SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

RIVERKEEPER, INC.; CORTLAND-ONONDAGA FEDERATION OF KETTLE LAKE ASSOCIATIONS, INC.; SIERRA CLUB; THEODORE GORDON FLYFISHERS, INC.; and WATERKEEPER ALLIANCE, INC.,

Petitioners/Plaintiffs,

Index No: 902103-17

- v. -

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

Respondents/Defendants.

PETITIONERS'/PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF AMENDED PETITION & COMPLAINT

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TABLE OF CONTENTS

TABLE OF CONTENTS I

TABLE OF AUTHORITIES III

PRELIMINARY STATEMENT 1

STATEMENT OF FACTS 5

A. Industrial Dairy Manure Poses Severe Risks to Water and Health 6

B. Industrial Dairies Are Contaminating Water in New York State 10

LEGAL BACKGROUND 15

PROCEDURAL BACKGROUND 19

STANDARD OF REVIEW 20

ARGUMENT 22

POINT I: THE GENERAL PERMIT VIOLATES THE CWA BY FAILING TO REQUIRE MEANINGFUL DEC OVERSIGHT OF CAFO PERMITTING 24

A. The General Permit Does Not Require DEC To Review a CWA-Compliant NMP and NOI Before Granting Coverage Under the General Permit. 24

1. The General Permit does not require ANMPs to ensure compliance with all EPA-mandated effluent limitations. 25

2. The General Permit does not require ANMPs to include enforceable limits. 27

3. Even if the ANMP included enforceable limits covering all mandated areas, it lacks background information necessary to evaluate such limits. 29

4. DEC’s NOI also fails to comply with federal requirements. 30

B. Review of the CNMP by an AEM Planner Does Not Cure the Lack of DEC Oversight Required by the CWA. 31

C. The General Permit Fails To Require DEC To Oversee Proposed Revisions to a Permitted CAFO’s Operations. 33

POINT II: THE GENERAL PERMIT UNLAWFULLY RESTRICTS OPPORTUNITIES FOR PUBLIC PARTICIPATION IN THE CAFO PERMITTING PROCESS 36

A. The General Permit Does Not Allow the Public To Comment on a CWA-Compliant NMP Before Coverage Is Granted. 37

B. The General Permit Fails To Provide for Public Participation Before Authorizing a CAFO To Revise Its ANMP or CNMP, in Violation of Federal Law. 38

POINT III: THE GENERAL PERMIT'S REQUIREMENTS FOR CNMPS ALSO FAIL TO SATISFY FEDERAL LAW 41

CONCLUSION 47

TABLE OF AUTHORITIES

Page(s)

Cases

Board of Water Works Trustees of City of Des Moines, Iowa v. Sac County Board of Supervisors,
890 N.W.2d 50 (Iowa 2017) 10

Citizens Coal Council v. U.S. EPA,
447 F.3d 879 (6th Cir. 2006) 17

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29 N.Y.S.3d 444 (2d Dep't 2016) 22

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80 F. Supp. 3d 1180 (E.D. Wash. 2015) 6

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344 F.3d 832 (9th Cir. 2003) 38, 39

U.S. Environmental Protection Agency v. California ex. rel. State Water Resources Control Board,
426 U.S. 200 (1976) 19

Flanagan v. Prudential-Bache Securities,
67 N.Y.2d 500 (1986) 22

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25 N.Y.3d 373 (2015) 22, 39

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673 F.2d 400 (D.C. Cir. 1982) 17

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91 N.Y.2d 98 (1997) 22

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223 F. Supp. 2d 997 (S.D. Ind. 2002) 30, 35

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91 N.Y.2d 618 (1998) 22

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781 F.3d 281 (6th Cir. 2015) 18

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817 F.2d 1169 (5th Cir. 1987) 16

Waterkeeper Alliance v. U.S. Environmental Protection Agency,
399 F.3d 486 (2d Cir. 2005).......... *passim*

Statutes

33 U.S.C. § 314.......... 17

33 U.S.C. § 1251.......... 15, 16, 38

33 U.S.C. § 1311.......... 16

33 U.S.C. § 1342.......... 16, 19, 38

33 U.S.C. § 1362.......... 16

33 U.S.C. § 1365.......... 28

ECL §§ 17-0801 *et seq.* 16

ECL § 17-0801.......... 19

ECL § 17-0807.......... 19

ECL § 17-0809.......... 19

ECL § 17-0815.......... 19

Rules & Regulations

40 C.F.R. § 122.21 .... 19, 31, 32

40 C.F.R. § 122.23 .... *passim*

40 C.F.R. § 122.28 .... 18, 19, 31, 39

40 C.F.R. § 122.42 .... *passim*

40 C.F.R. § 122.44 17

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6 N.Y.C.R.R. § 656.1 16

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C.P.L.R. § 7803(3) 22

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PRELIMINARY STATEMENT

Petitioners/Plaintiffs Riverkeeper, Inc.; Cortland-Onondaga Federation of Kettle Lake Associations, Inc.; Sierra Club; Theodore Gordon Flyfishers, Inc.; and Waterkeeper Alliance, Inc. (collectively, "Petitioners") challenge the Clean Water Act General Permit ("General Permit")[1] recently issued by the New York State Department of Environmental Conservation ("DEC"). The General Permit covers the approximately 250 medium and large Concentrated Animal Feeding Operations ("CAFOs") in the State that have a history or likelihood of discharging animal waste into the State's waters. The Clean Water Act ("CWA") requires this group of CAFOs (but not the thousands of other dairies in the state[2]) to operate under site-specific "nutrient management plans" ("NMPs") for managing the vast quantities of animal waste they generate. To comply with the CWA and implementing regulations adopted by the United States Environmental Protection Agency ("EPA"), an NMP must contain enforceable safeguards against water pollution, be reviewed and approved by impartial state experts, and be available to the public, including nearby residents. As set forth in detail below, the General Permit challenged here does not comply with the CWA or EPA's implementing regulations.

A CAFO is an animal facility that confines hundreds or even thousands of animals—in New York, mostly dairy cows—for at least part of the year with food being brought in, since the

[1] A true and correct copy of the General Permit is annexed to the Affirmation of Eve C. Gartner, sworn March 27, 2017 ("Gartner Aff."), as Exhibit 1. Citations to the General Permit hereafter will not include a reference to the Gartner Affirmation.

[2] In addition to the ~250 dairies subject to the CWA, ~300 of the ~5,000 dairies in the state must operate under a New York Environmental Conservation Law permit. The remaining ~90% of New York's dairies are not regulated by DEC. *See* EPA Region 2, New York State Animal Agriculture Program Assessment (2015) ("EPA Animal Ag. Assessment"), Gartner Aff. Ex. 30, at 3.

cows are not grass-fed.[3] An average dairy cow produces approximately 120 pounds of manure a day; as a result, dairy CAFOs produce enormous volumes of animal sewage year-round. As DEC has acknowledged, each of these industrial-scale facilities has the "pollution potential of a major sewage treatment plant" serving a large city.[4] But unlike major sewage treatment plants, which decompose and often disinfect human waste so that the waste does not pollute waters, CAFOs usually hold animal sewage in huge pits and then, absent any significant prior treatment, spread the sewage onto fields.

Spreading animal sewage, or livestock manure, on fields to fertilize crops and improve soil quality has agricultural value if the waste is applied at appropriate times and rates. But it is well known among regulatory agencies that the amount of nutrients present in the manure generated at CAFOs often exceeds the ability of nearby crops to absorb them.[5] When CAFOs land-apply more nutrients—in the form of manure and other animal or food waste—than crops

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[3] A "concentrated animal feeding operation" ("CAFO") is an "animal feeding operation" ("AFO") surpassing certain size thresholds. *See* 40 C.F.R. § 122.23(b)(2). An AFO "means a lot or facility . . . where . . . (i) "[a]nimals (other than aquatic animals) have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period, and (ii) [c]rops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility." *Id.* § 122.23(b)(1).

Under federal law governing dairy CAFOs, a "Large CAFO" houses 700 or more mature dairy cows; a "Medium CAFO" houses 200 to 699 mature dairy cows. 40 C.F.R. § 122.23(b)(4) & (6).

[4] DEC, Final Phase I Nutrient and Sediment Water Quality Improvement and Protection Plan at 18 (2010), http://www.dec.ny.gov/docs/water_pdf/finalphaseiwip.pdf.

[5] National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations (CAFOs) ("EPA 2003 CAFO Rule"), 68 Fed. Reg. 7,176, 7,180-81 (Feb. 12, 2003).

can use,[6] some of the excess can leach into groundwater or, because there are usually no impervious barriers between fields and watercourses, wash off the fields into nearby lakes, rivers, and streams.[7] Nitrates from excess waste can migrate into well water, leading to the potential for "blue baby syndrome," a life-threatening condition that affects infants.[8] In addition to causing nutrient pollution, this waste introduces antibiotics, hormones, pesticides, pathogens, and other dangerous and environmentally destructive contaminants into aquatic ecosystems, thus threatening drinking water sources and areas valuable for recreation.[9]

The CWA regulates how CAFOs manage animal sewage because, if this sewage is not carefully stored,[10] transported, and land-applied at appropriate times and in appropriate quantities, the vast amounts of manure generated by CAFOs will contaminate nearby surface and ground waters used for drinking or recreation, causing serious harm to human health and the environment. In addition to requiring the permitting authority to oversee a CAFO's NMP (its site-specific, enforceable plan for managing sewage to avoid water pollution), the CWA requires that the public—including neighbors, local government officials, and nearby tribes—be offered

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[6] A study presented to DEC, and submitted to this Court in a prior proceeding, demonstrates that, based on upstate land's ability to absorb nutrients in the manure, there is, in many counties, limited additional land capacity on which to spread more manure without increasing the risk of runoff. Michael D. Smolen, Lithochimeia, Inc., Analysis of the Impact of Proposed Changes to New York CAFO Rules 6 NYCRR Parts 360 and 750 at 22–24 (2013), *available at* https://www.riverkeeper.org/wp-content/uploads/2013/01/Appendix-A-Lithochimeia-Report.pdf.

[7] EPA 2003 CAFO Rule, 68 Fed. Reg. at, 7,180–81.

[8] DEC, Final Environmental Impact Statement, Dairy Industry Rulemaking Proposed Action, State Pollutant Discharge Elimination System (SPDES) Permits for Concentrated Animal Feeding Operations (CAFOs), Land Application & Anaerobic Digesters (2013) ("Dairy FEIS"), Gartner Aff. Ex. 3, at 56–57.

[9] EPA 2003 CAFO Rule, 68 Fed. Reg. at, 7,180–81.

[10] If improperly managed, excess manure can cause storage pits to overflow. *Id.* at 7,181.

an opportunity to review and comment on the NMP, both when it is first developed and when it is substantially modified.

EPA has repeatedly[11] notified DEC that the general permit that has been in effect since 2009, as well as the General Permit at issue here, are insufficient under the CWA, "particularly with respect to transparency, state oversight, and opportunities for public participation."[12] DEC was advised by EPA of these deficiencies in early 2015,[13] again during the public review and comment period on the draft General Permit,[14] and finally on March 10, 2017, over a month after the General Permit was issued.[15]

Despite this, and despite the serious history of CAFO contamination of New York waters (*see infra* Statement of Facts), DEC issued the General Permit without correcting many of its deficiencies. The General Permit falls short of the fundamental requirements of the Clean Water Act because it:

- fails to require impartial DEC experts to receive, review, or approve a CAFO's NMP to ensure it will prevent water pollution;
- denies access to the NMP to elected officials and other members of the public, including neighbors whose waters and health could be harmed by pathogens and other elements in animal waste;
- fails to require NMPs to effectively address potential discharges from many facets of CAFO operations, such as manure storage, "mortality" management, manure spreading, or food processing waste disposal, and

[11] *See* EPA Animal Ag. Assessment, Gartner Aff. Ex. 30, at 32; EPA Comments on Draft Permit (undated), Gartner Aff. Ex. 29; Letter from Alyssa Arcaya, EPA, to Jacqueline Lendrum, DEC (Mar. 10, 2017) ("EPA Mar. 2017 Comment Letter"), Gartner Aff. Ex. 32, at 1.

