IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

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

PERDUE FARMS INCORPORATED'S REPLY TO
PLAINTIFFS' OPPOSITION TO MOTIONS TO DISMISS

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> Defendant ***Perdue*** Farms, Inc. ***is an 'integrator'*** who, upon information and belief, ***maintains a contract*** with Alan and Kristin Hudson Farm under which Hudson Farm raises poultry on behalf of, and for the benefit of, Perdue Farms, Inc.
>
> …
>
> Our investigation revealed that ***Hudson Farm stockpiles uncovered poultry manure next to a drainage ditch in its production area. This 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, which in turn flows to the Pocomoke River, a navigable water of the United States. The Pocomoke, in turn, empties into the Chesapeake Bay. Both the Pocomoke River and the Chesapeake Bay are listed as nutrient impaired waters under the CWA. Photographs further reveal that ***discrete conveyances in the form of trenches exist from the manure stockpile to the field ditch to facilitate this run off.*** Results from downstream water sampling taken on October 30th, November 11th, 12th, 16th and December 9th, 2009 show high levels of pollutants including, fecal coliform, E. coli, phosphorus, nitrogen, arsenic and ammonia. ***Upon information and belief, the direct source of these elevated levels of pollutants is the uncovered manure pile located on Defendant's farm.***

December 17, 2009 Notice Letter ("Notice Letter") from some, but not all, Plaintiffs. Ex. D to Perdue Farms Incorporated's Motion to Dismiss at 2-3 (emphasis added).

INTRODUCTION

Given the belittling and patronizing tone directed at Defendant Perdue Farms Incorporated ("Perdue") and its counsel that permeates the Plaintiffs' opposition—Perdue and its

counsel are never merely wrong, but are rather disingenuous, unable to grasp legal concepts, don't understand the law, and make arguments that are nothing less than absurd—it would be easy to confuse this lawsuit with a crusade or morality play. Demonizing Perdue and its counsel may well help the Plaintiffs achieve a public relations victory, but it will not make up for the lack of merit in the lawsuit that they have filed.

While the Plaintiffs' irrelevant digressions into factual assertions concerning the condition of the Chesapeake Bay take up a lot of space (*see* Plaintiffs' Opposition to Defendants' Motions to Dismiss ("Opp.") at 5-7), they have nothing to do with the issues that Perdue raised in its Motion to Dismiss: namely, can Plaintiffs hold Perdue liable for a Clean Water Act violation based solely on Perdue's status as an integrator? Is the Notice Letter served by the Plaintiffs deficient in light of the Complaint that they filed? And, do Plaintiffs state a claim by alleging that water "downstream" from the Hudson Farm is polluted—without alleging any facts linking the Hudson Farm (let alone the poultry-growing operations at the Hudson Farm) to the pollution?

Plaintiffs' Notice Letter and their Complaint both say nothing about Perdue's asserted control over the Hudsons, other than alleging that Perdue has a contract with the Hudsons whereby the Hudsons grow chickens on Perdue's behalf. Perdue does not deny the fact that it has a contractual relationship with the Hudsons (in fact, Perdue attached the contract as Ex. B to its Motion to Dismiss), a relationship that is indistinguishable from any other relationship between an integrator and a contract grower. Much as they would like to do so, Plaintiffs cannot overcome that the mere fact of that relationship is not enough to make Perdue a defendant under the Clean Water Act ("CWA"). Both the United States Environmental Protection Agency ("EPA") and the Maryland Department of the Environment ("MDE") have considered and rejected requiring integrators to obtain discharge permits under the CWA for the Concentrated

Animal Feeding Operations ("CAFOs") of their growers. Inherent in that decision is the determination by the two regulatory agencies with expertise and the power to regulate in this area, that the mere status of integrator cannot be the basis for CWA liability. Accordingly, integrators *qua* integrators, are not proper defendants under the CWA. Plaintiffs argue that they are entitled to discovery so that they can prove that Perdue so controls the operation of the Hudson Farm poultry CAFO that they are liable for any claims based on those operations. Plaintiffs ask this Court to subject Perdue and every other poultry integrator to discovery for the alleged misdeeds of every one of the contract farms in Maryland, without alleging any facts to suggest that the integrator is a potentially liable party, in the hope that discovery will turn up something that will keep the deep pocket integrator in the case. The law does not allow such a fishing expedition, even on the Eastern Shore. *See* I.A., below.

The law also requires that Plaintiffs provide Defendants with adequate notice of their claims; Plaintiffs have failed to do so. Despite Plaintiffs' efforts to ignore the language that they decided to put in their Notice Letter, and pretend that the Notice Letter complained about something other than what it complained about, the facts are straightforward and uncontestable. The Notice Letter alleged, in language chosen by the Plaintiffs, that there was a "longstanding" pile of "uncovered poultry manure next to a drainage ditch." Ex. D to Perdue's Motion to Dismiss at 2. The discharge of pollutants "associated with poultry waste" from the pile was the problem identified in the Notice Letter, and the pile was the problem that was fixed, through the efforts of the MDE and the Hudsons. *Id*. at 2; *see* Ex. C and E to Perdue's Motion to Dismiss. The language employed by the Plaintiffs brooks no other interpretation: "***Upon information and belief***, the direct source of these elevated levels of pollutants is the uncovered manure [sic] pile located on Defendant's farm." Ex. D to Perdue's Motion to Dismiss at 3 (emphasis added).

Despite basing their Notice Letter allegations on information and belief, what has become clear, in the face of the unassailable evidence that the stockpile was not poultry manure, is that Plaintiffs' beliefs do not change no matter what information they have. According to MDE, Ocean City officials and records and the Hudsons, the pile was Ocean City biosolids stored in an open field, and not poultry manure. Ex. C to Perdue's Motion to Dismiss at 1. That fact is proven by incontrovertible evidence properly considered by this Court on a 12(b)(1) motion, and attached to Perdue's Motion to Dismiss. That Plaintiffs continue to insist that the pile was poultry manure in the face of this unassailable evidence, smacks of desperation to continue on a determined path for a test case, regardless of whether there are any facts to support the outcome Plaintiffs seek.

