IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

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|---|---|---|
| ASSATEAGUE COASTKEEPER, *et al.* | ) | |
| | ) | |
| Plaintiffs, | ) | |
| | ) | Civil No. 1: 10-cv-00487 -WDQ |
| v. | ) | |
| | ) | |
| ALAN AND KRISTIN HUDSON FARM, *et al.* | ) | |
| | ) | |
| Defendants. | ) | |

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PERDUE FARMS INCORPORATED'S MOTION TO DISMISS**

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**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PERDUE FARMS INCORPORATED'S MOTION TO DISMISS**

Defendant Perdue Farms Incorporated[1] ("Perdue"), by its undersigned counsel, submits this memorandum in support of its Motion to Dismiss the Complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) because this Court lacks subject matter jurisdiction and the Complaint fails to state a claim against Perdue. Perdue also moves to dismiss Plaintiff Assateague Coastkeeper pursuant to Fed. R. Civ. P. 17(b)(3) because it lacks capacity to sue.

## PRELIMINARY STATEMENT

This case is a citizen suit for penalties and injunctive relief brought by the Assateague Coastkeeper, the Assateague Coastal Trust, Kathy Phillips, and the Waterkeeper Alliance, Inc. (collectively "Plaintiffs") under the citizen suit provisions of the federal Clean Water Act ("CWA") against the Alan and Kristin Hudson Farm (the "Hudsons" or "Hudson Farm") and Perdue (collectively "Defendants"). The case relates to alleged discharges to a field ditch that empties into the Franklin Branch of the

[1] Misidentified in the Complaint as "Perdue Farms Inc."

Pocomoke River from the Hudson Farm, located at 9101 Logtown Road, Berlin, Maryland 21811. Plaintiffs claim that Perdue is a proper defendant in this action because it is a poultry company, known as an "integrator," that allegedly controls the poultry growing activities of its contract growers, the Hudsons, and thus "is responsible" for the Hudsons' handling of poultry waste at the Farm. Plaintiffs' Complaint must be dismissed pursuant to Rule 12(b)(1) and (6) of the Federal Rules of Civil Procedure because Plaintiffs have failed to satisfy the notice provisions for citizen suits brought under the federal CWA, lack standing to bring this action, and have failed to state a claim against Perdue.

Plaintiffs' claim against Perdue is an attempt to circumvent the regulatory authority of the Maryland Department of the Environment ("MDE"), the agency charged with interpreting and implementing the CWA in Maryland. MDE has determined that a poultry integrator, such as Perdue, is not required to seek or hold a permit, like the one required of poultry growers, under the CWA's National Pollutant Discharge Elimination System ("NPDES") permit program. Plaintiffs seek to have this Court indirectly impose regulatory requirements that MDE has considered and rejected.

Further, Plaintiffs failed to comply with the CWA requirement that they provide a notice letter to potential defendants at least 60 days before filing suit, detailing their precise alleged violations and affording the potential defendants an opportunity to cure any alleged violations. The CWA prohibits the filing of a citizen suit when the violation described in the notice has been cured. Instead of following CWA jurisdictional requirements, the Plaintiffs sent Perdue a notice letter that erroneously identified a pile of material as "poultry manure" and alleged that it was the source of discharges of pollutants

through "discrete conveyances" in the form of trenches from the stockpile to a field ditch. Any problems with this material were corrected by the Hudsons and no longer exist. Now, Plaintiffs file this lawsuit alleging violations that are wholly different from the one about which they gave notice. The Complaint makes absolutely no mention of a stockpile of poultry manure, and instead asserts wholly separate violations for which Plaintiffs have not provided adequate notice, as required by the citizen suit provisions of the CWA.

Furthermore, the Plaintiffs have also failed to allege facts sufficient to show that they have standing to bring this case or to assert a claim under the CWA. Finally, Plaintiff Assateague Coastkeeper must be dismissed because it has no legal existence and lacks capacity to sue.

## STATEMENT OF RELEVANT FACTS

The Hudsons own and operate an animal, grain and hay farm on approximately 226 acres of owned and leased land in Worcester County, Maryland, on which they raise poultry, cattle, and sheep, and cultivate crops. Exhibit A, Nutrient Management Plan ("NMP") attached to the Hudsons' application (hereafter "Application") for coverage under the Maryland General Discharge Permit for Animal Feeding Operations (the "General Permit" or "GP").[2] The Hudsons' poultry operation consists of two chicken

[2] Exhibit 1 to this Memorandum is the Affidavit of undersigned counsel M. Rosewin Sweeney, verifying that the documents attached in support of the Memorandum as Exhibits A through J are genuine and authentic copies.

A court may rely on evidence outside the pleadings in deciding a motion to dismiss for lack of subject matter jurisdiction filed pursuant to Rule 12(b)(1). *Evans v. B.F. Perkins Co.,* 166 F.3d 642, 647 (4th Cir. 1999). Therefore, in addition to documents referenced and relied on by Plaintiffs in the Complaint, the Court may take into account government records, admissions by the Plaintiffs and other documents referenced in this Memorandum.

houses. The Hudsons are independent contractors and currently raise poultry pursuant to a Poultry Producer Agreement with Perdue (hereafter "Grower Agreement"). Exhibit B.[3] According to the Hudsons' NMP, their cattle and sheep produce more than twice as much manure as their poultry operation. Exhibit A.

On or about March 18, 2009, the Hudsons began accepting at the Farm for use as fertilizer "Class A" sewage sludge or "biosolids" from the Ocean City Wastewater Treatment Plant. Exhibit C at 5, 12-13. Federal regulations allow the use of these materials as fertilizer and do not require a permit for those who land apply them. Standards for the Use and Disposal of Sewage Sludge, 40 C.F.R. pt. 503. A total of

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In considering a motion filed pursuant to Rule 12(b)(6), the Court may rely on documents referenced in but not attached to the complaint, without converting a 12(b)(6) motion to a motion for summary judgment. *Gasner v. County of Dinwiddie*, 162 F.R.D. 280, 282 (E.D. Va. 1995); *Provident Bank of Maryland v. McCarthy*, 383 F. Supp. 2d 858, 860 (D. Md. 2005) (Quarles, J.) ("In deciding a Rule 12(b)(6) motion, the court will consider the facts stated in the complaint and any attached documents. The court may also consider documents referred to in the complaint and relied upon by plaintiff in bringing the action.") (internal citation omitted). The Court can also rely on official public records. *Secretary of State For Defense v. Trimble Navigation Ltd.*, 484 F.3d 700, 705 (4th Cir. 2007); *see also Witthohn v. Federal Ins. Co.,* 164 Fed. Appx. 395, 396-97 (4th Cir. 2006) (holding that a district court "may clearly take judicial notice" of public records, including state court records); *Greenhouse v. MCG Capital Corp*., 392 F.3d 650, 655 (4th Cir. 2004) (holding that the Court of Appeals, as well as the district court, may take judicial notice of published stock prices without converting a motion to dismiss into a motion for summary judgment). In this case, the Plaintiffs attached their Notice of Intent to bring suit under the CWA to the Complaint and referenced and relied upon the Grower Agreement between Perdue and the Hudsons, the Hudsons' Application to be Covered by the General Permit, and a compliance agreement sent by the Maryland Department of the Environment to the Hudsons and other poultry CAFOs. *See* Complaint, pars. 28 and 29.

Perdue is confident that the documents it references in support of the 12(b)(6) portion of its motion may be considered by the Court without converting that portion of the motion to one for summary judgment. However, if the Court determines that any of the documents put forth by Perdue in support of the 12(b)(6) portion of the motion require that the Court convert that portion of the motion to dismiss into a motion for summary judgment, Perdue asks that the Court disregard that evidence for 12(b)(6) purposes.

