NOTES

National Pork Producers Council v. U.S. EPA: Striking Down Clean Water Act Rule for Factory Farms, the Fifth Circuit Strips the EPA of Effective Regulatory Power

I. OVERVIEW OF THE CASE

Each year, concentrated animal feeding operations (CAFOs) throughout the United States each raise hundreds to thousands of animals prior to shipping them to processing facilities where meat is prepared for eventual consumption.[1] CAFOs confine animals to tight quarters and individually generate millions of tons of animal manure annually, which is stored and later applied to crops as fertilizer in a process known as land application.[2] Because improper management of such waste poses a substantial threat to the environment,[3] Congress specifically included CAFOs in the Clean Water Act (CWA or the Act) during its original enactment in 1972.[4] Furthermore, the EPA implemented regulations governing CAFOs in 1976[5] and updated these regulations in 2003[6] and

1. Nat'l Pork Producers Council v. U.S. EPA, 635 F.3d 738, 741-42 (5th Cir. 2011).

2. *Id.* at 742 (citing Thomas R. Head, III, *Local Regulation of Animal Feeding Operations: Concerns, Limits, and Options for Southeastern States*, 6 ENVTL. LAW. 503, 516 (2000)).

3. *Id.*

4. *See* Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 2, 86 Stat. 816, 887 (1972); S. REP. NO. 92-414, at 98 (1971).

5. Concentrated Animal Feeding Operations, 41 Fed. Reg. 11,458 (Mar. 18, 1976) (to be codified at 40 C.F.R. pts. 124-25).

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

2008[7] in response to inadequate compliance and judicial review.[8]

The 2008 Rule at issue in this Note required that a CAFO owner or operator that "discharges or proposes to discharge" pollutants seek coverage under a National Pollutant Discharge Elimination System (NPDES) permit.[9] The rule clarified that CAFOs "propose to discharge" if they are "designed, constructed, operated, or maintained such that a discharge will occur."[10] It further granted the EPA the authority to hold a CAFO liable for failing to apply for a permit in addition to emitting the discharge itself.[11] Various farm and poultry organizations (Farm Petitioners) brought actions challenging these provisions in six federal courts of appeal.[12] In accordance with 28 U.S.C. § 2112, the Judicial Panel on Multidistrict Litigation randomly selected the United States Court of Appeals for the Fifth Circuit to consolidate and adjudicate the claims.[13] The Fifth Circuit *held*, inter alia, that the EPA lacked the authority to either impose liability for failure to apply for a permit or regulate CAFOs merely proposing to discharge pollutants, because such measures extended beyond the statutory scope of the CWA, which dictates only that the discharge of a pollutant shall be unlawful. Nat'l Pork Producers Council v. U.S. EPA, 635 F.3d 738, 749-51 (5th Cir. 2011).

II. BACKGROUND

A. The Clean Water Act and CAFO Regulations

Congress enacted the Federal Water Pollution Control Act (FWPCA) in 1948, urging states to create uniform water pollution control policies.[14] However, leaving complicated enforcement mechanisms largely up to the states themselves proved ineffective.[15] After Ohio's Cuyohoga River caught fire in 1969, Congress began

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7. 40 C.F.R. § 122.23(d) (2011); Revised National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines for Concentrated Animal Feeding Operations in Response to the Waterkeeper Decision, 73 Fed. Reg. 70,418 (Nov. 20, 2008) [hereinafter 2008 CAFO Rule].

8. *Nat'l Pork Producers Council*, 635 F.3d at 743-45.

9. 40 C.F.R. § 122.23(d)(1).

10. *Id.*

11. *Nat'l Pork Producers Council*, 635 F.3d at 746 (citing 2008 CAFO Rule, *supra* note 7, at 70,424).

12. *Id.* at 747.

13. *Id.*

14. *Id.* at 742 (citing Jeffrey M. Gaba, *Generally Illegal: NPDES Permits Under the Clean Water Act*, 31 HARV. ENVTL. L. REV. 409, 413 (2007); Kenneth M. Murchison, *Learning from More than Five-and-a-Half Decades of Federal Water Pollution Control Legislation: Twenty Lessons for the Future*, 32 B.C. ENVTL. AFF. L. REV. 527, 530-31 (2005)).