In any event, even if Plaintiffs had asserted facts sufficient to hold Perdue liable under a "control" theory for the alleged misdeeds of the Hudson Farm poultry CAFO, the only thing that ties Perdue in any way to the violation identified in the Notice Letter is the allegation (now disproven) that the stockpile consisted of poultry manure. Because the stockpile consisted of Ocean City biosolids, which had nothing to do with the poultry growing operation on the Hudson Farm, but everything to do with non-chicken and therefore non-Perdue activities, the Notice Letter is deficient with regard to Perdue for the complaint that was actually filed, which now abandons the "poultry manure" pile as the source of the problem.[1] Moreover, Plaintiffs' Notice Letter is additionally deficient because it fails to sufficiently identify several of the Plaintiffs and because it fails to specify the dates of the alleged CWA violations. *See* I.B., below.

Finally, Plaintiffs base their whole case on the alleged fact that their sampling of water at some unspecified location somewhere downstream of the Hudson Farm revealed pollutants in the

[1] Plaintiffs cannot dispute that the Hudson Farm and the Hudson Farm CAFO are not the same—the latter is only a part of the former, which includes numerous agricultural operations unrelated to poultry production. *See* Perdue's Memorandum in Support of Motion to Dismiss at 34-35 and Ex. A to Perdue's Motion to Dismiss.

water that are "consistent with pollution likely to come from the Facility." Opp. at 23. That allegation is insufficient as a matter of law. If Plaintiffs' pleading were all it took to state a claim, anyone could test the water at Baltimore's Inner Harbor, find pollution, and with no other basis in fact, file a lawsuit against any farm in the Greenspring Valley, simply because it is upstream from the Inner Harbor on the Jones Falls, and then proceed to discovery with the hope that something would turn up linking that farm to the pollution in the Harbor. *See* II., below.

I. THIS COURT LACKS SUBJECT MATTER JURISDICTION OVER PERDUE.

Plaintiffs accuse Perdue of impermissibly injecting facts into the record, which they claim transforms Perdue's Motion to Dismiss into a Motion for Summary Judgment that requires discovery. Opp. at 3-4. Perdue carefully noted, and Plaintiffs simply disregard, that there is a fundamental difference between Motions to Dismiss brought under Rule 12(b)(1) and those brought pursuant to Rule 12(b)(6). (Perdue's Memorandum in Support of Motion to Dismiss ("Perdue's Memo.") at 3 n. 2). While Rule 12(b)(6) Motions to Dismiss for failure to state a claim permit a court to examine only the complaint, documents referenced in the complaint, and facts about which the court can take judicial notice, no such limitations hamper the court's inquiry under Rule 12(b)(1). *Capel v. Countrywide Home Loans, Inc.,* Nos. WDQ-09-2374, WDQ-09-2439, 2010 WL 457534, at *1 n. 5 (D. Md. Feb. 3, 2010) (Quarles, J).

In deciding Perdue's Motion to Dismiss under Rule 12(b)(1), which posits that Plaintiffs have not established that the Court has subject matter jurisdiction because (1) the Plaintiffs have not established that Perdue is a proper defendant; and (2) Plaintiffs did not give proper notice of their claims, the Court may consider any and all relevant evidence and, where necessary, make factual determinations based on that evidence.[2] *See* Wright & Miller, Federal Practice and

[2] It is particularly ironic that Plaintiffs should argue differently, given that they have submitted materials outside the pleadings (*i.e.*, affidavits) to justify this Court's exercise of jurisdiction.

Procedure: Civil 3d §1350 at 160 (2004) (citing cases "from the four corners of the federal judicial system involving the district court's broad discretion to consider relevant and competent evidence on a motion to dismiss for lack of subject matter jurisdiction to resolve factual issues"); *Lovern v. Edwards,* 190 F.3d 648, 654 (4th Cir. 1999) ("the absence of jurisdiction … may be based on the court's review of the evidence"). Plaintiffs are simply wrong when they say (repeatedly) that the Court must accept as true all of their factual allegations on the issue of jurisdiction. *See* Wright & Miller, Federal Practice and Procedure: Civil 3d §1350 at 188, 198 (2004) ("once a factual attack is made on the federal court's subject matter jurisdiction, the district judge is not obliged to accept the plaintiff's allegations as true").

A. 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.

Perdue is not a proper defendant in this case when the only ***fact*** stated against Perdue is that it is a poultry integrator and that the Hudsons grow chickens on its behalf. Because Perdue is not a proper defendant, the Court does not have jurisdiction to hear the claims against Perdue and those claims should be dismissed pursuant to Federal Rule 12(b)(1).

EPA abandoned an effort to require integrators to obtain permits for their grower's CAFO operations. *See* 66 Fed. Reg. 2960 (Jan. 12, 2001) and 68 Fed. Reg. 7176 (Feb. 12, 2003) (the former proposing co-permitting and the latter declining to adopt it).[3] MDE, standing in the shoes of the EPA, also declined to require that integrators obtain CWA permits for the CAFO operations of their contract growers. (Perdue's Memo. at 12-14.) MDE specifically examined the role of integrators and the CWA and stated: "The Clean Water Act does not identify integrators as needing permit coverage as they are not point sources." Ex. I to Perdue's Motion

[3] Curiously, Plaintiffs' Opposition twice refers this Court to, and relies upon, EPA's comments supporting integrator co-permitting in EPA's "Proposed CAFO Rule" without ever advising this Court that EPA rejected such co-permitting. Opp. at 14, 20.

to Dismiss at 3. That decision is entitled to deference. *Elm Grove Coal Company v. Director, Office of Workers' Compensation Programs*, 480 F.3d 278, 292-293 (4th Cir. 2007). Unless and until the rule is modified, Plaintiffs cannot sue Perdue simply because it is an integrator.

Plaintiffs have admitted that integrators do not need a CWA permit for their contract growers' operations. Opp. at 13. Accordingly, integrators are not responsible for their independent contractors' CWA discharges ***purely by virtue of their status***.[4] Plaintiffs do not like that rule, but they have opted not to challenge MDE's decision not to require integrators to be "co-permittees" with their growers. *See* Perdue's Memo. at 13. Despite their failure to challenge MDE directly, Plaintiffs sued Perdue, alleging only that it is liable because it is an integrator – a claim that the law does not allow.

