA had enacted no regulation concerning the scope of the exemption with relation to non-land-application discharges like those at issue in *Alt*. With no regulation to interpret, the court held that it was interpreting the statute de novo.<sup>102</sup> Looking at the plain meaning of the statutory language, it held that the *Alt* CAFO was “agricultural” and that the runoff occurred as a result of “stormwater,” and thus was exempt from regulation under Section 402.<sup>103</sup>

If the EPA’s rule was intended to focus solely on which land applications may be exempt from regulation, the EPA may have viewed CAFOs as comprising essentially two distinct areas: the production area, from which pollutants originate, and any adjacent areas, which may be used for land application. These are the only two “areas” defined in the EPA’s CAFO regulations.<sup>104</sup> Based on this understanding, the EPA might have reasonably believed in 2003 that its regulation need only deal with what it viewed as the close cases: discharges from the land application areas. The EPA may have failed to address discharges from the CAFO other than from land application because it believed those discharges must be from the production area and therefore captured by inclusion of CAFOs within the definition of a point source. The following section explores this possibility and its implications for the second regulatory issue in *Alt*: whether the discharges came from the “production area.”

### C. Did the Discharges Come from the “Production Area”?

EPA regulations define the “production area” of the CAFO to include “the animal confinement area, the manure storage area, the raw materials

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<sup>101</sup> *Id.* at 712–13 (citing *Christopher v. SmithKline Beecham, Co.*, 132 S. Ct. 2156, 2166–67 (2012)).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 711.

<sup>104</sup> See 40 C.F.R. § 122.23(b)(1)–(9) (2015); see also Memorandum In Support re Cross-Motion for Summary Judgment filed by United States Environmental Protection Agency at 11, *Alt*, 979 F. Supp. 2d 701 (No. 2:12-CV-00042), ECF No. 106 (identifying regulatory definitions of two areas of a CAFO, the “production area” and the “land application area”).

storage area, and the waste containment areas.”<sup>105</sup> The “animal confinement area” is further defined as “includ[ing] but . . . not limited to open lots, housed lots, feedlots, confinement houses, stall barns, free stall barns, milkrooms, milking centers, cowyards, barnyards, medication pens, walkers, animal walkways, and stables.”<sup>106</sup> The EPA argued that the discharges of manure, litter, and dander from the farmyard originated from the production area,<sup>107</sup> and that its regulations prohibited application of the agricultural stormwater exemption for discharges from the CAFO production area.<sup>108</sup> In contrast, the plaintiffs’ argument seems to treat the farmyard as dead space—not part of the production area (which is defined to include the animal confinement area with its “open lots” and “barnyards”) nor the land application area—and therefore not reachable by the regulation.<sup>109</sup>

The district court agreed with the EPA’s argument that the grassy area between the covered houses was part of the CAFO.<sup>110</sup> The court rejected the EPA’s contention, however, that the grassy area or “farmyard” constituted part of the “production area.”<sup>111</sup> First, the court held that the farmyard was not the type of structure that was contemplated by the definition of the production area, since that definition was limited to places where animals were kept or raised.<sup>112</sup> Since neither party argued that the farmyard was a land application area either, the court’s opinion effectively treats the farmyard as regulatory dead space—part of the CAFO, but not part of any area of the CAFO defined by the EPA in the CAFO rules for identifying the reach of the statute.

The EPA argued that the discharges from the farmyard required a permit because they originated from the production area inside the poultry houses. The court disagreed, noting that the agricultural stormwater exemption applied to discharges that entered waters after mixing with stormwater, “even

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<sup>105</sup> 40 C.F.R. § 122.23(b)(8).

<sup>106</sup> *Id.*

<sup>107</sup> See Memorandum in Support re Cross-Motion for Summary Judgment filed by United States Environmental Protection Agency, *supra* note 94, at 16.

<sup>108</sup> *Id.* at 18.

<sup>109</sup> In its brief, the EPA noted that the plaintiffs’ argument effectively treats each individual poultry house as a separate AFO, but notes that the definition of AFO nevertheless treats adjoining AFOs under common ownership as a single AFO. *Id.* at 18 n.12.