[3] The Grower Agreement provides that Perdue consigns chicks to the Hudsons who care for them using feed, medications, bedding and other supplies provided by Perdue. Exhibit B at II. C. The Agreement recognizes that the Hudsons are the owners of the land, buildings and equipment utilized in the performance of the Agreement. *Id*. at III. C. Perdue's right to enter the Hudsons' Farm is limited – applying only to that part of the premises "where the flock is or shall be located to inspect the flock or facilities." *Id*. at III. D. The Hudsons are independent contractors (*Id*. at IV. A.) and agree to comply with all laws applicable to the operation's "environmental management, including, without limitation, nutrient management plans, operation permits, bird mortality, water quality, and air quality." *Id.* at II. M.

213.57 dry tons of biosolids were delivered to the Farm from the Ocean City Waste Water Treatment Plant between March and August 13, 2009. Exhibit C at 12-13.

On December 17, 2009, Plaintiffs served the Hudsons and Perdue with a Notice of Intent to Sue for Violations of the Clean Water Act (the "Notice"), that purported to fulfill the notice requirements of the CWA. 33 U.S.C. § 1365. Letter dated December 17, 2009, attached hereto as Exhibit D. The Notice asserted that the Hudson Farm is a concentrated animal feeding operation ("CAFO") under federal water pollution control laws. *See* 33 U.S.C. § 1311, *et seq.,* 40 C.F.R. § 122.23.[4] According to the Notice, the Hudsons maintained a longstanding stockpile of "uncovered *poultry manure* next to a drainage ditch in its production area." (Emphasis added.) The Notice asserted that this alleged poultry manure pile was a continual and ongoing source of pollution to navigable waters of the United States and that "discrete conveyances in the form of trenches exist from the manure stockpile to the field ditch to facilitate this runoff." No other sources of pollution or illegal discharges were claimed in the Notice.

In response to the Notice, MDE inspected the Hudson Farm on repeated occasions between December 18, 2009 and January 26, 2010. MDE concluded, based on its numerous inspections and representations made to it by, among others, representatives of the Ocean City Department of Public Works, that the stockpile observed by the Plaintiffs was not poultry manure but rather biosolids from the Ocean City Wastewater Treatment Plant. Exhibit E; Exhibit C at 1, 2, 5, 7. On December 18, 2009, MDE concluded that the Hudsons had eliminated the trenches referenced in the Plaintiffs' Notice as the means

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[4] As is discussed more thoroughly below, the MDE implements federal water pollution law within Maryland on behalf of the federal government and regulates animal feeding operations pursuant to a general permit that became effective on December 9, 2009. *See* Md. Code Ann., Envir. §§ 9-253(b), 9-322, 9-323; COMAR 26.08.03.09; general permit available at:

http://www.mde.state.md.us/assets/document/waste/AFO_General_Permit.pdf.

of conveying pollutants from the stockpile to the waters of the United States and observed no discharge. Exhibit C at 1-2. At the direction of MDE, and using equipment supplied by Ocean City, by January 7, 2010 the Hudsons had moved the biosolids pile approximately 100 feet to an upland location selected by MDE's inspector and covered it with plastic. Exhibit C at 5-7, 9-11. No further action on the part of the Hudsons was required. *Id*. Following an inspection on January 26, 2010, MDE's inspector noted that "no animal manure piles were observed outside." Exhibit C at 16. Another MDE report of that date also indicated that the relocated stockpile contained approximately 558.07 wet tons of biosolids. Exhibit C at 14.

Aerial photographs taken by Plaintiff Kathy Phillips and posted on the Assateague Coastkeeper website documented the existence of the pile and trenches on December 11, 2009. Additional aerial photographs taken by Ms. Phillips on January 9, 2010 and accompanying commentary acknowledge that the trenches were filled in and the pile moved and covered. Exhibit F.

## THE REGULATORY AND PERMITTING SCHEME

The CWA prohibits the discharge of pollutants from a "point source" to "waters of the United States," except as authorized by a permit issued under the NPDES program, which is administered by the U.S. Environmental Protection Agency ("EPA") or a delegated state such as Maryland. 33 U.S.C. §§ 1311, 1342, and 1362. The CWA provides for delegation of authority to the states. 33 U.S.C. § 1342; 40 C.F.R. § 123.25(a). Accordingly, Maryland administers the federal NPDES program and issues federal discharge permits in the State. *See Howard County v. Davidsonville Area Civic and Potomac River Ass'ns, Inc.*, 72 Md. App. 19, 24, 527 A.2d 772, 774 n.3 (1987) (EPA

retains the power to veto proposed state NPDES permits); s*ee also* 40 C.F.R. § 123.44(a) (EPA has 90 days to object to proposed state permits).

The regulations implementing the NPDES program define "animal feeding operations" ("AFOs") that meet certain criteria as "concentrated animal feeding operations" or "CAFOs" and as point sources under the CWA. As is discussed in more detail in Section I below, MDE does not require integrators, such as Perdue, to obtain discharge permits for their growers' CAFO operations.

CAFOs that discharge or propose to discharge to surface waters are required to obtain an NPDES permit. 40 C.F.R. § 122.23(d)(1). EPA regulations required that dry poultry manure operations such as the Hudsons' seek permit coverage by February 27, 2009. Revised CAFO rule at 73 Fed. Reg. 70418, 70422 (November 20, 2008).

MDE revised its CAFO regulatory program to be consistent with EPA's requirements and adopted new regulations for poultry operations with dry manure handling systems effective January 12, 2009, just six weeks before the federal compliance deadline. 36:1 Md. Reg. 24 (January 2, 2009).[5] MDE also developed a new General Discharge Permit for Animal Feeding Operations, Maryland Permit No. 09AF, NPDES Permit No. MDG01[6] (the "General Permit" or "GP") applicable to animal feeding operations that discharge to surface waters. Maryland published a "Final Determination" to adopt the General Permit for animal feeding operations on January 2, 2009 without EPA objection. Among its many requirements, the GP incorporates "best

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[5] Maryland first adopted regulations and a general permit applicable to certain animal feeding operations in 1996. These regulations applied to a relatively small number of Maryland animal feeding operations and did not cover dry manure poultry operations. The State regulations were amended in January 2009.

[6] A general permit is a permit issued to a class of dischargers. The newly adopted regulations set forth the method of obtaining coverage under the general permit. COMAR 26.08.04.09. The GP is both a federal permit (NPDES General Permit No. MGD01) and a State permit (State General Discharge Permit No. 09AF).

management practices" for the management of manure as it is stored and when it is land applied as fertilizer.

A CAFO subject to the General Permit must also prepare and implement a Comprehensive Nutrient Management Plan ("CNMP").[7] GP, Part III.B. This Plan is incorporated into the permit, and failure to implement it is a violation of the GP. GP, Part I.B.5.

The GP did not become effective until December 9, 2009 because of a challenge brought by some of the Plaintiffs in this action. *See Assateague Coastkeeper, et al., v. Maryland Department of the Environment,* Before the Final Decision Maker of the Maryland Department of the Environment, OAH No.: MDE-WMA-053-09-13516 (Sept. 3, 2009).[8]

CAFO operators such as the Hudsons, who submitted an Application to be covered by the General Permit on or about February 26, 2009, could not obtain coverage under the GP while the challenge was pending because the permit was not final until the administrative challenge was concluded. Further, MDE lacked the resources to process the approximately 480 CAFO applications it received. Exhibit C at 3, Exhibit G at 2. The agency therefore provided each CAFO permit applicant with a compliance agreement by which the applicant agreed to comply with specific terms of the CAFO permit until such time as the agency could grant them coverage under the permit. Exhibit

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[7] This term is defined in the GP.