Thus, Plaintiffs try to circumvent the EPA and MDE determinations by claiming that they are not suing Perdue because it is an integrator, but because it controls the Hudson Farm CAFO operations to such a degree that it is liable for alleged violations of the CWA associated with the Hudson Farm CAFO. Plaintiffs baldly assert, without any facts to support their assertion, that Perdue is a proper defendant in this case because "Perdue so supervises, dominates and controls the actions and activities of its respective poultry growers that the relationship is not one of independent contractor, but rather one of employer and employee or one of principal and agent." Complaint at ¶ 48.[5] Plaintiffs do not allege that Perdue treats the Hudson Farm CAFO any differently than is typical of integrators and contract growers. *See Wheeler v. Pilgrim's Pride*

[4] Perdue is not saying that an integrator can ***never*** be liable under the CWA for pollutants that emanate from the CAFOs where their chickens are grown; only that the mere fact of integrator status is insufficient.

[5] Without regard for consistency, and ignoring their failure to allege any factual support for these conclusory allegations in their Complaint, Plaintiffs at various points assert that they have properly sued Perdue because Perdue controls the Hudsons, that Perdue is the Hudsons' employer, that Perdue is the principal and the Hudsons its agents, and that Perdue is an operator of the poultry CAFO at the Hudson Farm. *See* Opp. at 15-21. In other words, Plaintiffs claim that Perdue could be liable independently, because it exercises control over or operates the poultry CAFO, or vicariously, because of the alleged liability of its employees or agents, the Hudsons. In any case, the issue is whether Plaintiffs have adequately alleged that Perdue exercises a sufficient degree of control over the operations at the Hudson Farm that allegedly resulted in discharges in violation of the CWA.

Corp. and Tyson Foods, Inc., 246 F.R.D. 532, 536 (E.D. Tex. 2007) ("The typical contract between an integrator and a grower provides that the integrator will provide chicks, feed, medicine, and other supplies to the growers.") Unless Plaintiffs can allege facts showing that Perdue exercises more control over the operation of the Hudson Farm than other integrators do over their contract growers, all they are alleging is that Perdue should be liable simply by virtue of being an integrator, a position that EPA and MDE declined to adopt. Accordingly, they cannot sue Perdue under the CWA.

In *Bender v. Suburban Hospital, Inc.*, 159 F.3d 186, 190 (4th Cir. 1998), a Title VII case, the Fourth Circuit addressed the issue of whether the plaintiff, a doctor, had adequately pled that she was the employee of her patients. The court stated that "[a]lthough various factors are considered in determining whether an employment relationship exists, the critical question is 'the degree of control exercised by the hiring party' over 'the work and its instrumentalities and circumstances.'" *Id.* In other words, the Fourth Circuit faced the precise question here—did the plaintiff sufficiently allege the control necessary to state a cause of action. The plaintiff in that case, like those here, did not allege specific facts denoting control, but instead relied on the status of her relationships and conclusorily asserted that they were employment relationships. The court found that the typical doctor-patient relationship was not one of employer-employee, so that plaintiff's status was not enough to render her pleading sufficient. The court noted that "[o]f course, it is not impossible that [plaintiff's] relationship with her patients could differ from the customary doctor-patient relationship." *Id.* Concluding that "[n]othing in her complaint, however, indicates that it does or even hints that it does," the court affirmed dismissal of the complaint. *Id.*

Bender is highly instructive. Just as there is nothing inherent in the doctor-patient relationship that renders it an employment relationship, there is nothing inherent in the chicken

integrator-chicken grower relationship that renders it one of control by the integrator—the EPA and the MDE have decided as much by declining to adopt co-permitting under their CAFO regulatory schemes. Plaintiffs' reliance on the nature of the relationship between the Defendants, therefore, ("Perdue so supervises, dominates and controls the actions and activities ***of its respective poultry growers***"), without reference ("or even hints") that Perdue's relationship with the Hudson Farm is in some way different from the customary integrator-grower relationship, is simply not enough. *Cf. Knowledge Boost, LLC v. SLC California, LLC,* No. WDQ-09-0936, 2009 WL 3379269, at *5 n. 12 (D. Md. Oct. 16, 2009) (Quarles, J.) ("The complaint alleges that 'at all relevant times, Sylvan representatives acted within the scope of their employment with Sylvan and Sylvan is responsible for their acts, representations and omissions made in the scope of employment.' … These allegations are merely legal conclusions which the Court need not accept as true.").[6]

All of the cases that Plaintiffs cite on this issue are red herrings. Whether a chicken catcher can be considered an employee of an integrator for purposes of the Fair Labor Standards Act or the Maryland Wage and Hour Law is irrelevant. *See Heath v. Perdue Farms Inc.*, 87 F.Supp.2d 452 (D. Md. 2000), cited in Opp. at 17. Moreover, in *Heath*, unlike here, the regulators with expertise had not evaluated the relationship at issue and had not concluded that the typical relationship did not involve a level of control sufficient to impose integrator liability.

[6] Again, Perdue is not arguing that it or any other integrator could never exercise a degree of control that would make it liable in a given case; just that Plaintiffs have to allege that something about this operation is different and that Perdue exercises control over the Hudsons other than by virtue of the relationship between them. Plaintiff cannot sue Perdue about every farm for which Perdue is an integrator, hoping that discovery will reveal facts proving their case. They must already have—and allege—at least some basis in fact for asserting that Perdue "controls" the Hudson Farm poultry CAFO—which they have not done and cannot do.

Notably, the MDE did not see Perdue as having "control"—MDE asked the Hudsons, not Perdue, for permission to test the stockpile and then directed the Hudsons, not Perdue, to move the pile and fill in trenches associated with the pile. Plaintiffs are just plain wrong when they say that "Defendants" refused to allow sampling of the "manure" pile. Opp. at 32 n. 33. One defendant, Perdue, was never asked.