15. *Id.* (quoting Gaba, *supra* note 14, at 414).

amending the FWPCA and implemented a more forceful federal water pollution policy in 1972.[16] This country's CWA emerged, aiming to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" with a "national goal that the discharge of pollutants into the navigable waters be eliminated."[17]

The Act further dictated that the discharge of any pollutant from a point source is unlawful without a federally mandated NPDES permit.[18] Therefore, if a facility applies for and obtains a permit, it may discharge pollutants within certain guidelines or effluent limitations.[19] The Act 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."[20] Notably, Congress chose to include CAFOs as the sole, specifically named industry included in the definition of "point source."[21]

Shortly following the enactment of the CWA, the EPA defined the parameters of the Act's first CAFO regulations.[22] The 1976 regulations identified the types of animal feeding operations that qualified as CAFOs, provided NPDES permit requirements, and implemented effluent limitation guidelines for these facilities.[23] This regulatory regime

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16. Hannah Connor, *Comprehensive Regulatory Review: Concentrated Animal Feeding Operations Under the Clean Water Act from 1972 to the Present*, 12 VT. J. ENVTL. L. 275, 283 (2011) (citing Jonathan Adler, *Fables of the Cuyahoga: Reconstructing a History of Environmental Protection*, 14 FORDHAM ENVTL. L.J. 89, 90, 93-94 n.16 (2002)).

17. 33 U.S.C. § 1251(a) (2006).

18. *Id.* §§ 1311(a), 1342.

19. *See id.* § 1342.

20. *Id.* § 1362(14) (emphasis added).

21. *Id.*; *see also* S. REP. NO. 92-414, at 100 (1971) ("Animal and poultry waste, until recent years, has not been considered a major pollutant . . . because animals were relatively widespread on pasture and rangeland and their manure was deposited on the ground to be naturally recycled through the soil and plant cover. . . . The picture has changed dramatically, however, as development of intensive livestock and poultry production on feedlots and in modern buildings has created massive concentrations of manure in small areas. The recycling capacity of the soil and plant cover has been surpassed. In these modern facilities the use of bedding and litter has been greatly reduced; consequently, the manure which is produced remains essentially in the liquid state and is much more difficult to handle without odor and pollution problems. Precipitation runoff from these areas picks up high concentrations of pollutants which reduce oxygen levels in receiving streams and lakes and accelerate the eutrophication process.").

22. *See* Concentrated Animal Feeding Operations, 41 Fed. Reg. 11,458 (Mar. 18, 1976) (to be codified at 40 C.F.R. pts. 124-125); Feedlots Point Source Category, Effluent Limitations Guidelines, 39 Fed. Reg. 5704 (Feb. 14, 1974) (to be codified at 40 C.F.R. pt. 412).

23. Waterkeeper Alliance, Inc. v. U.S. EPA, 399 F.3d 486, 494 (2d Cir. 2005) (citing Concentrated Annual Feed Operations, 41 Fed. Reg. 11,458); Feedlots Point Source Category, Effluent Limitations Guidelines, 39 Fed. Reg. 5704.

remained in effect until 2003, when the EPA finalized updated CAFO regulations in response to a 1989 lawsuit challenging its failure to revise effluent limitations pursuant to 33 U.S.C. § 1314(m).[24]

The 2003 Rule[25] assumed that all CAFOs had the "potential to discharge" and thus the duty to apply for an NPDES permit.[26] Additionally, it provided CAFOs with an option to request a "no potential to discharge" determination from the EPA in which case the facility would be exempt from the duty to apply for a permit.[27] The Rule further required CAFOs to develop and implement a site-specific Nutrient Management Plan (NMP) by establishing "'best management practices' (BMPs) . . . to ensure adequate storage of manure and wastewater, proper management of mortalities and chemicals, and appropriate site-specific protocols for land application."[28] Moreover, the Rule "expanded the definition of exempt 'agricultural stormwater discharge' to include land application discharge" if the application was compliant with NMPs.[29]

