

## Challenges to CAFO Regulations Play Out in North Carolina Courts Achieving Mixed Results

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### *Introduction*

Tension between the concentrated animal feeding operation (CAFO) industry and environmental groups over EPA's Clean Water Act implementing regulations specific to CAFOs has led to a decade long series of EPA rules and subsequent legal challenges. During this period of regulatory uncertainty, the EPA and state agencies have made enforcement of CAFO regulations a high priority. Interested parties on both sides are closely watching as legal challenges resulting from this nationwide enforcement effort play out in the North Carolina courts. North Carolina has become the focus of national attention, likely due to the state's strong agricultural industry, including a large number of CAFOs that push for less stringent regulation. At the same time, North Carolina is also home to committed environmental organizations that advocate for more encompassing regulation.

North Carolina is the second largest hog and pig producing state in the country behind Iowa.<sup>1</sup> Duplin County, North Carolina is the single largest hog and pig producing county, representing four percent of the total production in the United States.<sup>2</sup> Hog industry operations are primarily located in the southeastern portion of the state and are most prevalent in Duplin, Sampson, Bladen, and Robeson Counties.<sup>3</sup> North Carolina is also the second largest poultry and egg producing state in the nation behind Georgia.<sup>4</sup> The largest increase in sales over the

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<sup>1</sup> U.S. DEPARTMENT OF AGRICULTURE, 2007 CENSUS OF AGRICULTURE: HOG AND PIG FARMING 1 (2007), available at [http://www.agcensus.usda.gov/Publications/2007/Online\\_Highlights/Fact\\_Sheets/Production/hogsandpigs.pdf](http://www.agcensus.usda.gov/Publications/2007/Online_Highlights/Fact_Sheets/Production/hogsandpigs.pdf).

<sup>2</sup> *Id.*

<sup>3</sup> Center on Globalization, Governance & Competitiveness, *Hog Farming*, NORTH CAROLINA IN THE GLOBAL ECONOMY, [http://www.soc.duke.edu/NC\\_GlobalEconomy/hog/overview.shtml](http://www.soc.duke.edu/NC_GlobalEconomy/hog/overview.shtml), (last updated Aug. 23, 2007).

<sup>4</sup> U.S. DEPARTMENT OF AGRICULTURE, 2007 CENSUS OF AGRICULTURE: POULTRY AND EGG PRODUCTION 1 (2007), [http://www.agcensus.usda.gov/Publications/2007/Online\\_Highlights/Fact\\_Sheets/Production/poultry\\_and\\_eggs.pdf](http://www.agcensus.usda.gov/Publications/2007/Online_Highlights/Fact_Sheets/Production/poultry_and_eggs.pdf).

previous census occurred in North Carolina, suggesting that the poultry industry in the state is growing.<sup>5</sup> Therefore, any expansion of CAFO regulation will be felt throughout the state's agricultural industries.

The following discussion provides a brief introduction to the changes in CAFO regulation since the late 1990s, including how this dynamic regulatory climate has worked through the courts, continually redefining the boundary of regulated activities. This essay highlights two recent cases in North Carolina: *United States v. Freedman Farms, Inc.*,<sup>6</sup> an example of the successes of the CAFO regulation enforcement initiative, and *Rose Acre Farms v. North Carolina Department of Environment and Natural Resources*,<sup>7</sup> a case of first impression defining the limits of allowable regulation. These cases highlight North Carolina's prevalent role in shaping CAFO regulations that will be sure to affect parties throughout the nation.

### *Regulating CAFOs: A Brief History*

The Clean Water Act (CWA) regulates discharges of pollutants from "point sources," which are traditionally understood to include discreet conveyances such as pipes or ditches.<sup>8</sup> According to the statutory definition of the term, however, "point source" also includes CAFOs.<sup>9</sup> This definition allows the Environmental Protection Agency (EPA) to promulgate regulations that consider pollutants discharged from CAFO facilities as a whole rather than from individual

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

<sup>6</sup> No. 7:10-CV-15-FL, 2012 WL 928699 (E.D.N.C. March 19, 2012).

