

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

WATERKEEPER ALLIANCE, INC.

Plaintiff,

v.

ALAN AND KRISTIN HUDSON FARM,
et al.

Defendants.

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Civil Action No. 1:10-cv00487-WDQ

**PLAINTIFF'S MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT**

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**PLAINTIFF’S MEMORANDUM IN SUPPORT OF
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I. INTRODUCTION

Plaintiff brought this action pursuant to the Clean Water Act (“CWA” or the “Act”) citizen suit provision¹ after documenting significant amounts of pollutants, including nutrients (nitrogen, phosphorus, and ammonia²) and bacteria (fecal coliform and *E. coli*), in drainage ditches leaving the Alan and Kristin Hudson Farm (“the Facility”).³ Pollutants travel from these drainage ditches to the Franklin Branch, a tributary of the Pocomoke River, and out to the Pocomoke River itself.⁴

Between October 21, 2009 and December 9, 2009, Plaintiff sampled discharges from the Facility on numerous occasions with sample results consistently showing high numbers of fecal

¹ 33 U.S.C. § 1365 (2006). 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, *id.* § 1251(a), and included a citizen suit provision to help achieve these important goals. *Id.* § 1365.

² Ammonia and nitrates are forms of nitrogen that contribute to the total nitrogen pollutant load. *See* Ex. 2, U.S. EPA, Total Nitrogen, *available at* <http://www.epa.gov/region9/water/tribal/pdf/cwa-reporting/Total-Nitrogen.pdf>.

³ *See* Compl. ¶¶ 33–35; *see also infra* Part IV, Statement of Facts ¶ 1.

⁴ *See infra* Part IV, Statement of Facts ¶ 55.

coliform, *E. coli*, nitrogen, phosphorus, and ammonia.⁵ The sample results showed fecal coliform counts as high as 280,000 Most Probable Number per 100 milliliters (MPN/100 mL) and *E. coli* counts as high as 155,310 MPN/100 mL,⁶ more than 260 times the Maryland *E. coli* standard for impaired waters.⁷ The concentrations of phosphorus and nitrogen in the discharges were also significantly greater than EPA's reference condition for these pollutants.⁸

On December 17, 2009, Plaintiff sent a CWA 60-day notice letter to the owners/operators of the Facility, Perdue Farms, Inc. ("Perdue") and Alan and Kristin Hudson Farm, alerting them to the ongoing pollution problems. After Plaintiff sent the notice letter, it continued to sample discharges from the Facility, documenting that the violations were continuing.⁹ Furthermore, samples collected by the Maryland Department of the Environment ("MDE") after Plaintiff's notice letter also show extremely high levels of contamination in the ditches on site and leaving the Facility.¹⁰

During the 72-day period between the notice letter and the filing of the Complaint on March 1, 2010, Defendants did not contact Plaintiff to discuss this matter or seek an out-of-court resolution. Defendants filed motions to dismiss, which were fully briefed by the parties between March 29, 2010 and May 17, 2010. This Court denied the motions in significant part on July 21, 2010.¹¹ Defendants filed their Answers to Plaintiff's Complaint on August 4, 2010 and the

⁵ Compl. ¶¶ 33–35; *see infra* Part IV, Statement of Facts ¶¶ 44–47.

⁶ *See infra* Part IV, Statement of Facts ¶¶ 45–46.

⁷ *See infra* Part IV, Statement of Facts ¶ 46; Md. Code Regs. tit. 26 § 08.02.03–3(a) (2011).

⁸ *See infra* Part IV, Statement of Facts ¶ 47.

⁹ Compl. ¶ 36; *see infra* Part IV, Statement of Facts ¶¶ 42–47.

¹⁰ Compl. ¶ 36; *see infra* Part IV, Statement of Facts ¶¶ 48–52.

¹¹ As Defendants conceded, Plaintiff established standing in response to Defendants' Motions to Dismiss. *Assateague Coastkeeper v. Alan & Kristin Hudson Farm*, 727 F. Supp. 2d 433 n.2 (D. Md. 2010).

parties engaged in discovery until May 10, 2011. Plaintiff now files its Motion for Summary Judgment.

Based on the evidence gathered prior to the filing of the case, as well as that developed during discovery, Plaintiff has proven that Defendants, as owners and operators of the Facility, discharged pollutants from a point source into waters of the United States without a permit. Plaintiff is therefore entitled to summary judgment on these issues.

II. BACKGROUND

A. The Waterways of the Eastern Shore

According to a 2010 report from the United States Environmental Protection Agency (“EPA”), “most of the [Chesapeake] Bay’s waters are degraded and are incapable of fully supporting fishing, crabbing, or recreational activities. Algal blooms fed by nutrient pollution block sunlight from reaching underwater Bay grasses and lead to low oxygen levels in the water.”¹² This pollution has disrupted the food cycle in the Bay leading to record low levels of fish and shellfish populations.¹³

The local waterways that provide the aquatic lifeline of the Bay are not fairing any better. The Pocomoke River, a Maryland Scenic and Wild River, is home to many species of plants and animals, including some threatened and endangered species.¹⁴ Sadly, the Pocomoke is listed as impaired for both nutrients and bacteria.¹⁵

¹² See Ex. 3, U.S. EPA, *Chesapeake Bay Compliance and Enforcement Strategy* 1 (May 2010), available at <http://www.epa.gov/compliance/civil/initiatives/chesapeake-strategy-enforcement.pdf>.

¹³ *Id.*

¹⁴ See Ex. 4, Md. Dep’t of Natural Res. (“DNR”), *Maryland Scenic Rivers: The Pocomoke* 5, 17–22 (1982), available at <http://www.dnr.state.md.us/irc/docs/00001148.pdf>; see also Ex. 5, DNR, *Pocomoke River Basin, Environmental Assessment of Stream Conditions* 2, 18–21 (Dec. 1999), available at <http://www.dnr.state.md.us/irc/docs/00004408.pdf>.

¹⁵ Section 303(d) of the CWA requires states, territories, and authorized tribes to develop lists of impaired waters—waters that are too polluted or otherwise degraded to meet the water quality standards set by those entities. See Ex. 6, *Impaired Waters and Total Maximum Daily Loads*, United States Environmental Protection Agency, <http://water.epa.gov/lawsregs/lawguidance/cwa/tmdl/> (last updated Sept. 29, 2011); see also Ex. 7, Md. Dep’t of the Env’t (“MDE”), *Maryland’s Final 2010 Integrated Report of Surface Water Quality for Category 5 Waters* 3–4 (2010), available at

The consequence of severe nutrient pollution was acutely felt in the Pocomoke during 1996 and 1997 when there was a toxic *Pfisteria piscicida* outbreak.¹⁶ Excessive nutrient loadings “help[ed] create an environment rich in microbial prey and organic matter that the *Pfisteria* use as a food supply.”¹⁷ This outbreak caused lesions in a great number of fish and closed the Pocomoke to fishing and other human activity for six weeks.¹⁸

The pollutants most responsible for causing this dramatic die-off of the Chesapeake Bay watershed, North America’s largest and most biologically diverse ecosystem, are nutrients (phosphorus and nitrogen) and sediments. Agricultural operations constitute the largest single source of these pollutants to the Bay. EPA attributes 45% of phosphorus loading, 38% of nitrogen loading and 60% of sediment loading in the Bay watershed to agricultural sources.¹⁹ About one-half of these agricultural nitrogen loads in the Bay watershed are from animal waste,²⁰ much of which is from poultry operations.²¹ Given these alarming numbers, enforcement of existing laws that protect the Chesapeake Bay watershed is critically important. “The Chesapeake Bay and its watershed are an ecosystem and resource of enormous economic,

http://www.mde.state.md.us/programs/Water/TMDL/Integrated303dReports/Documents/Integrated_Report_Section_PDFs/2010%20Integrated%20Report%20FINAL_Part_F5.pdf (follow “Final 2010 IR part F-5” hyperlink); Ex. 8, MDE et al., *Total Maximum Daily Loads of Fecal Coliform for the Restricted Shellfish Harvesting/Growing Areas of the Pocomoke River* (June 12, 2009), available at

http://www.mde.state.md.us/programs/Water/TMDL/ApprovedFinalTMDLs/Documents/www.mde.state.md.us/assets/document/TMDL_Pocomoke_River_061209_revised_final.pdf.

¹⁶ *Pfisteria piscicida* is a toxic dinoflagellate (a single celled micro-organism) associated with fish lesions and fish kills. See Ex. 9, Harry Hughes et al., *Report of the Governor’s Blue Ribbon Citizens Pfisteria Piscicida Action Commission* (Nov. 3, 1997), available at

<http://www.msa.md.gov/megafile/msa/speccol/sc5300/sc5339/000113/000000/000152/unrestricted/20040010e.html>.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Ex. 3, *Chesapeake Bay Compliance and Enforcement Strategy* at 2.

²⁰ *Id.*

²¹ *Id.* at 10. The Delmarva poultry industry produces about 1.1 billion pounds of unmanageable poultry waste each year. See Ex. 10, Delmarva Poultry Indus., Inc., *Look What the Poultry Industry Is Doing for Delmarva* (Jan. 2011) available at http://www.dpichicken.org/faq_facts/ (follow the “Delmarva’s Broiler Chicken Industry” hyperlink); Md. Coop. Extension, *Structures for Broiler Litter Manure Storage* 1 (1990), available at <http://extension.umd.edu/publications/pdfs/fs416.pdf>.

social, and environmental significance.”²² This “national treasure”²³ is important for all citizens of Maryland, including watermen, property owners and those employed in the tourism sector.

B. Perdue Farms, Inc. and the Alan and Kristin Hudson Farm

Perdue contracts with many farms throughout the Eastern Shore of Maryland, some of which are Concentrated Animal Feeding Operations (“CAFOs”), to raise large numbers of Perdue’s poultry.²⁴ Perdue, like many other industrial operations with multiple production facilities, controls all aspects of its poultry business, including the day-to-day operation of its contract farms.²⁵

Alan and Kristin Hudson contract with Perdue to raise poultry.²⁶ According to Perdue, the Facility is one of its ten worst on the Eastern Shore of Maryland.²⁷ Perdue and the Hudsons raise over a half million of Perdue’s chickens each year at the Facility, generating approximately 280 tons of poultry waste²⁸ each year.²⁹ While Perdue directly operates and controls virtually every aspect of the Facility, and owns the poultry itself, the company refuses to take legal responsibility for the poultry waste.

²² Ex. 11, U.S. EPA, *The Next Generation of Tools and Actions to Restore Water Quality in the Chesapeake Bay* 1 (Nov. 24, 2009); *see also id.* at 6 (“Economists have estimated the Bay’s value at more than \$1 trillion, and its bounty includes more than 500 million pounds of seafood per year.”).

²³ Ex. 12, Exec. Order No. 13,508, 74 Fed. Reg. 23,099 (May 15, 2009).

²⁴ *See infra* Part V.A.

²⁵ *See infra* Part IV, Statement of Facts ¶¶ 74–115.

²⁶ Ex. 13, Poultry Producer Agreement (“PPA”) (June 23, 2008), Nos. HUD000941–000947. “Poultry”, “chickens”, and “birds” are used interchangeably throughout this case and this Motion, although the Facility grows Cornish hens. *See* Ex. 14, Notice of Intent, General Permit for Discharges From Animal Feeding Operations 1–2 (Mar. 19, 2009) (MDE certified).

²⁷ *See* Ex. 15, E-mail chain between T. Langford, Perdue Farms DMV South Accomar Growout Manager, et al. re: Top 10 Farms That You Are Worried About (Feb. 19–23, 2010), Nos. PER011332–011333 (ranking Hudson Farm as one of the top ten farms Perdue is worried about from a curb appeal, environmental, aesthetic and potential liability perspective in the Delmarva South region); Top 10 Farms that are Worried about in DMV South, No. PER016130 (ranking Hudson farm as one of the top 10 farms Perdue is worried about in the Delmarva South region); Ex. 16, A. Hudson Dep. 461:8–464:11.

²⁸ For the purposes of this Motion, “poultry waste” includes manure, litter, feathers and other waste generated inside the poultry houses. However “poultry waste” and “manure” are often used interchangeably throughout this case and this Motion.

²⁹ *See* Ex. 17, Nutrient Management Plan (“NMP”) for Alan Hudson 4 (Nov. 10, 2008), Nos. HUD001513–001669 ; Ex. 18, Partial NMP for Alan Hudson 4 (Nov. 10, 2008) (MDE certified).

III. LEGAL STANDARD FOR MOTION FOR SUMMARY JUDGMENT

Summary judgment is appropriate when, viewing the record as a whole in the light most favorable to the non-moving party, there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law.³⁰ “When a party has submitted sufficient evidence to support its request for summary judgment, the burden shifts to the non-moving party to show that there are genuine issues of material fact.”³¹ To survive a motion for summary judgment, the non-moving party “must do more than simply show that there is some metaphysical doubt as to the material facts.”³² In addition, the non-moving party “may not rest upon mere allegations or denials of his pleading, but must come forward with specific facts showing that there is a genuine issue for trial.”³³ “Mere unsupported speculation is not sufficient to defeat a summary judgment motion if the undisputed evidence indicates that the other party should win as a matter of law.”³⁴

IV. STATEMENT OF FACTS

The Defendants

1. Alan and Kristin Hudson (“the Hudsons”) own approximately 293 acres³⁵ located at 9101 Logtown Road in Berlin, Maryland, generally known as the Ro-Mar-Len Farm (“the Farm”).³⁶ For the

³⁰ *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–24 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Peters-Martin v. Navistar Intern. Transp. Corp.*, 410 Fed. Appx. 612, 619 (4th Cir. 2011) (citing Fed. R. Civ. P. 56(a)).

³¹ *Emmett v. Johnson*, 532 F.3d 291, 297 (4th Cir. 2008) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–88 (1986)).

³² *Matsushita Elec. Indus. Co.*, 475 U.S. at 586.

³³ *Emmett*, 532 F.3d at 297 (quoting *Matsushita*, 475 U.S. at 587) (internal quotation marks omitted).

³⁴ *Id.* (quoting *Francis v. Booz, Allen & Hamilton, Inc.*, 452 F.3d 299, 308 (4th Cir. 2006)).

³⁵ See Ex. 19, Md. Dep’t of Agric. (“MDA”) Nutrient Management Program Plan Implementation Evaluation Report for Alan Hudson (Aug. 12, 2010), Nos. HUD000249–000251. In different documents, the acreage varies; see e.g., Ex. 17, 2008 NMP at 1 (226 acres owned and leased).

³⁶ See Ex. 16, A. Hudson Dep. 14:21–15:1.

purposes of the animal feeding operation (“AFO”),³⁷ the Hudsons do business as the Alan and Kristin Hudson Farm or the Kristin Hudson Farm (“the Facility”).³⁸

2. The Hudsons have been producing Perdue’s poultry year-round for approximately eight years.³⁹
3. Among the Hudsons, Alan Hudson has primary responsibility for poultry production.⁴⁰ Kristin Hudson does not have day-to-day responsibilities for poultry production.⁴¹
4. Perdue Farms, Inc. (“Perdue”) is a corporation and a leading food and agricultural company headquartered in Salisbury, Maryland.⁴²
5. Perdue is the largest poultry integrator⁴³ on the Delmarva Peninsula⁴⁴ with 681 facilities in that region.⁴⁵

³⁷ An “AFO” is “a lot or facility (other than an aquatic animal production facility) where the following conditions are met: (i) Animals (other than aquatic animals) have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period, and (ii) Crops, 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)(1) (2011). It is incontrovertible that the Facility is an AFO as it confines animals in these conditions. *See id.*; Ex. 14, Notice of Intent at 1–2 (Mar. 19, 2009) (MDE certified).

