SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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In the Matter of the Application of

RIVERKEEPER, INC., WATERKEEPER ALLIANCE, INC., CITIZENS CAMPAIGN FOR THE ENVIRONMENT, INC., SIERRA CLUB ATLANTIC CHAPTER, BUFFALO NIAGARA RIVERKEEPER, INC., LOWER SUSQUEHANNA RIVERKEEPER, INC., and THEODORE GORDON FLYFISHERS, INC.,

Petitioners/Plaintiffs,

for Judgment Pursuant to Article 78 of the New York Civil Practice Law and Rules, Declaratory Judgment, and Injunctive Relief,

-against-

JOE MARTENS, in his capacity as the Commissioner of the New York State Department of Environmental Conservation, and the NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Respondents/Defendants.

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FIRST AMENDED VERIFIED PETITION AND COMPLAINT

Index No. 4166-13

Oral Argument Requested

Petitioners/Plaintiffs Riverkeeper, Inc., Waterkeeper Alliance, Inc., Citizens Campaign for the Environment, Inc., Sierra Club Atlantic Chapter, Buffalo Niagara Riverkeeper, Inc., Lower Susquehanna Riverkeeper, Inc, and Theodore Gordon Flyfishers, Inc. (collectively, "Petitioners"), for their verified petition for judgment pursuant to Article 78 of the New York Civil Practice Law and Rules ("CPLR") and their complaint seeking a declaratory judgment pursuant to section 3001 of the CPLR, by their attorneys, allege as follows:

PRELIMINARY STATEMENT

1. Petitioners challenge the actions and determinations of Respondents/Defendants New York State Department of Environmental Conservation ("NYSDEC") and its Commissioner, Joe Martens (collectively, "Respondents"), to categorically remove regulatory

environmental protections for what NYSDEC estimates will total 357 concentrated animal feeding operations ("CAFOs") over ten years.

2. CAFOs are "large-scale industrial" animal feeding operations ("AFOs"), or "agriculture enterprises where animals are kept and raised in confinement." *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 492 (2d Cir. 2005); 40 CFR § 122.23(b)(1) (2013). Under federal law, dairy AFOs are considered "Medium CAFOs" when they confine between 200 and 699 mature cows and discharge pollutants. 40 CFR § 122.23(b)(6)(i). Before its Rulemaking challenged in this proceeding, NYSDEC understood Medium CAFOs to include both discharging and non-discharging AFOs with between 200 and 699 mature cows. *See* Ex. 9 to the accompanying Affirmation of Daniel E. Estrin in Support of First Amended Verified Petition and Complaint dated September 27, 2013 ("Amended Estrin Aff."),[1] NYSDEC, FINAL PHASE II WATERSHED IMPLEMENTATION PLAN FOR NEW YORK SUSQUEHANNA AND CHEMUNG RIVER BASINS AND CHESAPEAKE BAY TOTAL MAXIMUM DAILY LOAD 28 (Jan. 7, 2013). As a result of the Rulemaking, NYSDEC no longer considers dairy operations with between 200 and 299 cows to be CAFOs, meaning that they are no longer regulated by the State.

3. Dairy operations in New York State generate millions of tons of wet manure every year, which manure, if improperly managed, poses substantial risks to public health and the environment. *See Waterkeeper Alliance, Inc.*, 399 F.3d at 493-94; Ex. 14, Citizens Campaign for the Environment, *Concentrated Animal Feeding Operation: CAFO 101,* http://www.citizenscampaign.org/PDFs/CAFO%20101_Fin.pdf; Ex. 15, EPA Region 9, Animal Waste: What's the Problem?, http://www.epa.gov/region9/animalwaste/problem.html (last visited Sept. 23, 2013) ("EPA Region 9 Website").

[1] Hereinafter, all references to exhibits shall be denoted "Ex. #," and shall refer to exhibits to the Amended Estrin Aff.

4. Animal waste contains a number of potentially harmful pollutants including: (1) nutrients such as nitrogen and phosphorus; (2) organic matter; (3) solids, including the manure itself and other elements mixed with it such as spilled feed, bedding and litter materials, hair, feathers and animal corpses; and (4) pathogens (disease-causing organisms such as bacteria and viruses). *Waterkeeper Alliance*, 399 F.3d at 494. Nutrient pollution from excess phosphorus and nitrogen can cause eutrophication and significant increases in algae in surface waters. These algae blooms harm water quality, food resources and habitats, and decrease the oxygen that fish and other aquatic life need to survive.

5. The U.S. Environmental Protection Agency ("EPA") recently found that 28% of the nation's rivers and streams have excessive levels of nitrogen and 40% have high levels of phosphorus. Ex. 11, EPA, OFF. OF WETLANDS, OCEANS AND WATERSHEDS, OFF. OF RESEARCH AND DEV., NATIONAL RIVERS AND STREAMS ASSESSMENT: 2008-2009, 30-31 (2013).

6. Pollutants from dairy operations can infiltrate surface waters in a variety of ways including spills, other dry-weather discharges, and overflows from storage ''lagoons." In addition, perhaps the most common way by which pollutants reach the surface waters is through improper ''land application." 399 F.3d at 494. "Land application, the predominant means by which many [livestock operations] dispose of animal waste, is a process by which manure, litter, and other process wastewaters are spread onto fields." *Id.* EPA has estimated that 90% of CAFO-generated animal waste is land applied. *Id.* at 511. "[W]hen [animal] waste is excessively or improperly land applied, the nutrients contained in the waste become pollutants that can and often do run off into adjacent waterways or leach into soil and groundwater." *Waterkeeper,* 399 F.3d at 494.

7. Some dairy operations in New York State accept food processing waste, such as acid whey—a liquid by-product of yogurt production—which they dispose of, in exchange for

tipping fees, by applying it to their land in addition to manure. Ex. 7, Affidavit of William J. Weida dated July 18, 2013, at ¶¶ 8-10 ("Weida Aff."); Ex. 6, Affidavit of Michael D. Smolen dated July 23, 2013, at ¶ 32 ("Smolen Aff."). Acid whey, like manure, contains nutrients, such as nitrogen and phosphorus, and bacteria. It also has high levels of chloride and Biological Oxygen Demand, which can be devastating to fish if it enters surface water. Ex. 7, Weida Aff., at ¶¶ 8-10; Ex. 6., Smolen Aff., at ¶ 32.

8. NYSDEC has developed a dual permitting system for CAFOs to prevent adverse water quality impacts. CAFOs that have confirmed discharges of pollutants to waters of New York State must obtain coverage under State Pollutant Discharge Elimination System ("SPDES") General Permit for CAFOs GP-04-02. CAFOs that claim to be "non-discharging" must obtain coverage under SPDES General Permit for CAFOs GP-0-09-001. Both permits require CAFO operators to implement controls to prevent pollutant discharges, including implementation of a comprehensive nutrient management plan ("CNMP"). A CNMP is prepared by a planner certified by the New York State Agricultural Environmental Management ("AEM") program and contains a set of farm-specific "best management practices" ("BMPs") necessary to ensure proper waste storage and the rate, location, timing, and method of nutrient application to agricultural fields to provide for crop growth while protecting water quality.

9. On August 15, 2012, Governor Andrew Cuomo convened the "New York State Yogurt Summit," at which New York State Department of Agriculture and Markets Commissioner Darrell Aubertine announced, prior to NYSDEC initiating State Environmental Quality Review Act ("SEQRA") review for such an action, that the state was "immediately increasing the animal threshold required for the CAFO permit from 200 to 300." Ex. 13, Karen DeWitt, "Cuomo Makes a Moo-ve for More Cows at 'Yogurt Summit,'" WNYC NEWS (Aug. 15, 2012) ("DeWitt Article"). Less than a year later, NYSDEC kept the Administration's promise

and completed its CAFO rulemaking, categorically dismantling its existing pollution prevention scheme for a significant number of dairy operations that had previously been categorized as Medium CAFOs.

10. Purportedly for economic purposes—not scientific or technical ones—NYSDEC has carved out an exemption from SPDES permit requirements for so-called "non-discharging" dairies with between 200 and 299 mature dairy cows ("dairies (200-299)"), relieving them from the duty to develop and implement a CNMP and other previously mandatory pollution controls. NYSDEC expects 285 farms to grow into the exempted size category in addition to the 72 dairies of this size already in existence. Ex. 2, NYSDEC, FINAL ENVIRONMENTAL IMPACT STATEMENT [ON THE] DAIRY INDUSTRY RULEMAKING PROPOSED ACTION STATE POLLUTANT DISCHARGE ELIMINATION SYSTEM (SPDES) PERMITS FOR CONCENTRATED ANIMAL FEEDING OPERATIONS (CAFOS) LAND APPLICATION & ANAEROBIC DIGESTERS 10, 25, 32 (Mar. 6, 2013) ("FEIS"). EPA estimates that each mature dairy cow produces approximately 120 pounds of manure each day. Ex. 15, EPA Region 9 Website. At this rate, the projected 357 dairies (200-299) that were or will be deregulated as a result of the Final Rulemaking will together produce over eight million pounds of manure per day, which may now be disposed of without a CNMP or regulatory oversight, increasing the risk that such additional manure will be improperly managed, stored and land applied. NYSDEC's regulatory withdrawal of the SPDES permit and CNMP requirements for dairies (200-299), as well as its changes to its solid waste management regulations described below, will, in turn, greatly increase the risk that manure and food processing wastes will contaminate waters of New York State.

11. Not only does the rulemaking seek to promote expansion of the yogurt industry in New York State, the combination of the revisions to 6 NYCRR parts 360 and 750 will also allow the yogurt industry to dispose of the acid whey it generates by encouraging deregulated dairies

(200-299) to land apply the food waste without a CNMP, regular inspections, or recordkeeping requirements.