<sup>7</sup> 10 EHR 6501 (Oct. 17, 2011), available at [www.oah.state.nc.us/hearings/decisions/ehr/10%20EHR%206501.doc](http://www.oah.state.nc.us/hearings/decisions/ehr/10%20EHR%206501.doc).

<sup>8</sup> 33 U.S.C. § 1362(14) (2011).

<sup>9</sup> *Id.* ("The term 'point source' means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, *concentrated animal feeding operation*, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.") (emphasis added).

discreet conveyances.<sup>10</sup> The EPA has made pursuing violations in CAFOs an enforcement priority because “[l]arge farms and dairies can cause serious damage to the environment if they illegally discharge wastewater into nearby lakes, rivers, and streams.”<sup>11</sup> Moreover, “manure, if not properly controlled, can contaminate both surface waters and ground waters that may be used as drinking water sources and harm fish and other aquatic species.”<sup>12</sup>

In 2003, the EPA revised the CWA implementing regulations with respect to CAFOs,<sup>13</sup> greatly expanding the number of operations covered.<sup>14</sup> Environmental advocacy groups and industry organizations challenged the 2003 Rule in *Waterkeeper Alliance, Inc. v. Environmental Protection Agency*.<sup>15</sup> The Second Circuit upheld much of the 2003 Rule, but overturned significant sections, most notably vacating the requirement that all CAFOs had a duty to apply for a CWA National Pollutant Discharge Elimination System (NPDES) permit unless the CAFO was able to demonstrate that it had no potential to discharge pollutants.<sup>16</sup>

EPA responded to the *Waterkeeper* decision with a proposed regulation that removed the duty to apply provision and replaced it with a rule that would require only CAFOs that “discharge or propose to discharge” pollutants to apply for a NPDES permit.<sup>17</sup> In 2008, the EPA

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<sup>10</sup> Meline MacCurdy, *EPA Issues Guidance for CAFOs on Scope of Clean Water Act Permitting, Plans Further Rulemaking*, MARTEN LAW (July 1, 2010), [www.martenlaw.com/newsletter/20100701-cwa-guidance-for-cafos-issued](http://www.martenlaw.com/newsletter/20100701-cwa-guidance-for-cafos-issued).

<sup>11</sup> *North Carolina Hog Farm and President Plead Guilty to Violating the Clean Water Act*, U.S. DEPARTMENT OF JUSTICE (July 7, 2011), <http://www.justice.gov/opa/pr/2011/July/11-enrd-891.html>.

<sup>12</sup> *Columbus Co. based Freedman Farms Fined \$1.5 Million, President Sent to Jail*, WWAY NEWS CHANNEL 3 (Feb. 13, 2012, 6:53 PM), <http://www.wwaytv3.com/2012/02/13/columbus-co-based-freedman-farms-fined-15-million-president-sent-to-jail#.UGhh5IGDmSo>.

<sup>13</sup> 68 Fed. Reg. 7176 (Feb. 12, 2003). The EPA has regulated CAFOs since the 1970s, but litigation in the early 1990s, claiming that the EPA was not in compliance with the CWA, settled through a consent decree that required EPA to update the CAFO regulations and thus resulted in promulgation of the 2003 Rule. See *Natural Resource Defense Council v. Reilly*, No. 89–2980, 1991 U.S. Dist. LEXIS 5334 (D.D.C. Apr. 23, 1991) (resulting in a consent decree requiring the EPA to develop CAFO regulations).

<sup>14</sup> EPA, *Summary of the Second Circuit’s Decision in the CAFO Litigation 1* (2005), available at [http://www.epa.gov/npdes/pubs/summary\\_court\\_decision.pdf](http://www.epa.gov/npdes/pubs/summary_court_decision.pdf).