³⁸ *See* Ex. 14, Notice of Intent at 1–2 (identifying the animal feeding operation farm name as Alan & Kristin Hudson); *see also* Ex. 20, Assignment of Proceeds Form (Nov. 28, 2007), No. PER000927 (Alan Hudson, DBA Kristin Hudson Farm).

³⁹ *See* Ex. 16, A. Hudson Dep. 138:8–139:19; Ex. 13, PPA.

⁴⁰ *See* Ex. 16, A. Hudson Dep. 128:15–129:12.

⁴¹ *See id.* at 124:19–125:4; *see also* Ex. 21, K. Hudson Dep. 29:4–9.

⁴² *See* Ex. 22, *Our Company, Our Vision, Values and Aspirations*, Perdue, http://www.perdue.com/Corporate/Our_Company/Our_Values/ (follow “Our Vision” hyperlink) (last visited Oct. 12, 2011); *see also* Ex. 23, *Perdue Farms, Inc., Dept ID #: T00166864*, Maryland Department of Assessments and Taxation, http://sdatcert3.resiusa.org/UCC-Charter/CharterSearch_f.aspx (search Name: “Perdue Farms Inc.”) (last visited Oct. 19, 2011).

⁴³ In the industrial agriculture sector, companies like Perdue who control and own many phases of animal production are known as integrators. *Spartan Grain & Mill Co. v. Ayers*, 581 F.2d 419, 421 (5th Cir. 1978); *see* Ex. 24, James M. MacDonald, U.S. Dep’t of Agric, *The Economic Organization of U.S. Broiler Production*, 1 (June 2008), available at <http://www.ers.usda.gov/publications/eib38/eib38.pdf>.

⁴⁴ *See* Ex. 25, *Memorandum of Agreement between United States Environmental Protection Agency and Perdue, Perdue Clean Bays Environmental Management Initiative 1* (Sept. 18, 2006), available at http://www.epa.gov/Region3/pdf/Perdue_MOA.pdf.

⁴⁵ *See* Ex. 26, Perdue Farms Clean Waters Environmental Initiative Power Point Presentation, Delmarva Grand Total – Farms 55 (April 22, 2009) (EPA version); Ex. 27, Email from J. Smith to D. McGuigan et al. re Perdue Delmarva Growers.

The Point Source

6. The Facility includes two poultry houses, identified as Chicken House 1 (the northern chicken house) and Chicken House 2 (the southern chicken house), that house Perdue's poultry.⁴⁶ The two houses have a combined capacity of approximately 80,000 birds.⁴⁷
7. Although Alan Hudson's Nutrient Management Plans ("NMPs")⁴⁸ state that he receives seven flocks of 80,000 birds per year,⁴⁹ for a total production of approximately 560,000 birds per year, Perdue actually provided the Facility with eight flocks of 80,000 birds per year, for a total production of approximately 640,000 birds per year in 2009 and in 2010.⁵⁰
8. The Facility also includes a 40' x 64' poultry manure storage shed⁵¹ and a two-bin composter that contains poultry waste used in composting poultry mortalities.⁵²
9. On March 3, 2009, Alan Hudson submitted a Notice of Intent ("NOI") to MDE applying for "CAFO Permit Coverage."⁵³
10. On December 18, 2009, Alan Hudson signed MDE's "General Compliance Schedule for Applicants for CAFO Coverage," which MDE executed in July, 2010.⁵⁴
11. On December 18, 2009, September 16, 2010, September 25, 2010, March 8, 2011, and July 17, 2011, Alan Hudson submitted Comprehensive Nutrient Management Plan ("CNMP") Status Forms to

⁴⁶ See Ex. 28, Aerial Map of Hudson Farm (A. Hudson Dep. Ex. 1); Ex. 16, A. Hudson Dep. 23:1-8.

⁴⁷ See Ex. 16, A. Hudson Dep. 119:12-16; see Ex. 17, 2008 NMP at 1.

⁴⁸ The NMP covers the application and management of manure and other fertilizers on all fields owned, leased or managed by the Hudsons. See generally, Ex. 17, 2008 NMP.

⁴⁹ Ex. 17, 2008 NMP; Ex. 29, NMP for Alan Hudson (Mar. 26, 2010) Nos. HUD000181-000247 at HUD000186.

⁵⁰ See Ex. 30, Six Flock History Report, Kristin Hudson, Producer Number: 1443, Nos. PER001142-001144 (showing the Facility received eight flocks in 2009); Ex. 31, Six Flock History Report, Kristin Hudson, Producer Number: 1443, No. PER000864; Perfect Placement, Kristin Hudson, No. PER025175; Perfect Placement, Kristin Hudson No. PER024690; Perfect Placement, Kristin Hudson, No. PER0029412 (showing the Facility received eight flocks in 2010).

⁵¹ See Ex. 17, 2008 NMP at 1; Ex. 32, MDE Inspection Photograph 21 (Jan. 26, 2010) (MDE certified).

⁵² See Ex. 17, 2008 NMP at 1; Ex. 16, A. Hudson Dep. 294:14-17; Ex. 33, MDE Inspection Photograph 47 (Jan. 26, 2010) (MDE certified).

⁵³ Ex. 14, Notice of Intent.

⁵⁴ Ex. 34, General Compliance Schedule for Applicants for CAFO Permit Coverage (July 26, 2010) (MDE certified).

MDE, which are required “[i]f no CNMP was included with the Notice of Intent to Comply with the General Permit for Animal Feeding Operations and your operation is a Concentrated Animal Feeding Operation (CAFO).”⁵⁵ In Spring 2010, Alan Hudson applied for and received approval for a federal grant of \$4,750 for preparation of his CNMP.⁵⁶

12. The topography of the Farm is relatively flat.⁵⁷ The Facility contains several man-made ditches designed to drain water away from the farm⁵⁸ and into surrounding surface waters.⁵⁹

13. Some of these ditches, specifically Ditch 1 and Ditch 3 (as identified in Exhibit 45, Attachment 5 to Dr. Bruce Bell’s Declaration), are in very close proximity to the poultry houses.⁶⁰

14. Ditch 1 originates on the Farm and flows west and then southwest past the poultry houses until it discharges from the property through a culvert.⁶¹

15. Ditch 3 runs along the south side of Chicken House 2 and intersects with Ditch 1 near the southwest corner of that chicken house.⁶²

⁵⁵ Ex. 35, Compilation of Comprehensive Nutrient Management Plans (“CNMP”) Status Forms (MDE certified).

⁵⁶ Ex. 36, USDA, Natural Resources Conservation Service, Conservation Program Contract (May 6, 2010); Ex. 37, USDA, Natural Resources Conservation Service, Conservation Plan or Schedule of Operations (May 6, 2010). On September 14, 2010, MDE sent a letter to Alan Hudson notifying him that he was in violation of the Compliance Schedule for failure to update his CNMP status form as required by Section 4 of the Compliance Schedule. Ex. 38, Letter from Gary F. Kelman, MDE, Head of CAFO Section, to Alan Hudson (Sept. 14, 2010) (MDE certified).

⁵⁷ See Ex. 39, Dr. Hagedorn Dep. 166:4–9; see Ex. 40, MDE Inspection Photograph 8 (Jan. 26, 2010) (MDE certified); Ex. 41, MDE Inspection Photograph 17 (Jan. 26, 2010) (MDE certified); Ex. 42, MDE Inspection Photograph 19 (Jan. 26, 2010) (MDE certified).

⁵⁸ See Ex. 43, MDE Hudson Farms Sample Map (MDE certified); Ex. 44, R. Hudson Dep. 61:8–13, 62:1–4, 64:9–67:10; Ex. 16, A. Hudson Dep. 206:1–14; Ex. 45, Dr. Bell Decl. ¶ 13(b), Attach. 5 (showing the location and flow direction of the ditches and swale); Ex. 39, Dr. Hagedorn Dep. 166:13–18.

⁵⁹ See Ex. 43, MDE Hudson Farms Sample Map (MDE certified); Ex. 44, R. Hudson Dep. 61:14–62:4, 64:9–67:10 (“Q[:] So those ditches also run to the Pocomoke – A[:] Everything goes to the Pocomoke River eventually.”); Ex. 45, Dr. Bell Decl. ¶ 13(b), Attach. 6 (showing pathways for water flow in ditches).

⁶⁰ See Ex. 45, Dr. Bell Decl. Attach. 5.

⁶¹ See Ex. 43, MDE Hudson Farms Sample Map (MDE certified); Ex. 45, Dr. Bell Decl. ¶ 13(b), Attach. 5.

⁶² See Ex. 45, Dr. Bell Decl. ¶ 13(d), Attach. 5.

16. When the poultry houses were constructed, the land was intentionally designed to slope down and away from the poultry houses forming a shallow swale between the poultry houses (the “Swale”).⁶³ By draining water away from the poultry houses, the Swale keeps the poultry houses dry.⁶⁴
17. Water in the Swale flows west from the east end of the poultry houses into a drainage pipe that was installed to discharge water from the Swale⁶⁵ directly into Ditch 1.⁶⁶

The Discharge of Pollutants

18. According to Alan Hudson’s NMPs, the Facility generates approximately 280 tons of poultry waste each year.⁶⁷
19. The poultry waste contains fecal coliform, *E. coli*, nitrogen, phosphorus, and ammonia,⁶⁸ which are all pollutants under the CWA.⁶⁹
20. Cleanouts and “crust-outs” involve the removal of poultry waste from both ends of the poultry houses using a front-end loader.⁷⁰ This tracks poultry waste from inside the houses to the outdoors.⁷¹
21. Alan Hudson began windrowing poultry waste, i.e. composting the poultry waste in the houses, between flocks sometime after October 2009,⁷² using a small tractor to move poultry waste around

⁶³ See Ex. 16, A. Hudson Dep. 135:18–137:7; Ex. 46, MDE Inspection Photograph 10 (Jan. 26, 2010) (MDE certified).

⁶⁴ See Ex. 16, A. Hudson Dep. 135:18–137:7.

⁶⁵ See Ex. 45, Dr. Bell Decl. ¶ 13(c), Attach. 5; Ex. 16, A. Hudson Dep. 144:6–13, 405: 4–13.

⁶⁶ See Ex. 16, A. Hudson Dep. 144:6–11, 405:4–13; Ex. 47, Waterkeeper Alliance Photograph (“WKA”), No. WKA000527; Ex. 45, Dr. Bell Decl. ¶ 13(c).

⁶⁷ See Ex. 17, 2008 NMP at 3; Ex. 29, 2010 NMP at HUD000186MENT.

⁶⁸ See Ex. 48, J. Smith Dep. 49:10–12, 62:7–21, 145–146; Ex. 39, Dr. Hagedorn Dep. 144:11–17; Ex. 49, C. Johnson Dep. 44:21–45:14; Ex. 45, Dr. Bell Decl. ¶ 21(b)–(d); see also, Ex. 50, Analytical Results, Perdue Processing Plant, Chicken Litter, EPA-HUD000431–000434 (Sample analysis confirms nutrients in poultry litter from the Hudson Farm).

⁶⁹ 33 U.S.C. § 1362(19) (2006) (“The term ‘pollution’ means the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.”); *id.* § 1314 (identifying “biological oxygen demanding, suspended solids, fecal coliform, and pH” as conventional pollutants).

⁷⁰ Ex. 16, A. Hudson Dep. 210:20–212:4, 213:20–214:21; Ex. 45, Dr. Bell Decl. ¶ 20(a).

⁷¹ Ex. 45, Dr. Bell Decl. ¶ 20(a); Ex. 39, Dr. Hagedorn Dep. 141:21–143:17 (Defendants’ expert concedes moving heavy equipment in and out releases pollutants from the poultry operation).

⁷² Ex. 16, A. Hudson Dep. 188:19–189:2, 192:15–17, 195:13–16, 210:5–10; Ex. 31, Six Flock History Report No. PER000864 (showing flocks placed on 12/13/2009 and 2/1/2010); Ex. 51, Perdue Growout General BMP Log, PER000803 (noting the second flock to windrow).

inside the poultry houses.⁷³ Poultry waste, containing pollutants, was tracked out of the poultry houses during windrowing.⁷⁴

22. Poultry waste, containing pollutants, was tracked out of the poultry houses by foot traffic, including that of Alan Hudson and Perdue's employees entering and exiting the poultry houses.⁷⁵

23. A tunnel fan ventilation system was installed in the poultry houses in approximately the early 2000s.⁷⁶ The system includes a total of 7 fans on each poultry house (6 fans on the sides of the houses at the westernmost end and 1 fan at the easternmost end of each house).⁷⁷

24. The exhaust fans on the poultry houses discharge a combination of dust, feathers, chicken litter, and manure into the area surrounding the houses and the Swale between the houses.⁷⁸

25. Fan exhaust from the poultry houses contains pollutants such as fecal coliform, *E. coli*, nitrogen, phosphorus, and ammonia.⁷⁹

26. Pollutants released into the area surrounding the poultry houses, including those discharged by the fans, were transported and deposited into Ditches 1 and 3 (as identified in Exhibit 45, Attachment 5

⁷³ Ex. 16, A. Hudson Dep. 465:9–466:14.

⁷⁴ See Ex. 39, Dr. Hagedorn Dep. 141:21–143:17 (Defendants' expert concedes moving heavy equipment in and out of the houses, and specifically windrowing, releases pollutants from the poultry operation), 143:18–145:1; Ex. 45, Dr. Bell Decl. ¶ 21(b).

⁷⁵ See Ex. 39, Dr. Hagedorn Dep. 143:18–145:1; Ex. 45, Dr. Bell Decl. ¶ 21(b).

⁷⁶ See Ex. 16, A. Hudson Dep. 147:5–9.

⁷⁷ See Ex. 52, WKA Aerial Photographs, Nos. WKA000199, WKA000168; Ex. 53, MDE Inspection Photograph 11 (MDE certified); Ex. 54, MDE Inspection Photograph 34 (MDE certified).

⁷⁸ See Ex. 48, J. Smith Dep. 274:14–275:17; Ex. 39, Dr. Hagedorn Dep. 157:3–5; Ex. 55, Perdue Clean Water Initiative Power Point Presentation, Nos. PER000034-000116 at No. PER00100 (identifying fan ventilation as a source of pollutants); Ex. 45, Dr. Bell Decl. ¶ 21(b), (d)–(f). This is consistent with photographs of the fans taken by MDE and Plaintiff showing litter and manure caked on the fans. See Ex. 53, MDE Inspection Photograph 11; Ex. 56, WKA Photograph No. WKA000532.