[12] Letter from Alyssa Arcaya, EPA, to Jacqueline Lendrum, DEC (Mar. 10, 2017) ("EPA Mar. 2017 Comment Letter"), Gartner Aff. Ex. 32, at 1.

[13] *See* EPA Animal Ag. Assessment, Gartner Aff. Ex. 30, at 32.

[14] *See* EPA Comments on Draft Permit, Gartner Aff. Ex. 29, at Attachment I.

[15] *See* EPA Mar. 2017 Comment Letter, Gartner Aff. Ex. 32, at 1.

- does not require NMPs to include enforceable site-specific restrictions.

The result is a permit that fails to ensure that manure is kept out of surface waters. The General Permit thus violates the CWA and the N.Y. Environmental Conservation Law ("ECL").

STATEMENT OF FACTS

The approximately 250 CAFOs covered by the General Permit produce prodigious amounts of waste. An average dairy cow produces over 120 pounds of manure per day, and the average large New York dairy CAFO, which confines approximately 950 cows,[16] produces over 110,000 pounds of animal waste per day. By contrast, according to one EPA estimate, the average household of four people produces about one pound of sewage waste per day.[17] Thus, the waste from *just one* of the smallest of the CAFOs covered by the General Permit (with 200 cows) is comparable to that from a city of 96,000—or about the same amount of sewage as produced by Albany's estimated 2016 population of 98,000.

The Administrative Record demonstrates major shortcomings in how this vast amount of sewage has been managed under the CWA general permit for CAFOs that has been in effect in New York since 2009. These shortcomings, coupled with major gaps in DEC's oversight of CAFOs' sewage management, has serious ramifications for the health of New York's residents, the vitality of ecosystems that provide wildlife habitat and places to fish and recreate, and the

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[16] In 2010, there were 245 dairy CAFOs in New York State with over 500 cows each. *See* Wayne A. Knoblauch et al., *Dairy--Farm Management*, *in* Cornell Univ., New York Economic Handbook 2012, Gartner Aff. Ex. 2, at tbl. 7-3 (based on data from New York Dairy Farm Business Summary and Analysis Project). These facilities house, on average, 950 cows. *Id.* at (Table 7-3 (totaling the number of cows and dividing by number of facilities of this size).

[17] EPA, Fact Sheet: Sewage Sludge Use and Disposal Rule (40 CFR Part 503) (1992), https://nepis.epa.gov/Exe/ZyPDF.cgi/20003HMM.PDF?Dockey=20003HMM.PDF.

health of our economy, especially for municipalities and towns that struggle to provide residents with safe drinking water.

A. Industrial Dairy Manure Poses Severe Risks to Water and Health

DEC itself has admitted that when animal sewage from industrial dairies is discharged into water, it can result in substantial harm because it:

- "migrates rapidly through aquifers and can contaminate public and private drinking water wells, and can impact public drinking water wells or multiple residential wells;"
- "is a source of pathogens, which . . . can cause gastrointestinal infections and other serious illnesses;"
- "can cause algal blooms, including growth of 'blue green algae,' a 'cyanobacteria' which can cause nausea, vomiting, diarrhea, skin and throat irritation, allergic reactions or breathing difficulties in exposed people;" and
- "is frequently the cause of fish kills."[18]

The Administrative Record here confirms that animal sewage-contaminated waters threaten human health and the environment.[19] According to the comments of the New York State Conference of Environmental Health Directors ("State Environmental Health Directors" or "NYSCEHD"), when public water supplies are contaminated by manure, it presents a long-term risk of "significant illness" in the community, as "[s]ome of the pathogens in manure can survive in the environment for months."[20] When private wells are contaminated, "[o]ften the tap water is

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[18] *See* DEC, State Environmental Quality Review (SEQR) Findings Statement (Mar. 29, 2013) ("Findings Statement"), Gartner Aff. Ex. 4, at 9–11; *see generally Cmty. Assn. for Restoration of the Envt., Inc. v. Cow Palace, LLC*, 80 F. Supp. 3d 1180, 1187–89 (E.D. Wash. 2015) (describing how manure from dairy CAFOs can contaminate drinking water wells).

[19] For the convenience of the Court, Petitioners are appending to this memorandum of law an Addendum which includes comments and documents submitted to DEC during the comment period for the draft General Permit, as well as documents referenced in the General Permit.

[20] Letter from Eileen O'Connor, Chair, Conference of Environmental Health Directors, to Douglas Ashline, DEC at 1 (Jan. 15, 2016) ("NYSCEHD Comments"), annexed hereto as Attachment A. The

brown with a strong manure odor, making the water unusable for any purposes."[21] In addition, the State Environmental Health Directors reminded DEC that, when manure pollutes surface water during the winter and spring, it contributes to development of toxic blue-green algae blooms in the summer. When manure contaminates the source water for drinking water systems, it has to be more aggressively disinfected, using more chemicals, which results in higher levels of disinfection by-products.[22] Citing to the New York State Department of Health, the NYSCEHD explained that elevated disinfection by-products are associated with an increased risk for certain types of cancers, low birth weights, miscarriages and birth defects.[23] It further noted that, while the full public health implications of toxins released by blue-green algae are not known, during the summer of 2014, the City of Toledo, Ohio ordered residents not to use public water to drink, cook, or bathe for almost three days due to a blue-green algae bloom.[24]

NYSCEHD is open to senior level staff with direct responsibility for administration of environmental health services in: the 36 county health departments with environmental health programs; the New York City Division of Environmental Health, and the 9 district offices of the New York State Health Department. *See Who We Are*, NYS Conference of Envtl. Health Directors, http://www.nyscehd.org/downloads/who-we-are (last visited Apr. 4, 2017).

[21] *Id.*

[22] *See id.* Blue-green algae and disinfection by-products are also discussed in the Recommendation Report of the Advisory Committee to the Cayuga County Manure Management Working Group, which was formed in response to multiple serious manure runoff incidents in Cayuga County. *See* Cayuga County Manure Mgmt. Working Grp., Recommendation Report of the Advisory Committee at 2 (2015), *attached to* Letter from Kathleen Cuddy, Cayuga County Health Dept. & Eileen O'Connor, Envtl. Health Division, to Douglas Ashline, DEC ("Cayuga County Health Dept. Comments") (Feb. 2, 2016), annexed hereto as Attachment B.

[23] NYSCEHD Comments at 2.

[24] *Id.*; Carolyn L. McCarthy et al., *Community Needs Assessment After Microcystin Toxin Contamination of a Municipal Water Supply – Lucas County, Ohio, September 2014*, 65 Morbidity & Mortality Weekly Report 925 (2016), https://www.cdc.gov/mmwr/volumes/65/wr/mm6535a1.htm.

Environmental pollution from industrial dairies also undermines quality of life because it impairs air quality and recreational waters in addition to drinking water, often imposing economic burdens on downstream communities. For example, sewage lagoons and manure spread on fields produce large amounts of noxious fumes such as ammonia and hydrogen sulfide and nuisance odors.[25] While the thrust of DEC's response to comments submitted on the General Permit is that the permitting system is well run and effective,[26] the comments from individuals and communities urging DEC to strongly and effectively prevent manure from contaminating their drinking water, recreational waters, and air tell a different story of real personal and economic impacts:

- "We must drink bottled water and cannot swim in Silver Lake [Wyoming County]."[27]
- "I had to put in a purification system for my water because it had e-coli in it."[28]
- "I am a physician residing on the shore of Owasco Lake. . . . We are avid "lake people" who enjoy swimming and boating. We have noticed a rapid, substantial degradation of the quality of the lake water for years and the pace of degradation has been exponentially increasing. . . . I did not swim from shore all last summer. There have been algal blooms like we have never seen. The water is malodorous and has a bad taste."[29]
- "The past few years we have noticed a great reduction of days we are able to even use the lake for recreational activities due to the contamination of the water . . . . Our

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[25] Animal feeding operations are the largest source of toxic ammonia and hydrogen sulfide emissions in the U.S. *See* EPA, *Non-Water Quality Impact Estimates for Animal Feeding Operations* (2002), at 2-30–2-31; D. Bruce Harris et al., *Ammonia Emissions Factors from Swine Finishing Operations*, *from* 10th Annual Emission Inventory Conference (2001), at 1; U.S. Dep't of Health & Human Servs., Agency for Toxic Substances & Disease Registry, *Toxicological Profile for Hydrogen Sulfide* (2006), ch. 3 at 26–53, 58–60, 62.

[26] *See, e.g.*, DEC Responsiveness Summary, Gartner Aff. Ex. 28, at 74–75, 77.

[27] Comment of Carolyn Lee, *attached to* Letter from Earthjustice to Basil Seggos, Comm'r, DEC at 2 (Feb. 12, 2016), which is annexed hereto as Attachment C.

[28] Comment of Maggie Kilbride, Attachment C at 2.

[29] Email from Brian S. Brundage, Attachment D.

property values have plummeted due to the water quality issue. We do not wish to take away anyone's livelihood, but business must be conducted in a way that is not damaging the environment and the property of others."[30]

- "On some days I now find myself cho[]king, from breathing the air where I live!!! I have watched as all the streams around me have become unrecognizable from pollution, or diversion, or gone dry . . . . In the interest of maintaining a good relationship with my neighbors I have kept quiet . . . [i]n hopes that environmentally responsible practices would be mandated by agencies like the DEC."[31]

In addition, when CAFO pollution enters source waters for drinking water supplies, the downstream drinking water provider must treat the water to ensure it meets federal and state safety standards. The economic burden of detoxifying drinking water that has been contaminated by industrial dairy waste is borne by municipalities and passed on to the taxpayers. For example, the City of Auburn's Director of Municipal Utilities noted that the likely $15 million cost for proposed upgrades to its drinking water plant is "a big, big number to have to try and absorb, even if you are a large public utility, which we are not. That's a huge cost."[32] *Cf. Bd. of Water Works Trustees of City of Des Moines, Iowa v. Sac County Bd. of Supervisors*, 890 N.W.2d 50, 54 (Iowa 2017) (stating that the Des Moines Water Works spends approximately $4,000-$7,000 per day to treat water contaminated by agricultural pollution, and that the Water Works will need to invest $260 million to design and construct a larger treatment facility before 2020 to ensure that water remains safe for human consumption).

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[30] Email from Russell & Lisa Germond, to Douglas Ashline, DEC (Jan. 31, 2016), annexed hereto as Attachment E.

[31] Email from Robert Duckett, to Douglas Ashline, DEC (Feb. 5, 2016), annexed hereto as Attachment F.

[32] Gwendolyn Craig, *Proposed Auburn Algae Toxin Treatments Could Cost up to $15 Million*, Auburn Citizen, Feb. 1, 2017, http://auburnpub.com/news/local/proposed-auburn-algae-toxin-treatments-could-cost-up-to-million/article_213fc29e-cc4d-5762-8a36-9c6bbec357a3.html.