<sup>15</sup> 399 F.3d 486 (2d Cir.2005) (holding that that the CWA does not authorize the EPA to require CAFOs to obtain NPDES permits unless there is an actual discharge).

<sup>16</sup> EPA, *supra* note 14 at 1.

<sup>17</sup> 71 Fed. Reg. 37744 (June 30, 2006).

finalized the revised rule.<sup>18</sup> Again, the rule was challenged by industry groups in *National Pork Producers Council v. EPA*.<sup>19</sup> In *Pork Producers*, industry groups challenged guidance letters sent by the EPA to members of Congress and a CAFO executive after EPA's issuance of the rule as well as the new "discharge or propose to discharge" provision of the 2008 Rule.<sup>20</sup> The Fifth Circuit held that there must be an actual discharge in order to require CAFOs to apply for a permit.<sup>21</sup> Moreover, the court held that the disputed guidance letters were not reviewable as final agency action, and the court thus did not reach the substantive issue as to whether the "poultry growers must apply for NPDES permits for the releases of dust through poultry confinement house ventilation fans."<sup>22</sup>

On July 19, 2012, the EPA issued a final rule that implemented the *Pork Producers* decision by removing the permit requirement for facilities that merely propose to discharge.<sup>23</sup> Although it may be too early to determine whether the current version of the CAFO regulations will be challenged, the recent series of challenges would suggest that this may not be the end of the struggle. Despite the period of dynamic changes in the regulations, the EPA and state agencies have continued to enforce and implement stringent pollution control and permitting requirements on CAFOs. The following discussion outlines two recent CAFO enforcement cases in North Carolina, the results of which may have national implications for the CAFO industry.

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<sup>18</sup> 73 Fed. Reg. 12321, 12324 (Mar. 7, 2008); 73 Fed. Reg. 70418 (Nov. 20, 2008).

<sup>19</sup> 635 F.3d 738, 741 (5th Cir. 2011).

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

<sup>21</sup> *See Id.* at 750.

<sup>22</sup> *See Id.* at 755–56.

<sup>23</sup> 77 Fed. Reg. 44494 (July 30, 2012).

*North Carolina Hog Farm Takes Center Stage in CAFO Pollution Enforcement Initiative*

In July 2012, the U.S. Department of Justice announced a significant victory in its CAFO enforcement initiative: “Freedman Farms, Inc. and its president, William B. Freedman, pleaded guilty . . . in federal court in New Bern, N.C., to violating the Clean Water Act when they discharged hog waste into a stream that leads to the Waccamaw River . . . .”<sup>24</sup> Freedman Farms raises hogs for market at its Columbus County, North Carolina facility.<sup>25</sup> The facility was permitted to discharge the waste from its 4,800 hogs to a series of two lagoons for treatment and disposal.<sup>26</sup> Instead, the company discharged hog waste from its lagoon into the White Marsh wetlands.<sup>27</sup> It flowed from the wetlands into Browder’s Branch, a tributary to the Waccamaw River and a water of the United States.<sup>28</sup>

The corporation was sentenced to five years of probation and ordered to pay nearly \$1.5 million in fines.<sup>29</sup> William Freedman was sentenced to six months of prison followed by six months of home confinement for his role in the illegal discharge.<sup>30</sup> As part of the judgment, Freeman Farms was required to implement “a comprehensive environmental compliance program and institute an annual training program.”<sup>31</sup>

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<sup>24</sup> U.S. DEPARTMENT OF JUSTICE, *supra* note 1.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*; *Columbus Co. based Freedman Farms Fined \$1.5 Million, President Sent to Jail*, WWAY NEWS CHANNEL 3 (Feb. 13, 2012, 6:53 PM), <http://www.wwaytv3.com/2012/02/13/columbus-co-based-freedman-farms-fined-15-million-president-sent-to-jail#.UGhh5lGDmSo>; *see also* House of Raeford Farms, Inc. v. N.C. Dep’t Env’t and Natural Res., 10 EHR 5508 (May 30, 2012), *available at* <http://www.oah.state.nc.us/hearings/decisions/ehr/10%20EHR%2005508.doc> (upholding the state agency’s administrative penalty for the CAFO’s discharge of hog waste to waters of the State in violation of the CWA under fact virtually indistinguishable from the *Freedman Farms* case). A “water of the United States” is a regulatory term within the CWA that defines which water features, i.e. streams, ponds, creeks, or wetlands, are covered by the Act. *See* 33 U.S.C. § 1362(7) (2011); 40 C.F.R. § 122.2 (2012).