12. NYSDEC's modifications to its CAFO permitting program fly in the face of its explicit assertion, in its March 2012 and July 2012 submissions to the EPA in support of its Watershed Implementation Plan for the New York Susquehanna and Chemung River Basins and the Chesapeake Bay, that deregulation of medium sized CAFOs would cause significant degradation to waterbodies:

> New York State regulates medium-size CAFOs in the same manner as it regulates large-size CAFOs, in that medium CAFOs are required to obtain permit coverage. Most other states nationwide regulate medium-size CAFO [sic] under a separate program that is often voluntary in nature. ***A nonregulatory approach, for a sector that has a significant pollution potential (the smallest medium CAFO has the pollution potential of a major sewage treatment plant), is neither credible nor effective.*** Professional management of waste at these facilities is critical to protection of water quality. That professional management is ensured by the New York CAFO permit program.

Ex. 8, NYSDEC, DRAFT PHASE II WATERSHED IMPLEMENTATION PLAN FOR NEW YORK SUSQUEHANNA AND CHEMUNG RIVER BASINS AND CHESAPEAKE BAY TOTAL MAXIMUM DAILY LOAD, 28 (July 6, 2012) ("DRAFT CHESAPEAKE WIP") (emphasis added); EX. 10, NYSDEC, DRAFT PHASE II WATERSHED IMPLEMENTATION PLAN FOR NEW YORK SUSQUEHANNA AND CHEMUNG RIVER BASINS AND CHESAPEAKE BAY TOTAL MAXIMUM DAILY LOAD, 30-31 (Mar. 23, 2012). NYSDEC further noted in the July 2012 submission to EPA that its "CAFO program covers all farms with as few as 200 cows with binding permits" that meet scientifically supported standards and that "anything less is inconsistent with the Clean Water Act's 'best technology' requirements." Ex. 8, DRAFT CHESAPEAKE WIP, at 19.

13. NYSDEC asserts that the purpose of its rulemaking was to "provide regulatory relief to encourage expansion in the dairy industry," by creating cost savings for certain CAFOs by removing the requirement to implement best management practices. Ex. 3, NYSDEC,

SEQRA FINDINGS STATEMENT 22 (2013) ("FINDINGS STATEMENT"). Yet, NYSDEC also states that it "believes that existing CAFOs with herd sizes between 200 and 299 and dairy farms that [are expected to] expand into this category would likely voluntarily institute necessary conservation practices, despite not being required to do so." Ex. 2, FEIS, at 51. The concept of removing the regulatory requirement that dairies institute what NYSDEC calls "necessary conservation practices," based on an unsupported hope or "belief" that they will voluntarily implement those necessary practices is utterly irrational and would defeat the purpose of the Final Rulemaking: cost savings.

14. NYSDEC's illogical reasoning has also created a "no-win" situation: "[i]f Medium CAFOs manage their waste appropriately, there will be no substantial cost savings associated with the proposed deregulation." Ex. 6, Exhibit A to Smolen Aff., at 2, *see* Ex. 6, Smolen Aff., at ¶ 15. On the other hand, "[i]f the industry chooses to avoid the costs of designing and operating proper waste handling, treatment, and storage systems, and land application, the pollution of the state's waterbodies will increase." Ex. 6, Exhibit A to Smolen Aff. at 8, *see* Ex. 6, Smolen Aff., at ¶¶ 15, 33.

15. Petitioners challenge the actions and determinations of the Respondents as set forth in the "Parts 750 and 360 of 6 NYCRR Rulemaking," noticed in the *New York State Register* on May 8, 2013 ("Final Rulemaking") (Ex. 1); the modified "State Pollutant Discharge Elimination System (SPDES) General Permit for Concentrated Animal Feeding Operations (CAFOs), General Permit No. GP-0-09-001," noticed in the Environmental Notice Bulletin ("ENB") on July 31, 2013 ("CAFO Permit Modification") (Ex. 4); FEIS (Ex. 2); and the Findings Statement (Ex. 3).

JURISDICTION AND VENUE

16. Pursuant to CPLR sections 505(a) and 506(b), Petitioners bring this proceeding and action in Albany County because the principal offices of the Respondents Commissioner Joe Martens and NYSDEC are located in Albany County.

17. This Court has jurisdiction pursuant to CPLR sections 7803(1)-(3) because Respondents' determinations to adopt the Final Rulemaking and CAFO Permit Modification were in excess of their jurisdiction, constituted errors of law and violations of lawful procedure, and were arbitrary and capricious. CPLR section 7803(3) authorizes a special proceeding to be brought against a body or officer whose determination was "made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion." CPLR § 7803(3).

18. The Court also has jurisdiction pursuant to CPLR Section 3001 to render declaratory relief declaring the Final Rulemaking and CAFO Permit Modification illegal, null and void and preempted by New York State and federal law. This Court also has jurisdiction pursuant to CPLR section 6301 to grant injunctive relief necessary to implement the relief requested herein.

19. Petitioners' allegations involve real and actual actions taken by Respondents that have injured Petitioners and their members, and from which Petitioners have no other remedy at law. Petitioners do not request an advisory opinion, but rather request that the Court declare that Respondents' actions complained of herein violate the New York State Constitution, the New York State Environmental Conservation Law ("ECL"), the State Environmental Quality Review Act ("SEQRA"), and the federal Clean Water Act ("CWA").

THE PARTIES

20. Petitioner/Plaintiff Riverkeeper, Inc. ("Riverkeeper"), is a 501(c)(3) not-for-profit corporation headquartered at 20 Secor Road, Ossining, New York 10562. Riverkeeper is a member-supported watchdog organization with approximately 3,388 active members, many of whom reside near and/or fish, swim, and recreate in the Hudson River Watershed and the New York City ("NYC") Drinking Water Watershed. Riverkeeper is dedicated to defending the Hudson River and its tributaries and to protecting the drinking water supply of nine million NYC and Hudson Valley residents. For more than 44 years Riverkeeper has stopped polluters, championed public enjoyment of the Hudson River and its tributaries, influenced land use decisions, and restored habitat, benefiting the natural and human communities of the Hudson River and its watershed. As a signatory to the 1997 NYC Watershed Memorandum of Agreement, Riverkeeper has a unique public role to ensure that the Agreement succeeds and special authority to enforce and oversee its implementation, including the success of the Watershed Agricultural Program, which leverages NYC, New York State, federal and private funds to reduce agriculture-related pollution in the NYC Watershed.

21. Petitioner/Plaintiff Waterkeeper Alliance, Inc., is a 501(c)(3) not-for-profit environmental organization headquartered at 17 Battery Place, Suite 1329, New York, New York 10004. Waterkeeper Alliance is a global movement of on-the-water advocates who patrol and protect over 100,000 miles of rivers, streams and coastlines in North and South America, Europe, Australia, Asia, and Africa. The organization seeks to protect every major watershed around the world, and to restore and maintain all waterways as fishable, swimmable and drinkable waters. To champion clean water and strong communities, Waterkeeper Alliance: (1) supports and empowers member Waterkeeper organizations to protect communities, ecosystems and water quality; (2) promotes the member Waterkeeper organizations; and (3) advocates for issues

common to Waterkeeper organizations. Waterkeeper Alliance works towards this vision through the grassroots advocacy of more than 200 member organizations, including three Petitioners/Plaintiffs in this case (1) Riverkeeper, (2) Buffalo Niagara Riverkeeper, and (3) Lower Susquehanna Riverkeeper.

22. Petitioner/Plaintiff Citizens Campaign for the Environment ("CCE") is a non-profit, non-partisan advocacy organization that works to empower communities and to advocate for solutions that protect public health and the natural environment in New York, Connecticut, and Washington, D.C. CCE is a membership organization with approximately 65,000 members based in New York State. CCE has worked on issues related to agriculture in New York State for more than 25 years, and it is committed to working to develop constructive approaches for promoting farmers and the farming industry in New York State while protecting waterbodies and watersheds. Toward these ends, CCE participated in the development of New York's AEM grant program to assist farmers in preventing water pollution from agricultural activities by providing technical assistance and financial incentives to farms that choose to participate. CCE also works with NYSDEC on agricultural issues and has participated in NYSDEC's CAFO Workgroup for more than fifteen years. CCE's goal is to help farms manage their waste responsibly rather than to take legal action after agricultural pollution has already impaired waterbodies.

23. Petitioner/Plaintiff Sierra Club Atlantic Chapter is a 501(c)(3) non-profit, volunteer-led environmental organization of 38,000 members statewide dedicated to protecting New York's air, land, water and remaining wild places. Its offices are headquartered at 353 Hamilton Street, Albany, New York. Sierra Club Atlantic Chapter volunteers have long been involved in CAFO issues, assisting communities and training activists to protect water quality and citizen rights in the context of unregulated factory farms. In 2005, the Sierra Club Atlantic

Chapter, along with Citizens Environmental Coalition, published the report "The Wasting of Rural New York State: Factory Farms and Public Health" and followed the publication with a series of workshops. From 2009 through 2011, the Chapter participated in stakeholder meetings with NYSDEC that resulted in CAFO permit revisions that demonstrated better water quality controls from farm run-off. Since July 2012, Chapter representatives have been involved in discussions with NYSDEC and the Office of the Governor about changes to the CAFO thresholds. In those discussions, the Sierra Club Atlantic Chapter has consistently taken the position that environmental standards should not be compromised as a means to boost milk production.

24. Petitioner/Plaintiff Buffalo Niagara Riverkeeper, Inc., is a 501(c)(3) not-for-profit corporation headquartered at 1250 Niagara Street, Buffalo, New York 14213, in the County of Erie. Buffalo Niagara Riverkeeper's mission is to protect water quality and quantity and connect people to water in Western New York. Buffalo Niagara Riverkeeper serves over 1,200 square miles of the Niagara River Watershed, including four counties—Erie, Niagara, Genesee, and Wyoming—all of which support multiple land uses, including agricultural. Within the region Buffalo Niagara Riverkeeper serves, approximately 3,250 miles of waterways supporting a multitude of human and natural resource functions, including provision of habitat for native or naturalized trout species.

25. Petitioner/Plaintiff Lower Susquehanna Riverkeeper, Inc. is a 501(c)(3) not-for-profit corporation headquartered at 2098 Long Level Road, Wrightsville, Pennsylvania 17368, in the County of York. Lower Susquehanna Riverkeeper's mission includes improving and defending the Lower Susquehanna River Watershed and its tributaries and the Chesapeake Bay. Lower Susquehanna Riverkeeper is a member-supported organization, many of whom reside near and/or fish, boat, swim, and recreate in the Lower Susquehanna River and its tributaries.