B. Industrial Dairies Are Contaminating Water in New York State

Respondent DEC is well aware that discharges from industrial dairy facilities have polluted water, including drinking water, in New York for years.[33] For example, during the spring of 2014, DEC investigated at least forty incidents of surface and/or ground water contamination resulting from industrial dairies applying manure and other waste to frozen, snow-covered ground during the winter months, purportedly as fertilizer.[34] In one incident, a discharge from a DEC-regulated large CAFO caused a 25-by-75 feet plume of liquid manure to enter Lake Owasco, a water body that provides drinking water for 44,000 residents in Central Cayuga County, New York.[35] Also in 2014, DEC fined a Genesee County dairy for contaminating six residential wells with E. coli.[36] Additional manure spreading-related water contamination incidents occurred in the spring of 2015 and again in February 2017.[37] Documents received from DEC through public records requests, and submitted into the record during the comment period

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[33] In 2013, DEC confirmed that "numerous private and public drinking water wells around the state . . . have been impacted by nutrients [from CAFOs] that are not properly managed." Dairy FEIS, Gartner Aff. Ex. 3, at 62.

[34] *See* DEC, Partial Response to FOIL Requests 14-1526 and 14-1658 (July 8, 2014), Summary of New York State Contamination Incidents Related to CAFOs in Winter and Spring of 2014, Gartner Aff. Ex. 5.

[35] *See* Carrie Chantler, *Owasco Lake Advocates Decry Runoff of Manure into Water*, Auburn Citizen, Apr. 6, 2014, http://auburnpub.com/news/local/owasco-lake-advocates-decry-runoff-of-manure-intowater/article_498bd2fe-a7ec-5994-b4ed-005111da2e89.html, Gartner Aff. Ex. 7.

[36] Nancy Sanders, *Dairy Farm Fined for Manure Contamination in March*, WIBV, Oct. 8, 2014, http://wivb.com/2014/10/08/dairy-farm-fined-for-manure-contamination-in-march, Gartner Aff. Ex. 9; *see also* Steve Orr, *NY, Genesee Officials Probe Water Contamination*, Democrat & Chronicle, Mar. 19, 2014, http://www.democratandchronicle.com/story/news/2014/03/19/genesee-county-water-contamination/6612105/, Gartner Aff. Ex. 10.

[37] *See* Summary of DEC Winter and Spring 2015 Pollutant Discharge Incident Investigations, Gartner Aff. Ex. 6; *cf. N.Y. Farms Warned to Halt Land Applications Due to Melting*, Dairy Herd Management, Mar. 25, 2015, http://www.dairyherd.com/news/ny-farms-warned-halt-land-applications-due-melting, Gartner Aff. Ex. 8; Matt Weinstein, *DEC: Manure Runoff Affecting Cayuga Lake*, Ithaca Journal, Feb. 20, 2017, http://www.ithacajournal.com/story/news/local/2017/02/20/dec-manure-runoff-impacting-cayuga-lake/98152244/.

on the draft General Permit, reveal more incidents of well water contamination in New York from CAFO waste over the last few years.[38] This pollution has even forced people to move from their homes: the State Environmental Health Directors advised DEC that "[m]any residents [of New York] have had to find alternative accommodations during a period of time following [a manure] runoff event."[39]

Many of the comments submitted to DEC on the draft General Permit confirm that industrial dairies are polluting New York's water, including drinking water, taking a serious health toll in some regions of the state. Several governmental bodies from Cayuga County, which has been especially hard hit by industrial dairy pollution, submitted urgent comments alerting DEC to the impact of dairies on the County's water. The Cayuga County Health Department told DEC: "It is essential that action be taken now to reverse the increased impairment of Cayuga County's water resources."[40] The Health Department reported serious health problems associated with blue-green algae blooms in the source water of the City of Auburn's drinking water system, which provides water to over half of the county's residents. It further noted that blue-green algae had been identified in local lakes; as a result, in 2015 alone

[38] It is impossible to know how many private wells in New York have high nitrate levels, because they are not regularly tested. However, a 1997 study of 419 wells in New York State that provided drinking water to New York farms found detectable levels of nitrates in 95% of tested wells and levels above 10 milligrams per liter ("mg/L") (the federal drinking water standard) in 15.7% of tested wells. Kitty H. Gelberg et al., *Nitrate Levels in Drinking Water in Rural New York State*, 80 Envt'l Res. Sec. A 34 (1997), Gartner Aff. Ex 11, at 35.

[39] NYSCEHD Comments, Attachment A, at 1. Contamination of drinking water wells by industrial dairies is not unique to New York. A *New York Times* report revealed a town in Wisconsin, in which more than 100 wells were polluted by waste from dairies within a few months. Charles Duhigg, *Health Ills Abound as Farm Runoff Fouls Wells*, N.Y. Times, Sept. 17, 2009, http://www.nytimes.com/2009/09/18/us/18dairy.html?pagewanted=1&_r=0, Gartner Aff. Ex 12.

[40] Cayuga County Health Dept. Comments, Attachment B, at 1.

the Health Department closed multiple bathing beaches on several occasions and issued warnings to the public to avoid contact with lake water.[41]

The Cayuga County Legislature, as well as the Cayuga County Town of Fleming and City of Auburn, all adopted similar resolutions concerning the draft General Permit, predicated on the fact that water quality in Cayuga County has declined in recent years, due at least in part to agricultural activities. These resolutions, which incorporated comments prepared by the Cayuga County Water Quality Management Agency, explained that the manner in which the CAFO General Permit regulates manure-handling activities "will have [long-term] implications for the water quality of Cayuga County's water resources."[42] The resolutions conclude with the warning that the draft General Permit does not include the provisions needed to turn the tide on dairy pollution and that, absent significant changes to the draft General Permit, the lack of adequate regulation of industrial dairies "will result in continued degradation of our water resources."[43] The City of Auburn, in its resolution, notified DEC that "the permits, as currently drafted, will not be acceptable for the protection of Owasco Lake . . . ."[44]

Unfortunately, due to DEC's failure to heed this warning, just this past fall noticeable levels of microcystins (a toxin which is released from blue-green algae) were found in the City of

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[41] *Id.*

[42] Cayuga County, Resolution No. 37-16 (adopted Jan. 26, 2016), *attached to* Letter from Keith Batman, Chairman, Cayuga County Legislature, to Douglas Ashline, DEC (Jan. 28, 2016), annexed hereto as Attachment G; *see also* City of Auburn, Council Resolution No. 23 of 2016 (adopted Feb. 4, 2016), annexed hereto as Attachment H; Town of Fleming, Resolution No. 1 of 2016 (adopted Feb. 8, 2016), *attached to* Letter from Gary B. Searing, Town Supervisor, Town of Fleming, to Douglas Ashline, DEC (Feb. 9, 2016), annexed hereto as Attachment I.

[43] Cayuga County, Resolution No. 37-16; City of Auburn, Resolution No. 23 of 2016; Town of Fleming, Resolution No. 1 of 2016.

[44] City of Auburn, Resolution No. 23 of 2016.

Auburn's treated drinking water. A few days earlier, the same toxin was found in the Town of Owasco's water filtration plant. This is the first time these toxins have been detected in tap water in New York State. As a result, "water treatment [p]lant operators in both Auburn and the town of Owasco are hoping to upgrade their facilities with [one or more upgrades] in time for next year's blue-green algae season."[45] Just two months ago, the State committed over $2 million of public funds, which will partially pay for necessary improvements to the water systems in Owasco and Auburn.[46]

Water contamination from industrial dairies is not confined to Cayuga County. The NYSCEHD advised DEC that between 2010 and 2013, "manure runoff contaminated both groundwater and surface water in Cayuga, Clinton, Genesee, Livingston, Madison, and Onondaga [C]ounties," and that during the winter and spring of 2014, "at least 21 counties throughout New York State" suffered "multiple occurrences of both groundwater and surface water contamination *from manure runoff*."[47] The Onondaga County Council on Environmental Health advised DEC that it had recently investigated three local manure runoff events and knew of a "significant number" of other manure runoff events in central and western New York.[48]

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[45] Gwendolyn Craig, *Auburn and Owasco Water Plants Consider Blue-Green Algae Toxin Treatments*, Auburn Citizen, Dec. 26, 2016, http://auburnpub.com/news/local/auburn-and-owasco-water-plants-consider-blue-green-algae-toxin/article_52551e8d-96dc-5c61-8cd0-581d0c609bf0.html

[46] *See* Gov. Andrew M. Cuomo, Press Release: Governor Cuomo Announces More Than $2 Million to Upgrade Drinking Water Systems in Auburn and Owasco (Jan. 16, 2016), https://www.governor.ny.gov/news/governor-cuomo-announces-more-2-million-upgrade-drinking-water-systems-auburn-and-owasco.

[47] NYSCEHD Comments, Attachment A at 1.

[48] Letter from Barbara S. Rivette, Chairman, Onondaga County Health Dept., to Douglas Ashline, DEC (Feb. 10, 2016) ("Onondaga County Council on Environmental Health Comments"), Gartner Aff. Ex. 22, at 1. *See also* Letter from Linda Wagner, Exec. Dir., County Health Officials of N.Y., to Douglas

Individuals living in the vicinity of industrial dairies see first-hand how manure mismanagement at industrial-scale dairies leads to runoff. For example, a commenter from near Perry City (in Wyoming County) reported to DEC:

> Directly behind my property is a 200 acre field farmed by . . . a large CAFO [which] spreads slurry (liquidfied [sic] manure) without care, without concern of or by neighbors . . . . The land slopes down so that this slurry run[s] into the streams: it is seldom plowed in. There was, at one time, habitats [sic] in the stream that runs through my property. Now, because of this run off, little exists here. . . . [It] is 'dumped' rather than spread. It appears that there is a need to get rid of excess. This farm has over 3000 cows. Health risks exist for both human and animals.[49]

Moreover, multiple commenters indicated that industrial dairies are discharging pollution even when following their operation plans for preventing discharge, strongly suggesting that the process for developing such plans is flawed. For example, the Owasco Lake Watershed Management Council, Inc. explained that "farms following comprehensive nutrient management plans prepared by certified planners have experienced significant runoff."[50]

Ashline, DEC (Feb. 5, 2016) ("Local health officials can cite several instances where manure run-off has contaminated ground and surface water over the past several years."), annexed hereto as Attachment J.

[49] Email from Debra Reid to Douglas Ashline, DEC (Feb. 12, 2016), annexed hereto as Attachment K. Another commenter reported:

> We have property on Deans Pond in Cortland County and our enjoyment of having waterfront property has been stolen from us. Deans Pond is downstream from a CAFO; the only obvious source of the excess nitrogen and phosphorous found and measured and reported through the CLASP program . . . . Last year Deans Pond was the first body of water in upstate New York to report and have confirmed a Harmful Algae Bloom . . . essentially robbing from us our use and enjoyment of our waterfront property . . . . Our property values have fallen with the rise of the Algae Blooms but our property taxes have risen!

Comment of David Nacy Snutes, annexed hereto as Attachment L.

[50] Letter from Michael Didio, Chairman, Owasco Lake Watershed Mgmt. Council, to Douglas Ashline, DEC (Jan. 26, 2016) ("OLWMC Comments"), Gartner Aff. Ex. 26, at ¶ 3; *see also* Letter from George C. Kelley, Pres., N.Y.S. Fed'n of Kettle Lake Assocs., Inc., to Douglas Ashline, DEC (Dec. 31, 2015), Gartner Aff. Ex. 25, at 4 (noting a 2015 Onondaga County incident in which a CAFO was found to have

LEGAL BACKGROUND

Congress enacted the CWA in an effort "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The Act protects surface waters that supply drinking water, support fish and wildlife, and provide aesthetic and recreational opportunities. One of the key goals of the CWA is to eliminate discharges of pollution into these waters. *See id.* § 1251(a)(1).[51] Toward that end, the Act establishes the National Pollutant Discharge Elimination System ("NPDES"), which is managed by EPA in partnership with delegated state environmental agencies, including DEC. *See id.* § 1342; ECL §§ 17-0801 *et seq*.