<sup>29</sup> *\$1 Million in Restitution Payments Announced to Preserve North Carolina Wetlands*, U.S. DEPARTMENT OF JUST. (July 25, 2012), <http://www.justice.gov/opa/pr/2012/July/12-enrd-919.html>.

<sup>30</sup> *Id.*

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

As restitution, Freedman Farms will pay one million dollars to fund environmental projects and acquire and preserve wetlands in the area damaged by the illegal discharge of hog waste.<sup>32</sup> The restitution will be paid in five annual payments, which will be directed to the North Carolina Coastal Land Trust (NCCLT).<sup>33</sup> In addition, a community service payment of \$75,000 will be made to the Southern Environmental Enforcement Network and will be used to promote environmental law enforcement training and information sharing.<sup>34</sup>

It is not often that we associate jail time with a violation of environmental laws. However, the severe penalty issued in this case should cause CAFO operators to take notice and act as a deterrent to illegal discharges to waters of the United States. The *Freedman Farms* case is distinctive due to the severity of the penalty. However, state and federal agencies across the nation have taken the CAFO regulation initiative seriously and are achieving great success in a variety of cases.<sup>35</sup> While cases such as *Freedman Farms* that involve a direct discharge of waste to a water of the United States have produced positive results for the regulatory community, attempts to regulate indirect discharges of pollutants through ventilation fans under the CWA have met more resistance.

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<sup>32</sup> U.S. DEPARTMENT OF JUST., *supra* note 29.

<sup>33</sup> *Id.*

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

<sup>35</sup> See *Darigold Pleads Guilty to Clean Water Act Violation*, NATIONAL OCEANOGRAPHIC AND ATMOSPHERIC ADMINISTRATION (June 15, 2011), <http://www.nmfs.noaa.gov/ole/news/2011/06/061511darigold.htm> (discussing the guilty plea by Darigold, Inc., the nation's fourth largest dairy cooperative, to CWA violations for discharges of ammonia to the East Fork of Issaquah Creek resulting in a sentence of a \$10,000 criminal fine, \$60,000 community service payment to restore and protect the Issaquah Creek watershed, development and implementation of a corporate environmental compliance plan covering its processing facilities in five states, and a public apology for its conduct); *Dairy Operator Sentenced For Violating Clean Water Act*, U.S. DEPARTMENT OF JUSTICE (Aug. 2, 2011), <http://www.justice.gov/usao/id/news/2011/aug/vierstra08032011.html> (discussing a federal jury's guilty verdict for an Idaho dairy operator, Mike Vierstra, for CWA violations resulting from discharges of wastewater from the dairy to Low Line Canal leading to a sentence of sixty days in jail, a \$12,000 fine, and three years of probation).

## *North Carolina Farm Challenges Regulation of Ventilation Fans as Source of Pollution*

Just as the U.S. Department of Justice announced its success in the *Freedman Farms* case, another “local skirmish . . . [that had] the potential for significant impacts nationally” was progressing through the North Carolina Office of Administrative Hearings.<sup>36</sup> In an apparent case of first impression, Rose Acre Farms, the largest egg producing facility in North Carolina, is challenging the Department of Environment and Natural Resources (DENR) NPDES permit condition requiring the facility to implement best management practices (BMPs) to control litter coming from its ventilation fans.<sup>37</sup>