Whitehead v. Safway Steel Products, 304 Md. 67, 497 A.2d 803 (1985), *Mackall v. Zayre Corp.*, 293 Md. 221, 443 A.2d 98 (1982), and *Clemons v. E. & O. Bullock, Inc.*, 250 Md. 586, 24 A.2d 240 (1968) are similarly irrelevant because they did not involve CWA violations at all. *Tyson Foods, Inc. v. Stevens*, 783 So.2d 804 (Ala. 2000) and *Sierra Club, Inc. v. Tyson Foods, Inc.*, 299 F.Supp.2d 693 (W.D. Ky. 2003) are similarly inapposite; they may have involved "environmental violations" as Plaintiffs allege (Opp. at 17), but they were not CWA cases, nor did they involve holdings that were inconsistent with the regulatory agencies' interpretation of the underlying statute. As explained above, integrators who do not exercise control above and beyond the control exercised in the typical integrator-grower relationship are not properly sued ***under the CWA.***

United States v. Stranquist, 993 F.2d 395 (4th Cir. 1993) and *United States v. TGR Corp.*, 171 F.3d 762 (2d Cir. 1999), did not even raise the issue of control; there was no question in those cases that the defendant employed the person who actually carried out the activity that resulted in a CWA violation. Similarly, in *United States v. Avatar Holdings*, No. 93-281-CIV-FTM-21, 1995 WL 871260, at *1 (M.D. Fla. Nov. 22, 1995) the relationship between the defendants was not one of integrator-grower, about which the relevant authorities have spoken, but one of parent-subsidiary. The case holds only that a parent corporation that exercises control over its subsidiary's ***pollution-causing*** activities is itself a potentially liable party under the CWA. *United States v. Smithfield Foods, Inc.*, 965 F.Supp. 769 (E.D.Va. 1997) presented the same scenario in reverse; there, the court held that a subsidiary corporation that actively violated a CWA permit held by its parent company was potentially liable for the violation.

The remaining cases cited by Plaintiffs are equally unavailing. *United States v. Board of Trustees of Florida Keys Community College*, 531 F.Supp. 267 (S.D. Fla. 1981) (defendant liable under the CWA not because it controlled operator, but because it itself did the work that

constituted the CWA violation); *United States v. Sargent County Water Resource District*, 876 F.Supp. 1081 (D.N.D. 1992) (defendant not liable because it did not control the precise activity that created the alleged pollution, as opposed to some other aspect of the enterprise).[7]

In order to establish this Court's jurisdiction, Plaintiffs must "assert a substantial federal claim." *Lovern*, 190 F.3d at 654, citing *Hagans v. Lavine*, 415 U.S. 528, 536-537, 94 S.Ct. 1372, 1379-1380 (1974) ("Over the years, this Court has repeatedly held that the federal courts are without power to entertain claims otherwise within their jurisdiction if they are 'so attenuated and unsubstantial [sic] as to be absolutely devoid of merit, wholly insubstantial, obviously frivolous, plainly insubstantial, or no longer open to discussion'") (citations omitted); *North Carolina Association of County Commissioners v. Thompson*, No. 101CV0796, 2002 WL 1284387, at *2 (M.D.N.C. May 9, 2002) (stating "[t]he Court may not exercise jurisdiction over a meritless case because federal jurisdiction requires a party to assert a substantial federal claim … [I]n that regard, the Fourth Circuit has stated that, similar to a dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), a court may decline to exercise its jurisdiction where it finds insufficient allegations in the pleadings"); *Davis v. Pak*, 856 F.2d 648, 650 (4th Cir. 1988) (dismissing case pursuant to Rule 12(b)(1) because district court lacked jurisdiction to hear federal claim that was not "substantial"). Here, Plaintiffs have sued Perdue based solely on its status as an integrator, stating conclusorily that it exercised control over the Hudson Farm CAFO, but alleging no facts to support their assertion. Accordingly, Plaintiffs have sued an improper party, have filed an "insubstantial" federal claim, and this Court lacks jurisdiction over the claims against Perdue.[8]

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[7] Plaintiffs in this case do not identify activities that Perdue allegedly performs having to do with waste, as opposed to other aspects of poultry production.

[8] Plaintiffs' failure to allege any facts showing that Perdue exercised control over the Hudson Farm CAFO or that its relationship to the Hudsons was not the usual one produces two consequences. First, this Court lacks jurisdiction over the claims against Perdue because, when sued solely due to its status as an integrator, Perdue is not a proper

Footnote continued on next page

B. Plaintiffs' 60-Day Notice was Inadequate.

1. Plaintiffs Failed to Give Notice to Perdue of the Activities About Which the Suit was Brought.

The Plaintiffs' Notice Letter asserts their intention to sue because of "illegal operations/discharges at the Hudson Farm Concentrated Animal Feeding Operation ('CAFO')." Ex. D to Perdue's Motion to Dismiss at 1. Although Plaintiffs now claim that this sentence is broad enough to cover their vague Complaint, the only "illegal operations/discharges" referred to in the Notice letter were those directly linked to the "manure" stockpile. Specifically, Plaintiffs' Notice Letter states that the discharge of pollutants is "associated with ***poultry waste***" and that "the Hudson Farm" was stockpiling "uncovered ***poultry manure*** next to a drainage ditch in its production area." *Id*. at 1-2 (emphasis added).[9] This stockpiling of manure was the only source of pollutants identified by Plaintiffs. According to the Notice Letter, discharges from the pile were being conveyed to a drainage ditch through "discrete conveyances in the form of trenches [that] exist from the manure stockpile to [a] field ditch…." *Id*. at 2. The Notice Letter specifically refers to no other discharges and states "[up]on information and belief [that] the ***direct*** source of these elevated levels of pollutants is the uncovered manure pile located on Defendant's farm." *Id*. at 3 (emphasis added).

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defendant under the CWA. Second, Plaintiffs' conclusory assertions of "control" do not state a claim and should be dismissed pursuant to Rule 12(b)(6). Plaintiffs' assertions of control are nothing more than "labels and conclusions, and a formulaic recitation of the elements of a cause of action." *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 1965 (2007). Under the pleading standards recently articulated by the Supreme Court in *Twombly* and *Ashcroft v. Iqbal*, --- U.S. ----, ----, 129 S.Ct. 1937 (2009), this Court need not accept unsupported legal allegations, *Revene v. Charles County Comm'rs,* 882 F.2d 870, 873 (4th Cir. 1989), legal conclusions couched as factual allegations, *Papasan v. Allain,* 478 U.S. 265, 286, 106 S.Ct. 2932, 2944 (1986), or conclusory factual allegations devoid of any reference to actual events, *United Black Firefighters of Norfolk v. Hirst,* 604 F.2d 844, 847 (4th Cir.1979).

[9] In response to Perdue's Motion to Dismiss, Plaintiffs try to broaden the thrust of their Complaint, sometimes referring to Perdue's alleged liability for the acts of "the Facility," which Plaintiffs elsewhere define as "Perdue's Hudson Farm," without reference to the poultry CAFO. Opp. at 5. These imprecise references artfully allow Plaintiffs to avoid coming right out and saying that Perdue is liable for discharges that have nothing to do with chickens—something they cannot in good faith say. At any rate, Plaintiffs could not make such an allegation, both because the Complaint limits Perdue's alleged liability by stating that Perdue "is responsible for the poultry waste created by the Hudson Farm" (Complaint at ¶ 16), and because Plaintiffs' Notice Letter was directed at a "stockpile" of "poultry manure." Ex. D to Perdue's Motion to Dismiss at 2.

