We also encourage EPA to clarify the type of corrective measures that will be deemed sufficient to remedy a prior accidental discharge. We recommend that, in the case of an accident involving some element of the production area, the element must be corrected in accordance with the applicable Director's technical design standard for that element for a similarly situated permitted CAFO with a similar manure management system and style of production area. As we have shown in section II. B. below, the available discharge record from several states, the predominant management practices for many CAFOs with open impoundments designed to contain a 25-year, 24-hour storm, and EPA's own simulation model analysis in the proposed rule, shows that these usual and customary systems and measures are effectively achieving zero discharge. A CAFO that experiences an accidental discharge and that addresses the factor or factors that caused the accident through the adoption of measures consistent with the applicable Director's technical design standard for a similarly situated permitted CAFO therefore has established that the operation has, at most, only a potential to discharge in the future. In the case of an accident involving some element of the land application area, we recommend that the correction be what would otherwise be considered appropriate to qualify for the agricultural stormwater exemption for similar land and crop circumstances. This will establish that any discharge from the relevant land application area would be exempt agricultural stormwater.

4. Unregulated Stormwater Discharges Cannot Trigger a "Duty To Apply"

CWA § 402(p) and EPA regulations at 40 C.F.R. § 122.26 establish specific and limited authority to regulate point source pollutant discharges that occur via stormwater. Only stormwater discharges that have been specifically designated for regulation in accordance with these provisions are subject to NPDES permitting. Moreover, any stormwater discharge

comprised of *agricultural stormwater* cannot be designated for regulation due to the statutory agricultural stormwater exemption.

The proposed "duty to apply" cannot lawfully be imposed for stormwater discharges that have not been designated for regulation pursuant to CWA § 402(p) and 40 C.F.R. § 122.26(a). For this reason, EPA should clarify that *unregulated* stormwater discharges at a CAFO do not trigger any duty to apply or CWA discharge liability. Such discharges include any discharge that qualifies as agricultural stormwater *and* any other stormwater discharge that has not been designated for regulation pursuant to § 402(p) and 40 C.F.R. § 122.26(a).

Some have taken the position that stormwater discharges from areas *near* (but outside) CAFO production areas will constitute a "discharge of pollutants" from the CAFO within the meaning of proposed § 122.23(d). This position would trigger a duty to seek permit coverage – if these stormwater discharges carry CAFO-related materials such as manure, feathers, dust, etc. that have been emitted from the CAFO production areas through ventilation fans or carried by the wind. Their position would result in CWA regulation of stormwater runoff from any area where CAFO manure, feathers, dust etc. may have been deposited by the wind or other means, no matter how far from the perimeter of the production area. Under this position, runoff from the roofs of barns or land between or around barns (all of which are outside the perimeter of the production area as characterized and analyzed by EPA in the 2003 CAFO rule's effluent limitation guidelines), would also constitute a "discharge of pollutants" that would trigger the proposed "duty to apply" at § 122.23(d).

Their assertion seems to rest on an overbroad interpretation of the definition of "process wastewater" at 40 C.F.R. § 122.23(b)(7) that would include this stormwater, even though the "waters" involved were never used in the operation of the animal feeding operation or mixed

with animal waste or other materials within the production areas. Based on the contention that the water in question constitutes "process wastewater," some have suggested that any such stormwater runoff should not be viewed as a "stormwater" discharge – even though any such discharge would be entirely the product of rainfall.[5]

EPA has never designated these near-production-area stormwater discharges for regulation pursuant to CWA § 402(p) and 40 C.F.R. § 122.26(a).[6] These provisions specifically govern the scope of NPDES permitting requirements for *all stormwater discharges, including stormwater discharges containing pollutants*. Regardless of whether stormwater discharges contain "pollutants" from a CAFO, stormwater discharges are subject to regulation *only* to the extent that they have been designated for regulation pursuant to CWA § 402(p) and 40 C.F.R. § 122.26(a). Because EPA has never purported to designate for regulation stormwater from outside CAFO production areas (including the roofs of barns, lands adjacent to barns, and other areas outside the defined "production area") – and, importantly, has never assessed in its CAFO NPDES and ELG rulemakings the tremendous cost that would be associated with the need to capture stormwater from all areas where CAFO-related pollutants may be deposited by wind or other means – EPA lacks authority to require permit coverage for such stormwater discharges.

For example, EPA states in its report on the cost methodology used to assess the economic achievability of the ELG technology standards for swine and poultry in the 2003 CAFO rule that "A cost model was developed to determine the average facility costs and total

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[5] EPA regulations define "stormwater" as "runoff, snow melt runoff, and surface runoff and drainage." 40 C.F.R. § 122.26(b)(13).

[6] We believe that such discharges also constitute exempt "agricultural stormwater discharges." Even setting that issue aside, however, such discharges are not subject to NPDES permitting and cannot trigger a "duty to apply" because they are stormwater discharges that have not been designated in accordance with the requirements applicable to stormwater discharges.

industry costs of the proposed regulation revisions to the swine and poultry animal feeding industries." EPA goes on to divide costs into four broad categories: (1) nutrient management planning, (2) facility upgrades, (3) land application, and (4) practices that reduce excess nutrients on the farm. (*See* Cost Methodology Report for Swine and Poultry Sectors ("Report for Swine and Poultry")" EPA-821-01-018, January 2001, Page 30).