Unlike the more direct discharge of pollutants discussed in *Freedman Farms*, the path pollutants take to waters of the United States in this case is more complex. Picture a single feather inside a chicken house being pulled through a ventilation fan, exiting the building, floating in the air, and eventually landing outside on the ground. The feather is contaminated with ammonia<sup>38</sup> from waste inside the chicken house. During the next rain event the feather washes into a local creek or wetland, carrying with it the pollutants from the chicken house into the waters of the United States. The EPA does not suggest that this emission would be a

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<sup>36</sup> Timothy J. Lundgren, *North Carolina Chicken Farm Fights NPDES Permit for Air Emissions*, VARNUM, L.L.P. (Apr. 23, 2012), <http://www.varnumlaw.com/blogs/water-marks/north-carolina-chicken-farm-fights-npdes-permit-for-air-emissions/>.

<sup>37</sup> Sara Wyant, *Rose Acre Continues Appeals Fight Against “Discharge” Designation*, AGRI-PULSE (Mar. 14, 2012), <http://www.agri-pulse.com/rose-acre-continues-appeals-fight-against-discharge-designation-03142012.asp>; *see also* Gary H. Baise, *Ventilation Fans: Sources of Water Pollution?*, FARM FUTURES (July 10, 2012), <http://farmfutures.com/blogs.aspx/ventilation-fans-sources-water-pollution-3410> (discussing a West Virginia poultry operator’s challenge to an EPA Administrative Order requiring an NPDES permit for discharges of dander and feathers through ventilation fans); *Alt v. EPA*, No. 2:12-cv-42 (N.D. W. Va. 2012), *available at* [http://www.fb.org/legal/files/id\\_85/2012.10.09%20Order%20Granting%20AFBF%20et%20al.,%20Motion%20to%20Intervene.pdf](http://www.fb.org/legal/files/id_85/2012.10.09%20Order%20Granting%20AFBF%20et%20al.,%20Motion%20to%20Intervene.pdf) (addressing an EPA Order of Compliance against a poultry farmer that found the farmer in violation of the Clean Water Act due to dust and fine particles of manure reaching waters of the United States).

<sup>38</sup> Ammonia has significant deleterious effects on aquatic environments including eutrophication, which causes algal blooms and reduces the dissolved oxygen in the water necessary for fish and other aquatic life to survive. Colo. State Univ., *Impacts of Ammonia* (June 20, 2008), AMMONIA BEST MANAGEMENT PRACTICES (BMPs) FOR LIVESTOCK OPERATIONS, <http://ammoniabmp.colostate.edu/link%20pages/impacts%20of%20ammonia.html>.

violation of the Clean Air Act, but rather indicates in its CAFO guidance that this scenario constitutes a violation of the Clean Water Act.<sup>39</sup>

As discussed above, in *Pork Producers*, poultry industry groups challenged the guidance letters issued by the EPA after the 2008 Rule was finalized. In describing what the EPA considered as sources of pollutants at CAFOs, the guidance letters stated that pollutants included “raw materials, products, or byproducts, including manure, litter, and feed.”<sup>40</sup> Moreover, the letters stated that potential sources of these pollutants include “manure handling and storage activities, feed storage, litter storage, exposed stockpiles of manure/litter, and litter released through confinement house ventilation fans.”<sup>41</sup> The EPA would deem a discharge to have occurred if “the ventilation dust comes into contact with any point source discharge of water.”<sup>42</sup>

Rose Acre Farms is located in Hyde County and operates a facility with three million hens.<sup>43</sup> Based upon EPA guidance, DENR required Rose Acre Farms to implement BMPs that would prevent emissions from the ventilation fans, including dust, litter, and feathers that contain ammonia, from reaching waters of the state.<sup>44</sup> Rose Acre Farms challenged the permit conditions arguing that an attempt to reduce air emissions was not an allowable requirement of a