[8] Final Decision available on MDE's website at:
http://www.mde.state.md.us/assets/document/MDE_CAFO_Mafo_Final_Decision.pdf. Some of the Plaintiffs in this case have appealed the agency's decision. *In re: Assateague Coastkeeper v, Maryland Department of the Environment,* In the Circuit Court for Baltimore City, Case No. 24-C-09-006417/AA.

C at 3, and Exhibit G, General Compliance Schedule for Applicants for CAFO Coverage ("Compliance Agreement"), and accompanying cover letter.

## LEGAL STANDARDS

Perdue moves to dismiss the Complaint pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction and Rule 12(b)(6) for failure to state a claim. Plaintiffs have the burden of proving that subject matter jurisdiction exists. *Evans v. B.F. Perkins Co.*, 166 F.3d 642, 647 (4th Cir. 1999); *Cambridge Environmental Health and Community Development Group v. City of Cambridge* ("*City of Cambridge*"), 115 F. Supp. 2d 550, 553 (D. Md. 2000) (Blake, J.). When a defendant challenges subject matter jurisdiction pursuant to Rule 12(b)(1), "the district court is to regard the pleadings as mere evidence on the issue, and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment." *Evans v. B.F. Perkins Co.,* 166 F.3d at 647 (quoting *Richmond, Fredericksburg & Potomac R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991)). A 12(b)(1) motion should be granted "if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law." *Id.* If a Plaintiff does not meet the statutory prerequisites of the CWA citizen suit provision, the Court lacks subject matter jurisdiction. *City of Cambridge*, 115 F. Supp. 2d at 553.

For purposes of a Rule 12(b)(6) motion, "[t]he pleadings must state 'more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.'" *Flanagan v. Anne Arundel County*, 593 F. Supp. 2d 803, 808 (D. Md. 2009) (Legg, J.) (quoting *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555 (2007)). Rather:

> To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a plaintiff must plead plausible, not merely conceivable, facts in support of his claim. *See Bell Atlantic Corp.*

> *v. Twombly,* 550 U.S. 544 (2007). This "plausibility standard" applies to all of plaintiffs' claims.

*Flanagan*, 593 F. Supp. 2d at 808. The facts alleged must be sufficient "to raise a right to relief above the speculative level." *Smith v. Smith*, 589 F.3d 736, 738 (4th Cir. 2009) (quoting *Twombly,* 550 U.S. at 555). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice," and allegations in a complaint which are "not more than conclusions are not entitled to the assumption of truth." *Ashcroft v. Iqbal*, 556 U.S. __, 129 S. Ct. 1937, 1949-50 (2009).

The Court is not required to accept as true the legal conclusions set forth in a plaintiff's complaint, nor is it required to accept as true "unwarranted inferences, unreasonable conclusions, or arguments." *Giarratano v. Johnson*, 521 F.3d 298, 302 (4th Cir. 2008); *see also City of Cambridge*, 115 F. Supp. 2d at 553. To the contrary, Rule 8 "requires a 'showing,' rather than a blanket assertion, of entitlement to relief." *Twombly*, 550 U.S. at 555 n.3. In short, "Rule 8(a) 'contemplates the statement of circumstances, occurrences, and events in support of the claim presented' and does not authorize a pleader's 'bare averment that he wants relief and is entitled to it.'" *Id*. (quoting 5 Wright & Miller § 1202, at 94, 95).

## **ARGUMENT**

The CWA provides, with certain limitations, that any citizen may bring a civil suit against any person who is alleged to be in violation of an effluent standard or limitation. 33 U.S.C. § 1365. A plaintiff must meet certain jurisdictional prerequisites in order to bring such a citizen suit. Plaintiffs in this matter have failed to meet four of these

prerequisites. First, as an integrator, Perdue cannot be the subject of a CWA citizen suit, based on the applicable regulatory law, for failing to have a discharge permit for its grower's CAFO operation. Second, the violation about which Plaintiffs gave Notice has ceased, which denies this Court subject matter jurisdiction. Third, the Plaintiffs failed to provide adequate notice of their intent to sue as required by the CWA. Fourth, the Plaintiffs failed to make basic allegations establishing their standing to file suit. Those failures require that the Complaint be dismissed pursuant to Rule 12(b)(1).

In addition to failing to satisfy jurisdictional requirements, Plaintiffs failed to plead sufficient facts to state a claim under the CWA against Perdue. Therefore, the Complaint should be dismissed under Rule 12(b)(6).

Finally, Plaintiff Assateague Coastkeeper lacks capacity to sue and must be dismissed as a plaintiff pursuant to Rule 17(b)(3).

## I. The Complaint Should be Dismissed Pursuant to Rule 12(b)(1) Because Integrators are not CAFOs and are not Obligated to be Co-permittees with their Growers under the CWA and the Court thus Lacks Subject Matter Jurisdiction.

Plaintiffs assert that Perdue is responsible for the handling of chicken waste produced at the Hudson Farm and is obligated to obtain a NPDES CAFO discharge permit. Because this claim is inconsistent with the applicable regulatory and permitting requirements, the Notice to Perdue is defective and Perdue is not a proper defendant in this action.[9]

[9] A motion to dismiss for having sued an improper defendant may also be asserted pursuant to Rule 12(b)(6), and, in the alternative, this Court may properly dismiss Plaintiffs' Complaint against Perdue on that basis. *Colida v. Sony Corporation of America*, No. 04 Civ. 2093 (RJH), 2004 WL 173835 (S.D.N.Y. August 2, 2004).

MDE has expressly rejected the Plaintiffs' interpretation of integrator obligations under the CWA. The agency considered and declined to adopt "co-permitting" requirements when it adopted new CAFO regulations and issued a final determination to adopt the Maryland CAFO General Permit in January of 2009.

Plaintiffs Waterkeeper Alliance ("Waterkeepers") and the Assateague Coastkeeper participated in the MDE CAFO regulation and General Permit adoption process, filing extensive comments on November 20, 2008 on MDE's proposed General Permit and accompanying regulations. Exhibit H. In the comments submitted, the Plaintiffs acknowledged that integrators such as Perdue are not obligated under the terms of the General Permit or the regulatory program to obtain coverage. In commenting on the inapplicability of the proposed General Permit to integrators, the Waterkeepers argued that integrators "should share in the liability that may result from improper waste handling and disposal and illegal discharges." Exhibit H at 26. Acknowledging that the General Permit and CAFO regulatory scheme proposed by MDE did not require integrators to be "co-permittees" with their contract growers, Plaintiff Waterkeepers commented:

> Integrators and contractors *should* be held jointly and severally liable for compliance with environmental regulations and for all damages that result from lack of compliance …

Exhibit H at 27 (emphasis added). The Waterkeepers additionally argued that failing to treat integrators as "co-permittees" "defies Maryland statutory law." Despite their current allegations to the contrary, the Waterkeepers acknowledged that integrators were not required to obtain permit coverage under the General Permit that MDE proposed and subsequently promulgated.

> By failing to require co-permitting of *controlling integrators*, MDE has acted arbitrarily and capriciously, acted to discriminate against other classes of operators required to obtain NPDES permits, and acted contrary to law.

Exhibit H at 30 (emphasis added.)

MDE's response to comments regarding the "General Discharge Permit for Animal Feeding Operations," dated December 31, 2008, responded to the Waterkeepers' claim that integrators should be co-permittees under the General Permit. This issue was directly addressed by MDE in two different responses to comments. In response to comments that MDE should require joint grower-integrator reporting of the total cleanout date for litter, MDE responded: "This would require a co-permittee approach *and would likely be rejected by the legal system*." (Emphasis added.) In response to comments to the effect that equity and economic efficiency demand that integrators be co-permitted with poultry AFOs, MDE responded: "*The Clean Water Act does not identify integrators as needing permit coverage as they are not point sources*. The commentor is aware of MDE's unsuccessful historical attempt through the judiciary system to require co-permits with integrators." Exhibit I, MDE Response to Comments, at 10 and 14 (emphasis added).