⁷⁹ See Ex. 48, J. Smith Dep. 48:14–16, 49:5–16, 62:16–63:5, 82:6–18; Ex. 39, Dr. Hagedorn Dep. 156:6–157:5 (Dr. Hagedorn admits: "The fans can clearly disperse bacteria and nutrients, especially ammonia, from the inside of the chicken houses"); 159:12–17, 161:2–18; Ex. 49, C. Johnson Dep. 46:13–48:3, 57:12–14; Ex. 45, Dr. Bell Decl. ¶ 21(d); Ex. 57, Larry D. Jacobson, *et al.*, *Air Emissions from Animal Production Buildings*, Presented at the XI International Society for Animal Hygiene 2003, Feb. 17–23, 2003, Mexico City, available at <http://www.isah-soc.org/index.php?action=15>. Ammonia is a component of Total Kjeldahl Nitrogen ("TKN"). See Ex. 58, U.S. EPA, Glossary at 9, available at http://water.epa.gov/scitech/wastetech/guide/aquaculture/upload/2005_09_01_guide_aquaculture_add_Glossary_508.pdf. Ammonia is deposited downwind of poultry houses by both wet and dry deposition. See Ex. 45, Dr. Bell Decl. ¶ 22.

of Dr. Bell's Declaration).⁸⁰ Flow of these pollutants to Ditch 1 was facilitated by the Swale that slopes toward a pipe.⁸¹ The pipe cuts through the bank of the ditch and discharges pollutants directly to Ditch 1.⁸² This pipe is a source of discharges of pollutants from the poultry operation to Ditch 1.⁸³

27. Equipment, foot traffic, and the exhaust fans discharged poultry waste, and its associated pollutants, into the area surrounding the chicken houses. The poultry waste, containing pollutants, was then transported into Ditches 1 and 3.⁸⁴ Ditch 3 intersects and discharges into Ditch 1 approximately 35 feet from the westernmost end of the southern chicken house.⁸⁵

28. In 2008 and 2009, Alan Hudson applied for funding under the Maryland Agricultural Water Quality Cost Share ("MACS") Program to construct concrete pads at the four doorways to the poultry houses.⁸⁶

29. These pads are authorized under MACS in "Heavy Use Areas" ("HUAs") that are susceptible to the deposit and subsequent runoff of manure, such as at the doors of poultry houses or adjacent to poultry waste storage structures.⁸⁷

30. MACS funding for HUA protection, such as the pads on the Facility, may only be applied "to farms which have been determined to have severe erosion and water quality problems along areas of

⁸⁰ See Ex. 45, Dr. Bell Decl. ¶¶ 21 (e)–(h), 22; Ex. 39, Dr. Hagedorn Dep. 192:1–193:21, 282:1–19 ("Yeah, something comes out of the houses and it's—I think we have established that there's a possibility that some of that that comes out of the houses and the fans could wind up on the ground here and then at some point rainfall could wash it into the ditch."); Ex. 48, J. Smith Dep. 82:6–18.

⁸¹ See Ex. 45, Dr. Bell Decl. ¶¶ 13(c), 21(e); Ex. 47, WKA Photograph, No. WKA000527.

⁸² See Ex. 45, Dr. Bell Decl. ¶¶ 13(c), 21(e); Ex. 59, WKA Site Inspection Photograph (Nov. 17, 2010) (as shown on Ex. 45, Dr. Bell Decl., Attach. 2, Figure 10).

⁸³ Ex. 45, Dr. Bell Decl. ¶ 21(e); Ex. 48, J. Smith Dep. 279:13–16 (Mr. Smith testified that the pipe could absolutely be a source of discharges from the Swale into Ditch 1).

⁸⁴ Ex. 45, Dr. Bell Decl. ¶¶ 21 (e)–(h), 22.; Ex. 39, Dr. Hagedorn Dep. 192:1–193:21 (Defendants' expert concedes that there is a pathway for pollutants discharged from the houses to the surrounding area), 282:1–19; Ex. 48, J. Smith Dep. 82:6–18.

⁸⁵ Ex. 60, Hudson Farm Plat (Sept. 16, 2002).

⁸⁶ Ex. 61, Maryland Agricultural Water Quality Cost Share ("MACS") Program, Water Quality Project Form (Mar. 6, 2008) (MDA certified); Ex. 62, MACS Program Application (Mar. 16, 2009) (MDA certified).

⁸⁷ Ex. 63, MACS Manual, Section II, Heavy Use Area Protection 561-1 (Mar. 2009).

frequent and intense livestock or equipment use, and where there is a need for properly designed artificial or vegetative cover in order to prevent the delivery of animal waste, sediment and nutrients to waters of the State.”⁸⁸

31. HUA protection practices are only authorized if “the delivery of contaminated runoff to local streams or waterways is *certain* to occur in the absence of this proper [best management practice (“BMP”)]”.⁸⁹

32. Both the 2008 and 2009 MACS applications and final agreements required Alan Hudson to certify that HUA pads were required to “solve a water quality problem” created by the Facility.⁹⁰

33. Alan Hudson certified the water quality problem in the 2008 MACS application as “an agricultural facility area heavily used by animals, vehicles, and equipment leading to water quality degradation of the Pocomoke River.”⁹¹

34. Alan Hudson certified the water quality problem in the 2009 MACS application as “manure runoff affects upper Pocomoke River.”⁹²

35. Alan Hudson received \$24,591.88 in MACS funding to install five HUA pads: four on the poultry houses (one on each end of the two houses) and one on the manure shed.⁹³ However, he only installed three of the four pads on the poultry houses. There is no pad on the westernmost end of

⁸⁸ *Id.*

⁸⁹ *Id.* (emphasis added).

⁹⁰ Md. Code Regs. tit. 15 § 01.05.03 (2011); Ex. 61, 2008 MACS Application; Ex. 62, 2009 MACS Application; Ex. 64, MACS Program Agreement 3 (June 11, 2008) (MDA certified); Ex. 65, MACS Program Agreement 2 (May 20, 2009) (MDA certified).

⁹¹ See Ex. 61, 2008 MACS Application; Ex. 64, 2008 MACS Agreement. Nutrient and bacteria levels in the Pocomoke River exceed water quality standards established by EPA. The Pocomoke River is impaired for both nutrients and bacteria. See *supra* note 15.

⁹² See Ex. 62, 2009 MACS Application; Ex. 65, 2009 MACS Agreement; Ex. 16, A. Hudson Dep. 351:4–10; Ex. 44, R. Hudson Dep. 83:17–84:7.

⁹³ Ex. 66, MDA Hudson Farm MACS Funding Spreadsheet.

Chicken House 2 because this end of Chicken House 2 is so close to the ditch that Alan Hudson could not install the HUA pad.⁹⁴

36. Also due to the close proximity between Chicken House 1 and Ditch 1, one of the three HUA pads installed on the poultry houses is roughly half the size of a full-size pad.⁹⁵

37. The State of Maryland provides MACS funding for HUA pads because it recognizes that the areas adjacent to the entrances of poultry houses are pathways for poultry waste to enter surface waters.⁹⁶ Even after HUA pads are installed, a potential pathway still exists if the pads are not kept clean and clear of poultry waste.⁹⁷

38. MDE personnel observed poultry waste on an HUA pad outside of the poultry houses at the Facility.⁹⁸

39. Perdue's Flock Supervisor also noted manure on the HUA pads at the Facility and repeatedly instructed the Hudsons to clean manure from the pads.⁹⁹ Perdue also instructed the Hudsons to address the manure leak from the two-bin dead-bird composter.¹⁰⁰

40. Poultry waste was deposited on the three HUA pads and on the ground in the unpaved HUA at the western end of Chicken House 2 during flock placement and removal, cleanouts, crust-outs, and general flock maintenance.¹⁰¹

⁹⁴ Ex. 16, A. Hudson Dep. 227:19–230:3; Ex. 67, Worcester Soil Conservation District (“WSCD”) Map of Hudson Farm (WSCD certified); Ex. 44, R. Hudson Dep. 82:17–83:6; *see also* Ex. 60, Hudson Farm Plat.

⁹⁵ Ex. 68, Conservation Assistance Notes, No. WSCD000239 (stating that the front pads are 40' x 40' and the rear pad is 40' x 24'); Ex. 16, A. Hudson Dep. 368:14–21.

⁹⁶ Ex. 63, MACS Manual at 561-1.

⁹⁷ Ex. 69, Operation & Maintenance Plan, Poultry Heavy Use Area Protection (Mar. 16, 2009) (MDA certified).

⁹⁸ Ex. 70, D. Bramble Dep. 15:10–19.

⁹⁹ Ex. 71, Perdue Perfect Placement Forms, Nos. PER009893, PER009917, PER010010; Ex. 72, Perdue Pest Inspection Forms, Nos. PER000738, PER000756, PER000766, PER000786, PER000802; Ex. 73, T. Seyfert Dep. 284:13–285:2.

¹⁰⁰ Ex. 71, Perdue Perfect Placement Forms; Ex. 72, Perdue Pest Inspection Form; Ex. 74, Perdue Flock Supervisor Report, No. PER000844; Ex. 73, T. Seyfert Dep. 284:13–285:9, 407:10–408:17.

¹⁰¹ Ex. 73, T. Seyfert Dep. 284:13–285:9, 407:6–17; Ex. 70, D. Bramble Dep. 15:10–17:9; Ex. 45, Dr. Bell Decl. ¶ 21(b).

41. Perdue's Director of Corporate Environmental Services, Jeff Smith, admitted that the Facility can be a source of pollutants.¹⁰²
42. On twelve occasions between October 21, 2009 and April 9, 2010, Plaintiff collected water samples at two locations (WK-A and WK-B as identified in Exhibit 45, Attachment 9 of Dr. Bell's Declaration) downstream of the discharge from the Facility. Plaintiff collected eleven samples at WK-A and one sample at WK-B.¹⁰³
43. Both WK-A and WK-B sampling locations are located in a drainage ditch on Rayne's Sand and Gravel property ("RS&G Drainage Ditch") near the point where Ditch 1 exits the Facility.¹⁰⁴
44. Plaintiff's samples were analyzed for fecal coliform, *E. coli*, nitrogen, phosphorus, and ammonia. The results showed elevated levels of these pollutants.¹⁰⁵
45. Fecal coliform concentrations in samples collected by Plaintiff at WK-A and WK-B were as high as 280,000 MPN/100 mL.¹⁰⁶
46. *E. coli* concentrations in samples collected by Plaintiff were as high as 155,310 MPN/100 mL, over 260 times greater than the water quality standard.¹⁰⁷ Eight of the twelve samples collected by Plaintiff from Ditch 1 contained *E. coli* concentrations greater than the water quality standard of 576 MPN/100 mL.¹⁰⁸

¹⁰² Ex. 48, J. Smith Dep. at 288:2–15.

¹⁰³ Ex. 75, Chesapeake Labs Inc., Sample Results; Ex. 76, K. Phillips Dep. 221:10–222:2; Ex. 45, Dr. Bell Decl. ¶ 13, Attach. 8 (Waterkeeper Surface Water Sampling Analytical Results Summary); Ex. 77, K. Phillips Decl., Attach. A (MDE Annotated Map: Hudson Farms).

¹⁰⁴ Ex. 45, Dr. Bell Decl. ¶ 16, Attach. 8 (summary of the WKA analytical results), Attach. 9 (sample collection locations); Ex. 77, K. Phillips Decl. ¶ 6, Attach. A (MDE Annotated Map: Hudson Farm).

¹⁰⁵ Ex. 45, Dr. Bell Decl. ¶¶ 15, 23 (a)–(c), 24(a)–(b), Attach. 8 (summary of the WKA analytical results); *see infra* Part IV, Statement of Facts ¶¶ 45–47.

¹⁰⁶ Ex. 75, Chesapeake Labs Inc.; Ex. 76, K. Phillips Dep. 221:10–222:2; Ex. 45, Dr. Bell Decl. ¶ 23(b), Attach. 10.

¹⁰⁷ Ex. 75, Chesapeake Labs Inc.; Ex. 45, Dr. Bell Decl. ¶ 23(c), Attach. 8.

¹⁰⁸ Ex. 75, Chesapeake Labs Inc.; Ex. 45, Dr. Bell Decl. ¶ 23(c), Attach. 8; Md. Code Regs. tit. 26 § 08.02.03–3(a) (2011).

47. TKN and phosphorus concentrations in samples collected by Plaintiff from WK-A and WK-B were higher than EPA's reference condition concentrations.¹⁰⁹ Specifically, phosphorus concentrations in samples collected by Plaintiff at WK-A and WK-B were as high as 3.35 mg/L, almost 64 times greater than EPA's reference condition.¹¹⁰

48. On January 26, 2010, MDE representatives conducted an inspection of the Farm and collected surface water samples from four locations in Ditch 1 (HF02-HF05 as identified in Exhibit 43, the MDE Sample Map) and one location in Ditch 1 near Rayne's Sand and Gravel (HF01 as identified in Exhibit 43). MDE also took one surface water sample (HF06 as identified in Exhibit 43) from Ditch 6 that runs along the south end of the cow pasture (as identified in Exhibit 45, Attachment 5 to Dr. Bell's Declaration). These samples were all analyzed for fecal coliform and *E. coli*, and samples HF01-HF05 were also analyzed for nitrogen, phosphorus, and ammonia.¹¹¹

49. MDE sample HF01 was collected near Rayne's Sand and Gravel at the culvert headwall adjacent to Logtown Road and was taken downstream of the confluence of Ditches 1 and 7 (as identified in Exhibit 45, Attachment 5 to Dr. Bell's Declaration).¹¹²

50. Sample HF01 contained an *E. coli* concentration of 111,990 MPN/100 mL, over 190 times the water quality standard,¹¹³ and a fecal coliform concentration of 70,000 MPN/100 mL.¹¹⁴ Sample HF01

¹⁰⁹ Ex. 75, Chesapeake Labs Inc.; Ex. 45, Dr. Bell Decl. ¶ 24(b), Attach. 8.

¹¹⁰ Ex. 75, Chesapeake Labs Inc.; Ex. 45, Dr. Bell Decl. ¶ 24(b), Attach. 8.

¹¹¹ Ex. 78, MDE, Waste Management Administration, *Report of Observations* (Jan. 27, 2010), MDE 00049 (MDE certified); Ex. 79, Md. Dep't of Health and Mental Hygiene, Laboratories Admin., *Bacteriological Examination of Streams and Wastewaters: Field Record* (Jan. 26, 2010) (MDE certified); Ex. 45, Dr. Bell Decl. ¶ 24 Attachs. 20 (summary of MDE sample results), 10 (MDE sample locations and bacterial results), 11 (MDE sample locations and nutrient results).

¹¹² Ex. 45, Dr. Bell Decl. ¶ 17, Attachs. 10-11.

¹¹³ Ex. 79, Md. Dep't of Health and Mental Hygiene; Ex. 45, Dr. Bell Decl. ¶ 22(d), Attach. 20; Md. Code Regs. tit. 26 § 08.02.03-3(a) (2011).

