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Casenote

ENVIRONMENTAL LAW—AGRICULTURAL POLLUTION—The Uncertain Future of Clean Water Act Agricultural Pollution Exemptions After *Concerned Area Residents for the Environment v. Southview Farm*, 34 F.3d 114 (2d Cir. 1994), cert. denied, 115 S. Ct. 1793 (1995).

Introduction

Two decades of regulation under the Clean Water Act (CWA or the Act)¹ have produced significant progress in controlling point source pollution.² But those water quality improvements have been jeopardized by a failure to regulate and control major sources of pollution commonly known as “nonpoint source” (NPS) pollution.³ Agricultural activities are a

1. 33 U.S.C. §§ 1251-1387 (1988).

2. See ROBERT W. ADLER ET AL., *THE CLEAN WATER ACT: 20 YEARS LATER* xii, 14-19, 85 (1993); Brian Weeks, *Trends in Regulation of Stormwater and Nonpoint Source Pollution*, ELR NEWS & ANALYSIS, 25 ELR 10300-1 (June 1995) (noting significant improvements in water quality from regulation of point source discharges). A “point source” is “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.” 33 U.S.C. § 1362(14).

3. No federal statutory or regulatory definition of “nonpoint source” exists. It is a *de facto* residual category; pollution sources not defined as point sources are nonpoint sources. The Environmental Protection Agency (EPA) has adopted the following nonregulatory definition:

NPS pollution is caused by diffuse sources that are not regulated as point sources and normally is associated with agricultural, silvicultural and urban runoff, runoff from construction activities, etc. . . . In practical terms, nonpoint source pollution does not result from a discharge at a specific, single location (such as a single pipe) but generally results from land runoff, precipitation, atmospheric deposition, or percolation.

ENVIRONMENTAL PROTECTION AGENCY, *NONPOINT SOURCE GUIDANCE DOCUMENT 3* (Dec. 1987). See also *National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 166 n.28 (D.C. Cir. 1982) (quoting the EPA brief describing a “non-point source” as “nothing more than a pollution problem not involving a discharge from a point source”). The EPA, in its National Water Quality Inventory 1986 Report to Congress, indicated that NPS pollution was the leading cause of water quality impairment. JACKSON BATTLE & MAXINE I. LIPELES, *ENVIRONMENTAL LAW: WATER POLLUTION* 422 (2d ed. 1993). See also ADLER ET AL., *supra* note 2, at 171 (“Poison runoff impairs more water bodies, surface and ground, urban and rural, than any other pollution source in the country.”).

significant source of NPS pollution.⁴ NPS pollution generally escapes regulation under the Act,⁵ and significant agricultural activities that might otherwise be regulated as point sources enjoy specific statutory exemptions in the Act.⁶ The decision of the U.S. Court of Appeals for the Second Circuit in *Concerned Area Residents for the Environment v. Southview Farm*,⁷ could signal a trend toward new rigor in applying the Act's agricultural exemptions.

Southview Farm (Southview) was one of New York's largest dairies with 1100 acres and 2200 animals including 1290 mature cows.⁸ The cows were not pastured, remaining in barns except for periodic milking.⁹ Southview employed a liquid/solid manure disposal system¹⁰ involving five storage lagoons, one with a capacity of six to eight million gallons.¹¹ Southview applied millions of gallons of liquid manure and chemical process waste to its fields as fertilizer through use of a "center pivot

4. State assessments of surface water in 1990 and 1991 found that "[c]rop and animal agriculture nonpoint pollution affected about 72 percent of impaired river and stream miles, 56 percent of impaired lake acres, and 43 percent of impaired estuary square miles." GENERAL ACCOUNTING OFFICE, ANIMAL AGRICULTURE: INFORMATION ON WASTE MANAGEMENT AND WATER QUALITY ISSUES 9 (June 1995) [hereinafter ANIMAL AGRICULTURE]; Drew L. Kershen, *Agricultural Water Pollution: From Point to Nonpoint and Beyond*, NAT. RESOURCES & ENV'T, Winter 1995, at 3 ("Within nonpoint sources of pollution, near unanimous agreement exists that agricultural [NPS] pollution is the largest contributor.").

5. The Act declares that "it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this [Act] to be met." 33 U.S.C. § 1251(a)(7). However, the Act undertook no direct federal regulation of or responsibility for nonpoint sources, choosing instead to require states to develop their own "management programs" for controlling NPS pollution. 33 U.S.C. § 1329. *See, e.g.*, 33 U.S.C. § 1288(b)(2)(G) (calling for areawide waste treatment management plans, which shall "set forth procedures and methods (including land use requirements) to control to the extent feasible [NPS]"). The Act fails to provide for federal intervention if states fail to develop or implement such plans.

6. The definition of "point source" specifically excludes "agricultural stormwater discharges and return flows from irrigated agriculture." 33 U.S.C. § 1362(14).

7. 34 F.3d 114 (2d Cir. 1994).

8. *Id.* at 116.

9. *Id.*

10. Brief for Defendants-Appellees at 5, *Concerned Area Residents for the Env't v. Southview Farm*, 34 F.3d 114 (2d Cir. 1994) (No. 93-9229), *cert. denied*, 115 S. Ct. 1793 (1995) [hereinafter Appellees' Brief] (on file with the *Land and Water Law Review*). The manure was collected and filtered through a separator when it exited the barn. *Id.* Solids were placed in a concrete storage area or directly into spreaders. *Id.* Liquids were pumped into lagoons. *Id.*

11. *Southview Farm*, 34 F.3d at 116. This particular lagoon, located on the main property, was filled with liquid manure piped directly from the separator and with process waste, a mixture of washwater mixed with chlorine cleanser and a phosphorus acid solution used to wash down the milking parlors and flush the milking machines after each of the three daily milkings. Respondents' Brief in Opposition at 6-7, *Southview Farm v. Concerned Area Residents for the Env't*, (No. 94-1316) *cert. denied*, 115 S. Ct. 1793 (1995) [hereinafter Respondents' Brief] (on file with the *Land and Water Law Review*).

irrigation system,"¹² a "hard hose traveler,"¹³ and conventional manure-spreading equipment.¹⁴

Neighboring land owners, collectively Concerned Area Residents for the Environment (CARE), sued Southview pursuant to the CWA's citizen-suit provision,¹⁵ alleging multiple CWA violations and asserting pendent state common law trespass, nuisance, and negligence claims.¹⁶ All CWA claims related to CARE's allegation that Southview improperly applied manure to its fields, resulting in unpermitted discharges of pollutants into adjacent waters.¹⁷ Alleged CWA violations¹⁸ included:

12. *Southview Farm*, 34 F.3d at 116. Pipes connected a self-propelled pivot to the liquid manure storage lagoons. *Id.* The diameter of the circle could be adjusted to fit the field being fertilized. *Id.* Southview's piping system extended under state and local highways to connect its various properties to the lagoons. Respondents' Brief, *supra* note 11, at 7.

