IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF LINN

CHRISTINA EASTMAN, in her individual capacity, FARMERS AGAINST FOSTER FARMS, an Oregon nonprofit corporation; FRIENDS OF FAMILY FARMERS, an Oregon nonprofit corporation, AND WILLAMETTE RIVERKEEPER, an Oregon nonprofit corporation; Petitioners, v. OREGON DEPARTMENT OF AGRICULTURE, an agency of the State of Oregon, OREGON DEPARTMENT OF ENVIRONMENTAL QUALITY, an agency of the State of Oregon; Respondents.	Case No. 22CV34340 **PETITIONERS' RESPONSE TO RESPONDENTS' MOTION FOR PARTIAL SUMMARY JUDGMENT** Hon. Rachel Kittson-MaQatish Hearing: November 16, 2023, at 9:00 a.m.

SUGERMAN DAHAB
707 SW Washington Street, Suite 600 - Portland, Oregon 97205
Phone 503.228.6474 | Fax 503.228.2556

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Petitioners Christina Eastman, Farmers Against Foster Farms (FAFF), Friends of Family Farmers (FOFF), and Willamette Riverkeeper (collectively referred to as "Petitioners") hereby respond to Oregon Department of Agriculture (ODA) and Oregon Department of Environmental Quality's (DEQ) (collectively referred to as "Respondents") motion for partial summary judgment and respectfully request that the Court deny the motion in its entirety. This response is supported by the points and authorities below and the Declaration of Nadia Dahab, filed concurrently herewith.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This case concerns the largest mega-chicken operation in Oregon, sited in a very wet area of the state next to a pristine stretch of the North Santiam River and abutting several neighboring farms and homes. This concentrated animal feeding operation (CAFO) proposes to raise 3.5 million broiler chickens a year for Foster Farms, generating 4500 tons of manure and chicken litter each year, all while sitting on land that is saturated in the winter and situated just 483 yards from the wildlife rich North Santiam River, which the community uses for recreation. The science and legal precedent that apply in this case are complex, but one fact is clear: Petitioners, who are family farmers, rural residents, and environmentalists from different backgrounds and ideologies, all agree that J-S Ranch poses an enormous threat to the community if allowed to proceed under the current permit.

Respondents' motion raises issues of both federal and state law. Oregon has jurisdiction over all waters of the state, including surface and ground water. It also implements the federal Clean Water Act, which protects navigable waters including the North Santiam River. Despite requests from Petitioners to consider the impacts that J-S Ranch will have on the North Santiam River, Respondents failed to do so. Instead, they simply accepted J-S Ranch's application for a permit that neither regulates nor limits discharges of pollutants to surface water. In doing so,

SUGERMAN DAHAB
707 SW Washington Street, Suite 600 - Portland, Oregon 97205
Phone 503.228.6474 | Fax 503.228.2556

Respondents failed to follow state and federal law. They also ignored evidence and public comments demonstrating the likely impacts to groundwater from the CAFO operation.

Respondents move for partial summary judgment on several grounds. As explained below, their motion should be denied in its entirety. Petitioners allege—and genuine disputes of material fact remain—that pollution from J-S Ranch will reach the surface waters of the North Santiam River, including through aerial deposition of ammonia gas and litter dust (particulate matter) from chicken building fans, and from runoff of contaminated water from the CAFO's production area. These discharges trigger Clean Water Act permitting requirements. Because that is so, the Court should deny Respondents' motion.

II. FACTUAL BACKGROUND

A. The Proposed J-S Ranch Operation

Petitioner Christina Eastman is a resident of Scio, Oregon, and a third-generation farmer in the area. One of Petitioner Eastman's farms sits at 37231 Jefferson-Scio Dr., or 350 yards from the proposed operation. She has spent her life protecting the delicate ecosystem of the North Santiam River by using sustainable farming practices. In this judicial review proceeding, Petitioner Eastman, among others, seeks review of the Water Pollution Control Facility (WPCF) permit issued by Respondents on May 26, 2022, for the operation of a large, confined animal feeding operation for broiler chickens, also referred to as a "mega-chicken" facility, known as "J-S Ranch."

J-S Ranch is a Foster Farms integrator mega-chicken operation that is proposed to be located at 37225 Jefferson-Scio Dr. in Scio, Oregon, just one-quarter mile from the North Santiam River. Matthews Decl. ¶ 7. The permitted facility will consist of eleven barns capable of housing over 580,000 broiler chickens at a time, with an estimated annual production output of 3.5 million chickens. Matthews Decl. ¶¶ 7, 11, 15. Approximately 4,500 tons of chicken

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707 SW Washington Street, Suite 600 - Portland, Oregon 97205
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manure will be produced each year and stored in two manure sheds on site. Matthews Decl. ¶ 7. If it is built, J-S Ranch will be the largest poultry operation in Oregon. Dahab Decl. ¶ 2, Ex. A.

J-S Ranch's eleven proposed poultry barns are to be equipped with industrial fans to ensure adequate air circulation for the birds. Matthews Decl. ¶ 20. As explained in more detail below, chicken litter produces enormous quantities of ammonia as a byproduct. *See also* Matthews Decl. ¶ 20. The industrial fans at J-S Ranch will cause the ammonia from the litter to exit the barns and make its way into the North Santiam River by aerial deposition. Dahab Decl. ¶ 12; *see also* Matthews Decl. ¶ 20 ("Each barn at J-S Ranch will have fans that will exhaust air containing ammonia from the barns into the outside air.").

J-S Ranch will produce approximately 4,500 tons of chicken litter each year and according to its plans intends to export 100 percent of the litter as compost, rather than apply any to crop fields (or "land application"). Matthews Decl. ¶ 7, Ex. 2; ¶ 8, Ex. 3 (animal waste management plan); ¶ 16; Dahab Decl. ¶ 2, Ex. A. But its permit application indicates its storage capacity will be maxed out before export occurs, and it has provided no guarantee that contracts for exports have been secured. See Matthews Decl. ¶ 10, Ex. 5. And despite a prohibition on land application of waste, ODA still required recordkeeping for land applications of waste in the WPCF permit it granted J-S Ranch. Matthews Decl. ¶ 10, Ex. 5, at 4.

B. Large Scale Broiler Operations

Poultry CAFOs produce waste byproducts. Some byproducts are relatively easy to see—like poultry litter and dust, which can contain feathers, skin fragments, feces, feed particles, microorganisms, and chemicals. Others—including particulate matter and various gases, most notably ammonia—are not. *See* Dahab Decl. ¶ 3, Ex. B, at 3. Ammonia is a form of nitrogen; although nitrogen has beneficial impacts in limited quantities, it is toxic to plant and aquatic life in large enough concentrations. *See Md. Dep't of Env't v. Assateague Coastal Tr.*, 484 Md 399, 477–78, 299 A3d 619 (2023).

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707 SW Washington Street, Suite 600 - Portland, Oregon 97205
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Nitrogen from poultry waste is released to the atmosphere as gaseous ammonia through volatilization or denitrification. *Id.* at 478. The manure of an average broiler chicken emits approximately 0.54 grams of ammonia each day, meaning large poultry CAFOs can easily produce more than a hundred tons of ammonia every year.[1] Ammonia can cause "acidification of soils, forest decline * * * and eutrophication in downwind ecosystems." *See* Dahab Decl. ¶ 4, Ex. C, at 2). Eutrophication is a process that results from accumulation of nutrients in waterbodies. Excess nutrients increase the plant and algae growth, creating algal blooms and low-oxygen waters that can lead to devastating fish kills.[2]

Poultry CAFOs also release significant quantities of particulate matter, which are small particles of solid or liquid matter suspended in air.[3] Particulate matter emanating from poultry CAFOs consist of "[f]eed, bedding, dry manure, unpaved soil surfaces, animal dander, and poultry feathers"; it therefore also routinely contains fecal matter, bacteria, fungi, and skin cells.[4] Particulate matter is emitted through poultry barns' industrial fans, transported, and deposited nearby on both land and water. *See generally* Dahab Decl. ¶ 4, Ex. C.

III. LEGAL BACKGROUND

A. CAFO Permitting in Oregon

Both state and federal law require the State of Oregon to protect water quality by preventing the discharge of animal waste into "waters of the State." ORS 468B.200; 33 USC §

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[1] *See* Env't Integrity Project, Ammonia Emissions from Broiler Operations Higher than Previously Thought at 14 (Jan 2018), *available at* https://environmentalintegrity.org/reports/ammonia-emissions/ (last visited Oct 25, 2023). Attached as Exhibit D to the Dahab declaration.