Waters from the main stem of the Susquehanna Watershed in New York drain into the Lower Susquehanna River and its tributaries in Pennsylvania and Maryland, and the Chesapeake Bay.

26. Petitioner/Plaintiff Theodore Gordon Flyfishers, Inc. ("TGF") is a 501(c)(3) domestic not-for-profit corporation organized under the laws of New York State and based in New York County in New York State. TGF is a conservation and fly-fishing group whose dual mission is to preserve and enhance the cold-water fisheries of the Catskills and Delaware regions. TGF focuses on proper stream management, protection of wild trout, and promoting catch and release practices. Formed in 1962, TGF earned its reputation as an advocate of clean waters and healthy fisheries in critical legal fights; notably: defeating a pumped storage plan for Schoharie Creek, which would have destroyed the fishery; protecting the Bashakill wetlands at the entrance to the Catskills; defeating the proposed dam at Tocks Island; and helping to write the Wild and Scenic Rivers Law. Members of TGF use and enjoy many waterways in New York State and other states for a number of activities, including, but not limited to, fishing.

27. Respondent/Defendant Joe Martens is the Commissioner of NYSDEC. His principal office is located in Albany County.

28. Respondent/Defendant NYSDEC is an agency of the State of New York with the powers and duties set forth in the ECL. The principal office of the Department is located in Albany County.

FACTUAL BACKGROUND

A. Dairy Operations Create an Enormous Amount of Waste That, Unless Well Managed, Can Cause Significant Harm to Human Health and the Environment.

29. NYSDEC estimates that its Final Rulemaking would add 25,000 mature cows to New York State's dairy herds. Ex. 2, FEIS, at 10, 25. EPA estimates that each mature dairy cow produces approximately 120 pounds of manure each day. Ex. 15, EPA Region 9 Website. This

would result in more than three million additional pounds of urine and feces produced each day by dairies, or more than one billion additional pounds of cow waste produced each year. The expected corresponding increase in yogurt production in New York State will also result in more yogurt manufacturing by-product, acid whey, some of which is disposed of by spreading on agricultural fields in New York State. Ex. 6, Smolen Aff., at ¶ 32. Discharges of the pollutants contained in animal waste (*e.g.*, pathogens, phosphorus, nitrogen, and sediment), or those in food processing waste (*i.e.*, phosphorus, nitrogen, low pH, *see id*.) may occur due to improper waste storage or land application, *see id*. at ¶ 12, resulting in significant human health and environmental impacts, as explained *supra* ¶¶ 3-6.

30. "The only assurance that these problems are under control is the documentation and management associated with a valid CAFO permit." Ex. 6, Smolen Aff., at ¶ 13. Prior to the adoption of NYSDEC's Final Rulemaking and CAFO Permit Modification, all dairies with over 200 mature dairy cows were considered CAFOs and required to be permitted, whether or not they discharged to waters of New York State. *Id*. at ¶ 6.

> The CAFO permits ensured the dairy operator was responsible for managing the facility without discharging animal manure or food waste to New York's waters by requiring installation of structural and nonstructural systems for pollution control [including professional engineering design of animal waste lagoons and stormwater retention systems], operation under a CNMP developed by a certified planner, annual reporting, and inspections.

Id.

31. NYSDEC admits that when permit requirements are removed, (1) the Department's ability to track compliance by CAFOs is greatly diminished "because there would not be any specific permit requirements to monitor"; and (2) there is no legal obligation for dairy operations to "demonstrate continued implementation of BMPs. . . ." Ex. 2, FEIS, at 117-21. Indeed, "[w]ithout the permit and its corresponding design, recordkeeping, reporting, and inspections, there is likely to be pollutant runoff and discharges from waste storage areas, animal

exercise areas, and other areas in contact with pollutants." Ex. 6, Smolen Aff., at ¶ 7; *see id*. ("[D]ischarges of pollutants [are] certain to occur from time to time unless there are properly designed and operated structural and nonstructural controls in place.").

B. Many Dairies (200-299) with Histories of Discharges and/or Poor Waste Management Practices Have Now Been Deregulated.

32. Recent NYSDEC and EPA inspection reports and Notices of Violation demonstrate that illegal discharges, permit violations, and non-compliance with CNMPs are the norm at dairies (200-299). *See* Ex. 16, NYSDEC, Selected Inspection Reports and Notices of Violation; Ex. 26, Comment Letter from CCE, Earthjustice, Env't N.Y., Envtl. Advocates of N.Y., Riverkeeper, Sierra Club, and Waterkeeper Alliance, to Robert Simson, Div. of Water, N.Y. State Dep't of Envtl. Conservation, at apps. C-K (Jan. 22, 2013) ("Petitioners' Joint Comments").[2] Of the 72 known dairies (200-299) in New York State, 50% have not been inspected in the last six years and 74% have not been inspected in the last two years. Of the 36 facilities that have been inspected in the last six years, nearly all of the facilities have either discharged or failed to implement NYSDEC mandated practices necessary to prevent discharges. Despite this record of noncompliance, NYSDEC has only issued Notices of Violations related to these violations at eight of the subject facilities. *See* Ex. 16, NYSDEC, Selected Inspection Reports and Notices of Violation.

33. One example, Hendee Homestead Farms, a dairy with between 200 and 300 mature cows, is located directly between, and within one-half mile of, two Hornell City drinking water reservoirs. *See* Ex. 16, NYSDEC, Hendee Homestead CAFO Facility Inspection Report, at 2 (Oct. 15, 2008); Ex. 50, Affidavit of Suzanne R. Miller dated July 23, 2013, at ¶ 3 ("Miller Aff."). Moreover, the dairy is at a higher elevation than the reservoirs, so any runoff or leaching

[2] All inspection reports and notices of violation were submitted to NYSDEC during the public comment period on the Draft Environmental Impact Statement ("DEIS") and must be incorporated into the administrative record. A select sample of inspection reports and notices of violation is attached as Exhibit 16.

of animal waste or other contaminants will discharge to the drinking water supply. *See* Ex. 16, Letter from Sam Hendee, Hendee Homestead Farms to Jacqueline Lendrum, Division of Water Permits RE: Hendee Homestead Farms, app. E at 6 (Oct. 15, 2008); Ex. 50, Miller Aff., at ¶ 3. Hendee Farm reported a serious discharge in 2008, and then in a 2012 inspection, NYSDEC found that the facility was only in "marginal compliance" with its permit requirements, *see* Ex. 16, Letter from Brian K. Lee, Environmental Engineer Division of Water to Sam & Jack Hendee, at 1 (Apr. 13, 2012), meaning that it had not remedied the situation that led to the earlier discharge. *See id*.

REGULATORY HISTORY OF THE DAIRY CAFO DEREGULATION

34. On August 15, 2012, Governor Andrew M. Cuomo convened a "New York State Yogurt Summit" to hear ideas for ensuring that the yogurt industry continues to grow in New York State. *See* Ex. 12, Press Release from Governor's Press Office (Aug. 15, 2012). According to press accounts, the Governor told summit attendees that he wants New York State to become the yogurt capital of the United States. Ex. 13, Freeman Klopott, *Cuomo Says Dairy Industry Can Make New York U.S. Yogurt Capital*, BLOOMBERG BUSINESSWEEK (Aug. 15, 2012). New York State Department of Agriculture and Markets Commissioner Darrell Aubertine reportedly announced at the summit that the state was "immediately increasing the animal threshold required for the CAFO permit from 200 to 300," thereby exempting dairy farms within that size category from environmental permitting requirements. Ex. 13, DeWitt Article.

35. On October 10, 2012, NYSDEC posted in its ENB a Short Form Environmental Assessment ("EA") regarding its proposal to "revise its Part 750 regulation and ECL CAFO general permit [GP-0-09-001] to exempt certain medium sized CAFO farms (dairy farms between 200-299 mature dairy cows in size) from current CAFO SPDES permitting requirements," and also to revise its Part 360 regulations related to disposal of food processing

wastes (and other wastes) by facilities permitted under Part 750. The EA identified "one or more potentially large or significant adverse impacts which **MAY** occur," insofar as the action "could potentially result in impacts to ground or surface waters" and to "fish and aquatic life" due to the fact that some "medium sized CAFO dairy farms would no longer be required to prepare and implement Comprehensive Nutrient Management [Plans], which could lead to increased pollutant loading to waters of the state." Ex. 18, NYSDEC, STATE ENVIRONMENTAL QUALITY REVIEW SHORT ENVIRONMENTAL ASSESSMENT FORM [FOR] CAFO RULEMAKING AND MODIFICATIONS TO GENERAL PERMIT 1-2 (2012) (emphasis in original); Ex. 18, NYSDEC, ENB, at 1-2 (Oct. 10, 2012).

36. As a result of the EA, NYSDEC issued a Positive Declaration/Determination of Significance under SEQRA for the proposed regulatory and permit modifications. The Positive Declaration was posted in the ENB on October 10, 2012. Ex. 18, NYSDEC, ENB (Oct. 10, 2012); *see* Ex. 19, NYSDEC, STATE ENVIRONMENTAL QUALITY REVIEW POSITIVE DECLARATION; NOTICE OF INTENT TO PREPARE A DRAFT EIS; DETERMINATION OF SIGNIFICANCE (Oct. 5, 2012).

37. On December 5, 2012, NYSDEC published in the *State Register* a Notice of Proposed Rulemaking to deregulate dairy CAFOs with between 200 and 299 mature dairy cows. *See* Ex. 20, NYSDEC, Proposed Rule Making Hearing(s) Scheduled [to] Amend Provisions of 6 NYCRR Subpart 750-1, 6 NYCRR Subpart 360-4 and 6 NYCRR Subpart 360-5, XXXIV N.Y. Reg. 4 (Dec. 5, 2012) ("Proposed Rulemaking"). The draft express terms of the regulatory modifications, which did not appear in the *State Register*, but which are attached as Ex. 22, sought to add a new definition of "CAFO" to 6 NYCRR § 750-1.2(a)(21), a section of the regulations that had previously been reserved.