13. *Southview Farm*, 34 F.3d at 116. The hard hose traveler consisted of flexible plastic tubing which could be unwound from a large reel. *Id.* The hose had a nozzle on the end and could spray liquid manure 150 feet in either direction. *Id.*

14. *Id.* Southview used both tractor-pulled and self-propelled spreaders with individual carrying capacity of approximately 5,000 gallons to spread manure not processed through the separation system. *Id.*

15. 33 U.S.C. § 1365. Citizen suits serve as adjuncts to federal, state, and local enforcement efforts which seek to promote compliance with environmental laws. Beverly McQueary Smith, *Recent Developments in Citizens' Suits Under Selected Federal Environmental Statutes*, ALI-ABA Course of Study, C981 ALI-ABA 701 (Feb. 15, 1995). In general terms, the citizen-suit provision of the CWA authorizes any citizen to initiate a civil action against any person, including the U.S. government, any other governmental entity or agency (within the limits of the Eleventh Amendment to the Constitution) who violates the statute, or an order of the Administrator of EPA or a State, or the Administrator for failure to perform a non-discretionary duty or act. 33 U.S.C. § 1365. The courts may require compliance and the payment of civil penalties and award litigation costs including reasonable attorney and expert witness fees to the prevailing or substantially prevailing party. *Id.* See Jeffrey G. Miller, *Private Enforcement of Federal Pollution Control Laws Part I*, ELR NEWS & ANALYSIS, 13 ELR 10309 (October 1983).

16. *Concerned Area Residents for the Env't v. Southview Farm*, 834 F. Supp. 1410, 1412 (W.D.N.Y. 1993) (*CARE I*) (reporting the district court's opinion denying Southview's motions to dismiss and for summary judgment). The trespass claim was based on evidence that nitrates from Southview's manure operations were leaching into plaintiffs' groundwater. *Id.* at 1420. CARE also claimed Southview's contamination of area waterways constituted both a public and private nuisance. *Id.* at 1421. CARE's negligence claim was based on an allegation that one discharge was done intentionally to harm and cause emotional distress to two individual plaintiffs. *Id.* at 1412.

17. *Id.* at 1412. The district court rejected Southview's argument that manure is not a "pollutant" within the meaning of 33 U.S.C. § 1311(a), which makes unlawful "the discharge of any pollutant" without a permit pursuant to the Act. *Id.* at 1416. The Act defines "pollutant" to include "dredged spoil, solid waste, . . . sewage, . . . sewage sludge, . . . chemical wastes, biological materials, . . . and agricultural waste discharged into water." 33 U.S.C. § 1362(6). The court relied on *Carr v. Alta Verde Indus., Inc.*, 931 F.2d 1055 (5th Cir. 1991) (treating manure-laden water used to irrigate and fertilize fields as a pollutant), and *Higbee v. Starr*, 598 F. Supp. 323, 330 (E.D. Ark. 1984) (holding as a matter of law that accumulated hog waste, mixed with water and used as fertilizer, was "agricultural waste"), *aff'd*, 782 F.2d 1048 (8th Cir. 1985); *CARE I*, 834 F. Supp. at 1416. Further, the court held that there was no evidence Congress intended "agricultural waste" in the CWA to have the same meaning as in the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6991(k) (1986 & Supp. 1993), cited by Southview. Moreover, the RCRA regula-

(1) On July 13, 1989, two individual plaintiffs observed liquid manure spreading and tracked it downfield to a swale on Southview's property that lead to a drain tile passing through a stonewall to a ditch that flowed off Southviews's property and downstream into a stream, ultimately flowing into the Genesee River.¹⁹

(2) On July 12, 1989, and August 22, 1989, two individual plaintiffs also saw Southview's vehicles spreading a large amount of liquid manure in the same field they observed on July 13, 1989, but did not track the flow of the manure.²⁰

(3) On September 26, 1990, and April 15, 1991, Southview had spread manure on certain areas of its fields until it began to "pool." When it subsequently rained, the manure flowed off Southview property.²¹

The United States District Court for the Western District of New York denied Southview's motion for summary judgment.²² The jury found that Southview had committed five CWA violations and common law trespass.²³ Partially granting Southview's motion for judgment as a matter of

tions, in fact, "implicitly support the view that manure used as a fertilizer constitutes solid waste." *Id.* at 1417. The Second Circuit had earlier concluded, based on its reading of 33 U.S.C. § 1311(a) (the basic prohibition on discharge of pollutants into navigable waters) and § 1342(a)(1) (the National Pollutant Discharge Elimination System (NPDES) permit section) together, that "absent a permit, 'the discharge of any pollutant by any person' is unlawful. 33 U.S.C. § 1311(a)." *United States v. Plaza Health Labs., Inc.*, 3 F.3d 643, 645 (2d Cir. 1993).

18. The six alleged CWA violations on which the jury found in favor of Southview are omitted.

19. *Southview Farm*, 34 F.3d at 118-19.

20. *Id.* at 119-20.

21. *Id.* at 120-21.

22. The district court found that CARE alleged sufficient injury-in-fact to support standing and that CARE's complaint sufficiently alleged CWA violations. *CARE I*, 834 F. Supp. at 1413-20. The court held that factual issues precluded summary judgment on CARE's trespass and nuisance claims. *Id.* at 1420-22. Moreover, the court granted CARE's pre-trial motion to file a supplemental complaint. *Id.* at 1413. The court allowed CARE to add a CWA violation arising out of manure discharges occurring after the suit commenced and a violation based on information obtained through discovery. *Id.* at 1412-13. The court also allowed CARE to add its pendent negligence claim. *Id.* Additionally, the court accepted an *amicus* brief from the Farm Bureau, a private organization representing farmers' interests, even though the organization had contributed \$10,000 to Southview's defense. *Id.* at 1413. (The court had earlier denied Southview's motion to dismiss the complaint. *Id.* at 1412 n.1).

