IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

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

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER FEDERAL AUTHORITIES

OTHER AUTHORITIES

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PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

Plaintiffs Assateague Coastkeeper, Kathy Phillips, Assateague Coastal Trust and Waterkeeper Alliance, by their undersigned counsel, hereby submit this Opposition to Defendants' Motions to Dismiss and request that the Court deny Defendants' Motions.

On March 1, 2010 Plaintiffs filed this action pursuant to the citizen suit provision, 33 U.S.C. § 1365 (2006), of the Federal Water Pollution Control Act (commonly known as the Clean Water Act and hereinafter referred to as "CWA"), 33 U.S.C. § 1251–1376 (2006), alleging significant violations of the CWA by the Defendants. In response, the Defendants filed Motions to Dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) arguing that this Court lacks subject matter jurisdiction and that the Complaint fails to state a claim upon which relief can be granted. Defendants also challenge the standing of the Plaintiffs to bring this action. To distract the Court from the Plaintiffs' well-pleaded allegations, Defendants' Motions to Dismiss make unsupported legal arguments, mischaracterize the clear allegations of the Complaint and rely on factual assertions that Plaintiffs contest and dispute and

that are not yet properly before the Court. For the reasons set forth in detail below, Defendants' Motions to Dismiss should be denied.

LEGAL STANDARD

As Defendants concede in their Motions to Dismiss, the burden Defendants must overcome to prevail on a Rule 12(b)(1) motion is high. *See* Perdue Br. at 9; Hudson Br. at 9. A 12(b)(1) motion can only be granted "if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law." *Evans v. B.F. Perkins Co.,* 166 F.3d 642, 647 (4th Cir. 1999) (*quoting Richmond, Fredericksburg & Potomac R. Co.v. United States*, 945 F.2d 765, 768 (4th Cir. 1991)). Although the burden of proof on jurisdiction is on Plaintiffs, for a motion under Rule 12(b)(1), a court must accept Plaintiffs' factual allegations as true and draw all reasonable inferences from those allegations in Plaintiffs' favor. *Khoury v. Meserve*, 268 F. Supp. 2d 600, 606 (D. Md. 2003). Plaintiffs' only burden is to properly plead their claims; they need not show the likelihood of prevailing.

The Defendants also have a high burden to overcome when considering a Rule 12(b)(6) motion to dismiss. The reviewing court is required to accept the plaintiff's factual allegations as true and construe those factual allegations in a light most favorable to the plaintiff. *See Tucker v. Chrysler Credit Corp.*, No. 97-1364, 1998 WL 276266, at *2 (4th Cir. May 29, 1998); *Estate Constr. Co. v. Miller & Smith Holding Co., Inc.*, 14 F.3d 213, 217–18 (4th Cir. 1994). Furthermore, the court must "disregard the contrary allegations of the opposing party." *Gillespie v. Dimension Health Corp.*, 369 F. Supp. 2d 636, 640 (D. Md. 2005).

The law requires that a motion to dismiss for failure to state a claim for relief should not be granted if the complaint is plausible on its face. *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S. Ct. 1937, 1949

(2009) (*citing Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Thus, Defendants must prove that Plaintiffs' Complaint does not allow the court "to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 1940. The law requires that, in order to maintain the motion as a motion to dismiss, the defendant must prove these elements without presenting evidence extrinsic to the plaintiff's complaint. Fed. R. Civ. P. 12(d).

A court hearing a motion to dismiss for failure to state a claim is limited to reviewing the complaint, any attachments to that complaint, and "documents referred to in the complaint and relied upon by plaintiff in bringing the action." *Provident Bank v. McCarthy*, 383 F. Supp. 2d 858, 860 (D. Md. 2005) (J. Quarles). The court can also review documents attached to the motion to dismiss that are "integral to and explicitly relied on in the complaint if the plaintiffs do not challenge [their] authenticity." *Luy v. Baltimore Police Dept*., 326 F. Supp. 2d 682, 688 (D. Md. 2004) (*citing Am. Chiropractic Ass'n v. Trigon Healthcare, Inc.*, 367 F.3d 212, 234 (4th Cir. 2004)). If the Defendants present and the Court accepts such extrinsic evidence, the motion to dismiss for failure to state a claim must be converted to a motion for summary judgment and the Plaintiffs must be given proper notice and reasonable opportunity for discovery. Fed. R. Civ. P. 12(d).

Unfortunately, rather than basing their arguments to support their Motions to Dismiss on the facts in the Complaint and attached Notice of Intent ("Notice Letter") viewed in the light most favorable to the Plaintiffs, Defendants ask this Court to consider extrinsic materials not appropriate for a motion to dismiss. A number of the documents and other materials cited by Defendants are not relied upon in the

Complaint, and are therefore outside the proper purview of this Court.[1] Furthermore, some of these documents are wholly within the control of the Defendants and Plaintiffs had no prior notice of their contents. Others represent handpicked documents from MDE's files carefully selected to illustrate one side of the facts in dispute.[2] Defendants' reliance on these materials is an attempt to do more than simply blur the line between the standards for a motion to dismiss on the pleadings under 12(b)(6) and a motion for summary judgment under Rule 56. As outlined above, this is inappropriate in the context of a motion to dismiss. Furthermore, as illustrated throughout this Response, this extrinsic evidence actually highlights that virtually every fact in this case is in dispute and that these disputes can only be resolved through discovery of all available evidence and a determination by the finder of fact.

After offering up a string of contested factual allegations and attempts to persuade the Court with extrinsic exhibits, Perdue then asks the Court to not consider these documents should it be inclined to convert its Motion into one for summary judgment. *See* Perdue Br. at 3–4 n.2. Defendants want to have their cake and eat it too; they want to have the Court look beyond Plaintiffs' allegations and consider only *their* side of the facts, while preventing Plaintiffs from conducting rightful discovery. The Court should properly exclude factual contentions that are not otherwise alleged in or referenced by the Complaint. *See Provident Bank*, 383 F. Supp. 2d at 860.[3]

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[1] Many of the materials put forward by Defendants are not "integral" or "explicitly relied on" by Plaintiffs in the Complaint. Therefore, these documents have no proper role in deciding this Motion. *See Luy v. Baltimore Police Dept*., 326 F. Supp. 2d 682, 688 (D. Md. 2004) (citing *Am. Chiropractic Ass'n v. Trigon Healthcare, Inc.*, 367 F.3d 212, 234 (4th Cir. 2004)).

[2] For example, Defendant Perdue's Exhibit C contains only eleven documents which are described as: "Inspection reports, reports of observations, and e-mail communications relating to the Hudson Farm, provided to me by the Maryland Department of the Environment in response to a Public Information Act request." Perdue Ex. 1. However, these eleven documents are but a small fraction of the complete MDE file on this matter and present an incomplete picture of MDE's actions. Furthermore, these documents raise more questions than they answer, thus illustrating the need for discovery in this case.

[3] Plaintiffs urge the Court to disregard extrinsic materials submitted by the Defendants. The following specific exhibits should be excluded from consideration of the Defendants' Motions to Dismiss: Defendant Hudson Farms Exhibits 1 and 3; Defendant Perdue's Exhibits B, C, E, F, H, I, and J. If the Court is inclined to convert Defendants' Motions to ones for

Faced with Defendants' legal and factual arguments, the Court has two options. The Court can properly treat this as a motion to dismiss on the pleadings, ignoring Defendants' factual contentions and extrinsic materials. Alternatively, the Court can take Defendants' factual arguments for what they are, arguments in support of a motion for summary judgment, and set forth a schedule that allows for full discovery by all parties to the case. Under either scenario, the Defendants' Motions to Dismiss should be denied.

FACTUAL BACKGROUND

In late October 2009, Plaintiff Kathy Phillips, the Assateague Coastkeeper, became aware of a potential discharge emanating from a Concentrated Animal Feeding Operation ("CAFO") located in Worcester County, Maryland. Plaintiffs discovered that the CAFO in question was the Alan and Kristin Hudson Farm (hereinafter "Hudson Farm"), located in Berlin, Maryland. The Hudson Farm raises poultry on behalf of, and for the benefit of Perdue Farms, Inc., (hereinafter "Perdue"). As is set forth in more detail in the Complaint, the birds at the Hudson Farm are owned by Perdue throughout the growing process and Perdue formulates, provides, and owns the feed that is fed to its birds during the growing process.

Perdue's Hudson Farm, (hereinafter referred to as ("Facility"), including its poultry sheds and production area, are surrounded by a series of drainage ditches that carry water from the Facility to the surrounding waterways and ultimately into the Franklin Branch, which flows into the Pocomoke River. The Pocomoke River is a tributary of the Chesapeake Bay, North America's largest and most

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summary judgment, Plaintiffs request that the Court provide Plaintiffs with an opportunity for full disclosure and supplemental briefing.

biologically diverse estuary. Despite intense efforts to preserve, protect and restore the Bay, the country is at risk of losing what is acknowledged to be a "national treasure".[4] Agriculture is a significant source of pollution in the Chesapeake Bay watershed. Agricultural fertilizers, livestock waste, and topsoil contribute 39 percent of the Bay's nitrogen, 45 percent of the Bay's phosphorus, and 60 percent of the Bay's sediment pollution.[5]

According to the United States Environmental Protection Agency ("EPA"), excess nitrogen and phosphorus in surface water result in algae blooms and rob the water of dissolved oxygen that is essential for fish and other aquatic life. This decrease in dissolved oxygen causes the release of toxic metals from sediments and increases the availability of other toxic substances such as ammonia and hydrogen sulfide that reduce acceptable habitat for aquatic organisms. In addition, excess nutrients increase turbidity and decrease water clarity. Finally, excess nutrients can lead to negative aesthetic impacts, fish kills, reduced biodiversity, growth of toxic organisms such as the *Pfisteria piscidia* microbe, and impaired ecosystem function.[6] Both the Pocomoke River and the Chesapeake Bay are listed as nutrient impaired waters under the CWA.

In addition to nutrient pollution, poultry waste also contains other pollutants, such as fecal coliform and *E. coli*. Ingestion of water containing these bacteria can cause diarrhea and other gastrointestinal distress. These bacteria can also adversely impact shellfish.[7]

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[4] Exec. Order No. 13,508, 74 Fed. Reg. 23099 (May 15, 2009) at 1.
[5] Perez, Michelle et al., Facing Facts in the Chesapeake Bay at 5, Environmental Working Group (2009).
[6] U.S. EPA, National Estuary Program, Challenges, http://www.epa.gov/owow/estuaries/challenges.html (last visited Apr. 22, 2010).
[7] There is a shellfish harvesting industry on the Pocomoke River. Currently there are two restricted shellfish harvesting areas in the lower Pocomoke River. Fecal coliform is the indicator organism that the National Shellfish Sanitation Program uses to assess waters used for shellfish harvesting. MDE & Virginia Dep't of Envt. Quality, Total Maximum Daily Loads for Fecal Coliform for the Restricted Shellfish Harvesting/Growing Areas of the Pocomoke River in the Lower Pocomoke River Basin and Pocomoke Sound Basin in Somerset and Worcester Counties, Maryland and Accomack, Virginia at 1 (2009).