The Plaintiffs' use of the phrase "discrete conveyance" in their Notice Letter to describe the stockpile was not accidental. The phrase is lifted from the Clean Water Act's definition of "point source," which "means any discernible, confined and **discrete conveyance**, including but not limited to any pipe, **ditch**...." 33 U.S.C. §1362(14) (emphasis added); *see also Sierra Club v. Abston Construction Co., Inc.*, 620 F.2d 41, 45-46 (5th Cir. 1980) (defining trenches as point sources). Thus, despite the Plaintiffs' current claims to the contrary, their Notice Letter identified the runoff from stockpiled poultry manure as the "discharge… from a point source" about which they intended to bring suit. Ex. D to Perdue's Motion to Dismiss at 1.

Following receipt of the Notice Letter, the MDE inspected the Hudson Farm and determined—contrary to the allegations in Plaintiffs' Notice Letter—that the "manure" pile about which notice was given consisted of biosolids from the Ocean City Wastewater Treatment Plant. Ex. C and E to Perdue's Motion to Dismiss at 1. The Hudsons acknowledged this fact. Ex. C to Perdue's Motion to Dismiss at 1. MDE, not Perdue, then directed that the biosolids be relocated and covered and confirmed that no discharges of poultry manure were occurring. Ex. C and E to Perdue's Motion to Dismiss. Yet, notwithstanding that their prior understanding of the facts proved to be wrong, Plaintiffs filed suit on March 1, 2010.

The Complaint, unlike the Notice Letter, does not claim that the alleged discharges originate from stockpiled poultry manure. Rather, the Complaint abandons the claim identified in Plaintiffs' Notice Letter and instead refers generally to the discharge of "pollutants such as solid waste, biological materials, and agricultural waste…" from the Hudson Farm CAFO. Complaint at ¶¶ 55 and 60. The Complaint notes that these substances may contain specific pollutants such as "fecal coliform, E. coli bacteria, nitrogen, phosphorus, ammonia, and nitrates," (*Id.*), but does ***not*** allege that there has been a discharge of ***poultry*** manure and does not explain how any activity of Perdue's is alleged to have resulted in the discharge from the CAFO of

common agricultural pollutants, which Plaintiffs acknowledge are present in both human and animal wastes. *Compare* Complaint ¶¶ 19, 55 and 60. The failure to allege a link between these pollutants and Perdue's activities is particularly significant because other activities at the Hudson Farm, such as the use of biosolids and the raising of cattle and sheep, are obvious sources of these very same pollutants and Plaintiffs have not claimed (nor can they claim) that Perdue is responsible for those activities. *See* Ex. A and C to Perdue's Motion to Dismiss; *cf., Sierra Club, Inc.*, 299 F.Supp.2d at 717 (defendant not an operator under CERCLA or EPCRA unless it managed, directed or conducted operations specifically related to pollution).

The Plaintiffs were obligated to give notice of the activities about which they intended to sue, but did not. In numerous cases, courts have dismissed CWA claims for the notice deficiencies that exist here. For example, in *ONRC Action v. Columbia Plywood, Inc.*, 286 F.3d 1137 (9th Cir. 2002), Plaintiff ONRC's notice letter informed Columbia Plywood that ONRC intended to contest the validity of Columbia Plywood's water discharge permit and that the cure for the alleged violation would be for Columbia Plywood to obtain a new permit. However, "***in quite explicit language***, ONRC's notice put forward a particular theory on which the permit was invalid …." *Id.* at 1143 (emphasis added). ONRC ultimately sued Columbia Plywood on several bases, each of which challenged the validity of Columbia Plywood's permit. The 9th Circuit found ONRC's notice inadequate:

> Columbia Plywood was not required to speculate as to all possible attacks on its NPDES permit that might be added to a citizen suit when the 60-day notice letter so specifically identified only one attack ….

Id. at 1143. The Court reasoned further that ONRC's failure to specify its other theories of liability denied government authorities the opportunity to take appropriate action. *Id.* at 1144.

Similarly, in *Sierra Club Ohio Chapter v. City of Columbus*, 282 F.Supp.2d 756, 774 (S.D. Ohio 2003), the plaintiffs gave notice of violations of a municipal separate storm sewer

system permit that required defendant to "take all reasonable steps to reduce or prevent any discharge that is in violation of this permit." The court held that the notice letter "did not provide sufficient information for the recipients to determine the ***activity or omission*** alleged to constitute a violation" and "failed to set forth the particular date or dates and location or locations of any alleged discharge…." *Id*. (Emphasis added.) The court also considered whether appropriate notice was given for general allegations in the complaint pertaining to the defendants' alleged wrongdoing. The defendant, City of Columbus, argued that the notice letters failed to provide any notice whatsoever as to these general allegations and were required to be dismissed. The plaintiffs asserted that the City was put on notice of these general allegations by virtue of the "entire text and tenor of the notice letters, as well as specific statements contained therein, such as the statements indicating that certain individuals' use of Ohio rivers and streams had been 'impaired by the City's violations of its … NPDES permit[s] … and by discharges of raw sewage … directly and indirectly into those water bodies.'" *Id*. at 775. The court determined that:

> neither these purportedly specific statements, nor the general text of the notice letters provide the Defendants with sufficient information to determine the specific limitation(s) or standard(s) that they are alleged to have violated. Rather, the statements in the notice letter are fairly vague, and do not serve the intended purposes of providing sufficient information that would allow government agencies to evaluate fully and adequately the violations alleged, and thereby to determine their appropriate level of involvement, and allow the recipient the opportunity to cure the violations before suit is brought, thereby obviating the need for costly litigation. Furthermore, the letters failed to provide any information regarding the date or dates and location or locations of any alleged violation, as required by the regulation.

Id.[10]

[10] *See also Lone Rock Timber Co. v. United States Department Of Interior*, 842 F.Supp. 433, 440 (D. Or. 1994) (In the context of the similar 60-day notice requirement under the Endangered Species Act, the court ruled that "[t]he December 17 notice complained of the [Fish and Wildlife Service]'s failure to timely issue the biological opinions, and threatened to sue if the FWS didn't promptly release those opinions. The new claims challenge the opinions themselves, and the process by which those opinions were developed. These are separate claims wholly apart from the first group, and require a new notice of intent to sue. Accordingly, these claims should be dismissed without prejudice.")