23. *Concerned Area Residents for the Env't v. Southview Farm*, 834 F. Supp. 1422, 1423 (W.D.N.Y. 1993) (*CARE II*) (reporting the district court's opinion granting Southview's motion for judgment as a matter of law on the five CWA violations). The jury found in favor of Southview on six other alleged CWA violations and the state law nuisance and negligence claims. *Id.*

law following the jury verdict in CARE's favor,²⁴ the district court set aside the jury's verdict on the five CWA violations while sustaining the verdict on the trespass claim.²⁵

The United State Court of Appeals for the Second Circuit unanimously reversed the district court.²⁶ The court held that the swale coupled with the drain tile leading into a stream was "in and of itself a point source"²⁷ and, alternatively, that "the manure spreading vehicles themselves were point sources."²⁸ The Second Circuit declined to apply the CWA's "agricultural stormwater discharge" exemption,²⁹ holding that a reasonable jury could conclude that the discharges were not the result of rainfall but of oversaturation of the fields with liquid manure.³⁰ The court also held that Southview's liquid manure spreading operations were a "point source within the meaning of CWA section 1362(14) because the farm itself falls within the definition of a concentrated animal feeding operation ('CAFO') and is not subject to the agricultural exemption."³¹ Without stating any reasons, the Supreme Court denied Southview's petition for a writ of certiorari.³²

This casenote focuses on the CWA violations that occurred at Southview. It discusses the Second Circuit's analysis of what constitutes a "point source" and what constitutes a "concentrated animal feeding operation" (CAFO) within the meaning of the CWA. It also analyzes the Second Circuit's interpretation of the "agricultural stormwater discharge" exemption under the Act.³³

24. Fed. R. Civ. P. 50(b).

25. *CARE II*, 834 F. Supp. at 1423. The district court held that the evidence presented at trial did not show a point source discharge as a matter of law. *Id.* at 1424-35. The court concluded that runoff from the site where the manure was applied did not constitute a discharge from a "point source" either because it was an "agricultural stormwater discharge" exempt from the CWA's definition of "point source," or because there was no discharge from "any discernible, confined and discrete conveyance." *Id.* at 1426-35. The court also held there was sufficient evidence to support CARE's trespass claim and that expert testimony regarding the claim was permissible because Southview waived the issue by failing to object at trial and the testimony was sufficient to support the jury verdict, not merely speculative. *Id.* at 1435-37.

26. *Southview Farm*, 34 F.3d at 123.

27. *Id.* at 118.

28. *Id.* at 119.

29. 33 U.S.C. § 1362(14).

30. *Southview Farm*, 34 F.3d at 120-21.

31. *Id.* at 115.

32. 115 S. Ct. 1793 (1995).

33. 33 U.S.C. § 1362(14).

BACKGROUND

The broad remedial purposes of the Clean Water Act are to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”³⁴ The CWA provides that, absent a permit, “the discharge of any pollutant by any person shall be unlawful.”³⁵ Permits are issued pursuant to the Act’s federally mandated and supervised National Pollutant Discharge Elimination System (NPDES).³⁶ Point sources³⁷ are subject to a permit requirement,³⁸ and *all* point source discharges are illegal unless permitted.³⁹ Nonpoint sources, however, are outside the NPDES and largely unregulated.⁴⁰

Thus, for regulatory purposes, the point-nonpoint source distinction is critical. At a practical level, the CWA “subjects point source pollution to direct, reasonably aggressive, and reasonably effective federal regulation . . . [and] leaves nonpoint source pollution primarily to the states, with the federal role being indirect, almost passive, and largely ineffective.”⁴¹ Excluding CAFOs, “most water pollution generated by agricultural activities is nonpoint source,” thus, outside direct federal regulation.⁴² NPS pollution is addressed primarily through a planning process, placing primary responsibility on the states.⁴³

34. 33 U.S.C. § 1251(a).

35. 33 U.S.C. § 1311(a). The Act defines “pollutant” to include “dredged spoil, solid waste, . . . sewage, . . . sewage sludge, . . . chemical wastes, biological materials, . . . and agricultural waste discharged into water.” *Id.* § 1362(6). “[D]ischarge of a pollutant” includes “any addition of any pollutant to navigable waters from any point source.” *Id.* § (12).

36. 33 U.S.C. § 1342(a). An NPDES permit sets maximum discharge levels for various pollutants based on technology-based, uniform national effluent limitations. 33 U.S.C. § 1311(b). The permit also establishes monitoring and reporting requirements, and delineates the permittee’s obligations. 33 U.S.C. § 1342(a).

37. *See supra* note 2.

38. 33 U.S.C. § 1342.

39. 33 U.S.C. § 1311.

40. *See* 33 U.S.C. §§ 1288, 1329.

41. George A. Gould, *Agriculture, Nonpoint Source Pollution, and Federal Law*, 23 U.C. DAVIS L. REV. 461, 474 (1990). *See also* Weeks, *supra* note 2, at 10300-12 n.16 (noting that “[a]lthough nonpoint sources have become the primary source of surface water pollution in the United States, EPA has a limited regulatory mandate and can only encourage the use of nonpoint source control measures”); Robert D. Fentress, *Nonpoint Source Pollution, Groundwater, and the 1987 Water Quality Act: Section 208 Revisited?*, 19 ENVTL. L. 807, 808 (1989) (CWA left “regulation of nonpoint sources to the states.”).

42. Gould, *supra* note 41, at 474.

43. 33 U.S.C. §§ 1288, 1329 *See supra* note 5.

Regulatory Status of Agricultural Activities

Following passage of the CWA, the Environmental Protection Agency (EPA) adopted an expansive view of point source pollution, including many commonplace agricultural activities.⁴⁴ The Act required the Administrator of the EPA to promulgate effluent limitation guidelines for point sources within one year of its passage.⁴⁵ Faced with the difficulties of permitting numerous small, geographically dispersed point sources, in 1973 the EPA issued regulations exempting designated categories of point source discharges, including all silvicultural and many agricultural activities, from the NPDES permit requirements.⁴⁶ The Natural Resources Defense Council then brought suit, challenging the EPA's authority to exclude certain point sources from permit requirements.⁴⁷ The Court of Appeals for the D.C. Circuit rejected the EPA's "administrative infeasibility" argument⁴⁸ and held that "the EPA Administrator does not have authority to exempt categories of point sources from the permit requirements"⁴⁹ The court went on to suggest that, if the EPA could not find a practical way to permit the more troublesome point sources, "the remedy lies with Congress."⁵⁰

Subsequently, Congress did act to limit application of the NPDES program to agriculture. First, Congress amended the term "point source" to specifically exclude "return flows from irrigated agriculture."⁵¹ Con-

44. "For example, EPA considered irrigation return flows and rainfall runoff to be point sources if the return flows and runoff were in any way channeled or collected by human activity prior to being discharged into the waters of the United States." Kershen, *supra* note 4, at 3.

45. 33 U.S.C. § 1314. When the EPA failed to issue regulations within a year, a suit was brought to force compliance. As a result, a federal district court established a time table for EPA compliance. *Natural Resources Defense Council, Inc. v. Train*, 6 E.R.C. 1033 (D.D.C. 1973), *stay granted in part, denied in part*, 7 E.R.C. 1123 (D.D.C. 1974), *aff'd in part, rev'd in part on other grounds*, 510 F.2d 692 (D.C. Cir. 1974).

46. 40 C.F.R. § 125.4 (1975). *See* 38 Fed. Reg. 18000-04 (1973). Exempted activities included "[d]ischarges of pollutants from agricultural and silvicultural activities, including irrigation return flow and runoff from orchards, cultivated crops, [and] pastures," and "[d]ischarges from animal confinement facilities" below a certain size. 40 C.F.R. § 125.4(j) (1975).