¹¹⁴ Ex. 79, Md. Dep't of Health and Mental Hygiene; Ex. 45, Dr. Bell Decl. ¶ 23(d), Attach. 20.

contained a TKN concentration of 2.5 mg/L, 5 times greater than the reference condition and a total phosphorus concentration of 1.65 mg/L, more than 30 times the reference condition.¹¹⁵

51. Pollutant levels spiked at MDE sample point HF02 in Ditch 1, approximately 240 feet downstream of the poultry houses, in comparison to the levels found in samples taken upstream of the poultry houses at MDE sample points HF03–HF05.¹¹⁶ This spike is consistent with the pollutant pathways set forth *supra* at ¶¶ 20–27.

52. Between sample HF03, collected upstream of the poultry houses, and sample HF02, collected downstream of the poultry houses, fecal coliform and *E. coli* concentrations increased by about 13 and 331 times, respectively.¹¹⁷ The TKN concentration increased by 1.5 times and the phosphorus concentration more than doubled between these two sample points.¹¹⁸

53. Plaintiff’s expert, Dr. Bruce Bell, found the samples taken by Plaintiff and MDE to be reliable.¹¹⁹

54. Defendants’ only expert, Dr. Charles Hagedorn, found the samples taken by Plaintiff and MDE to be reliable.¹²⁰

55. Pollutants discharge from the Facility via Ditch 1 through a culvert to a conveyance, the RS&G Drainage Ditch, that carries the surface water under Route 50 to the Franklin Branch and ultimately the

¹¹⁵ Ex. 80, Phase Separation Science, Inc., *Analytical Report for MDE* (Feb. 24, 2010) (MDE certified); Ex. 45, Dr. Bell Decl.¶ 24(c), Attach. 20.

¹¹⁶ Ex. 80, Phase Separation Science Inc.; Ex. 79, Md. Dep’t of Health and Mental Hygiene; Ex. 45, Dr. Bell Decl.¶ 25(a), Attachs. 20 (summary of MDE sampling results), 23 (graph showing relative levels of nutrients and bacteria).

¹¹⁷ Ex. 79, Md. Dep’t of Health and Mental Hygiene; Ex. 45, Dr. Bell Decl.¶ 25(b), Attachs. 20 (summary of MDE sampling results), 23 (graph showing relative levels of nutrients and bacteria).

¹¹⁸ Ex. 80, Phase Separation Science, Inc.; Ex. 45, Dr. Bell Decl. ¶ 25(c), Attachs. 10–11, 20, 23.

¹¹⁹ Ex. 45, Dr. Bell Decl.¶ 23(e).

¹²⁰ See Ex. 39, Dr. Hagedorn Dep. 163:13–165:16. Defendant Perdue originally identified two experts, Dr. Charles Hagedorn and Mr. Damien Preziosi. Perdue ultimately withdrew any reliance on Mr. Preziosi. Counsel for Alan and Kristin Hudson Farm chose to rely on the expert identified by Perdue, leaving Dr. Hagedorn as Defendants’ sole expert between them.

Pocomoke River.¹²¹ The surface water carries fecal coliform and *E. Coli* to, at the very least, the Franklin Branch, and it carries nitrogen, phosphorus, and ammonia to the Franklin Branch and the Pocomoke River.¹²²

Waters of the United States

56. Perdue admits that the Pocomoke River and Franklin Branch are waters of the United States under the CWA.¹²³

57. The Franklin Branch, a primary tributary of the Pocomoke River, flows into the Pocomoke River between Massey's and Purnell's crossings, approximately two miles downstream of the point at which Route 50 crosses the Pocomoke River.¹²⁴

58. The Franklin Branch splits into an east and a west fork approximately 2.5 miles above its confluence with the Pocomoke River. Each fork originates from separate headwater areas.¹²⁵

59. The Franklin Branch appears on multiple historical maps including United States Geological Survey ("USGS") maps of the Ninepin Branch Quadrangle, the 1973 United States Department of Agriculture ("USDA") soil survey map of Worcester County, and the Maryland Department of Planning

¹²¹ See Ex. 45, Dr. Bell Decl. ¶¶ 24–26; see Ex. 39, Dr. Hagedorn Dep. 126:16–129:15 (Dr. Hagedorn concedes that it is possible that pollutants from Ditch 1 flow to the Franklin Branch and to the Pocomoke); Ex. 81, A. Dolgos Decl. ¶¶ 9–30; Ex. 75, Chesapeake Labs, Inc.; Ex. 76, K. Phillips Dep. 221:10–222:2; Ex. 77, K. Phillips Decl., ¶¶ 6–15, Attach. A (MDE Annotated Map: Hudson Farm); Ex. 82, No. WKA000236 (K. Phillips Sample Log); Ex. 61, 2008 MACS Application; Ex. 62, 2009 MACS Application; Ex. 64, 2008 MACS agreement; Ex. 65, 2009 MACS Agreement; Ex. 16, A. Hudson Dep. 351:4–10; Ex. 44, R. Hudson Dep. 61:11–65:9, 83:17–84:7.

¹²² See Ex. 45, Dr. Bell Decl. ¶¶ 23–25; see Ex. 39, Dr. Hagedorn Dep. 126:16–129:15 (Dr. Hagedorn concedes that it is possible that pollutants from Ditch 1 flow to the Franklin Branch and to the Pocomoke). Ex. 81, A. Dolgos Decl. ¶¶ 9–30; Ex. 75, Chesapeake Labs, Inc.; Ex. 76, K. Phillips Dep. 221:10–222:2; Ex. 77, K. Phillips Decl. ¶¶ 6–15, Attach. A (MDE Annotated Map: Hudson Farm); Ex. 82, No. WKA000236 (K. Phillips Sample Log); Ex. 61, 2008 MACS Application; Ex. 62, 2009 MACS Application; Ex. 64, 2008 MACS agreement; Ex. 65, 2009 MACS Agreement; Ex. 16, A. Hudson Dep. 351:4–10; Ex. 44, R. Hudson Dep. 61:11–65:9, 83:17–84:7.

¹²³ See Ex. 83, Def. Perdue Resp. to Pl.'s Req. for Admis.

¹²⁴ See Ex. 81, A. Dolgos Decl. ¶¶ 9–10.

¹²⁵ See *id.* ¶ 11.

Tax Map 19.¹²⁶ The Franklin Branch also appears on Army Map Service (“AMS”) and Maryland Geological Survey (“MGS”) maps, including the AMS map of the Ninepin quad published in 1950 and the MGS map published in 1971 (with a 1950 topographic base).¹²⁷ None of these maps identify the forks as anything other than the Franklin Branch.¹²⁸

60. Maryland state law authorizes the formation of Public Drainage Associations (“PDAs”)¹²⁹ to excavate and clean out streams and the public ditches that feed the streams to ensure drainage of groundwater and surface water from nearby farm fields out into surrounding waterways.¹³⁰

61. By the 1960s, a Franklin Branch Public Drainage Association (“FBPDA”) was established to enhance the flow of the streams in the Franklin Branch drainage area and to ensure drainage of surrounding areas, particularly farm fields and ditches draining those fields.¹³¹

62. Roger Hudson, Alan Hudson’s father and past owner of the Farm, is a manager of the FBPDA and has been for a number of years.¹³² He testified that water flows off of the Farm and goes to the Pocomoke River.¹³³

63. The FBPDA is required to inspect and maintain the various sections that constitute the FBPDA.¹³⁴ In the 1964 Workplan, the FBPDA labeled various streams and ditches in its drainage area

¹²⁶ See *id.* ¶ 12.

¹²⁷ See Ex. 84, Library of Congress Government Source, Army Map Service, Map of Ninepin, Maryland (1950) (certified copy on file with Plaintiff); Ex. 85, Md. Geological Survey, Map of Worcester Co. Showing the Topography and Election Districts (1950, revised 1964 and 1971) (certified copy on file with Plaintiff).

¹²⁸ Ex. 84, Map of Ninepin, Md.; Ex. 85, Map of Worcester Co.; Ex. 81, A. Dolgos Decl. ¶ 12.

¹²⁹ Md. Ann. Code Art. 25 § 52 (LexisNexis 2006 & Supp. 2011).

¹³⁰ *Id.* (“purpose of establishing and maintaining watershed drainage systems”); Ex. 44, R. Hudson Dep. 61:11–21, 62:1–4, 65:6–9; Ex. 86, WSCD, *1989 Operation and Maintenance Plan for Franklin Branch Public Drainage Association* 3 (Nov. 29, 1989) (WSCD certified).

¹³¹ Ex. 87, WSCD, *Work Plan for the Franklin Branch Watershed, Worcester County, Maryland* (Mar. 1964) (WSCD certified).

¹³² Ex. 88, *Public Drainage Association Manager’s Nomination Form* (2011).

¹³³ Ex. 44, R. Hudson Dep. 61:11–21, 62:1–4, 64:20–65:9.

¹³⁴ Md. Ann. Code Art. 25 § 96 (LexisNexis 2006 & Supp. 2011). Ex. 86, *Operation and Maintenance Plan*.

as prongs, which facilitates identifying those sections that need maintenance work to maintain the flow.¹³⁵ The FBPDA labeled the east fork of the Franklin Branch as “Prong 2.”¹³⁶

64. The portion of the Facility where the poultry houses are located is just north of the portion of the Franklin Branch that parallels Route 50.¹³⁷

65. The headwaters of the east fork of the Franklin Branch initiate in the vicinity of Route 346.¹³⁸ The Franklin Branch flows in a southwesterly direction paralleling Logtown Road, continues to flow under and parallel Route 50, and then continues to flow in a southwesterly direction through Deer Run Golf Course to its confluence with the Pocomoke River.¹³⁹

66. The water that flows off the Facility through Ditch 1 discharges into the RS&G Drainage Ditch and continues to flow underneath Logtown Road and both lanes of Route 50 before re-emerging as an open ditch on the south side of Route 50 where it flows into the Franklin Branch and continues to flow freely downstream through Deer Run Golf Course to the Pocomoke River.¹⁴⁰

67. The total distance from the point the surface water discharges from the Facility via Ditch 1 until it reaches the Franklin Branch is approximately 750 feet. The total distance from the point the pollutants discharge from the Facility to the Pocomoke River is approximately 3.5 miles.¹⁴¹

68. The Franklin Branch is capable of navigation by kayak from at least the Timmonstown Road crossing to the Pocomoke River.¹⁴²

¹³⁵ Ex. 87, *Work Plan*; Ex. 86, *Operation and Maintenance Plan*; Ex. 81, A. Dolgos Decl. ¶ 14.

¹³⁶ See Ex. 81, A. Dolgos Decl. ¶ 15, Attach. C.

¹³⁷ See Ex. 89, M. Scott Decl., Attach. B.

¹³⁸ Ex. 81, A. Dolgos Decl. ¶ 16.

¹³⁹ *Id.*

¹⁴⁰ *Id.* ¶ 17; Ex. 90, A. Dolgos Dep. 146:6–147:14. See also Ex. 91, Soil Conservation and Water Quality Plan, Nos. HUD000992–001008.

¹⁴¹ Ex. 81, A. Dolgos Decl. ¶ 18; Ex. 89, M. Scott Decl. Attach. A.

¹⁴² Ex. 77, K. Phillips Decl. ¶ 8, Attach. B.

69. The Pocomoke River originates in Delaware, flows through Maryland and empties into the Chesapeake Bay at the confluence of the Pocomoke Sound and the Bay.¹⁴³

70. The Pocomoke River and its tributaries have been used in commerce since the 1600s¹⁴⁴ and from 1912 to 1947, it was channelized and deepened to enhance navigability and commerce.¹⁴⁵

71. The Pocomoke River is currently used for a variety of commercial and recreational purposes including fishing, tourism, boating, bird-watching, canoeing, picnicking, camping, swimming, hiking, and nature studies.¹⁴⁶

Permit Status

72. The Alan and Kristin Hudson Farm does not have a CAFO permit.¹⁴⁷

73. The Alan and Kristin Hudson Farm admits that it has yet to receive coverage under the CAFO permit.¹⁴⁸

Owners and Operators

74. On May 2, 2003, Perdue entered into a contract, referred to as the Poultry Producer Agreement (“PPA”), with the Hudsons to raise poultry owned by Perdue.¹⁴⁹

75. Perdue provided the PPA to the Hudsons, who both signed it without negotiating its terms.¹⁵⁰

76. Under the terms of the PPA, Perdue may terminate its contract with the Hudsons at any time and for any reason, including their failure to follow corrective actions and/or “deviation response plans.”¹⁵¹

¹⁴³ Ex. 4, *Maryland Scenic Rivers* at 5; Ex. 5, *Pocomoke River Basin* at 5.

¹⁴⁴ Ex. 5, *Pocomoke River Basin* at 5.

¹⁴⁵ *Id.*; Ex. 4, *Maryland Scenic Rivers* at 5.

¹⁴⁶ Ex. 5, *Pocomoke River Basin* at 8; Ex. 4, *Maryland Scenic Rivers* at 23.

¹⁴⁷ *See supra*, Part IV, Statement of Facts 9–11.

¹⁴⁸ Ex. 92, Def. Hudson Farm’s Resp. to Pl.’s Req. for Admis., Response to Request No. 2.

¹⁴⁹ *See* Ex. 13, PPA.

¹⁵⁰ *See* Ex. 16, A. Hudson Dep. 139:20–140:3; Ex. 21, K. Hudson Dep. 51:14–52:1; Ex. 13, PPA.

77. Under the PPA, Perdue owns the birds¹⁵² and merely consigns them to the Hudsons during the growing process.¹⁵³
78. Under the PPA, the Hudsons are required to raise Perdue’s chickens according to Perdue’s standards until the flock is removed.¹⁵⁴ Perdue has the exclusive right to determine when and whether chicks are delivered to the Facility and when they will be removed.¹⁵⁵
79. Perdue retains the unrestricted right to enter the Facility and inspect both the flock and the poultry production facilities. If Perdue is unsatisfied with the Hudsons’ performance of their obligations, Perdue can undertake the maintenance, treatment, feeding, and care of the flock.¹⁵⁶
80. If Perdue is not satisfied with the Hudsons’ care of Perdue’s birds, Perdue may issue a corrective action and/or a deviation response plan, using specific deadlines and warnings to bring the Facility back into compliance with Perdue’s requirements, including that Perdue will stop providing flocks to them, refer them for regulatory action, and ultimately terminate their contract.¹⁵⁷
81. Perdue pays premium housing bonuses for particular upgrades to the poultry houses at its producer farms, such as the premium payment for the tunnel ventilation system installed at the Facility.¹⁵⁸
82. Perdue advances money at zero-interest for improvements to the Facility that is then paid back over time as automatic deductions from the Hudsons’ “settlement” or payment from Perdue.¹⁵⁹

¹⁵¹ See *id.* at ¶¶ III.D–E, V; Ex. 49, C. Johnson Dep. 14:7–15:6, 49:3–51:8, 62:8–63:5, 77:5–78:15. Deviation response plans are prepared by Perdue when deviations from environmental regulations occur at its facilities to ensure that “these deviations be corrected in a prompt and appropriate manner.” Ex. 25, MOA at 3; see also Ex. 49, C. Johnson Dep. 48:19–49:16.

¹⁵² See generally Ex. 13, PPA at ¶ III.E; see also Ex. 73, T. Seyfert Dep. 32:16–34:10; Ex. 16, A. Hudson Dep. 128:1–2.