[2] *See* Nat'l Oceanic & Atmospheric Admin., *What is Eutrophication?*, https://oceanservice.noaa.gov/facts/eutrophication.html (last visited Oct 10. 2023).

[3] Envtl. Prot. Agency, *Particulate Matter (PM) Basics*, https://www.epa.gov/pm-pollution/particulate-matter-pm-basics (last visited Oct 10, 2023).

[4] Nat'l Ass'n of Local Bds. of Health, *Understanding Concentrated Animal Feeding Operations and Their Impacts on Communities* 6 (2010). Attached as Exhibit E to the Dahab declaration.

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1311(a). Waters of the state include both surface waters and groundwater.[5] To safeguard both surface and groundwater quality CAFOs[6] must obtain a water quality permit before construction and operation. ORS 468B.025 (unless they hold a permit under ORS 468B.050, "no person shall cause pollution of any waters of the state or place or cause to be placed any wastes in a location where such wastes are likely to escape or be carried into the waters of the state by any means").

Depending on the nature of their discharges, CAFOs must obtain either a Water Pollution Control Facility (WPCF) permit or a National Pollution Discharge Elimination System (NPDES) permit. CAFO operators may apply for either the State's general WPCF, an NPDES CAFO permit (which includes the federal permit for protection of navigable waters and the state permit for protection of all state waters), or an individual permit. An individual permit is necessary only in certain circumstances, such as where the operation is in an environmentally sensitive area, uses experimental treatment technology, or has a history of noncompliance with general permit

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[5] "Waters of the State" means

> "lakes, bays, ponds, impounding reservoirs, springs, wells, rivers, streams, creeks, estuaries, marshes, inlet, canals, the Pacific Ocean within the territorial limits of the State of Oregon, and all other bodies of surface or underground waters, natural or artificial, inland or coastal, fresh or salt, public or private (except those private waters that do not combine or effect a junction with natural surface or underground waters) that are wholly or partially within or bordering the state or within its jurisdiction."

OAR 340-051-0010(8).

[6] State law defines a CAFO as

> "[t]he concentrated confined feeding or holding of animals or poultry. * * * (A) In buildings or in pens or lots where the surface has been prepared with concrete, rock or fibrous material to support animals in wet weather; or (B) That have wastewater treatment works; or (C) That discharge any wastes into waters of the state."

OAR 603-074-0010(3)(a). Facilities that meet the federal definition of concentrated animal feeding operations are also included. OAR 603-074-0010(3)(b).

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707 SW Washington Street, Suite 600 - Portland, Oregon 97205
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conditions.[7] OAR 603-074-0010(8); OAR 340-045-0033(10)(c). Although the Oregon DEQ is generally responsible for issuing NPDES and WPCF permits, ORS 468B.030; ORS 468B.035(1), ODA has been granted co-authority to implement state water pollution control laws and the provisions of the Clean Water Act "relating to the control and prevention of water pollution from a confined animal feeding operation." ORS 468B.035(2), ORS 468B.217(2)(a). Federal and state law require that CAFOs discharging to surface waters obtain an NPDES permit. OAR 340-045-0010(13); 33 USC § 1311(a).

Congress enacted the Clean Water Act in 1972 "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 USC § 1251(a). The Act prohibits the "discharge of any pollutant" into waters of the United States, except when in compliance with a NPDES permit. 33 USC §§ 1251(a)(1), 1311(a), 1342(a)(1). "Discharge of a pollutant" is defined as any addition of any pollutant to navigable waters from any point source. *Id.* § 1362(12). "Concentrated animal feeding operations," or CAFOs, fall within the Clean Water Act's definition of "point source," demonstrating Congress's intent to control and reduce discharges of pollution from CAFOs through the NPDES program. 33 USC § 1362(14), OAR 340-0450-0010(17).

NPDES permits place limits, referred to as effluent limitations, on the type and quantity of pollutants that can be released into waters of the United States. The Clean Water Act authorizes the Environmental Protection Agency (EPA) to issue and enforce NPDES permits, 33 USC §§ 1319, 1342(a)(1); however, it also empowers the EPA to delegate its NPDES permitting authority to states. 33 USC § 1342(b). While authorized states must ensure their pollution control laws are at least as stringent as the provisions of the Clean Water Act, they are also empowered to impose more stringent pollution control laws. 40 CFR §§ 122.44(d), 123.25(a).

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[7] General permits are issued for certain industries or categories of discharges when they are susceptible to regulation under common terms and conditions. *See* 40 CFR §§ 122.28(a), 123.25; OAR 340-045-0033; OAR 603-074-0014.

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707 SW Washington Street, Suite 600 - Portland, Oregon 97205
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Oregon has been authorized to administer the NPDES program since 1973, and as noted above, ODA has been primarily tasked with such administration as it relates to CAFOs. ORS 468B.035(2).

CAFOs that do not discharge to surface waters are regulated under state law. Oregon regulates CAFOS that discharge to groundwater or operate disposal systems through WPCF permits. ORS 468B.020; ORS 468B.025; ORS 468B.050; OAR 340-045-0015. WPCF permits allow for the "construct[ion] and operat[ion] of a disposal system *with no discharge to navigable waters*." OAR 340-045-0010(32) (emphasis added). WPCF permits are thus only appropriate when a CAFO will *not* discharge to surface waters.

Finally, the North Santiam River is also subject to the "Three Basin Rule," which prohibits "new or increased waste discharges" to preserve or improve the existing high-quality water for municipal water supplies, recreation, and preservation of aquatic life." OAR 340-041-0350. In areas subject to the Three Basin Rule, no new NPDES permits are allowed for CAFOs, and ODA may issue a WPCF permit for a new CAFO only if (1) there is no waste discharge to surface water, and (2) all groundwater quality protection requirements of OAR 340-040-0030 are met. *Id.*

B. The Oregon APA

The circuit court reviews a challenge to a final state agency order in accordance with the standard of review set forth in the APA. "ORS 183.484(5) sets forth the criteria for judicial review of an order in other than a contested case." *G.A.S.P. v. Envtl. Quality Comm'n*, 198 Or App 182, 187, 108 P3d 95 (2005). This provision provides:

> (a) The court may affirm, reverse or remand the order. If the court finds that the **agency has erroneously interpreted a provision of law and that a correct interpretation compels a particular action**, [the court] shall:
>
> (A) Set aside or modify the order; or

SUGERMAN DAHAB
707 SW Washington Street, Suite 600 - Portland, Oregon 97205
Phone 503.228.6474 | Fax 503.228.2556

> (B) Remand the case to the agency for further action under a correct interpretation of the provision of law.
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> (b) The court shall remand the order to the agency if the court finds **the agency's exercise of discretion** to be:
>
> (A) Outside the range of discretion delegated to the agency by law;
>
> (B) Inconsistent with an agency rule, an officially stated agency position, or a prior agency practice, if the inconsistency is not explained by the agency; or
>
> (C) Otherwise in violation of a constitutional or statutory provision.
>
> (c) The court shall set aside or remand the order if [the court] finds that the order is **not supported by substantial evidence** in the record. Substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding.

ORS 183.484(5) (emphases added). Thus, the APA authorizes this court to reverse, remand or set aside a final order in other than contested case only if it finds that the order: (a) is based on an erroneous interpretation of law, (b) results from improper exercise of discretion, or (c) is not supported by substantial evidence. These three criteria circumscribe the scope of circuit court review. *See Portello v. Or. State Sys. of Higher Educ.*, 122 Or App 314, 318, 858 P2d 145 (1993) (trial court's reversal of an agency order is error, where "[n]one of the grounds for reversal given by the trial court come within its permissible scope of review under ORS 183.484.").

IV. LEGAL STANDARD

Summary judgment is appropriate only "if the pleadings, depositions, affidavits, declarations and admissions on file show that there is no genuine issue as to any material fact and that the moving party is entitled to prevail as a matter of law." ORCP 47C. "No genuine issue as to a material fact exists if, based upon the record before the court viewed in a manner most favorable to the adverse party, no objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject of the motion * * * ." *Id.* The Court generally may consider evidence only to the extent that it is properly presented and otherwise admissible.

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707 SW Washington Street, Suite 600 - Portland, Oregon 97205
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See Hickey v. Settlemier, 318 Or 196, 206 n 9, 864 P2d 372 (1993); *Demaray v. Dep't of Envtl. Quality*, 127 Or App 494, 497, 873 P2d 403 (1994). The Court must construe that evidence, and draw any reasonable inferences therefrom, in the light most favorable to the nonmoving party. *Dewsnup v. Farmers Ins. Co.*, 349 Or 33, 35, 239 P3d 493 (2010) .