<sup>110</sup> *Alt.*, 979 F. Supp. 2d at 713. The EPA’s regulations define an Animal Feeding Operation (“AFO”), which includes its subset, a CAFO, as “a lot or facility . . . where . . . (i) [a]nimals . . . 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) [c]rops, 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) (emphasis added). A “facility” is defined to include any point source, “including land or appurtenances thereto.” *Id.* § 122.2.

<sup>111</sup> *Alt.*, 979 F. Supp. 2d at 718–19.

<sup>112</sup> *Id.* at 713.

when those discharges came from what would otherwise be point sources.”<sup>113</sup> Quoting the Second Circuit’s opinion in *Waterkeeper*, the court stated that Congress, in enacting the agricultural stormwater exemption, “was affirming the impropriety of imposing . . . liability for agriculture-related discharges triggered not by negligence or malfeasance, but by the weather—even when those discharges came from what would otherwise be point sources.”<sup>114</sup>

This issue seems to be at the heart of the parties’ dispute: Were the discharges at issue in *Alt* the result of negligence or malfeasance, or were they just the inevitable result of operating a poultry CAFO in the rain? The EPA clearly viewed as negligent those discharges that originated from the CAFO production area, settled in the farmyard, and washed off into the stream. The plaintiffs (and the court) viewed those discharges as an unavoidable consequence of responsible agriculture plus rain.

The EPA’s view may be supported by the Second Circuit’s first decision interpreting the agricultural stormwater exemption, *Concerned Area Residents for the Environment v. Southview Farm*.<sup>115</sup> In that case, the Second Circuit considered two types of discharges resulting from a combination of precipitation and land application of manure to fields near an animal confinement area. It was reasonable for a jury to find, the court concluded, that some of the discharges occurred because manure was applied too thickly, while others occurred only because rain happened to wash away manure that was applied at appropriate agricultural utilization rates. Only the latter discharges were eligible for the agricultural stormwater exemption, the court held: “[T]he 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>116</sup>

The EPA might argue that discharges of poultry litter from a poultry CAFO’s farmyard are unlike the discharges that were considered agricultural stormwater in *Southview Farm*, and instead were more like those that were not held to be exempt. Unlike the land applications of manure that the Second Circuit viewed as exempt, the emission of manure, litter, and dander into the poultry farmyard was never intended for an agriculturally beneficial use. Therefore, the poultry farmyard runoff might more closely resemble the land applications of manure that ran off because they were too thick, rather than those that ran off simply because they mixed with stormwater. In other words, CAFO operators might be excused for discharges where the operator was attempting to put the animal waste to good use as a fertilizer, but may still be expected to mitigate (or acquire a permit for) any discharges that had nothing to do with cycling nutrients on the farm. This reading makes sense of the

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<sup>113</sup> *Id.* at 714 (quoting *Waterkeeper All., Inc. v. EPA*, 399 F.3d 486, 507 (2d Cir. 2005)).

<sup>114</sup> *Id.*

<sup>115</sup> 34 F.3d 114 (2d Cir. 1994).

<sup>116</sup> *Id.* at 120–21 (emphasis added).

agricultural stormwater exemption as applied to CAFOs without creating a loophole that prevents the EPA from reaching CAFO point source discharges simply because they hit the ground outside the poultry house before entering the nation's waters.

This reading also makes sense of the EPA's regulations, which distinguish between the "production area" and the "land application area" of the CAFO based on their ability to generate excess nutrients, as opposed to absorbing nutrients for an agriculturally beneficial purpose. In the Preamble to its 2001 Proposed Rule on permitting requirements for CAFOs, the EPA stated,

The production area of the CAFO would continue to be ineligible for the agricultural stormwater discharge exemption because it involves the type of industrial activity that originally led Congress to single out concentrated animal feeding operations as point sources. However, the land application areas under the operational control of the CAFO, where CAFO manure or wastewater is appropriately used as a fertilizer for crop production, appear to have the kind of agricultural activity that Congress intended to exempt.<sup>117</sup>

In contrast, the EPA did not include the "farmyard" in the definition of the "production area."<sup>118</sup> This omission makes sense based on the EPA's distinction between areas that produce pollutants and areas that absorb those pollutants as nutrients. Since virtually no pollutants are either produced in or absorbed by the farmyard itself, the EPA may have sensibly assumed that CAFO pollutants could be classified either as coming from the production area or from the land application area. Thus, discharges that come from the production area and are not applied as nutrients to adjacent areas might sensibly be viewed as discharges from the production area despite the fact that they briefly hit the ground before running off into the surrounding waters.