The regulations and General Permit subsequently became final *without* co-permitting requirements for "controlling integrators." Although the Waterkeepers challenged the General Permit adopted by MDE on several grounds, it did not appeal MDE's decision not to require integrators to obtain permit coverage. *In re: Assateague*

*Coastkeeper v. Maryland Department of the Environment*, In the Circuit Court for Baltimore City, Case No. 24-C-09-006417/AA.[10]

Plaintiffs now attempt to circumvent MDE's general permitting approval process.[11] The Plaintiffs have already tried—and failed—to bring integrators, such as Perdue, into the MDE permitting scheme. Plaintiffs' arguments having been rejected by MDE, they now ask that this Court impose on Perdue, and all other integrators, requirements that the agency charged with implementing the CWA in Maryland has considered and declined to adopt. Naming a defendant who cannot be sued under federal law, such as Perdue here, just like the failure to name a defendant required to be sued under federal law, deprives this Court of subject matter jurisdiction and requires dismissal of Perdue under Rule 12(b)(1). *Cummings v. United States Postal Service*, No. 09-C-502, 2009 WL 2383857, at *2-3 (E.D. Wis. July 31, 2009).

This Court should repel Plaintiffs' blatant attempt to circumvent the regulatory process and to pursue in this forum arguments that were already addressed and rejected by the proper regulatory authority. For that reason, the Complaint should be dismissed.

## II. This Court Lacks Jurisdiction and the Complaint Should be Dismissed Pursuant to Rule 12(b)(1) Because There is no Continuing Violation of the Clean Water Act.

A CWA citizen suit may be brought only if there is an "ongoing violation of the Act" at the time the complaint is filed. *Connecticut Coastal Fishermen's Ass'n v.*

[10] EPA could have objected to MDE's CAFO General Permit but has not done so. *See* 33 U.S.C. § 1342(d)(2).

[11] State and federal courts defer to agencies' constructions of their own regulations. *See, e.g. Arkansas v. Oklahoma*, 503 U.S. 91, 105-10 (1992), on remand *State of Oklahoma v. EPA*, 962 F.2d 996 (10th Cir. 1992) (EPA entitled to discretion to interpret its own regulations and those regulations are entitled to deference); *MTA v. King*, 369 Md. 274, 288-89, 799 A.2d 1246, 1254 (2002) (agency's interpretation of regulation is of controlling weight unless it is plainly erroneous). *See also In re Cities of Annandale and Maplelake*, 731 N.W.2d 502, 511-513 (Minn. 2007) (when a state agency is charged with the day-to-day responsibility for enforcing and administering a federal regulation, courts should give same deference to state agency's interpretation of federal regulation as it would to agency's interpretation of state regulation.).

*Remington Arms Co., Inc*., 989 F.2d 1305, 1312 (2d Cir. 1993). *See also Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.,* 484 U.S. 49, 59-60 (1987) (interpreting 33 U.S.C. § 1365(a)(1)). Thus, the requirement that there be an ongoing violation is not only an element of the claim that, if not adequately pled, would require dismissal under Rule 12(b)(6), it is also jurisdictional. This matter cannot proceed unless there is an ongoing violation of the CWA.

According to Plaintiffs' own online statements, the stockpile that Plaintiffs' Notice alleged was poultry manure and discharging via trenches to a drainage ditch was relocated and covered and the trenches filled in by January 9, 2010. Exhibit F, aerial photographs taken by Ms. Phillips on January 9, 2010 and accompanying commentary, also available at http://www.assateaguecoastkeeper.org/onthewaterphotoalbum.html. Exhibit E (March 26, 2010 MDE press release: "Maryland Department of the Environment Secretary Shari T. Wilson said, 'MDE's first job was to immediately ensure the potential source of pollution was controlled. That was done.'") Moreover, the "poultry manure" stockpile about which Plaintiffs provided notice was determined by MDE, based on inspections and statements from representatives of the Hudsons and Ocean City, to be biosolids from the Ocean City Wastewater Treatment Plant. Exhibit C, *passim*; Exhibit E (MDE March 26, 2010 cover letter to MDE Complaint and Administrative Penalty stating that they are issued "concerning violations. . .that occurred as a result of the placement of a pile of sewage sludge in a position where it was likely to pollute waters of the State.") MDE subsequently confirmed that the relocated biosolids pile "was no longer in a position to possibly pollute waterways." Exhibit C at 11. Exhibit E (Administrative Complaint and Penalty issued March 26, 2009, ¶ 19: "On

January 7, 2010, Mr. Littlefield performed a follow-up visit to Hudson Farm and noted that the pile of sewage sludge had been moved 155 ft. away from the ditch and stream, and covered with a plastic liner. The area where the pile had been located was graded, mulched, and seeded with rye cover crop, and straw bales were placed around the area to prevent potential run-off. The two ditches were also filled and blocked to prevent continued drainage from the original site of the sludge.")

Because discharges from the pile that was mischaracterized in Plaintiffs' Notice have ceased, there is no continuing violation and this Court lacks subject matter jurisdiction. Accordingly, the Complaint should be dismissed pursuant to Rule 12(b)(1).[12]

### III. Plaintiffs' Claims Should be Dismissed Pursuant to Rule 12(b)(1) Because Plaintiffs' Notice of Intention to File Suit was Inadequate.

Citizen plaintiffs must provide a notice of intent to sue to the alleged violator, the U.S. Environmental Protection Agency, and the relevant state enforcement agency at least 60 days prior to actually filing suit. 33 U.S.C. § 1365(b)(1)(A). Notice in citizen suits is a "mandatory, not optional, condition precedent" to filing suit. *Hallstrom v. Tillamook County*, 493 U.S. 20, 26, 31 (1989). Without adequate notice, the Court does not have subject matter jurisdiction to hear the case. *City of Cambridge*, 115 F. Supp. 2d at 557-59. Notice must be "given in such manner as the [EPA] Administrator shall prescribe by regulation." 33 U.S.C. § 1365(b).

EPA regulations require that notice must include "sufficient information to permit the recipient to identify the *specific* standard, limitation, or order alleged to have been violated, the activity alleged to constitute a violation, the person or persons responsible

[12] Furthermore, because this material was not poultry manure, there is no basis for determining that Perdue, a poultry integrator, was responsible for its discharge.

for the alleged violation, the location of the alleged violation, the date or dates of such violation, and the full name, address, and telephone number of the person giving notice." 40 C.F.R. § 135.3(a) (emphasis added).

There are numerous jurisdictional deficiencies in Plaintiffs' Notice. Namely:

1. It fails to provide notice of the violations alleged in the Complaint.
2. It fails to allege specific violations.
3. It fails to identify dates of violation.
4. It fails to properly identify plaintiffs.

Each of these is discussed below.

### A. Plaintiffs Did Not Give Notice of the Violations Ultimately Alleged in the Complaint.

The Notice sent by Plaintiffs regarding CWA violations at Hudson Farms alleged that "Hudson Farm stockpiles uncovered poultry manure next to a drainage ditch" and "[t]his longstanding manure pile is a continual and ongoing source of pollutants. In particular, during and after each rain event, this manure stockpile discharges pollutants into a field ditch that drains to the Franklin Branch.… Photographs further reveal that discrete conveyances in the form of trenches exist from the manure stockpile to the field ditch to facilitate … run off." Exhibit D at 2.

In stark contrast to the Notice provided, Plaintiffs' Complaint does not allege a discharge from a specific pile of waste connected by trench to a drainage ditch. Instead, the Complaint alleges that discharges of pollutants occurred from unspecified locations at the Hudson Farm and the Hudson Farm CAFO. Complaint, ¶¶ 36, 54. Thus, despite the fact that the Hudsons responded to the Notice in the precise manner that Congress

intended would prohibit a subsequent lawsuit—promptly fixing the alleged problem identified—Plaintiffs have sued the Hudsons and Perdue anyway. But Plaintiffs have moved the goal line, suing for a problem not identified in the Notice.