Between October and December, 2009, Plaintiff Phillips sampled water in a ditch flowing from the Facility on five separate occasions. On each date, sample analysis documented that these discharges from the Facility contained pollutants, including very high levels of fecal coliform and *E. coli* bacteria. Additional investigation revealed stockpiles of what was believed to be uncovered poultry manure[8] next to a drainage ditch in the CAFO production area which could be a source of the pollutants discharging from the site. It also appeared that trenches channeled the water from the stockpiles into a field ditch. This production area also contained what appears to be a chicken house and several other potential sources of water pollution.

Based on this and additional information, Plaintiffs filed their Notice Letter on December 17, 2009 against Defendants Hudson Farm and Perdue due to discharges of dangerously high levels of fecal coliform, *E. coli*, nitrogen, phosphorus, and ammonia from Perdue's Hudson Farm CAFO. As is required by the statute, the Notice Letter put the Defendants, EPA and MDE on notice of the alleged violations.

After the Notice Letter was sent, Plaintiffs continued their investigation to include additional sampling and record review. Sampling by Plaintiff Phillips on December 29, 2009, January 18, and February 12, 2010, showed high numbers of fecal coliform and E. coli bacteria, as well as nitrogen, phosphorus, and ammonia, establishing that the discharges, and thus the violations, were continuing. Samples taken by MDE in late January also showed extremely high levels of contamination. The results show fecal coliform counts as high as 280,000 MPN/100ml and E. coli counts as high as 155,310 MPN/100ml, more than one thousand times over the Maryland standard for impaired waters.

[8] Under the CAFO regulations, "manure" is defined "to include manure, bedding, compost and raw materials or *other materials commingled with manure* or set aside for disposal. 40 C.F.R. § 122.23(b)(5) (emphasis added).

Plaintiffs were unable to determine definitively whether the Facility is covered by a CWA permit, a Compliance Schedule, or nothing at all, and therefore properly plead the allegations in the alternative in their Complaint.

All of the above facts, including those set forth in more detail in the Complaint, establish a pattern of ongoing discharges of pollutants from a CAFO point source into waters of the United States. The Complaint also lays out in detail the facts that support the standing of each of the Plaintiffs.

STATUTORY AND REGULATORY FRAMEWORK

When Congress first passed the CWA in 1972, it articulated a goal of restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters. 33 U.S.C. § 1251 (2006). To achieve this goal, the CWA prohibits a person from discharging any pollutants from a point source into waters of the United States without obtaining a permit. 33 U.S.C. § 1311(a) (2006).

The term "discharge of pollutants" means "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12) (2006). The term "pollutant" includes "solid waste…sewage, garbage, sewage sludge . . . chemical wastes, biological materials, . . . and industrial, municipal and agricultural waste discharged into water." 33 U.S.C. §1362(6) (2006). A point source is defined as "any discernable, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, *concentrated animal feeding operation,* or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. §1362(14) (2006) (emphasis added).

Early in the CWA's history, Congress acknowledged the distinction between traditional farming and Defendants' factory-style industrial meat production by including CAFOs as an explicitly listed "point source" of pollution.

> Animal and poultry waste, until recent years, has not been considered a major pollutant. . . . The picture has dramatically changed, however, as development of intensive livestock and poultry production on feedlots and in modern buildings has created massive concentrations of manure in small areas. The recycling capacity of the soil and plant cover has been surpassed. … [W]aste management systems are required to prevent waste generated in concentrated production areas from causing serious harm to surface and ground waters.

Statement of Senator Robert Dole, S. Rep. No. 92-414, at 100 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3761.

Permits issued under the CWA are known as National Pollution Discharge Elimination System ("NPDES") permits and can be either individual facility permits or general permits.[9] General permits, such as the CAFO permit at issue in this case, regulate categories of industrial activity. 40 C.F.R. § 122.28(a)(2) (2009). A CAFO is explicitly defined as a point source in the text of the CWA. 33 U.S.C. § 1362(14).

Under the CWA, EPA may authorize a state to administer the NPDES program. 33 U.S.C. § 1342(a)(5) (2006). A delegated state must implement all aspects of the NPDES program, including issuing permits that conform to federal standards. 33 U.S.C. §1342(b)(1)(A) (2006). Maryland was delegated authority to administer the permitting program of the CWA in 1989. As part of its overall responsibilities under the CWA, Maryland must permit CAFOs within the state which discharge or propose to discharge into navigable waters of the United States. While Maryland is authorized to issue

[9] *See* U.S. EPA, Office of Wastewater Management – Water Permitting, *Water Permitting 101*, *available at* http://www.epa.gov/npdes/pubs/101pape.pdf.

federal discharge permits, the terms of any permit issued by the state, including a CAFO permit, must be at least as stringent as the applicable federal standards. 40 C.F.R. § 123.25(a)(6) (2009). Therefore, MDE does not have the authority to exempt or otherwise approve discharges that violate federal law.

Section 306 of the CWA requires the EPA to promulgate regulations establishing federal standards of performance for new sources, including CAFOs. 33 U.S.C. § 1316(b)(1)(B) (2006). States may develop and implement a procedure under state law for applying and enforcing the standards of performance, provided that the state procedure does so in conformity with the requirements of section 306. 33 U.S.C. § 1316(c). EPA's CAFO Rule[10] was promulgated, in part, under the statutory authority granted to the agency under section 306. 73 Fed. Reg. at 70,419.

EPA first promulgated rules regulating CAFOs under the CWA in 1974 and 1976. *See* 39 Fed. Reg. 5,704 (Feb. 14, 1974); *see also* 41 Fed. Reg. 11,458 (Mar. 18, 1976). CAFO regulation remained largely static until 2003, when EPA promulgated a new CAFO Rule. 68 Fed. Reg. 7,176 (Feb. 12, 2003). After legal challenges,[11] this Rule was revised and finalized on November 20, 2008 and became effective on December 22, 2008. 73 Fed. Reg. at 70,418. The Rule establishes effluent guidelines for CAFOs that require all CAFOs to obtain a NPDES permit, and to develop a Comprehensive Nutrient Management Plan ("CNMP").

A key part of the regulations is the prohibition of any discharge of manure, litter, or process wastewater from the production area[12] of a CAFO into waters of the United States. 40 C.F.R. §

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[10] Final Rule - Revised National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines for Concentrated Animal Feeding Operations in Response to the Waterkeeper Decision, 73 Fed. Reg. 70,418 (Nov. 20, 2008).

[11] *Waterkeeper Alliance v. EPA*, 399 F.3d 486 (2d Cir. 2005).

[12] "Production area means that part of an AFO that includes the animal confinement area, the manure storage area, the raw materials storage area, and the waste containment areas. The animal confinement area includes but is not limited to open lots, housed lots, feedlots, confinement houses, stall barns, free stall barns, milkrooms, milking centers, cowyards, barnyards,

412.43(a)(1) (2009). The only exception to this zero discharge standard occurs when there is a discharge as a result of a 25 year, 24 hour rainfall event. *See* 40 C.F.R. § 412.2(i) (2009). The current regulations require that all CAFO operators submit their CNMP along with their NPDES permit application and a permit may not be issued until the CNMP is completed. The regulations also mandate that permitting authorities review the CNMP and make the plan an enforceable element of the CAFO's NPDES permit.[13] Maryland could, under the CWA, impose requirements on CAFOs that are more stringent than federal law, but is not permitted to regulate CAFOs in a manner that does not conform to the minimum requirements of the federal CAFO regulations. 40 C.F.R. § 123.25(a)(6) (2009).

A state-issued discharge permit that incorporates federal standards of performance enacted pursuant to section 306, such as the Maryland General Discharge Permit for Animal Feeding Operations, is an enforceable limitation under the CWA, and a violation of such a permit is also a violation of section 306 of the CWA. Citizens may file suit against any person alleged to be in violation of an effluent standard or limitation under the CWA. 33 U.S.C. § 1365(a)(1) (2006). An "effluent standard or limitation" specifically includes both violations of section 301 (discharging without a permit) and violations of standards of performance under section 306. 33 U.S.C. § 1365(f) (2006). A violation of either the federal CAFO Rule or a state-issued CAFO permit is also a violation of an "effluent standard or limitation" under the CWA, and therefore the proper subject of a CWA citizen suit. *See* 33 U.S.C. § 1316(e) (2006).

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medication pens, walkers, animal walkways, and stables. The manure storage area includes but is not limited to lagoons, runoff ponds, storage sheds, stockpiles, under house or pit storages, liquid impoundments, static piles, and composting piles. The raw materials storage area includes but is not limited to feed silos, silage bunkers, and bedding materials. The waste containment area includes but is not limited to settling basins, and areas within berms and diversions which separate uncontaminated storm water. Also included in the definition of production area is any egg washing or egg processing facility, and any area used in the storage, handling, treatment, or disposal of mortalities." 40 C.F.R § 122.23(b)(8) (2009).

[13] *See* U.S. EPA, *Concentrated Animal Feeding Operations Final Rulemaking – Fact Sheet*, available at http://www.epa.gov/npdes/pubs/cafo_final_rule2008_fs.pdf (Oct. 2008).

As a CAFO, the Facility must not discharge pollutants into surface waters of the United States. Maryland's CAFO NPDES permit, issued on December 30, 2008, is consistent with the federal regulations with respect to CAFOs and maintains a "zero discharge" standard, prohibiting any discharges of pollutants to surface waters of the United States, except those that result from a storm event greater than the 25-year, 24-hour storm. (NPDES Permit NO. MDG01 Part B.2.). [14]

ARGUMENT

I. This Court Has Subject Matter Jurisdiction Over Defendant Perdue

As a matter of law, the CWA imposes liability on parties that control the performance of work resulting in CWA violations even when they do not hold a permit. *See infra* at 13–15. Since Plaintiffs have alleged sufficient facts to establish Defendant Perdue's liability for CWA violations that occurred at Perdue's Hudson Farm, *see infra* at 15–21, this court has subject matter jurisdiction over Defendant Perdue.

Defendant Perdue's argument that the Court lacks subject matter jurisdiction over Perdue in this case is based on a flawed legal assumption. Perdue argues that because it is not a co-permittee of the Facility, it can, as a matter of law, escape liability for pollution emanating from the CAFO. Defendant suggests that, as a matter of law, Perdue and other integrators are completely insulated from liability for

[14] The Complaint properly alleges alternative theories of liability: that the Defendants are discharging without a permit or, in the alternative that the Defendants are discharging in violation of a permit. Complaint ¶¶ at 55, 60. The exact permit status is a factual issue to be determined after full discovery. Similarly, whether the Compliance Schedule, attached as Perdue Exhibit G, has been properly executed and its actual effective date, are also a facts yet to be determined. Since the Compliance Schedule requires the farm to comply with certain terms and conditions of the CAFO permit, including the zero discharge requirement, until such time as its CAFO permit is issued, whether the Facility has a permit or not, the conduct alleged in the Complaint is still a violation.

violations of the CWA simply because MDE failed to require integrators to be co-permittees with their growers. Defendants fail to cite to any law to support this argument because there is none.