47. *Natural Resources Defense Council, Inc. v. Train*, 396 F. Supp. 1393 (D.D.C. 1975), *aff'd sub nom. Natural Resources Defense Council, Inc. v. Costle*, 568 F.2d 1369 (D.C. Cir. 1977).

48. The EPA argued that requiring permits for all point sources would overwhelm the agency with millions of applications and that "in order to conserve the Agency's enforcement resources for more significant point sources of pollution, it is necessary to exclude these smaller sources of pollutant discharges from the permit program." *NRDC v. Costle*, 568 F.2d at 1373, 1377-82.

49. *Id.* at 1377.

50. *Id.* at 1383.

51. Pub. L. No. 95-217, § 33(b), 91 Stat. 1577 (1977) (codified at 33 U.S.C. § 1362(14) (1982 & Supp. V 1988)).

gress also prohibited the EPA from requiring, directly or indirectly, NPDES permits for irrigation return flows.⁵² Then, in the Water Quality Act of 1987, Congress again amended the definition of “point source” to exclude “agricultural stormwater discharges.”⁵³ Consequently, many identifiable and discrete agricultural pollution sources are, by definition, nonpoint sources beyond the purview of federal regulation.⁵⁴

Agricultural Stormwater Discharge Exemption

Since 1987, agricultural stormwater runoff has been consistently considered NPS, exempt from the Act and other regulatory schemes.⁵⁵ The Act, however, fails to define “agricultural stormwater discharge.”⁵⁶ Case law sheds little light on the “agricultural stormwater discharge” exception.⁵⁷ In *Costle*, the EPA described “runoff” as “wastewaters generated by rainfall that drain over terrain into navigable waters, picking up pollutants along the way,”⁵⁸ recognizing that rainwater cannot migrate over land without picking up some measure of pollutants. The EPA’s descriptive focus on the causal role of the natural precipitation is reflected in its stormwater regulations.

The phrase “agricultural stormwater discharge” is not defined in any EPA regulations, although “stormwater” is defined by regulation as “storm water runoff, snow melt runoff, and surface runoff and drainage.”⁵⁹ “Storm water runoff” is defined further as including “runoff caused by rainfall . . .

52. Pub. L. No. 95-217, § 33(c), 91 Stat. 1577 (1977) (codified at 33 U.S.C. § 1342(1) (1982 & Supp. V 1988)).

53. Pub. L. No. 100-4, § 503, 101 Stat. 75 (1987) (codified at 33 U.S.C. § 1362(14) (1982 & Supp. V 1988)).

54. “For example, irrigation return flows are designated as ‘nonpoint sources’ by section 402(1) of the Clean Water Act, even though the discharge is through a discrete conveyance.” EPA, *supra* note 3, at 3.

55. 33 U.S.C. § 1362(14). *See also* 40 C.F.R. § 122.3(e) (exempting “introduction of pollutants from non point-source agricultural and silvicultural activities, including storm water runoff from orchards, cultivated crops, pastures, range lands, and forest lands” from permit requirements). The language of this regulatory exemption was also contained in the EPA’s earlier attempt to exempt certain categories of point sources from permit requirements without congressional authorization. 40 C.F.R. § 125.4(j) (1975). *See supra* notes 46-49 and accompanying text.

56. According to the Act, “[t]he term ‘discharge’ when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.” 33 U.S.C. § 1362(16). The legislative history notes only that the CWA is amended by “providing that Agricultural Stormwater Discharges are not defined as a point source.” *Section-by-Section Analysis*, 133 CONG. REC. H131 (Jan. 7, 1987), reprinted in 1987 U.S.C.C.A.N. 5, 41.

57. In *CARE II*, the district court noted that “the parties have not submitted, and the court has not found, any cases interpreting [the agricultural stormwater discharge] exception.” 834 F. Supp. at 1427.

58. 568 F.2d 1369, 1377 (D.C. Cir. 1977) (emphasis added).

59. 40 C.F.R. § 122.26(b)(13).

which flows overland” rather than percolating into the soil.⁶⁰ The EPA’s test for determining whether a stormwater discharge has occurred is whether the discharge was “caused or initiated solely by natural processes such as precipitation,” reflecting “[t]he intent of the regulations . . . to exclude from the NPDES permit program all natural runoff from agricultural land which results from precipitation events.”⁶¹ In other words, the EPA implementing regulations exempt discharges caused by precipitation, not those that just happen to occur on a rainy day.⁶²

Concentrated Animal Feeding Operations

The CWA specifically identifies a “concentrated animal feeding operation” as a point source,⁶³ but does not further define the term. The implementing regulations define a CAFO as an “animal feeding operation” (AFO) that meets the criteria of Appendix B of the rules.⁶⁴ An AFO is “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.”⁶⁵ The EPA has further specified that a CAFO “does not include areas of the facility where crops or forage crops are maintained throughout the growing season.”⁶⁶ The EPA’s regulations allow the director of a state NPDES program to “designate any animal feeding operation as a [CAFO] upon determining that it is a significant contributor of pollution to the waters of the United States.”⁶⁷

PRINCIPAL CASE

In *Southview Farm*, the Court of Appeals for the Second Circuit reversed the district court’s judgment as a matter of law, holding that liquid

60. 58 Fed. Reg. 7610, 7614 (1993) (emphasis added).

61. 41 Fed. Reg. 7963, 7964 (1976) (emphasis added).

62. As the court noted in *Southview Farm*, “all discharges eventually mix with precipitation run-off in ditches or streams or navigable waters so the fact that the discharge might have been mixed with run-off cannot be determinative.” 34 F.3d at 121.

63. 33 U.S.C. § 1362(14).

64. 40 C.F.R. § 122.23(b). The pertinent criterion of Appendix B requires that the AFO contain 700 mature dairy cattle. 40 C.F.R. Pt. 122, app. B. (*Southview* kept more than 1200 mature dairy cattle on its feed lot. *Southview Farm*, 34 F.3d at 116, 122). If an AFO meets the criteria of Appendix B, it is presumed to be a CAFO unless the only time a discharge of pollutants into navigable waters occurs is “in the event of a 25 year, 24-hour storm event.” 40 C.F.R. Pt. 122, app. B.

65. 40 C.F.R. § 122.23(b)(1).

66. 58 Fed. Reg. 7610, 7616 (1993).

67. 40 C.F.R. § 122.23(c)(1).

manure-spreading operations at a dairy farm constitute a "point source" under the Act.⁶⁸ As an initial matter the court ruled, without discussion, that liquid manure is a pollutant within the meaning of the Act.⁶⁹ The court then held that a swale in one of Southview's fields that "collected and channelized" the liquid manure, coupled with a pipe leading into a ditch feeding into a stream, "was in and of itself a point source."⁷⁰ Explicitly relying on case law, the court also held, alternatively, that Southview's conventional manure-spreading vehicles constituted point sources.⁷¹ The court upheld the jury verdict concerning the July 13, 1989, CWA violation when plaintiffs actually tracked the manure migrating off Southview's property,⁷² and the violations occurring on July 12 and August 22, 1989, when the same manure-spreading activities occurred.⁷³

The court held that, despite the occurrence of rain, the September 26, 1990, and April 15, 1991, incidents⁷⁴ were not within the Act's "agricultural stormwater" exemption.⁷⁵ The court found that the jury had a reasonable basis to conclude that the discharges were "primarily caused by the oversaturation of the fields rather than the rain," and that "sufficient quantities" of manure were present to preclude classifying the runoff as "stormwater."⁷⁶

68. *Southview Farm*, 34 F.3d at 115; 33 U.S.C. § 1362(14).