Plaintiffs were obliged to provide notice of the violations *about which they would actually sue* and cannot expand their claims in this fashion. *See Stephens v. Koch Foods, LLC*, 667 F. Supp. 2d 768, 788 (E.D. Tenn. 2009) (holding that the court had no subject matter jurisdiction over certain discharges alleged in complaint where plaintiff's notice identified discharges from a particular pump station and complaint specified discharges from other locations); *Sierra Club Ohio Chapter v. City of Columbus*, 282 F. Supp. 2d 756, 766-67 (S.D. Ohio 2003) (dismissing citizen suit where variance between notice and complaint revealed that the notice insufficiently informed defendants of the locations of the discharges that would be asserted).

The Supreme Court has found that Congress intended the citizen suit provision to "strike a balance between encouraging citizen enforcement" and "avoiding burdening the federal courts." *Hallstrom*, 493 U.S. at 29. The Court found that the Notice provisions served this goal in two ways: 1) allowing government agencies to take responsibility for enforcing environmental regulations, "obviating the need for citizen suits," and 2) giving the alleged violator an opportunity to bring itself into compliance with the Act. *Id.* By giving an inadequate Notice and by filing a Complaint alleging violations that were not included in the Notice, Plaintiffs have failed to give either the relevant government agencies or the Defendants time to address the new alleged violations. The consequence of this failure is that the Complaint must be dismissed. Otherwise the intent of Congress in enacting the citizen suit provision would be thwarted.

Courts have long held that there must be strict compliance with the notice requirements in order to satisfy Congressional intent. In *Garcia v. Cecos Int'l*, 761 F.2d 76, 79 (1st Cir. 1985), the court wrote that "[t]he notice requirement is not a technical wrinkle or superfluous formality that federal courts may waive at will … it is part of the jurisdictional conferral from Congress that cannot be altered by the courts." *See also Walls v. Waste Resource Corp.*, 761 F.2d 311, 316 (6th Cir. 1985). These holdings were based on the intent of Congress to make the citizen suit provisions an aid to dispute resolution, thus avoiding costly and cumbersome litigation. The *Garcia* court noted that "[a]fter the complaint is filed the parties assume an adversary relationship that makes cooperation less likely." *Garcia*, 761 F.2d at 82. The Sixth Circuit observed, "Congress evidently believed that the filing of a private lawsuit hardens bargaining positions and leaves the Administrator with less room to maneuver." *Walls v. Waste Resource Corp.*, 761 F.2d at 317 (noting that notice allows EPA to develop uniform interpretations of complex environmental standards). The Ninth Circuit has taken a similar position, describing the Notice as

> not just an annoying piece of paper intended as a stumbling block for people who want to sue; it is purposive in nature and the purpose is to accomplish corrections where needed without the necessity of citizen action.

*Center for Biological Diversity v. Marina Point Dev. Co.,* 566 F.3d 794, 800 (9th Cir. 2009).

To ensure that Congressional intent is realized, even if a Defendant has "actual" or "constructive" notice of the elements required to be contained in the Notice, a complaint must be dismissed as inadequate if it fails to clearly identify those elements. *Hallstrom*, 493 U.S. at 26, 31 (holding that actual notice does not suffice); *Karr v.*

*Hefner*, 475 F.3d 1192 (10th Cir. 2007) (rejecting argument of actual notice); *Nat'l Parks and Conservation Assn v. TVA,* 502 F.3d 1316 (11th Cir. 2007) (rejecting justification that defendant had actual knowledge, despite defective notice, because of EPA enforcement proceedings); *City of Ashtabula v. Norfolk Southern Corp.,* 633 F. Supp. 2d 519 (N.D. Ohio 2009) (declining to consider claim that defendants took remedial action in response to notice, thus demonstrating "actual notice"); *Sierra Club Ohio Chapter v. City of Columbus*, 282 F. Supp. 2d 756 (S.D. Ohio 2003) (rejecting "actual" notice argument and noting that plaintiffs had not cited a single case in support of that theory).

The District of Maryland has affirmatively decided that "actual notice" is never adequate. *City of Cambridge*, 115 F. Supp. 2d at 559 (rejecting plaintiffs' claim of actual notice and holding that "in light of the Fourth Circuit's strict interpretation of the notice requirement" the claim was immaterial, citing *Monongahela Power Co. v. Reilly*, 980 F.2d 272 (4th Cir. 1993)).

Plaintiffs' Notice was directed at a stockpile that they claimed to be poultry manure. Both MDE and the Hudsons responded to the Notice and the potential violations asserted therein were promptly corrected. The Complaint says nary a word about a stockpile. Therefore, the Notice failed to provide the requisite notification and thwarts the intent of the law, which is to allow responsible parties to cure the alleged violation before litigation erupts.

### B. The Notice Failed to Allege Violations of the CWA with Sufficient Specificity.

The Notice provides a recitation of the law governing CAFO discharges, but does not specifically allege that Perdue, or Hudson Farms, has violated a *specific* standard, limitation, or order. The law requires such specificity. *See Washington Trout v. McCain*

*Foods, Inc.,* 45 F.3d 1351 (9th Cir. 1995) (requiring strict adherence to all aspects of notice requirements); *Frilling v. Village of Anna*, 924 F. Supp. 821, 833 (S.D. Ohio 1996) (holding that a plaintiff "must provide notice of the *specific* limitations, standards, or orders alleged to be violated") (emphasis in original); *City of Ashtabula v. Norfolk Southern Corp.,* 633 F. Supp. 2d 519 (N.D. Ohio 2009) (allowing a suit on counts under CWA § 1342, violations of which were specifically alleged in a notice, but not under § 1311, which was not alleged in the notice); *Carroll v. Litton Systems, Inc.*, No. B-C-88-253, 1990 WL 312969 (W.D.N.C. Oct. 29, 1990) (holding a Resource and Conservation Recovery Act citizen suit notice insufficient where it failed to identify the specific provisions allegedly violated).

The Notice states that there are "illegal operations" at the Farm and states an "intent to seek redress for the ongoing discharge of pollutants into the Pocomoke River, in violation of the CWA." It also states that "Hudson Farm is discharging pollutants into navigable waters of the United States on a continuous and ongoing basis without a NPDES permit."[13] The Notice further states that if the Hudsons are covered by a permit they are in "in violation of a zero discharge permit."

None of these statements alleges the violation of a specific limitation or standard of the CWA. *See Sierra Club Ohio Chapter v. City of Columbus*, 282 F. Supp. 2d 756 (S.D. Ohio 2003) (holding that references in Notice to certain paragraphs of permit allegedly violated were insufficient where the paragraphs contained numerous requirements and Notice did not specify which ones were violated). General allegations are not sufficient. *See Nat'l Parks and Conservation Assn v. TVA,* 502 F.3d 1316

[13] As noted above, Perdue is not required to obtain a permit. The Hudsons applied for permit coverage more than a year ago but, like all animal feeding operations in Maryland that are newly defined as CAFOs, have not yet received coverage.

(holding that a notice must identify the "specific" standard violated and a claim of violation of "all of the requirements" of a part of a permit that listed standards for several pollutants was not enough); *Karr v. Hefner*, 475 F.3d 1192, 1329-30 (affirming dismissal of a complaint where the notice failed to clearly identify with appropriate specificity the laws that the defendant allegedly violated); *Atwell v. KW Plastics Recycling Div.*, 173 F. Supp. 2d 1213, 1224 (M.D. Ala. 2001) (holding that a general notice "that merely informs a recipient of what a plaintiff *may* allege is patently insufficient") (emphasis in original).