In *Stephens v. Koch Foods, LLC*, 667 F.Supp.2d 768, 787-88 (E.D. Tenn. 2009), the plaintiffs gave notice of sewage overflows from a specific pump station on two specific dates but brought suit for twelve additional overflows that did not clearly occur at the same pump station and occurred on dates not provided in the notice letter. The court concluded that it lacked subject matter jurisdiction as to the additional claims.

Moreover, Plaintiffs are required to plead a continuing violation of the CWA, thus they must have given notice of a violation that persists. In other words, Plaintiffs do not have a lawsuit if the problem identified in their Notice Letter has been cured. As discussed in Ex. C and E to Perdue's moving papers, and acknowledged by Plaintiffs, the "manure pile" that they identified was relocated and covered and is no longer discharging. Opp. at 24 ("By the time MDE was allowed to sample on January 26, 2010, the pile had been moved."). The trenches surrounding the former pile have been filled in. Ex. C to Perdue's Motion to Dismiss at 1, 5. Any allegations in the Complaint about water samples showing elevated pollutant levels after the pile was moved are irrelevant and reinforce the inadequacy of the notice.

The notice requirement is not merely a formality. *Center for Biological Diversity v. Marina Point Development Co.*, 566 F.3d 794, 800 (9th Cir. 2009) ("the giving of a 60-day notice is not simply a desideratum."). Its purpose is to "allow[] Government agencies to take responsibility for enforcing environmental regulations, thus obviating the need for citizen suits," *Hallstrom v. Tillamook County*, 493 US. 20, 28, 110 S.Ct. 304, 310 (1989), and to provide potential defendants with sufficient information to allow them to remedy the alleged violation, *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 175, 120 S.Ct. 693, 701 (2000), *see also National Environmental Foundation v. ABC Rail Corp*., 926 F.2d 1096, 1097 (11th Cir. 1991) (Provision of adequate notice is a mandatory condition precedent to a CWA citizen suit). Without an adequate 60-day notice letter, a court lacks subject

matter jurisdiction over the lawsuit, requiring its dismissal. *Natural Resources Defense Council v. Southwest Marine, Inc.*, 236 F.3d 985, 995 (9th Cir. 2000), *cert. denied* 533 U.S. 902, 121 S.Ct. 2242 (1994).

The Plaintiffs in this case gave specific notice of one activity resulting in a discharge—the stockpiling of poultry manure. The Notice Letter described no activity other than this stockpiling. Just as the citizen suit provision of the CWA was designed, MDE and the Hudsons responded to the Notice Letter and remedied the problem identified. Because Plaintiffs now sue about something other than stockpiling, their notice is inadequate.[11]

2. The Notice Letter Fails to Sufficiently Identify Several of the Plaintiffs.

As described more fully in Perdue's Memorandum in Support of its Motion to Dismiss, notice was inadequate as to three of the four Plaintiffs in this action: ACT, Kathy Phillips, and Assateague Coastkeeper. Plaintiffs concede that notice was inadequate as to ACT because it was not named in the Notice Letter at all. Opp. at 39. Therefore, ACT should be dismissed.

Plaintiffs also concede that they failed to provide Kathy Phillips' address and phone number and further concede that "Assateague Coastkeepeer" is not an organization but merely a title for Kathy Phillips and assert that "she is free to use this title in litigation." Opp. at 38. Indeed, Ms. Phillips is free to go by whatever title she chooses, but she is not free to appear in this case as two separate plaintiffs, entitled to two sets of interrogatories, two 7-hour depositions and two examinations of each trial witness.

An individual doing business under a trade name must sue or be sued in his or her own name. *See Snowden v. CheckPoint Check Cashing,* 290 F.3d 631, 635 n. 2 (4th Cir. 2002) ("CheckPoint is merely a trade name for Elite. As such, Checkpoint is not a separate legal entity

[11] The only other claim about which Plaintiffs gave notice is that the Hudson Farm CAFO operated without an NPDES permit. Plaintiffs now concede that Perdue is not obligated to have such a permit. Opp. at 13.

capable of being sued.") "Assateague Coastkeper" is not even Ms. Phillips' trade name; it apparently is only her job title. An individual may sue under an assumed name in very limited circumstances, not present here. *See Doe v. Shady Grove Adventist Hospital,* 89 Md. App. 351, 598 A.2d 507 (1991) (AIDS patient allowed to use assumed name despite general rule to contrary). Plaintiffs cite no authority that would allow Ms. Phillips to sue as the Assateague Coastkeeper in this case, particularly when she seeks to sue in her own name as well. Indeed, the law in this district is to the contrary. In *Frison v. Ryan Homes*, No. AW-04-350, 2004 WL 3327904, at *3 (D. Md. Oct. 29, 2004), plaintiffs sued both NVR, Inc. and Ryan Homes. In holding that the plaintiffs' claims against Ryan Homes were "not proper and will not survive," the court wrote: "…Plaintiffs cannot maintain this cause of action against Ryan Homes, as the record indicates that Ryan Homes is not a separate legal entity but rather merely a trade name under which NVR does business. Trade names are not jural persons and cannot sue or be sued." Plaintiffs offer no explanation as to why Assateague Coastkeeper, a legal non-entity, is a proper plaintiff in this action and offer no rebuttal of Defendants' motion to dismiss this Plaintiff pursuant to Rule 17(b)(3).

Whether named individually or by her job title, proper notice was not given as to Ms. Phillips. This Court has previously held that failure to properly identify an individual plaintiff in a Notice Letter precludes that individual's participation in a citizen suit, even if the organization of which that individual is a member was properly named. *Community of Cambridge Environmental Health and Community Development Group v. City of Cambridge,* 115 F.Supp.2d 550, 558-559 (D. Md. 2000) (strictly applying *Hallstrom*, 493 U.S. at 26 and *Monongahela Power Co. v. Reilly*, 980 F.2d 272, 275 n. 2 (4th Cir. 1993), dismissing individual plaintiffs because of the absence of identifying information in the notice letter).