The crux of the NPDES is that known or likely water polluters must operate under permits that establish enforceable limits on discharges of pollutants into waters. 33 U.S.C. § 1342(a)(1) & (2). Congress explicitly included CAFOs among the entities subject to NPDES permitting requirements. *Id.* § 1362(14). The enforceable limits in NPDES permits are called "effluent limitations." *Id.* § 1311(e); *Sierra Club v. Shell Oil Co*., 817 F.2d 1169, 1173 (5th Cir. 1987) (defining effluent limits as the "actual restrictions on discharges"). As the Second Circuit has explained, effluent limitations are of critical importance in the NPDES framework. *See Waterkeeper Alliance v. U.S. EPA*, 399 F.3d 486, 491–92 (2d Cir. 2005).

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caused a violation of water quality standards despite being in compliance with its comprehensive nutrient management plan).

[51] A "discharge" is the "addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12). "Pollutant" is defined to include, among many other contaminants, sewage, sewage sludge, industrial and agricultural waste. *Id.* § 1362(6). A "point source" is "any discernible, confined, and discrete conveyance, including but not limited to any . . . [CAFO] . . . from which pollutants are or may be discharged." *Id.* § 1362(14).

Effluent limitations may be expressed as either numeric limits—which, for example, set out the maximum concentration of a pollutant permitted to be discharged, *see e.g.*, 40 C.F.R. § 133.102(b)(1) (providing that the 30-day average of suspended solids in wastewater treatment plant effluent "shall not exceed" 30 milligrams per liter)—or as narrative limits prescribing certain outcomes, *see e.g.*, 6 N.Y.C.R.R. § 656.1 (requiring "[r]emoval of substantially all floating and settleable solids which are readily visible and attributable to sewage"); *id.* § 703.2 (requiring "[n]o [turbidity] increase that will cause a substantial visible contrast to natural conditions").

Narrative effluent limitations can also set out required practices, or "best management practices," particularly when dealing with "runoff, spillage or leaks." 33 U.S.C. § 314(e); *see also* 40 C.F.R. § 122.44(k). CAFO permits, including the General Permit here, rely largely on narrative best management practice effluent limitations because, unlike other CWA-regulated industrial facilities from which waste is usually discharged from easily identifiable pipes, CAFO discharges tend to result from the "land application" of animal sewage (often at a location removed from where livestock are stabled or confined) and the storage of the waste prior to land application. The fact that effluent limitations in CAFO permits are "narrative," not "numeric," does not undercut the fact that they must be clear and enforceable.[52]

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[52] Several federal courts of appeal have approved EPA's construction that effluent limitations are not limited to numeric discharges. *E.g.*, *Citizens Coal Council v. U.S. EPA*, 447 F.3d 879, 895 (6th Cir. 2006) (en banc) (upholding EPA's interpretation that "effluent limitations are not limited to numeric discharges but encompass 'any restriction' on discharges"); *Waterkeeper*, 399 F.3d at 502 ("[R]ather than setting forth *numerical* effluent limitations for land application of manure, the [EPA 2003] CAFO Rule establishes *non-numerical* effluent limitations in the form of best management practices." (emphases in original)); *see also Natural Resources Defense Council, Inc. v. U.S. EPA*, 673 F.2d 400, 403 (D.C. Cir. 1982).

To ensure that NPDES permits for CAFOs effectively address the potential for nutrient pollution from animal waste, EPA requires any CWA permit issued to a CAFO to "include a requirement to implement a nutrient management plan that, at a minimum, contains best management practices" addressing nine (or, at times, more) specific activities to ensure that animal sewage is stored, transported, applied, injected, and disposed of in a manner that prevents runoff into surface water and leaching into ground water (which can be hydrologically connected to surface water). 40 C.F.R. § 122.42(e)(1). Such NMPs must include "applicable effluent limitations and standards." *Id.*

For some types of dischargers, EPA allows the use of "general permits" that establish a common set of effluent limitations and other permit conditions that will apply to a potentially large number of "substantially similar" operations with the "same types" of waste and that "[r]equire the same effluent limitations [and] operating conditions" *See id.* § 122.28(a). While covering many facilities, these general permits must be as specific and enforceable as individual permits. *Sierra Club v. ICG Hazard, LLC*, 781 F.3d 281, 288 (6th Cir. 2015) ("[A] general permit is identical to an individual permit regarding effluent limitation[s], water quality standards, monitoring and sampling requirements, and enforceability."); *see also* 40 C.F.R. § 122.28(a)(4)(i).

EPA has adopted regulations that harmonize the use of *general* permits under the NPDES with the requirement that NPDES permits for CAFOs include *site-specific* NMPs. *See* 40 C.F.R. § 122.23(h) (specific procedures for CAFOs seeking coverage under a general permit). These regulations require each CAFO to adapt the generally applicable requirements set forth in 40 C.F.R. § 122.42(e) to that CAFO's particular characteristics, resulting in the development of an

NMP that satisfies EPA-mandated minimum requirements and imposes site-specific effluent limitations to address the aspects of the CAFO's operations that present the greatest risks of water pollution. *See id.* § 122.23(h)(1); *id.* § 122.42(e)(1)–(2) (requirement that NMPs be "site-specific"). To obtain coverage under a general permit, the CAFO then submits its NMP to the permitting agency, as part of a notice of intent ("NOI"). *See id.* §§ 122.21(i)(1), 122.23(h)(1). The permitting agency must at this time "make available for public review and comment the [NOI] submitted by the CAFO, including the CAFO's [NMP]," and afford the public an opportunity to request a hearing. *Id.* § 122.23(h)(1).

If, after the agency reviews the NOI, the NOI is approved, the NMP's site-specific effluent limitations are incorporated into the CAFO's NPDES permit and are subject to enforcement by the permitting authority and private citizens. *See EPA v. California ex. rel. State Water Resources Control Bd.*, 426 U.S. 200, 205 (1976) ("An NPDES permit serves to transform generally applicable effluent limitations and other standards including those based on water quality into the obligations . . . of the individual discharger.").

EPA has the authority to delegate to a state the authority to administer the NPDES. 33 U.S.C. § 1342(b). Every delegated program must meet general system requirements established by EPA. 40 C.F.R. §§ 122.28, 123.25(a)(11). EPA has delegated to DEC the authority to administer the NPDES in the State of New York. 6 N.Y.C.R.R. § 750-1.1(a). DEC's permitting program, the State Pollutant Discharge Elimination System ("SPDES"), must "meet all applicable requirements" of the CWA and all "rules, regulations, guidelines, criteria, standards

and limitations adopted pursuant thereto." ECL § 17-0801.[53] This expressly includes federal provisions specific to CAFOs. 6 N.Y.C.R.R. § 750-1.11(a)(3), (9) (SPDES permits shall ensure compliance with 40 C.F.R. § 122.23 and the effluent limitations of 40 C.F.R. part 412).

This case concerns the CWA CAFO General Permit issued by DEC under its delegated authority to implement the NPDES program in New York in conformity with the CWA and EPA regulations.

PROCEDURAL BACKGROUND

On December 23, 2015, DEC published in the New York Environmental Notice Bulletin ("ENB") a draft General Permit for CAFOs subject to the CWA, Permit No. GP-0-16-002.[54] The current CWA CAFO General Permit, which will remain in effect until July 24, 2017 (or longer if the Court agrees that the General Permit under review is not lawful), expired on June 30, 2009, and has been "administratively continued" since then.[55]

During the 34 business-day comment period for the draft General Permit,[56] governmental entities, tribes, and organizations submitted over 50 sets of comments to DEC. In addition,

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[53] *See also, e.g.*, *id.* § 17-0807(4) (prohibiting all discharges not permitted by the CWA); *id.* § 17-0809(1) (providing that SPDES permits shall include all "applicable effluent limitations as required by the [CWA]"); *id.* § 17-0815(7)–(8) (providing that SPDES permits shall include any other requirements applicable under the Act); *cf.* 33 U.S.C. § 1342(b)(1).

[54] A copy of this permit is attached to the Gartner Affirmation as Exhibit 21.

[55] EPA Mar. 2017 Comment Letter, Gartner Aff. Ex. 32, at 1. A copy of the current CWA CAFO General Permit is attached to the Gartner Affirmation as Exhibit 20.

[56] Several commenters complained about the short time period for review, which spanned the Christmas and New Years holidays, undermining the ability of many affected communities to organize and prepare comments on the draft General Permit. *See e.g.*, Letter from Hilary Lambert, Pres., Finger Lakes Regional Watershed Alliance, to Douglas Ashline, DEC (Feb. 12, 2016), annexed hereto as Attachment M ("express[ing] dismay that the overly-brief public comment period for these highly influential permits took place over the year-end holiday period"); Cayuga County, Resolution No. 37-16, Attachment G, ¶ 1; Letter from Cassandra Archer, M.D., Pres., Cayuga County Bd. of Health, to Douglas Ashline, DEC at ¶

approximately 5,000 individuals submitted comments, many expressing their personal experience with CAFO-caused water pollution.[57] Most of the comments were highly critical of the draft General Permit and urged stricter controls. As discussed further below, EPA raised concerns about the draft General Permit's inconsistency with federal regulations, emphasizing inadequate state oversight and opportunities for public participation.[58]

On January 25, 2017, DEC published a Notice of Issuance in the DEC Environmental Notice Bulletin announcing that it had finalized the General Permit.[59]

On March 10, 2017, EPA again wrote to DEC to advise that many revisions, "particularly with respect to transparency, state oversight, and opportunities for public participation," were still needed to "ensure consistency with federal regulations." To our knowledge, DEC has not modified the General Permit since March 10, 2017 to address EPA's ongoing concerns.

On March 27, 2017, Petitioners filed a timely Notice of Petition, challenging the legality of the General Permit.

STANDARD OF REVIEW

Petitioners argue that the General Permit violates federal and state law. Thus, the Court must decide whether the decision by DEC to adopt the General Permit "was made in violation of

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1 (Jan. 28, 2016) ("Cayuga County Bd. of Health Comments"), annexed hereto as Attachment N; OLWMC Comments, Gartner Aff. Ex. 26, at ¶ 1.

[57] All of the comments submitted are available at this link prepared by DEC: ftp://ftp.dec.ny.gov/dow/CAFO/CommentsReceivedOn2015Permits/. A copy of DEC's response to comments is attached to the Gartner Affirmation as Exhibit 28.

[58] EPA's comments on the Draft Permit are attached to the Gartner Affirmation as Exhibit 29.

[59] DEC, *Notice of Issuance—Renewal of State Pollutant Discharge Elimination System (SPDES) Concentrated Animal Feeding Operations (CAFO) General Permits*, ENB—Statewide Notices 1/25/2017, http://www.dec.ny.gov/enb/20170125_not0.html (last accessed Mar. 27, 2017), Gartner Aff. Ex. 31.

lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion." C.P.L.R. § 7803(3); *see Matter of Civ. Serv. Empls. Assn., Inc. v. Westchester County Health Care Corp.*, 29 N.Y.S.3d 444, 446 (2d Dep't 2016) (petitioners met their burden of proving "error of law" where challenged resolution was not authorized by Public Authorities Law).