V. ARGUMENT

Respondents violated state and federal law by granting it a groundwater-only WPCF permit to J-S Ranch. The Court should deny Respondents' motion for partial summary judgment for several reason. First, aerial deposition of ammonia and dust or particulate matter is a cognizable discharge of a pollutant under the Clean Water Act and Oregon law. Second, the fact that this dust and gaseous ammonia will be blown from fans and travel first through the air does not mean it is exempt. Third, discharges of pollution to the river from contaminated stormwater runoff is also prohibited absent a permit; there is no agricultural stormwater exemption for a discharge from a CAFO production area. Fourth, this surface water threat implicates not only the Clean Water Act, but Oregon's Three Basin Rule, meant to protect the sensitive area where J-S Ranch choose to operate. Finally, despite not being permitted to do land apply its chicken litter and manure, the state failed to ensure that J-S Ranch's 100-percent export plan was feasible and protective of surface and groundwater quality. For all these reasons, Respondents' arguments fail as a matter of law. The Court should deny the motion in its entirety.

A. CAFO discharges to surface water are prohibited without an NPDES permit.

Respondents move for summary judgment on Count 1 in its entirety, Count 2 as it relates to surface water discharges in the form of nitrogen pollutants, and Count 3 as it relates to aerial deposition of ammonia on the basis of aerial emissions not being subject to regulation under the Clean Water Act. Motion at 7. But state and federal law, including EPA's own guidance, stands in contrast to Respondents' narrow framing of the Clean Water Act. J-S Ranch will discharge to surface waters through aerial deposition of nutrients and particulate matter and runoff of

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707 SW Washington Street, Suite 600 - Portland, Oregon 97205
Phone 503.228.6474 | Fax 503.228.2556

contaminated stormwater. At minimum, an NPDES permit was therefore required.

1. Aerial deposition of gaseous ammonia and particulate matter is a "discharge of a pollutant" under the Clean Water Act.

Like all mega-chicken confinement operations, J-S Ranch proposes to use large ventilation fans to move contaminated air out of the buildings for the purposes of preventing the buildup of ammonia gas that would suffocate the chickens. Matthews Decl. ¶ 20. Those large industrial fans will blow out both ammonia gas and dust from the chicken litter (containing chicken waste, bedding, feathers, etc.). This, in turn, will cause discharges of pollutants into surface waters through aerial deposition of nutrients like nitrogen (in the form of gaseous ammonia) and other waste (in the form of particulate matter). As explained above, the Clean Water Act prohibits the "discharge of any pollutant" to waters of the United States, except when in compliance with a NPDES permit. 33 USC §§ 1251(a)(1), 1311(a), 1342(a)(1). "Discharge of a pollutant" is defined as [1] any addition of [2] any pollutant to [3] navigable waters from [4] any point source. 33 USC § 1362(12).

Respondents do not dispute that J-S Ranch, a CAFO, is categorically a "point source," or that the North Santiam River is a navigable water. Instead, they argue that airborne emissions from CAFOs do not constitute an "addition of pollutants" for Clean Water Act purposes. Motion at 8. Respondents attempt to justify this conclusion by arguing that aerial emissions from CAFOs constitute air emissions not intended to be regulated by the CWA and too indirect to be considered a discharge from a point source. Those arguments, however, cannot be reconciled with the Clean Water Act itself, Oregon's expansion of the Act, and caselaw expressly holding that aerial depositions and indirect but functionally equivalent additions of pollutants to waters are discharges subject to the CWA. The arguments therefore cannot prevail.

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707 SW Washington Street, Suite 600 - Portland, Oregon 97205
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a. Gaseous ammonia is a pollutant under federal and state law.

Oregon, as a delegated Clean Water Act program, is authorized to impose requirements that are more stringent than what is required by the Clean Water Act and EPA's regulations. *Id.*; 40 CFR §§ 122.44(d), 123.25(a). And there can be little doubt that Oregon has done so—Oregon not only has defined the word "discharge," but also has expanded the definition of "pollutant" by further defining the terms "wastes" and "industrial waste" to include gases like the waste ammonia from J-S Ranch.

Under Oregon law, "discharge" means "placing wastes into public waters, on land, or otherwise into the environment in a manner that affects or may tend to affect the quality of public waters." OAR 340-045-0010(5). A "pollutant" includes "industrial, municipal, and agricultural waste discharged into water." OAR 340-045-0010(18); *see also* 33 USC § 1362 (mirroring federal Clean Water Act definition). And Oregon further defines "wastes" to include "industrial wastes, and all other liquid, *gaseous*, solid, radioactive, or other substances, that will or may cause or tend to cause pollution of any waters of the state." OAR 340-045-0010(31) (emphasis added). "Industrial waste" is gaseous waste from "*any* process of industry, manufacturing, trade, or business." OAR 340-045-0010(10) (emphasis added). *Compare with* 33 USC § 1362 (failing to expand the definition of discharge and failing to further define pollutants subcategories). Those definitions plainly reach gaseous ammonia emissions: under either the general definition of "waste" or the more specific definition of "industrial waste," gaseous ammonia emissions are a covered pollutant. And under Oregon's definition of "discharge," emission of gaseous ammonia (from, for instance, a CAFO fan) is a discharge of a pollutant.

Respondents argue the opposite, contending that excluding aerial deposition of ammonia emissions from regulation "is consistent with EPA's regulations for CAFOs" because, in Respondents' view, those regulations generally address pollution in the form of manure, litter,

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707 SW Washington Street, Suite 600 - Portland, Oregon 97205
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and process wastewater, not odors, gas, or air quality. Motion at 9. But not only is Oregon *not* limited by EPA's regulations, genuine disputes of material fact exist as to whether a particulate matter will also be aerially discharged into the North Santiam from J-S Ranch if it is constructed. *See* Dahab Decl. ¶ 12. As explained above, particulate matter contains "[f]eed, bedding, dry manure, unpaved soil surfaces, animal dander, and poultry feathers"—*i.e.*, pollution in forms generally addressed by the EPA. It therefore plainly qualifies as a "pollutant": it is solid and liquid waste resulting from J-S Ranch's process of growing poultry. *See* OAR 340-045-0010 (10) (defining "industrial waste" as "any liquid, gaseous, radioactive, or solid waste substance, or a combination of them, resulting from any process of industry, manufacturing, trade, or business or from developing or recovering any natural resources.").[8] Those pollutants will be blown out of the barn fans, travel to through the air, and settle on the surface of the North Santiam River. *See* Dahab Decl. ¶ 12.

At least one state court recently agreed with Petitioners that gaseous ammonia emissions should properly be regulated under the Clean Water Act. In 2021, a Maryland state court considered whether the Maryland Department of the Environment (MDE) unlawfully failed to set effluent limitations for ammonia emitted from CAFOs near Chesapeake Bay. *See In re Petition of Assateague Coastal Trust*, No.: 482915-V (Md Cir Ct Mar 11, 2021).[9] The circuit court held that MDE erroneously concluded that gaseous ammonia emissions are not governed by Maryland's expansion of the Clean Water ACt and remanded for MDE "to mandate effluent limitations for ammonia." *Id*. at 12. The court noted that Maryland defined "pollutant" as "any liquid, *gaseous*, solid, or other substance that will pollute any waters of this State." *Id*. at 8–9 (emphasis in original). In addition, the state defined "discharge" as "the addition, introduction,

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[8] Particulate matter arguably would fit within the category of agricultural waste as well. *See* OAR 340-045-0010 (18) (defining pollutant to include agricultural waste).

[9] A copy of the trial court's order in *Assateague Coastal Trust* is attached as Exhibit F to the Dahab declaration.

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leaking, spilling, or *emitting* of a pollutant into the waters of this State." *Id*. at 9 (emphasis in original). Under this construction, the court explained, "it is clear that CAFOs in Maryland, particularly CAFOs operating as poultry farms, emit gaseous ammonia by discharging noxious fumes onto the waters of the State via industrial fans." *Id*. at 10. On appeal, although the Maryland Supreme Court disagreed with the circuit court's finding that the permit failed to set effluent limitations for ammonia, it did *not* reverse the circuit court's conclusion that gaseous ammonia emissions are governed by Maryland's expansion of the Clean Water Act. *Assateague Coastal Trust*, 484 Md at 481. Instead, it agreed this conclusion was correct, acknowledging MDE's own admission that it can regulate such emissions.[10] *Id.* at 478–84.

b. Discharges need not be "direct" to be covered by the Clean Water Act.