Environmental petitioners and farm petitioners challenged the 2003 Rule, resulting in the United States Court of Appeals for the Second Circuit opinion, *Waterkeeper Alliance, Inc. v. U.S. EPA*, in which the court upheld much of the 2003 Rule, but struck down the EPA's attempt to regulate potential discharges and further required that the NMPs must be incorporated into a CAFO's NPDES permit.[30] The court reasoned that requiring all CAFOs to take action to apply for a permit was beyond the scope of the CWA, which the court found gave the EPA authority to regulate actual discharges, not potential discharges.[31] The *Waterkeeper* decision led the EPA to update CAFO regulations in its 2008 Rule.[32]

The 2008 Rule included a "duty to apply" for CAFOs that discharge and those that "propose to discharge," defining those that propose to discharge as CAFOs that are "designed, constructed, operated, or maintained such that a discharge *will* occur."[33] In doing so, the EPA reformed the 2003 Rule, which regulated *potential* discharges, instead

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24. *Waterkeeper*, 399 F.3d at 494-95; *see* Natural Res. Def. Council, Inc. v. Reilly, No. 89-2980 (RCL), 1991 U.S. Dist. LEXIS 5334 (D.D.C. Apr. 23, 1991).

25. 2003 CAFO Rule, *supra* note 6.

26. Nat'l Pork Producers Council v. U.S. EPA, 635 F.3d 738, 744 (5th Cir. 2011) (citing 2003 CAFO Rule, *supra* note 6, at 7266-67).

27. *Id.*

28. *Id.* (citing 2003 CAFO Rule, *supra* note 6, at 7213-14, 7176).

29. *Id.* (citing 2003 CAFO Rule, *supra* note 6, at 7198).

30. *Id.* at 744-45 (citing Waterkeeper Alliance, Inc. v. U.S. EPA, 399 F.3d 486, 502, 505 (2d Cir. 2005)).

31. *Waterkeeper*, 399 F.3d at 504-05.

32. *See* 2008 CAFO Rule, *supra* note 7.

33. *Id.* at 70,423 (emphasis added).

creating a new rule, which regulated only *future*, *actual* discharges. Furthermore, the 2008 Rule required each CAFO to assess whether it discharges or proposes to discharge[34] and placed liability on CAFOs for failing to apply for a permit in addition to being held liable for the discharge itself.[35] While the 2008 Rule made the application process voluntary, a CAFO that did not apply would have the burden of proving that it did not propose to discharge in an enforcement hearing.[36] Lastly, the 2008 Rule required NMPs to be an enforceable part of an NPDES permit.[37]

B. Judicial Review of Agency Actions

The United States Supreme Court provided guidance on judicial review of agency actions in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[38] There, the Supreme Court outlined a two-prong test for a court reviewing "an agency's construction of the statute which it administers:"[39]

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[40]

The Court noted that "considerable weight" should be given to the agency's construction of a statute and a court should review with a "principle of deference to administrative interpretations."[41] The standard is not whether the regulation is "inappropriate," but whether the Administrator's judgment that it is appropriate within the particular program is "reasonable."[42]

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34. *Id.* at 70,424.
35. *Id.* at 70,426.
36. *Id.* at 70,427.
37. *Id.* at 70,443.
38. 467 U.S. 837 (1984).
39. *Id.* at 842.
40. *Id.* at 842-43 (footnotes omitted) (citing ROSCOE POUND, THE SPIRIT OF THE COMMON LAW 174-75 (1921)).
41. *Id.* at 844 (citations omitted).
42. *Id.* at 845.