Indeed, in a statement relied on differently by the court in *Alt*, the EPA made this point in response to comments on its 2003 CAFO rule when it explained that the "production area" did not include the entire farmyard:

EPA disagrees the definition of production area explicitly includes the entire farmyard. . . . In the final rule EPA has included a clear definition as to the specific aspects of an operation that are considered within the production area. EPA believes it is important to regulate runoff from production areas since runoff from these areas is a major route of pollutant discharges from CAFOs. Therefore, in today's final rule, production area means that part of an AFO that includes the

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<sup>117</sup> National Pollutant Discharge Elimination System Permit Regulation, 66 Fed. Reg. 2960, 3031 (Jan. 12, 2001).

<sup>118</sup> 40 C.F.R. § 122.23(b)(8) (2015).

animal confinement area, the manure storage area, the raw materials storage area, and the waste containment areas.<sup>119</sup>

## V. IMPASSE AND OPTIONS

The EPA's case for cleaning up poultry farmyard pollution, while not without basis, did not prevail in *Alt*. The EPA initially responded by appealing the case to the Fourth Circuit, but soon withdrew the appeal. Why did the EPA withdraw its appeal, and what are its intentions going forward? What considerations might motivate the EPA's decision to pursue other enforcement actions? This section examines the EPA's public statements about its legal position and looks forward to evaluate factors that may affect the EPA's motivation to pursue enforcement in other cases.

### A. EPA's Withdrawal in *Alt*: Gone but Not Forgotten

On December 20, 2013, the EPA filed a notice of appeal from the district court's order granting summary judgment in favor of *Alt*.<sup>120</sup> Shortly following appeal, the EPA moved to place the case in abeyance pending the Fourth Circuit's resolution of a related appeal in which Chesapeake Bay Foundation challenged the district court's order denying the foundation the opportunity to intervene.<sup>121</sup> After the court of appeals affirmed the district court's order in the related appeal,<sup>122</sup> the court scheduled briefing on the EPA's appeal from the district court's grant of summary judgment.<sup>123</sup> Before filing its opening brief, the EPA moved to dismiss the appeal,<sup>124</sup> and the Fourth Circuit granted the motion on September 24, 2014.<sup>125</sup>

Despite moving to dismiss the appeal, an EPA spokesperson issued a statement that the EPA maintained its legal position "that when CAFOs discharge pollutants from the production area into waters of the United States, as the *Alt* operation did, the law requires permit authorization."<sup>126</sup> The EPA

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<sup>119</sup> See *Alt*, 979 F. Supp. 2d at 713–14 (quoting EPA, 2003 *Response to Comments*, at 1–661 (EPA-HQ-OW-2002-0025-0060) (May 25, 2005)).

<sup>120</sup> See United States Environmental Protection Agency's Notice of Appeal, *Alt v. EPA*, 979 F. Supp. 2d 701 (N.D.W. Va. Dec. 20, 2013) (No. 2:12-CV-0042), ECF No. 152.

<sup>121</sup> See Defendant-Appellant United States Environmental Protection Agency's Motion to Hold Briefing in Abeyance, *Alt v. EPA*, No. 13-2527 (4th Cir. Jan. 8, 2014).

<sup>122</sup> *Alt v. EPA*, 758 F.3d 588 (4th Cir. 2014).

<sup>123</sup> See Letter from Patricia S. Connor, Clerk, to Counsel, *supra* note 7; Briefing Order—Civil, *supra* note 7; Order Amending Briefing Schedule, *supra* note 7.

<sup>124</sup> See Motion to Voluntarily Dismiss Appeal, *Alt v. EPA*, No. 13-2527 (4th Cir. Sept. 22, 2014).

<sup>125</sup> Order, *Alt v. EPA*, 979 F. Supp. 2d 701 (4th Cir. Sept. 24, 2014) (No. 2:12-CV-0042), ECF No. 165.

