

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

WATERKEEPER ALLIANCE, INC.)	
)	
Plaintiff,)	
)	Civil No. 1: 10-cv-00487 -WDQ
v.)	
)	
ALAN AND KRISTIN HUDSON FARM,)	
<i>et al.</i>)	
)	
Defendants.)	

ANSWER OF PERDUE FARMS INCORPORATED

Perdue Farms Incorporated (“Perdue”), by its undersigned counsel, answers the Complaint as follows:

1. Perdue admits that this action is brought under the citizen suit provisions of the Clean Water Act as asserted in the first sentence of Paragraph 1 of the Complaint. Perdue denies the assertion of the second and third sentences of Paragraph 1 that it has discharged pollutants to the waters of the United States. Perdue lacks knowledge or information sufficient to form a belief about the truth of the allegations of the second and third sentences of Paragraph 1 that Alan and Kristin Hudson Farm (the Hudson Farm) discharged pollutants to the waters of the United States from a Concentrated Animal Feeding Operation or “CAFO” without a permit or in violation of the General CAFO NPDES Permit No. MDG01.
2. Perdue admits that Paragraph 2 of the Complaint correctly describes the relief sought.
3. Perdue denies the allegations of Paragraph 3 of the Complaint.

4. Perdue admits that Plaintiff Waterkeeper gave notice to Perdue on or about December 17, 2009 of its intent to file suit against the defendants. Perdue denies that Plaintiff Waterkeeper or anyone else gave notice of the violations specified in the complaint, and denies that the notice provided complied with 33 U.S.C. § 1365(b)(1)(A). Perdue lacks knowledge or information sufficient to form a belief about the truth of the allegations concerning the notice provided to the Hudson Farm, to the Administrator of the United States Environmental Protection Agency (EPA), to the Regional Administrator of EPA, to the United States Attorney General, and to the State of Maryland. Perdue admits that exhibit A is a copy of the letter provided to Perdue on or about December 17, 2009.

5. Perdue admits that 60 days have passed since it received the letter attached as Exhibit 1, but denies all other allegations of the first and second sentences of Paragraph 5. Perdue lacks knowledge or information sufficient to form a belief about the truth of the allegations in the third sentence of Paragraph 5 of the Complaint but asserts that the Maryland Department of the Environment (MDE) has taken appropriate enforcement action.

6. Perdue admits that venue is proper in the United States District Court for the District of Maryland.

7. Paragraph 7 of the Complaint will be stricken as a result of the Court's granting, in part, of Perdue's motion to dismiss. To the extent that Perdue is required to respond to Paragraph 7, Perdue lacks knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 7 of the Complaint.

8. Paragraph 8 of the Complaint will be stricken as a result of the Court's granting, in part, of Perdue's motion to dismiss. To the extent that Perdue is required to respond to Paragraph 8, Perdue lacks knowledge or information sufficient to form a belief about the truth of the allegations regarding the employment of Kathy Phillips. Perdue denies the accuracy of the description of the organization known as the Assateague Coastal Trust (ACT) contained in the first, second and third sentences of Paragraph 8 of the Complaint.

9. Paragraph 9 of the Complaint will be stricken as a result of the Court's granting, in part, of Perdue's motion to dismiss. To the extent that Perdue is required to respond to Paragraph 9, Perdue lacks knowledge or information sufficient to form a belief concerning the membership of ACT, as alleged in the first and second sentences of Paragraph 9 of the Complaint, and denies the other allegations in the second sentence. Perdue denies the allegations in the third, fourth and fifth sentences of Paragraph 9 of the Complaint. Perdue lacks knowledge or information sufficient to form a belief about the truth of the allegations regarding the activities of ACT members as described in the sixth sentence of Paragraph 9 and the subparts of that sentence.

10. Paragraph 10 of the Complaint will be stricken as a result of the Court's granting, in part, of Perdue's motion to dismiss. To the extent that Perdue is required to respond to Paragraph 10, Perdue denies the allegations of Paragraph 10.

11. Paragraph 11 of the Complaint will be stricken as a result of the Court's granting, in part, of Perdue's motion to dismiss. To the extent that Perdue is required to respond to Paragraph 11 Perdue denies the allegations of Paragraph 11.

12. Perdue lacks knowledge or information sufficient to form a belief about the truth of the allegations of Paragraph 12 of the Complaint.

13. Perdue lacks knowledge or information sufficient to form a belief about the truth of the allegations of Paragraph 13 of the Complaint.

14. Perdue lacks knowledge or information sufficient to form a belief about the truth of the allegations of Paragraph 14 of the Complaint.