38. Specifically, NYSDEC proposed, "as authorized by federal regulations," *id*., that the animal threshold numbers for a Medium dairy CAFO would be 200 to 699 mature dairy cows, whether milked or dry. *Id*. NYSDEC also proposed adding a new section to its SPDES regulations that would have declared that Medium CAFOs with 200 to 299 mature dairy cows without a discharge "are not required to get a SPDES permit because for the purposes of [the ECL] these CAFOS are not considered a point source." Ex. 22, Draft 6 NYCRR § 750-1.5(a)(12).

39. The proposed regulation also sought to amend NYSDEC's Part 360 solid waste management regulations in order to, *inter alia*: (1) exempt anaerobic digesters ("ADs") from the Part 360 approval process if located on a CAFO; (2) remove permitting requirements for facilities with ADs that accept less than 50 tons of food processing waste per day for digestion and land application; and (3) remove permitting and registration requirements for land application of fish hatchery waste.

40. On December 5, 2012, NYSDEC posted in the ENB a Notice of Acceptance of Draft Environmental Impact Statement ("DEIS") for the dairy CAFO deregulation, and a notice of public hearing on the DEIS. Ex. 21, NYSDEC, ENB, at 1 (Dec. 5, 2012); *see also* Ex. 21, DEIS.

41. On December 19, 2012, NYSDEC posted in the ENB its proposed modifications to the SPDES ECL General Permit for CAFOs ("Draft Modified CAFO General Permit"). Ex. 23, NYSDEC, ENB, at 2 (Dec. 19, 2012). NYSDEC's notice provided that the period during which the public could comment on the DEIS, the Proposed Rulemaking and/or the Draft Modified CAFO General Permit would expire on January 21, 2013. *Id.*

42. Because the 45-day comment period on the DEIS and Proposed Rulemaking and the 33-day comment period on the Draft Modified CAFO General Permit spanned three federal

holidays, and due to Petitioners' engagement in the simultaneous public comment period on proposed high-volume hydraulic fracturing regulations, on January 2, 2013, Petitioners requested from NYSDEC a 30-day extension of time for submitting comments. This request was denied by NYSDEC on January 17, 2013. *See* Ex. 25, Letter from Petitioners to Robert Simson, NYSDEC (Jan. 2, 2013); Ex. 25, Letter from Koon Tang, P.E., Director, NYSDEC, to Petitioners (Jan. 17, 2013).

43. On January 4, 2013, NYSDEC held simultaneous public hearings on the Proposed Rulemaking and permit modification in Albany, Ray Brook, Syracuse and Avon. Representatives from Petitioners Riverkeeper and CCE testified against the proposals.

44. Petitioners filed two joint legal and technical comment letters on January 22, 2013, because the posted due date, January 21, 2013, fell on the Martin Luther King, Jr., holiday. In their comment letters, Petitioners explained that the Proposed Rulemaking and proposed modification to the ECL CAFO General Permit could not be finalized because they were inconsistent with the CWA and the ECL. Petitioners also detailed the ways in which the DEIS failed to satisfy the requirements of SEQRA and must be modified or supplemented before NYSDEC could proceed with the proposed actions. *See* Ex. 26, Petitioners' Joint Comments; Ex. 27, Petitioners' Supplemental Comments to Robert Simson.

45. In support of their two sets of legal and technical comments, Petitioners submitted to NYSDEC the technical and scientific comments presented in *Report to Riverkeepers: Analysis of the Impact of Proposed Changes to New York CAFO Rules, 6 NYCRR parts 360 and 750* (Jan. 21, 2013), Ex. 6, Exhibit A to Smolen Aff., and *A Review of the December 5, 2012 Draft Environmental Impact Statement* (Jan. 19, 2013), Ex. 7, Exhibit A to Weida Aff.

46. On March 6, 2013, NYSDEC published in the ENB a Notice of Acceptance of FEIS. Ex. 2, NYSDEC, ENB, at 2 (Mar. 6, 2013). The FEIS fails to address many of the

substantive concerns raised by Petitioners in their comments regarding compliance with the ECL, SEQRA and the CWA.

47. On April 24, 2013, NYSDEC published in the ENB a Notice of Adoption of Findings regarding the Final Rulemaking. *See* Ex. 30, NYSDEC, ENB, at 1-2 (Apr. 24, 2013). The notice stated that the Notice of Adoption of Rules was filed with the New York State Department of State on April 18, 2013. *Id*. The ENB notice did not include, or link to, the actual Findings Statement, which is required to be "maintained in files that are readily accessible to the public and made available on request." 6 NYCRR § 617.12(b)(3).

48. Petitioners repeatedly requested from NYSDEC a copy of the SEQRA Findings Statement, and in response, were advised by NYSDEC to submit a Freedom of Information Law request in order to obtain a copy. While the Findings Statement was signed by the NYSDEC Commissioner on March 29, 2013, NYSDEC did not provide a copy to Petitioners until April 30, 2013. *See* Ex. 3, Email from Thomas Berkman, NYSDEC, to Kate Hudson (Apr. 30, 2013 at 5:08 PM). The Findings Statement fails to address the substantive issues raised by Petitioners in their comments regarding, *inter alia*, NYSDEC's failure to identify all likely environmental impacts of the deregulation, to demonstrate a "public need" for the deregulation, to identify realistic mitigation measures, and to consider a range of reasonable alternatives.

49. NYSDEC published in the *State Register* a Notice of Adoption of its final regulatory revisions to Parts 750 and 360 on May 8, 2013. *See* Ex. 1, NYSDEC, Notice of Adoption [to] Revise 6 NYCRR Subpart 750-1 and 6 NYCRR Subparts 360-1, 360-4 and 360-5, XXXV N.Y. Reg. 24 (May 8, 2013). According to NYSDEC's Notice of Adoption, the changes to the Part 750 Regulations were effective immediately, *i.e.*, on May 8, 2013, and the changes to the Part 360 regulations would become effective 60 days from May 8, 2013, *i.e.*, on or about July 7, 2013. *Id.*

50. NYSDEC published notice in its ENB of the CAFO Permit Modification on July 31, 2013. Ex. 4, CAFO Permit Modification.

51. This hybrid Article 78 proceeding and declaratory judgment action now follows.

FIRST CAUSE OF ACTION:
NYSDEC Lacks Authority to Issue Regulations
in Contravention of ECL Article 17

52. Petitioners repeat and re-allege the allegations contained in paragraphs 1-51 above, and incorporate such allegations by reference as if fully set forth herein.

53. "The legislative power of [New York State is] vested in the senate and assembly," not in the governor. N.Y. Const., art. III, § 1. In contrast, the governor and his executive agencies "shall take care that the laws are faithfully executed." N.Y. Const., art. IV, § 3.

54. "[A]n administrative agency may not, in the exercise of its rule-making authority, promulgate a regulation out of harmony with the plain meaning of the statutory language." *Festa v. Leshen*, 145 A.D.2d 49, 55 (1st Dep't 1989) (citing *Lower Manhattan Loft Tenants v. N.Y.C. Loft Bd.*, 104 A.D.2d 223, 225 (1st Dep't 1984), *aff'd* 66 N.Y.2d 298 (1985); *Finger Lakes Racing Ass'n v. N.Y. State Racing & Wagering Bd.*, 45 N.Y.2d 471, 480 (1978); *Jones v. Berman*, 37 N.Y.2d 42, 53 (1975); *Goldsmith v. Gabel*, 42 Misc. 2d 732, 734 (Sup. Ct. N.Y. Cnty. 1964), *aff'd* 21 A.D.2d 782 (1st Dep't 1964)); *see Boreali v. Axelrod,* 71 N.Y.2d 1, 15 (1987).

55. It is the declared public policy of New York State "to maintain reasonable standards of purity of the waters of the state . . . and to that end . . . ***prevent*** and control the pollution of the waters of the state of New York." ECL § 17-0101 (emphasis added). Likewise, the stated purpose of ECL Article 17 is "to safeguard the waters of the state from pollution by ***preventing*** any new pollution. . . ." ECL § 17-0103 (emphasis added).

56. The statutory and regulatory framework implementing the New York State Water Pollution Control Law explicitly mandates that all point sources of pollutants, including all CAFOs, whether discharging or purportedly "non-discharging," must obtain permits prior to operation. ECL § 17-0701(1)(a) requires "a written SPDES permit . . . to make or cause to make or use any . . . outlet or point source." *Id.*; *see also* ECL § 17-0505. "'Point source' means any discernible, confined and discrete conveyance, including but not limited to any . . . concentrated animal feeding operation . . . from which pollutants are or may be discharged." ECL § 17-0105(16).

57. According to NYSDEC:

> one of the primary goals of ECL Article 17 is to require permit coverage ***before*** a discharge occurs so that adequate ***safeguards*** are in place to mitigate the effects of any discharge. This is reflected in ECL § 17-0701(1)(a) which prohibits the creation of a point source for the discharge of waste to waters of the State without a SPDES permit. Furthermore, ECL §§ 17-0101 and 17-0103 indicate a legislative intent to "prevent" pollution from adversely impacting the waters of the State.

Ex. 2, FEIS, at 120 (emphases added); *see also id.* at 12 ("state law, unlike the federal rule . . . regulates CAFOs that do not discharge . . . .").

58. NYSDEC's attempt to regulate dairies (200-299) only ***after*** a discharge has been proven contravenes the plain language as well as the broad policy and purpose of ECL Article 17, as the legislature has explicitly mandated preventive measures for all point sources prior to any discharge.

59. NYSDEC's attempt to exempt this category of dairy operations from the requirements of the statute, and the resulting exemption from SPDES permit coverage and compliance, fails because of this lack of statutory authority. CPLR § 7803(2).

60. Even if NYSDEC had the authority to issue this regulatory carve-out, which it did not, establishing this exemption from New York State's CAFO permitting framework was arbitrary and capricious.

61. Through its Final Rulemaking and CAFO Permit Modification, NYSDEC has created a regulatory loophole that allows pollution, stymieing the very purpose of its SPDES program. The deregulation will lead to a regulatory structure in which all point sources in New York State are required to obtain permit coverage at creation and prior to discharge ***except for*** dairies (200-299).