A. As a matter of law, CWA liability extends beyond the permit holder.

Defendant Perdue is asking this Court, *as a matter of law*, to rule that integrators, because they are not *required* to be co-permittees under the MDE CAFO regulations, can never be liable for CWA violations at facilities over which they exercise operation and control. This is completely at odds with the CWA and legal precedent interpreting it.

The CWA imposes liability on a party with responsibility for, or control over, the performance of work that leads to a CWA violation, without regard to whether that party is a permit-holder. *United States v. Board of Trustees of Florida Keys Community College*, 531 F. Supp. 267, 274 (S.D. Fla. 1981); *United States v. Sargent Co. Water Resource District*, 876 F. Supp. 1081, 1088 (D.N.D. 1992). In *United States v. Avatar Holdings,* No. 93-281-CIV – FTM -21, 1995 WL 871260, *14 (M.D. Fla. Nov. 22, 1995), the District Court determined that Avatar, the parent company, could be liable for CWA violations that its subsidiary committed even though Avatar was not a permittee or co-permittee. The *Avatar Holdings* court stated that the parent company may be liable for such violations if it exercised "actual and pervasive control of Florida Cities to th extent of actually being involved in the daily operations of Florida Cities," and that the extent of control that the parent exerted over the subsidiary was a genuine issue of material fact which could not be resolved on summary judgment. *Id.* at * 14–*15. In *United States v. Smithfield Foods,* 965 F. Supp. 769, 781 (E.D. Va. 1997), the court found liability in the reverse situation. A subsidiary was liable under the CWA even though its parent company

was the actual permit-holder. *Id.* at 781–82. The court cited *Avatar Holdings* and emphasized that the CWA clearly states that persons—not permit holders—are liable for permit violations. *Id.* at 781–82. Thus, a party's status as a permittee is not a pre-requisite to civil liability under the CWA when that party has responsibility for, or control over, the work that resulted in a violation of the statute.[15]

Defendant Perdue rests its entire argument for dismissal on this issue on the mistaken premise that MDE's CAFO regulations exempt Perdue and other integrators from complying with the CWA and CAFO regulations. This is simply not the case. When MDE adopted its CAFO regulations the agency simply declined to *require* integrators to be co-permittees with its growers.[16] Notably, Defendant Perdue can point to nothing in the regulations that insulates it from liability for unpermitted discharges or discharges that violate the terms of a permit that occur at facilities, such as Perdue's Hudson Farm, over which they exert substantial control.

Indeed, EPA has expressly stated that a co-permitting scheme was not necessary to hold an integrator liable under the CWA for violations by one of its growers since operators may be subjected to CWA liability.[17] Contrary to Defendant Perdue's position, MDE does not have the authority to exempt

[15] Defendants focus their entire argument on the assumption that the allegations are exclusively discharges in violation of a permit. However the Plaintiffs' complaint also alleges discharges without a permit. Parents, subsidiaries and employers are also responsible for unpermitted discharges. *See United States v. TGR Corp.*, 171 F.3d 762 (2d Cir. 1999) (holding that parent company was liable for unpermitted discharges by employees).

[16] The comments on the Maryland CAFO General Permit referenced by Perdue in its Motion to Dismiss do not constitute a concession that integrators are exempt from the provisions of the CWA. Perdue Br. at 12–13. To the contrary, the parties in that action were simply advocating that MDE's regulations make explicit when integrators are required to be co-permitted along with their producers. In 2001 when EPA proposed a new CAFO rule that would, among other things, clarify when a corporate entity that exercised "substantial operational control" over a CAFO would be *required* to be a co-permitted along with the producer, EPA made it very clear that such entities could already be required to obtain an NPDES permit, and that the proposed co-permitting scheme was only a clarification of existing law and not a new legal requirement. Proposed Rules: National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines and Standards for Concentrated Animal Feeding Operations, 66 Fed. Reg. 2,960, 3,023 (Jan. 12, 2001) [hereinafter "Proposed CAFO Rule"].

[17] Proposed CAFO Rule at 3,024.

entities from CWA liability if such entities would otherwise be liable under the federal law and MDE's CAFO regulations do not in fact exempt Perdue or other integrators from liability.[18]

B. Plaintiffs' Complaint alleges sufficient facts to establish Defendant Perdue's liability for CWA violations that occurred at the Hudson Farm[19]

Reading the facts as alleged in the Complaint in the light most favorable to the Plaintiffs, Defendant Perdue is liable for CWA violations that occur at its Facility for the following reasons. First, the facts as alleged (and supported by extrinsic evidence submitted by Defendant in its Motion) establish that the relationship between Perdue and Hudson Farm is one of employer and employee, which makes Perdue liable for any violations committed by its employee Hudson Farm. Second, Perdue is an operator of Hudson Farm within the meaning of the CWA and is, therefore, liable for any discharges that result from its operation of the CAFO. Because an integrator like Perdue is liable under existing law for CWA violations occurring at its producers' facilities, this Court has subject matter jurisdiction over Defendant Perdue.

[18] Furthermore, if MDE's interpretation of the extent of its own permitting authority under the CWA were to be inconsistent with federal law, that interpretation would have no effect on the federal law. Under 40 C.F.R. § 123.25(a)(6), a state's CAFO program must be at least as stringent as the federal CAFO program. *See Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 491-92 (1987) ("Such a conflict will be found when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.") (internal citations omitted).

[19] Plaintiffs reiterate that under the proper legal standards on a motion to dismiss, the Court does not look to the factual arguments. Since Defendant Perdue has failed to meet its burden that it cannot be held liable as a matter of law, the Court need look no further in denying its motion. However, Plaintiffs feel compelled, given the factual arguments made by Defendants, to offer the Court the following theories as to how the Court might find liability after a full examination of all the facts of this case.

1. The relationship between Perdue and Hudson Farm is one of employer and employee, making Perdue liable for CWA violations committed by Hudson Farm

Plaintiffs allege that Perdue's degree of control over operations at the Facility is so extensive that the relationship between co-defendants is one of employer-employee. It is well established that employers are liable for CWA violations that their employees commit. *See, e.g., United States v. Stranquist,* 993 F.2d 395 (4th Cir. 1993) (holding a manager of marina and campground liable when employees dumped raw sewage into creek); *United States v. TGR Corp.,* 171 F.3d 762 (2d Cir. 1999) (convicting corporate defendant after employees dumped waste slurry from asbestos removal project into waters of the United States). An entity that exercises substantial control, such as a parent corporation, a subsidiary or an employer, is liable even when the parent corporation, subsidiary or employer does not hold a permit. *Avatar Holdings,* 1995 WL 871260, at *2; *Smithfield Foods,* 965 F. Supp. 769, 781.

To determine whether a relationship is one of employer-employee,[20] Maryland state courts evaluate five factors: 1) the power to select and hire the employee, 2) payment of wages, 3) the power to discharge the employee, 4) the power to control the employee's conduct, and 5) whether the work is part of the regular business of the employer. *Whitehead v. Safway Steel Products*, 304 Md. 67, 77–78, 497 A.2d 803, 808 (1985). Maryland courts recognize the fourth factor, the power to control, as the most decisive factor of the five in defining the employer-employee relationship. *Id*. at 78.[21] The relationship

[20] Additional facts to support Plaintiffs' argument that Perdue is in fact an employer will be more fully developed during discovery. However, it should be noted that Defendant Perdue's Exhibit B supports this theory. The terms of Perdue's "Poultry Processor Agreement" with Hudson Farm demonstrate that Perdue is a corporate entity that exercises substantial operational control over the Hudson Farm CAFO and should therefore be held jointly responsible for compliance with the CWA.

[21] In *State Commission on Human Relations v. Suburban Hospital, Inc.,* 113 Md. App. 62, 87–88, 686 A.2d 706, 719 (1996), *vacated on other grounds* 348 Md. 413, 704 A.2d 445 (1998), the Maryland Court of Special Appeals re-emphasized and

of employer and employee exists when the employer retains the *right* to direct the manner in which the work is done, as well as the result. *Mackall v. Zayre Corp*., 293 Md. 221, 230, 443 A.2d 98, 103 (1982); *Clemons v. E. & O. Bullock, Inc.,* 250 Md. 586, 600, 244 A.2d 240, 248 (1968).

In *Heath v. Perdue Farms, Inc.,* Judge Nickerson held that "chicken catchers" that Perdue sent to farms to collect chickens for processing were Perdue employees, not independent contractors. 87 F. Supp. 2d 452, 456–57 (D. Md. 2000). "Courts have also stressed that the label that the parties give to their relationship is not controlling . . . .Thus, just because Perdue now calls its crew leaders 'independent contractors' does not exclude the crew leaders or the members of the crew from being considered employees for the purpose of the FLSA or the Maryland Wage and Hour Law. Courts look not to the label, but to the underlying 'economic reality' of the relationship." *Id.* at 457. In short, the label that parties give to their relationship is not controlling.

In the cases involving agricultural integrators, such as Perdue, courts in other jurisdictions consistently rule that integrators who exercise a similar degree of control over their growers, as Plaintiffs allege Perdue exercises in this case, may be held liable for environmental violations committed by the grower. In *Tyson Foods, Inc. v. Stevens,* 783 So. 2d 804, 808–09 (Ala. 2000), the jury, and later the Alabama Supreme Court, found that agency existed because Tyson had the right to control how the farmer performed his work. The Supreme Court held that the existence of an agency relationship is a question of fact for a jury to decide. In upholding the jury's verdict, the Alabama Supreme Court found

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refined this doctrine, citing *Spirides v. Reinhardt,* 613 F.2d 826, 831 (D.C. Cir. 1979). Noting that *Spirides* was compatible with Maryland law, the Court said the case "combines the common law of agency with the economic realities of the workplace." *Id.* at 87. Although a court's consideration of all circumstances surrounding a work relationship is essential, the D.C. Circuit noted the extent of the employer's *right* to control the "means and manner" of a worker's performance is the most important factor to review under the common law and in the context of several other federal statutes (emphasis added). *Id.* at 88.

that the plaintiffs had proved that Tyson: 1) specified the size and location of hog houses and also financed them; 2) required growers to implement a specific waste-management system; 3) inspected the growers' operation almost every week; 4) provided the hogs; 5) provided the food, veterinary supplies and veterinary care; and 6) left to the grower only the feeding, watering and caring for the animals. Based on these facts, the court determined that the processor-grower relationship is defined by the facts, not a contract disclaimer. *Id.*

In *Sierra Club, Inc. v. Tyson Foods, Inc.*, 299 F. Supp. 2d 693, 720 (W.D. Ky. 2003), which was decided three years later, the court found that whether Tyson was a "person in charge" was determined by examining the relationship between it and the facility in question, not by how the parties chose to characterize their relationship. The court compared the *Sierra Club v. Tyson Foods, Inc.* facts to those in *Stevens* and concluded that the extent to which Tyson dictated the growers' work made it liable as a "person in charge" under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). *Id.* at 720–21.