¹⁵³ Ex. 13, PPA at ¶ II.A.

¹⁵⁴ See Ex. 13, PPA at ¶ II.B–D.

¹⁵⁵ See Ex. 73, T. Seyfert Dep. 181:17–182:18; Ex. 13, PPA at ¶ II.A.

¹⁵⁶ See Ex. 13, PPA at ¶ III.D–E; Ex. 16, A. Hudson Dep. 383:11–384:14; Ex. 73, T. Seyfert Dep. 261:17–262:13.

¹⁵⁷ See Ex. 49, C. Johnson Dep. 14:7–15:6, 49:3–51:8, 62:8–63:5, 77:5–78:15.

¹⁵⁸ See e.g., Ex. 93, Flock Settlement Review Packet, No. HUD000814; see also Ex. 73, T. Seyfert Dep. 139:11–143:12, 374:11–375:18; Ex. 94, Tier Requirements Checklist, No. PER000921. The tunnel ventilation system causes pollutant discharges. See *supra* Part IV, Statement of Facts ¶¶ 23–26.

83. Perdue tests the Facility's water supply to the poultry houses¹⁶⁰ and tracks the poultry feed consumed.¹⁶¹ The Hudsons do not perform these necessary tasks.¹⁶²
84. Perdue provides, or arranges for the provision of, the exclusive feed, pesticides, fuel, poultry litter, litter amendments, medications, vaccinations, disinfectants, and other supplies which are necessary for the production of Perdue's chickens.¹⁶³ The Hudsons are not allowed to deviate from Perdue's directed use of these supplies.¹⁶⁴
85. Perdue provides veterinary services to its chickens, including those at the Facility.¹⁶⁵
86. Perdue audits the Facility's biosecurity practices and creates action plans with recommendations where shortcomings are detected.¹⁶⁶
87. Perdue establishes operational parameters for the Facility, including the temperature, lighting, pressure, ventilation conditions, ammonia concentrations, and feed and drinker line levels in the poultry houses.¹⁶⁷ These inputs and operational conditions must be monitored and controlled throughout the growing process.¹⁶⁸

¹⁵⁹ See Ex. 16, A. Hudson Dep. 201:20–202:9; Ex. 20, Assignment of Proceeds Form; *see, e.g.*, Ex. 95, Main Breaker Relocation Financing Agreement (Aug. 6, 2009), Nos. PER001103–001105.

¹⁶⁰ *See, e.g.*, Ex. 96, Perdue Well Water Analysis Report, No. PER000536, Perdue Water Analysis Summary Report, No. PER027207; Ex. 16, A. Hudson Dep. 172:6–15.

¹⁶¹ *See* Ex. 16, A. Hudson Dep. 149:11–150:4; Ex. 31, Six Flock History Report, No. 0000864; Ex. 30, Six Flock History Report, No. PER001142; Ex. 97, Email from T. Seyfert to K. Baker re Feed Order and Invoice, No. PER025185.

¹⁶² *See* Ex. 16, A. Hudson Dep. 172:6–15, 149:11–150:4.

¹⁶³ *See* Ex. 13, PPA at ¶¶ I.B, II.C; Ex. 73, T. Seyfert Dep. 98:2–7, 111:20–113:8; Ex. 49, C. Johnson Dep. 120:16–121:20; Ex. 16, A. Hudson Dep. 145:4–154:18, 160:7–162:1, 204:4–18; *See also* Ex. 98, Litter Spreadsheet, No. PER027703.

¹⁶⁴ *See* Ex. 13, PPA at ¶¶ I.B., II.C.

¹⁶⁵ *See, e.g.*, Ex. 99, MDA, Salisbury Animal Health Laboratory, Follow Up Report, No. PER027935; Avian Influenza Testing Report, No. PER027221; Labvantage Bird Health Test Data, No. PER026520; Pesticide/Avian Influenza Daily Clearance Report, No. PER027833; Serology Spreadsheet, No. PER027205; Ex. 73, T. Seyfert Dep. 221:13–224:20.

¹⁶⁶ *See, e.g.*, Ex. 100, Farm Biosecurity Plan, Nos. PER011237–011241.

¹⁶⁷ *See, e.g.*, Ex. 16, A. Hudson Dep. 154:4–18; Ex. 101, Summer Visitation Report, Nos. PER000504–000505; *see also* Ex. 73, T. Seyfert Dep. 112:8–116:15.

¹⁶⁸ *See* Ex. 73, T. Seyfert Dep. 111:20–113:8; Ex. 16, A. Hudson Dep. 145:4–154:18.

88. Perdue records and analyzes many parameters related to its poultry growers, including: cleanout dates,¹⁶⁹ growers' periodic contributions to Delmarva Poultry Industry, Inc. ("DPI"),¹⁷⁰ tunnel ventilation type, electronic controller type, sidewall type, drinker nipple type, heater system, lighting system, generator system, water conditioning system, water source, manure storage, method of dead-bird disposal, nutrient management plan certification, electric supplier, animal welfare certification, fuel company, nutrient management plan year, drinker nipple density,¹⁷¹ fuel usage,¹⁷² and litter type and usage.¹⁷³ Perdue also tracks the number and types of "piles" present on its growers' property, the presence of standing water on the property,¹⁷⁴ and damage to chicken house pads, foggers, and tunnel fans.¹⁷⁵ Perdue records the internal dimensions¹⁷⁶ and external dimensions of each poultry house and the date of its construction.¹⁷⁷ Perdue records the amount of water consumed by each flock and the number of mortalities in each flock.¹⁷⁸ Perdue records and "scores" its growers based on parameters including distance to non-Perdue poultry houses, vegetative buffers, fencing, presence of a warning sign at the entrance, trash removal, vehicles, the on-farm residence, presence of a warning sign at the poultry house door, downtime, water source, water sanitation, cleanout, visitor log, caretaker/employee dress code, visitor dress code, pets, wild birds, and dead bird disposal.¹⁷⁹

¹⁶⁹ See Ex. 102, Clean-out Spreadsheet, Nos. PER010988–010990.

¹⁷⁰ Ex. 103, DPI Contribution Flock Deductions 2010 Spreadsheet, No. PER026877; DPI Fund Drive Spreadsheet, No. PER026955.

¹⁷¹ Ex. 104, Farm Information Spreadsheet, No. PER027019; see also Ex. 105, Month End Numbers Spreadsheet, No. PER027048; Nipple and Feeder Space Report, No. PER026852.

¹⁷² Ex. 106, Fuel Usage Spreadsheet, No. PER026995.

¹⁷³ Ex. 107, Producer Litter Usage Spreadsheet, No. PER027749.

¹⁷⁴ Ex. 108, Farm Pile Survey, No. PER027054.

¹⁷⁵ Ex. 109, Pad, Fogger, Tunnel Fan, No. PER026924.

¹⁷⁶ Ex. 110, Clearance Spreadsheet, No. PER011325.

¹⁷⁷ Ex. 111, House Ages DMV South Spreadsheet, No. PER026958.

¹⁷⁸ Ex. 112, Mortality and Water Consumption Record, No. PER000814.

¹⁷⁹ Ex. 113, Scorecard Spreadsheet, No. PER027005.

89. Many of the operational conditions or parameters at the Facility are electronically controlled and monitored by equipment that Perdue maintains.¹⁸⁰ The electronic equipment controls temperatures, lights, fans, heating and cooling systems, and the alarms.¹⁸¹
90. Perdue adjusts the settings for the electronic controllers located in the Facility¹⁸² and maintains logs of the temperature in the poultry houses during the growth of Perdue's flocks.¹⁸³
91. Perdue controls visitor access to the Facility by maintaining a visitor log at the entrance to the farm lane.¹⁸⁴
92. As part of Perdue's direct operational involvement in and supervision of the Facility, a number of Perdue employees, including Perdue's flock supervisors, visit the Facility 2-3 times per week.¹⁸⁵ During multiple months, Perdue employees visited the Facility at least 13 times, or more than once for every two business days during the month.¹⁸⁶
93. A Perdue Flock Supervisor regularly visits the Facility, performs operational tasks, ensures that the Hudsons have the required materials, and maintains appropriate operating conditions.¹⁸⁷
94. The Flock Supervisor's duties include verifying that the grass is cut, the trash is removed, the doors are closed tightly, no wild birds, rodents, or pests are present, and no feed is on the feed pads the day that a flock is placed.¹⁸⁸

¹⁸⁰ See Ex. 73, T. Seyfert Dep. 234:20–235:20, 415:7–416:19, 421:6–8.

¹⁸¹ *Id.* at 415:7–416:19.

¹⁸² *Id.* at 234:20–235:20, 415:7–416:19, 421:6–8.

¹⁸³ See, e.g., Ex. 114, House Temperature Graph, No. PER000592.

¹⁸⁴ Ex. 16, A. Hudson Dep. 100:16–101:21; Ex. 73, T. Seyfert Dep. 278:1–12; Ex. 115, Perdue Farm Visitor Log Compilation (T. Seyfert Dep. Ex. 18).

¹⁸⁵ See Ex. 115, Perdue Farm Visitor Log Compilation (T. Seyfert Dep. Ex. 18); Ex. 73, T. Seyfert Dep. 345:21–354:21.

¹⁸⁶ See Ex. 115, Perdue Farm Visitor Log Compilation (T. Seyfert Dep. Ex. 18).

¹⁸⁷ Ex. 73, T. Seyfert Dep. 95:2–19, 110:12–113:13; see also Ex. 16, A. Hudson Dep. 145:4–154:18.

¹⁸⁸ See Ex. 116, Perdue Pest Inspection Forms Compilation (T. Seyfert Dep. Ex. 22); Ex. 73, T. Seyfert Dep. 210:3–4.

95. Perdue evaluates its Flock Supervisors' performance, in part, on the performance and compliance of the farms that are on the Flock Supervisor's route and the implementation of Perdue's action plans for poor performing farms.¹⁸⁹

96. Before a flock is placed, and if her schedule permits, the Flock Supervisor audits the poultry houses and fills out an inspection form leaving comments for the producer.¹⁹⁰ This audit includes verifying a series of control points including ventilation, temperatures, pressures, litter amendment, feed and drinker lines, alarm settings, house lighting, and house cleanout and disinfection.¹⁹¹

97. The Flock Supervisor returns the day the flock is placed and fills out a Perdue Perfect Placement Form.¹⁹² The Perfect Placement Form includes an area for comments where the Flock Supervisor leaves instructions for the Hudsons.¹⁹³

98. At flock placement, the Flock Supervisor checks several operational parameters including the litter temperature, ammonia levels, litter amendment, static pressure, water flow, water quality, and drinker lines.¹⁹⁴ The Flock Supervisor also checks whether the supplemental feed standards are met and that the minimum lighting in the house is met.¹⁹⁵

99. The day after flock placement, the Flock Supervisor inspects the Facility and fills out a checklist to ensure that the operational parameters are being maintained: that target temperatures are achieved, and that flow rates, heights, lighting, and pressures are all adequate.¹⁹⁶

¹⁸⁹ See Ex. 117, Perdue Performance Planning & Appraisal Process, Nos. PER028998–029003; Ex. 118, Perdue Performance Planning & Appraisal Process, Nos. PER029005–029010; Ex. 49, C. Johnson Dep. 26:18–28:2.

¹⁹⁰ See Ex. 73, T. Seyfert Dep. 203:13–204:15, 208:17–209:8; Ex. 119, Chick Pre-Placement Audit Compilation (A. Hudson Dep. Ex. 44); Ex. 120, Perdue Growout General BMP Logs, Nos. PER009894, PER009918.

¹⁹¹ See Ex. 119, Perdue Chick Pre-Placement Audit Compilation (A. Hudson Dep. Ex. 44).

¹⁹² See Ex. 73, T. Seyfert Dep. 205:8–206:11; Ex. 121, Perfect Placement Form Compilation (A. Hudson Dep. Ex. 45).

¹⁹³ See generally Ex. 121, Perfect Placement Form Compilation (A. Hudson Dep. Ex. 45).

¹⁹⁴ See Ex. 73, T. Seyfert Dep. 205:8–207:19; Ex. 121, Perfect Placement Form Compilation (A. Hudson Dep. Ex. 45).

¹⁹⁵ See Ex. 73, T. Seyfert Dep. 205:8–207:19; Ex. 121, Perfect Placement Form Compilation (A. Hudson Dep. Ex. 45).

¹⁹⁶ See Ex. 73, T. Seyfert Dep. 209:12–210:2; Ex. 122, Perdue Flock Visitation, Week 1, No. HUD000978.

100. The Flock Supervisor inspects the Facility again on the third day after placement and at one-week after placement, each time filling out a Perdue Flock Visitation—Week 1 form.¹⁹⁷ The forms include a section of “special notes/messages” where the Flock Supervisor leaves instructions for the Hudsons on several aspects of production.¹⁹⁸

101. The Flock Supervisor then returns, often multiple times, in each of the following weeks to supervise and operate the Facility and fill out the Two-Week, Three-Week, and Four-Week Perdue Visitation forms.¹⁹⁹

102. These visitations include an inspection of the Facility to ensure that a number of operational parameters are maintained, that target temperatures are achieved, and that flow rates, heights, lighting, alarms, culling, ammonia levels, and pressures are all adequate.²⁰⁰

103. The visitation forms for weeks 2, 3 and 4 have a section for “special notes/messages” that include instructions to the Hudsons on several aspects of production.²⁰¹

104. Tammie Seyfert was the Flock Supervisor at the Facility starting in early 2008 through 2010.²⁰² Ms. Seyfert visited the Facility regularly during this period, making at least weekly visits to supervise the flock, alter settings in the poultry houses, drop off supplies, and/or to perform other inspections and tasks.²⁰³

105. On many of these visits, Ms. Seyfert filled out various forms, including the “Perdue Delmarva Flock Visitation” forms which document her inspection of several conditions at the Facility, including

¹⁹⁷ See Ex. 73, T. Seyfert Dep. 210:14–213:17.

¹⁹⁸ See, e.g., Ex. 122, Perdue Flock Visitation, Week 1, No. HUD000978.

¹⁹⁹ See Ex. 73, T. Seyfert Dep. 215:3–216:19.

²⁰⁰ See, e.g., Ex. 123, Flock Visitation, Week 2, No. HUD000973, Perdue Flock Visitation, Week 3, No. PER000843, Perdue Flock Visitation, Week 4, No. PER000828.

²⁰¹ See, e.g., *id.*

²⁰² See Ex. 121, Perfect Placement Form Compilation (A. Hudson Dep. Ex. 45); Ex. 116, Perdue Pest Inspection Form Compilation (T. Seyfert Dep. Ex. 22); Ex. 73, T. Seyfert Dep. 82:9–17; Ex. 124, Flock Settlement Sign-off Sheet Compilation (T. Seyfert Dep. Ex. 23).