15. Perdue admits the allegations in the first sentence of Paragraph 15 of the Complaint. Perdue denies the other allegations of Paragraph 15 of the Complaint.

16. Perdue admits the allegation of the first sentence of Paragraph 16 of the Complaint as to its address but asserts that its proper name is Perdue Farms Incorporated. Perdue admits the allegations of the second sentence of the Complaint that it is considered “an integrator” in the poultry industry and that it maintains a contract with Alan and Kristin Hudson pursuant to which the Hudsons raise poultry in accordance with a Poultry Producer Agreement attached to Perdue’s Motion to Dismiss as Exhibit B, which agreement speaks for itself. The allegations of the second sentence of Paragraph 16 of the Complaint are otherwise denied. The allegations of the third sentence of Paragraph 16 of the Complaint are denied.

17. Paragraph 17 of the Complaint contains descriptive matter as to which no response is required. To the extent that a response is required, Perdue lacks knowledge or information sufficient to form a belief about the truth of the allegations of Paragraph 17 of the Complaint.

18. Paragraph 18 of the Complaint contains descriptive matter as to which no response is required. To the extent that a response is required, Perdue lacks knowledge or information sufficient to form a belief about the truth of the allegations of Paragraph 18 of the Complaint.

19. Paragraph 19 of the Complaint contains descriptive matter as to which no response is required. To the extent that a response is required, Perdue lacks knowledge or information sufficient to form a belief about the truth of the allegations of Paragraph 19 of the Complaint.

20. Paragraph 20 of the Complaint contains descriptive matter as to which no response is required. To the extent that a response is required, Perdue lacks knowledge or information sufficient to form a belief about the truth of the allegations of Paragraph 20 of the Complaint.

21. Paragraph 21 of the Complaint contains an assertion of Congressional intent, not of fact, to which Perdue need not respond.

22. Paragraph 22 of the Complaint contains an assertion of law, not of fact, to which Perdue need not respond.

23. Paragraph 23 of the Complaint contains an assertion of law, not of fact, to which Perdue need not respond.

24. Paragraph 24 of the Complaint contains an assertion of Congressional intent, not of fact, to which Perdue need not respond.

25. Paragraph 25 of the Complaint contains an assertion of law, not of fact, to which Perdue need not respond.

26. Perdue acknowledges that 40 CFR § 122.23 defines concentrated animal feeding operations, or CAFOs, but denies that the entirety of the Hudson Farm, consisting of 300 acres, or all of its operations, is a CAFO.

27. Perdue denies the characterization in Paragraph 27 of the Complaint of the Maryland CAFO NPDES permit and states that the permit speaks for itself.

28. Upon information and belief, Alan Hudson submitted a notice of intent on behalf of himself and Kristin Hudson to be covered under the Maryland CAFO permit on or about February 26, 2009. Following a challenge by Plaintiff Waterkeeper Alliance, the Maryland CAFO permit became effective on December 1, 2009. On information and belief, as of August 2010, the State of Maryland has issued coverage to only a handful of the 480 applicants for coverage under the CAFO permit due to staffing shortages. Perdue denies the remaining allegations of the first and second sentences of Paragraph 28.

29. Upon information and belief, the MDE sent a compliance agreement to the Hudson Farm and approximately 480 other applicants for coverage under the general CAFO NPDES permit on or about November 5, 2009. These applicants could not obtain coverage under the permit due to staffing shortages within State government. The Compliance Agreement speaks for itself and, therefore, Perdue denies the remaining allegations of Paragraph 29.

30. Perdue lacks knowledge or information sufficient to form a belief about the truth of the allegations regarding the compliance status of the poultry CAFO owned and operated by Alan and Kristin Hudson, as alleged in the first sentence of Paragraph 30 of the Complaint. To the extent that Paragraph 30 of the Complaint describes the terms of the Maryland CAFO NPDES permit, that document speaks for itself and, thus, Perdue denies the remaining allegations of Paragraph 30.

31. Perdue denies the allegations of Paragraph 31 of the Complaint as to Perdue. Perdue lacks knowledge and information sufficient to form a belief about the truth of the allegations regarding discharges by the Hudson Farm.

32. With regard to the first two sentences of Paragraph 32 of the Complaint, Perdue admits that drainage ditches surround the Hudson Farm, denies that the entire Hudson Farm is a CAFO, and denies that drainage ditches surround the production area of the Hudson Farm CAFO. Perdue lacks knowledge or information sufficient to form a belief concerning the flow of the drainage ditches, as alleged in the second sentence of Paragraph 32. Perdue admits the allegations of the third and fourth sentences of Paragraph 32 of the Complaint.