Facility upgrades are the technologies and practices that are applicable to the production area, including the proper understanding of what is the perimeter of the animal housing area and what water and wastes need to be managed. Within this "facility upgrades" category, EPA goes on to detail nine specific technologies and practices to which costs will be assigned in the EPA analysis. These are a mortality composting facility, manure storage (for poultry litter), lagoon liners, lagoon covers, lagoon depth markers, anaerobic digesters, high rise hog facility upgrades, stormwater diversions, and lastly, field runoff control. Of these nine practices, all but field runoff control apply to the production area. The field runoff controls are applicable to "fields used for manure application." (*See* "Report for Swine and Poultry," page 66). There is no mention anywhere in any of the narrative descriptions of these other eight practices of controlling materials like dust, feathers, or other materials that could blow out of an animal house and onto the ground outside or onto an animal house roof. (*See* "Report for Swine and Poultry," pages 54-67).

In the case of the high rise hog facility the discussion of what the facility entails from a manure and pollutant management perspective relate entirely to what goes on within the interior surfaces of the roof and walls and floor. Ventilation and air movement is discussed explicitly in this system **without any mention whatsoever of controlling pollutants from ventilated air carrying dust or small manure particles out of the house, and that includes no mention that**

such dust or manure would be considered for management under the ELG. (*See* "Report for Swine and Poultry," page 65).

In the case of stormwater diversions, there is no mention of stormwater entering an animal house. EPA does say that "[t]o prevent runoff from entering manure storage facilities, stormwater can be diverted by constructing berms on two sides up-gradient of the storage facility or lagoon." (*See* "Report for Swine and Poultry," page 65). The perimeter of this aspect of the production area, the manure storage facility, is the top of the berm, and the purpose of this berm is to contain manure and keep out exterior stormwater. These stormwater diversions themselves therefore are not addressing, in EPA's economic achievability analysis, the cost of preventing stormwater outside of the manure storage facilities from reaching a water of the United States.

Further evidence of EPA's specific concept of a swine and poultry production area with respect to the perimeter defining the limit of the regulation, can be seen in EPA's treatment in the 2001 proposed rule of the Option 5 zero-discharge best available technology for existing swine and poultry facilities. There is *no* discussion in this zero-discharge proposal that the requirement addresses stormwater that may carry dust or small manure particles or feathers. In fact, EPA makes clear that "there are no open animal confinement areas to generate contaminated storm water" and where there are open, liquid impoundments, they can comply by "diverting uncontaminated storm water away from the structure . . ." (*See* 66 Fed. Reg. at 3,063).

EPA also prepared a cost methodology report for beef and dairy operations (*See* Cost Methodology Report for Beef and Dairy Animal Feeding Operations, ("Report for Beef and Dairy")" EPA-821-01-019, January 2001)). Again, none of the discussions of the technologies and practices considered make any mention of dust or manure particles outside of the perimeter of the animal confinement area, nor make any mention of managing runoff outside of these

areas. (*See* Report for Beef and Dairy, pages 3-10 to 4-33). The runoff that **is** explicitly discussed is that from the drylot itself ("Only runoff from the drylot is considered to be contaminated with manure solids; therefore it requires collection and storage." *See* Report for Beef and Dairy, page 3-11. "The precipitation and area of the drylot are used to determine the total amount of runoff from the drylot." *See* Report for Beef and Dairy, page 3-12.) The runoff from within the interior of the drylot, and only that, is what must be collected and stored in this cost analysis, and it is only that runoff that is subject to the resulting final ELG technology standard.

EPA should clarify that unregulated stormwater discharges from a CAFO (*e.g.*, from areas at the CAFO that are outside the production areas) do not constitute the "discharge of pollutants" from the CAFO within the meaning of proposed § 122.23(d), even if such stormwater discharges contain pollutants from the CAFO. (Of course, there is also no permit requirement for stormwater runoff from land application areas, which are nonpoint source agricultural stormwater discharges so long as land application has been conducted in accordance with § 122.42(e)(1)(vi)-(ix).) Failure to make this clarification could subject CAFO operators to unlawful permit demands and would leave proposed § 122.23(d) in apparent conflict with CWA § 402(p) and EPA's existing stormwater regulations.

5. The "Duty To Apply" Could Arise Only from Discharges to "Navigable Waters" Subject to CWA Jurisdiction.

"Discharge" is a term of art under the CWA that refers to the addition of a pollutant from a point source to "navigable waters," which in turn are defined as "waters of the United States." The scope of the term "waters of the United States" has been litigated frequently for many years and has been further narrowed by the recent Supreme Court ruling in *Rapanos*. *Rapanos v. United States*, 126 S. Ct. 2208 (2006). Nevertheless, whatever the scope of "navigable waters,"