62. Moreover, by NYSDEC's admission, this carve-out has created an unnecessarily confusing regulatory structure. In the DEIS, NYSDEC originally rejected the chosen option, that is, "excluding non-discharging AFOs with 200 to 299 mature dairy cows from the definition of medium CAFO," because such an action "could lead to confusion since non-discharging CAFOs with 300 or more mature dairy cows are still required to maintain ECL permit coverage." Ex. 2, FEIS, at 122. Yet, this confusing—indeed, arbitrary and capricious—option is the one that NYSDEC has now adopted.

SECOND CAUSE OF ACTION:
Violation of the Separation of Powers Doctrine
of the New York State Constitution

63. Petitioners repeat and re-allege the allegations contained in paragraphs 1-62 above, and incorporate such allegations by reference as if fully set forth herein.

64. "[A]n agency may not, in excess of its lawfully delegated authority, promulgate rules and regulations for application to situations not within the intendment of the statute." *Festa*, 145 A.D.2d at 55 (citing *Boreali v. Axelrod*, 71 N.Y.2d 1 (1987); *Trump-Equitable Fifth Ave. Co. v. Gliedman*, 57 N.Y.2d 588, 595 (1982); *Bates v. Toia*, 45 N.Y.2d 460, 464 (1978); *Lower Manhattan Loft Tenants v. N.Y.C. Loft Bd.*, 104 A.D.2d at 225)).

65. An agency of the state also may not "improperly assume[] for itself '[the] open-ended discretion to choose ends' . . . , which characterizes the elected Legislature's role in our system of government." *Boreali*, 71 N.Y.2d at 11 (citation omitted).

66. The New York State Constitution tasks the legislature with, among other things, the duty:

> to conserve and protect its natural resources and scenic beauty and encourage the development and improvement of its agricultural lands. . . . The legislature, in implementing this policy, shall include adequate provision for the abatement of air and water pollution and of excessive and unnecessary noise, the protection of agricultural lands, wetlands and shorelines, and the development and regulation of water resources.

N.Y. Const. art. XIV, § 4.

67. The statutory and regulatory framework implementing the New York State Water Pollution Control Law explicitly mandates that all point sources of pollutants, including all CAFOs, whether discharging or "non-discharging," must obtain permits prior to operation. ECL § 17-0701(1)(a) requires "a written SPDES permit . . . to make or cause to make or use any . . . outlet or point source." *Id.*; *see* ECL § 17-0505. "'Point source' means any discernible, confined and discrete conveyance, including but not limited to any . . . concentrated animal feeding operation . . . from which pollutants are or may be discharged." ECL § 17-0105(16).

68. As expressed in the ECL "Declaration of Policy," the New York State Legislature has determined that:

> the quality of our environment is fundamental to our concern for the quality of life. It is hereby declared to be the policy of the State of New York to conserve, improve and protect its natural resources and environment and ***to prevent***, abate and control water, land and air pollution, in order to enhance the health, safety and welfare of the people of the state and their overall economic and social well being.

ECL § 1-0101 (emphasis added). Likewise, the stated purpose of ECL Article 17 is "to safeguard the waters of the state from pollution by ***preventing*** any new pollution. . . ." ECL § 17-0103 (emphasis added).

69. The purpose of the ECL is also reflected in NYSDEC's mission statement: "[t]o conserve, improve and protect New York's natural resources and environment and ***to prevent***, abate and control water, land and air pollution, ***in order to enhance*** the health, safety and welfare of the people of the state and their overall economic and social well-being." Ex. 31, NYSDEC, About DEC, http://www.dec.ny.gov/ 24.html (last visited July 19, 2013) (emphases added); Ex. 2, FEIS, at 47-48.

70. In order "to carry out the environmental policy of the state set forth in section 1-0101," the NYSDEC Commissioner has the power to "[f]oster and promote ***sound practices*** for the use of agricultural land . . . ; [and] [e]ncourage industrial, commercial, residential and community development which provides the ***best use*** of land areas, ***maximizes*** environmental benefits and ***minimizes*** the effects of less desirable environmental conditions." ECL §§ 3-0301(1)(f)-(g) (emphases added); Ex. 2, FEIS, at 47.

71. The New York State Legislature has introduced two bills intended to directly address the economic burdens on dairy operations and one bill that would promote economic development for agricultural operations. *See* Ex. 32, A.11284, 233d N.Y. Leg. Sess. (2010); A.9226, 233d N.Y. Leg. Sess. (2010); S.6140, 233d N.Y. Leg. Sess. (2010). The Senate also passed Senate Bill No. 4240A, titled, "An act . . . in relation to authorizing industrial development agencies to provide assistance to agricultural producers," Ex. 32, S.4240A, 234th N.Y. Leg. Sess. (2011), which would allow state industrial development agencies to provide loan assistance to agricultural enterprises, including dairies.

72. This past June, Senator Kathleen Marchione introduced Senate Bill No. 5166, Ex. 32, S.5166, 236th N.Y. Leg. Sess. (2013), which, along with an identical bill introduced in the Assembly by David DiPietro, Assembly Bill No. 7986, Ex. 32, A.7986, 236th N.Y. Leg. Sess. (2013), would repeal 1,000 regulations or rules that purportedly hinder job creation and economic development in New York.

73. As expressly acknowledged by NYSDEC, the goal of its action, challenged herein, is purely economic. "The proposed action aims to remove certain regulatory requirements that cause economic barriers to allow New York dairy farms to meet th[e] demand [for increased milk production]." Ex. 3, FINDINGS STATEMENT, at 5; *see also id.* at 22 (The goal of the proposed action is to "provid[e] regulatory relief to encourage expansion in the dairy industry."); *see id.* at 25 ("The department finds that the need to provide regulatory relief to allow for the expansion of dairies is necessary to meet the growing demand for milk and provides a significant economic benefit without a significant impact on the environment.").

74. NYSDEC intended its Final Rulemaking to "reduc[e] costs associated with the current regulatory scheme by eliminating the required development and implementation of a CNMP pursuant to a permit" in order to encourage 285 traditional dairies to "increase their herd size to greater than 200 mature milking cows over the next decade." Ex. 3, FINDINGS STATEMENT, at 5.

75. NYSDEC also admits that the expansion of dairy farms will increase the risk of discharges of agricultural pollutants to the environment:

> as farms grow, they are at an increased risk of having a discharge because they store more silage, more manure, and produce more milk processing waste. Given the larger volumes of potential pollutants, any unintended discharge has the potential to be more environmentally significant. As CAFOs grow in size, it becomes increasingly important for them to implement BMPs and to have the benefit of oversight, not only from NYSDEC staff during inspections, but also from an AEM certified planner who would regularly provide guidance to the farmer.

Id. at 22-23 (considering and rejecting the alternative of removing the CAFO SPDES permit program in its entirety).

76. The facts set forth above demonstrate that the NYSDEC's sole purpose for exempting dairies (200-299) from SPDES permitting requirements is to relieve one sector of New York's agricultural livestock industry from the financial burden of permitting requirements, while NYSDEC will continue to enforce those same requirements against similarly-sized CAFOs with other types of livestock. NYSDEC did not provide any technical or scientific justification for the regulatory change.

77. By deregulating dairies (200-299), NYSDEC has shirked the duty imposed upon it by the Legislature "[t]o conserve, improve and protect New York's natural resources and environment," ECL § 1-0101, and usurped the legislative prerogative to determine policy regarding the economic interests of New York State. In so doing, NYSDEC operated well outside of its proper sphere of authority in violation of the separation of powers doctrine of the New York State Constitution.

78. Petitioners are therefore entitled to judgment declaring that NYSDEC's Final Rulemaking effecting a deregulation of dairies (200-299) in New York State (1) were adopted in violation of the New York State Constitution; (2) are without or in excess of NYSDEC's jurisdiction; (3) are arbitrary and capricious, and (4) are without legal effect.

THIRD CAUSE OF ACTION:
Failure to Comply with Procedural Requirements of SEQRA

79. Petitioners repeat and re-allege the allegations contained in paragraphs 1-78 above, and incorporate such allegations by reference as if fully set forth herein.

80. SEQRA requires that an Environmental Impact Statement ("EIS") include "a detailed statement setting forth . . . a description of the proposed action . . . ; the environmental

impact of the proposed action including short-term and long-term effects; . . . alternatives to the proposed action: . . . [and] mitigation measures proposed to minimize the environmental impact." ECL § 8-0109(2). NYSDEC regulations further require that a draft EIS include: "a concise description of the proposed action, its purpose, public need and benefits"; "a statement and evaluation of the potential significant adverse environmental impacts at a level of detail that reflects the severity of the impacts and the reasonable likelihood of their occurrence"; and a "description and evaluation of the range of reasonable alternatives to the action that are feasible." 6 NYCRR § 617.9(b)(5)(i), (iii) & (v).

81. New York courts require strict, not substantial, compliance with SEQRA's procedural requirements. *Brander v. Town of Warren Town Bd.*, 18 Misc. 3d 477, 479 (Sup. Ct. Onondaga Cnty. 2007) ("[t]he substance of SEQRA cannot be achieved without its procedure, and . . . departures from SEQRA's procedural mechanisms thwart the purposes of the statute. Thus it is clear that strict, not substantial, compliance is required.") (quoting *King v. Saratoga Cnty. Bd. of Supervisors*, 89 N.Y.2d 341, 347-48 (1996)).

82. NYSDEC did not fulfill the strict procedural requirements of SEQRA. In particular, NYSDEC omitted from the FEIS any statement or evaluation of the environmental impacts of the disposal of acid whey generated from increased yogurt production, and the impacts of newly deregulated dairies (200-299) land applying acid whey without a CNMP. NYSDEC also omitted any statement or evaluation of the environmental impacts of allowing fish hatchery waste to be land applied without any regulatory oversight. In addition, NYSDEC's description of the public need and benefits of the Final Rulemaking, as well as its discussion of mitigation and alternatives, is so lacking in substance or logical reasoning that it is tantamount to not even including these required sections in the FEIS.