Gaseous ammonia emissions also need not be "direct" to constitute a "discharge" within the meaning of the Clean Water Act. In *County of Maui v. Hawai'i Wildlife Fund*, the Supreme Court addressed the test for indirect discharges, holding that indirect discharges of pollutants still trigger Clean Water Act requirements if they are the "functional equivalent" of direct discharges.

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[10] Specifically, the court stated,

> In the Department's written response to Assateague's comments, it expressly acknowledges its authority under state law to include air deposition in this permit. In explaining its basis for including [air emissions requirements in the permit], the Department accurately stated that: "EPA does not regulate odors or air quality through its CAFO permitting program. See generally 40 CFR 122.23." Although the Department correctly pointed out that the EPA does not regulate air quality through its CAFO permitting regulations, *the Department also correctly acknowledged that it has such authority under both federal and state law*. In its written comments, the Department explained that, "[w]hile MDE derives much of its NPDES permitting authority from the EPA and the [Clean Water Act], *it is authorized, as a delegated program, to impose requirements that are more stringent than what is required by the [Clean Water Act] or EPA's regulations*."

Id. at 481 (emphasis added).

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590 US --, 140 S Ct 1462, 1476, 206 L Ed 2d 640 (2020). There, the plaintiffs brought a Clean Water Act citizen suit against the county, alleging that it was discharging a pollutant into navigable waters without the required permit. *Id.* The Supreme Court upheld the lower court's finding of liability, articulating a test for when pollution reaches navigable waters in an indirect way (there, through groundwater to the Pacific Ocean). *Id.* at 1470. The Supreme Court held that the Clean Water Act requires a permit when there is the "functional equivalent of a direct discharge." *Id.* at 1476. In other words, "an addition [of a pollutant] falls within the statutory requirement that it be 'from any point source' when a point source directly deposits pollutants into navigable waters, or when the discharge *reaches the same result through roughly similar means*." *Id.* at 1476 (emphasis added).

The same reasoning applies to the discharge of gaseous ammonia and particulate matter from the J-S Ranch ventilation fans. Indeed, the Supreme Court in *County of Maui* expressly observed that excluding pollutants that travel through air would be an absurd interpretation. *Id.* at 1475–76 (excluding a discharge from a pipe because it travels through air before hitting navigable waters would be absurd). Here, pollutants would be expelled from the point source (the ventilation fans at J-S Ranch), flow through a non-point source (air), and discharge into navigable waters (the North Santiam River). And the pollutants emitted from J-S Ranch need only travel one-quarter of a mile to do so. Applying *County of Maui*, this Court should reject Respondents' claim that an indirect discharge like an aerial deposition is not covered by the Clean Water Act.

To be sure, even before *County of Maui* was decided, courts in the Ninth Circuit agreed with Petitioners that airborne depositions can fall within the Clean Water Act. Indeed, Respondents admit as much. *See* Motion at 8–9 (citing *Sierra Club v. BNSF Rwy. Co.*, 2016 WL 6217108, at *9 (WD Wash 2016) (holding that aerial deposition of coal dust from railcars is a discharge of pollutants when there is a "discrete conveyance")). But Respondents nevertheless

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attempt to distinguish cases like *Sierra Club* by arguing that airborne ammonia emissions from the J-S Ranch CAFO are indirect *atmospheric* emissions because the CAFO fans that emit the ammonia are situated a quarter of a mile from the North Santiam River. But again, caselaw makes plain that a discharge need not be "direct" for an addition to have occurred; a discharge from the point source can travel through non-point sources (or here, the air) to the navigable water and still trigger the Act and its permitting requirements.

In fact, courts have previously considered the specific situation of aerial deposition and found it covered by the Clean Water Act. In *National Cotton Council of America v. EPA*,[11] the Sixth Circuit considered an EPA rule that declared the agency would consider the residues of pesticides discharged from point sources in accordance with the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) to be nonpoint source pollutants. 553 F3d 927, 934 (6th Cir 2009). The Sixth Circuit ruled against the agency, highlighting EPA's "longstanding position" that an "NPDES pollutant is 'added' when it is introduced into a water from the 'outside world' by a point source." *Id*. at 940. The court held that to determine whether there is an addition from a point source, "the relevant inquiry is whether—but for the point source—the pollutants would have been added to the receiving body of water." *Id*. (citing *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 US 95, 103, 124 S Ct 1537, 158 L Ed 2d 264 (2004)). The court concluded "[i]t is clear that but for the application of the pesticide, the pesticide residue and excess pesticide would not be added to the water[.]" *Id*. Thus, "the pesticide residue and excess pesticide are from a 'point source.'" *Id*. The same logic applies here: but for J-S Ranch and its chicken building fans, gaseous ammonia and particulate matter will not be added to the North Santiam. The gaseous ammonia and particulate matter are emitted from a point source.

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[11] This decision is binding in the Ninth Circuit. *See Saint John's Organic Farm v. Gem Cty. Mosquito Abatement Dist.*, 574 F3d 1054, 1060 (9th Cir 2009) ("The regulation was eventually held invalid in *National Cotton Council of America v. EPA*, 553 F3d 927 (6th Cir 2009), a multidistrict litigation decision that is binding in this circuit.").

SUGERMAN DAHAB
707 SW Washington Street, Suite 600 - Portland, Oregon 97205
Phone 503.228.6474 | Fax 503.228.2556

Respondents rely on several other cases that do not control the resolution of this one. First, they rely on *Alaska Community Action on Toxics v. Aurora Energy Services*, 40 F Supp 2d 1005, 1022 (D Alaska 2013), *rev'd on other grounds*, 765 F3d 1169 (9th Cir 2014), to support their argument that airborne discharges must be direct. *See* Motion at 8–9. That decision is not controlling, has been called into serious question after *County of Maui*, and is factually distinct. In *Alaska Community Action*, the coal dust alleged to be a discharge under the Clean Water Act blew into the water on windy days "from several sources around the Facility, including the stacker-reclaimer, the railcar unloader, and the coal stockpiles." *Id.* at 1008. The court took issue primarily with the lack of "conveyance" present for each source, explaining that "a 'point source' is a '*conveyance.*' * * * Consequently, the [sources], no matter how easily they are identified as the original sources of coal dust * * * cannot by themselves constitute "point sources" where there is no "discernible, confined and discrete conveyance" of the dust from those sources to the water." *Id.* at 1024. Notably, the dust at issue in that case was being picked up by the existing "sources" and further carried through the air. Here, the gaseous ammonia and particulate matter will not simply be emanating generally from the CAFOs or the surrounding area; it will be actively blown out of the CAFOs from the industrial fans—a discernible, confined and discrete conveyance.[12]

Respondents attempt to distinguish *Alaska Community Action* from *Sierra Club* on distance of the coal dust alone, finding the adjacent aerial discharges (in *Sierra Club*) sufficiently direct, but those a half-mile away (in *Alaska Community Action*) too indirect. But both *Alaska*

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[12] Respondents also rely upon on *Simsbury-Avon Pres. Club, Inc. v. Metacon Gun Club, Inc.*, 575 F3d 199, 224 (2d Cir 2009), for support that airborne substances don't qualify as a point source discharges. *See* Motion at 8. *Simsbury* presents the same issue as *Alaska Community Action*. The court there primarily took issue with the berm being a point source because it was not a discernable, confined, and discrete conveyance. As noted above, here, the barns and their fans will constitute a discernable, confined, and discrete conveyance. And CAFOs, again, are explicitly included in the definition of "point source." 40 CFR § 122.2.

SUGERMAN DAHAB
707 SW Washington Street, Suite 600 - Portland, Oregon 97205
Phone 503.228.6474 | Fax 503.228.2556

Community Action and *Sierra Club* based their decisions on the presence or absence of a "discrete conveyance" from the "point source" definition. 40 CFR § 122.2 ("Point source means any discernible, confined, and discrete conveyance, including but not limited to, * * * concentrated animal feeding operation."). In *Alaska Community Action*, the court decided that the sources of coal dust where not discrete conveyances (*i.e.*, stockpiles), while the court in *Sierra Club* found that railcars were ("rolling stock" is one of the specifically enumerated conveyances in the "point source" definition).