<sup>126</sup> See *Giles*, *supra* note 9.

statement said that the EPA withdrew the appeal in order to spend resources “remediating more serious, ongoing pollution,”<sup>127</sup> but also noted that the “EPA remains committed to working with the agricultural community to ensure compliance with this legal requirement and to pursue enforcement when necessary.”<sup>128</sup> The statement correctly (and perhaps ominously, for poultry farmers) noted that “[o]ne district court decision does not change either the law across the country or the EPA’s commitment to protecting water quality.”<sup>129</sup> An agriculture and food magazine also reported that an EPA official confirmed by email that its decision to withdraw the appeal “does not change EPA’s commitment to pursue enforcement when necessary under the Clean Water Act.”<sup>130</sup> The environmental intervenors in the case, Potomac Riverkeeper, Inc., West Virginia Rivers Coalition, and Waterkeeper Alliance, issued a statement after the EPA withdrew the appeal “urg[ing] EPA to step up enforcement of the Clean Water Act by ensuring that large . . . CAFOs obtain permits to control discharges of animal waste.”<sup>131</sup>

### B. *The Outlook for Future Enforcement Actions*

The EPA might fare better in front of a court that views discharges from the production area more broadly to include pollutants that escape from the poultry house through ventilation systems. Similarly, the EPA might succeed before a court that views the agricultural stormwater exemption from CAFOs more narrowly to include only runoff of CAFO pollutants that were applied for an agriculturally beneficial use. Either of these readings appears plausible when viewed in light of the purpose of the CWA as a whole and the inclusion of CAFOs within the definition of a point source. A more literal reading of the EPA regulations, however, likely leans toward the conclusion drawn by the court in *Alt*. The EPA’s chances of success if it were to take future enforcement action are uncertain. At the very least, the uncertainty of the EPA’s case suggests that enforcement dollars should be invested to pursue the most pervasive and ongoing violations. Such a strategy would have a greater dollar-for-dollar impact on the Chesapeake Bay and other jurisdictional waters.

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

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> Andrew Jenner, *EPA Withdraws from Clean Water Case, Farm Bureau Declares Victory*, MOD. FARMER (Oct. 10, 2014), <http://modernfarmer.com/2014/10/epa-withdraws-high-profile-clean-water-act-case-farm-bureau-declares-victory-environmental-groups-dismayed/>.

<sup>131</sup> *Concentrated Animal Feeding Operations—Dismissal of Appeal in Alt v. EPA*, POTOMAC RIVERKEEPER NETWORK (Oct. 2, 2014), <http://www.potomacriverkeepernetwork.org/press-releases/2014/10/27/combined-animal-feeding-operations-dismissal-of-appeal-in-alt-v-epa>.

In the *Alt* case, the EPA acknowledged that the problems observed at the Alt farm were remedied upon a follow-up inspection.<sup>132</sup> The EPA's citation and the letter withdrawing it, however, do not make clear how Alt resolved any pollution coming through the ventilation fans. The citation noted that, "[d]uring the inspection, EPA representatives observed that the poultry houses were constructed to include poultry house ventilation system. Dust from the ventilation exhaust fans settles on the ground. Dust includes feathers and fine particulates of dander and manure which would therefore contain pollutants."<sup>133</sup> In the letter withdrawing the citation, the EPA noted that, during a follow-up inspection, "the Alts showed EPA new management practices they had implemented since the issuance of the order, including their method of conducting poultry house clean-outs using a conveyor and a hopper."<sup>134</sup> The letter also noted that the Alts described other efforts to keep the facility from discharging pollutants, such as "keeping the loading area swept and in order during and after litter transfer."<sup>135</sup> From these statements, it is unclear whether the ventilation fans were in fact a major source of the pollution initially observed on the Alt farm, whether Alt was successfully able to remediate any such pollution, or whether other growers would be able to remedy pollution originating from the poultry houses and scattered through ventilation fans.