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<sup>39</sup> The EPA guidance states that sources of pollutants at CAFOs include “animal confinement areas; feed storage areas; manure, litter, and process wastewater storage areas; *confinement house ventilation fan exhaust*; land-applied manure, litter, or process wastewater; and other site specific sources of pollutants, as well as pathways for pollutants from the CAFO to reach waters of the U.S.” EPA, IMPLEMENTATION GUIDANCE ON CAFO REGULATIONS – CAFOs THAT DISCHARGE OR ARE PROPOSING TO DISCHARGE (EPA-833-R-10-006) 2 (2010) (emphasis added), *available at* [http://www.epa.gov/npdes/pubs/cafo\\_implementation\\_guidance.pdf](http://www.epa.gov/npdes/pubs/cafo_implementation_guidance.pdf).

<sup>40</sup> *Rose Acre Farms, Inc. v. N.C. Dep’t of Env’t and Natural Res.*, 10 EHR 6501 (Oct. 17, 2011), *available at* [www.oah.state.nc.us/hearings/decisions/ehr/10%20EHR%206501.doc](http://www.oah.state.nc.us/hearings/decisions/ehr/10%20EHR%206501.doc). (quoting Letter from James D. Giattinia, Director, The EPA Water Protection Division to Jeff Smith, Corporate Environmental Manager, Perdue Farms, Inc. (Mar. 4, 2009)).

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

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

<sup>43</sup> *Meeting of the N.C. Envtl. Mgmt. Comm’n Minutes*, ENVTL. MGMT. COMM’N (Jan. 12, 2012), [http://portal.ncdenr.org/c/document\\_library/get\\_file?uuid=9cbaf68c-e7bc-4646-a067-8319334bb8eb&groupId=61581](http://portal.ncdenr.org/c/document_library/get_file?uuid=9cbaf68c-e7bc-4646-a067-8319334bb8eb&groupId=61581) [hereinafter EMC Meeting Minutes].

<sup>44</sup> Gary H. Baise, *Critical Decision for Animal Agriculture*, FARM FUTURES (Oct. 31, 2011), <http://farmfutures.com/blogs.aspx/critical-decision-for-animal-agriculture-2745>.

NPDES permit.<sup>45</sup> The facility is a dry-litter operation, and there is no allegation that any discharge to waters has occurred.<sup>46</sup> While feathers and other matter are discharged into the air through the ventilation fans, DENR has determined that the facility does not require a Clean Air Act permit for this discharge.<sup>47</sup>

On October 17, 2011, the Office of Administrative Hearings granted a motion for summary judgment in favor of Rose Acre Farms and the North Carolina Poultry Federation stating that “[t]here is authority that air emissions should not be regulated under the Clean Water Act.”<sup>48</sup> The holding was informed by the *Pork Producers* decision that limited an agency’s ability to regulate to situations in which an actual discharge occurs:

No court has previously ruled on the effect of EPA's guidance on ventilation dust serving as the basis of a discharge. This occasion does not require require the [court] to pass judgment on the validity of EPA's guidance. Instead, Instead, [DENR’s] assertion that ventilation dust requires Rose Acre to obtain a permit is invalid because there are no facts indicating that a discharge is discharge is actually occurring. The EPA Letters indicated that a discharge may discharge may occur when pollutants from ventilation fans come into contact with contact with point sources of water. There are no facts supporting the claim that ventilation dust is coming into contact with point sources of water.<sup>49</sup>

The administrative law judge (ALJ) held that DENR could not require Rose Acre Farms to obtain a permit since Rose Acre does not and cannot discharge pollutants to waters of the United States.<sup>50</sup> Therefore, the court left open the possibility that the EPA may still require a permit for emissions from ventilation fans under different site conditions.

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<sup>45</sup> Wyant, *supra* note 37.

<sup>46</sup> *Id.*; *see also* Lundgren, *supra* note 36.

<sup>47</sup> Lundgren, *supra* note 36.