Relevant here, CAFOs are a specifically enumerated "conveyance" under the EPA's definition of "point source," and the ventilation fans actively blowing chicken litter are also clearly discrete "conduits," "tunnels," or other "conveyances." 40 CFR § 122.2. And although Petitioners do not read any portion of *Alaska Community Action* to suggest that the court based its decision on the *distance* the dust had traveled before reaching the water, that would not support Respondents' review in any event. Even if it were relevant, the gaseous ammonia and particulate matter at issue here will be traveling *half* the distance, only a quarter of a mile. In that respect, this case is more like *Sierra Club.* But in all events the Supreme Court has not set any bright line rule with respect to distance traveled, noting simply that 50 miles *may* be too far, depending on the facts of the particular case. *Cty. of Maui*, 140 S. Ct. at 1476–77 ("there are too many potentially relevant factors applicable to factually different cases for this Court now to use more specific language").[13]

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[13] The Supreme Court in *County of Maui* did list several factors that "may prove relevant (depending on the circumstances of a particular case): "including potentially (1) transit time, (2) distance traveled, (3) the nature of the material through which the pollutant travels, (4) the extent to which the pollutant is diluted or chemically changed as it travels, (5) the amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source, (6) the manner by or area in which the pollutant enters the navigable waters, (7) the degree to which the pollution (at that point) has maintained its specific identity. Time and distance will be the most important factors in most cases, but not necessarily every case." *Id.* at 1476–77.

SUGERMAN DAHAB
707 SW Washington Street, Suite 600 - Portland, Oregon 97205
Phone 503.228.6474 | Fax 503.228.2556

Respondents next turn to *Chemical Weapons Working Grp., Inc. (CWWG) v. U.S. Dept. of the Army*, 111 F3d 1485 (10th Cir 1997), for the proposition that air emissions are not regulated as discharges under the Clean Water Act because "common sense dictates that [aerial] emissions constitute discharges into the air—not water—and are therefore beyond [the Act's] reach." Motion at 8. As an initial matter, *CWWG* has also been called into question post-*County of Maui*. And Respondents also conveniently omit from their discussion of *CWWG* the Tenth Circuit's acknowledgement in that case that "an object may fly through the air and still be 'discharged * * * into the navigable waters' under the Clean Water Act." 111 F3d at 1490.

On the merits, *CWWG* is also factually distinct from this case. The petitioner in *CWWG* argued that government-sanctioned incineration of chemical weapons created pollution that ultimately returned to Earth and polluted waterways, violating the Clean Water Act. *Id.* The Tenth Circuit rejected this argument, in large part because the emissions at issue were already being regulated under the Clean Air Act; regulation under the Clean Water Act would thus create a regulatory conflict. *Id.* at 1490–91. No such regulatory conflict exists here, because air emissions from CAFOs are not currently regulated under federal or state law.

CWWG is also distinct to the extent that incineration of chemical weapons is a discrete, distant event with a relatively tenuous connection to water pollution. By contrast here, poultry CAFOs consistently and repeatedly emit ammonia discharges into the nearby water body. *See In re Petition of Assateague Coastal Trust*, Ex. F, at 10–12 (so reasoning). J-S Ranch will not be a one-time emitter of gaseous ammonia or particulate matter; rather, it will emit ammonia every single day it is in operation, and some portion of those emissions will reach the nearby waterbody. Matthews Decl. ¶ 20; *see also* Dahab Decl. ¶ 12.

Several other cases have disagreed with the idea that aerial emissions that end up in navigable waters constitute discharge into air, not water. In *No Spray Coal., Inc. v. City of New York*, the federal district court held that the spraying of pesticides over navigable water can

SUGERMAN DAHAB
707 SW Washington Street, Suite 600 - Portland, Oregon 97205
Phone 503.228.6474 | Fax 503.228.2556

constitute an addition of a pollutant under the Clean Water Act. 2005 WL 1354041, *4 (SDNY, June 8, 2005). According to that court, it did not matter that the pesticide "[wa]s initially sprayed into the air as a fine mist" if "the mist descends downward into the water." *Id*. Likewise, in *Peconic Baykeeper, Inc. v. Suffolk County*, the Second Circuit held that pesticides sprayed over or near water from spray applicators attached to trucks and helicopters were discharged from a point source, and not the from the air. 600 F3d 180, 188 (2d Cir 2010). The court explained "the spray apparatus was attached to * * * the source of the discharge.* * * [and] [t]he pesticides were discharged "from" the source * * *. The word "from" is defined "to indicate a starting point," and *also denotes the "source or original or moving force of something*." *Id.* at 188–89 (emphases added); *see also League of Wilderness Defenders v. Forsgren,* 309 F3d 1181, 1185 (9th Cir 2002) (finding aerial insecticide spraying over water from an airplane fitted with tanks and mechanical spraying apparatus to be from a "discrete conveyance" and thus regulable point source pollution to water under the Clean Water Act).

Gaseous ammonia and particulate matter will reach the North Santiam River in the same way the pesticides reached jurisdictional bodies of water in *No Spray Coal., Peconic Baykeeper*, and *Forsgreen*. The industrial fans in the J-S Ranch barns will be the source "or moving force of" the pollutants. Those pollutants will leave the barns and, although initially entering the air as gas and small particles near the water, both will then "descen[d] downward into the water." Accordingly, discharge of both gaseous ammonia and particulate matter (chicken litter) from J-S Ranch fans is a "discharge of a pollutant" from a point source into navigable waters and triggers the federal Clean Water Act.

2. Stormwater-related runoff to surface waters is not exempt under the Agricultural Stormwater exemption.

J-S Ranch will also contaminate surface waters from the runoff of contaminated dust that falls on the ground outside of the chicken barns. This runoff will be carried over the land and

SUGERMAN DAHAB
707 SW Washington Street, Suite 600 - Portland, Oregon 97205
Phone 503.228.6474 | Fax 503.228.2556

into the navigable waters of the North Santiam River. The law is clear that such runoff constitutes discharges of pollutants from point sources (*i.e.*, CAFOs like J-S Ranch) and is prohibited in the absence of a Clean Water Act permit.

This type of water pollution is relevant to all Plaintiffs' claims: Count 1 (the state should have issued a NPDES permit if any permit at all due to surface water pollution); Count 2 (permit will violate the Three Basins Rule by adding a new discharge of pollutants to surface waters); and Count 3 (ODA did not have substantial evidence to support its conclusion that J-S Ranch operating under a WPCF permit would not cause any surface water pollution).

Nothing in the statutes, EPA's regulations under the Clean Water Act, or EPA guidance suggests that runoff from JS Ranch is exempt "agricultural stormwater." To the contrary, in addition to impacts to surface water from direct aerial deposition of ammonia and litter dust from JS Ranch's ventilation fans, any litter that lands on the ground at J-S Ranch and is then washed into ditches or over land into the North Santiam River is also an unpermitted discharge of pollutants from a point source, in violation of the Clean Water Act and Oregon law. Respondents not only failed to consider this manner of surface water pollution regarding the correct permit, but also unlawfully issued a WPCF (groundwater-only) permit without assessing the impacts to surface water from this type of discharge.

a. Neither the Clean Water Act, Oregon law, nor EPA regulation or guidance suggests that runoff from J-S Ranch would be exempt agricultural stormwater.

The question here is whether runoff due to rain or other precipitation, contaminated with manure and other pollutants from the fans on J-S Ranch's confinement houses, is excluded from regulation under the Clean Water Act. It is not.

As explained in more detail below, since the Clean Water Act initially was passed, Congress has defined "point source" (requiring a permit to pollute waters of the United States) to include CAFOs. When Congress amended the Act in 1987, it excluded "agricultural storm water

SUGERMAN DAHAB
707 SW Washington Street, Suite 600 - Portland, Oregon 97205
Phone 503.228.6474 | Fax 503.228.2556

runoff" from the definition of "point source" but did not remove CAFOs from that definition. *See* Water Quality Act of 1987, HR 1, 100th Cong § 503 (1987–1988) (enacted). The statutory and regulatory history plainly show that neither Congress nor the EPA ever intended the "agricultural stormwater exemption" to apply to the type of discharge that will occur from J-S Ranch.