83. NYSDEC's failure to include adequate analysis in the FEIS covering these matters, as required by SEQRA, violates lawful procedure, was affected by an error of law, and was arbitrary and capricious and an abuse of discretion. Accordingly, the Final Rulemaking and CAFO Permit Modification should be invalidated under CPLR § 7803(3). *See Chinese Staff & Workers Ass'n v. City of New York*, 68 N.Y.2d 359, 369 (1986) (annulling a special permit because of deficiencies in environmental review).

FOURTH CAUSE OF ACTION:
Violations of SEQRA's Substantive Requirements

84. Petitioners repeat and re-allege the allegations contained in paragraphs 1-83 above, and incorporate such allegations by reference as if fully set forth herein.

85. SEQRA's mandates are not merely procedural, but also substantive. *Town of Henrietta v. N.Y. State Dep't of Envtl. Conservation*, 76 A.D.2d 215, 220-23 (4th Dep't 1980) (an EIS is "not a mere disclosure statement" but is a substantive part of an agency's decisionmaking, which must take into account environmental concerns "to the fullest extent possible"). Substantively, SEQRA requires agencies to take environmental concerns into account to the fullest extent possible as part of their decisionmaking.

86. For an EIS to serve SEQRA's purposes, it must take a "hard look" at all the relevant areas of environmental concern, and make a "'reasoned elaboration' of the basis for [the agency's] determination." *Jackson v. N.Y. State Urban Dev. Corp.*, 67 N.Y.2d 400, 417 (1986) (quoting *Aldrich v. Pattison*, 107 A.D.2d 258, 265 (2d Dep't 1985)).

87. An EIS must also include "a statement and evaluation of the potential significant adverse environmental impacts at a level of detail that reflects the severity of the impacts and the reasonable likelihood of their occurrence," including "cumulative impacts." 6 NYCRR § 617.9(b)(5)(iii) & (iii)(a).

88. In violation of SEQRA, NYSDEC failed to (1) take a "hard look" at "reasonably related short-term and long-term impacts, cumulative impacts and other associated environmental impacts," *id*. § 617.9(b)(5)(iii)(a); (2) provide "a concise description of the proposed action, its purpose, public need and benefits, including social and economic considerations," *id*. § 617.9(b)(5)(i); (3) provide "a description of the mitigation measures," *id*. § 617.9(b)(5)(iv); and (4) provide "a description and evaluation of the range of reasonable alternatives to the action that are feasible . . . " *id*. § 617.9(b)(5)(v).

A. Failure to Identify and Evaluate All of the Potential Significant Adverse Environmental Impacts of the Final Rulemaking.

89. NYSDEC failed to take a "hard look" at: (1) the potentially significant environmental impacts of disposing of the acid whey produced by increased yogurt production in the state, especially disposal by land application on deregulated dairies; (2) the likelihood that allowing dairies to land apply wastes without a SPDES permit, CNMP, and regulatory oversight will have potentially significant adverse environmental impacts; (3) the cumulative impacts of dairies adding additional phosphorus (in the form of manure and acid whey) to soil where phosphorus is already at high levels without a CNMP and regulatory oversight; and (4) the environmental impacts of NYSDEC's decision to completely deregulate the land application of fish hatchery waste.

1. Failure to Consider Disposal of Acid Whey.

90. The FEIS does not meet the requirements of SEQRA because NYSDEC failed to take a "hard look" at how acid whey produced by increased yogurt production will be disposed of, or at the likelihood that the whey will be disposed of at dairies that operate without regulatory oversight where discharges and degradation of water quality are likely.

91. If the deregulation of dairies (200-299) succeeds in increasing yogurt production in New York State to the extent predicted in the FEIS, it will also result in the production of

millions of pounds of acid whey, a liquid by-product of yogurt production that, like manure, contains nutrients that can degrade the quality of surface and groundwaters. Ex. 7, Weida Aff., at ¶¶ 8-10; Ex. 6, Smolen Aff., at ¶ 32. This by-product of yogurt production must be disposed of, and because it is heavy and expensive to transport, it is likely to be disposed of in close proximity to New York State yogurt plants. Dairies often accept acid whey for disposal in exchange for tipping fees. Ex. 7, Weida Aff., at ¶¶ 8-10; Ex. 6, Smolen Aff. at ¶ 32.

92. NYSDEC did not consider: (1) how much acid whey will be land applied in the state as a result of the Final Rulemaking and CAFO Permit Modification, nor the impacts of land applying millions of pounds of acid whey each year, likely in close proximity to the yogurt plants, and likely on at least some dairies that do not operate under CNMPs and regulatory oversight; (2) the environmental impacts of allowing dairies (200-299) that operate without CNMPs and without regulatory oversight to land apply both manure and acid whey; and (3) how the Final Rulemaking and CAFO Permit Modification will make it more likely that acid whey will be land applied at New York State dairy facilities that do not operate under CNMPs or permits, thus increasing the likelihood that acid whey will pollute waters of New York State.

93. The failure to take a "hard look" at how the acid whey generated by increased yogurt production will be disposed of, and the likelihood that it will be discharged to waters of the state, is a fatal flaw in the FEIS.

2. Failure to Consider Likelihood That Allowing Dairies (200-299) to Operate Without a CNMP and Regulatory Oversight Will Have Significant Adverse Environmental Impacts.

94. The FEIS is also substantively deficient because NYSDEC failed to take a "hard look" at "the severity of [all of] the impacts [of the Final Rulemaking] and the reasonable likelihood of their occurrence." 6 NYCRR § 617.9(b)(5)(iii). NYSDEC identifies numerous potential environmental impacts, but then discounts the likelihood that these impacts will occur

because it assumed, without any stated basis whatsoever, that potentially significant environmental impacts of the Final Rulemaking and CAFO Permit Modification will be mitigated by dairies (200-299) voluntarily developing and implementing CNMPs and BMPs.

95. NYSDEC admits that when permit requirements are removed, (1) the Department's ability to track compliance by CAFOs would be greatly diminished "because there would not be any specific permit requirements to monitor"; and (2) there would be no legal obligation on the part of the deregulated dairies to "demonstrate continued implementation of BMPs." Ex. 2, FEIS, at 117-21. NYSDEC's proposed mitigation, which assumes that dairies (200-299) will voluntarily take all necessary safeguards to protect water quality, despite the significant cost, even if not required to do so, is completely unrealistic. In addition, the premise that deregulation will save dairies money, yet will cause no environmental harm, makes no sense—responsible waste management costs the same whether those practices are mandated or adopted voluntarily. Voluntary compliance with permitting standards, as admitted by NYSDEC, "cannot be relied upon as a mitigation strategy for all [CAFOs]." Ex. 2, FEIS, at 108; Ex. 6, Smolen Aff., at ¶ 26.

96. By relying on a far-fetched and irrational theory of mitigation to write-off the potential for environmental impacts, and by ignoring the fact that if dairies save money on waste management, there will inevitably be discharges and environmental harm, NYSDEC has failed to take a "hard look" at "the reasonable likelihood of the[] occurrence" of significant adverse environmental impacts, in violation of SEQRA. 6 NYCRR § 617.9(b)(5)(iii).

3. Failure to Consider Cumulative Impacts of Applying Phosphorus to Land That Already Has High Levels.

97. The FEIS also does not meet the substantive requirements of SEQRA because it does not take a "hard look" at the cumulative impacts of (1) newly deregulated dairies land applying manure and acid whey, which contain the nutrient phosphorus ("P"), without a CNMP

and regulatory oversight (and thus likely over-applying P), and (2) land applying P on New York State lands where P is already present at high levels in the soil.

98. Excess P in soil leads to increased P runoff and leaching losses from agricultural fields to surface and groundwater. *See* Ex. 2, FEIS, at 50. Thus, NYSDEC should have considered the environmental impacts of land application of wastes in areas with existing high levels of P in the soil, which require more, not less, nutrient management planning and oversight. *See* Ex. 6, Smolen Aff., at ¶ 21.

99. NYSDEC admits that excess P in soil already "is a leading contributor to water quality impairments in watersheds of New York and other areas of the nation." Ex. 2, FEIS, at 54; *see also id*. at 64 ("Phosphorus has caused widespread impacts across the state"); *id*. at 116 ("many waterbodies in New York State are impaired due to excess phosphorus"). NYSDEC also admits that P "can have negative impacts on public drinking water reservoirs and potentially public health." *Id*. at 54.

100. NYSDEC's failure to discuss and take a "hard look" at the "cumulative impacts" of deregulating the application of P to soils that are already saturated with P violates the substantive requirements of SEQRA.

4. Failure to Consider Unregulated Disposal of Fish Hatchery Waste.

101. The FEIS is also deficient because NYSDEC omits from the FEIS any discussion of the potential environmental impacts of the complete deregulation of the land application of fish hatchery-related food and fecal waste by the Final Rulemaking. Under prior law, a facility that land applied "undigested food and fecal material emanating from a New York State owned or licensed fish hatchery" had to be registered. 6 NYCRR § 360-4.2(b)(1) (regulations in effect until July 7, 2013). As amended by the Final Rulemaking, the Part 360 regulations now

completely exempt facilities that land apply food and fecal waste from fish hatcheries from regulation. 6 NYCRR § 360-4.2(a)(4).

102. NYSDEC's omission from the FEIS of any "statement and evaluation of the potential significant adverse environmental impacts," 6 NYCRR § 617.9(b)(5)(iii), regarding the fish hatchery waste deregulation, and the agency's failure to take any look, let alone a "hard look," at the impacts of this aspect of the Final Rulemaking are substantive defects under SEQRA.

103. In sum, NYSDEC failed to take a "hard look" at the cumulative environmental impacts of the Final Rulemaking and CAFO Permit Modification, specifically the disposal of acid whey, the unlikelihood that deregulated dairies will voluntarily implement pollution controls, the overloading of P on saturated land, and the disposal of fish hatchery waste. Thus, NYSDEC did not meet the substantive requirements of SEQRA. Accordingly, the Court should invalidate the Final Rulemaking and CAFO Permit Modification. *See Chinese Staff & Workers Ass'n*, 68 N.Y.2d at 369 (annulling a special permit because of deficiencies in environmental review).