<sup>48</sup> Rose Acre Farms, Inc., 10 EHR 6501, \*3 (citing No Spray Coalition, Inc. v. City of New York, 2000 WL 1401458 (S.D.N.Y. 2000); Chemical Weapons Working Group v. U.S. Department of the Army, 111 F.3d 1485 (10th Cir. 1997); and American Canoe Assn. v. D.C. Water and Sewer Authority, 306 F. Supp.2d 30 (D.D.C. 2004)).

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

<sup>50</sup> *Id.*

In a unanimous vote, the NPDES Committee of the Environmental Management Commission (EMC) refused to affirm the ALJ's decision, finding that there were material facts in dispute that should be addressed in an evidentiary hearing.<sup>51</sup> On January 30, 2012, Rose Acre Farms filed a Petition for Review of the NPDES Committee/Environmental Management Commission's Decision and Order in Superior Court, asking the state court to set aside the EMC's decision.<sup>52</sup>

There is no doubt that the CAFO industry is keeping a watchful eye on the progression of the *Rose Acre Farms* case because the result could have significant impacts on the industry if it is ultimately determined that discharges from ventilation fans can be regulated.<sup>53</sup> CAFO regulation would then require expensive pollution control technologies, in the form of BMPs, capable of eliminating pollutants such as feathers and dust from the air discharged from the fans. Other requirements might include BMPs that would prevent the pollutants emitted from the fans from reaching waters of the United States. Environmental groups would likely support this type of regulation since these measures would result in less pollution from CAFOs reaching waters of the United States leading to cleaner streams and wetlands.

### *Conclusion*

Industry and environmental groups will likely continue to challenge the EPA's CAFO regulations due to tensions between the parties. North Carolina will, no doubt, continue to play

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<sup>51</sup> EMC Meeting Minutes, *supra* note 43.

<sup>52</sup> Wyant, *supra* note 37.

<sup>53</sup> See, e.g., Jennifer Thompson, *Federal Court to Decide if Regulators Can Limit Air Emissions Under the Clean Water Act*, BINGHAM GREENBAUM DOLL L.L.P. (July 9, 2012), <http://www.bgdlegal.com/news/2012/07/09/environmental-law-letter/federal-court-to-decide-if-regulators-can-limit-air-emissions-under-the-clean-water-act/> (referring to the *Alt* and *Rose Acre Farms* cases and noting that they "could have broad implications for [CAFOs] as well as industrial facilities and power plants that emit emissions such as mercury or nitrogen that deposit into waters.").

an important role in the national debate regarding CAFO regulations because of its strong agricultural industry presence and large number of CAFOs.<sup>54</sup>

As we have seen, the EPA's enforcement initiative has achieved mixed results and appears to depend on how clearly the EPA can establish the path from pollutant to waters of the United States. The EPA and state agencies have seen successes in cases in which there was a discreet or direct discharge similar to a ditch or pipe. So far, success has been limited in regulating particulate matter discharged through ventilation fans where the connection between the pollutant and the waters of the United States is more tenuous. The CAFO industry may have declared the *Rose Acre Farms* case a success, but because the court did not reach the substantive issue of whether or not emissions from ventilation fans could constitute a discharge to waters of the United States, this issue remains unresolved. The outcome of enforcement case challenges will continue to define the boundaries of Clean Water Act regulation with respect to CAFOs.

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<sup>54</sup> The CAFO enforcement initiative continues in North Carolina as a group of environmental advocacy groups filed suit against Taylor Finishing, Inc., a hog farm facility located in Jones County on July 31, 2012. *Lawsuit Aims to Stop Ongoing Water Pollution from NC Hog Farm*, WATERKEEPER ALLIANCE (July 31, 2012), <http://www.waterkeeper.org/ht/d/ContentDetails/i/26000>. The Waterkeeper Alliance, an advocacy organization designed to protect and preserve the waters of the United States, stated that the "filing is the culmination of several years of surveying the Taylor facility and the broader North Carolina CAFO industry for discharging animal waste into community water bodies and lands." *Id.*