When Congress enacted the Clean Water Act, it sought to end all pollution of the waters of the United States. More than thirty years ago, the Tenth Circuit held that "the [Act] was designed to regulate to the *fullest extent possible* those sources emitting pollution into rivers, streams and lakes." *United States v. Earth Sciences, Inc*., 599 F2d 368, 373 (10th Cir 1979) (emphasis added). The mechanism was a permit for those needing to discharge pollution into waters, and the "concept of a point source was designed to further this scheme by embracing the *broadest possible definition* of any identifiable conveyance from which pollutants might enter the waters of the United States." *Id.* (emphasis added). It would therefore "contraven[e] the intent of [the Clean Water Act] * * * to exempt from regulation any activity that emits pollution from an identifiable point." *Id.* This reasoning and holding have been widely followed. *See, e.g.*, *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F2d 156, 183 (DC Cir 1982); *Cordiano v. Metacon Gun Club, Inc.*, 575 F3d 199, 219 (2d Cir 2009*)*; *United States v. W. Indies Transp., Inc.*, 127 F3d 299, 309 (3d Cir 1997); *Trustees for Alaska v. EPA*, 749 F2d 549, 558 (9th Cir 1984); *see also United States v. Moses*, 496 F3d 984, 992 (9th Cir 2007) ("Exceptions from the CWA must be analyzed in light of the Act's purposes and exceptions must be construed narrowly." (internal quotation marks omitted)).[14]

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[14] Oregon's definition of point source mostly mirrors the federal definition and also excludes "agricultural storm water discharges," without further definition. ORS 468B.005(4). Oregon law further states that absent a permit, no person "shall cause pollution of any waters of the state or place or cause to be placed any wastes in a location where such wastes are likely to escape or be carried into the waters of the state by any means." ORS 468B.025(1)(a).

SUGERMAN DAHAB
707 SW Washington Street, Suite 600 - Portland, Oregon 97205
Phone 503.228.6474 | Fax 503.228.2556

Congress was also keenly aware that pollution from CAFOs was different from other types of agricultural pollution, and specifically that "precipitation runoff from these industrial operations" required regulation:

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

See S Rep No 92-414, 92-93 (1971), *reprinted in* 1972 USCCAN 3668, 3670 (emphasis added). Consequently, Congress specifically included "concentrated animal feeding operation" in the definition of a "point source." 33 USC § 1362(14). EPA was tasked with implementing the Clean Water Act and the NPDES permit system, and in the last 50 years has consistently maintained a separation between agricultural runoff (not regulated) and runoff from CAFOs (regulated), with a limited exception for land application of CAFO manure that does not apply to J-S Ranch. In 1973, EPA wrote the first comprehensive regulations for the Clean Water Act and excluded agricultural point sources; it did *not*, however, exclude CAFOs. EPA stated that "discharges of pollutants from agricultural and silvicultural activities, including irrigation return flow and runoff from orchards, cultivated crops, pastures, rangelands, and forest lands," did not require a NPDES permit, except the exclusion "shall not apply to * * * discharges from animal confinement facilities" EPA, *Form and Guidelines Regarding Agricultural and Silvicultural Activities*, 38 Fed Reg 18,000, 18,003–04 (July 5, 1973) (formerly codified at 40 CFR § 125.4(j); current version at *id*. § 122.3(e)) ("Agricultural Exclusion").[15] EPA reasoned that Congress

[15] Attached as Exhibit G to the Dahab declaration.

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707 SW Washington Street, Suite 600 - Portland, Oregon 97205
Phone 503.228.6474 | Fax 503.228.2556

intended for certain agricultural discharges to be considered non-point sources; it noted that, at the time, there were more than three million farmers, and sought to reduce the burdens to "small farmers." *Id.* at 18,000.

At the time of its adoption, EPA described the Agricultural Exclusion as applying to activities "in connection with *crop production*." EPA, *Notice of Proposed Rulemaking Regarding Agricultural and Silvicultural Activities*, 38 Fed Reg 10,960, 10,961 (May 3, 1973) (emphasis added).[16] Other than small, non-substantive changes, the Agricultural Exclusion has remained unchanged for 50 years. By its text, it does not require a permit for

> (e) Any introduction of pollutants from non point-source agricultural and silvicultural activities, including storm water runoff from orchards, cultivated crops, pastures, range lands, and forest lands, *but not discharges from concentrated animal feeding operations as defined in § 122.23*, discharges from concentrated aquatic animal production facilities as defined in § 122.24, discharges to aquaculture projects as defined in § 122.25, and discharges from silvicultural point sources as defined in § 122.27.

40 CFR § 122.3(e) (emphasis added).

EPA's exemption of certain agricultural activities from NPDES requirements prompted litigation. *See, e.g.*, *NRDC v. Train*, 396 F Supp 1393, 1396 (DDC 1975) (the CWA does not "allo[w] the Administrator the latitude to exempt entire classes of point sources from the NPDES permit requirements), *aff'd*, *NRDC v. Costle*, 568 F2d 1369, 1377 (DC Cir.1977). This prompted Congress to enact the 1987 Water Quality Act, which, consistently with EPA's Agricultural Exclusion, excluded by statute "agricultural stormwater discharges" from the definition of "point source." 33 USC § 1362(14). But nothing in the text, context, or legislative history of those 1987 amendments suggests that Congress intended to disturb the pre-existing statutory and regulatory scheme that applied to CAFOs at that time. Under that scheme, all CAFO discharges

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[16] Attached as Exhibit H to the Dahab declaration.

SUGERMAN DAHAB
707 SW Washington Street, Suite 600 - Portland, Oregon 97205
Phone 503.228.6474 | Fax 503.228.2556

were considered "point source" discharges.

In 1989, EPA amended its regulations to codify the 1987 Water Quality Act definition of "point source" to exclude "agricultural stormwater discharges" and explained that the Agricultural Exclusion represented EPA's definitive interpretation of the "agricultural storm water discharge" exclusion. EPA stated that, for consistency, it added the reference to the Agricultural Exclusion (§ 122.3(e)) to the definition of point source. NPDES Permit Regulations, 54 Fed Reg 246, 247 (Jan. 4, 1989). In other words, EPA has consistently maintained a separation between CAFOs and the agricultural stormwater exclusion, first with its regulatory exclusion in 1973, and then again in 1989 after that exclusion had been codified in statute.

To be sure, in 2003, EPA expand its agricultural stormwater exclusion—never before applied to CAFOs—to cover runoff from land application areas associated with CAFOs under specific circumstances. 40 CFR § 122.23(e). The 2003 rule classified as agricultural stormwater "any 'precipitation-related discharge of manure, litter, or process wastewater from land areas under the control of a CAFO' where the 'manure, litter or process wastewater has [otherwise] been applied in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization.'" *Waterkeeper Alliance, Inc. v. EPA*, 399 F3d 486, 507 (2d Cir 2005) (upholding this new expansion of the agricultural stormwater exclusion). The Fifth Circuit characterized the new rule as an "expan[sion]" of the agricultural stormwater discharge exception because it represented the first time EPA had ever classified any CAFO-related discharges as "agricultural stormwater discharges." *Nat'l Pork Producers Council v. EPA*, 635 F3d 738, 744 (5th Cir 2011).[17] The agricultural stormwater discharge exemption applies to

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[17] So did the court in *Alt v. EPA*: "The 2003 Rule also expanded the definition of exempt 'agricultural stormwater discharge' to include land application discharge, if the land application comported with appropriate site-specific nutrient management practices. However, if the land

SUGERMAN DAHAB
707 SW Washington Street, Suite 600 - Portland, Oregon 97205
Phone 503.228.6474 | Fax 503.228.2556

discharges from land under the control of a CAFO—but not to discharges "from a CAFO" — when animal waste is used appropriately in connection with crop production. This provision, which is consistent with the Agricultural Exclusion in § 122.3(e), was challenged and upheld in *Waterkeeper Alliance*, 399 F3d at 507–09.

Nothing in the 2003 rule suggests that the type of polluted runoff generated by the J-S Ranch ventilation fans qualifies as exempted agricultural stormwater. To the contrary, in response to inquiries from industry and legislators, EPA has explained that: "'pollutant' is defined broadly by the [Clean Water Act] and the regulations could include litter released through confinement house ventilation fans." *Nat'l Pork Producers*, 635 F.3d at 748. EPA has "also discussed the agricultural stormwater exemption, explaining that it 'applies only to precipitation-related discharges from *land application areas* * * * where application of manure, litter, or process wastewater is in accordance with appropriate nutrient management practices,' and not to 'discharges from the CAFO production area.'" *Id.* (emphasis added). Indeed, the Fifth Circuit in *National Pork Producers* held that requiring CAFO operators to obtain a permit if they discharge manure or litter through ventilation fans did not "create new legal consequences," but merely "restated [the statutory] prohibition against discharging pollutants without an NPDES permit." *Id*. at 756.