Two notable circuit opinions utilized the *Chevron* test and interpreted the CWA as limiting EPA authority to the regulation of actual discharges of pollutants into navigable waters. In *Natural Resources Defense Council, Inc. v. U.S. EPA*, the United States Court of Appeals for the District of Columbia Circuit concluded, "[T]he CWA does not empower the agency to regulate point sources themselves; rather, EPA's jurisdiction . . . is limited to regulating the discharge of pollutants."[43] Furthermore, recently in *Service Oil, Inc. v. U.S. EPA*, the United States Court of Appeals for the Eighth Circuit conceded, "EPA and state permitting authorities obviously need detailed data from a new point source applicant in order to fashion and issue an appropriate permit *before discharges commence*."[44] However, the court noted that regulations for permit applications serve this purpose[45] and held that the Environmental Appeals Board (EAB) erred in assessing a monetary penalty for failure to apply for an NPDES permit prior to starting construction because it was outside the scope of EPA authority within the CWA.[46]

Other opinions have given more leeway to a broad interpretation of the CWA. For example, in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.* (*Gwaltney I*), the Supreme Court held that citizens do not have standing to seek civil penalties for "wholly past violations," but that citizens may bring suit under the Act alleging continuing or intermittent violations.[47] On remand, the United States Court of Appeals for the Fourth Circuit held in *Chesapeake Bay Foundation, Inc. v. Gwaltney of Smithfield, Ltd.* (*Gwaltney II*) that a violation under the Act is ongoing if it: (1) "continue[s] on or after the date the complaint is filed" or (2) there is "a continuing likelihood of a recurrence in intermittent or sporadic violations."[48] Thus, both cases illustrate that an industry may be held accountable for past and future discharges that have not occurred on or since the filing of the lawsuit.[49]

Finally, the Fifth Circuit itself interpreted the CWA broadly in *Carr v. Alta Verde Industries*.[50] After a feedlot discharged waste from stored manure and holding ponds during heavy rains, plaintiffs filed suit

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43. 859 F.2d 156, 170 (D.C. Cir. 1988).
44. 590 F.3d 545, 549 (8th Cir. 2009).
45. *Id.* (citing Natural Res. Def. Council v. U.S. EPA, 822 F.2d 104, 111 (D.C. Cir. 1987)).
46. *Id.* at 551.
47. 484 U.S. 49, 64 (1987).
48. 844 F.2d 170, 171-72 (4th Cir. 1988).
49. *See* Carr v. Alta Verde Indus., 931 F.2d 1055, 1062 (5th Cir. 1991) ("The defendant's mere '[v]oluntary cessation of allegedly illegal conduct,' however, 'does not make the case moot.'" (alteration in original) (quoting United States v. W.T. Grant Co., 345 U.S. 629, 632 (1953))).
50. *Id.*

alleging that the feedlot violated the CWA by discharging without an NPDES permit.[51] The United States District Court for the Western District of Texas dismissed the suit because no discharges had occurred on or since the filing of the complaint and further stated that because the discharges had been within effluent limitation guidelines, the company was not required to obtain an NPDES permit.[52] The Fifth Circuit reversed and remanded, stating, "Because the [EPA's] effluent limitations guidelines do not create such an exception to the NPDES permit requirement, we conclude that Alta Verde's failure to obtain a permit amounted to a continuing violation of the Act, and any discharges in the future will amount to intermittent violations."[53] In finding that the feedlot had violated the CWA by failing to obtain an NPDES permit, the court specifically created a separate liability in addition to the liability for future discharges.[54]

In reviewing agency regulations within the scope of the CWA, courts have utilized the *Chevron* test to interpret the Act to limit EPA authority, as seen in *Natural Resources Defense Council, Inc. v. U.S. EPA* and *Service Oil*. However, other courts, including the Fifth Circuit, have interpreted the Act more broadly, as seen in *Gwaltney I*, *Gwaltney II*, and *Carr*. It is upon this background of competing case law that the Fifth Circuit decided the noted case.

III. THE COURT'S DECISION

In the noted case, the Fifth Circuit employed the *Chevron* test to evaluate whether the EPA's 2008 Rule was within the scope of the agency's CWA authority.[55] In doing so, the court relied heavily on the Second Circuit's holding in *Waterkeeper*, which stated that the CWA dictates that "the discharge of any pollutant by any person shall be unlawful."[56] The Second Circuit found this language to be unambiguous, concluding that only actual discharges were regulated under the CWA.[57] Under this reasoning, the Fifth Circuit in the noted case found that the EPA lacked authority to require CAFOs that merely propose to discharge