²⁰³ See Ex. 115, Perdue Farm Visitor Log Compilation (T. Seyfert Dep. Ex. 18); Ex. 16, A. Hudson Dep. 169:3–5.

pest control, temperature and pressure settings and associated alarms, ammonia levels, ventilation, and visitor log.²⁰⁴

106. During her many visits, Ms. Seyfert routinely enters the poultry houses and directly performs many of the operational tasks critical to growing poultry, including adjusting drinker lines, vent boxes, static pressure, lighting, setting and reprogramming chicken house temperatures, and culling chickens.²⁰⁵

107. Ms. Seyfert also leaves lengthy, detailed written notes with clear instructions for tasks the Hudsons are to perform before her next visit.²⁰⁶

108. Ms. Seyfert often completes Perdue Pest Inspection Forms, an additional form that also includes an area for comments where the Flock Supervisor leaves instructions for the Hudsons on several aspects of production.²⁰⁷

109. Perdue's Flock Supervisor also has responsibility for ensuring that there are no environmental problems at the Facility.²⁰⁸

110. Perdue signed a Memorandum of Agreement ("MOA") with EPA in order to foster its "environmental leadership in the poultry industry by providing training, assistance, and environmental assessments to the Producers to enhance their compliance with federal, state, and local environmental regulations and specific best management practices ("BMPs")."²⁰⁹

111. Under the Clean Waters Environmental Initiative ("CW Initiative"), which was formed with EPA as part of the MOA, Perdue agreed to "launch a company-wide environmental management

²⁰⁴ See, e.g., Ex. 125, Perdue Flock Visitation Compilation (T. Seyfert Dep. Ex. 24).

²⁰⁵ See Ex. 73, T. Seyfert Dep. 115:1–116:15, 235:15–20, 238:9–239:7, 414:20–416:19; Ex. 125, Perdue Flock Visitation Compilation (T. Seyfert Dep. Ex. 24).

²⁰⁶ See Ex. 125, Perdue Flock Visitation Compilation (T. Seyfert Dep. Ex. 24).

²⁰⁷ See generally Ex. 116, Perdue Pest Inspection Form Compilation (T. Seyfert Dep. Ex. 22).

²⁰⁸ See Ex. 73, T. Seyfert Dep. 110:17–111:14.

²⁰⁹ See Ex. 25, MOA at 2.

program over four years for all contract poultry farms growing for Perdue” with the pilot program including the Eastern Shore of Maryland and the Facility.²¹⁰

112. The goal of the CW Initiative is to promote compliance with environmental laws or to “make sure that the farm is within the rules and regulations of the corresponding state that they’re in.”²¹¹ If the environmental assessment finds that the farm is out of compliance with applicable laws, Perdue issues a corrective action to bring the farm into compliance.²¹²

113. If a Perdue grower chooses not to participate in the CW Initiative, Perdue will likely terminate the grower.²¹³ Growers can be terminated if they do not meet Perdue’s compliance deadlines under the program.²¹⁴

114. Perdue’s environmental oversight is enforced through the deviation response program that can result in contract termination.²¹⁵

115. Under Perdue’s deviation response plan, the producer is told that the next flock placement will be withheld if the issue is not resolved within Perdue’s timeframe.²¹⁶

²¹⁰ See Ex. 126, *Environmental Stewardship*, Perdue, <http://web.archive.org/web/20110104062541/http://www.perdue.com/company/commitments/stewardship/partnerships.html> (archived July 15, 2011), *Corporate Responsibility*, Perdue, http://es.perdue.com/Corporate/Corporate_Responsibility/Environmental_Stewardship/ (last visited Oct. 12, 2011).

²¹¹ See Ex. 49, C. Johnson Dep. 48:19–49:9. See also, Ex. 25, *MOA* at 2; Ex. 127, Email from D. McGuigan to H. Zygmunt re Perdue EPA Meeting Recap (Perdue commits to ensure its growers have permit coverage and handle manure consistent with federal regulations).

²¹² See Ex. 49, C. Johnson Dep. 48:19–49:9. Producer environmental assessments occur three time per year and “determine that critical elements of the [NMP] as it relates to poultry operations, are being followed and that Best Management Practices are fully implemented.” Ex. 25, *MOA* at 3.

²¹³ See Ex. 48, J. Smith Dep. 231:6–19; 78:20–79:21.

²¹⁴ *Id.*

²¹⁵ See Ex. 128, Email from J. Smith to R. Darnell re Deviation Response, Nos. PER028939–028940; Ex. 129, Letter from D. McGuigan to J. Smith re Clean Water Initiative 2 (stating “EPA observed that nine farms were currently under the deviation notification procedure. Perdue had not placed birds at these nine farms and would not be placing birds until Perdue’s environmental concerns had been addressed.”).

²¹⁶ See Ex. 128, Email from J. Smith to R. Darnell re Deviation Response, Nos. PER028939–028940; Ex. 129, Letter from D. McGuigan to J. Smith re Clean Water Initiative 2.

V. ARGUMENT

In order to establish that Defendants violated the CWA, Plaintiff must prove, by a preponderance of the evidence, that (1) Defendants discharged a pollutant, (2) from a point source, (3) into waters of the United States, and (4) without a permit.²¹⁷

In this case, the evidence gathered during Plaintiff's initial investigation and subsequent document discovery and depositions clearly establishes that the Alan and Kristin Hudson Farm is a CAFO, a point source under the CWA. The evidence also proves that pollutants were discharged from the CAFO into waters of the United States without a permit and that each of the Defendants is an owner or operator of the Facility.²¹⁸ Plaintiff fully meets its burden of proof on all elements of its claim and is entitled to summary judgment on all outstanding issues in this case.

A. The Alan and Kristin Hudson Farm Is a CAFO and Is Therefore a Point Source Under the CWA.

It is an incontrovertible fact that the Alan and Kristin Hudson Farm is a CAFO. The Facility meets all the statutory and regulatory requirements to establish that it is a CAFO. Furthermore, it is currently seeking coverage under the state's CAFO NPDES program, thereby acknowledging its CAFO status.²¹⁹

The plain language of the CWA makes it clear that a CAFO is, by definition, a point source. A "point source" is "any discernable, confined and discrete conveyance, including but not limited to any

²¹⁷ 33 U.S.C. § 1311(a) (2006). Permits issued under the CWA are known as National Pollutant Discharge Elimination System ("NPDES") permits and can be either individual facility permits or general permits. *Id.* 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) (2011).

²¹⁸ Responsibility for illegal discharges of pollutants under the CWA falls on both owners and operators of facilities. *See Assateague Coastkeeper v. Alan & Kristin Hudson Farm*, 727 F. Supp. 2d 433, 442–43 (D. Md. 2010).

²¹⁹ *See supra* Part IV, Statement of Facts ¶¶ 9–11.

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.”²²⁰

An Animal Feeding Operation (“AFO”)²²¹ that confines 37,500 to 124,999 chickens is automatically a medium CAFO if either one of the following conditions are met:

- (A) Pollutants are discharged into waters of the United States through a man-made ditch, flushing system, or other similar man-made device; or
- (B) Pollutants are discharged directly into waters of the United States which originate outside of and pass over, across, or through the facility or otherwise come into direct contact with the animals confined in the operation.²²²

This Facility clearly falls within the size parameters of a medium CAFO²²³ and, as evidenced below, meets the discharge requirement.²²⁴

On March 3, 2009, Alan Hudson submitted a Notice of Intent (“NOI”), together with a comprehensive nutrient management plan (“CNMP”) status form, to MDE²²⁵ seeking coverage under the State’s CAFO general permit.²²⁶ As part of the permit process, in the spring of 2010, Alan Hudson applied for and received approval for a federal grant of \$4,750.00 for preparation

²²⁰ 33 U.S.C. § 1362(14) (2006) (emphasis added).

²²¹ See *supra* note 37.

²²² 40 C.F.R. § 122. 23(b)(6)(i)–(ii) (2011).

²²³ See *supra* Part IV, Statement of Facts ¶¶ 6–7.

²²⁴ See *infra* Parts V.B., V.C.

²²⁵ As a CWA delegated state, Maryland created its CAFO NPDES program in 2008. See Ex. 130, General Discharge Permit for Animal Feeding Operations, Final Determination, Dec. 30, 2008, *available at* http://www.mde.state.md.us/programs/Land/SolidWaste/CAFOMAFO/Documents/www.mde.state.md.us/assets/document/AFO_General_Permit_Final_Determination_12.30.08.pdf.

²²⁶ See *supra* Part IV, Statement of Facts ¶¶ 9–11. A CNMP is developed in accordance with the USDA Natural Resources Conservation Service (“NRCS”) technical standards. CAFOs that do not have a CNMP must fill out a CNMP Status Form and submit it to MDE along with its NOI, and periodically thereafter. See Ex. 131, *MDE AFO (CAFO/MAFO) Webpage*, MDE, http://www.mde.state.md.us/programs/Land/SolidWaste/CAFOMAFO/Pages/Programs/LandPrograms/Solid_Waste/cafo/ind ex.aspx (last visited Oct. 19, 2011).

of a CNMP.²²⁷ As recently as July, 2011, Alan Hudson continues to be engaged in the CAFO permitting process.²²⁸

Given these facts, it is uncontroverted that the Facility is a CAFO²²⁹ and therefore a point source under the CWA.

B. The Facility Discharged Pollutants.

The CWA prohibits the discharge of any pollutants without a permit. The term “discharge of a pollutant” means “any addition of any pollutant or combination of pollutants to waters of the United States.”²³⁰ This includes additions of pollutants from “surface runoff which is collected or channeled by man.”²³¹ The term “pollutant” includes “solid waste. . . sewage, garbage, sewage sludge . . . chemical wastes, biological materials . . . and industrial, municipal and agricultural waste discharged into water.”²³²

The evidence in this case, including (1) the water samples collected by both Plaintiff and MDE, (2) Plaintiff’s experts’ testimony and reports, (3) Defendants’ own witnesses (including their expert), and (4) deposition testimony, clearly establishes that the Facility discharged pollutants.

²²⁷ See *supra* Part IV, Statement of Facts ¶¶11.

²²⁸ *Id.*

²²⁹ See *supra* Part IV, Statement of Facts ¶¶ 6–55

²³⁰ 40 C.F.R. § 122.2 (2011); see also 33 U.S.C. § 1362(7), (12) (2006).

²³¹ 40 C.F.R. § 122.2. “When it applies to water, ‘discharge’ commonly means a ‘flowing or issuing out,’ [or] ([t]o emit; to give outlet to; to pour forth; as, the Hudson discharges it waters into the bay’), and this ordinary sense has consistently been the meaning extended when this Court has used the term in prior water cases....” *S.D. Warren Co. v. Maine Board of Env’tl. Prot.*, 547 U.S. 370, 376 (2006) (citing Webster’s New International Dictionary 742 (2d ed. 1949)).

²³² 33 U.S.C. § 1362(6) (2006).

1. Poultry Waste Contains All the Pollutants Identified in Plaintiff’s Complaint.

It is uncontroverted that the poultry waste²³³ generated at the Facility contains fecal coliform, *E. coli*, nitrogen, phosphorus, and ammonia.²³⁴ In addition to testimony of Plaintiff’s expert, Dr. Bruce Bell, this fact is readily admitted by several of Defendants’ own witnesses, including Jeff Smith (Perdue’s Director of Corporate Environmental Services), Carrie Johnson (a Perdue Area Coordinator), and Dr. Charles Hagedorn (Defendants’ expert).²³⁵

2. Poultry Waste Containing Pollutants Reached Drainage Ditches Through Several Pathways.

Plaintiff’s expert, Dr. Bell, has identified several pathways whereby the pollutants from the poultry houses reach the ditches that drain the Facility.²³⁶ These pathways include poultry waste that is tracked in and out of the poultry houses during cleanouts and crustouts, regular, daily foot traffic during routine flock maintenance, and the coming and going of heavy machinery and foot traffic during windrowing.²³⁷ In addition, Dr. Bell has testified that the ventilation fans located on both poultry houses exhaust fecal coliform, *E. Coli*, nitrogen, phosphorus, and ammonia.²³⁸ Defendants’ witnesses also concede these same pathways exist for the pollutants to travel from the poultry houses to nearby ditches.²³⁹

It is well documented in Perdue’s records that poultry waste is tracked out of the poultry houses. Tammie Seyfert, the Flock Supervisor, constantly reminded Alan Hudson to clean up

²³³ See *supra* note 28 (“For the purposes of this Motion, ‘poultry waste’ includes manure, litter, feathers and other waste generated inside the poultry houses. However ‘poultry waste’ and ‘manure’. are often used interchangeably throughout this case and this Motion”)

²³⁴ See *supra* Part IV, Statement of Facts ¶ 19.

²³⁵ See *supra* note 68.

²³⁶ See *supra* Part IV, Statement of Facts ¶¶ 20–27.

²³⁷ *Id.*

²³⁸ See *supra* notes 78–79 and accompanying text.

²³⁹ See *supra* Part IV, Statement of Facts ¶¶ 20–27; see also *supra* notes 71, 74–75, 78–80, 83–84.

manure outside of the houses.²⁴⁰ An MDE inspector, David Bramble, testified that it is normal for manure to be tracked out of poultry houses during livehaul and cleanout activities.²⁴¹ During MDE's January 26, 2010 inspection, which the Hudsons knew in advance would occur, Mr. Bramble witnessed manure on the HUA pads outside the poultry houses at the Facility.²⁴² Furthermore, the State of Maryland recognizes that poultry waste is tracked out of poultry houses, as it spent \$24,591.88 on HUA pads for the Facility and similarly funded over 600 HUA projects for the express purpose of abating or preventing water pollution from waste material tracked out of poultry facilities.²⁴³

Defendants' witnesses also conceded that the fans were a source of pollutants. Defense expert Dr. Hagedorn testified that the fans at the Facility "can clearly disperse bacteria and nutrients, especially ammonia from the inside of chicken houses."²⁴⁴ In addition to Dr. Hagedorn, Defendants' witnesses Jeff Smith and Carrie Johnson also admit that the tunnel ventilation fans at the Facility forcibly exhaust dust, litter and manure containing the aforementioned pollutants to the area outside of the chicken houses.²⁴⁵ In April 2009, Mr. Smith participated with EPA in a joint power point presentation to Perdue employees about CWA compliance.²⁴⁶ The power point, which has been adopted by Perdue in training its flock supervisors and producers, including Alan Hudson, specifically identifies sources of pollutants in poultry operations to include:

²⁴⁰ See *supra* notes 99–100 and accompanying text.

²⁴¹ Ex. 70, D. Bramble Dep. 15:10–17:9.

²⁴² *Id.*

²⁴³ See *supra* notes 96 (MACS Manual), 93 (MDA Hudson Farm MACS Funding Spreadsheet); see also Ex. 132, MDA, 2010 MACS Annual Report 4–5 (Feb. 15, 2011).

²⁴⁴ See Ex. 39, Dr. Hagedorn Dep. 157:3–5.

²⁴⁵ See *supra* notes 78–79 and accompanying text.

²⁴⁶ See Ex. 48, J. Smith Dep. 224:4–20 (Jeff Smith is listed on the title page of the power point and he testified that he reviewed it prior to the presentation); *id.* at 223:16–226:1; Ex. 55, Clean Waters Initiative Presentation, Nos. PER000034-000116.