69. *Southview Farm*, 34 F.3d at 117. See *supra* note 35.

70. *Southview Farm*, 34 F.3d at 118-19. The court reaffirmed its position in *Dague v. City of Burlington*, 935 F.2d 1343, 1354 (2d Cir. 1991), *rev'd on other grounds*, 112 S. Ct. 2638 (1992), that "[t]he definition of a point source is to be broadly interpreted" (railroad culvert through which pollutants were conveyed from a marsh pond into the rest of a wetland held to be a point source under the CWA). See also *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1979) ("The concept of a point source was designed to further this [regulatory] scheme by embracing the broadest possible definition of any identifiable conveyance from which pollutants might enter the waters of the United States."). The court distinguished *United States v. Plaza Health Labs., Inc.*, 3 F.3d 643, 649 (2d Cir. 1993) ("There the court simply refused to treat a human being as a 'point source' under the criminal provisions of the [CWA] by virtue of the rule of lenity."). *Southview Farm*, 34 F.3d at 119.

71. *Southview Farm*, 34 F.3d at 119. The Act defines "point source" to include a "container" or "rolling stock." 33 U.S.C. § 1362(14). The court cited *United States v. Tull*, 615 F. Supp. 610, 622 (E.D. Va. 1983) (holding bulldozers and dump trucks constitute point sources under CWA), *aff'd*, 769 F.2d 182 (4th Cir. 1985), *rev'd on other grounds*, 481 U.S. 412 (1987); *Avoyelles Sportmen's League, Inc. v. Alexander*, 473 F. Supp. 525, 532 (W.D. La. 1979) (holding land-clearing, ditch excavation, and discing equipment not used in connection with "normal farming" are point sources of pollution under CWA); *United States v. Weisman*, 489 F. Supp. 1331, 1337 (M.D. Fla. 1980) (holding bulldozers and dump trucks are point sources under CWA).

72. See *supra* note 19 and accompanying text.

73. See *supra* note 20 and accompanying text. The court concluded that proof of three subsequent discharges and photographic evidence of discharges gave the jury sufficient evidence, in addition to plaintiffs' testimony, from which to infer that the July 12 and August 22, 1989, CWA violations did occur. *Southview Farm*, 34 F.3d at 120.

74. See *supra* note 21 and accompanying text.

75. *Southview Farm*, 34 F.3d at 120-21; 33 U.S.C. § 1362(14).

76. *Southview Farm*, 34 F.3d at 121.

The court also held that Southview's manure-spreading operations were a point source "because the *farm itself* falls within the definition of a [CAFO]." ⁷⁷ The court ruled that Southview's "feed lot" was a CAFO, rather than an agricultural NPS, because it did not contain any vegetation *within* the confinement area. ⁷⁸ The court rejected Southview's argument that the fields adjacent to the confinement area prevented the farm from being an AFO. ⁷⁹ Reasoning by analogy to regulation of a "feed lot" under an NPDES permit, ⁸⁰ the court adopted the United States' *amicus* position ⁸¹ that "the vegetation criterion pertains only to the lot or facility *in which the animals are confined,*" not to fields *adjacent* to the feed lot. ⁸²

In deciding not to exempt Southview from regulation as a CAFO, the court relied on the EPA's two-fold rationale for limiting the NPDES vegetation exemption to the actual confinement area. ⁸³ First, the presence of vegetation suggests a lower density of animals and, second, the vegetation helps to assimilate the manure and reduce pollution. ⁸⁴ Since Southview's 1100 acres of adjacent cropland were outside the lot and the cows were never pastured thereon, the exemption did not apply. ⁸⁵ The court thus concluded that Southview's operation was a CAFO point source subject to federal regulation under the Act rather than an agricultural NPS exempted by the CWA and left to state regulation. ⁸⁶ As a result, Southview's unpermitted point source discharges violated the CWA.

77. *Id.* 34 F.3d at 115 (emphasis added). A CAFO is defined by regulation. 40 C.F.R. § 122.23. See *supra* notes 63-67 and accompanying text. CAFOs are, by definition, point sources. 33 U.S.C. § 1362(14).

78. *Southview Farm*, 34 F.3d at 123 (citing 40 C.F.R. § 122.23(b)(1)). The court consistently characterizes the confinement area where Southview kept its cows in barns as a "feed lot." *Id.* at 122-23.

79. 40 C.F.R. § 122.23(b)(1). See *supra* notes 63-66 and accompanying text.

80. *Southview Farm*, 34 F.3d at 123. In the regulations setting forth NPDES technology-based effluent limitations, a "feed lot" is defined as "a concentrated, confined animal or poultry growing operation for meat, milk or egg production, or stabling, in pens or houses wherein the animals or poultry are fed at the place of confinement and crop or forage growth or production is *not sustained in the area of confinement.*" 40 C.F.R. § 412.11(b) (emphasis added).

81. Brief for the United States as *Amicus Curiae* at 8, Concerned Area Residents for the Environment v. Southview Farm, 34 F.3d 114 (No. 93-9229), *cert. denied*, 115 S. Ct. 1793 (1995) [hereinafter Brief for U.S.] (on file with the *Land and Water Law Review*); see also *Southview Farm*, 34 F.3d at 123.

82. *Southview Farm*, 34 F.3d at 123 (emphasis added).

83. *Id.* (quoting 39 Fed. Reg. 5703, 5704 (1974)).

84. Brief for U.S., *supra* note 81, at 9.

85. *Southview Farm*, 34 F.3d at 116, 122-23. The court cited *Higbee v. Starr*, 598 F. Supp. 323, 325 (E.D. Ark. 1984) (hogs confined in finishing houses where waste fell through slats in floors into holding basins and was then spread on adjacent pastureland for fertilizer; hog farm held to be a CAFO).

86. *Southview Farm*, 34 F.3d at 123.

ANALYSIS

The CWA contains no general exemption for agricultural pollution sources. Given the significant contribution of agricultural pollution to the total water pollution problem,⁸⁷ Congress could not have meant to put all agricultural pollution discharges beyond the reach of the NPDES permit requirements and still hope to meet the objectives of the Act to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”⁸⁸ The fact that Congress has twice exempted specific agricultural discharges from point source regulation⁸⁹ suggests that other agricultural discharges meeting the definitional requirements do constitute point sources within the purview of the CWA. The Second Circuit’s *Southview Farm* opinion is a reasonable interpretation of both the CWA and implementing EPA regulations, particularly in light of current trends in U.S. agriculture in general and livestock production in particular.