Unlike in standard administrative review cases, no deference to DEC is warranted in this case for three reasons. First, federal law controls whether DEC's General Permit reflects an error of law. According to the New York Court of Appeals, because "DEC operates the SPDES program as EPA's NPDES delegee, [it] is bound to follow EPA's interpretation of the CWA." *Matter of Natural Res. Def. Council, Inc. v. DEC*, 25 N.Y.3d 373, 395 n.16 (2015); *see also Seittelman v. Sabol*, 91 N.Y.2d 618, 625 (1998) ("We decline to adopt the State's interpretation of the Federal statute.").

Second, where, as here, federal courts are in agreement about the proper interpretation of a federal statute, state courts should not adopt contrary interpretations. *Cf. Flanagan v. Prudential-Bache Sec.*, 67 N.Y.2d 500, 506 (1986) (The Court of Appeals is "bound to apply [federal] statute . . . in accordance with the rule established by lower Federal courts if they are in agreement."). There is no disagreement among federal courts regarding the issues here.

Third, where the text of a statute is clear and unambiguous, as it is here with respect to the requirements of the Clean Water Act, courts must give effect to the plain meaning of the statute, not a contrary agency interpretation. *See, e.g.*, *Seittelman v. Sabol*, 91 N.Y.2d at 625–26 (where question is one of pure statutory reading and analysis, there is "little basis to rely on any special competence or expertise of the administrative agency"); *Matter of Raritan Dev. Corp. v.*

Silva, 91 N.Y.2d 98, 100, 107 (1997) (applying the "long-established rule" that a court must give effect to the plain meaning of words used in a statute, rather than a contrary agency interpretation). Accordingly, no deference to DEC's interpretation of the CWA or its implementing regulations is warranted here.

ARGUMENT

The General Permit fails to meet central requirements of the CWA and its implementing regulations and, therefore, is invalid. EPA rules direct that a CAFO may not obtain coverage under a CWA general permit *unless* the CAFO submits a site-specific, enforceable NMP—establishing how the CAFO will handle its animal sewage to prevent water pollution—to the permitting agency for review and approval, and the permitting agency makes the proposed NMP available to the public for comment.

Instead of following EPA's clear instructions, the General Permit establishes a highly unusual,[60] highly complex, and wholly inadequate permitting structure. The General Permit directs CAFOs to engage an Agricultural Environmental Management Certified Planner ("AEM Planner") to "develop[] or review[]" and certify a "comprehensive" NMP ("CNMP") which is kept at the CAFO.[61] General Permit, § III.D. DEC experts do not see a CAFO's CNMP *unless* an inspector goes to the CAFO and asks to review it. The public is never able to see a CNMP. *Id.* § V.D, F.[62] In addition to the CNMP, the General Permit requires each CAFO to prepare an

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[60] Petitioners have found no other state that has created a general permit with a two-part NMP.

[61] The certification must state that the CNMP complies with "all applicable [U.S. Dept. of Agriculture Natural Resources Conservation Service] Conservation Practice Standards" and the General Permit. *Id.* It does *not* require AEM Planners to certify that the permit complies with EPA regulations.

[62] As EPA has repeatedly explained to DEC, in order for the CNMP to constitute a CWA-complaint NMP, the entirety of the CNMP must be submitted to the permitting authority and made available for

"annual" NMP ("ANMP"), *id.* § IV.F, an informational summary document that DEC describes as an "outline" of the CNMP. DEC, Fact Sheet for CWA SPDES General Permit for CAFOs, Permit No. GP-0-16-002 at 4(2017) ("The ANMP provides an outline of the farm-specific effluent limitations . . . ."), annexed hereto as Attachment O; *see also* General Permit App'x C. To obtain coverage under the General Permit, a CAFO must submit to DEC a completed DEC-specific "NOI" form ("DEC CAFO NOI")[63] that does not meet federal requirements, *see infra* Argument Point I.A.4, and an ANMP.

The General Permit's unnecessarily complex system cannot mask its utter failure to meet the fundamental oversight, public participation, and enforceability requirements of the CWA.[64] DEC's issuance of the General Permit constitutes an "error of law" because it: (1) fails to require DEC review and approval of a CWA-compliant NMP and NOI before granting coverage to a CAFO; (2) provides no opportunity for the public to review and comment on a CWA-compliant NMP; and (3) does not require CNMPs to contain enforceable, site-specific restrictions covering the full range of a CAFO's operations that are at high risk for polluting water.

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public review and comment. *See* EPA Animal Ag. Assessment, Gartner Aff. Ex. 30, at 32; EPA Comments on Draft Permit, Gartner Aff. Ex. 29, at Comment 105 (p.31).

[63] *See* DEC, Instructions for How To Complete the Notice of Intent (2017) ("DEC CAFO NOI"), Gartner Aff. Ex. 33.

[64] *See* EPA Comments on Draft Permit, Gartner Aff. 29, at Comment 1 (preface) ("The distinction between ANMP and CNMP should be avoided, as all NMP requirements must be contained in one publicly available document.").

POINT I: THE GENERAL PERMIT VIOLATES THE CWA BY FAILING TO REQUIRE MEANINGFUL DEC OVERSIGHT OF CAFO PERMITTING

A. The General Permit Does Not Require DEC To Review a CWA-Compliant NMP and NOI Before Granting Coverage Under the General Permit.

Under EPA regulations, a permitting authority may not authorize a CAFO's coverage under a general permit without first reviewing the CAFO's NOI and NMP. *See* 40 C.F.R. § 122.23(h)(1); *see also supra* Legal Background. The review of the NMP allows the agency to assess whether the CAFO's NMP is sufficient to prevent discharges of animal sewage. 40 C.F.R. § 122.23(h)(1). The permitting authority must assess whether a CAFO's "site-specific" NMP, *id.* § 122.42(e)(5), contains "at a minimum, . . . best management practices necessary to meet the [nine specific requirements set forth in the regulations]" for preventing discharges from CAFOs. 40 C.F.R. § 122.42(e)(1). Large CAFOs, including those with at least 700 mature cows, must also comply with the best management practices in 40 C.F.R. § 412.4. 40 C.F.R. § 122.42(e)(1). The "best management practices" in an NMP constitute that CAFO's site-specific effluent limitations. *Id.* § 122.23(h)(1) ("[T]he terms of the [NMP] shall become incorporated as terms and conditions of the permit . . . ."); *Waterkeeper*, 399 F.3d at 501, 502, 524 (invalidating portions of the EPA 2003 CAFO Rule because it would have "allow[ed] permitting authorities to issue permits without reviewing the terms of [CAFOs' NMPs]" and, therefore, "[did] not ensure that [regulated] CAFOs will, in fact, develop [NMPs] … that comply with applicable effluent limitations and standards"). Thus, to meet federal requirements, a CAFO's NMP must, at a minimum, contain all EPA-mandated minimum requirements *and* these requirements must be set forth in enforceable terms that constitute actual restrictions. *See* 40 C.F.R. § 122.42(e)(1).

Under the scheme established by the General Permit, the only documents DEC need

review before granting coverage to a CAFO are the CAFO's ANMP and the DEC CAFO NOI. *See* General Permit § II.A. But, as explained below (and as EPA repeatedly emphasized to DEC), an ANMP is not a CWA-compliant NMP.[65] Accordingly, as also explained below, when DEC decides whether to grant coverage, it has not reviewed a CWA-compliant NMP and, indeed, does not even know first-hand if one was developed. The DEC CAFO NOI also does not collect certain data required by federal law, thereby compounding DEC's failure to perform an adequate review before granting CAFOs coverage under the General Permit. This fundamental breach in oversight violates the CWA. 40 C.F.R. § 122.23(h)(1).

1. The General Permit does not require ANMPs to ensure compliance with all EPA-mandated effluent limitations.

The General Permit defines an ANMP as "the document containing the critical information of the . . . CNMP." General Permit App'x A.J. It directs CAFOs to follow a template form, which is found at Appendix C to the General Permit, in preparing ANMPs. *Id.* § II.A. The ANMP template calls only for: a statement of the maximum number of each type of animal planned to be confined, maps and/or descriptions of the facility, and descriptions of the management practices to be employed. *See id.* App'x C.

The management practices that Appendix C directs CAFOs to describe in their ANMPs do not include several of EPA's minimum requirements for NMPs. For instance, under the CWA, an NMP must contain effluent limitations to:

- "Ensure adequate storage of . . . litter[] and process wastewater . . .;"

[65] *See* EPA Comments on Draft Permit, Comment 1 (preface) ("[T]he ANMP does not contain all of the elements of the required NMP . . . ."); *id.* Comment 83 (p. 23) ("[T]he ANMP does not contain the [CNMP] requirements.").

- "Prevent direct contact of confined animals with waters of the United States;" and
- "Ensure that chemicals and other contaminants handled on-site are not disposed of in any manure, litter, process wastewater, or stormwater storage or treatment system unless specifically designed to treat such chemicals and other contaminants."

See 40 C.F.R. § 122.42(e)(1)(i), (iv), (v). In addition, NMPs for Large CAFOs must include an effluent limitation that requires the operator to "periodically inspect equipment used for land application of manure, litter, or process wastewater." *Id.* § 412.4(c)(4). But the General Permit does not require an ANMP to include any information or description (let alone actual restrictions) addressing how CAFOs will achieve those mandatory protections. *See* General Permit App'x C. On this basis alone, an ANMP does not constitute a CWA-compliant NMP.

In addition to simply omitting these mandated effluent limitations, ANMPs give such short shrift to several other minimum federal requirements for NMPs that they offer no meaningful information to the permitting authority (or the public). For instance, 40 C.F.R. § 122.42(e)(1)(i) requires NMPs to contain enforceable site-specific effluent limitations to "ensure adequate storage of manure . . . ." However, the ANMP template calls only for maps showing the "existing and planned locations" of manure storage facilities. General Permit App'x C sec. II.[66] A CAFO cannot guarantee adequate manure storage capacity merely by identifying a storage facility's location.

Thus, ANMPs are not required to include many of the effluent limitations mandated for "NMPs" by federal law.

[66] At the planner's discretion, an ANMP may substitute a "comprehensive description" of storage facilities for a facility map. *Id*.

2. The General Permit does not require ANMPs to include enforceable limits.

Even if an ANMP touched on descriptions or information addressing all the minimum requirements under federal law, which it does not, it still would not constitute a CWA-compliant NMP because the General Permit does not require ANMPs to contain *enforceable* limitations for those minimum requirements. The data points and descriptions in an ANMP, as called for by the template set out at Appendix C to the General Permit, are not enforceable restrictions on the discharge of pollutants. For example, in contrast to federal regulations requiring an NMP to include effluent limitations addressing how manure will be land applied to prevent discharge, *see* 40 C.F.R. § 122.42(e)(1)(viii), the General Permit merely requires an ANMP to contain a "comprehensive description" of "manure *recommendations*." General Permit App'x C sec. IV (emphasis added). A description of "manure recommendations" need not identify the specific best management practices required to comply with federal law. Neither DEC nor citizens can bring enforcement actions against CAFOs that deviate from the "manure *recommendations*" that are "descri[bed]" in their ANMPs, resulting in the pollution of nearby waters.[67] *See also* General Permit App'x C sec. IV (requirement that CAFOs describe "chemical fertilizer recommendations" in an ANMP).

Likewise, in contrast to federal regulations that require an NMP to contain effluent limitations ensuring proper management of "mortalities" (*i.e.*, dead animals), *see* 40 C.F.R. § 122.42(e)(1)(ii), the General Permit merely requires an ANMP to include a map showing the location of "[m]ortality management facilities, if utilized." General Permit App'x C sec. II. This

[67] Citizens can bring civil actions to enforce the Clean Water Act, but enforcement actions against permit-holders are limited to alleged violations of "effluent standard[s] or limitation[s]." 33 U.S.C. § 1365(a)(1).

provision does not require proper mortality management. If poor management of decomposing animals results in water contamination, neither DEC nor citizens could bring an enforcement action, because the map included in a CAFO's ANMP does not impose requirements for proper mortality management.