B. Failure to Describe the "Public Need and Benefits" of the Final Rulemaking in Violation of SEQRA.

104. SEQRA requires an EIS to include an accurate description of the "public need and benefits" of the proposed action. 6 NYCRR § 617.9(b)(5)(i).

105. NYSDEC's discussion of "public need and benefits" in the FEIS does not meet the "hard look" test because: (1) it fails to address why environmental deregulation will lead to dairy expansions in the face of all the other pressing economic reasons that dairies have recently chosen not to expand; and (2) it ignores established research showing that pushing traditional dairies to expand their herds will not strengthen the upstate economy.

106. The statement of public need and benefits in the FEIS is also deficient, because despite the fact that the entire purported benefit of the Final Rulemaking is economic, NYSDEC did not evaluate the "net benefits" of the Final Rulemaking, meaning it did not take into account the costs to the public of increasing the size of this category of dairy farms—such as subsidies to dairies that participate in the AEM program, remedying environmental damage to water and air, and pollution control costs that will ultimately need to be shifted to municipal dischargers in impaired watersheds. Ex. 6, Exhibit A to Smolen Aff., at 8; Ex. 6, Smolen Aff., at ¶¶ 8, 20, 30.

107. Because NYSDEC did not analyze the net public benefits (meaning the claimed economic benefits offset by the public costs to achieve those benefits), NYSDEC failed to take a "hard look" at the public need and benefits of its action, and did not include in the FEIS a reasoned elaboration of the basis for its determination that there will in fact be a net benefit to the New York State public from deregulating dairies. *Jackson*, 67 N.Y.2d at 417 (requiring reasoned elaboration of SEQRA determinations).

C. Failure to Describe and Evaluate a Range of Reasonable Alternatives in Violation of SEQRA.

108. SEQRA requires an EIS to "descri[be] and evaluat[e] . . . the range of reasonable alternatives to the action that are feasible." 6 NYCRR § 617.9(b)(5)(v). While SEQRA does not require consideration of every possible alternative, it does require consideration of feasible alternatives that could avoid environmental harm.

109. NYSDEC did not fulfill this requirement because it failed to consider a genuine "range" of reasonable options, and, in particular, failed to consider any alternative approaches to increasing New York State's milk supply that do not involve environmental deregulation.

110. NYSDEC sets forth four alternatives in the FEIS for the proposed action: (1) a "no-action" alternative; (2) deregulating dairies with 200 to 299 cows, but mandating their enrollment in the AEM program; (3) deregulating dairies with 200 to 299 cows, but mandating

that any deregulated facility located in a watershed with an impaired waterbody enroll in the AEM program; and (4) terminating New York State's ECL permit program in its entirety and simply administering the federal CWA permit. Ex. 2, FEIS, at 111-21.

111. Two of these alternatives—doing nothing, and fully dismantling NYSDEC's CAFO regulations—were not realistically on the table. The only real options NYSDEC considered were slight variations on the proposal it did adopt—removing the permit requirement for dairies (200-299), and requiring all or some of the deregulated dairies to participate in the AEM program—a result that NYSDEC now claims will occur anyway, even if not required.

112. NYSDEC did not consider feasible alternative approaches to increasing New York State's milk supply, for example, by increasing milk production at New York State dairies with more than 300 cows, which already operate under permits, CNMPs and regulatory oversight. These dairies have structural and non-structural practices in place to manage large amounts of cow waste. Ex. 7, Exhibit A to Weida Aff., at 2-3.

113. NYSDEC also did not consider feasible alternative approaches, which would retain the agency's existing regulatory structure, and provide additional financial assistance to dairies with 200 to 299 cows to help them comply with the requirements of the permit.

114. Because NYSDEC failed to consider a genuine "range" of alternatives, it violated SEQRA's mandate to "evaluat[e] . . . the ***range*** of reasonable alternatives to the action that are feasible." 6 NYCRR § 617.9(b)(5)(v) (emphasis added).

D. Failure to Propose Meaningful Mitigation Measures in Violation of SEQRA.

115. SEQRA requires an EIS to include "a detailed statement setting forth . . . mitigation measures proposed to minimize the environmental impact." ECL § 8-0109(2)(f). In assessing the adequacy of proposed mitigation measures, the New York Court of Appeals looks

at whether the agency has a "reasonable basis to conclude" the measures will "in fact minimize those adverse effects." *Jackson*, 67 N.Y.2d at 426.

116. NYSDEC's "mitigation measures," found in the FEIS and Findings Statement, consist of NYSDEC's "***expect[ation]*** that ***many*** of the exempt~~ed C~~AFOs . . . would take advantage of" the "numerous voluntary programs that promote best management practices and industry guidelines," both "because of available funding, as well as the farm's economic self-interest" in avoiding enforcement actions under statutes and regulations that protect public health and the environment. Ex. 2, FEIS, at 77 (emphases added) (strikethrough in original); *see also* Ex. 3, FINDINGS STATEMENT, at 16 (NYSDEC "***expects*** that CAFOs exempt from permit coverage by this proposed action would either voluntarily elect to retain or seek permit coverage, which the proposed action allows, or enroll in the AEM program, which offers ***many*** of the same environmental protections as the Department's permit program") (emphases added).

117. NYSDEC has no "reasonable basis to conclude" that its reliance on voluntary compliance as a mitigation measure "will in fact minimize" the serious water quality impairments likely to result from the Final Rulemaking. This is because the mitigation proposal is based on two fundamentally inconsistent premises: (1) deregulation is necessary because the cost of the responsible waste handling measures required by operating under the CAFO General Permit prevents traditional dairies from increasing their herd size to more than 199 cows; and (2) deregulated dairies (200-299) will voluntarily adopt responsible waste handling measures even if not required to do so, which will mitigate any potential environmental impact.

118. NYSDEC provides no "reasoned elaboration" in the FEIS to explain ***why*** it "expect[s]" that dairy facilities will voluntarily develop responsible waste management practices, including CNMPs and BMPs, when the stated purpose of deregulating these facilities was to

enable these facilities to avoid the financial costs of developing CNMPs and BMPs to manage waste if their herds grow to between 200 and 299 cows.

119. NYSDEC's unsupported mitigation theory is belied by the evidence that many dairies (200-299) will not voluntarily undertake the level of nutrient management planning necessary to avoid water quality impairments. Ex. 6, Smolen Aff., at ¶¶ 14, 20(d) & (e), 21, 26, 27; Ex. 7, Weida Aff., at ¶ 5. Indeed, documents obtained from NYSDEC show that many dairies (200-299) did not fully comply with their permit requirements. Ex. 16, NYSDEC, Selected Inspection Reports and Notices of Violation.

120. NYSDEC's mitigation theory rests on the "expectation" that deregulated dairies (200-299) will voluntarily develop responsible waste management practices, because the state will provide them with funding to do so. Ex. 3, FINDINGS STATEMENT, at 23. However, NYSDEC does not offer a "reasoned elaboration" for why the state will not or could not make these funds available to assist ***regulated*** dairy facilities to come into compliance with the requirements of the Part 750 regulations.

121. Contrary to NYSDEC's theory of expected mitigation, dairies (200-299) are highly unlikely to voluntarily adopt responsible waste management practices due to the threat of enforcement. Many discharges are not easily detectable or traceable. Ex. 6, Smolen Aff. ¶ 27; Ex, 6 Exhibit A to Smolen Aff., at 9. NYSDEC has admitted to having limited capacity to adequately monitor dairies (200-299) to determine if they are discharging wastes. Ex. 29, FEIS, app. D at 35 ("Response to Comments"); Ex. 2, FEIS, at 119-20.

122. The cost of proper waste management and disposal is the same whether it is done under mandate or voluntarily. *See* Ex. 7, Exhibit A to Weida Aff., at 9-10. Accordingly, there is a necessary trade-off between regulatory cost and environmental cost. If dairies (200-299) choose to avoid the costs of: (1) developing and operating under CNMPs; and (2) operating

professionally certified waste storage, treatment and land application systems, the pollution of New York State's waterbodies will increase.

123. For these reasons, NYSDEC had no "reasonable basis to conclude" that its purported mitigation "w[ill] in fact minimize" the environmental impacts of the Final Rulemaking and CAFO Permit Modification. *Jackson*, 67 N.Y.2d at 426.

124. Accordingly, NYSDEC violated SEQRA by failing to take a "hard look" at mitigation measures that would actually minimize the environmental impact of the Final Rulemaking and CAFO Permit Modification. ECL § 8-0109(2)(f); 6 NYCRR § 617.9(b)(5)(iv).

E. Issuance of Insupportable SEQRA Findings.

125. After finalizing an EIS, SEQRA requires a decisionmaker to "balance the benefits of a proposed project against its unavoidable environmental risks in determining whether to approve the project." *Town of Henrietta*, 76 A.D.2d at 222. Before it can approve a project, the agency must make an "explicit finding" in writing that, "to the maximum extent practicable, adverse environmental effects . . . will be minimized or avoided." ECL § 8-0109(8).

126. Despite all of the failings in NYSDEC's environmental analysis—the failure to consider the environmental impacts of disposal of acid whey from yogurt manufacturing, irrationally downplaying the likelihood of environmental impacts in reliance on a pipedream of voluntary compliance, omitting analysis of the cumulative impacts of applying P on saturated lands, the failure to evaluate net economic benefits of the Final Rulemaking and CAFO Permit Modification, the complete failure to consider alternatives for increasing milk production that do not involve dairies with fewer than 300 cows, and the fallacies underlying the proposed mitigation—NYSDEC's Findings Statement concludes that deregulation of dairy facilities with 200 to 299 cows will "benefit New York State by promoting the dairy industry and increasing

economic opportunities, while at the same time minimizing any potential environmental impacts." Ex. 3, FINDINGS STATEMENT, at 25.

127. NYSDEC also perfunctorily makes the finding required by ECL section 8-0109(8)—that "from among the reasonable alternatives," the Final Rulemaking and CAFO Permit Modification "minimize[] or avoid[] adverse environmental effects to the maximum extent practicable." Ex. 3, FINDINGS STATEMENT, at 26.

128. For all of the reasons above, these findings are belied by the facts in the record and are undermined by the shortcomings of NYSDEC's analysis, and the conclusions are not supported by any "reasoned elaboration." *Jackson*, 67 N.Y.2d at 417 (requiring reasoned elaboration of SEQRA determinations).