Here, the facts as alleged by Plaintiffs demonstrate that the high degree of control Perdue has over Hudson's operations makes Hudson an employee of Perdue under the law. These allegations are supported by the "Poultry Producer Agreement" submitted as Exhibit B of Defendant Perdue's Motion to Dismiss. According to the plain terms of this agreement, Perdue owns the chickens and merely consigns them to Hudson. Perdue provides and delivers to Hudson all feed, fuel, litter, medications, vaccinations and other supplies necessary for Hudson to grow the chickens. Hudson must notify Perdue immediately of any health problems with the chicks and allow Perdue to enter the producer/grower's premises to inspect the flock or facilities. In addition, Hudson must relinquish the growing of the flock if Perdue is dissatisfied with the grower's performance and assume the costs of Perdue's growing.

Because Perdue retains the right to control the means and manner by which Hudson performs its work for Perdue, Perdue and Hudson have an employer-employee relationship. Any part of the Poultry Producer Agreement simply declaring otherwise is not dispositive. Because employers are, in general, liable for the actions of their employees done in furtherance of their employment, Perdue is liable for any environmental violations committed at the Facility. This case is essentially the Maryland poultry equivalent of the hog farms in *Stevens* and *Sierra Club v. Tysons Food, Inc.,* and this Court should hold that Perdue is liable for this violation of the CWA, or, at a minimum, hold that such liability is a question of fact to be decided after the completion of discovery by the trier of fact.

2. Perdue is an operator of the Facility and is liable under the CWA for any illegal discharges that result from the operation of that Facility

Perdue is also liable for the illegal discharges from its Facility because it is an "operator" of that point source as defined by the CWA. The term "owner or operator" is defined in section 306 of the CWA[22] as "any person who owns, leases, operates, *controls*, *or supervises* a source." 33 U.S.C. § 1316(a)(4) (emphasis added). Further, a source is defined in that section as any facility "from which there is or may be the discharge of pollutants." 33 U.S.C. § 1316(a)(3). In this case, the Facility is clearly a "source" within the meaning of the CWA in light of the numerous discharges that are attributable to it. Perdue is just as clearly an "operator" of the Facility because of the high degree of control that it exercises over the Facility and the high level of supervision and oversight that Perdue reserves for itself under the terms of its Poultry Producer Agreements, as described previously.

[22] The term "owner or operator" is not defined in 40 C.F.R. § 122.23 (2009). However, the CAFO Rule was enacted, in part, under EPA's section 306 authority to enact new source performance standards, and as such, the definition of "owner or operator" from section 306 is applicable to the CAFO Rule.

This definition of "operator" is consistent with other courts' construction of the term within the context of other environmental statutes. In *United States v. Bestfoods*, the Supreme Court, for the purposes of CERCLA liability, defined an operator as "someone who directs the workings of, manages, or conducts the affairs of a facility." 524 U.S, 51, 66 (1998). Because "operator" was circularly defined in the statute, the Court gave the term its "ordinary or natural meaning." *Id.* Similarly, the District Court in *Sierra Club, Inc. v. Tyson Foods, Inc.* found that Tyson Chicken was both a "person in charge" of its contract growers' facilities under CERCLA and an "operator" of those facilities under EPCRA. 299 F. Supp. 2d 693, 721 (W.D. Ky. 2003). In support of its grant of summary judgment in favor of the plaintiffs on those two issues, the court noted that Tyson Chicken owned the chicks throughout the production process, provided the growers with feed, technical support, medicine, and veterinary care for the chicks, and had its own technical advisors monitor the growers' facilities. The reasoning underlying these cases supports the proposition that a corporate entity that exercises a sufficient degree of control over a facility or otherwise supervises the operation of the facility is an "operator" of that facility, and is accordingly liable for any environmental consequences that may result from its operation.

EPA's construction of the term "operator," as used in the CAFO Rule, indicates that the agency believes that integrators like Perdue can be "operators" of their contract growers' CAFOs and therefore jointly responsible for complying with the CWA. In its 2001 Proposed CAFO Rule, the EPA definitively stated that "under the *existing* regulation and the *existing* case law, integrators which are responsible for or control the performance of the work at individual CAFOs may be subject to the CWA as an operator of the CAFO." 66 Fed. Reg. 2,960, 3,024 (Jan. 12, 2001) (emphasis added). Given the definitions of "operator" found in the CWA and the CAFO Rule, EPA's interpretation of the term, as well as existing case law that interprets the term in analogous cases, it is abundantly clear that Perdue is

an "operator" of the Facility. As an operator of the Facility, Perdue is liable for unpermitted discharges from the Facility as well as any discharges that are occurring in violation of an existing permit.

II. Plaintiffs' Complaint Alleges a Continuing Violation from Hudson Farm

The only question before the Court at this stage is whether Plaintiffs pled sufficient facts in the Complaint, when viewed in the light most favorable to the Plaintiffs, to establish jurisdiction. *Am. Canoe Ass'n v. Murphy Farms, Inc.*, 326 F.3d 505, 521 (4th Cir. 2003) ("As with other jurisdictional matters, the plaintiff's burden to establish an ongoing violation evolves over the course of the litigation. At the motion to dismiss stage, a plaintiff need only have pled facts sufficient to support such a finding."). As set forth below, the Plaintiffs have clearly met their burden.

Under the CWA, citizen suit plaintiffs must simply make a good faith allegation of continuous or intermittent violation to satisfy the jurisdictional requirement of the statute. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 64 (1987); *Connecticut Coastal Fiserhmen's Ass'n v. Remington Arms Co., Inc.,* 989 F.2d 1305, 1312 (2d. Cir. 1993) ("Good faith allegations, it is true, will defeat a motion to dismiss on the pleadings for lack of subject matter jurisdiction."). Plaintiffs are not required to *prove* allegations of ongoing violations before jurisdiction attaches. *See Gwaltney*, 484 U.S. at 64. Rather, jurisdiction is supported by the allegation that there is a reasonable likelihood that a violation will recur. *See Gwaltney*, 484 U.S. at 57. The Supreme Court makes it clear in *Gwaltney* that all that is required is *allegations* of noncompliance, not *proof*. *Id.* at 65–66. When a defendant disputes this allegation, the appropriate procedural mechanism for challenging the veracity of the allegation is a motion for summary judgment. *See Woodward v. Goodwin*, No. C 99-1103 MJJ, 2000 WL 694102, at *7, (N.D. Ca. May 12, 2000); *see also Gwaltney*, 484 U.S. at 65-66.

Plaintiffs' Complaint contains numerous independent allegations of continuing or ongoing violations at the Facility along with the factual context that provides the good faith basis for these allegations. These allegations start at paragraph 5 of the Complaint, and continue throughout the Complaint. Paragraph 5 specifically alleges that "[s]ixty days have passed since the notice was served, *and the violations complained of in the notice letter are continuing at this time, or are reasonably likely to continue*." *See* Complaint at ¶ 5 (emphasis added). Similar allegations are contained throughout the Complaint.

Paragraph 31 of the Complaint alleges, "[D]efendants have repeatedly discharged *and continue to discharge* pollutants through a point source into waters of the United States . . . ." *See* Complaint at ¶ 31 (emphasis added). After discussing several sampling results indicating violations, Plaintiffs allege, "[t]hese results, and others taken by MDE, show that the illegal discharges coming from the [D]efendants' farm *are ongoing and likely to continue*." *See* Complaint at ¶ 36 (emphasis added). Count I alleges that "by discharging *and continuing to discharge* pollutants" Defendants violated and continue to violate the CWA. *See* Complaint at ¶ 55 (emphasis added). Paragraph 59 alleges "[D]efendants are likely to continue discharging pollutants from the Hudson Farm into waters of the United States." *See* Complaint at ¶ 59. Finally, Plaintiffs allege that "by discharging and continuing to discharge pollutants" Defendants "violated and continue to violate" the CWA by violating the terms of their NPDES permit. *See* Complaint at ¶ 60.

Based on the extensive claims of ongoing and continuing violations, there is no question that Plaintiffs have sufficiently pled federal jurisdiction. Having noted that the Complaint contains sufficient allegations to satisfy the minimal jurisdictional requirement, Defendants are limited to challenging Plaintiffs' good faith basis for these allegations. However, Defendants have not done so and

could not sustain that claim given the extensive support for Plaintiffs' allegations. Instead, Defendants make factual contentions, inappropriately contained in a motion to dismiss on the pleadings, that do not directly or fully address Plaintiffs' allegations and are contradicted by what limited facts the Plaintiffs currently have in their position.[23]

Defendants incorrectly argue that since a pile of what Plaintiffs in good faith believe to be manure was moved and the trenches from the pile were filled in, there are, as a matter of fact, no continuous and ongoing violations. Defendants attempt to bolster their argument that no continuing discharge exists at the Facility by pointing to various MDE documents wherein MDE, with little to no evidentiary support, concludes that they believe the pile in question was biosolids and that the pollution emanating from the pile has ceased and therefore, there is no continuing discharge. [24]

Unfortunately for the Defendants, the well-plead allegations in Plaintiffs' Complaint undermine Defendants' factual argument. As the Complaint alleges, Plaintiffs have documented discharges of pollutants consistent with pollution likely to come from the Facility on five separate occasions between October 30, 2009 and December 9, 2009. *See* Complaint at ¶¶ 33–35. In fact, as is illustrated below,

[23] Plaintiffs have not had the benefit of discovery in this case in order to further support their allegations. The evidence provided, limited by this lack of discovery, provides sufficient basis for Plaintiffs' allegations. Following discovery, Defendants can appropriately challenge the veracity of these allegations, but for the time-being, Plaintiffs should not be denied the right to conduct discovery based on Defendants' conclusory claims of contested fact.

[24] Administrative actions aimed at correcting the violations complained of in a citizen suit, but that are commenced subsequent to the filing of that suit, do not bar the citizen suit. *See, e.g., Altamaha Riverkeepers v. City of Cochran*, 162 F. Supp. 2d 1368, 1373 (M.D. Ga. 2003) (allowing citizen suit to proceed even though state administrative agency had proposed a Consent Order with the defendant and had imposed fines); *See also Black Warrior Riverkeeper, Inc. v. Birmingham Airport Authority*, 561 F. Supp. 2d 1250, 1253, 1255 (N.D. Ala. 2008) (finding that Consent Order that entered into force after plaintiffs had filed suit did not bar plaintiffs' citizen suit; "Because the plaintiff alleges ongoing violations, not resolved by the Consent Orders, this court finds this suit is not barred by *Gwaltney*"). Furthermore, if Congress intended diligently prosecuted administrative actions to act as a bar to a citizen suit, it would not have included and exception to the diligent prosecution bar in situations where a citizen files suit prior to the commencement of the administrative action. *See* 33 U.S.C. § 1319(g)(6)(B)(i) (2006).

the extrinsic materials Defendants urge this Court to consider actually reinforce the basis for Plaintiffs' claims of ongoing violations.