Another example is manure applications on land. Federal law requires permits issued to CAFOs to include an effluent limitation that "[e]stablishes protocols to land apply manure" and other animal waste "in accordance with site specific . . . practices that *ensure* appropriate agricultural utilization of the nutrients in manure." 40 C.F.R. 122.42(e)(1)(viii) (emphasis added). In contrast, the ANMP template in Appendix C requires only descriptions of planned crops and yields and manure application rates and timing. General Permit App'x C sec. IV. These "descriptions" need not explain the ability of crops to absorb the nutrients in the waste applied. In any case, mere descriptions of these items, even if they are "comprehensive," do not constitute "protocols" that can "ensure" appropriate uptake of pollutants in manure, because descriptions are not enforceable.

The structure of the General Permit underscores that DEC never intended the ANMP to constitute an NMP within the meaning of the CWA. The provisions relevant to the ANMP are in the General Permit section entitled "Monitoring, Reporting, and Retention of Records"—not in the General Permit section identifying practices to prevent discharge. *See id.* § IV.F. Because the information that must be included in an ANMP does not equate to enforceable site-specific effluent limitations, ANMPs do not satisfy federal standards for NMPs. *Cf. Save the Valley, Inc. v. U.S. EPA*, 223 F. Supp. 2d 997, 1009 (S.D. Ind. 2002) ("[I]t is not clear that the permits actually implemented any effluent limitations. Thus it is not clear that they were 'equivalent' to

NPDES permits.")

3. <u>Even if the ANMP included enforceable limits covering all mandated areas, it lacks background information necessary to evaluate such limits.</u>

Even if the General Permit could somehow be construed as requiring an ANMP to develop enforceable restrictions covering all CWA-mandated aspects of a CAFO's operations, the General Permit still does not require the level of DEC oversight required by the CWA. When EPA adopted 40 C.F.R. § 122.23(h)(1), it explained that an agency cannot effectively review the mandated NMP unless the NMP includes the background information necessary to understand and evaluate the effluent limitations and standards, such as the historic crop yield data used to calculate appropriate rates of application. *See* Revised National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines for CAFOs in Response to the Waterkeeper Decision ("EPA 2008 CAFO Rule"), 73 Fed. Reg. 70,418, 70,444 (Nov. 20, 2008), codified at 40 C.F.R. parts 9, 122, 412, Gartner Aff. Ex. 34; *see also Waterkeeper*, 399 F.3d 500–02 (agency must obtain full understanding of a CAFO's "specific situation" to ensure that proposed waste application rates are appropriate and facility has not "propos[ed] a set of minimum measures for itself that would reduce discharges by far less than the maximum extent practicable."), citing *Envtl. Defense Center, Inc. v. U.S. EPA*, 344 F.3d 832, 856 (9th Cir. 2003).

In adopting the EPA 2008 CAFO Rule, EPA further explained that an NMP that satisfies the CWA is a "comprehensive … tool[] used to guide a wide range of practices regarding nutrient production, storage, and use." EPA 2008 CAFO Rule, 73 Fed. Reg. at 70,443. Only by reviewing such a comprehensive tool can a permitting authority like DEC "ensure that the [NMPs] designed by the [regulated] CAFOs will *in fact* reduce land application discharges."

Waterkeeper, 399 F.3d at 500 (quoting 40 C.F.R. § 412.4(c)(1)) (emphasis in original). But the ANMP does not contain the required comprehensive information DEC needs, and the CWA requires, for DEC to conduct a meaningful review of the permit application. *See* EPA Comments on Draft Permit, Gartner Aff. Ex. 29, at Comment 83 (p.23) ("[T]he ANMP does not contain the comprehensive NMP requirements.").

4. DEC's NOI also fails to comply with federal requirements.

Pursuant to EPA regulations, DEC has developed an NOI form for CAFOs to complete and submit with their ANMP when applying for coverage under the General Permit. *See* DEC CAFO NOI, Gartner Aff. Ex. 33. The DEC CAFO NOI, however, fails to comply with federal mandates. CAFO NOIs must meet the requirements set forth in 40 C.F.R. § 122.21. *See* 40 C.F.R. § 122.28(b)(2). The DEC CAFO NOI, even when read in conjunction with the ANMP, does not ask CAFOs seeking coverage to supply all of the information that EPA requires. *Compare* 40 C.F.R. § 122.21(i)(1)(iv), (vi), (viii)–(x) *and* 40 C.F.R. § 122.21(f)(5) & (6), *with* DEC CAFO NOI, Gartner Aff. Ex. 33 *and* General Permit App'x C.

First, neither the DEC CAFO NOI nor the ANMP contemplated by the General Permit demand the required estimations of the "amounts of manure, litter, and process wastewater" 1) "generated per year" and 2) "transferred to other persons per year." *See* 40 C.F.R. § 122.21(i)(1)(viii)–(ix). Second, federal law also requires that an applicant's NOI provide "[t]he type of containment and storage (anaerobic lagoon, roofed storage shed, storage ponds, underfloor pits, above ground storage tanks, below ground storage tanks, concrete pad, impervious soil pad, other) and total capacity for manure, litter, and process wastewater storage." *Id.* § 122.21(i)(1)(vi). Yet the DEC CAFO NOI requests only the location, dimensions,

construction materials, and capacity of "*waste storage* structures *over 10,000 gallons*" (emphases added). DEC CAFO NOI, Gartner Aff. Ex. 33, at sec. VI. Third, although the ANMP requires the submission of facility and field maps, neither the DEC CAFO NOI nor the ANMP requires the submission of a topographic map meeting the requirements of 40 C.F.R. § 122.21(f)(7) and/or § 122.21(i)(1)(iv). Finally, the DEC CAFO NOI and ANMP fail to comply with 40 C.F.R. § 122.21(f)(5) and (6), which require an indication of whether the facility is located on Indian lands and a "listing of all permits or construction approvals received or applied for" under a number of federal programs.

* * *

Because the General Permit does not require ANMPs to include either enforceable site-specific restrictions covering any of CAFOs' high-risk-for-discharge operations or sufficient background information, it does not qualify as a CWA-compliant NMP. And because the deficient ANMP is the only animal sewage-related plan that the General Permit requires DEC to review before deciding whether to grant a CAFO coverage under the General Permit, along with a legally deficient NOI, DEC's hands-off approach to oversight of industrial dairy CAFOs violates 40 C.F.R. § 122.23(h)(1).

B. Review of the CNMP by an AEM Planner Does Not Cure the Lack of DEC Oversight Required by the CWA.

DEC may argue that the oversight of a CAFO's NMP mandated by the CWA is satisfied by the AEM Planner's review and certification of the CNMP. *See* discussion *supra* note 61. Such an argument would fail. First, the General Permit does not require a CAFO to develop a CWA-compliant NMP at all. *See supra* Argument Point I.A.1–3; *infra* Argument Point III.

Even if, however, the CNMP were construed to be CWA-compliant, review of the CNMP by an AEM Planner cannot satisfy the CWA's mandate that the *permitting authority* review and approve an NMP before granting coverage.

First, in devising 40 C.F.R. § 122.23(h)(1)**,** EPA *rejected* the suggestion that it allow certified planners to "review and certify NMPs coupled with appropriate public agency oversight." *See* 2008 CAFO Rule, 73 Fed. Reg. at 70,440. EPA explained that while state permitting authorities could seek *advice or assistance* from certified nutrient management planners, ultimately "[t]he permitting authority is responsible for reviewing NMPs and for ensuring that the terms of the NMP meet the applicable requirements of the NPDES process." In sum, DEC adopted an approach that EPA explicitly rejected as insufficient.

Second, EPA's concern is amplified here where certified planners may have conflicts of interest that prevent unbiased review of whether a CNMP complies with the CWA. The General Permit provides that a certified planner could face criminal charges and civil fines if the General Permit's requirements are not "strictly adhere[d]" to. *See* General Permit §§ V.B., V.G.3.[68] The prospect of such penalties creates an incentive for planners to prioritize ease of compliance over protecting water. Thus, independent DEC review of the sufficiency of a CAFO's CNMP is essential to ensure that potential conflicts of interest have not influenced the terms of a CNMP. *See, e.g.*, Cayuga County Bd. of Health Comments, Attachment N, at ¶ 3 ("Adequate review of .

[68] Several CAFO industry representatives raised objections about subjecting AEM planners to such severe penalties. *See* Comment of McClelland Ag. at 3 (undated and unsigned comment to DEC available on DEC's website found in note 57) (DEC's permit scheme "place[s] [AEM-certified planners] in a difficult position" by casting them as "pseudo-regulator[s]"), annexed hereto as Attachment P; Letter from Brian Boerman et al., Agricultural Consulting Services, to Douglas Ashline, DEC, at 7(Feb. 10, 2016), annexed hereto as Attachment Q.

. . [CNMPs] and oversight of certified planners are currently lacking in the draft permits. In the past, farms following comprehensive nutrient management plans prepared by certified planners have experienced significant runoff. Plans, once they are created, do not receive a rigorous review by an objective third party and planners have been shown to be inattentive to important specific details on the farm resulting in significant problems.").

Third, the signed agreement between EPA and New York State for DEC to implement the CWA in New York allows DEC to delegate its duties exclusively to *personnel*. *See* Memorandum of Agreement Between the Chairman of the New York State Board on Electric Generation Siting and the Environment and the Environmental Protection Agency Region II (Oct. 28, 1975), Gartner Aff. Ex. 19, at 8.[69] DEC's sub-delegation of its oversight duties to certified planners who are not DEC personnel constitutes an impermissible violation of DEC's agreement with EPA. *See Save the Valley*, 223 F. Supp. 2d at 1014 (state must comply with terms of its agreement with EPA authorizing state to administer the NPDES program).

Thus, even if a CNMP were construed to constitute a CWA-compliant NMP, the General Permit would be invalid for failing to require DEC review and approval of the CNMP prior to granting approval for coverage under it.

C. The General Permit Fails To Require DEC To Oversee Proposed Revisions to a Permitted CAFO's Operations.

Even if the General Permit required sufficient DEC oversight of a CAFO's sewage

[69] The delegation initially covered only NPDES permits for electric generating facilities, but was subsequently amended to include the State's General Permit program. *See* Amendment to the National Pollutant Discharge Elimination System Memorandum of Agreement Between the New York State Department of Environmental Conservation and the U.S. Environmental Protection Agency, Region II Relating to General Permits (Oct. 15, 1992), Gartner Aff. Ex. 19.

management plan when the CAFO first sought coverage, which it does not, the General Permit still would violate the CWA because it fails to require DEC to conduct the EPA-mandated review and approval *before* authorizing a CAFO to revise its ANMP or CNMP. Because a CAFO's desired modifications could bring the CAFO out of compliance with federal law, EPA regulations require the permitting authority to review all proposed revisions to an NMP. 40 C.F.R. § 122.42(e)(6)(ii); *see also* EPA 2008 CAFO Rule, 73 Fed. Reg. at 70,453–54, Gartner Aff. Ex. 34 (Because the NMP contains "enforceable terms and conditions of the permit" and modifications "can directly (and measurably) alter the outcome . . . and the efficacy of that plan," "CAFOs must submit changes to the NMP to the permitting authority and receive approval before a change is made."). A CAFO may not proceed with the revisions unless and until it receives notification from the permitting authority that it may do so. 40 C.F.R. § 122.42(e)(6).