The EPA might consider addressing poultry house ventilation discharges by pursuing violations that do not get tangled up in the agricultural stormwater exemption. For instance, if manure, litter, and dander escaped from poultry house ventilation systems and were either blown or tracked into jurisdictional waters without the help of stormwater, such discharges would seem to be discharges from a CAFO, which are by definition point sources, and would not fall under the agricultural stormwater exemption. The EPA made this clear in the context of land application discharges in its 2003 rule:

EPA notes that any dry weather discharge of manure or process wastewater resulting from its application to land areas under the control of a CAFO would not be considered an agricultural storm water discharge and would thus be subject to Clean Water Act requirements. As a matter of common sense, only storm water can be agricultural stormwater. Further, if manure or process wastewater were applied so thickly that it ran off into surface waters even during dry weather, this would not be

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<sup>132</sup> See Memorandum in Support by United States EPA re Motion to Dismiss, Exhibit A: Letter, *Alt v. EPA*, 979 F. Supp. 2d 701 (N.D.W. Va. 2013) (No. 2:12-CV-00042), ECF No. 69.

<sup>133</sup> See Complaint, Exhibit A, *supra* note 80, ¶ 23.

<sup>134</sup> See Exhibit A: Letter, *supra* note 132.

<sup>135</sup> *Id.*

consistent with practices designed to ensure appropriate agricultural utilization of nutrients.<sup>136</sup>

Similarly, if poultry houses discharge pollutants through ventilation systems heavily enough that those pollutants enter neighboring waters without first mixing with stormwater, such discharges serve no appropriate agricultural purpose and are clearly not agricultural stormwater. The “discharge of a pollutant” is defined in the CWA as “any addition of any pollutant to navigable waters from any point source,”<sup>137</sup> and does not require that the discharge be composed of or mixed with liquids. While this theory would likely give rise to a clearer case on liability, such discharges may be more difficult to identify and prove.

Even if the EPA maintains its position that pollutants escaping from ventilation systems and running off in stormwater are subject to regulation as non-exempt CAFO discharges, political and strategic considerations may cause the agency to hesitate in pursuing enforcement against individual farmers. For one thing, contract growers may lack sufficient capital to make substantial changes to facilities that may be necessary to effectively remedy pollution from ventilation systems. Most producers rely on debt, often government-guaranteed loans from Farm Service Agency or the Small Business Administration, to build poultry houses, and may not be assured enough income to repay those initial loans,<sup>138</sup> much less to afford expensive retrofits or redesigns of poultry houses.<sup>139</sup>

Moreover, even contract growers who have the resources may lack the authority to redesign poultry houses in a way that would effectively remedy pollution from ventilation systems. Integrators provide design specifications for poultry houses.<sup>140</sup> It is unclear whether those design specifications would permit a grower to make changes from those standards, even where they would improve environmental performance.

Finally, the EPA may smart from public criticism that it is suing “the family farmer” if it cannot successfully hold integrators liable for environmental pollution.<sup>141</sup> The EPA has recognized that an integrator who exercises “substantial operational control” may be liable as an “operator” of a

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<sup>136</sup> National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations (CAFOs), 68 Fed. Reg. 7176, 7198 (Feb. 12, 2003).

<sup>137</sup> 33 U.S.C. § 1362(12)(A) (2014).

<sup>138</sup> See PEW CHARITABLE TRS., *supra* note 14, at 23–24.

<sup>139</sup> See *id.* at 25–26.

<sup>140</sup> See RHODES ET AL., *supra* note 59 and accompanying text.

<sup>141</sup> See Susan M. Brehm, *From Red Barn to Facility: Changing Environmental Liability to Fit the Changing Structure of Livestock Production*, 93 CALIF. L. REV. 797, 797–98 (2005) (describing the mythology of agriculture as distorting in era of concentrated industrial animal production).

CAFO facility,<sup>142</sup> and a few cases have held that plaintiffs may sue integrators for environmental violations by CAFO grower contract facilities if the integrators exercise sufficient control.<sup>143</sup> As in the *Alt* case, however, most liability has been against individual growers rather than integrators. This may be due to any number of causes: insufficient evidence that integrators exercise substantial operational control over particular CAFOs;<sup>144</sup> desire of the growers themselves to minimize claims of integrator control in order to maintain independence or to avoid souring relationships with integrators;<sup>145</sup> or confidentiality of production contracts and insufficient knowledge about the level of integrator control over environmental performance generally. Moreover, production contracts may include clauses that require growers to indemnify integrators for environmental harms.<sup>146</sup> Further research would be required to substantiate a theory of integrator liability for pollution from ventilation systems.