On December 17, 2009 Plaintiffs filed a Notice Letter alerting MDE, EPA and the Defendants of violations of the CWA at the Perdue Hudson Farm CAFO. Plaintiffs identified a potential source[25] as what appeared to be a pile of manure[26] located within the production area of the CAFO. Between December 18, 2009 and January 25, 2010, MDE inspectors visited the Perdue Hudson Farm on multiple occasions but *never* took a single sample[27] of the pile identified by the Plaintiffs, the drainage ditches flowing through the property or the water in the ditch leading to Franklin Branch after it exited the Hudson Farm property. As MDE later admitted, one of the reasons it failed to take samples for more than 5 weeks after initially being notified of the alleged violations was because Alan Hudson had refused to allow MDE or other government officials to sample the pile, the drainage ditches, or anywhere on the farm.[28] *See* E mail between Dawn Soltzfus and Horatio Tablada (Jan. 15, 2010), attached as Ex. A; Worchester County Environmental Programs Notes (Dec. 29, 2009), attached at Ex. B.[29]

By the time MDE was allowed to sample on January 26, 2010, the pile had been moved. Neither MDE nor Plaintiffs were present during the movement of the pile and there is no way, at this point, to

[25] *See infra* at 27–33, for a full discussion of the difference between a "point source" within the meaning of the CWA and the word "source."

[26] This was a reasonable assumption, which despite all of the Defendants and MDE's rhetoric over the last several months, has yet to be disproved. *See also supra* note 8(stating the CAFO regulation's definition of "manure).

[27] Notwithstanding this fact, MDE representative repeatedly and falsely told the Plaintiffs and the general public that it had sampled the site and had confirmed that the pile in question was biosolids and not manure. *See* Perdue Ex.. C at 8.

[28] There has been no explanation provided by MDE as to why they failed to sample the flow emanating from the Hudson Farm for more than five weeks.

[29] Exhibits A – D were obtained via a Public Information Act request from MDE. *See* Declaration of Kathlyn Phillips, attached as Ex. H at ¶ 18.

determine whether the pile in its current location is identical in size and content to the pile before it was moved.[30]

MDE did take samples of the water flowing through the ditches on the Facility on January 26th and those results establish alarmingly high levels of pollutants both on and flowing off the Facility. Notably, since these samples were taken *after* the purported remedial actions were taken, these results completely undermine Defendants position that the remedial actions they took prior to January 26, 2010 eliminated the unlawful discharges. *See* MDE Sample Map, attached as Ex. C. As alleged in the Complaint, samples taken by MDE "show that the illegal discharges coming from [D]efendants' farm are ongoing and likely to continue." *See* Complaint at ¶ 36.

Further discrediting Defendants' claim of having eliminated the discharge problems, sampling performed on February 12, 2010, more than a month after Defendants' "fix," confirmed the presence of pollutants continuing to be discharged from the Facility. *See* Complaint at ¶ 36. In addition, sampling performed on February 23, 2010, less than a week before the Complaint was filed, again confirmed the ongoing discharge of pollutants.

While Plaintiffs have not, in any way, limited their allegations to discharges from one particular pile of waste or another, the allegations of both sides, taken together, confirm both that the source of the discharges is not possibly limited to a single manure pile and that the violations are continuing. For now, the relevant question is simply whether Plaintiffs have alleged ongoing pollutant discharges from

[30] The extrinsic materials referenced by the Defendants establish this point. There is a clear discrepancy in the quantity of material that Alan Hudson alleges was on the Facility as of December 2009 and what MDE observed during its site visits. According to his Affidavit, the Facility "received the biosolid pile in question in approximately August, 2009." Hudson Ex.1. According to the MDE files attached to Defendant Perdue's pleading, 29.6 tons of biosolids were delivered to the Facility in August 2009. Perdue Ex. C at 13. However, when MDE observed the relocated piles in January 2010, two different inspectors gave two different estimates as to the size of the relocated materials. One estimated the volume to be 444 cubic yards. Perdue Ex. C at 9. Another inspector, on a different date, estimated the quantity to be 558.7 tons. Perdue Ex. C at 14. These discrepancies must be clarified through discovery.

Defendants' Facility and it is clear before reading past the first few paragraphs of the Complaint that they have.

Rather than focus on the legal question that is central to a 12(b)(1) motion to dismiss, Defendants instead attempt to use extrinsic evidence not found in the pleadings to argue facts that Plaintiffs dispute. In fashioning their argument, Defendants seem to have forgotten that a 12(b)(1) motion can only be granted "if material jurisdictional facts are not in dispute." *Evans.,* 166 F.3d at 647 (*quoting Richmond, Fredericksburg & Potomac R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991). Since material jurisdictional facts are in dispute, Defendants' Motions to Dismiss should be denied.

III. Plaintiffs' Notice Letter Was Sufficient To Put Defendants on Notice

Defendants allege that Plaintiffs' Notice Letter fails on four separate grounds. Their arguments are without merit. First, Plaintiffs gave adequate notice of the violations ultimately alleged in the Complaint. Both the Notice letter and the Complaint define the Facility as the point source and the Plaintiffs' Notice Letter gave sufficient notification to allow relevant government agencies and Defendants to address the violations, which they did not do. Second, the Notice Letter alleged violations of the CWA with sufficient specificity. A specific standard is cited as having been violated and numerous pollutants are identified in both the Notice Letter and the Complaint. Third, the Notice Letter identifies specific dates of the violations. Fourth, the Plaintiffs are properly identified in the Complaint. Therefore, as set forth below, the Plaintiffs have complied with citizen suit notice requirements, and the Motions to Dismiss should be denied.

A. Plaintiffs gave adequate notice of the violations ultimately alleged in the Complaint

1. Both the Notice Letter and Complaint clearly define the Facility as the point source

In order for there to be a violation of the CWA, there must be a discharge of a pollutant from a *point source* into waters of the United States. It is therefore critical to understand what constitutes the point source in this case. The CWA affirmatively states that it is the CAFO that *is* the point source. 33 U.S.C. §1362(14). Under relevant regulatory provisions and applicable case law, the definition and parameters of a CAFO point source are broad and clear. For CWA purposes, a large poultry CAFO is defined as any animal feeding operation that "uses a liquid manure handling system" and confines "30,000 or more laying hens or broilers" for a "total of 45 days or more in a 12-month period, and [c]rops vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility." 40 C.F.R. § 122.23(b) (2009).

In recognition of the significant source of pollution that typically flows from CAFOs and the difficulty that potential Plaintiffs who have no direct access to the Facility may have in identifying where on the Facility the pollution may be coming from, Courts have attached very broad parameters to the CAFO as point source:

> The very nature of a CAFO and the amount of animal wastes generated constitute a large threat to the quality of the waters of the nation. Therefore, Congress empowered the EPA to regulate CAFOs as point sources. 40 C.F.R. § 122.23(c). Defining a CAFO to include any manure spreading vehicles, as well as manure storing fields, and ditches used to store or transfer the waste serves the purpose of the CWA to control the disposal of pollutants in order to restore and maintain the waters of the United States.

Comty. Ass'n for Restoration of the Env't v. Henry Bosma Dairy, 305 F.3d 943, 955 (9th Cir. 2002). Defendants do not dispute that Perdue's Hudson Farm is a CAFO point source for purposes of the CWA.

Given the fact that it is the entire CAFO which is the point source in this case, Defendants' suggestion that Plaintiffs' Complaint expanded the allegations contained in the Notice Letter is without merit. *See* Perdue Br. at 17-18; Hudson Br. at 17-18. In support of their position, Defendants argue that because Plaintiffs referenced a particular pile of waste in the Notice Letter, Plaintiffs have somehow "expand[ed]" their claims and thus Defendants were not put on notice of the violations. *See* Perdue Br. at 17; Hudson Br. at 18. The entirety of Defendants' argument flows from its failure to grasp the fundamental distinction between a CAFO "point source" as defined under the CWA and referenced in both the Notice Letter and the Complaint and the general use of the word "source" as used to reference the one pile of waste in the Notice Letter.

In providing adequate 60-day notice of alleged violations under the CWA, the notice regulations, in part, state that Plaintiff must only provide "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 for the alleged violation, the location of the alleged violation." 40 C.F.R. § 135.3(a) (2009). Given the recognized breadth and complexity of potential CAFO discharges and the lack of access to these facilities by citizens looking to enforce the CWA, the burden on Plaintiffs in noticing an alleged CWA violation for a CAFO point source is to identify the CAFO from which the illegal discharges are occurring. The law simply does not require Plaintiffs to provide anything more with regard to the exact location of the source of the discharge *within* the CAFO

point source. To do so would be unduly burdensome and is above and beyond what the law requires. It would effectively end the ability of citizens to ever pursue CWA claims against such facilities.[31]

In this case, both the Notice Letter and Complaint clearly state that Plaintiffs are bringing an action for illegal discharges from a CAFO point source as defined under the CWA. *See* Notice Letter at 1; Complaint at ¶ 31. Plaintiffs identify the point source of the pollution in both the Notice Letter and the Complaint as Perdue's Hudson Farm. Nowhere in the Notice Letter do Plaintiffs refer to the particular pile noted in the Notice Letter as a "point source" for purposes of the CWA. To the contrary, Plaintiffs' Notice Letter indicates that Defendants are being placed on notice for violations emanating from a CAFO point source as that term is defined under the CWA. *See* Notice Letter at 1. That is the burden placed on Plaintiffs in providing notice and that is the burden met by Plaintiffs in the Notice Letter sent in December. Defendants' misreading of the Notice Letter, or their failure to understand the difference between "point source" and "source," does not render the Notice Letter insufficient.

Defendants' reliance on *Stephens v. Koch Foods, LLC,* 667 F. Supp. 2d 768 (E.D. Tenn. 2009) (*See* Perdue Br. at 18; Hudson Br. at 9), further reinforces the notion that they simply do not understand how the CWA looks at CAFOs as point sources of pollution. In *Koch Foods*, the Plaintiff's notice letter identified discharges from a particular point source pump station. *Id.* at 788. However, the complaint filed in the *Koch* case specified alleged discharges of pollutants from other, separate point source locations. *Id.* In finding insufficient notice, the Court noted that the complaint contained alleged additional point sources of pollution that were not listed in the notice. *Id.* Here, in stark contrast, Plaintiffs list no additional point sources of pollution in their complaint. As noted above, the pile

[31] Asking Plaintiffs to pinpoint specific sources of pollution on inaccessible CAFO point sources would be akin to asking Plaintiffs to crawl up the discharge pipe of a factory to determine the very piece of machinery that is causing the violation occurring at the end of the pipe. Obviously, that is not the approach embraced by the CWA's notice provision.

referenced in the Notice Letter and the CAFO are not two separate point sources; neither the Notice Letter nor the Complaint suggests this. Instead, the CAFO referenced in both the letter and the Complaint is undisputedly the only point source at issue in this case and the pile is merely a potential source within the point source, as much as a malfunctioning piece of industrial equipment might be the source of violations from a factory pipe point source.