33. Perdue lacks knowledge or information sufficient to form a belief about the truth of the allegations of Paragraph 33 of the Complaint.

34. Perdue lacks knowledge or information sufficient to form a belief about the truth of the allegations of Paragraph 34 of the Complaint.

35. Perdue lacks knowledge or information sufficient to form a belief about the truth of the allegations of Paragraph 35 of the Complaint.

36. Perdue denies that it has an ownership interest in the property that is the subject of this action and denies that it controls any activities at the property that result in discharges to the waters of the United States. Perdue therefore denies the allegations of Paragraph 36 in so far as it refers to Perdue. With respect to the allegations regarding the Hudson Farm, Perdue lacks knowledge or information sufficient to form a belief about the truth of the allegations of Paragraph 36 of the Complaint.

37. Perdue lacks knowledge or information sufficient to form a belief about the truth of the allegations of Paragraph 37 of the Complaint.

38. Perdue denies the allegations of Paragraph 38 of the Complaint that it made any discharge alleged in the Complaint. Perdue lacks knowledge or information sufficient to form a belief about the truth of any allegation that the Hudson Farm made any discharge.

39. Perdue admits the allegations of Paragraph 39 of the Complaint.

40. Perdue's contractual relationship with Alan and Kristin Hudson is described in the Poultry Producer Agreement attached as Exhibit B to Perdue's Motion to Dismiss, which agreement speaks for itself. Perdue otherwise denies the allegations of Paragraph 40.

41. Perdue denies the allegations of Paragraph 41 of the Complaint.

42. Perdue admits that the birds are raised by the contract growers until they are removed at Perdue's direction, but otherwise denies the allegations of Paragraph 42.

43. Perdue admits that the birds are raised by the contract growers until they are removed at Perdue's direction, but otherwise denies the allegations of Paragraph 43.

44. Perdue admits the allegations of Paragraph 44 of the Complaint.

45. Perdue admits the allegations in the first sentence of Paragraph 45 of the Complaint. Because Perdue does not understand the meaning of the phrase "are influenced" in the last sentence, it lacks knowledge or information sufficient to form a belief about the truth of the allegations in that sentence.

46. Perdue's relationships with its poultry growers are governed by contracts voluntarily entered into by the parties thereto, which contracts speak for themselves. Accordingly, Perdue denies the allegations of Paragraph 46.

47. Perdue admits that Perdue's staff make periodic visits to the chicken houses in which Perdue chickens are raised but otherwise denies the allegations of Paragraph 47 of the Complaint.

48. Perdue denies the allegations of Paragraph 48 of the Complaint.

49. Paragraph 49 of the Complaint contains a conclusion of law to which no response is required. To the extent that it contains any allegations of fact, or a response is otherwise required, Perdue denies the allegations of Paragraph 49.

50. Paragraph 50 of the Complaint contains a conclusion of law to which no response is required. To the extent that it contains any allegations of fact, or a response is otherwise required, Perdue denies the allegations of Paragraph 50.

51. Paragraph 51 of the Complaint contains a conclusion of law to which no response is required. To the extent that it contains any allegations of fact, or a response is otherwise required, Perdue denies the allegations of Paragraph 51.

52. In response to Paragraph 52 of the Complaint, Perdue incorporates its responses to Paragraphs 1 – 51 of the Complaint.

53. Paragraph 53 of the Complaint is a statement of law to which no response is required.

54. Perdue denies the allegation of Paragraph 54 of the Complaint that it discharges pollutants from any point on the property owned by Alan and Kristin Hudson and lacks knowledge or information sufficient to form a belief about the truth of the remaining allegations of Paragraph 54.

55. Perdue denies the allegations of Paragraph 55 that it discharged and/or discharges pollutants into the waters of the United States. Perdue lacks knowledge or information sufficient to form a belief about the truth of the remaining allegations of Paragraph 55.

56. In response to Paragraph 56 of the Complaint, Perdue incorporates by reference its responses to Paragraph 1 – 55 of the Complaint.

57. Paragraph 57 contains a conclusion of law to which Perdue need not respond.

58. Perdue denies the allegations of the first sentence of Paragraph 58 as it relates to Perdue. Perdue lacks knowledge or information sufficient to form a belief about the truth of these allegations as they relate to the Hudson Farm. The second sentence of Paragraph 58 of the Complaint is an incomplete description of some of the terms of the MD CAFO permit, which permit speaks for itself.