The American Farm Bureau has agreed with that interpretation. As an intervenor in *Waterkeeper* and *Concerned Area Residents for the Environment v. Southview Farm*, 34 F3d 114 (2d Cir 1994), it acknowledged that the agricultural stormwater exclusion applies only in the context of fertilizing crop fields. I n a brief to the Second Circuit in *Waterkeeper*, the Farm Bureau explained, "[T]he obvious purpose of the stormwater exemption * * * is to ensure that farmers fertilizing their fields are not held responsible for discharges that result from the

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application was not in compliance with those practices, the land application discharge would be an unpermitted discharge in violation of the CWA." 979 F Supp 2d 701, 708 (ND W Va 2013) (internal citations omitted).

SUGERMAN DAHAB
707 SW Washington Street, Suite 600 - Portland, Oregon 97205
Phone 503.228.6474 | Fax 503.228.2556

weather." *See* Reply Brief of Petitioners/Intervenors-Respondents American Farm Bureau Federation, National Chicken Council, and National Pork Producers Council at 68, *Waterkeeper*, 399 F3d 486 (No. 03-4470(L)), 2004 WL 3757416, at *68 (2d Cir June 30, 2004).[18] Likewise, in a brief filed in the U.S. Supreme Court in *Southview Farm*, the American Farm Bureau acknowledged that discharges from "factory-like" livestock operations "where livestock are simply held for feeding and fattening prior to slaughter"—a description that perfectly fits the J-S Ranch CAFO—*are* point source discharges. *Southview Farm v. Concerned Area Residents for the Environment*, 1995 WL 17048849 (U.S.), at 12–13 (citations omitted).[19] The Farm Bureau explained the basis for this distinction, which underlies the agricultural stormwater exemption and the issue here: "Concentrated animal production without crop activity has long been viewed as more industrial than agricultural." *Id*.

Neither Congress, EPA, nor the State of Oregon has deviated from this clear rule: CAFOs, including their production areas and land application fields, *are point sources*. The agricultural stormwater exclusion does not apply to CAFOs, except only as expanded by EPA in 2003 regarding *land application only.* Because land application is not proposed by J-S Ranch, the potential for pollution discharges from litter expelled from ventilation fans is subject to the Clean Water Act.

b. *Alt* is incorrect and has never been followed by any other court.

Respondents rely on *Alt v. EPA*, 979 F Supp 2d 701 (ND W Va 2013) for the proposition that litter and manure washed from a CAFO to navigable waters by a precipitation event is an "agricultural stormwater discharge" exempt from the Clean Water act's NPDES permit requirement. Alt is neither binding nor persuasive: indeed, it is contrary to EPA's own long-standing interpretation and prior court decisions, incorrectly construes the agricultural

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[18] Attached as Exhibit I to the Dahab declaration.

[19] Attached as Exhibit J to the Dahab declaration.

SUGERMAN DAHAB
707 SW Washington Street, Suite 600 - Portland, Oregon 97205
Phone 503.228.6474 | Fax 503.228.2556

stormwater exemption, and has not been followed by any court in the decade since it was decided.

Notably, in urging the Court to adopt *Alt*, Respondents make not mention of *Southview Farm*, the case most cited for its interpretation of the agricultural stormwater exclusion as applied to CAFOs.[20] There, the Second Circuit reversed judgment as a matter of law on five Clean Water Act violations, holding that "the liquid manure spreading operations are a point source within the meaning of [Clean Water Act §] 1362(14) because the farm itself falls within the definition of a concentrated animal feeding operation ('CAFO') and is not subject to the agricultural exemption." *Id.* at 115. The court specifically addressed the alleged discharges that took place during rain, finding that the district court erred in setting aside a jury verdict based on the idea that they were "agricultural stormwater discharges" and therefore exempt. *Id.* at 120. The court agreed with the community environmental group "that, while the statute does include an exception for 'agricultural stormwater discharges,' there can be no escape from liability for agricultural pollution simply because it occurs on rainy days." *Id.*

Consistently with the statutory and regulatory history described above, the *Southview Farm* court also noted that even before the 1987 amendments, "agricultural stormwater run-off has always been considered nonpoint-source pollution exempt from the Act." *Id.* (citing 40 CFR § 122.3(e) (1993)). The court distilled the issue: it is not whether discharges occur during rainfall or were mixed with rainwater runoff, but whether the discharges were the *result of* precipitation, because of course all discharges would eventually mix with precipitation runoff in surface waters. *Id.* It upheld the jury verdict because it was reasonable for the jury to find that

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[20] *See, e.g.*, *Cmty. Ass'n for Restoration of the Env't v. Henry Bosma Dairy*, 305 F3d 943, 955 (9th Cir 2002); *Waterkeeper*, 399 F3d at 508; *Nat'l Pork Producers*, 635 F3d at 743; *Alt v. EPA*, 979 F Supp 2d 701, 712 (ND W Va 2013) (explaining that under *Southview Farm*, "a discharge of liquid manure would not be exempt just because it happened to be raining at the time, but a discharge of such manure caused by precipitation would be exempt.").

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707 SW Washington Street, Suite 600 - Portland, Oregon 97205
Phone 503.228.6474 | Fax 503.228.2556

the unlawful discharges were "not the result of rain, but rather simply occurred on days when it rained." The discharges alleged were primarily caused by over-saturation of the fields, rather than rain; put another way, it was the *operation* that caused the discharge, not the rain. *Id.* at 121.

In 2005, in *Waterkeeper Alliance*, the Second Circuit reaffirmed the central holding of *Southview Farm*. There, the court concluded that when land applications of CAFO waste meet the essential nutrient management requirements outlined in EPA's 2003 rule, a subsequent discharge from land application fields qualifies for the agricultural stormwater exclusion only if it was "*primarily* the result of 'precipitation.'" 399 F3d at 508–09 (emphasis added).

Other courts, including courts in the Ninth Circuit, have continued to rely on *Southview Farm*. *See, e.g*., *Cmty. Ass'n for Restoration of the Env't v. Henry Bosma Dairy*, 305 F3d 943, 955 (9th Cir. 2002) (relying on *Southview Farm* for proposition that CAFO includes manure-storing fields and ditches); *Garrison v. New Fashion Pork, LLP*, 2020 WL 1811373 *at 9 (ND Iowa Jan 9, 2020) (holding that runoff resulting from manure application to saturated and snow-covered ground qualified as point sources discharges subject to regulation); *Food & Water Watch v. U.S. Envt'l Protection Agency*, 20 F4th 506, 510 (9th Cir 2021) (citing *Southview Farm*); *see also Hawai'i Wildlife Fund v. Cty. of Maui,* 886 F3d 737 (9th Cir 2018) (indirect discharge from a point source to navigable waters attaches Clean Water Act liability and citing *Southview Farm*), *rev'd on other grounds by Cty. of Maui v. Hawai'i Wildlife Fund*, 140 S Ct 1462, 1476 (2020).

Respondents do not spend any time with this controlling and persuasive precedent addressing the "agricultural stormwater" exception. Instead, they choose to rely on *Alt v. EPA*—a West Virginia district court case that rejected EPA's *own* interpretation of its agricultural stormwater exception based on incorrect statutory interpretation and twisted logic. 979 F Supp 2d at 713. Although the court in *Alt* cites *Southview Farms*, and although it rejected Alt's

SUGERMAN DAHAB
707 SW Washington Street, Suite 600 - Portland, Oregon 97205
Phone 503.228.6474 | Fax 503.228.2556

argument that the vegetated area surrounding the chicken barns was not part of the "CAFO" (a point source), it accepted Alt's argument that this "farmyard" was not part of the CAFO "production area." *Id.* Of course, the term "farmyard" does not appear in any relevant statute, regulation, or guidance; rather, it was conjured up by the Alt CAFO to downplay the industrial nature of its confinement operation. While the court in *Alt* broadly construed the agricultural stormwater exemption from "point source" in the Clean Water Act, it chose a much narrower and constricted view of the phrase "production area."

EPA's regulations define "production area" as:

> that part of an AFO that includes the animal confinement area, the manure storage area, the raw materials storage area, and the waste containment areas. The animal confinement area includes *but is not limited to* open lots, housed lots, feedlots, confinement houses, stall barns, free stall barns, milkrooms, milking centers, cowyards, barnyards, medication pens, walkers, animal walkways, and stables. The manure storage area includes *but is not limited to* lagoons, runoff ponds, storage sheds, stockpiles, under house or pit storages, liquid impoundments, static piles, and composting piles. The raw materials storage area includes *but is not limited to* feed silos, silage bunkers, and bedding materials. The waste containment area includes *but is not limited to* settling basins, and areas within berms and diversions which separate uncontaminated storm water. Also included in the definition of production area is any egg washing or egg processing facility, and any area used in the storage, handling, treatment, or disposal of mortalities.