The General Permit, however, fails to require the mandated prior review and approval for changes to either the CNMP or ANMP. The General Permit does not require prior DEC *approval* of any changes to the CNMP. *See* General Permit § III.E.[70] Even prior *notice* to DEC is limited to a handful of changes the General Permit categorizes as "major." *See id.* § II.B (requiring prior notice for certain changes); *id.* § III.E.2 (setting forth DEC's determination of what constitutes "major changes."). In most cases, the General Permit requires only that changes be noted in the CNMP (the only copy of which is kept at the CAFO) and in a subsequent annual

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[70] Although it would not be a sufficient substitute for required DEC approval, *see* 40 C.F.R. § 122.42(e)(6); EPA 2008 CAFO Rule, 73 Fed. Reg. at 70,453–54, the General Permit does not even require a certified planner to approve any changes to the CNMP. Rather, the General Permit requires only that limited specified "major changes" be made in the CNMP "under the direction of" a certified planner, and, that all other changes be noted in the annual compliance report "as applicable." General Permit § III.E.

compliance report.[71] General Permit § III.E.4.

The General Permit also fails to call for prior DEC review and approval for most changes to an ANMP. The General Permit requires *prior* DEC approval only for the narrow set of changes that the General Permit defines as "significant." *Id.* § IV.F. And while all proposed changes to an ANMP must first be approved by a certified planner, *see id.*, such review is not a sufficient substitute for the DEC review required by 40 C.F.R. § 122.42(e)(6). *See supra* Argument Point I.B.

DEC's lax approach to reviewing CNMP/ANMP modifications was explicitly considered and rejected by EPA. When EPA proposed the rule codified as 40 C.F.R. § 122.42(e)(6), commenters requested, *inter alia*, that a CAFO be allowed to implement changes it deemed non-substantial while the permitting authority reviewed those changes and that any changes implemented during a given year be reported annually. *See* 2008 EPA CAFO Rule, 73 Fed. Reg. at 70,454. EPA rejected both suggestions, explaining that "the process and criteria in 40 C.F.R. § 122.42(e)(6) are reasonable and necessary" to comply with federal law, emphasizing that CAFOs must submit proposed changes "to the permitting authority and receive approval before a change is made, not annually." *Id.*

Accordingly, as EPA has repeatedly highlighted to DEC,[72] the General Permit's failure to

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[71] One of the "major changes" under the General Permit is an increase in the number of animals of 20 percent or more. *Id.* § II.B.2. As the Cayuga County Board of Health noted in comments to the DEC, "[f]or a farm with 1000 cows, which is a medium sized operation in Cayuga County, an operator would not need to notify []DEC if they added 199 cows, which is equivalent to 24,000 pounds of manure a day. This large increased quantity of manure generated certainly needs to be accounted for [by notifying DEC]." Cayuga County Bd. of Health Comments, Attachment N, at ¶ 9.

[72] *See* EPA Comments on Draft Permit, Comment 71 (p.20); *id.*, Comment 84 (p.24); EPA Mar. 2017 Comment Letter, App'x A ("Neither the permit not fact sheet clarify how members of the public will be notified about proposed NMP changes."); *id.*, Comment A3 on Final Permit (p.21).

require DEC review and approval of all changes to either the ANMP or the CNMP before they are implemented is an error of law. This error requires invalidation of the General Permit.

POINT II: THE GENERAL PERMIT UNLAWFULLY RESTRICTS OPPORTUNITIES FOR PUBLIC PARTICIPATION IN THE CAFO PERMITTING PROCESS

The General Permit's limited provision for public participation defies the CWA's emphasis on public involvement. As the Act itself proclaims, "[p]ublic participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this chapter *shall be provided for, encouraged, and assisted* by the Administrator and the States." 33 U.S.C. § 1251(e) (emphasis added); *see also Envtl. Defense Center*, 344 F.3d at 856 ("Congress identified public participation rights as a critical means of advancing the goals of the Clean Water Act in its primary statement of the Act's approach and philosophy."). The Act requires that "[a] copy of each permit application and each [CWA] permit . . . shall be available to the public," 33 U.S.C. § 1342(j), and the public must be afforded an "opportunity for public hearing" prior to the issuance of any Clean Water permit. *See* 33 U.S.C. § 1342(a)(1), (b)(3).

EPA's concern about the secrecy of many aspects of DEC's regulation of CAFOs was brought to DEC's attention in a written assessment of whether the New York animal agriculture program is consistent with CWA requirements. *See* EPA Animal Ag. Assessment, Gartner Aff. Ex. 30, at 1. In its report, EPA explained that "CNMPs are the foundation of New York State's regulatory program designed to control potential water pollution from CAFOs." *Id.* at 2, 20. EPA rebuked DEC over its "confidential treatment of CAFO CNMPs," which it described as "not consistent with the 40 C.F.R. § 122.23(h) federal CAFO requirement, which requires [DEC] review of the CAFO's NMP and an adequate opportunity for public review of both a CAFO's NMP and the terms of the NMP incorporated into the draft permit." *Id.* at 32; *see also id.* at 47, 55. EPA concluded that "New York State's position of not requiring [DEC] review and public notice of CAFO CNMPs . . . is not in accordance with the federal CAFO requirements." *Id.* at 32.

A. The General Permit Does Not Allow the Public To Comment on a CWA-Compliant NMP Before Coverage Is Granted.

To implement the CWA's call for robust public participation, EPA's CAFO regulations mandate multiple opportunities for public review and comment. *See* 40 C.F.R. § 122.23(h)(1). Under these regulations, whenever a CAFO seeks coverage under a general permit and the permitting agency proposes to grant coverage to the CAFO, the agency must "make available for public review and comment the [NOI] submitted by the CAFO*, including the CAFO's [NMP]*," and afford the public an opportunity to request a hearing. *Id.* § 122.23(h)(1) (emphasis added).[73]

As explained above, however, the General Permit does not require CAFOs to submit a CWA-compliant NMP. Instead, CAFOs need only submit an NOI and ANMP, General Permit § II.A, both of which fail to satisfy federal requirements. *See supra* Argument Point I.A. Because only the deficient NOI and ANMP are made available for public review and comment, the

[73] EPA's clear public participation requirement when a CAFO seeks coverage under a general permit stands in stark contrast to the regulatory framework for general permits covering municipal separate storm sewer systems ("MS4s"), the legality of which was considered by the Court of Appeals in *Matter of Natural Resources Defense Council, Inc. v. New York State Department of Environmental Conservation* ("*NRDC*"), 25 N.Y.3d 373 (2015). At the time that case was decided, the Ninth Circuit had remanded federal regulations governing small MS4 general permits to EPA to remedy deficiencies regarding public participation and agency review of NOIs, but EPA had not yet revised the pertinent regulations. *See Envtl. Defense Center*, 344 F.3d at 879. In the absence of clear federal requirements mandating greater permitting authority review and public participation, the Court deferred to DEC's determination that the General Permit was adequate despite only limited provisions for agency review and public participation. *NRDC*, 25 N.Y.3d at 394-97 ("Unless and until EPA revises its 1999 regulations, DEC's SPDES general permitting program for small MS4s . . . need not go beyond the specifications of those regulations unless New York law requires it to do so."). Following the Court of Appeals' decision, EPA issued revisions to its federal stormwater regulations governing small MS4 general permits, which mandate greater agency review and opportunities for public participation in the context of MS4 permitting. *See* 40 C.F.R. § 122.28(d); National Pollutant Discharge Elimination System (NPDES) Municipal Separate Storm Sewer System General Permit Remand Rule, 81 Fed. Reg. 89,320 (Dec. 9, 2016). *NRDC* is not controlling here because in enacting 40 C.F.R. § 122.23(h), EPA squarely found that "a second round of public notice and comment *is* necessary when providing coverage for *CAFOs* under a general permit." 2008 EPA CAFO Rule, 73 Fed. Reg. at 70,439 (emphasis added).

General Permit fails to comply with 40 C.F.R. § 122.23(h)(1). As a result, the General Permit "deprives the public of its right to assist in the 'development, revision, and enforcement of ... [an] effluent limitation'" and "impermissibly compromises the public's ability to bring citizen-suits," in violation of the Clean Water Act. *Waterkeeper*, 399 F.3d at 503 (quoting 33 U.S.C. § 1251(e)).

B. The General Permit Fails To Provide for Public Participation Before Authorizing a CAFO To Revise Its ANMP or CNMP, in Violation of Federal Law.

Even if either the ANMP or the CNMP somehow sufficed as a CWA-compliant NMP (which they do not), the General Permit would still be invalid because it omits federally mandated requirements for public participation before the permitting authority may authorize a CAFO to revise its NMP. Under EPA regulations, if the permitting authority determines that the CAFO has proposed "substantial changes" to its NMP, the agency must affirmatively seek public comment and entertain requests for a public hearing. 40 C.F.R. § 122.42(e)(6)(iii). Even if the permitting authority deems proposed changes "not substantial," it still must inform the public and "must make" the proposed changes publicly available. *Id*. § 122.42(e)(6)(ii). EPA defines "substantial changes" broadly, with a focus on changes to manure application practices that increase the risk of runoff and "nitrogen and phosphorous transport to waters of the U.S." *See id.* § 122.42(e)(6)(iii); *see also* EPA Comments on Draft Permit, Comment 84 (p.24) [74]

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[74] Under EPA's regulations, "substantial changes" to an NMP, include:

> (1) "[a]ddition of new land application areas not previously included in the CAFO's [NMP]," (with a few exceptions);
>
> (2) "changes to the field-specific maximum annual rates for land application";

The General Permit flagrantly ignores these public participation mandates. It does not mandate prior public notice of *any* proposed changes to a CNMP—not even "substantial changes," as defined by EPA. General Permit § III.E. Nor does it provide the public with the opportunity to comment or request a public hearing in connection with a proposed substantial change. *Id.* EPA has repeatedly admonished DEC that these failures violate 40 C.F.R. § 122.42(e)(6). *See* EPA Mar. 2017 Comment Letter, Gartner Aff. Ex. 32, at App'x A ("Neither the permit nor fact sheet clarify how members of the public will be notified about proposed NMP changes."); *id.*, Comment A3 (p.21); EPA Comments on Draft Permit, Comments 27 & 28 (p. 5).

The General Permit also falls far short of federal requirements for proposed changes to the ANMP, because it requires publication only of proposed changes that the General Permit defines as "significant."[75] *See* General Permit § IV.F. As EPA has repeatedly noted, the law requires that that public be afforded an opportunity for comment and possibly a hearing for a far wider category of proposed changes. *See* EPA Mar. 2017 Comment Letter, Comment A4; *id.*

> (3) changes to the "maximum amounts of nitrogen and phosphorus derived from all sources for each crop";
>
> (4) "[a]ddition of any crop or other uses not included in the terms of the CAFO's [NMP] and corresponding field-specific rates of application"; and,
>
> (5) "[c]hanges to site-specific components of the CAFO's nutrient management plan, where such changes are likely to increase the risk of nitrogen and phosphorus transport to waters of the U.S."

40 C.F.R. § 122.42(e)(6)(iii).

[75] The General Permit defines "significant changes" as:

> (1) the addition of new land (with some exceptions); and,
>
> (2) changes to the maximum field application rates, or implementation of other required management practices, *that violate the NRCS standards*.

General Permit § IV.F (emphasis added). Since the General Permit *requires* compliance with NRCS Standards, *id.* §§ III.A.4., A.7, this appears to mean that changes are publicized only if there is an addition of land or a change in maximum application rates or practices to such an extent that they *are known to be a violation of the General Permit*.

App'x A; EPA Comments on Draft Permit, Comment 84.