Likewise, Defendants erroneously rely on *Sierra Club v. City of Columbus,* 282 F. Supp. 2d 756 (S.D. Ohio 2003), where a Motion to Dismiss was granted because the Plaintiff's notice letter lacked specificity as to the nature of the violations alleged in the Complaint. There the Court found that the notice letter was insufficient to put the Defendant on notice of their violations as the notice letters did not indicate the particular paragraphs, subparagraphs, or standards in the permit that were allegedly violated, the manner in which they were violated, or dates and locations of allegedly improper discharges. *Id.* at 771. Defendants fail to explain how this holding is applicable to the case at bar, for here, quite the opposite is true. Plaintiffs' Notice Letter is ripe with detail as to the nature of the violations. In addition to the identification of the point source, Plaintiffs' Notice Letter provides dates and types of violations alleged. In addition, the Notice Letter clearly states the exact alleged violation under the CWA and the Maryland CAFO permit: both "prohibit any discharges of pollutants to surface waters of the United States from CAFO production areas unless it results from a storm event greater than the 25-year, 24-hour storm." Permit No. MDG01 Part B.2. cited in Notice Letter and Complaint.

2. Plaintiffs' Notice Letter gave sufficient notification to allow relevant government agencies and Defendants to address the violations

In discussing notice requirements, the Supreme Court has noted the importance of striking a balance between encouraging citizen suits as a means of enforcement of environmental laws and not

overburdening federal courts. *Hallstrom v. Tillamook County,* 493 U.S. 20, 29 (1989). Other Courts have also stressed that notice requirements should not be read to place undue burden on citizens:

> The purpose of the 60 day notice is to provide the agencies and the defendant with information on the cause and type of environmental laws or orders the defendant is allegedly violating so that the agencies can step in, investigate, and bring the defendant into compliance. The point is to trigger agency enforcement and avoid a lawsuit. Congress did not intend to unduly burden citizens by requiring them to basically carry out the job of the agency.

Comty. Ass'n for Restoration of the Env't, 305 F.3d at 953. *See also Pub. Interest Research Group of New Jersey v. Hercules Inc.,* 50 F.3d 1239, 1246 (3d Cir. 1995); *Hudson Riverkeeper Fund v. Putnam Hospital Ctr., Inc*. 891 F. Supp. 152 (S.D.N.Y.1995).

Here, Defendants claim that by giving inadequate notice, Plaintiffs failed to give either the relevant government agencies or the Defendants time to address the new alleged violations. *See* Perdue Br. at 18. Defendants' argument that neither they nor MDE had ample notice to act is disingenuous on several grounds.

As discussed above, the Complaint did not contain new alleged violations, and Plaintiffs' Notice Letter provided both MDE and Defendants with detailed information about the violations. Indeed, the events and actions taken by MDE, Perdue, and Hudson Farm, clearly indicate that Defendants had more than ample information to attempt to remedy the problem and that Plaintiffs provided what is mandated by the CWA notice requirements.

MDE responded to Plaintiffs' notice allegations within a day of the Notice Letter being sent out. *See* Perdue Ex. C.[32] MDE's inability to properly assess the CAFO discharges, take soil and water samples, and do everything they could to remedy the ongoing violation was impeded not by insufficiencies in the Notice Letter, but by the Defendant Hudson Farm's refusal to allow MDE to carry

[32] Indeed Perdue actually sampled the Facility before MDE arrived. *See* Perdue Ex. C.

out its work. *See* Ex. A. MDE documents note that MDE employees from Water Management, Land Management and Waste Management inspected Hudson Farm on at least five different occasions without sampling. Alan Hudson overtly refused to have samples taken on two at least of those occasions. *See* Exs. A–B.

Notably, upon finally gaining access to sample, MDE conducted a site assessment which was not focused on the pile of waste on which Defendants now focus their attention,[33] but on the CAFO point source cited in both the Notice Letter and the Complaint. According to documents obtained from MDE, the agency conducted water samples in ditches that flow both past the waste piles and past the chicken houses. MDE took an extensive array of photographs from around the farm, including one of several piles of waste, standing water, trenches and buildings. MDE purportedly took one soil sample from an undisclosed location and installed piezometers in areas around the Facility. *See* Email between David Bramble, Dave Lyons, and Dave Pushkar, employees of MDE, detailing soil samples and installation of piezometers around the Facility on January 26, 2010 (Jan. 27, 2010), attached at Ex. D.[34]

[33] Throughout their Motions to Dismiss, Defendants continually seek to improperly raise a purely factual issue of the composition of the pile of waste referenced in Plaintiffs notice letter. For the reasons given above regarding the definition of point source under the CWA, that issue is irrelevant to the immediate proceeding and the decision on the Motions to Dismiss. From a factual matter, however, the composition of waste in the pile that Defendants reference is purely a triable issue. It is worth noting that, to Plaintiffs' knowledge, no one has ever objectively determined the composition of that waste pile. Contrary to earlier published reports, MDE *never tested the pile in situ*. As noted above, the agency was refused sampling by the Defendants in this case and MDE was later forced to retract its false claims of testing. In addition, MDE took at most one sample of a pile that they described as covering 444 cubic yards, and provide no explanation as to how one sample could be representative of all that material.

[34] MDE decided not to pursue civil litigation in this matter, but their decision was not made because they could not find any evidence of an ongoing discharges from the CAFO point source; indeed, their own water sampling showed high levels of pollutants including fecal coliform and E.coli in all the ditches sampled around the production area, including in ditches that ran past where the pile once stood and, significantly, in even higher amounts in a ditch that ran past the chicken house. *See* Ex. C. MDE's decision to not prosecute arose, instead, purportedly from an internal determination that they could not tie pollution in the ditches to the operations of this farm. Plaintiffs challenge the factual premises for this decision, which was articulated in the press release attached as Exhibit E to the Defendant Perdue's motion. But MDE's decision not to seek a CWA prosecution is completely irrelevant to the issue of sufficiency of notice and Plaintiffs' case at bar. *See also supra* note 24.

Defendant Hudson Farm also apparently took actions in the production area in an attempt to remedy ongoing violations based on the Notice Letter sent by Plaintiffs. According to published reports, piles of waste were shifted and covered, drainage trenches were filled, and some Best Management Practices were implemented. *See* Perdue Ex. C. As discussed above, however, the steps taken by Defendants to eliminate illegal discharges of pollutants from the production area point source were insufficient and Plaintiffs continued to gather evidence showing ongoing violations.

As noted above, only Defendants have access to the CAFO point source in question here. To suggest to the Court that Plaintiffs need to somehow do more than they have done here would create a burden so high it would make bringing citizen suits impossible.

B. The Notice Letter alleges violations of the CWA with sufficient specificity

Defendants suggest that Plaintiffs failed to identify specific standards or specific pollutants. As detailed below, Plaintiffs clearly indicated both standards and pollutants in both the Notice Letter and Complaint. Therefore, Defendants' arguments should be rejected outright by the Court.

1. Plaintiffs' Notice Letter alleges violations of specific standards of the CWA

In their Motions to Dismiss, Defendants claim that Plaintiffs failed to allege that Perdue or Hudson Farm violated a specific standard, limitation, or order. *See* Perdue Br. at 20; Hudson Br. at 9. Contrary to Defendants' claims, both the Notice Letter and Complaint clearly state that Defendant violated a very specific provision of the CWA, section 301(a), 33 U.S.C. §1311(a), which prohibits the discharge of pollutants and states that such a discharge by any person shall be unlawful. Both the Notice Letter and the Complaint also state that in the alternative, should the Facility be deemed covered under

the pending state CAFO permit, Defendants violated the zero discharge standard found at part B.2. of NPDES Permit NO. MDG01.[35] Neither of these are general allegations as claimed by Perdue; they are specific CWA standards and provisions. *See* Perdue Br. at 21; Hudson Br. at 9. Defendants' assertions are therefore, completely unfounded.

2. Plaintiffs' Notice Letter identifies specific pollutants

Defendants' argument that Plaintiffs' Notice Letter fails because it does not identify any pollutant discharged is nothing less than absurd. Both the Notice Letter and the Complaint name fecal coliform, *E. coli*, phosphorus, nitrogen and ammonia as specific pollutants that were found in high levels in downstream water samples. *See* Notice Letter at 2-3; Complaint at ¶¶ 33-35. Contrary to Defendant's argument, the Notice Letter does allege that these were discharged from the Facility. *See* Notice Letter at 2.

Finally, Defendants contend that although the Complaint alleges discharges of "solid waste, biological waste materials, and agricultural waste", and "nitrates", none of these were mentioned in the Notice Letter and thus cannot be basis of this CWA suit. Defendants miss the point here. As stated, the Notice Letter and Complaint list fecal coliform, E. coli, phosphorus and nitrogen, and ammonia as the specific pollutants that are being discharged in violation of the CWA. *See* Notice Letter at 2-3; Complaint at ¶¶ 33-35. The more general terms "solid waste, biological waste materials, and agricultural waste" are simply broad descriptors of these very specific pollutants — they do not constitute separate allegations of discharges of pollutants. The argument that these more general and all-

[35] As cited above, the MD CAFO NPDES Permit states: "*No discharge* of pollutants to surface waters of the State from CAFO production areas shall be permitted unless it results from a storm event greater than the 25-year, 24-hour storm…" NPDES Permit NO. MDG01, B.2. (emphasis added).

encompassing terms were not included in the Notice Letter, therefore, does not result in insufficient notice of the very specific pollutants listed in both the Notice Letter and Complaint.

C. The Notice Letter identifies dates of the violations

Defendants allege that Notice Letter is defective in three respects with regard to providing the dates of violation. First, they claim that since discharges may occur only as a result of rain events they are neither continuous nor ongoing. *See* Perdue Br. at 23. Defendants' reasoning and understanding of the law are fundamentally flawed. Under the CWA, citizen suit plaintiffs are simply required to make a good faith allegation of continuous or intermittent violations. *Gwaltney*, 484 U.S. at 64. The legal standard is merely that there must be an allegation of a reasonable likelihood that a violation will recur. *Id*. at 56. In the case at bar, for violations to be likely to continue, there need only be a reasonable likelihood that it will rain again. This standard is easily met on the Eastern Shore of Maryland which experiences an average rainfall of over 40 inches per year.[36] Rain will fall where the Facility is located and additional violations are more than likely to occur when it does. This fact has been borne out by the many water samples taken by Plaintiffs.