The Notice also fails because it does not identify any pollutant discharged. "[I]dentification in an NOI letter of a *pollutant* allegedly discharged is essential to provide adequate notice of the alleged violation." *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York,* 273 F.3d 481, 487 (2d Cir. 2001) (emphasis added). "Failure to do so will justify a district court's dismissing claims based on pollutants not properly noticed." *Id*. at 448; s*ee also Klebe v. Tri Municipal Sewer Comm'n,* No. 07-CV-7071, 2008 WL 5245963 (S.D.N.Y. Dec. 17, 2008) (dismissing a CWA citizen suit where plaintiffs failed to identify any specific pollutant); *Friends of the Earth, Inc. v. Chevron Chemical Co.*, 900 F. Supp. 67 (E.D. Tex. 1995) (holding notice insufficient to allow claims for temperature violations where Notice did not include any specific allegations of temperature exceedances). The Notice only states that Plaintiffs identified certain pollutants in waterways near the Farm but does not allege that any of these were discharged from the Farm. Although the Complaint alleges discharges of "solid waste, biological waste materials, and agricultural waste" and "nitrates," none of these were even mentioned in the Notice and thus cannot be the basis of this CWA citizen suit.

### C. The Notice Fails to Provide Specific Dates of the Alleged Violations.

The Notice is defective in several respects with regard to providing the dates of violation. First, while the Notice makes conclusory claims that discharges are continuous and ongoing, it's only factual claim is to the contrary: that discharges occur only as a result of rain events, which are neither continuous nor ongoing.

Second, while Plaintiffs allege that pollution occurred during rain events, no dates of rainfall are provided. Statements that violations are ongoing or continuing are not synonymous with a claim that violations are occurring daily. *Freeman v. Cincinnati Gas & Elec. Co.,* No. C-1-04-781, 2005 WL 1669324, at *3 (S.D. Ohio July 18, 2005) (citing *Frilling, et al. v. Honda of America Mnfg., Inc.*, No. C-3-96-181, 1996 U.S. Dist. Lexis 22526, at *21, *24-25 (S.D. Ohio Oct. 21, 1996)) for the proposition that "ongoing," "continuous" and "nearly daily" are insufficient to satisfy the requirement that plaintiffs provide sufficient information to allow the defendant to identify the date or dates of the alleged violations).

Third, providing "results from downstream water sampling" conducted on several occasions between October 30, 2009 and February 12, 2010, is not the equivalent of providing the dates of discharge from the alleged source of pollutants. The fact that water flowing in an off-site drainage ditch[14] contained pollutants on specific dates is not notice of the dates on which *discharges* from a *point source* located at the Hudson Farm may have occurred, particularly when the Hudsons' cattle and sheep operation and fields under cultivation could be federally unregulated *non-point* sources of pollution to the

[14] Plaintiffs acknowledged during a March 2, 2010 press conference that they did not have access to the Hudson Farm and that their samples were taken from a drainage ditch located off the property. *See* audio available on Plaintiffs' website at http://www.assateaguecoastkeeper.org/.

unidentified ditch where Plaintiffs sampled. *See also* Exhibit E: "The source of the bacteria was not conclusively identified."

**D. The Notice Fails to Adequately Identify the Plaintiffs.**

The Notice declared that it constituted "the Assateague Coastkeeper's and Waterkeeper Alliance's ("Plaintiffs") notice of intent to sue" and that Kathy Phillips filed the notice letter "in her capacity as Coastkeeper and in her own individual capacity…." Based on ¶ 8 of the Complaint, "Assateague Coastkeeper" is not an organization but merely the title that Plaintiff Kathy Phillips uses in her capacity as an employee of Plaintiff Assateague Coastal Trust ("ACT").

The Notice is deficient as to ACT because the organization is not named or identified in the Notice. Because of this defect, the Notice is insufficient under EPA's notice regulations with regard to Plaintiff ACT. *Washington Trout v. McCain Foods, Inc.,* 45 F.3d 1351, 1354 (9th Cir. 1995) (failure to name two organizations failed to satisfy notice requirements).

The Notice is also deficient as to Ms. Phillips because it failed to include any contact information for her whatsoever, either individually or in her capacity as the "Assateague Coastkeeper." The failure to provide Ms. Phillips' address and phone number renders the Notice inadequate as to her. *Sierra Club v. City of Columbus*, 282 F. Supp. 2d 756, 776 (S.D. Ohio 2003) (holding that plaintiffs' failure to include a phone number was "reason enough to dismiss their Complaint for lack of jurisdiction").

## IV. Plaintiffs' Claims Should be Dismissed Pursuant to Rule 12(b)(1) Due to Their Lack of Standing

A plaintiff must have standing in order to invoke federal jurisdiction. *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975). Plaintiffs have failed to allege facts showing that

they satisfy the three constitutional elements of standing: injury, causation, and redressability. Plaintiffs have also failed to show that they meet the requirements for organizational standing. Consequently, this action must be dismissed pursuant to Rule 12(b)(1).

**A. Plaintiffs Fail to Allege Facts Showing Constitutional Standing.**

The United States Supreme Court has repeatedly held that there are three constitutional requirements for standing that must be established "at the outset of the litigation." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.* ("*Laidlaw*"), 528 U.S. 167, 180 (2000). A party must show that (1) it has suffered an "injury in fact," a harm that is concrete and actual, not conjectural or hypothetical; (2) the injury is fairly traceable to the defendant's actions, and (3) it is likely, and not merely speculative, that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife* ("*Lujan*"), 504 U.S. 555, 560-61 (1992); *see also Mirant Potomac River, LLC v. EPA,* 577 F.3d 223, 226 (4th Cir. 2009). To establish standing in a citizen suit under the CWA, a plaintiff must demonstrate the same three constitutional requirements: that it has suffered an injury in fact, caused by the defendant, that the court is capable of redressing. *Laidlaw*, 528 U.S. at 180-81.

Plaintiffs bear the burden of establishing these elements. *Lujan*, 504 U.S. at 561. At the pleading stage, plaintiffs must make at least "general *factual* allegations" to establish these elements. *South Carolina Wildlife Fed'n v. Limehouse*, 549 F.3d 324, 329 (4th Cir. 2008) (quoting *Lujan*, 504 U.S. at 561) (emphasis added). Plaintiffs have not met their burden because they have not alleged *any* facts showing they have suffered an injury fairly traceable to the Defendants that is redressable by the Court.

Plaintiffs Kathy Phillips and "Assateague Coastkeeper" make no claim at all alleging that they have standing; thus, they must be dismissed. *See* Complaint, ¶ 7 and 8.[15] In contrast, Plaintiffs ACT and Waterkeepers have attempted to claim standing but have not alleged any facts showing they meet the three part test outlined in *Lujan*.

**1. Plaintiffs Fail To Allege an Injury in Fact**

Plaintiffs, whether an organization or an individual, must demonstrate that an individual has suffered an "injury in fact." To meet the injury in fact requirement, the party must demonstrate an injury that is "concrete and particularized, and actual or imminent, as opposed to conjectural or hypothetical." *Long Term Care Partners, LLC v. United States*, 516 F.3d 225, 231 (4th Cir. 2008). The injury may not be mere speculation or conjecture, but must be based on facts. *Lujan*, 504 U.S. at 563.

> [T]he 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured.

*Id*. (citations omitted). The requirement precludes those with merely generalized grievances from bringing suit to vindicate an interest common to the entire public. Each plaintiff must allege, through facts, that each (or if an organization, one or more of its members) is "directly" affected. *Id.*; *see also City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983) (holding that a plaintiff must show he has suffered some "direct injury"). The "irreducible constitutional minimum" is that a plaintiff show that it "personally has suffered." *See Lujan* at 560; *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.,* 454 U.S. 464, 472 (1982) (internal quotations omitted). Plaintiffs have not done this.