Plaintiffs encourage this Court to simply ignore their failure to provide the required identifying information, relying primarily on inapposite cases that hold that courts need not determine ***standing*** as to all plaintiffs where one plaintiff is demonstrated to have standing. Plaintiffs cite no cases that apply such an analysis where the issue is inadequate notice under citizen suit provisions. Opp. at 39. Moreover, the court in *Community of Cambridge Environmental Health* rejected such an approach. *Community of Cambridge Environmental Health and Community Development Group*, 115 F.Supp.2d. at 558-559 (individual plaintiffs not identified in notice dismissed, notwithstanding a finding that the remaining organizational plaintiffs had standing to sue).[12]

3. Plaintiffs Failed to Provide Adequate Notice of the Dates on Which the Alleged Violations Occurred.

The Notice Letter provides dates on which Plaintiffs allegedly ***sampled*** water in an undisclosed off-site location. Plaintiffs have not cited any case law that supports the proposition that allegations regarding mere sampling dates are sufficient substitutes for providing notice of the dates of alleged violation. Furthermore, the Plaintiffs' insistence that sampling data from an undisclosed location demonstrates a violation of the CWA is premised on the erroneous belief that the entire 300 acre Hudson Farm is regulated as a poultry CAFO. Plaintiffs ignore that substantial portions of the Hudsons' property are devoted to other agricultural activities, such as cattle and sheep production and the cultivation of crops without the use of poultry manure as fertilizer, that are ***unrelated*** to poultry production. *See* Ex. A to Perdue's Motion to Dismiss. These activities are potential sources of exactly the types of pollutants found in Plaintiffs' offsite water samples and runoff from these livestock and cultivation activities is not a discharge from a

[12] Perdue does not address the standing issues in this case that Plaintiffs try to cure by submitting affidavits to enhance their Complaint. On their face, Plaintiff's affidavits appear to cure their defective pleading regarding standing. Perdue reserves its rights to raise the issue after discovery, however, in the event that this motion to dismiss is not granted on other grounds.

federally regulated point source, much less a discharge with any connection whatsoever to Perdue. In addition, Plaintiffs' off-site water samples in an undisclosed location may easily contain pollutants from other properties, to which neither of the Defendants in this action have any connection.[13] Giving notice of the presence of pollutants in an undisclosed location, to which multiple pollution sources drain, is not the equivalent of giving notice of the dates on which violations actually occurred. In short, knowing when the Plaintiffs allegedly sampled water does not give the Defendants notice of when there was a discharge from the CAFO, let alone from the "manure" pile.

The Fourth Circuit has ruled that "[c]itizen suit notice requirements are 'mandatory conditions precedent to commencing suit' and may not be avoided by employing a 'flexible or pragmatic' construction." *Monongahela Power Co.,* 980 F.2d at 275 n. 2. The U.S. District Court for the District of Maryland has relied on *Monongahela* to strictly interpret the CWA's notice requirements. *Community of Cambridge Environmental Health and Community Development Group,* 115 F.Supp.2d at 558. Plaintiffs' notice was inadequate under these standards and their Complaint should be dismissed. [14]

II. THE COMPLAINT SHOULD BE DISMISSED PURSUANT TO RULE 12(b)(6) FOR FAILURE TO STATE A CLAIM.

The Complaint does not allege facts sufficient to prove that Perdue violated the Clean Water Act. Specifically, the Complaint fails to present any facts showing that a discharge from the Hudson Farm CAFO added a pollutant to navigable waters. "To establish a violation of the Act's NPDES requirements, a plaintiff must prove that defendants (1) discharged, i.e., added (2)

[13] Note that MDE took water samples on site and concluded that it could not determine a CWA violation had occurred because of the number of potential, unregulated sources. *See* Ex. E to Perdue's Motion to Dismiss.

[14] Plaintiffs rely primarily on *San Francisco Baykeeper, Inc. v. Tosco Corp*. as support for applying a more lenient standard with regard to notice of dates of violation. 309 F.3d 1153, 1155 (9th Cir. 2002). The *Baykeeper* case does not support a lenient interpretation of the Plaintiffs' notice obligations with regard to the stormwater discharge violations involved in this case. To the contrary, in *Baykeeper,* the plaintiffs gave notice of 190 specific dates on which rainfall was allegedly sufficient to cause a discharge. *Id.* at 1158.

a pollutant (3) to navigable waters (4) from (5) a point source." *Committee to Save Mokelumne River v. East Bay Mun. Util. Dist*., 13 F.3d 305, 308 (9th Cir. 1993), *cert. denied*, 513 U.S. 873, 115 S.Ct. 198 (1994) (citing *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 165 (D.C. Cir. 1982)); *see also West Virginia Highlands Conservancy, Inc. v. Huffman*, 651 F.Supp.2d 512, 518 (S.D. W.Va. 2009); *Reynolds v. Rick's Mushroom Service, Inc.*, 246 F.Supp.2d 449, 454 (E.D. Pa. 2003), *State of Georgia v. City of East Ridge, Tennessee*, 949 F.Supp. 1571, 1576 (N.D. Ga. 1996), *Sierra Club and Mineral Policy Center v. El Paso Gold Mines, Inc.*, No. 01PC2163, 2002 WL 33932715, at *7 (D. Colo. Nov. 15, 2002).

Here, Plaintiffs' Complaint fails to allege a discharge from the Hudson Farm CAFO. Plaintiffs allege only that they "sampled running water downstream of the Hudson farm," (Complaint at ¶¶ 33, 34, and 35), and that those samples showed elevated levels of certain pollutants. *Id.* They do not allege, however, where or how far downstream they took those samples or how the location sampled in any way relates to the Hudson Farm CAFO. As pled, Plaintiffs could have taken the samples miles downstream from the Hudson Farm CAFO, with any number of intervening sources of pollution between the Hudson Farm CAFO and the area sampled.

Only once in the Complaint do Plaintiffs allege something that is arguably more specific than just "downstream." Paragraph 32 states that the Hudson Farm "is surrounded by a series of ***drainage ditches that carry water from the farm to the surrounding waterways***." (Emphasis added.) Paragraph 33 alleges that "[o]n October 30, 2009, Plaintiff Coastkeeper[15] sampled running water in the drainage ditch downstream of the Hudson Farm."[16] In their Opposition

[15] "Coastkeeper" is a legal non-entity. This apparently refers to Ms. Phillips.