Although Courts have held that a reasonably specific indication of time-frame when alleged violations have occurred is necessary, notice requirements for citizen suits under the CWA do not require that specific dates of violations be included in the notice letter. *See Hudson Riverkeeper v. Putnam Hospital Ctr.*, 891 F. Supp at 154; *San Francisco BayKeeper, Inc. v. Tosco Corp***.** 309 F.3d 1153, 1155 (9th Cir. 2002). In *BayKeeper*, the Court had to determine whether the Plaintiff could pursue its claim that defendant was responsible for illegal discharges "on each day when the wind has been

[36] According to MDE, Worcester County's normal precipitation totals are 44.2 inches per year. *See* http://www.mde.state.md.us/Programs/WaterPrograms/Water_Conservation/Previous_Conditions/normalprecip_new.asp

sufficiently strong to blow coke from the piles into the slough." 309 F.3d at 1158. "*BayKeeper* did not provide any specific dates other than the general date range covered by its notice letter." *Id.* at 1159. The Court found that the "notice did, however, clearly identify the alleged violation — namely, that during the time when the coke piles remained uncovered, wind blew coke into the slough." *Id.* BayKeeper's notice was therefore "sufficiently specific to inform [the defendant] about what it is doing wrong." *Id.* at 1159 (*citing Natural Res. Def. Council v. Southwest Marine, Inc.,* 236 F.3d 985, 996 (9th Cir. 2000)). "It was also specific enough to give Tosco an opportunity to correct the problem, by enclosing or covering the coke piles." *Id.* at 1159 (internal citation omitted). The Court ultimately held that BayKeeper's notice with respect to wind-related discharges was sufficient, and that BayKeeper could pursue those claims at trial. *Id.* at 1160. In the present case, Plaintiffs' Notice Letter exceeds the notice standards articulated in *BayKeeper* as it goes beyond providing the general date range of rain-related discharges and actually provides the specific dates that discharges occurred.

Defendant Perdue further makes the argument that while Plaintiffs allege that pollution occurred during rain events, no dates of rainfall are provided. *See* Perdue Br. at 23. As an initial matter, it should be noted that Plaintiffs did provide very specific dates of sampling that showed CWA violations were occurring. Plaintiffs thereby properly put Defendants on notice for illegal discharges of pollutants to waters of the United States on very specific dates and allege that whenever it rains, additional discharges are likely. There is no notice insufficiency with regard to dates of alleged discharges.

Defendant Perdue further argues that violations that are ongoing or continuing are not synonymous with a claim that violations are occurring daily. *See* Perdue Br. at 23. Nowhere in their

Notice Letter or Complaint have Plaintiffs suggested otherwise. Plaintiffs agree that ongoing does not mean daily and the CWA does not require daily violations.[37]

Finally, Defendants argue that 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." *See* Perdue Br. at 23. They further state: "The fact that water flowing in an off-site ditch contained pollutants on specific dates is not notice of the date on which *discharges from a point source located at the Hudson Farm* may have occurred…." Perdue Br. at 23 (emphasis added). Defendants again fail to understand how the CWA defines a CAFO point source. Plaintiffs do not claim, either in the Notice Letter or the Complaint, that there are discharges from point sources located on or within the CAFO; rather, the CAFO itself is a point source. Defendants seem unable to grasp this basic CWA concept. Pollutants found downstream in the ditch that runs from the Facility's production area were undisputedly discharges from that CAFO point source, and these clearly constitute CWA violations. Again, for Defendants to suggest that Plaintiffs must illegally trespass onto the point source CAFO to locate subsources of the pollution within the Facility is unreasonable, unduly burdensome, and, most importantly, not required by the law. Plaintiffs, contrary to the claims made by Defendants in their Motions to Dismiss, surpassed CWA notice requirements by providing the exact date on which each violation occurred. *See* Notice Letter at p. 2; Complaint at ¶ 33-36.

[37] In referencing to *Frilling, et al. v. Honda of America Mnfg., Inc.,* No. C-#-96-181, 1996 U.S. Dist. Lexis 22526 (S.D. Ohio 1996), for the proposition that "ongoing", "continuous", and "nearly daily" are insufficient to satisfy the requirements that plaintiffs provide sufficient information to allow the defendant to identify the date or dates of the alleged violations (*see* Perdue Br. at 23), Defendants' cited to yet another case that has no relevance to the arguments made by Plaintiffs. As stated, Plaintiffs provided exact dates of violations in the Notice.

D. The Notice Letter properly identifies Plaintiffs

Defendants allege that Assateague Coastkeeper is not an organization but merely the title that Plaintiff Kathy Phillips uses in her capacity as an employee of Assateague Coastal Trust. *See* Perdue Br. at 24; Hudson Br. at 8-9. Nothing in the Notice Letter or Complaint indicates that Plaintiffs suggested otherwise. Kathy Phillips is the Assateague Coastkeeper and is free to use this title in litigation. The Assateague Coastal Trust holds a license for the use of Assateague Coastkeeper, a member program of Waterkeeper Alliance. Declaration of Kristine Stratton ("Stratton Decl."), Ex. E at ¶¶ 8–9, 14. As a member program of Waterkeeper Alliance, the contact information attached to Waterkeeper is the information through which member programs may be contacted.

Defendants also allege that Notice Letter is deficient as to Kathy Phillips because it failed to include her address and phone number. Although Plaintiffs concede this was a technical oversight, the oversight is harmless and the Defendants cite to a case that is not applicable to these facts. The Court in *City of Columbus* dismissed plaintiffs' complaint for lack of jurisdiction because of their failure to include the individual plaintiffs' phone numbers. *Sierra Club v. City of Columbus,* 282 F. Supp. 2d at, 776. However, in *City of Columbus*, the issue was dispositive because none of Plaintiffs' phone numbers were provided and because recipients of the Notice Letter could not determine which Sierra Club organization was providing notice. *City of Columbus*, 282 F. Supp. 2d at 775. Such a lack of contact information thwarted any chance that Defendants could reach out to any Plaintiffs to explore settlement.

In the case at bar, the Notice Letter only failed to include the phone number of one individual plaintiff. However, Assateague Coastkeeper, Kathy Phillips, is a member program of Waterkeeper Alliance and is being represented by this national organization. Waterkeeper Alliance was properly

identified as a plaintiff, listed all contact information and clearly has standing in this case. Once a single plaintiff establishes standing for a cause of action, the Court has enough to proceed to the merits of the case and should not look to the standing of all other Plaintiffs. *See Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (determining that one plaintiff had Article III standing and therefore the Court need not consider the standing issue as to the other plaintiffs).

Furthermore, here the rationale for dismissing Kathy Phillips as a Plaintiff does not exist:

> In *Washington Trout*, we affirmed the dismissal of a citizen suit where the notice letter failed to give the identity and contact information of the plaintiffs. In that case, because the defendants did not know the identities of the plaintiffs, they were not in a position to negotiate with the plaintiffs or seek an administrative remedy. This made any sort of resolution between the parties during the notice period an impossibility.

Baykeeper, 309 F.3d at 1157-58 (*citing Washington Trout*, 45 F.3d at 1354) (internal citations omitted). Here, there was no such bar to negotiation. Defendants had all the contact info they needed to contact Plaintiffs and seek a resolution to this case. They simply chose not to do so.

Plaintiffs concede that notice is deficient as to Assateague Coastal Trust (ACT) because the organization is not named or identified in the Notice Letter. However, due to Waterkeeper Alliance's clear standing, this case will proceed with or without ACT. Therefore, this Court is not under any obligation to dismiss ACT from the suit. "The general rule applicable to federal court suits with multiple plaintiffs is that once the court determines that one of the plaintiffs has standing, it need not decide the standing of the others." *Leonard v. Clark*, 12 F.3d 885, 888 (9th Cir.1993) (*citing Carey v. Population Services Int'l*, 431 U.S. 678, 682 (1977)).

IV. Plaintiffs Have Satisfactorily Demonstrated Their Standing to Bring This Action.

Through the allegations lodged in their Complaint, supported by the declarations attached to this Response, Plaintiffs fully meet the burden of establishing Article III standing. Defendants' efforts to argue that Plaintiffs lack standing are based substantially on their misunderstanding of the procedural requirements for proving standing at the complaint stage. The facts pled in the Complaint were sufficient to establish standing at that stage of the litigation and are further developed in this Opposition and the attached declarations. Defendants further mischaracterize Plaintiffs' injuries and the relevant case law surrounding the standing inquiry. When properly considered, all of these factors support a finding that Plaintiffs do, in fact, satisfy all elements of Article III standing and are properly before this court.

A. Plaintiffs generalized statements of injury and interest were sufficient to prove standing at the complaint-stage of this proceeding.

Plaintiffs agree with Defendants that litigants must have standing at the onset of litigation. This standing can be established by allegations in the Complaint, as was done in the case at bar. Indeed, at the complaint stage of litigation, "'general factual allegations of injury resulting from the defendant's conduct may suffice,' and the court 'presum[es] that general allegations embrace the specific facts that are necessary to support the claim.'" *Sierra Club v. EPA*, 292 F.3d 895, 898-99 (D.C. Cir. 2002) (*quoting Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561 (1992)). In their Complaint, Plaintiffs clearly provided "allegations of injury," as Defendants seemingly acknowledge. *See* Perdue Br. at 27. These allegations are more than general allusions to inchoate harms; they specify the waters polluted by Defendants' activities, point to a geographic connection between these activities and the waters enjoyed

by Plaintiffs and their members, and identify the impact Defendants' illegal discharges have on these waters and the members' legally protected ability to enjoy them. *See* Complaint at ¶¶ 31, 32, 37.

Despite the well established law on this issue, Defendants argue that the Plaintiffs have failed to introduce "factual allegations about how Defendants' conduct adversely affects their interests." *See* Perdue Br. at 27; Hudson Br. at 9. Defendants imply that Plaintiffs must produce evidence that establishes the bases for their standing "at the outset of the litigation." *See* Perdue Br. at 25 (*quoting Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC),Inc.*, 528 U.S. 167, 180 (2000)). This is incorrect. As a full reading of *Laidlaw*, *Lujan* and *Sierra Club v. EPA* demonstrates, there is a distinction between having properly *alleged* standing at the outset of litigation and the requirement urged by Defendants that Plaintiffs must *prove* standing at the outset of litigation.

Contrary to Defendants' claims, the proper time for Plaintiffs to introduce affidavits, declarations or other evidence to support allegations of injury arises when a dispositive motion is filed: "On a motion for summary judgment, however, 'the plaintiff can no longer rest on such 'mere allegations', but must 'set forth' by affidavit or other evidence 'specific facts,' . . . which for purposes of the summary judgment motion will be taken to be true.'" *Sierra Club v. EPA,* 292 F.3d at 898-99 (*quoting* Fed.R.Civ.P. 56(e)). Accordingly, Plaintiffs' declarations attached hereto present in more detail the "specific facts" that support their earlier allegations. As detailed below, these facts are fully sufficient to support Plaintiffs' standing to bring this action.

B. Plaintiffs have suffered injuries to their legally protected interests because of Defendants' illegal discharges.

An individual possesses Article III standing "if (1) he or she has suffered an 'injury in fact,' (2) that is fairly traceable to the challenged action of the defendant, and (3) it is likely that the injury will be

redressed by a favorable decision." *Piney Run Preservation Ass'n v. County Com'rs of Carroll County*, 268 F.3d 255, 262–63 (4th Cir. 2001); *see also Laidlaw*, 528 U.S. at 180-81. To demonstrate that a plaintiff has suffered an "injury in fact," a plaintiff must show "an invasion of a legally protected interest which is concrete and particularized, as well as actual or imminent." *Piney Run* 268 F.3d at 263 (*citing Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 154 (4th Cir. 2000)). Each of the Plaintiffs in this action satisfy this test.