129. NYSDEC did not comply with the procedural and substantive requirements of SEQRA. Accordingly, the determination to deregulate dairy facilities with 200 to 299 mature cows was "made in violation of lawful procedure [and] was arbitrary and capricious [and] an abuse of discretion," and should be invalidated pursuant to CPLR § 7803(3).

FIFTH CAUSE OF ACTION:
NYSDEC's Decision to Rely on Discretionary Designation of Discharging Dairies (200-299) As Small CAFOs Does Not Meet Minimum CWA Requirements

130. Petitioners repeat and re-allege the allegations contained in paragraphs 1-129 above, and incorporate such allegations by reference as if fully set forth herein.

131. Section 402(b) of the CWA authorizes a state to "administer its own permit program for discharges into navigable waters within its jurisdiction." 33 USC § 1342(b).

132. CWA section 510 prohibits states that operate federally-delegated SPDES programs, such as New York State, from "adopt[ing] or enforc[ing] any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is ***less stringent than*** the effluent limitation, or other limitation, effluent standard,

prohibition, pretreatment standard, or standard of performance under [the CWA]." CWA § 510, 33 USC § 1370 (emphasis added); *Natural Res. Def. Council, Inc. v. EPA*, 859 F.2d 156, 186 (D.C. Cir. 1988); *see* 6 NYCRR §§ 750-1.11(5)(i)-(iii).

133. NYSDEC has duties under federal law to properly exercise control over activities required to be regulated under the CWA, to issue SPDES permits, to act on violations of permits or other program requirements, and to inspect and monitor activities subject to the CWA. CWA § 510, 33 USC § 1370; 40 CFR §§ 123.63(a)(2), (3) & (5).

134. New York State law requires "a written SPDES permit . . . to make or cause to make or use any . . . point source." ECL § 17-0701(1)(a). CAFOs are defined as point sources under New York State law. ECL § 17-0105(16); 6 NYCRR § 750-1.2(a)(65) ("Point source means any discernible, confined and discrete conveyance, including but not limited to any . . . concentrated animal feeding operation . . . from which pollutants are or may be discharged.").

135. Under the CWA and the federal CAFO regulations, 40 CFR §§ 122, 123, 412, a discharging facility qualifying numerically as a Medium CAFO (*i.e.*, an AFO with between 200 and 699 mature dairy cows) ***must*** be covered by a NPDES permit and ***is*** subject to enforcement, by operation of law. 40 CFR §§ 122.23(b)(6), (d)(1).

136. In contrast, under the Final Rulemaking and CAFO Permit Modification, if a dairy (200-299) is found to be discharging, NYSDEC has the discretion to allow the discharging dairy to continue operating without a permit and without regulatory oversight. At least twice in the FEIS, NYSDEC states that if it determines that a dairy (200-299) has discharged, it has the discretion to "designate" such "AFOs" as CAFOs. For example, NYSDEC claims, "[a]n AFO with 200-299 mature dairy cows found to be discharging ***can*** be designated as a Small CAFO and ***could*** be subject to enforcement actions." Ex. 2, FEIS, at 81 (emphases added); *see* Ex. 29, Response to Comments, at 34-35.

137. NYSDEC also concedes in the FEIS that a discharging dairy (200-299) would not be considered a CAFO required to obtain a permit unless designated:

> Because ~~C~~CAFOs between 200 and 299 mature dairy cows would no longer be required by permit (as they would no longer be considered a CAFO ***unless designated***) to spread manure in accordance with a CNMP, there is the potential for increased adverse environmental impacts from runoff caused by the unmanaged manure.

Ex. 2, FEIS, at 52-53, 58 (emphasis added) (strikethrough in original); *see* Ex. 4, CAFO Permit Modification, at 9.

138. NYSDEC states that it "may" designate a dairy (200-299) as a Small CAFO if it "determines" that the dairy "could cause a water quality impact." The factors NYSDEC would consider include the amount of wastes reaching waters of the state and the frequency of discharge. Ex. 3, FINDINGS STATEMENT, at 16; *see also* Ex. 4, CAFO Permit Modification, at 28. According to the CAFO Permit Modification, NYSDEC may designate an AFO as a Small CAFO upon assessing "the size of the AFO and the ***amount*** of waters reaching the State"; the "***means of conveyance*** of animal wastes and process waste waters into waters of the State"; and the factors "affecting the likelihood or ***frequency of discharge*** of animal wastes, manure and process waste waters into waters of the State." Ex. 4, CAFO Permit Modification, at app. A – Definitions, § K (emphasis added).

139. In other words, NYSDEC's Final Rulemaking and CAFO Permit Modificaiton require an additional, prerequisite step of "designating" discharging dairies (200-299) as CAFOs before they may be required to obtain a permit. Designation, which is discretionary, is based not only on the fact of a discharge, but also on the amount and frequency of discharge and the water quality impact. In contrast, under the federal CAFO program, a dairy with 200 to 299 cows that discharges ***any*** pollutants (regardless of amount or frequency of discharge) would be required to obtain a NPDES permit. *See* 33 USC §§ 1311(a), 1342(a) (requiring a permit for "the discharge

of ***any pollutant***") (emphasis added). The additional designation step weakens New York State's SPDES CAFO program, making it facially inconsistent with, and less stringent than, federal requirements.

140. Without NYSDEC staff available to seek out dischargers, or the requirement to implement a CNMP, NYSDEC will have no realistic way to identify dairies (200-299) that discharge or to verify that others are not discharging. NYSDEC admits that it will not be able to properly identify discharging dairies (200-299), because "staffing is limited, and staff will not be on the ground specifically searching to identify dischargers. Staff will respond to complaints and suspected violations if made aware of them, but likely will not be able to seek out and search for dischargers." Ex. 29, Response to Comments, at 35. NYSDEC confesses that "staffing in the CAFO program is limited, making it difficult to allocate resources necessary to identify discharges." Ex. 2, FEIS, at 119. It further admits that the "ability to track compliance by CAFOs of all sizes [depends on] specific permit requirements . . . . [T]he Department regularly inspects CAFOs with ECL permit coverage and mandates submittal of an Annual Report as part of tracking compliance with the ECL permit." *Id.* at 118.

141. Without required implementation of CNMPs, NYSDEC will also be less likely to identify discharging dairies (200-299) upon inspection. NYSDEC recognized prior to its rulemaking that in order to maintain their "non-discharging" status, dairy operations must "[c]ontinuously follow[] a nutrient management plan." Ex. 43, NYSDEC, *Medium CAFO Designations for Animal Feeding Operations (AFOs)*, at 6; Ex. 44, Jacqueline Lendrum, NYSDEC, *CAFO Compliance Success Story: Hudson Valley Foie Gras: NYWEA Clear Waters – Summer 2010* (asserting "[k]ey among the permit's many requirements is the development, implementation and maintenance of a current Comprehensive Nutrient Management Plan (CNMP) . . . .").

142. Consequently, deregulation of dairies (200-299) violates CWA section 510, which prohibits states from enacting less stringent regulations and SPDES program implementation than the federal NPDES program. NYSDEC's action violates its duty to properly exercise control over activities regulated under the CWA, and is contrary to ECL section 17–0701(1)(a), which requires permits for all CAFO point sources.

143. NYSDEC has also violated its own regulatory requirements. *See* 6 NYCRR §§ 750-1.11(a)(1) & (9) (requiring each issued SPDES permit to ensure compliance with CWA effluent limitations and the provisions of 40 CFR § 122.23 relating to CAFOs).

144. Petitioners are therefore entitled to judgment declaring that NYSDEC's Final Rulemaking deregulating dairies (200-299) in New York (1) were adopted in violation of the CWA and the ECL, (2) result in NYSDEC's failure to perform a mandatory duty, (3) are arbitrary and capricious, and (4) are without legal effect. CPLR §§ 7803(1)-(3).

* * *

WHEREFORE, Petitioners respectfully request that this Court enter judgment:

1. declaring that Respondents have acted arbitrarily, capriciously, and contrary to law by issuing a Final Rulemaking and CAFO Permit Modification that fail to conform to the requirements of federal and state law in the manner described herein;
2. annulling, voiding, and vacating the Final Rulemaking and CAFO Permit Modification;
3. requiring immediate withdrawal of the Final Rulemaking and resulting regulations from the New York Codes, Rules and Regulations;
4. directing the Respondents to issue immediately a press release notifying the public and the regulated community that the Final Rulemaking and CAFO Permit Modification have been vacated and are not in effect;

5. awarding Petitioners attorneys' fees and the costs and disbursements of this proceeding; and

6. granting such other and further relief as the Court deems just, proper and equitable.

Pace Environmental Litigation Clinic, Inc.

By: _____
Daniel E. Estrin
Meaghan A. Colligan, Legal Intern
Kimberly A. P. Cortes, Legal Intern
Nicole C. Sasaki, Legal Intern
78 North Broadway
White Plains, New York 10603
(914) 422-4343
destrin@law.pace.edu

Michael P. Dulong, Staff Attorney
Riverkeeper, Inc.
of counsel

Earthjustice

By: Eve Gartner (DE)
Eve C. Gartner
156 William Street, Suite 800
New York, New York 10038
(212) 791-1881
egartner@earthjustice.org

Dated: September 27, 2013
White Plains, New York

VERIFICATION

STATE OF NEW YORK)
: ss.
COUNTY OF WESTCHESTER)

Katherine Hudson, being duly sworn, deposes and says:

1. I am the Director of the New York City Watershed Program at Riverkeeper, Inc., one of the Petitioners-Plaintiffs in this hybrid Article 78 proceeding and declaratory judgment action.

2. I have read the foregoing amended petition, and can state that its factual contents are true based upon my personal knowledge, except as to matters alleged upon information and belief, which matters I believe to be true based on my review of pertinent documents and conversations with persons with personal knowledge.

Katherine Hudson

Sworn before me this
26th day of September, 2013

Notary Public

KARL S. COPLAN
Notary Public, State of New York
No. 02CO4928961
Qualified in Rockland County
Commission Expires Oct. 04, 2014