- Run-off that comes in contact with bedding, litter, and feed;
- Sources include: storage facilities, litter handling activities, poultry handling and fan ventilations.²⁴⁷

Both Dr. Bell and Defendants' own witnesses testified that, once carried outside the poultry houses either via the ventilation fans or from traffic in and out of the poultry houses, the pollutants will reach the drainage ditches on the Facility, specifically Ditches 1 and 3.²⁴⁸ The transport of the pollutants to the drainage ditches is facilitated by the physical layout of the Facility which ensures that pollutants carried outside the poultry houses enter the ditches.²⁴⁹ As depicted in Attachment 5 of Dr. Bell's Declaration, and as Alan Hudson testified, the poultry houses are located very close to the drainage ditches²⁵⁰ and are on higher ground so that surface water drains away from the poultry houses.²⁵¹ In between the two poultry houses, surface water run-off flows directly into the Swale constructed between the houses.²⁵² The Swale funnels contaminated surface water run-off directly into a drainage pipe that cuts through the bank of Ditch 1. This ensures that pollutants from the poultry houses are discharged directly into Ditch 1.²⁵³ Surface water run-off from the area around Chicken House 2 (the southern chicken house) is also discharged to Ditch 1 through Ditch 3. Surface water run-off from the north side of Chicken House 1 (the northern chicken house) will also discharge into Ditch 1.²⁵⁴

Dr. Bell testified that the movement of pollutants outside the poultry houses coupled with the physical layout of the surrounding land, drainage patterns, and proximity of the ditches results in

²⁴⁷ Ex. 55, Clean Waters Initiative Presentation at PER000100; *see also* Ex. 73, T. Seyfert Dep. 52:4–53:21 (discussing Ms. Seyfert's environmental training); Ex. 49, C. Johnson Dep. 60:15–61:8 (discussing producer environmental training).

²⁴⁸ *See supra* Part IV, Statement of Facts ¶ 26.

²⁴⁹ *Id.*

²⁵⁰ *See supra* Part IV, Statement of Facts ¶ 13; Ex. 16, A. Hudson Dep. 229:18–230:3.

²⁵¹ *See supra* Part IV, Statement of Facts ¶ 16.

²⁵² *Id.*

²⁵³ *See supra* Part IV, Statement of Facts ¶ 17.

²⁵⁴ *See* Ex. 45, Dr. Bell Decl. ¶ 21(c)–(h).

pollutants entering Ditches 1 and 3.²⁵⁵ Defendants' witness Jeff Smith and their expert Dr. Hagedorn conceded that poultry house pollutants will reach the ditches.²⁵⁶ Mr. Smith testified that it is not a question of *whether* pollutants will reach the ditches, but rather *how much* of the pollutants will.²⁵⁷ Dr. Hagedorn opined that the inevitable result of the physical layout of the area is that poultry waste will flow into Ditch 1 during surface water run-off events.²⁵⁸

The January 26, 2010 sampling done by MDE confirms that the poultry house pollutants are reaching the Facility's drainage ditches.²⁵⁹ MDE sampled at three locations (HF03, HF04, and HF05) in Ditch 1 upstream of the poultry houses and at one location (HF02) in Ditch 1 downstream of the poultry houses and the point where Ditch 3 intersects with Ditch 1.²⁶⁰ From the point just upstream of the poultry houses, HF03, to the point just downstream of the poultry houses, HF02, fecal coliform and *E. coli* concentrations increased approximately 13 times and 331 times, respectively.²⁶¹ TKN concentrations increased approximately 1.5 times and phosphorus concentrations more than doubled.²⁶² After reviewing the MDE sample results and the attendant map, Dr. Bell concluded that although not the only source, the poultry are the largest source of the bacteria and nutrients found in the ditches.²⁶³

3. Pollutants from the Facility Discharge into the Franklin Branch and the Pocomoke River.

Taken together, Plaintiff's and MDE's sample results show definitively that the pollutants Plaintiff identified in its Complaint²⁶⁴ are in fact in the ditches that discharge from the Facility.

²⁵⁵ See *supra* Part IV, Statement of Facts ¶¶ 26–27; Ex. 45, Dr. Bell Decl. ¶¶ 21–22.

²⁵⁶ See *supra* notes 71, 74–75, 78–80, 83–84.

²⁵⁷ See Ex. 48, J. Smith Depo. at 82:6–18.

²⁵⁸ See *supra* notes 71, 74–75, 78–80, 84.

²⁵⁹ See *supra* Part IV, Statement of Facts ¶¶ 48–54.

²⁶⁰ *Id.*

²⁶¹ See *supra* Part IV, Statement of Facts ¶ 52.

²⁶² *Id.*

²⁶³ Ex. 45, Dr. Bell Decl. ¶ 25.

²⁶⁴ See Compl. ¶¶ 55, 60.

From Fall 2009 to Spring 2010, Plaintiff sampled water from Ditch 1 as it was leaving the Facility.²⁶⁵ Plaintiff's expert, Dr. Bell, testified that Plaintiff's samples were properly documented and collected in accordance with standard sampling practices.²⁶⁶ Defendants' only expert accepted the legitimacy of the sample results and relied on them for his analysis.²⁶⁷

Plaintiff's samples contained very high levels of fecal coliform and *E. coli* bacteria as well as elevated levels of nitrogen, phosphorus, and ammonia,²⁶⁸ the very pollutants that are coming from the poultry and affecting the water quality of the Franklin Branch and the Pocomoke River.²⁶⁹ Samples taken by MDE on January 26, 2010 from the RS&G Drainage Ditch corroborate the results taken by Plaintiff as they show high levels of several of the same pollutants.²⁷⁰

It is undisputed that water in Ditch 1 (as identified in Exhibit 45, Attachment 5 to Dr. Bell's Declaration) leaves the Facility through a culvert that discharges into the RS&G Drainage Ditch.²⁷¹ It is also undisputed that water in the RS&G Drainage Ditch flows under Route 50 and into the Franklin Branch.²⁷² From there, the uncontroverted evidence establishes that the Franklin Branch directly connects with the Pocomoke River, an interstate and navigable-in-fact water of the United States.²⁷³ The total distance from the point where the pollutants discharge from the Facility to the Pocomoke River is approximately 3.5 miles.²⁷⁴

Based on the totality of the evidence, Dr. Bell concluded that the Facility discharged high levels of fecal coliform and *E. coli* from Ditch 1 to the Franklin Branch and that the Facility discharged high

²⁶⁵ See *supra* Part IV, Statement of Facts ¶¶ 42–44.

²⁶⁶ See Ex. 45, Dr. Bell Decl. ¶ 23(e).

²⁶⁷ See *supra* Part IV, Statement of Facts ¶ 54; Ex. 39, Dr. Hagedorn Dep. 163:13–165:16.

²⁶⁸ See *supra* Part IV, Statement of Facts ¶ 44–47.

²⁶⁹ See *id.* ¶¶ 18–27, 32–34; Ex. 45, Dr. Bell Decl. ¶¶ 24–25.

²⁷⁰ See *supra* Part IV, Statement of Facts ¶¶ 48–52.

²⁷¹ See *id.* ¶ 55.

²⁷² See *id.*

²⁷³ See *id.* ¶¶ 60–66.

²⁷⁴ See *id.* ¶ 67.

levels of nitrogen, phosphorus, and ammonia from Ditch 1 to the Franklin Branch and the Pocomoke River.²⁷⁵

Defendants have produced no admissible evidence to contradict the fact that water and pollutants in Ditch 1 are discharged to the Franklin Branch and then to the Pocomoke River. To the contrary, Defendants' expert, Dr. Hagedorn, conceded that the ditches on the Facility are there to drain water away from the farm and that when they are filled with water, the water, nutrients, and bacteria from the Facility are transported through Ditch 1 under Route 50 some distance into the branch system.²⁷⁶ He went on to state that it is possible that water and pollutants discharged from the Facility reached the Pocomoke River,²⁷⁷ a position that is consistent with the opinions of Plaintiff's experts in this case.²⁷⁸ In addition, Alan Hudson also repeatedly certified that discharges from the poultry operation create water quality problems that affect the Pocomoke River.²⁷⁹

While Mr. Hudson has received state money to address those problems, he not only failed to comply with all requirements of the projects,²⁸⁰ but undermined the very purpose of the state-funded program by continuing to use the pipe to drain the Swale. This ensures that pollutants from the poultry houses are discharged from the Facility.

C. The Franklin Branch and the Pocomoke River Are Waters of the United States.

The CWA defines "navigable waters" as waters of the United States, including the territorial seas.²⁸¹ As the term is defined by CWA implementing regulations, it includes:

²⁷⁵ See Ex. 45, Dr. Bell Decl. ¶¶ 23–24 .

²⁷⁶ See *supra* Part IV, Statement of Facts ¶¶ 12, 55.

²⁷⁷ See *id.* ¶ 55.

²⁷⁸ *Id.*

²⁷⁹ See *id.* ¶¶ 32–34.

²⁸⁰ See *id.* ¶¶ 26–40.

²⁸¹ 33 U.S.C. § 1362(7) (2006).

- (a) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- (b) All interstate waters including interstate wetlands;
- (c) All the other waters such as intrastate lakes, rivers, streams (including intermittent streams)...the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:
 - (1) Which are or could be used by interstate or foreign travelers for recreational or other purposes;
 - (2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce;
 - ...
- (e) Tributaries of waters identified in paragraphs (a) through (d) of this definition.²⁸²

It is well-settled that the term “navigable waters” under the CWA “includes something more than traditional navigable waters.”²⁸³

The United States Supreme Court has addressed the extent of CWA jurisdictional waters in three cases, *United States v. Riverside Bayview Homes*,²⁸⁴ *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*,²⁸⁵ and *Rapanos v. United States*.²⁸⁶ Waters that are interstate, navigable-in-fact or tributaries of an interstate or navigable-in-fact water, including seasonally intermittent streams, are within the scope of the Act.²⁸⁷

²⁸² 40 C.F.R. § 122.2 (2011).

²⁸³ *Rapanos v. United States*, 547 U.S. 715, 730–31 (2006). The Court’s decision in *Rapanos* was fragmented with no majority opinion. Four Justices joined in the plurality opinion. Justice Kennedy concurred in the judgment but gave a very different basis for his decision; the remaining four Justices dissented.

²⁸⁴ 474 U.S. 121 (1985).

²⁸⁵ 531 U.S. 159 (2001).

²⁸⁶ 547 U.S. 715 (2006).

²⁸⁷ *See id.* at 732 (noting that the Court did “not necessarily exclude *seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months.... Common sense and common usage distinguish between a wash and seasonal river”); *see also United States v. Moses*, 496 F.3d 984, 989, 991 (9th Cir. 2007) (interpreting *Rapanos* to mean that “intermittent streams (at least those that are seasonal) can be waters of the United States”).

Perdue admits that the Pocomoke River is a water of the United States as that term is defined under the CWA.²⁸⁸ In addition, the geography, history and use of this interstate waterway make its status as a navigable-in-fact water of the United States incontrovertible.²⁸⁹ Perdue also admits that the Franklin Branch, as it understands the term, is a water of the United States.²⁹⁰ Given the undeniable status of the Pocomoke River as a navigable-in-fact water of the United States,²⁹¹ the Franklin Branch, as a tributary to the Pocomoke River, is also a CWA protected waterway.²⁹²

D. The Alan and Kristin Hudson Farm Did Not Have a CWA NPDES Permit at the Time of the Documented Discharges.

Section 301(a) of the CWA explicitly states, in relevant part, that “except as in compliance with ...section[.]... 1342 ... of this title, the discharge of any pollutant by any person shall be unlawful.”²⁹³ Therefore, without a CWA § 402 NPDES permit, Defendants are prohibited from discharging any pollutants from the Facility. Here, Defendants had no such permit. Defendant Alan and Kristin Hudson Farm filed an NOI to be covered under the Maryland-delegated General CAFO NPDES permit in March 2009 but no permit has been issued to date.²⁹⁴ Defendant Alan and Kristin Hudson Farm admits that the Facility has yet to receive coverage under the Maryland General CAFO NPDES Permit.²⁹⁵ Defendant Perdue has never sought, nor received, a permit for discharges from the Facility.

²⁸⁸ See *supra* Part IV, Statement of Facts ¶ 56.

²⁸⁹ See *id.* ¶¶ 69–71.

²⁹⁰ See *id.* ¶ 56.

²⁹¹ 40 C.F.R. § 122.2 (2011); see *supra* Part IV, Statement of Facts ¶¶ 69–71.

²⁹² See 40 C.F.R. § 122.2(e) (2011); *supra* Part IV Statement of Facts ¶¶ 57–68.

²⁹³ 33 U.S.C. § 1311(a) (2006).

²⁹⁴ See *supra* Part IV, Statement of Facts ¶¶ 9–11; see also Ex. 16, A. Hudson Dep. 399:20–400:1. On July 26, 2010, the Hudsons and MDE entered into a Compliance Schedule. However, this Compliance Schedule, which was not even finalized and effective until after the Complaint in this case was filed, is not a permit. See *supra* Part IV, Statement of Facts ¶ 10.

²⁹⁵ See *id.* ¶ 73.

E. The Hudsons and Perdue Are Owners and/or Operators of the Facility and Are Both Responsible for the Unpermitted Discharge of Pollutants.

The term “owner or operator” is defined in Section 306 of the CWA²⁹⁶ as “any person who owns, leases, *operates, controls, or supervises* a source.”²⁹⁷ The term “source” is defined in that section as any facility “from which there is or may be the discharge of pollutants.”²⁹⁸ In this case, in light of the numerous discharges attributable to the Facility, it is clearly a “source” within the meaning of the CWA.²⁹⁹

The CWA holds both “owners” and “operators” liable for discharges from source facilities. Section 301(a) of the CWA states that “the discharge of any pollutant by any person shall be unlawful.”³⁰⁰ Violations by “any person” are unlawful, not solely permit-holders.³⁰¹ Courts have held that “the CWA imposes liability both on the party who actually performed the work and on the party with responsibility for or control over performance of the work.”³⁰²

The evidence gathered in this case, the many documents on file with state agencies and produced during discovery, and the deposition testimony of both the Hudsons and employees of Perdue point to the undeniable conclusion that, while Alan and Kristin Hudson own and operate the Facility, Perdue

²⁹⁶ The term “owner or operator” is not defined in 40 C.F.R. § 122.23 (2011). 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. 73 Fed. Reg. 70,418, 70,419 (Nov. 20, 2008).

²⁹⁷ 33 U.S.C. § 1316(a)(4) (2006) (emphasis added).

²⁹⁸ *Id.* § 1316(a)(3).

²⁹⁹ *See supra* Part IV, Statement of Facts, ¶¶ 18–55.

³⁰⁰ 33 U.S.C. § 1311(a).

³⁰¹ *Cf. United States v. Smithfield Foods, Inc.*, 965 F. Supp. 769, 781 (E.D. Va. 1997) (holding that section 309 of the CWA applies to persons who violate, not just permit holders) (rev’d on other grounds).