These obstacles to further enforcement efforts by the EPA may give poultry contract producers some comfort, but the threat of action by the EPA remains alive as long as the EPA maintains its position that it has authority to require permits for such discharges. The EPA, for its part, may need to consider one or more of these enforcement strategies going forward if it is serious about containing discharges from poultry production facilities, particularly in the sensitive Chesapeake Bay watershed. While these strategies might improve the EPA's likelihood of success both legally and politically, under the current

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<sup>142</sup> See National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines and Standards for Concentrated Animal Feeding Operations, 66 Fed. Reg. 2960-01, 3023 (proposed Jan. 12, 2001).

<sup>143</sup> See *Assateague Coastkeeper v. Alan & Kristin Hudson Farm*, 727 F. Supp. 2d 433, 442-43 (D. Md. 2010) (denying poultry integrator's motion to dismiss allegations that integrator exercised sufficient control over grower's operations to be liable under CWA); *Sierra Club v. Tyson Foods, Inc.*, 299 F. Supp. 2d 693 (W.D. Ky. 2003) (holding poultry integrator was a "person in charge" under CERCLA and an "operator" under EPCRA subject to liability for failure to report ammonia emissions at poultry grower's facility based on extensive control by integrator of house design and ventilation practices); *Water Keeper All., Inc. v. Smithfield Foods*, Nos. 4:01-CV-27-H(3), 4:01-CV-30-H(3), 2001 WL 1715729 (E.D.N.C. Aug. 7, 2001).

<sup>144</sup> See, e.g., Findings of Fact and Conclusions of Law at 47-49, *Waterkeeper All., Inc. v. Hudson*, No. WMN-10-487, 2012 WL 6651930 (D. Md. Dec. 20, 2010) (control exercised by integrator Perdue Farms over CAFO facility was not sufficient to hold integrator liable as operator of facility with respect to pollution).

<sup>145</sup> See Paul Stokstad, *Enforcing Environmental Law in an Unequal Market: The Case of Concentrated Animal Feeding Operations*, 15 MO. ENVTL. L. & POL'Y REV. 229, 257 (2008) (describing contract grower opposition to the EPA's proposal of co-permitting between integrators and contractors under the CWA).

<sup>146</sup> See, e.g., PILGRIM'S PRIDE BROILER PRODUCTION AGREEMENT, *supra* note 59, at G(4). The enforceability of such agreements is subject to challenge. See *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex.*, on April 20, 2010, 841 F. Supp. 2d 988, 1005 (E.D. La. 2012) (declining to enforce contractual indemnity agreement to shield operator from civil liability for regulatory non-compliance).

regulatory regime the EPA retains a colorable claim for authority to regulate poultry production pollution from ventilation fans.

## VI. CONCLUSION

For now, only farmers in the Northern District of West Virginia—a state that in 2012 was responsible for only \$188 million of the \$24.76 billion of poultry produced nationally<sup>147</sup>—can be confident that the EPA will not allege CWA violations for discharges of manure, litter, and dander from the farmyard area between poultry production houses. For most poultry farmers, including most poultry farmers in the Chesapeake Bay watershed, the threat of EPA enforcement action remains.

This avenue to liability remains uncertain, however. Other courts may agree with the Northern District of West Virginia that discharges from poultry CAFO farmyards that mix with rainwater are exempt from regulation as agricultural stormwater. Alternatively, the EPA may choose not to pursue such cases out of recognition that individual contract growers may lack the resources to make necessary changes to their poultry houses and operations to effectively remedy the pollution even if liability were established. Moreover, the EPA may be sensitive to the fact that only growers who are targeted with enforcement actions are likely to attempt expensive remediation options, and growers who do will be less profitable than their competitors. The legal and political uncertainty of the EPA's case leaves the Chesapeake Bay in dire straits as poultry production pollution continues to contribute to degradation of its waters.

Looking ahead, the EPA might be more likely to pursue its legal case if success were more likely to lead to widespread remediation of poultry production pollution. To do this, the EPA would have to show that integrators, not just individual growers, could be held liable for environmental violations. Future work will evaluate the likelihood of holding integrators liable for CWA and other environmental violations based on recent legal developments and the structure of the industry.

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<sup>147</sup> See NASS, POULTRY—PRODUCTION AND VALUE 2012, at 7 (Apr. 2013), <http://www.the-farmsite.com/reports/contents/PoulProdVa29April2013.pdf>.