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51. *Id.* at 1057-58.
52. *Id.* at 1057.
53. *Id.*
54. *Id.* at 1062 ("Because Alta Verde's failure to obtain an NPDES permit was and is a violation of the Act, we conclude that the plaintiffs proved a continuing violation.").
55. Nat'l Pork Producers Council v. U.S. EPA, 635 F.3d 738, 749 (5th Cir. 2011).
56. Waterkeeper Alliance, Inc. v. U.S. EPA, 399 F.3d 486, 504 (2d Cir. 2005) (emphasis omitted) (quoting 33 U.S.C. § 1311(a) (2006)).
57. *Id.* at 504-05.

to apply for a permit, since the Act regulated only *present actual* discharges and not future discharges, even if they are imminent.[58]

In formulating this holding, the Fifth Circuit also relied on *Natural Resources Defense Council, Inc. v. U.S. EPA* and *Service Oil*, in which the D.C. and Eighth Circuits, respectively, limited the CWA to the regulation of actual discharges into navigable waters as opposed to point sources or future discharges.[59] The court also looked to *S.D. Warren Co. v. Maine Board of Environmental Protection*, in which the Supreme Court narrowed the definition of "discharge of any pollutant" by interpreting it to require an addition of a pollutant to a body of water.[60] Thus the Fifth Circuit reasoned that this limited interpretation, which encompassed only actual discharges upon their addition to water, meant that the EPA could not regulate discharges prior to that stage.[61] In relying on this body of case law, the Fifth Circuit struck down the EPA's proposed authority to regulate actual discharges prior to their release by interpreting the CWA definition of discharge narrowly.[62]

Next, the Fifth Circuit held that the CWA authorized the EPA to require a CAFO to obtain an NPDES permit only if the CAFO actually discharges pollutants, and not a moment before.[63] The court relied on the Act itself, which requires a NPDES permit in order to lawfully discharge from a point source[64] and penalizes unlawful discharge with civil fines and criminal enforcement.[65] Furthermore, the court reasoned that *Chevron* dictated examination of congressional intent, which the court found clearly mandated a duty to apply on CAFOs that are discharging.[66]

Next, the court addressed the Farm Petitioners' challenge to the 2008 Rule's creation of CAFO liability for failure to apply for a permit.[67] Here, the court found congressional intent to be clear and unambiguous under 33 U.S.C. § 1319,[68] which allows the EPA to impose liability on any person in violation of certain enumerated sections of the CWA.[69] The

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58. *Nat'l Pork Producers Council*, 635 F.3d at 750-51.

59. *Id.* (citing Natural Res. Def. Council v. U.S. EPA, 859 F.2d 156, 170 (D.C. Cir. 1988); Serv. Oil, Inc. v. U.S. EPA, 590 F.3d 545, 550 (8th Cir. 2009)).

60. *Id.* at 750 (quoting S.D. Warren Co. v. Me. Bd. of Envtl. Prot., 547 U.S. 370, 380-81 (2006)).

61. *Id.*

62. *Id.* at 751.

63. *Id.*

64. *Id.* (citing 33 U.S.C. § 1311 (2006)).

65. *Id.* (citing 33 U.S.C. § 1319).

66. *Id.* ("This has been the well-established statutory mandate since 1972.").

67. *Id.* at 751-53.

68. *Id.* at 752.

69. Those sections are limited to: 33 U.S.C. §§ 1311 (discharge prohibition), 1312 (water-based effluent limitations), 1316 (national standards of performance for new sources),

court held liability for failure to apply for a permit to be outside the scope of these sections and therefore beyond the scope of EPA authority.[70] Furthermore, the court relied on *Service Oil*, which stated, "[T]he [EPA]'s authority to assess monetary penalties by administrative proceeding is limited to unlawful discharges of pollutants."[71] There, the Eighth Circuit held that 33 U.S.C. § 1318, granting EPA its information-gathering authority, did not extend to give the agency power to impose liability for failing to apply for an NPDES permit.[72] Thus, the Fifth Circuit agreed that a limitation also applied in the noted case.[73]