³⁰² *United States v. Lambert*, 915 F. Supp. 797, 802 (S.D. W. Va. 1996) (holding person who hired contractor liable for violation of exceeding permit limitations). *See also United States v. Avatar Holdings, Inc.*, Civ. No. 93-281, 1995 WL 871260, *14 (M.D. Fla. Nov. 22, 1995) (holding that where a subsidiary that holds a NPDES permit violates § 309(d) of the CWA, a parent corporation is liable if it exercised sufficient control over the subsidiary such that “it may be considered a ‘person who violates’”); *United States v. Board of Trustees of Fla. Keys Comty. Coll.*, 531 F. Supp. 267, 274 (S.D. Fla. 1981) (holding contractor liable for violations of CWA despite his belief that the contracting college had obtained the requisite permit).

supervises, controls, and operates the Facility as well. As such, both Defendants are liable for the discharges.³⁰³

1. Alan and Kristin Hudson Are Owners and Operators of the Facility.

Alan and Kristin Hudson are persons within the meaning of the CWA and own and operate the Alan and Kristin Hudson Farm.³⁰⁴ There are numerous documents in the record that identify the Hudsons as owners of the Facility.³⁰⁵ In addition, the Hudsons, at Perdue's direction, perform operational tasks at the Facility.³⁰⁶

2. Perdue Is an Operator of the Facility.

Perdue's status as an operator of the Facility could not be more evident. Perdue's employees enter the poultry houses on a regular basis and perform all the operational tasks associated with raising Perdue's own birds.³⁰⁷ This includes, but is not limited to, adjusting temperatures and drinker lines, adjusting fan and airflow, and culling weakened birds from the flock.³⁰⁸ At the end of the visit, these employees leave detailed instructions for the Hudsons to perform tasks over the days between Perdue's visits.³⁰⁹ In short, Perdue conducts and directly manages all the day-to-day operations needed to ensure that its birds are raised in accordance with its demands.

a. Perdue Directly Operates the Facility

³⁰³ See *Assateague Coastkeeper v. Alan & Kristin Hudson Farm*, 727 F. Supp. 2d 433, 442–43 (D. Md. 2010). The Court provided a thorough discussion of the law and standards for holding a non-owner liable under the CWA. Plaintiff provided a brief summary of that discussion.

³⁰⁴ See *supra* Part IV, Statement of Facts ¶¶ 1–2.

³⁰⁵ See *e.g.*, *supra* notes 36, 38, 86.

³⁰⁶ See *supra* Part IV Statement of Facts ¶¶ 2, 100–103, 107–108.

³⁰⁷ See *id.* ¶¶ 89–93, 104, 106.

³⁰⁸ See *id.* ¶¶ 106.

³⁰⁹ See *id.* ¶¶ 96–97, 100–103, 107–108.

Perdue's role in the operation of the Facility is methodically delineated in the Poultry Producer Agreement ("PPA") between Defendants.³¹⁰ Perdue retains title to the birds raised at the Facility³¹¹ and merely consigns the birds to the Hudsons.³¹² Perdue determines when and whether chicks are consigned to the Facility and when they will be removed.³¹³ Perdue provides (or arranges for the provision of) the exclusive feed, fuel, litter, litter treatment, medications, vaccinations, and other supplies including disinfectant, which are necessary for the raising of the consigned chicks, and the Hudsons are not allowed to deviate from these supplies.³¹⁴ Perdue retains the unrestricted right to enter the Facility and inspect both the flock and the poultry houses.³¹⁵ If Perdue is unsatisfied with the Hudsons' performance of their obligations, Perdue may terminate the agreement with the Hudsons at any time and for any reason.³¹⁶ Perdue may also remove the flock or continue the maintenance, treatment, feeding and care of the flock at the Facility.³¹⁷

Perdue's pervasive role in the operation and control of the Facility begins with the PPA but clearly does not end there. Perdue also maintains a continuous presence at the Facility with its regular visits, plethora of instructions, and extensive monitoring and control.³¹⁸ Just beyond the Perdue sign at the entrance to the Facility, Perdue controls visitor access by maintaining a log of visitors to the Facility.³¹⁹ A review of the Perdue visitor logs demonstrates that Perdue employees visit the Facility 2–3 times per week.³²⁰ During multiple months, Perdue employees

³¹⁰ See generally Ex. 13, PPA, Nos. HUD000941–000947.

³¹¹ See *supra* Part IV, Statement of Facts ¶ 77.

³¹² See *id.*

³¹³ See *id.* ¶ 78.

³¹⁴ See *id.* ¶ 84.

³¹⁵ See *id.* ¶ 79.

³¹⁶ See *id.* ¶ 76.

³¹⁷ See *id.* ¶¶ 79–80.

³¹⁸ See *id.* ¶¶ 83–115.

³¹⁹ See *id.* ¶ 91.

³²⁰ See *id.* ¶ 92.

visited the facility at least 13 times, or more than once for every two business days during the month.³²¹ Perdue's Flock Supervisor routinely checks settings, temperatures, alarms, ventilation, and other conditions in the poultry houses, making any necessary changes to these conditions or instructing the Hudsons to do the same.³²² Perdue employee Tammie Seyfert, the Facility Flock Supervisor, worked at the Facility on a regular basis.³²³ A sampling of the notes that Ms. Seyfert left on Flock Visitation Reports after visiting the Facility provide undisputed examples of Perdue's operation of the Facility:

- I added the rest of the sensors on for you on fans & alarms. (PER000588)
- I went and put 2 hrs of darkness on the light clock...I move T/Fan #4 into that place... I lower all fans down 1° so things come on a little sooner. I save this as program #4 in the controller. (PER000589).
- I add time to your cool pad – was 75/225 now 100/200. Keep on adding time as needed to help maintain temps under 85°. (PER000591).
- In hse #1 I move box lids down into 2nd & 3rd chamber under every other pan. (PER000618).
- I dim lights today & took sidewall 3 + 4 out & lower all T/fans down some to help give you a better airflow. (PER000619).
- Watch your min temps in hse #2 getting a little low. I raise static up & took a few sec off of reopening time. (PER000632).
- In both hses I went through and did some heavy culling out for you. You will need to do a lot more. Try to work on this over the weekend...I dim lights down to 5. Each day dime down until you get a 4. (PER000634).
- Keep working on the culls. I did some heavy culling out for you. The ones in the middle are from me. (PER000636).
- I dim lights down to 8 today slow dim down until you get to 6 – dim daily. In both hses your ends were cool. I button up most vent boxes...I raise water lines up a little more. (PER000654).
- "I did some culling out for you today." (PER000656).
- I up your timers in hse #2 ammonia levels were 40 ppm. Was 40/260. Now 50/250. (PER000681).
- I raised up your water lines today...I made some adjustments to your timer fans & static. I added some more time and lower static down. I also open up some vent boxes. (PER000684).

³²¹ *Id.*

³²² *See id.* ¶¶ 89–90, 93–115

³²³ *See id.* ¶¶ 104–109; *see also* notes 202–208.

- In hse #1 I added more time to your min vent fans...In hse #2, I added more time due to ammonia levels out of range...I raised water lines up on feed bin side was on low side. (PER000697).
- I made some adjustments to the controller on fan & heat settings. I lower fan down 1° from set temp on (min vent) & lower heaters down ½ more...I added 10 more sec to your min vent fans. (PER000699).
- I did some heavy culling out in hse #1. I need for you to cull out about 300 to 400 a day in both houses until all the small ones are out. (PER000791) (emphasis in original).³²⁴

As evidenced by Ms. Seyfert's notes in the above documents and her deposition testimony,³²⁵ she, on behalf of Perdue, undoubtedly directly operated the Facility.

Under the terms of the PPA, Perdue employees may continue to enter and maintain the poultry houses even if the contractual relationship between the Hudsons and Perdue is terminated.³²⁶ Clearly, Perdue directly operates the Facility and therefore, Perdue is an operator within the meaning of the CWA.

b. Perdue Supervises and Controls the Hudsons' Actions Related to the Facility.

In addition to directly operating the poultry houses at the Facility, Perdue also supervises and controls the actions of Alan and Kristin Hudson. As mentioned previously, Perdue determines when, and whether, chicks are consigned to the Facility and when they will be removed.³²⁷ Perdue retains the unrestricted right to enter the site and inspect both the flock and the facilities.³²⁸

At the end of her regular visits to the Facility, Ms. Seyfert gives oral and written instructions to Mr. Hudson regarding the operation of the poultry houses.³²⁹ A sampling of the

³²⁴ See Ex. 133, Sampling of Perdue Flock Visitation Reports re Operation.

³²⁵ See *supra* Part IV, Statement of Facts ¶¶ 104–109.

³²⁶ See *id.* ¶¶ 76, 79.

³²⁷ See *id.* ¶ 78.

³²⁸ See *id.* ¶ 79.

³²⁹ See *id.* ¶¶ 97–109.

notes that Ms. Seyfert left on Flock Visitation Reports shows that she assigns very specific tasks for the Hudsons to perform addressing the central parameters to chicken production.³³⁰

- try to level the water lines...watch for the burn out bulbs you have some in 2nd and 3rd chamber. Need to replace them ASAP... Add more time to timer fans as needed...run Manage on birds for 3 days 1 gallon to 3 gallons of water. (PER000587).
- In hse #1 need to lower sensor #1 down...keep working on getting the culls out...keep working on level water lines...watch temps, bird comfort + make adjustments as needed...run Manage again on birds. (PER000588).
- In hse #1 T/fan #2 is not working. Need to check out & fix...Keep working on culls & watch dead birds into the feeder pans...Run manage on birds again, and run vinegar couple days a week. (PER000589).
- Keep working on the culls. Try to have them all clean up by movement...Keep a close eye on bird comfort with set temp & static. You may need to fine tune through-out the day. Temps will be very hot make adjustments as needed. (PER000605).
- Need to do some heavy culling in #2 a lot of small culls. (PER000618).
- Watch the feed in areas of both hses a lot of spots you have too much feed down & it is overflowing on the ground. Try to control the feed your self instead of leaving on. Feed 3 times or as needed...Before moving into 2nd chamber preheat at least 24 hours & check litter temps. (PER000632).
- In both hses fine tune up drinker height the hi & low areas of drinker lines. Try to keep the silver tip at top of birds head. Keep eye on floor condition & flow. Ideal flow. 25-ml/per min...In hse #2 drive down the birds on T/fan end & put migration in...start patching up any holds on inlet curtains and solid sidewall areas to help heat & static... Keep vent boxes close in front of sensors at nights & cool days. (PER000633).
- Start running Amprol on the birds for each hse run 1 ½ gallons of Amprol to 7 ½ gallons of water run until all gone...Things to work on: poly up the end doors. You have a lot of air coming thru. Fix any sockets & replace out any burn out bulbs. Very important to keep lights even out. (PER000653).
- In hse #1 I need for you to lower down sensor #6. (PER000682).
- Birds have a little noise in them run some iodine or bleach. (PER000685).
- Need to work on these things ASAP. Need to drive birds down and put your last section of migration in both hses...Need to work on leveling up the water lines & feeder lines in both hses...close up chick mates & move some box lids down to 2nd chamber...watch the old dead birds in feeders that need to be work on. Fix any feeder pans that have falling off...Need to replace brooder curtains. (PER000700).

³³⁰These are only a limited selection of the numerous notes indicating both supervision and control by Perdue. *See also* Ex. 125, Perdue Flock Visitation Compilation (T. Seyfert Dep. Ex. 24).

- The main thing is to do some heavy culling out in hses #2. Looks like you got 300 to cull out per hse. (PER00701).³³¹

Perdue's role of oversight and control seen in the Flock Visitation Reports is echoed in Perdue's Pest Inspection Forms.³³² These records also contain a prepared form at the top with a list of specific conditions for the Flock Supervisor to verify including that the grass is cut, trash is removed, the doors are closed tightly, and that there are no wild birds or other signs of rodents or pests.³³³ A comment section contains Perdue's instructions to the Hudsons:³³⁴

- Add fresh bait as needed. Check weekly. Fix any holes in brood curtain & sidewalls. Also any brood curtains don't zip down will need to be replace. (PER00707).
- Keep working on the weeds & grass where needed...Get rid of any old medi & trash. (PER000722).
- Keep feed pads & loading area pads clean at all times. (PER000738).
- Need to replace brood curtains by next flock. (PER00756).
- I need for you to put [illegible] around the chicken hse bait stations. (PER000766).
- Need to keep feed pad & loading area pad clean of feed and manure. (PER000786).
- Very important to keep composter and manure shed clean at all times of any leakage of manure leaking out on the ground. (PER000802).
- Need to keep loading area clean from manure at all times and any area on the dirt. Need to keep manure in composter and manure shed at all times. If leaking out on the ground need to clean up. (PER000817).³³⁵

c. Perdue's Control of the Facility Extends to Environmental Compliance.

Perdue also plays a pivotal role in environmental management of the Facility in accordance with the MOA signed with the EPA.³³⁶ Perdue's company-wide environmental management program, the Perdue Clean Waters Initiative ("CW Initiative"), establishes Perdue's

³³¹ See Ex. 134, Sampling of Flock Visitation Reports re Supervision and Control.

³³² See Ex. 116, Perdue Pest Inspection Forms Compilation (T. Seyfert Dep. Ex. 22).

³³³ See *id.*

³³⁴ These are only a limited selection of the numerous notes indicating both supervision and control by Perdue. See also Ex. 116, Perdue Pest Inspection Forms Compilation (T. Seyfert Dep. Ex. 22).

³³⁵ See Ex. 135, Sampling of Pest Inspection Forms.

³³⁶ See *supra* Part IV, Statement of Facts ¶¶ 109–115.

environmental management role on Maryland's Eastern Shore, including at the Facility.³³⁷ The goal of this program is to promote compliance with environmental laws.³³⁸ Perdue's environmental management is enforced through corrective actions and the deviation response procedure, which include specific deadlines for compliance and the threat of contract termination.³³⁹ While Perdue characterizes the CW Initiative as a "voluntary" program, Jeff Smith testified that if they chose not to participate, "chances are they're not going to be growing for Perdue."³⁴⁰ As a part of the CW Initiative, Perdue provided environmental training to Alan Hudson and performed an environmental assessment of the operations at the Facility.³⁴¹

Perdue's direct operation of the Facility, its rigid supervision, management and control of the Hudsons' poultry-related activities and its oversight of environmental compliance lead to an undeniable conclusion that Perdue is an operator of the Facility and is, therefore, liable for the illegal discharges from it.

VI. CONCLUSION

Based on the totality of the overwhelming evidence, both direct and circumstantial, Plaintiff has clearly met its burden of proving that both Defendants are owners and operators of the Alan and Kristin Hudson Farm and that they discharged, and continue to discharge, pollutants from a point source into waters of the United States. Plaintiff therefore requests that the Court grant its Motion for Summary Judgment.

³³⁷ *Id.*

³³⁸ *See id.* ¶ 112; Ex. 48, J. Smith Dep. 126:15–127:12.

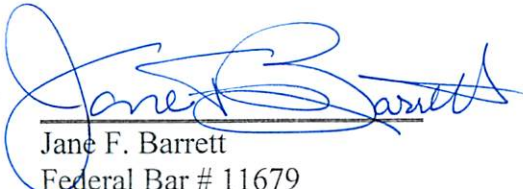
³³⁹ *See supra* Part IV, Statement of Facts, ¶¶ 112–115.

³⁴⁰ *See* Ex. 48, J. Smith Dep. 231:6–19.

³⁴¹ *See* Ex. 73, T. Seyfert Dep. 323:14–324:9.

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