The Growing Problem of Animal Waste⁹⁰ Disposal

American agriculture is becoming increasingly “industrialized.”⁹¹ For the past twenty-five years, U.S. agriculture has moved toward large confinement operations.⁹² In the beef industry, only two percent of the feedlots in the Great Plains region in 1980 contained more than 1000 head; by 1991, thirty-two percent of the region’s feedlots contained more than 32,000 head.⁹³ The amount of waste produced at large confinement facilities is staggering. In Arkansas, the Department of Pollution Control and Ecology reported that the waste produced by chickens, swine, and cattle in *two counties* totalled thirty million

87. “Agriculture continues to be the single largest contributor to [NPS] problems in the nation. It is the leading source of impacts to rivers, lakes, and wetlands . . . [A]griculture is the leading source of water pollution in the United States, even when point source impacts are included in the analysis.” EPA, *MANAGING NONPOINT SOURCE POLLUTION* 2, 17 (Jan. 1992).

88. 33 U.S.C. § 1251(a).

89. See *supra* notes 51-54 and accompanying text.

90. “Animal agriculture waste generally refers to manure but also includes urine, animal carcasses, bedding, poultry litter, and wastewater.” *ANIMAL AGRICULTURE*, *supra* note 4, at 1 n.1.

91. Neil D. Hamilton, *Feeding Our Future: Six Philosophical Issues Shaping Agricultural Law*, 72 NEB. L. REV. 210, 213 (1993).

92. A GAO study found that in the top ten hog-producing states, the inventory of the largest operations (500 or more hogs) increased from approximately 40% of the total inventory in those states in 1978 to 77% in 1994. *ANIMAL AGRICULTURE*, *supra* note 4, at 2. From 1974 to 1992, sales of broilers attributable to large producers (100,000 or more birds sold) increased from about 70% of national sales to 97%. *Id.*

93. Larry C. Frarey & Staci J. Pratt, *Environmental Regulation of Livestock Production Operations*, NAT. RESOURCES & ENV’T, Winter 1995, at 8.

pounds per day, equivalent to that generated by a city of over eight million people.⁹⁴ Just the mature cows on Southview produced more than fifty tons of wet manure each day.⁹⁵

The impact of this manure-based pollution on water quality is both diverse and significant. Excessive nutrients, such as nitrogen and phosphorus, "can have a toxic effect on aquatic organisms, or they can contribute to excessive enrichment, which reduces the amount of dissolved oxygen in the water."⁹⁶ Excessive enrichment results in eutrophication.⁹⁷ Nitrates, a compound of nitrogen, entering surface waters or leaching into groundwater as in *Southview Farm*⁹⁸ pose significant human health risks.⁹⁹ Manure also introduces to water pathogens, such as bacteria and protozoa, which can cause severe illness in humans.¹⁰⁰

If the trend toward large animal production facilities continues, the need to control both the direct and *indirect* discharge of manure-based pollutants into the nation's waters will grow increasingly severe. Federal regulation may be necessary to prevent large confinement operations from 'shopping' among states for the lowest possible environmental standards.¹⁰¹ The Second Circuit's decision recognizes the ability of the

94. John T. Holleman, *In Arkansas Which Comes First, the Chicken or the Environment?*, 6 TUL. ENVTL. L.J. 21, 27 (1992).

95. An average mature dairy cow produces approximately 82 pounds of wet manure each day. Frarey & Pratt, *supra* note 93, at 8. Southview had approximately 1290 mature cows at the time of the suit. *Southview Farm*, 34 F.3d at 116.

96. TROUT UNLIMITED, *THE INVISIBLE MENACE: AGRICULTURAL POLLUTED RUNOFF IN OUR NATION'S STREAMS* 5 (Feb. 1994).

97. "The enrichment of lakes and streams with nutrients, such as nitrogen and phosphorus, can trigger accelerated plant growth, algal blooms, reduced oxygen content of the water, and other changes in the aquatic ecosystem that are commonly referred to as eutrophication." Deborah Moore & Zach Willey, *Water in the American West: Institutional Evolution and Environmental Restoration in the 21st Century*, 62 U. Colo. L. Rev. 775, 777 n.8 (1991). Eutrophication decreases fish populations, and gives water an unpleasant odor and taste. T. PHIPPS & P. CROSSON, *Agriculture and the Environment: An Overview*, in *AGRICULTURE AND THE ENVIRONMENT* 7 (T. Phipps et al. eds., 1986). Concern about eutrophication of lakes was a driving force behind passage of the "clean lakes" section of the CWA. 33 U.S.C. § 1324. See S. Rep. No. 370, at 69-70, reprinted in 1977 U.S.C.C.A.N. at 4394-95.

98. See *supra* notes 16, 23, 25 and accompanying text.

99. Nitrates in drinking water can cause methemoglobinemia or "blue baby syndrome," a potentially fatal condition resulting from the blood's reduced ability to carry oxygen. See FRESHWATER FOUNDATION, *NITRATES & GROUNDWATER: A PUBLIC HEALTH CONCERN* (1988). High levels of nitrates in drinking water have also been linked to increased cancer levels. AGRICULTURAL LAW AND POLICY INSTITUTE, *ISSUES BOOKLET NO. 1, FARMING & GROUNDWATER: AN INTRODUCTION* 32 (1988).

100. GRAZING MANAGEMENT: AN ECOLOGICAL PERSPECTIVE 155-56 (Rodney K. Heitschmidt & Jerry W. Stuth eds., 1991). Microorganisms in waste manure may cause up to 150 diseases including cryptosporidiosis, cholera, tuberculosis, typhoid fever, salmonella, and polio. EPA, *REPORT OF THE EPA/STATE FEEDLOT WORKGROUP* 17-18 (Sept. 1993).

101. There have already been reports of large confinement operations relocating in search of the state with the lowest environmental standards. See, e.g., Steve Marbery, *By Moving Hog Operations to Oklahoma, Tyson Finds Welcome*, FEEDSTUFFS, June 29, 1992, at 9.

CWA's statutory and regulatory framework to address the environmental risks posed by large industrialized agricultural operations.

Controlling Agricultural Pollution - CAFOs & Citizen Suits

In exempting only certain agricultural operations from the CWA permit requirements, Congress arguably was trying to protect traditional mixed-use agricultural enterprises.¹⁰² Accordingly, the EPA's regulatory framework places only large confinement operations within the reach of the NPDES. Dairies with fewer than 700 mature cattle¹⁰³ or traditional farms where cows are pastured are not CAFOs.¹⁰⁴ If the presence of contiguous fields is sufficient to trigger exemption from the CAFO permit requirements, virtually all animal confinement operations would be beyond the reach of the CWA,¹⁰⁵ and Congress' statutory designation of CAFOs as point sources¹⁰⁶ would be negated.