59. Perdue denies the allegations of Paragraph 59 that Perdue has discharged pollutants or will discharge pollutants from the Hudson Farm to the waters of the United States. Perdue lacks knowledge or information sufficient to form a belief about the truth of any allegations of any discharges by the Hudson Farm.

60. Perdue denies any allegation of Paragraph 60 of the Complaint that it has discharged pollutants or continues to discharge pollutants to the waters of the United States. Perdue lacks knowledge or information sufficient to form a belief about the truth of any allegations concerning the conduct of the Hudson Farm.

RESPONSE TO PRAYER FOR RELIEF

WHEREFORE, based on the foregoing, Perdue requests that Plaintiff's prayer for declaratory relief, injunctive relief, penalties, attorneys fees, and costs be denied.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

The claims contained in the Complaint are pre-empted in whole or in part by the Clean Water Act (CWA) and/or federal and/or state laws and regulations that exempt poultry integrators from the relevant permitting requirements.

SECOND AFFIRMATIVE DEFENSE

The Court lacks subject matter jurisdiction over Perdue because Plaintiffs have not sufficiently alleged Perdue's control over the CAFO operator and cannot sue Perdue based solely on its status as a poultry integrator.

THIRD AFFIRMATIVE DEFENSE

The Court lacks subject matter jurisdiction over Perdue because Plaintiffs' 60-Day Notice was inadequate in that Plaintiffs failed to give notice to Perdue of the activities about which the suit was brought.

FOURTH AFFIRMATIVE DEFENSE

The Court lacks subject matter jurisdiction over Perdue because Plaintiffs' 60-Day Notice was inadequate in that Plaintiffs failed to provide adequate notice of the dates on which the alleged violations occurred.

FIFTH AFFIRMATIVE DEFENSE

Plaintiffs fail to state a claim because to the extent that the Complaint identifies any violations of the CWA, they are the result of the State's inability to process the applications for permits that it has received.

SIXTH AFFIRMATIVE DEFENSE

Plaintiffs fail to state a claim under the CWA because the MDE has already taken enforcement action in connection with the allegations in the Complaint.

SEVENTH AFFIRMATIVE DEFENSE

Plaintiffs fail to state a claim under the CWA because they cannot establish a continuing violation.

EIGHTH AFFIRMATIVE DEFENSE

Plaintiffs fail to state a claim under the CWA because they cannot establish that the Hudson Farm CAFO was the source of any of the pollutants allegedly found in surrounding waters.

NINTH AFFIRMATIVE DEFENSE

Plaintiffs fail to state a claim because they cannot establish that Perdue exercised the degree of control necessary to hold it liable for any CWA violations attributable to the Hudson Farm CAFO.

Respectfully submitted,

/s/ Michael Schatzow

Michael Schatzow
(Federal Bar No. 00252)
(mschatzow@venable.com)
Thomas M. Ligan
(Federal Bar No. 08894)
(tmligan@venable.com)
M. Rosewin Sweeney
(Federal Bar No. 03334)
(mrsweeney@venable.com)

VENABLE LLP
750 E. Pratt Street, Suite 900
Baltimore, MD 21202
(410) 244-7400
(410) 244-7742 - facsimile
Attorneys for Defendant
Perdue Farms Incorporated

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of August, 2010, the foregoing Answer was served on the following via ECF:

Jane F. Barrett, Director
Environmental Law Clinic
University of Maryland School of Law
500 W. Baltimore Street
Baltimore, MD 21201
jbarrett@law.umaryland.edu

Christine M. Myers, Fellow
Environmental Law Clinic
University of Maryland School of Law
500 W. Baltimore Street
Baltimore, MD 21201
cmeyers@law.umaryland.edu

Liane Curtis
Waterkeeper Alliance
50 S. Buckhout Street, Suite 302
Irvington, NY 10533
lcurtis@waterkeeper.org

Chris Nidel
Nidel Law, P.L.L.C.
1225 15th Street, N.W.
Washington, D.C. 20005
chris@nidellaw.com

Counsel for Plaintiffs

George F. Ritchie
Gordon, Feinblatt, Rothman,
Hoffberger & Hollander, LLC
The Garrett Building
233 East Redwood Street
Baltimore, MD 21202
410-576-4131
FAX: 410-576-4026
gritchie@gfrlaw.com

Hugh Cropper, IV
Cowdrey Thompson
9923 Stephen Decatur Highway, D-2
Post Office Box 535
Ocean City, MD 21843
410-213-2681
FAX: 410-213-2685
kcropper@verizon.net

Counsel for Defendant Hudson Farm

/s/ Michael Schatzow _____

Michael Schatzow