Finally, the Fifth Circuit addressed statute of limitations and jurisdictional issues.[74] The Farm Petitioners argued that the EPA's requirement to include NMPs in NPDES permits exceeded the EPA's statutory authority because NMPs did not "constitute effluent limitations that must be included in NPDES permits."[75] Because this issue related to the 2003 Rule, which had already been brought up and decided on in *Waterkeeper*, the Fifth Circuit held that the Farm Petitioners had their chance to argue this issue and thus were time barred from bringing this claim.[76] In addition, the Farm Petitioners contested the substance of three guidance letters that followed and clarified the 2008 Rule.[77] Regarding this claim, the Fifth Circuit held that the letters were not a "final action" within the meaning of 33 U.S.C. § 1369(b)(1) and therefore were not justiciable in this proceeding.[78]

IV. ANALYSIS

In the noted case, the Fifth Circuit struck down much of the challenged 2008 Rule, limiting the scope of the EPA's authority to regulate CAFOs under the CWA. In doing so, the court maintained the agency's reactive enforcement position and failed to make progress towards the goals of the CWA. Furthermore, while the court reasoned

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1317 (toxic and pretreatment effluent standards), 1318 (EPA's information gathering authority), 1328 (provisions permitting the discharge of specific aquaculture pollutants), 1342 (any permit condition or limitation), and 1345 (provisions governing the disposal or use of sewer sludge). *Id.*

70. *Id.*

71. *Id.* at 752-53 (quoting Serv. Oil, Inc. v. U.S. EPA, 590 F.3d 545, 550 (8th Cir. 2009)).

72. *Id.* at 752 (citing *Serv. Oil*, 590 F.3d at 550).

73. *Id.*

74. These issues are not the focus of this Note, but are addressed briefly to offer a full understanding of the Fifth Circuit's opinion.

75. *Nat'l Pork Producers Council*, 635 F.3d at 753-54 (quoting Waterkeeper Alliance, Inc. v. U.S. EPA, 399 F.3d 486, 502 (2d Cir. 2005)).

76. *Id.* at 754.

77. *Id.* at 754-55.

78. *Id.* at 755-56.

within the framework of *Waterkeeper* and other precedent, it produced contradictory holdings and failed to consider a body of case law that interpreted the Act within the context of its policies and history.[79]

The Fifth Circuit did take one step in the right direction, holding that discharging CAFOs have a duty to apply for an NPDES permit.[80] Finding no statutory language regarding a "duty to apply" for an NPDES permit in the CWA, the court correctly looked to *Chevron* step two and weighed whether such an interpretation was "a permissible construction of the statute."[81] The court correctly concluded, "[I]t would be counter to congressional intent for the court to hold that requiring a discharging CAFO to obtain a permit is an unreasonable construction of the Act."[82] Indeed, the Act itself indicates that a discharging CAFO must have an NPDES permit.[83]

Now one might ask, if the Fifth Circuit held that discharging CAFOs have a duty to apply for a permit, how can the EPA exercise such a duty without the authority to hold a CAFO liable for failing to apply for one? While the court relied on *Service Oil*, in which the Eighth Circuit specifically concluded, "the agency's authority to assess monetary penalties by administrative proceeding is limited to unlawful discharges of pollutants," this decision came before the Fifth Circuit's holding that CAFOs have a duty to apply.[84] Perhaps, in light of the decision in the noted case, a court might now hold otherwise. Furthermore, the Fifth Circuit itself held to the contrary in *Carr v. Alta Verde Industries* where the court stated, "Because Alta Verde's failure to obtain an NPDES permit was and is a violation of the Act, we conclude that the plaintiffs proved a continuing violation."[85] Such an articulation of liability by the Fifth Circuit should not be ignored.

Further relying on *Waterkeeper* and the language of 33 U.S.C. § 1311(a), the Fifth Circuit in the noted case limited the EPA's authority

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79. *See, e.g.*, Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 62-63 (1987) (holding that continuous *and intermittent* discharges may be punishable under the CWA).

80. *Nat'l Pork Producers Council*, 635 F.3d at 751.

81. *Id.* (quoting Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984)).