Contrary to Southview's characterization, the Second Circuit's decision does not mean "that a large dairy farm would have to grow crops *inside* its cattle barns" to avoid designation as a CAFO.¹⁰⁷ In applying the EPA's "vegetation criterion" to the confinement area, the court simply required *actual mixed-use* that would help mitigate animal waste production, rather than the *mere presence* of adjacent fields, to prevent classification as a CAFO.¹⁰⁸ Thus, the Second Circuit's hold-

102. Hamilton, *supra* note 91, at 215-16. *See generally* WILLIAM P. BROWNE ET AL., SACRED COWS AND HOT POTATOES: AGRARIAN MYTHS IN AGRICULTURAL POLICY (1992). The courts have also distinguished single and mixed-used animal production. Single-use concentrated animal production without crop activity typically has been viewed as more industrial than agricultural. *See* Farmegg Prods., Inc. v. Humboldt County, 190 N.W.2d 454, 459 (Iowa 1971) (holding land used for concentrated poultry production where no feed crops are grown is not for "agricultural purposes").

103. 40 C.F.R. Pt. 122.23(b), app. B; 58 Fed. Reg. 7616 (1993).

104. The EPA distinguishes CAFOs from "confined in pasture operations" (CIPOs). The regulatory definition of CAFOs excludes operations where animals are confined in an outdoor, vegetated environment. "Confinement of animals *on pasture lands* are [sic] not regulated under [the CAFO] permit." 58 Fed. Reg. 7616 (1993) (emphasis added). In theory, the presence of vegetation where livestock are confined suggests a lower density of animals and allows the vegetation to help assimilate manure; thus, CIPOs pose less severe waste management problems than CAFOs. *See supra* notes 80-84 and accompanying text.

105. "EPA presumes that most, if not all, feedlots have some vegetation nearby." EPA, PERCEPTIONS ABOUT EPA'S ACTIONS IN THE SOUTHVIEW FARM CASE 1 (Dec. 1994).

106. 33 U.S.C. § 1362(14).

107. Petition for a Writ of Certiorari at 2, Southview Farm v. Concerned Area Residents for the Env't, (No. 94-11316) *cert. denied*, 115 S. Ct. 1793 (1995) (emphasis in original) [hereinafter Petitioners' Brief] (on file with the *Land and Water Law Review*).

108. Adjacent crop or pasture lands have not precluded other courts from designating animal confinement areas as CAFOs. *See* Higbee v. Starr, 598 F. Supp 323, 325, 330 (E.D. Ark. 1984) (holding farm with 10 hog finishing houses is a CAFO even though liquid manure is spread on adjacent pastureland as fertilizer), *aff'd without op.*, 782 F.2d 1048 (8th Cir. 1985); Carr v. Alta Verde

ing that Southview Farm is a CAFO is a reasonable application of the CWA and its implementing regulations to a dairy with industrial characteristics. The court's interpretation is also consistent with legislative intent. Having specifically included CAFOs as point sources under the Act,¹⁰⁹ it is unlikely that Congress intended for large industrial operations to escape regulation as CAFOs by locating in a rural setting.

The Second Circuit's reasoning could be extended to other, less obtrusive, animal confinement practices currently degrading water quality. For instance, some commentators argue that certain grazing operations should be designated as CAFOs.¹¹⁰ Richard H. Braun points to the use of "sacrifice areas" and "water gaps" as "analogous to [CAFOs]."¹¹¹ In these areas, cattle trample and denude the ground until there is little or no vegetation left to help assimilate the animal waste, which may be discharged directly into streams. Following the Second Circuit's reasoning, the mere presence of surrounding grasslands would not preclude a CAFO designation if there was no vegetation in the watering area itself and other CAFO criteria were met.¹¹² If water gaps or sacrifice areas were designated as CAFOs, they would be, by statutory definition, point sources¹¹³ and subject to the NPDES program.¹¹⁴

Unfortunately, meeting the requisite criteria for designation as a CAFO is no guarantee that permit requirements will be enforced against an agricultural facility. The EPA and delegated states have thus far shown little enthusiasm for vigorously pursuing CAFO permitting.¹¹⁵ But operation of a CAFO

Indus., Inc., 931 F.2d 1055, 1057-60 (5th Cir. 1991) (holding cattle feedlot on 230 acres is a CAFO even though use of liquid manure to irrigate and fertilize three adjacent fields complied with EPA's effluent limitation guidelines).

109. 33 U.S.C. § 1362(14).

110. See generally DENZEL FERGUSON & NANCY FERGUSON, SACRED COWS AT THE PUBLIC TROUGH (1983); Richard H. Braun, *Emerging Limits on Federal Land Management Discretion: Livestock, Riparian Ecosystems, and Clean Water Law*, 17 ENVTL. L. 43 (1986).

111. "Sacrifice areas" are the trampled out areas near watering facilities, and "water gaps" are small lengths of a stream left unfenced to provide cattle access. Braun, *supra* note 112, at 71 n.88. The author points out that "[n]o court has yet addressed [the] question" of whether these areas qualify as point sources under the CWA. *Id.*

112. See *supra* notes 64-66 and accompanying text. The pertinent Appendix B criterion for a cattle feeding operation requires confinement of more than 1000 slaughter and feeder cattle. 40 C.F.R. Pt. 122, app. B.

113. 33 U.S.C. § 1362(14).

114. 33 U.S.C. § 1342(a).

115. "[I]n 1992, less than 10 percent of the estimated 10,000 livestock operations sufficiently large to be classified as CAFOs held NPDES permits." Frarey & Pratt, *supra* note 93, at 9. The EPA did issue a general permit applicable to all feedlots in its Region 6 (Louisiana, New Mexico, Oklahoma and Texas), imposing detailed management practices, and prohibiting the creation of any environmental or public health hazard. *Id.* at 10; 58 Fed. Reg. 7610 *et. seq.* (1993). The permit defines runoff from land containing applied manure as a point source of pollution, and requires that these

without a permit creates the opportunity for individuals and groups to use citizen's suits to compel enforcement of the Act's NPDES requirements.¹¹⁶ Faced with the prospect of meeting NPDES requirements or having their operations enjoined by citizen-suits, agricultural interests might "voluntarily" develop more environmentally sound practices. If these operations cannot be defined as point sources and are left virtually unregulated as NPS pollution, reliance on voluntary change seems futile.¹¹⁷

Clarifying "Agricultural Stormwater Discharge"

In declining to apply the "agricultural stormwater discharge" exemption to the effluent that migrated off Southview's field, the Second Circuit focused its inquiry on the *cause* of the discharge. The court looked beyond the mere fact that it had rained to "whether the discharges were the *result of precipitation*."¹¹⁸ Similarly, albeit arriving at a different conclusion, the district court also focused its analysis¹¹⁹ and that of the jury on the *cause* of the discharges.¹²⁰ Both courts rejected Southview's position that Congress intended a "blanket exclusion" of "any agricultural pollution picked up by rainstorm runoff."¹²¹

Contrary to Southview's subsequent charge that the Second Circuit read the exemption to mean that "only *pure rainwater*"¹²² was exempt, the court held that "there can be no escape from liability for agricultural pollution simply because it occurs on rainy day."¹²³ Rather than reflecting "a burst of

"process water discharges" be permitted. 58 Fed. Reg. 7632. Thus, the EPA has brought some crude liquid manure handling systems under the purview of the CWA. The EPA rule is in accord with the decision in *Southview Farm*. See 34 F.3d 114 (2d Cir. 1994).