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[15] In addition to lacking standing, the "Assateague Coastkeeper" is not a legal entity that has the capacity to bring suit under the CWA. *See* Part VI., *infra*.

Plaintiffs allege only that they have interests that have been "impacted" or "adversely affected" but they do not allege any facts describing any injury. The Complaint states at ¶ 9 that "ACT has approximately 700 members across the state of Maryland." It further states that members' "environmental, economic, health, aesthetic, and recreational interests … have been, are being, and will be adversely affected." *Id.* The Complaint avers that the members use waters and lands[16] "impacted" by defendants' alleged conduct, 'including waters downstream from defendants' discharges." *Id.* The Complaint states that Defendants' discharges flow into drains and ditches that flow into the Pocomoke River and ultimately the Chesapeake Bay. It lists various ways that nameless individuals use "these areas," including living within the watershed, earning a living on the waters, recreating on the waters, enjoying wildlife in the watershed, and having an "aesthetic and health interest" in the waters allegedly impacted. *Id.*

Despite this list of "interests," which is unsupported by any facts whatsoever, including the areas used, Plaintiffs have completely failed to allege any harm or injury to those interests. Plaintiffs merely state that they have been "adversely affected." *Id.* at ¶ 10. This is equivalent to complaining that they have been "injured." These are legal conclusions. Without facts, these statements fail to allege an injury in fact.

Plaintiffs' statements do not contain any facts with which the Court can determine whether an injury has or will occur. The Plaintiffs must state how they have been injured. They must make some factual allegation about how the Defendants' conduct adversely affects their interest or how their use of the waters has been adversely affected. They must also make some allegation about where they have been injured in order for the

[16] To the extent that Plaintiffs allege injuries related to land use, this is not an injury the CWA can address.

Court to be able to conduct an analysis of remaining standing elements: that the injury is traceable to Defendants' conduct and is redressable.

In *Pollack v. DOJ* ("*Pollack*"), 577 F.3d 736 (7th Cir. 2009), *cert. denied*, No. 09-836, __ U.S. __ (March 22, 2010), the Seventh Circuit Court of Appeals held that allegations that bird watching at Lake Michigan would be adversely affected by certain pollution in the Lake were "too generalized to give rise to standing." *Id*. at 743. In the matter at hand, this Court cannot analyze traceability to Defendants nor redressability because the Plaintiffs have not averred a single fact describing their alleged injury. Consequently, the case must be dismissed. *See LaFleur v. Whitman*, 300 F.3d 256, 269 (2d Cir. 2002) (dismissing petitioner in Clean Air Act citizen suit because it did not allege any facts establishing injury in fact); *Sierra Club v. SCM Corp.*, 747 F.2d 99, 107 (2d Cir. 1984) (affirming district court dismissal where plaintiffs failed to provide a "concrete indication" of how plaintiffs were affected by pollution).

The Complaint also fails to establish standing by failing to identify the specific waters the Plaintiffs allegedly use that are impacted by the alleged conduct, resulting in an injury. In *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871 (1990), the Supreme Court upheld a district court determination that plaintiffs failed to allege an injury in fact where they only alleged that they used "unspecified portions of an immense tract of territory" on some portions of which they alleged injurious conduct occurred. *Nat'l Wildlife Fed'n* at 889; *see also Summers v. Earth Island Institute*, 555 U.S. ____, 129 S. Ct. 1142, 1150-51 (2009) (holding that because plaintiffs failed to identify any particular area of National Forest they used, they lacked standing to challenge certain National Forest regulations).

In *Pollack*, the Seventh Circuit made a similar finding. In considering a motion to dismiss for lack of standing, the court held that a plaintiff's allegations that he enjoyed watching birds in the "Great Lakes watershed" and enjoyed visiting public parks "along the Illinois portion of Lake Michigan" were insufficient to establish an interest capable of injury resulting from contamination of a particular portion of Lake Michigan. *Pollack*, 577 F.3d at 742-43. The court noted that the section of Lake Michigan bordering Illinois stretches for approximately 70 miles and the plaintiff never specified where along the shoreline he visited. *Id*. at 743. The court wrote that *Nat'l Wildlife Fed'n*:

> makes clear that when a vast environmental area is involved and the pollution affects one discrete area while a plaintiff intends to visit a different discrete area, that plaintiff does not have standing.

*Id*. at 742. The court noted that both *Nat'l Wildlife Fed'n* and *Summers*, "demonstrate that a plaintiff must show that he has actual aesthetic interest in the area affected by the pollution." *Id*.

Here, the Plaintiffs not only fail to allege that they use any specific area where Defendants could cause them injury, they have also failed to identify any area where Defendants' alleged conduct could have caused *anyone* any injury. The Pocomoke River is approximately 73 miles long, and the Chesapeake Bay, the largest estuary in the United States, covers thousands of square miles. The Chesapeake Bay watershed encompasses parts of six states. In failing to identify with any specificity the area of waters or land they use, the Plaintiffs make it impossible for the Court to determine whether it has jurisdiction to hear this case because the Court cannot ascertain whether Plaintiffs have stated a cognizable injury caused by the Defendants that may be redressed by the Court.

### 2. Plaintiffs Do Not Adequately Allege that Perdue Caused Their Unidentified Injury

To meet their burden, Plaintiffs must aver facts showing that the injury is "fairly traceable to the challenged action of the defendant." *Laidlaw*, 528 U.S. at 180. If the line of causation is too attenuated, standing does not lie. *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 155 (4th Cir. 2000).

The failure to identify any injury makes it impossible for this Court to determine if this unidentified injury is fairly traceable to Perdue's conduct. Plaintiffs have simply made no statement indicating how Perdue's conduct has harmed their use of the allegedly affected waters.

### 3. The Failure To Allege an Injury Prevents the Court from Determining Whether It Can Redress the Injury

Plaintiffs must also demonstrate redressability, "a substantial likelihood that the requested relief will remedy the alleged injury in fact." *Vermont Agency of Natural Resources v. United States*, 529 U.S. 765, 771 (2000) (internal quotations omitted). Redressability requires that it be "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Laidlaw*, 528 U.S. at 181. The Court is unable to make this determination because it is impossible to determine whether the relief requested by Plaintiffs will remedy an unknown injury.

In *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998), the United States Supreme Court held that an environmental group failed to satisfy the redressability requirement for standing in a citizen suit against a company for failure to file reports required by the Emergency Planning and Community Right-to-Know Act ("EPCRA").

The plaintiff in *Steel Co.* claimed that he was injured by being deprived of the information required in the EPCRA reports. *Id*. at 105. The Court held that the plaintiff's request for declaratory judgment that the defendants had violated the law was "worthless" where there was no dispute about the failure to file the reports, but they had subsequently been filed. *Id.* at 106. The Court also held that payment of civil penalties, which are paid to the United States Treasury, not to individual plaintiffs, would not redress the plaintiff's alleged injury of not having access to the information required in the EPCRA reports. *Id*. at 106-07. *See also San Francisco Baykeeper, Inc. v. Moore*, 180 F. Supp. 2d 1116 (E.D. Cal. 2001) (holding that plaintiffs had not demonstrated redressability where conduct complained of had ceased and defendant had applied for, though not yet received, a NPDES permit).

Because the Court cannot determine whether it has the power to redress an unidentified injury, the Plaintiffs have failed to establish standing.

### B. Plaintiffs Have Not Alleged Facts Establishing Organizational Standing

An organization has standing to sue on behalf of its members only if (1) one of its members would have standing to sue in his or her own right, (2) the interests at stake are germane to the organization's purpose, and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Laidlaw,* 528 U.S. at 181. Plaintiffs bear the burden of demonstrating that they have organizational standing. *Id*. at 180. Plaintiffs in this case have not met that burden. Thus, even if Plaintiffs established the three constitutional elements for standing: injury, causation, and redressability, they still do not have standing to bring this action.