82. *Id.*

83. 33 U.S.C. § 1311(a) (2006) ("Except as in compliance with this section and section[] . . . 1342 . . . of this title, the discharge of any pollutant by any person shall be unlawful."); *id.* § 1342 ("[T]he Administrator may . . . issue a permit for the discharge of any pollutant, or combination of pollutants.").

84. Serv. Oil, Inc. v. U.S. EPA, 590 F.3d 545, 550 (8th Cir. 2009).

85. 931 F.2d 1055, 1062 (5th Cir. 1991).

to the regulation of *actual* discharges only.[86] However, no language exists in *Waterkeeper* that precludes the EPA from requiring permits of *actual* discharges, *before* they discharge.[87] Furthermore, such a determination contradicts the Supreme Court's interpretation of the Act in *Gwaltney I*.[88] There, the Court interpreted the legislative history of the CWA, finding that "an intermittent polluter—one who violates permit limitations one month out of every three—is just as much 'in violation' of the Act as a continuous violator."[89] While actions based on "wholly past violations" could not be brought for lack of jurisdiction, the Supreme Court noted specifically that those based on continuous *or intermittent* violations were justiciable.[90] The Fourth Circuit in *Gwaltney II*, following the Supreme Court's decision, articulated that the burden of proof lies on the defendant violator to demonstrate that the suit has become moot, creating a high bar for violators.[91]

Admittedly these cases govern intermittent discharges, not actual future discharges that have yet to begin. However, *Gwaltney I* and *Gwaltney II* effectively negate the Fifth Circuit's interpretation that the text of the Act must be limited to *actual present* discharges. Even further, by placing the burden of proof on the alleged violator of the Act,[92] this body of case law illustrates that a violator may have ceased discharging, but may still be held liable for *potential future* discharges.

The Fifth Circuit quoted *Waterkeeper*, "While we appreciate the policy considerations underlying the EPA's approach in the CAFO Rule, however, we are without authority to permit it because it contravenes the regulatory scheme enacted by Congress."[93] However, the statutory text itself supports EPA's decision to regulate CAFOs that propose to discharge. For example, the Act states, "[I]t is the national goal that the discharge of pollutants into the navigable waters be eliminated."[94] Without requiring CAFOs that will discharge to apply for NPDES permits, the Act cannot attain its statutory goal, because the EPA will

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86. *Nat'l Pork Producers Council*, 635 F.3d at 749-50 (citing 33 U.S.C. § 1311; Waterkeeper Alliance, Inc. v. U.S. EPA, 399 F.3d 486, 504-05 (2d Cir. 2005)).

87. *See Waterkeeper*, 399 F.3d at 506 n.22 (discussing whether the EPA may reasonably presume that some large CAFOs would discharge).

88. Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49 (1987).

89. *Id.* at 63.

90. *Id.* at 63-64.

91. Chesapeake Bay Found. Inc. v. Gwaltney of Smithfield, Ltd. 890 F.2d 690, 697 (4th Cir. 1989).

92. *Id.*

93. Nat'l Pork Producers Council v. U.S. EPA, 635 F.3d 738, 753 (5th Cir. 2011) (quoting Waterkeeper Alliance, Inc. v. U.S. EPA, 399 F.3d 486, 505 (2d Cir. 2005)).

94. 33 U.S.C. § 1251(a)(1) (2006).

have to find proof of often intermittent illegal discharges from CAFOs using its limited enforcement resources.[95] Because the NPDES permitting scheme requires self-monitoring and reporting,[96] the problem of scarce enforcement resources would be avoided by requiring CAFOs that will discharge to apply before doing so.