116. 33 U.S.C. § 1365. See *supra* note 15. (*Southview Farm* was brought under the citizen-suit provision of the CWA.)

117. The EPA admits that voluntary efforts alone are not generally sufficient to deal with NPS pollution. EPA, *NONPOINT SOURCES: AGENDA FOR THE FUTURE 19-20* (1989). Since most of the effects of NPS pollution are off-farm, agriculturalists have little incentive to undertake voluntary efforts. Gould, *supra* note 41, at 489.

118. *Southview Farm*, 34 F.3d at 121 (emphasis added).

119. *CARE II*, 834 F. Supp. at 1426-30. The district court concluded that the effluent "would have remained on [Southview's] land *had it not been for a heavy rain*." *Id.* at 1429 (emphasis added). The district court recognized, however, that the agricultural stormwater exemption was not "limitless;" a court could consider whether the discharge had "been *caused* by defendants, not by the effects of natural precipitation." *Id.* (emphasis added).

120. The district court's charge to the jury regarding the "agricultural stormwater discharge" exemption focused its inquiry on the cause of the discharge: "Disparate, random, naturally induced run-off of pollutants, whatever kind, caused *primarily* by rainfall or other natural precipitation around activities that employ or cause pollutants is not a point source discharge." Respondents' Brief, *supra* note 11, at 18 (emphasis in original).

121. Petitioners' Brief, *supra* note 109, at 15-17.

122. *Id.* at 2 (emphasis in original).

123. *Southview Farm*, 34 F.3d at 120.

environmental zeal,¹²⁴ the court's decision recognizes nearly twenty years of EPA regulation of stormwater discharges based on whether the discharge was "caused or initiated solely by natural processes."¹²⁵ Moreover, the court's so-called "sufficient quantities" test¹²⁶ acknowledges that naturally occurring precipitation will cause effluent to migrate off fields, but recognizes that at some point the pollutant may subsume the stormwater. The court explicitly recognized that "agricultural stormwater run-off has always been considered [NPS] pollution exempt from the Act,"¹²⁷ but refused to allow parties to skirt the CWA simply by dumping pollutants on the ground without regard for absorption capacity at the dumping site.¹²⁸

Vehicles as Point Sources

The Second Circuit's ruling that the manure spreading vehicles were point sources is consistent with case law¹²⁹ and within the statutory language of the CWA, which defines "point source" to include a "container" or "rolling stock."¹³⁰ The fact that the spreaders did not dump liquid manure directly into navigable waters does not, as Southview contended, make the connection between the equipment and the eventual discharge too "indirect" to constitute a point source discharge.¹³¹

The statutory definition of point source has been interpreted broadly.¹³² Similarly, the CWA contains no requirement that a point source discharge must be *directly* into navigable waters to violate the Act.¹³³ To the contrary,

124. Petitioners' Brief, *supra* note 109, at 2-3.

125. 41 Fed. Reg. 7963, 7964 (1976). *See supra* notes 59-61 and accompanying text.

126. *Southview Farm*, 34 F.3d at 121. *See supra* note 76 and accompanying text. The court found "that sufficient quantities of manure were present so that the run-off could not be classified as 'stormwater.'" *Southview Farm*, 34 F.3d at 121. Southview characterizes this as imposing a "'sufficient quantities' test amount[ing] to a judicial device to rescind this unqualified Congressional exemption [for agricultural stormwater runoff] and substitute a judge-made rule." Petitioners' Brief, *supra* note 109, at 16-17.

127. *Southview Farm*, 34 F.3d at 120.

128. The U.S. Brief also raised this concern: "The CWA's statutory prohibition on discharges of pollutants from point sources (such as CAFOs) would be of little value if the persons responsible for such discharges could avoid responsibility merely by placing those pollutants onto the ground, where, as here, the discharges are made at such rates, in such quantities, and at times that the pollutants would naturally and foreseeably be washed into the waters of the United States in a matter of hours or days." Brief for U.S., *supra* note 81, at 17-18.

129. *See supra* note 71 and accompanying text.

130. 33 U.S.C. § 1362(14).

131. Petitioners' Brief, *supra* note 109, at 18-19.

132. *See supra* note 70.

133. *See, e.g.*, *United States v. Velsicol Chemical Corp.*, 438 F. Supp. 945 (W.D. Tenn. 1976) (holding discharges into municipal sewers which eventually emptied into a river are a point source); *O'Leary v. Moyer's Landfill, Inc.*, 523 F. Supp. 642 (E.D. Pa. 1981) (holding landfill discharging through "gullies, trenches and ditches" is a point source).

the legislative history of the Water Pollution Control Amendments of 1972 indicates the Senate noted that "discharge" includes both "direct and indirect discharges into the navigable waters."¹³⁴ The fact that a manure spreader did not discharge directly into navigable waters is not dispositive. At best, the question of "directness" raises a factual question for the jury.

CONCLUSION

The modern trend toward industrialized agriculture demands thoughtful interpretation, or perhaps reinterpretation, of the CWA's agricultural exemptions. Thus, the Second Circuit did not "judicial[ly] override . . . federal legislation"¹³⁵ in designating Southview Farm a CAFO subject to NPDES permit requirements. Nor did the court judicially "rescind"¹³⁶ the "agricultural stormwater discharge" exemption by refusing to apply it to Southview's practice of over-saturating its fields with liquid manure. To the contrary, in restoring the jury's verdict, the court read the agricultural exemptions and implementing regulations in a manner consistent with the overall legislative goal of "restor[ing] and maintain[ing] the . . . integrity of the Nation's waters."¹³⁷ The Second Circuit's decision may signal a new and necessary rigor in applying the CWA to agricultural operations. Industrialized agricultural operations should not be allowed to pollute at will by hiding behind exemptions clearly designed to protect traditional mixed-use farms.

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134. A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, VOL. 1, at 178 (USGPO SER. NO. 93-1, 1973). The House also noted that "the term 'discharge of a pollutant,' does not in any way contemplate that the discharge be directly from the point source to the waterway." *Id.* at 255.

135. Petitioners' Brief, *supra* note 109, at 2. *See supra* note 128.

136. *Id.* at 16-17.

137. 33 U.S.C. § 1251(a).