

## CLIENT ALERT

### CITIZEN SUIT WATCH: Federal District Court Grants Victory to Farmer and Poultry Integrator After Bench Trial in Clean Water Act Citizen Suit

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Following a ten-day bench trial, a federal district court in Maryland found that a plaintiff environmental group failed to show, by a preponderance of the evidence, that a farm's poultry operations discharged pollutants into waters of the United States. The case, *Waterkeeper Alliance, Inc. v. Hudson*, No. 10-cv-487, involved allegations that chicken litter containing various pollutants was discharged without a permit into a tributary of the Pocomoke River. In addition to alleging that the farm's operator (Alan Hudson) was directly liable for the alleged discharges, the plaintiff sought to hold Perdue Farms, Inc. ("Perdue") liable under the theory that it sufficiently controlled the day-to-day operations of the Hudson Farm's poultry operations. Finding that the plaintiff's proffered evidence fell short of establishing that there were any discharges from the poultry operations, the Court ultimately concluded that the plaintiff failed to meet its obligation of "responsibly and effectively" bringing suit under the Clean Water Act's citizen suit provision.

#### Factual Background

This suit concerned poultry operations at the Hudson Farm, which is located on the Eastern shore of Maryland near the Pocomoke River. In addition to raising chickens within two chicken houses at his farm, Hudson grows field crops and raises beef cattle that graze in several different fields. Perdue, a "poultry integrator," contracted with Hudson to raise Perdue's Cornish hens at the Hudson Farm.

After conducting aerial surveillance and some water sampling, Waterkeeper Alliance, Inc. ("Waterkeeper")<sup>1</sup> gave notice that it intended to sue Hudson Farm and Perdue, claiming that its investigation revealed that the farm was discharging pollutants from an uncovered pile of chicken manure. Waterkeeper's notice letter focused only on the Hudson Farm's poultry operations and did not contain any allegations of unlawful discharges relating to the farm's cattle operations. In response to the notice letter, several Maryland state employees inspected the Hudson Farm on the next day. They ultimately determined that the pile alleged to be chicken manure was actually Class A bio-solids that were to be used as fertilizer, and they did not find evidence of any discharges of chicken litter. A second inspection by ten state employees occurred approximately one month later, revealing that "something was adding high levels of bacteria and nutrients to the water." That inspection, however, "was not designed to isolate whatever contribution there might have been from the chicken houses."

Shortly after these inspections, Waterkeeper filed suit in March 2010 against Hudson and Perdue, alleging unlawful discharges of chicken litter. Though Waterkeeper's "theory as to the source of that chicken litter has changed over time, its theory at trial centered on litter that is either blown out through the chicken house exhaust fans or tracked out on shoes and equipment coming in and out of the chicken houses." According to Waterkeeper, the confined poultry operations on the Hudson Farm are the major source of pollution, even though the unconfined cattle operations produced tons of manure that was left in the fields during the same time period.

During the trial, Waterkeeper did not demonstrate that it actually sampled any of the "small or trace amounts" of actual chicken litter observed outside of the chicken houses. Nor did it demonstrate that it sampled any of the material observed on or immediately below the chicken house exhaust fans to determine whether it was chicken litter or manure. As the Court summarized, Waterkeeper did not put forth any evidence or testimony at trial "of any *observable* discharge of pollution from chicken litter into any ditch on the Hudson Farm."<sup>2</sup>

With respect to the expert testimony proffered by the parties, the Court found both Waterkeeper's and the defendants' experts to be generally credible and forthcoming. But the Court ultimately found that Waterkeeper's (and its expert's) lack of sampling was fatal to the case because Waterkeeper could not "isolate[] the alleged contribution of contaminates from the chicken houses from that contributed by the cattle." Absent such sampling, Waterkeeper could not establish that any discharges actually occurred from the poultry operations.

### **District Court's Holding**

The Court concluded that Waterkeeper failed to prove, by a preponderance of the evidence, that there was a discharge from the Hudson Farm's poultry operation. The Court acknowledged the possibility that some chicken litter may have *eventually* made its way into a tributary of the Pocomoke River and that Waterkeeper may have been able to uncover evidence of such a discharge through "appropriate testing." But, in the Court's view, the mere fact that "such pollution is possible" could not satisfy the preponderance of evidence standard.