Moreover, 33 U.S.C. § 1311(a) states, "[T]he discharge of any pollutant by any person shall be unlawful."[97] Given that "discharge of a pollutant" is defined as "any *addition* of any pollutant *to* navigable waters from any point source,"[98] this statement is textually ambiguous. As David Drelich, an EPA Senior Attorney, keenly notes:

> Common dictionary definitions of both "addition" and "to" contain dual and inconsistent meanings. "Addition" can mean either "the result of adding" or "the act or process of adding." . . . The same ambiguity permeates the primary dictionary definition of "to," which includes "in the direction of and reaching," as well as "in the direction of; towards." Consequently, "discharge of a pollutant" can be interpreted as occurring at the time and place when a pollutant reaches a water of the United States or at the location of the discharger's point source, which can occur before any pollutants reach a water of the United States. . . . Contrary to expectations, there is no plain meaning.[99]

Indeed, in *United States v. Texas Pipe Line Co.*, the United States Court of Appeals for the Tenth Circuit stated, "It makes no difference that a stream was or was not at the time of the spill discharging water continuously into a river navigable in the traditional sense."[100] Furthermore, in *In re: Larry Richner/Nancy Sheepbouwer & Richway Farms*, the EAB found appellants to be in violation of discharge provisions where water was inhibited from flowing to connected waters at the time of inspection.[101] Such cases defy a plain-meaning interpretation of the statute.

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95. *See* National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines and Standards for Concentrated Animal Feeding Operations, 66 Fed. Reg. 2690, 3008 (Jan. 12, 2001) (proposed rule) (discussing the reasons why CAFOs rarely apply for NPDES permits).

96. *See* 40 C.F.R. § 122.41(j) (2011).

97. 33 U.S.C. § 1311(a).

98. *Id.* § 1362(12) (emphasis added).

99. David Drelich, *Restoring the Cornerstone of the Clean Water Act*, 34 COLUM. J. ENVTL. L. 267, 303-04 (2009) (footnotes omitted). The article noted, "These remarks were written by the author in his private capacity and do not necessarily represent the views of the EPA or the United States." *Id.* at 267 n.*.

100. 611 F.2d 345, 347 (10th Cir. 1979); *see also* United States v. Holland, 373 F. Supp. 665, 675 (M.D. Fla. 1974) (stating that pollutants disposed of on dry land which is periodically inundated by waters of the United States are not beyond the reach of the CWA).

101. No. 10-97-0090-CWA/G, 2002 EPA App. LEXIS 13, at *5-6 (EAB July 22, 2002).

Because an examination of the CWA and supporting case law illustrates that its text, considering its context, is indeed ambiguous as to whether the EPA may regulate CAFOs that propose to or will discharge, a court must examine whether such an interpretation "is based on a permissible construction of the statute."[102] The second prong of the *Chevron* test must be invoked, which recognizes that "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer" and instructs courts to employ "the principle of deference to administrative interpretations."[103] Examined through this test, the 2008 Rule is clearly a reasonable construction of the statute in light of the Act's goal to prevent discharges through the NPDES permit system.[104] Both the context and text of the CWA permit and support a broader interpretation than the Fifth Circuit allows. In limiting the EPA's authority, the court steps away from the Act's goal of pollutant elimination.

V. CONCLUSION

In response to Farm Petitioners challenges, the Fifth Circuit struck down much of the EPA's authority in the 2008 Rule governing CAFOs.[105] The decision prohibited the EPA from regulating actual CAFO discharges before they began and imposing liability for failure to apply for an NPDES permit.[106] Simultaneously, the Fifth Circuit sanctioned a "duty to apply" to discharging CAFOs.[107] Because such a duty is unenforceable without liability for failure to apply for a permit, the court's holdings contradict one another. Furthermore, the court ignored the statutory goals of the Act and the ambiguity of its text. Under *Chevron*, the court should have allowed the EPA to regulate actual CAFO discharges prior to flow and impose liability on CAFOs failing to apply for permits. In failing to do so, the court legitimizes the EPA's reactive enforcement procedures and falls short of progressing towards the CWA's stated goals of eliminating discharge of pollutants into navigable waters.

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102. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).

103. *Id.* at 844 (citations omitted).

104. *See id.* at 845 ("[T]he question before it was not whether in its view the concept is 'inappropriate' in the general context of a program . . . but whether the Administrator's view that it is appropriate in the context of this particular program is a reasonable one.").

105. Nat'l Pork Producers Council v. U.S. EPA, 635 F.3d 738 (5th Cir. 2011).

106. *Id.* at 753.

107. *Id.* at 752.

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