40 CFR § 122.23(b)(8); OAR 306-074-0010(25). Ignoring the modifier "includes but is not limited to," the *Alt* court declared that the "areas between the poultry houses" somehow did not constitute "production area," and thus the so-called "farmyard" was not a CAFO production area. *Id.* at 713. Thus, it found that the discharge of any pollutant from the "farmyard" between the barns was not a discharge *from* the CAFO point source; instead, it was subject to the agricultural stormwater exception. *Id.* at 714. This, again, is the same exception that has *never* applied to CAFOs outside of the EPA's limited 2003 rule.

SUGERMAN DAHAB
707 SW Washington Street, Suite 600 - Portland, Oregon 97205
Phone 503.228.6474 | Fax 503.228.2556

This Court should decline to adopt the flawed reasoning of the West Virginia district court in *Alt.* The reasoning has never been extended by any court, and for good reason: it defies both established canons of statutory construction and common sense. Further, the logical outcome of its conclusion is that CAFOs could simply dump manure waste in the "farmyard" area between buildings, allow it to be washed away by the rain, and avoid Clean Water Act regulations. That conclusion is untenable and inconsistent with federal and state law.

Moreover, the holding of *Alt v. EPA* is not consistent with the Supreme Court's decision in *County of Maui*, which, as explained above, held that even discharges from groundwater to surface water trigger the Clean Water Act if they are the "functional equivalent" of a direct discharge. *Cty. of Maui*, 140 S Ct at 1476; *see also id.* ("[A]n addition [of a pollutant] falls within the statutory requirement that it be 'from any point source' when a point source directly deposits pollutants into navigable waters, or when the discharge *reaches the same result through roughly similar means*."). Although *Maui* dealt with an indirect discharge through groundwater, its reasoning applies here and is difficult to reconcile with *Alt*. I ndeed, exempting pollution from a CAFO (a point source) because it landed on grass between CAFO buildings and ran off into navigable waters as "overland flow and infiltration into the soil"[21] is simply not consistent with the Supreme Court's reasoning. It should also not apply here.[22]

Finally, as noted above, genuine disputes of material fact remain as to whether there will

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[21] Matthews Decl. ¶ 17.

[22] Oregon water pollution laws are in accord. The statute prohibiting water pollution broadly states that no person shall "cause to be placed any wastes in a location where wastes are likely to escape or be carried into the waters of the state by any means." ORS 468B.025(1)(a). J-S Ranch will "cause" contaminated chicken litter dust to be "placed" outside of its barns through ventilation fans, in an area with high precipitation where they are "likely to be carried into the waters of the state" (North Santiam River) by "any means" (precipitation). Even if the Clean Water Act agricultural stormwater exemption applied here—and it does not—Oregon law still prohibits the type of surface water pollution at issue, unless allowed by a permit. J-S Ranch's permit does not address, let alone permit, runoff of contaminated water from the CAFO production area to the river.

SUGERMAN DAHAB
707 SW Washington Street, Suite 600 - Portland, Oregon 97205
Phone 503.228.6474 | Fax 503.228.2556

be discharges of pollutants from J-S Ranch's ventilation fans. Plaintiffs have retained a qualified expert prepared to testify to, among other things, the movement of pollutants from the J-S Ranch operation into and through water into the navigable waters of the North Santiam River. Dahab Decl. ¶ 12. Because, as a matter of law, discharges from J-S Ranch's operation are discharges of pollutants from a point source to navigable waters, the Clean Water Act applies. The Court should deny Respondents' motion for summary judgment.

B. Summary judgment is improper with respect to the claims in Count 2.

Respondents ask this Court to grant summary judgment on Petitioners' Three Basin Rule claim for the same reasons addressed above. Contrary to their claim, aerial deposition of pollutants from J-S Ranch ventilation fans is a surface water discharge. At the very least, genuine disputes of material fact remain on this issue, and therefore summary judgment is not appropriate. *See* Dahab Decl. ¶ 12. For the same reasons articulated above, the Court should deny Respondents' motion as to Count 2.

Respondents argue that aerial emissions of gas are regulated only as air pollution, and that Oregon has chosen to exempt CAFOs from these rules. But that argument ignores the particulate matter that will also issue from J-S Ranch's fans and settle on both the grounds of the CAFO and in the North Santiam River. Those pollutants, once settled on the CAFO grounds, will then be washed into the river. This is a discharge of a pollutant, and an NPDES permit was therefore required.

Of course, even if Respondents are correct that aerial and runoff discharges do not necessitate a NPDES permit under federal law, the Three Basin Rule is a state law meant to restrict new sources of water pollution in the enumerated basins. It prohibits new NPDES permits, *and* any new state permit that would allow waste discharge to surface water. OAR 340-041-0350(8)(a), (b). Because J-S Ranch will discharge pollutants to surface waters, this discharge would violate the Three Basin Rule and the Court should deny summary judgment.

SUGERMAN DAHAB
707 SW Washington Street, Suite 600 - Portland, Oregon 97205
Phone 503.228.6474 | Fax 503.228.2556

C. Summary judgment is improper with respect to the claims in Count 3.

Respondents' final argument is that Petitioners' claim set forth in Count 3 is unsupported as a matter of law "as it relates to land application of chicken litter." Motion at 11-12. Petitioners disagree. F or the reasons explained above, discharges through either aerial deposition or stormwater-related runoff are not exempt from the Clean Water Act's NPDES permitting requirements. Whether substantial evidence exists for Respondents' conclusion that those discharges will not reach the North Santiam River is a question of fact that Petitioners will prove at trial. Summary judgment is therefore improper.

Central to this question of fact is the question whether J-S Ranch can execute its plan to export 100 percent of the chicken litter and other waste from the J-S Ranch property. Although land application of chicken litter is not permitted under the existing permit, the volume of litter that J-S Ranch will generate is significant, and the agencies have not required any proof of export contracts to ensure that land application will not, in fact, occur, and that J-S Ranch can export at the rate that it demands. Instead, and contrary to the permit's prohibition on land application, the agencies have included recordkeeping requirements for land application, implying that such application is, indeed, expected. Moreover, the evidence in the agency record and the summary judgment record establishes concern among community members about whether and where (and, frankly, how) chicken litter will be used once it is exported. Dahab Decl. ¶ 13, Ex. K. On this record, genuine disputes of material fact foreclose summary judgment.

SUGERMAN DAHAB
707 SW Washington Street, Suite 600 - Portland, Oregon 97205
Phone 503.228.6474 | Fax 503.228.2556

VI. CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court deny Respondents' Motion for Partial Summary Judgment in full.

DATED this 25th day of October, 2023.

Amy van Saun, OSB No. 155085
Pegga Mosavi, OSB No. 224575
CENTER FOR FOOD SAFETY
2009 NE Alberta Street, Ste. 207
Portland, OR 97211
Telephone: (971) 271-7372
avansaun@centerforfoodsafety.org
pmosavi@centerforfoodsafety.org

/s/ Nadia H. Dahab
David F. Sugerman, OSB No. 862984
Nadia H. Dahab, OSB 125630
SUGERMAN DAHAB
707 SW Washington Street, Suite 600
Portland, OR 97205
Telephone (503) 228-6474
david@sugermandahab.com
nadia@sugermandahab.com

Attorneys for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served the foregoing **PETITIONERS' RESPONSE TO RESPONDENTS' MOTION FOR PARTIAL SUMMARY JUDGMENT** on the following named person(s) on the date indicated below:

Nina Ruth Englander
Shaunee Morgan
Assistant Attorney General
OREGON DEPARTMENT OF JUSTICE
1000 SW Market St.
Portland, OR 97201
(971) 673-1880

Attorneys for Respondents

☐ by Overnight Delivery
☐ by Facsimile
☐ by U.S. Mail with postage prepaid
☒ by OJD File & Serve
☒ by Email
nina.englander@doj.state.or.us
shaunee.morgan@doj.state.or.us

DATED this 25th day of October, 2023.

By: /s/ Nadia H. Dahab
Nadia H. Dahab, OSB 125630
SUGERMAN DAHAB
707 SW Washington Street, Suite 600
Portland, OR 97205
Telephone (503) 228-6474
nadia@sugermandahab.com

Attorneys for Petitioners