Importantly, the Court emphasized that "the evidence offered here in support of [Waterkeeper's] claim stands in sharp contrast to the evidence presented in every reported case involving discharge from a [concentrated animal feeding operation] in violation of the [Clean Water Act]."<sup>3</sup> In those other cases, there were observed discharges, unlike in this case. The Court stopped short of concluding "that there must always be an eyewitness to a discharge" to establish a violation, but it refused Waterkeeper's demand that the Court "ignore the obvious source of the discharge [*i.e.*, the cattle operations] in favor of a source tied to the discharge by a string of possibilities."

The Court also had no difficulty rejecting Waterkeeper's "puzzling" suggestion that discharges from the Hudson Farm's cattle operations are themselves a basis for claims against *both* Hudson and Perdue under the Clean Water Act in this lawsuit. First, it noted that Waterkeeper "has never seriously advanced the Hudson Farm cows as a basis for [Clean Water Act] liability." It then stressed that "there is certainly no evidence in the record on which [Waterkeeper] could support the conclusion that Perdue would be liable" because Waterkeeper failed to establish that Perdue had any connection to the farm's cattle operations. Finally, the Court noted that Waterkeeper's notice of intent to sue covered only the Hudson Farm's poultry operations.

As to whether Perdue could be held liable as an operator if the Court had found a Clean Water Act violation based on a discharge from the Hudson Farm poultry operations, the Court offered limited dicta. It repeated an earlier finding, from its opinion denying Perdue's motion to dismiss, that an integrator could in theory be subject to liability as an "operator" of a concentrated animal feeding operation. Quoting the Supreme Court's decision in *United States v. Bestfoods*,<sup>4</sup> the *Waterkeeper* Court noted that such liability requires a showing that the defendant "must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations." In this case, most of Waterkeeper's evidence showed that Perdue provided advice on bird health and product quality, *not* environmental compliance, and thus, whatever control Perdue exercised was not a basis for imposing liability. Although Waterkeeper presented some evidence that Perdue personnel received training from the U.S.

Environmental Protection Agency on environmental compliance and, in turn, educated its growers on those issues, the Court noted that, if anything, "Perdue should be commended, not condemned." Indeed, "Perdue appears to have tried to take the lead in addressing some of the very issues about which Plaintiff is concerned" and it apparently suspended those efforts, "at least in part, because of concerns related to this litigation and concerns that Plaintiff would do just as it has done, i.e., attempt to use [those efforts] as proof of control and as a basis of liability."

### Implications

Although the Court ruled against Waterkeeper for failure of proof, it did not reject as a matter of law the theory underlying this lawsuit – *i.e.*, that a Clean Water Act violation could be found without evidence of any *observed* discharges. The Court said it "could readily envision finding a violation without eyewitness testimony of an observed actual discharge" if, for example, Waterkeeper had conducted testing or sampling to measure the contribution from the poultry houses. Also significant, the Court repeated its earlier finding that a poultry integrator such as Perdue could conceivably be held liable under Waterkeeper's theory that it sufficiently controlled a particular farm's operations to be deemed an "operator." Last, given the judgment in their favor, the defendants in this case may try to recover the costs of litigation (including attorney and expert witness fees) from Waterkeeper under the Clean Water Act's citizen suit provision.<sup>5</sup> The grant of such costs, if any, lies within the Court's discretion.

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<sup>1</sup> Waterkeeper filed suit along with other plaintiffs, but those other plaintiffs were dismissed from the suit in an earlier ruling by the Court.

<sup>2</sup> (Emphasis in original).

<sup>3</sup> In support of this finding, the Court cited the following cases: *Concerned Area Residents for the Env't. v. Southview Farm*, 34 F.3d 114, 117–118 (2d Cir. 1994); *Am. Canoe Ass'n v. Murphy Farms, Inc.*, 412 F.3d 536, 538 (4th Cir. 2005); *Idaho Rural Council v. Bosma*, 143 F. Supp. 2d 1169, 1176 (D. Idaho 2001); *Community Ass'n for Restoration of the Env't. v. Henry Bosma Dairy*, 65 F. Supp. 2d 1129, 1148 (E.D. Wash. 1999); *Higbee v. Starr*, 598 F. Supp. 323, 331 (D. Ark. 1984).

<sup>4</sup> 524 U.S. 51, 66-67 (1998).

<sup>5</sup> See 33 U.S.C. § 1365(d).

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