Neither ACT nor the Waterkeepers have identified a member who has standing, nor have they indicated why the participation of their individual members is not required. In addition, although they have made statements alleging that the interests at stake in this matter are germane to their organizational purposes, ACT's statement is at odds with its public declaration of its organizational purpose as declared on its website.

**1. ACT Does Not Have Standing**

ACT identifies no individual member upon whom its standing relies. Failure to do so is fatal to the Complaint. *See Arbor Hill Concerned Citizens Neighborhood Ass'n v. City of Albany*, 250 F. Supp. 2d 48, 57 (N.D.N.Y. 2003) (holding that because "not one of plaintiff's member's names is ever explicitly mentioned in the complaint," the matter must be dismissed, "even at the liberal pleading stage"). This is a separate failure that independently requires dismissal of this case for lack of standing, but it is related to the more basic failure to identify a cognizable injury. Because no individual is identified, the individual standing analysis cannot be conducted. *Id*. at 56. Although general *factual* allegations of injury may suffice, "they must be general factual allegations of injury to someone, not just in general, and not just in the purely hypothetical or speculative sense." *Id*. at 57. Otherwise, it is impossible for the Court to even conduct a standing analysis.

In addition, this action is not even relevant to ACT's organizational purpose. ACT makes an allegation regarding its organizational purpose in an effort to meet the second prong of organizational standing, but the statement is contrary to its publicly professed purpose on its website. ACT's website states that:

> Assateague Coastal Trust works to protect and enhance the natural resources of the Atlantic coastal bays watershed through advocacy, conservation, and education.[17]

[17] http://www.actforbays.org/pages/about.php (last visited on March 27, 2010). Attached as Exhibit J.

The Complaint, inconsistently, alleges that its organizational purpose is as follows:

> An environmental non-profit organization working to protect and enhance the natural resources of Worcester County.

ACT provides no explanation for this change in purpose. An organization cannot achieve standing by conveniently changing its stated purpose only in its Complaint. Because the Complaint alleges discharges of pollutants to the Pocomoke River and the Chesapeake Bay and not to any area of the Atlantic coastal bay watershed, ACT cannot establish that its organizational purposes are germane to this matter.

**2. Waterkeepers Does Not Have Standing**

Waterkeepers utterly fail to make any statement whatsoever that any of its members have suffered any injury. Although this is enough to dismiss its claim, it is also important to note that it failed to identify any member who has an interest in this matter and it has made no statement as to why the individual participation of a member is not required.

Because the organizational plaintiffs have not established their standing to bring this action, the Complaint must be dismissed.

**V. The Complaint Should be Dismissed Pursuant to Rule 12(b)(6) Because Plaintiffs have Failed to Plead Sufficient Facts to State a Claim under the Clean Water Act.**

The basic elements of claim under the Clean Water Act are: 1) an unauthorized discharge, 2) of a pollutant, 3) from a point source, 4) to the waters of the United States. *See Stephens v Koch Foods, LLC,* 667 F.Supp. 2d 768, 779-80 (E.D. Tenn. 2009). Plaintiffs have alleged that the Defendants own or operate a CAFO, a point source, from which unauthorized discharges of pollutants to the waters of the United States occurred.

*See e.g*. Complaint, ¶ 31. However, Plaintiffs say little more than that, providing only conclusory assertions of the elements of their claim, without providing factual details. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice," and allegations in a complaint which are "no more than conclusions are not entitled to the assumption of truth." *Ashcroft v. Iqbal*, 566 U.S. __, 129 S. Ct. 1937, 1949-50 (2009). To the contrary, Rule 8 "requires a 'showing,' rather than a blanket assertion, of entitlement to relief." *Twombly*, 550 U.S. at 555 n.3.

The defects in Plaintiffs' claim are several. First, because Plaintiffs are undoubtedly aware that the stockpile about which they gave notice on December 17, 2009, was in fact biosolids and not the poultry manure specified in their Notice, the Complaint fails to allege at all that the substance actually discharged from the CAFO is poultry manure. Instead, Plaintiffs allege that "solid waste, biological materials, and agricultural waste, including fecal coliform, E. coli bacteria, nitrogen, phosphorus, ammonia, and nitrates" were discharged. Complaint, ¶¶ 55, 60.

If the only activity conducted at the Hudson Farm was a poultry CAFO, this vagueness in pleading might be more easily overlooked. However, as the Hudsons' Application for coverage under the General Permit demonstrates, the Hudsons engage in cattle and sheep production and the cultivation of crops, which are wholly separate from the poultry operation and obvious sources of the same types of pollutants about which Plaintiffs complain. Exhibit A. *See, e.g., Bufford v. Williams,* 42 Fed. Appx. 279, 284 (10th Cir. 2002) (finding that because elevated levels of fecal coliform exist in both human and cattle waste, water samples taken downstream of defendant's wastewater treatment facility on land where plaintiffs raised cattle "reveal nothing about the potential

source of the pollutants, and therefore do not constitute evidence of a point source discharge" of pollutants from the wastewater treatment plant.) These sources have no connection to Perdue, a poultry integrator.

The Hudsons' cattle and sheep operation generates more than twice as much manure as the poultry operation, and the cattle and sheep waste, unlike poultry waste, is not collected for use in cultivation or stored in a manure barn. Exhibit A. Instead, the Farm's NMP describes an operation where waste from cattle and sheep lies "uncollected on pasture" where it is "spread by animal movement" and from where it could be discharged to field ditches as federally unregulated *nonpoint* sources of agricultural pollution. Because Plaintiffs failed to allege a discharge of poultry manure from the Hudson farm, the Complaint does not sufficiently allege a discharge from a regulated *point* source.

Plaintiffs' claim is also insufficient because it does not allege dates on which actual discharges occurred. Instead, Plaintiffs claim to have documented the presence of pollutants in a drainage ditch downstream of the Hudson Farm on 8 occasions. Complaint, ¶¶ 33-36. Alleging that one has found pollutants in a drainage ditch on a given date is *not* the equivalent of alleging a *discharge* from a point source on a specific date. The mere presence of common agricultural pollutants in a ditch does not state a claim that those pollutants originate from a regulated point source rather than unregulated nonpoint sources that are also in close proximity to the sampling point.

**VI. Plaintiff "Assateague Coastkeeper" Must Be Dismissed Pursuant to Rule 17(b)(3) Because It Has No Legal Existence and thus Lacks Capacity to Sue.**

The "Assateague Coastkeeper" lacks capacity to bring this suit because it is apparently a job title but not a legal entity. *Barker v. District Court In and For Larimer County*, 609 P.2d 628, 630 (Colo. 1980) (holding that actions may be brought only by legal entities). The "Assateague Coastkeeper" has no legal existence, has not identified itself as a legal entity in the Complaint, and thus may not be a party to this suit. Rule 17(b)(3) states that the capacity to sue of parties that are not individuals or corporations is determined by the state where the court is located. Maryland law provides that "applicable substantive law governs the capacity to sue or be sued." Md. Rule 2-202. The CWA provides that a "citizen" may bring suit under § 1365. Citizen is defined as "a person or persons having an interest which is or may be adversely affected." 33 U.S.C. § 1365(g). "Person" is defined under the CWA as "an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body." The "Assateague Coastkeeper" is not a "person" under the CWA and thus is not a "citizen" with the capacity to bring suit.

Because the "Assateague Coastkeeper" has no legal existence and lacks capacity to sue, it must be dismissed from this action. Consequently, ¶¶ 33, 34 and 35, constituting allegations about the activities of this legally fictive entity, must be stricken as immaterial pursuant to Rule 12(f).

## CONCLUSION

In light of the foregoing, the Complaint should be dismissed.

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