Generally, Defendants make overbroad representations about the degree to which Plaintiffs must prove injury and traceability. In so doing they both misread applicable law and understate the particularity of Plaintiffs' bases for standing. In a CWA citizen suit, it is sufficient for a plaintiff to show that "he used the affected area, and that he is an individual 'for whom the aesthetic and recreational values of the area [are] lessened' by the defendant's activity." *Piney Run,* 268 F.3d at 263 (*quoting Sierra Club v. Morton*, 405 U.S. 727, 735, (1972)); *see also Defenders of Wildlife*, 504 U.S. at 562-63; *Gaston Copper*, 204 F.3d at 159.

1. All Plaintiffs and/or Plaintiffs' members suffer an injury in fact

Plaintiffs Assateague Coastal Trust (ACT) and Waterkeeper Alliance are organizations with members or employees who live near, recreate on, or otherwise enjoy waters which receive discharges from, and are negatively affected by, Defendants' operation. Similarly, Plaintiff Kathy Phillips, in her individual capacity and as Assateague Coastkeeper, lives near, works and recreates on, and otherwise enjoys waters which receive discharges from, and are negatively affected by, Defendants' operation.

Ms. Stacy Paulsen is a member of both ACT and Waterkeeper Alliance. *See* Declaration of Stacy Paulsen ("Paulsen Decl."), Ex. F at ¶ 2. At different times during the year, she canoes with her

husband and children on the Pocomoke River downstream from the Facility. *See id.* at ¶ 5. Ms. Paulsen enjoys viewing wildlife along the River, and participating in educational events such as visits to the Furnace Town Heritage Museum, located on Nassawango Creek, a tributary of the Pocomoke River. *Id.* at ¶ 5. Ms. Paulsen is aware of the results of water quality samples drawn from Hudson Farm run-off, and is concerned that high levels of bacteria in this run-off make it unsafe for herself and her family to recreate on and in the Pocomoke. *Id*. at ¶¶ 6–8. She is also concerned that high levels of nutrients in this run-off interfere with the aquatic life which she enjoys observing. *Id*. As a result of these concerns, Ms. Paulsen is not able to "fully enjoy the Pocomoke River and surrounding area." *Id.* at ¶ 8.

Waterkeeper Alliance member Carolyn Lott also recreates on and near the Pocomoke River, downstream from the Facility , and has family members who do so. *See* Declaration of Carolyn Lott ("Lott Decl."), Ex. G at ¶¶ 2, 8. Ms. Lott is aware of health and water quality issues associated with water contamination that she believes is caused by poultry operations of the type operated by Defendants. *Id.* at ¶ 10. These concerns diminish her ability to use and enjoy the Pocomoke River and make her reluctant to allow her son to participate in Boy Scouting activities on and near the River out of fear that the pollution may exacerbate his health condition. *Id.* at ¶¶ 9, 12, 15.

Kathy Phillips is Executive Director and Assateague Coastkeeper for, and a member of, ACT. Assateague Coastkeeper is also a member program of Waterkeeper Alliance. In Ms. Phillips' professional capacity as Assateague Coastkeeper, she patrols local bays, rivers and streams including the Pocomoke River and its tributaries to monitor water quality and investigate sources of pollution. *See* Declaration of Kathlyn Phillips ("Phillips Decl."), Ex. H ¶¶ 2, 10. In the course of these duties, she regularly comes in contact with the waters of the River and its tributaries, including those downstream from the Facility. *Id.* at ¶ 10. In addition to these professional activities, Ms. Phillips kayaks, canoes,

hikes and bird-watches on and near the Pocomoke River for her personal pleasure. *Id.*at ¶ 11. Ms. Phillips' declaration, which details her diminished enjoyment of the waterways detrimentally impacted by Defendant's discharges, firmly establishes her injury as an individual Plaintiff, as the Assateague Coastkeeper, and as a member of ACT.

The above harms suffered by Plaintiffs are concrete and particularized. In Defendants' argument that Plaintiffs injuries are too generalized, they rely exclusively on *Pollack v. US Dept of Justice*, which is factually distinguishable from this case. 577 F.3d 736 (7th Cir. 2009). Unlike the case at hand, in *Pollack*, the plaintiff was unable to show an impact from pollutants that were introduced into the water *downstream* from his property. *Id*. at 741. In contrast, Plaintiffs in this case, and their members, are directly harmed by Defendants' discharges, having recreated on and come into contact with waters adjacent to and proximately downstream from the Facility. *See* Phillips Decl., Ex. H at ¶ 10; Lott Decl., Ex. G at ¶¶ 6,8; Paulsen Decl., Ex. F at ¶ 5. Their interests relative to this litigation are confined to one specific watershed, downstream from the Facility, and are likely to be harmed by the type of contaminants found in Defendants' unlawful discharges. This situation is far from allegations based on the use of "unspecified portions of an immense tract of territory" which frustrated plaintiff's standing in *Lujan*. *See Pollack*, 577 F.3d at 741; *Lujan*, 497 U.S. at 889.

2. Plaintiffs' injuries are fairly traceable to defendants' illegal discharges.

The harms suffered by Plaintiffs in this case are fairly traceable to the water pollution from the Facility. In order to satisfy the "traceability" inquiry articulated in *Piney Run* and elsewhere, Plaintiffs need not "show to a scientific certainty that defendant's effluent ... caused the precise harm suffered by the plaintiffs." *Natural Res. Def. Council, Inc. v. Watkins,* 954 F.2d 974, 980 n. 7 (4th Cir.1992)

(citations omitted); *see also Gaston Copper,* 204 F.3d at 161. "Rather, a plaintiff must merely show that a defendant discharges a pollutant that causes or contributes to the kinds of injuries alleged." *Piney Run*, 268 F.3d at 264 (*quoting Watkins,* 954 F.2d at 980) (internal quotation marks omitted). In *Piney Run*, the plaintiffs submitted evidence and testimony that the defendant in that case was discharging thermal pollution into the Piney Run, and that such discharges can cause a proliferation of algae, of the sort that diminished the plaintiffs' enjoyment of Piney Run. *See id*. at 263.

Plaintiffs in this case have made a similar showing. Ms. Paulsen's declaration reveals her awareness that discharges from the Facility have high levels of bacteria and harmful nutrients. *See* Paulsen Decl., Ex. F at ¶ 6. Ms. Paulsen further declares that the presence of these contaminants diminishes her ability to enjoy the Pocomoke River and its tributaries, and may adversely impact her children's health. *Id.* at ¶¶ 7–8. Ms. Phillips expresses her concern that contact with water contaminated by the high levels of pollutants in Defendants' discharges may adversely impact her health and reduce her enjoyment of nearby waters. *See* Phillips Decl., Ex. H. at ¶ 16. Nothing more is required to satisfy the test set forth in *Piney Run* and *Watkins*.

3. A favorable decision will redress Plaintiffs' injuries

Plaintiffs' reduced enjoyment of their local waterways due to water pollution from the Facility will be redressed by a favorable decision in this lawsuit. As Defendants point out, *Laidlaw* requires a showing that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *See* Perdue Br. at 30 (*quoting Laidlaw*, 528 U.S. at 181). However, not only are Plaintiffs' injuries in this case far more substantial than the delayed filing of paperwork at issue in *Steel Co. v. Citizens for a Better Environment*, but the relief prayed for will go much further to redressing

those injuries. 523 U.S. 83 (1998). Plaintiffs here seek injunctive relief intended to ensure that Defendants cease their unlawful discharges and cease polluting the watersheds enjoyed by Plaintiffs and their members. *See* Complaint, Prayer for Relief at 14. Further, this injunctive relief will ensure that Defendants meet their legal obligations to comply with the CWA and to restore the environmental harm caused by their discharges. *Id*. Far from being speculative, these remedies are directly related to righting the injuries suffered by Plaintiffs and their members.

4. As organizations, Waterkeeper Alliance and ACT have standing to represent the interests of their respective members

Organizations may have standing to bring an action as the representative of their members who have been harmed. *Gaston Copper*, 204 F.3d at 155. An organization has representational standing when (1) at least one of its members would have standing to sue in his own right; (2) the organization seeks to protect interests germane to the organization's purpose; and (3) neither the claim asserted nor the relief sought requires the participation of individual members in the lawsuit. *Id. (citing Hunt v. Washington State Apple Adver. Comm'n,* 432 U.S. 333, 343 (1977)).

In this case, members of both ACT and Waterkeeper Alliance clearly established their individual Article III standing as evidenced by the attached declarations, thereby satisfying the first prong of the organizational standing requirements. Ms. Paulsen and Ms. Phillips are both members of ACT, and detailed the harms they suffer as a result of the water pollution from the Hudson CAFO, thereby establishing standing for ACT. Likewise, the harms suffered by Ms. Lott and Ms. Paulsen, detailed *supra*, are sufficient to confer standing upon them individually and therefore upon Waterkeeper Alliance as their representative. *See* Lott Decl., Ex. G; at ¶ 15; Paulsen Decl., Ex. F at ¶ 8.

With regard to the second prong, Plaintiff ACT has among its organizational purposes efforts to "protect and enhance the natural resources of Worcester County, which encompasses the Chesapeake Bay watershed and the Atlantic Coastal Bays, through advocacy, conservation, and education." *See* Complaint at ¶ 8.[38] Securing the Pocomoke River against contamination from poultry CAFOs like Perdue's Hudson Farm benefits ACT's members and falls squarely within the organization's interests in protecting the coastal and Chesapeake Bay watersheds. Plaintiff Waterkeeper Alliance has dual purposes to protect those interests of the member Waterkeeper member programs, such as Assateague Coastkeeper, and those of its individual members. *See* Stratton Decl., Ex. E, at ¶¶ 57. The interests at issue in this litigation are undeniably germane to Waterkeeper Alliance's mission. *See* Stratton Decl., Ex. E at ¶ 4.

With respect to the final prong, Plaintiffs have asked this court to enjoin Defendants' unlawful discharges and assess the penalties prescribed by the CWA for these violations. *See* Complaint at ¶ 15. Neither of these remedies requires the participation of any member of either Waterkeeper Alliance or ACT. Having met all three prongs of the test set forth in the *Hunt* decision, both organizations, in addition to individual Plaintiffs, have standing to bring this action.

38 Defendants' attempt to distinguish the mission statement on ACT's website from that paraphrased in the Complaint is much ado about nothing. *See* Perdue Br. at 32-33. The Pocomoke River, rising in southern Delaware and flowing through the eastern shore counties of Maryland, can only be considered as one of "the natural resources of the Atlantic coastal bays watershed." *Id.* Furthermore, Ms. Phillips has stated that in her capacity as Assateague Coastkeeper, a position that reflects ACT's mission and purpose, both she and the organization have "a history of ...working in Worcester County, which borders the Pocomoke River and is part of both the Chesapeake Bay and Atlantic Coastal Bays watersheds." *See* Phillips Decl., Ex. H at ¶¶ 5, 8.

CONCLUSION

For all the foregoing reasons, Plaintiffs request that Defendants' Motions to Dismiss be denied.

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Respectfully submitted,

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