[16] Plaintiffs' Opposition continually (and erroneously) claims that their Notice Letter identified the point source at issue as the Hudson Farm CAFO, not a stockpile of manure. Ironically, the Complaint fails to identify ***any*** discharge from ***any*** point source at all, instead relying on sampling from an area downstream of the Hudson Farm, an area that includes multiple potential sources.

brief, Plaintiffs state that "[b]etween October and December 2009, Plaintiff Phillips sampled water ***in a ditch flowing from the Facility*** on five separate occasions." Opp. at 7 (emphasis added).[17] Notably, Plaintiffs cannot and do not allege that they took any samples that they can connect even remotely to the Hudson Farm CAFO any time ***after*** December, 2009, when the Hudsons filled in the trenches and moved the stockpile that Plaintiffs' Notice Letter identified as the source of pollution. Ex. C to Perdue's Motion to Dismiss at 7, 9. After December 2009, Plaintiffs can allege only that they took water samples somewhere (who knows where), "downstream of the Hudson Farm." Plaintiffs allege nothing at all linking those sample results to the Hudson Farm CAFO, let alone to any activity on the Hudson Farm involving poultry growing operations.[18]

As a matter of law, a plaintiff cannot plead a CWA violation by saying, in essence, a pollutant found at point X that is not tied exclusively to defendant Y is the type of pollutant that defendant Y would discharge; therefore, I have stated a claim against defendant Y and now get to take discovery that might allow me to find out whether defendant Y is actually discharging. Because Plaintiffs do not and cannot allege that they found pollution in water that is linked exclusively or even primarily with the Hudson Farm CAFO (other than being "downstream" from it), Plaintiffs fail to state a claim. *See Bufford v. Williams*, 42 Fed.Appx. 279, 283 (10th Cir. 2002) (unpublished) (to establish CWA violation, plaintiffs must do more than show a correlation between the pollutants that the defendant's facility would emit and the pollutants detected; plaintiff must have "evidence of a 'point source' discharge from the facility").

[17] Plaintiffs are not permitted to augment the allegations in their pleadings in this manner, but even with that added assertion, Plaintiffs do not state a claim.

[18] Plaintiffs tuck away in footnote 34, page 32 of their Opposition the damning admission that the MDE refused to institute a civil action against the Hudsons because of "an internal determination that they could not tie pollution in the ditches to the operations of this farm."

This Court must dismiss Plaintiffs' Complaint pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted because it does not plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 570, 127 S.Ct. 1955, 1974 (2007). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully. *Ashcroft v. Iqbal,* --- U.S. ----, ----, 129 S.Ct. 1937, 1949 (2009). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id.* (quoting *Twombly*, 550 U.S. at 557). Under *Iqbal*, a court considering a motion to dismiss may first identify allegations that are no more than conclusions, and therefore not entitled to the assumption of truth. *Id.* at 1950; *see Dittman v. DJO, LLC*, No. 08-CV-02791, 2009 WL 3246128, at *3 (D. Colo. Oct. 5, 2009) (dismissing claim under new 12(b)(6) pleading standards for alleging "no facts, only speculation" that the defendants ***possibly*** caused the harm alleged: "This mere possibility, *i.e.,* that the medicine used could have been made by these defendants, rather than by any number of other manufacturers of anesthesia drugs, is not adequate to state a claim under the prevailing standards as set forth by *Twombly* and *Iqbal*"*); see also Sadowski v. U.S. Postal Service*, 643 F.Supp.2d 749, 752 (D. Md. 2009) ("Under the plausibility standard, a complaint must contain 'more than labels and conclusions' or a 'formulaic recitation of the elements of a cause of action' in order to survive a motion to dismiss.") (citations omitted) (Bennett, J.).

CONCLUSION

The Complaint against Perdue should be dismissed because Plaintiffs have failed to establish that the Court has jurisdiction over Perdue. Plaintiffs have not alleged any facts that even hint that Perdue's relationship with the Hudson Farm is one in which Perdue exercises "control" over the operation of the poultry CAFO at the Hudson Farm for CWA purposes or is

anything other than a typical poultry integrator-poultry grower relationship. As a matter of law, a poultry integrator is not a proper defendant in a Clean Water Act case based on the grower's alleged actions, when the only "fact" linking the integrator to the alleged violation is the integrator's status as an integrator. Plaintiffs want discovery so that they can show that Perdue ***is*** a proper party in this case. But that is not the way it works in federal court. Plaintiffs first have to allege facts necessary to establish the Court's jurisdiction over Perdue; they have not and cannot do so.

Moreover, although they now want to backtrack, Plaintiffs noticed a claim against Perdue based on the presence of a "poultry manure stockpile" in what they claimed was the CAFO production area at the Hudson Farm. The noticed pile presents Plaintiffs with two problems.

First, that pile is the only thing that links Perdue to any alleged water pollution found downstream of the Hudson Farm. But the evidence from the MDE, the Ocean City Department of Public Works and the Hudsons is indisputable: the pile was biosolids, not poultry manure. Because the stockpile that was the subject of Plaintiffs' Notice Letter was ***not*** related to poultry, the Notice Letter was deficient as to Perdue and the Plaintiffs' claims against Perdue are "a monument to what ought not to be in a federal court." *Lovern*, 190 F.3d at 656 (dismissing claims that were "plainly insubstantial and entirely frivolous" pursuant to Rule 12(b)(1)).

Second, Plaintiffs' Complaint says nothing about a stockpile. The Notice Letter identified the problem as a chicken manure pile, yet Plaintiffs filed an inconsistent Complaint that says nothing about a pile and instead presents for the first time a series of vague allegations about water pollutants that may or may not be linked to the chicken-growing operations at the Hudson Farm.

Finally, Plaintiffs' Complaint suffers from a fatal pleading deficiency. Plaintiffs allege that they found pollution in water somewhere downstream from the Hudson Farm and, with no

other factual foundation, allege that the pollution they found came from the Hudson Farm. Plaintiffs' Complaint does not allege any basis at all for attributing the alleged water pollution to the Hudson Farm, much less Perdue. Because they fail to adequately plead a basic element of their claim—that the Hudson Farm ***discharged*** a pollutant—they fail to state a claim.

For the reasons set forth above and in Perdue's opening papers, Plaintiffs' claims against Perdue should be dismissed with prejudice.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of May, 2010, the foregoing Reply to Plaintiffs' Opposition to Motions to Dismiss was served on the following via ECF:

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