Recent events highlight the potential dangers of a system, like the General Permit allows, where the public is not given prior notice of, or the opportunity to comment on, proposed substantial changes to a CAFO's operation. In 2015, a CAFO in the City of Watertown began construction of a 7.5 million gallon manure storage facility on steep terrain adjacent to the Black River, immediately upstream of the intake to the City's water filtration plant that produces potable water for 65,000 residents. A massive waste lagoon in this location would pose a serious risk of animal sewage discharge and drinking water contamination. Letter from Michael J. Sligar, Superintendent, City of Watertown, to Douglas Ashline, DEC (Feb. 11, 2016), Gartner Aff. Ex. 24, at 2. The City of Watertown received no advance notice of this clear threat to the City's drinking water. *Id*. The City learned of the facility when it was only weeks away from becoming operational. Fortuitously, the City was able to thwart construction by demonstrating that the storage facility's construction was in violation of NRCS standards, a violation that neither DEC nor the CAFO had recognized. *Id*.[76]

Because the construction of large manure storage facilities, like the one in Watertown, would "likely . . . increase the risk of nitrogen and phosphorus transport to waters of the U.S.," such construction constitutes a "substantial change" to an NMP requiring public notice *and* an opportunity for comments and hearing requests under federal regulations. *See* 40 C.F.R. § 122.42(e)(6)(iii). Yet under the General Permit, it is likely that no advance public notice would

[76] Incredibly, a similar situation occurred again in Watertown eight months later. *Id.* at 2–3**.**

be required for such a substantial change in a CAFO's operations.[77] In other words, the General Permit would sanction the repetition of the City of Watertown's just-averted potential disaster.

POINT III: THE GENERAL PERMIT'S REQUIREMENTS FOR CNMPS ALSO FAIL TO SATISFY FEDERAL LAW

Even if the General Permit required that CNMPs be submitted to DEC for approval and made available for public review and comment, the General Permit would still violate federal law because it does not mandate that CNMPs comply with EPA's requirements for NMPs. As discussed earlier, to meet federal requirements, a CAFO's NMP must include enforceable effluent limitations addressing all EPA-mandated minimum requirements, which cover the aspects of a CAFO's operations that present the greatest risks of water pollution. *See* 40 C.F.R. § 122.42(e)(1), (5). But the General Permit does not require CNMPs to address many specific EPA requirements.

1. ***Chemical Handling***. The General Permit entirely omits the requirement that NMPs contain effluent limitations to "[e]nsure that chemicals and other contaminants handled on-site *are not disposed* of in any manure, litter, process wastewater, or storm water storage or treatment system *unless specifically designed to treat such chemicals and other contaminants*." *See id.* § 122.42(e)(1)(v) (emphases added). Instead, the General Permit expressly authorizes CAFOs to dispose of "[n]on-farm generated organics, such as food processing waste and digested [f]ats, [o]ils, and [g]reases . . . in the manure storage facility" governed by a CAFO's CNMP, *without* requiring the CNMP to indicate whether this manure storage facility is "specifically designed to

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[77] Local residents have a strong interest in knowing when massive sewage lagoons are proposed to be built in their communities not only because of the threat to drinking water, but also because of the air quality impacts. *See* discussion *supra* note 25.

treat such chemicals or other contaminants." General Permit § III.B.3(c); 40 C.F.R. § 122.42(e)(1)(v). Such wastes cannot be considered "process wastewater," which EPA defines as "water directly or indirectly used in the operation of the [Animal Feeding Operation]." *Id.* § 122.23(b)(7). Nonetheless, the General Permit authorizes a CAFO to utilize up to 50% of its "*manure* storage facility" for "non-farm generated organic[]" waste without requiring that the facility be designed to treat or handle this type of waste and without any additional DEC oversight. General Permit § III.B.3(c). EPA's comments on the draft General Permit repeatedly noted this serious flaw. *See, e.g.*, EPA, *Comparison of NYSDEC CNMP and ANMP to Federal NMP Requirements* (2016) (hereinafter, "EPA Comparison of Draft Permit to Federal Requirements"), *attached to* EPA Comments on Draft Permit as Attachment III (the CNMP does not "appear to include a requirement to ensure that chemicals or other contaminants handled on-site are not disposed of in any manure, litter, process wastewater or storm water storage or treatment system unless specifically designed to treat such chemicals and other contaminants"). EPA directed DEC to "ensure that 40 C.F.R. § 122.42(e)(1)(v) is addressed" in the final permit. *Id*. However, DEC did not modify the General Permit as instructed. For this reason alone, the CNMP does not constitute a CWA-compliant NMP.

2. ***Nutrient Utilization***. The General Permit also fails to include an enforceable requirement that NMPs "*[e]stablish* protocols to land apply manure, litter or process wastewater in accordance with site-specific nutrient management practices that *ensure appropriate agricultural utilization of the nutrients* in the manure, litter or process wastewater." *See* 40 C.F.R. § 122.42(e)(1)(viii) (emphasis added); *see also id.* § 122.42(e)(5)(i)–(ii). The General Permit requires that "[a]pplications of [waste] shall be planned in the CNMP according to the

NRCS NY 590 Standard"[78] and that personnel "shall manage application rates and timing so as *to prevent runoff from leaving crop fields during any application event*." General Permit § III.A.7 (emphasis added). However, these directives fail to satisfy 40 C.F.R. § 122.42(e)(1)(viii) for three reasons.[79]

First, to comply with federal law, the CNMP must direct application of waste in a manner that "ensure[s] appropriate agricultural utilization of the nutrients." 40 C.F.R. § 122.42(e)(1)(viii), (5). But the General Permit says the CNMP "shall . . . plan[] [applications of waste] . . . according to the NRCS 590 Standard." General Permit § III.A.7. If NRCS NY 590 prescribed practices to "ensure appropriate agricultural utilization" of the nutrients in waste, then the General Permit might be sufficient in this respect. But this is not the case. The NRCS Standard is not a set of prescriptions. Instead, it consists primarily of "criteria" and "considerations" for planners.[80] Thus, the General Permit essentially directs applications of waste to be planned in the CNMP "according to the [criteria and considerations laid out in] the NRCS NY 590 Standard." Directing that a manure utilization plan be developed "according to" non-binding considerations is not an effluent limitation. Indeed, the CAFO would probably argue that it is in compliance with the General Permit, and thus the CWA, so long as the AEM planner says these issues were "considered" – regardless of the actual environmental outcome. Such hortatory language does not satisfy 40 C.F.R. § 122.42(e)(1)(viii) and 40 C.F.R. § 122.42(e)(5)(i)–(ii).

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[78] The NRCS NY 590 Standard dated January 2013 is annexed hereto as Attachment R.

[79] General Permit § III.7(a) also specifies certain "prohibited conditions" for spreading. Here we focus on shortcomings in the General Permit when these special conditions are not applicable.

[80] NRCS NY 590 Standard at 590-1, -7, -8.

Second, NRCS NY 590 assumes and accepts that CAFOs will leach nutrients into ground water—an occurrence signifying that the nutrients *have not been* "appropriate[ly] . . . utilize[ed]." 40 C.F.R. § 122.42(e)(1)(viii), (5)(i)–(ii). The NRCS NY 590 guidelines contemplate that CAFOs will apply sewage even when it is known that "the potential for [nutrient] leaching below the root zone is high." NRCS NY 590 at 590-4. Per the NRCS, the only constraint on this high-risk practice is that CAFOs should implement "at least one" management practice to "reduce" the potential for contaminating ground water when spreading in high risk circumstances. *Id*. The General Permit, incorporating this provision, cannot be squared with the CWA's clear regulations. A lax standard that tolerates CAFOs applying waste at rates that pollute ground water is the polar opposite of a requirement to "[e]nsure appropriate agricultural utilization" of waste. 40 C.F.R. § 122.42(e)(1)(viii).

Third, the General Permit's directive that a CNMP contain a plan to "manage application rates and timing so as to prevent runoff from leaving crop fields *during any application event*," General Permit § III.A.7, does not satisfy 40 C.F.R. § 122.42(e)(1)(viii). This directive limits runoff only "during [the] application event," General Permit § III.A.7, which falls far short of EPA's requirement for CAFOs to implement effluent limitations that protect water from runoff without time limitation, and therefore even days or weeks after waste is applied to fields. For instance, excess nutrients from a manure application might remain on fields for several days until heavy precipitation washes them into nearby waters; in that case, even though these nutrients would not have runoff "*during [the] application event,*" *id.*, the waste application would nonetheless have failed to ensure that nutrients were absorbed by crops. EPA advised DEC of this flawed approach in its comments on the draft General Permit. *See* EPA Comparison of Draft

Permit to Federal Requirements (advising DEC that merely directing CAFO personnel to ensure that no single application of waste runs off into nearby water "does not give reasonable assurance that there will be appropriate agricultural utilization of the nutrients in the manure, litter or process wastewater and that NMPs will be developed accordingly"). But DEC did not fix the problem.

3. ***Waste Storage***. The General Permit's conditions related to waste storage—an activity that presents a high risk of water pollution—also do not require the adoption of enforceable site-specific effluent limitations as required by 40 C.F.R. § 122.42(e)(1)(i). The General Permit states: "[p]ractices identified in the CNMP shall be designed, constructed, operated and maintained *in accordance with* all applicable New York State NRCS Standards," including NRCS NY 313,[81] which governs waste storage facilities. General Permit § III.A.4 (emphasis added). However, NRCS NY 313 does not specify particular measures that CAFOs must implement to prevent pits containing manure and other waste from contaminating nearby surface and ground water. Instead, like NRCS NY 590, this standard merely outlines important "considerations." For example NRCS NY 313 directs CAFOs to "*consider* potential contamination of ground water" when siting manure storage facilities and explains generally that, in making decision about waste storage, "*[c]onsideration* should be given to environmental concerns, … and safety and health factors." NRCS NY 313 at 313-1, 313-7 (emphases added). Even with respect to an issue as important as minimizing the risk of catastrophic manure spills resulting from the "failure" of storage pits, this standard merely lists actions that "should be *considered*," such as planning ahead for heavy precipitation. *Id.* at 313-7 (emphasis added).

[81] The NRCS NY 313 Standard dated October 2014 is annexed hereto as Attachment S.

Equally troubling, NRCS NY 313 authorizes CAFOs to locate manure pits in areas that pose significant risks to water—for example, above an aquifer used for drinking water—so long as "*consideration*" is given to "providing an additional measure of safety from pond seepage." NRCS NY 313 at 313-8 (emphasis added). This litany of "considerations" does not amount to an enforceable site-specific effluent limitation. A CAFO might "consider" all required information and nonetheless design and operate its facility in a manner that still poses an unnecessary and serious threat to New York waters. By incorporating the NRCS "considerations" instead of imposing "requirements," the General Permit creates a system where neither DEC nor private citizens could succeed in an enforcement action against a CAFO if it considered—but, ultimately decided against—imposing more stringent protections. Thus, practices that could result in a catastrophic manure spill, drinking water contamination, or other significant harm to human health or the environment are not clearly prohibited by the General Permit.

4. ***Wet Weather Application***. The General Permit suggests that CNMPs "*should* . . . follow[]" Cornell University guidance governing the use of manure and other wastes as fertilizers during or in anticipation of wet weather. General Permit § III.A.7(d) (emphasis added). This guidance, in turn, informs CAFOs that "[i]f the expected precipitation amount is 0.25 inches or less, there is *usually* little risk of runoff," "[p]recipitation amounts of 0.25 to 0.5 inches will likely produce *some* runoff," and that "[i]t is difficult to simplify the runoff risk for different soil and site conditions when precipitation exceeds 0.5 inches." Karl Czymmek et al., Cornell Univ., Animal Science Publication Series No. 245, Revised Winter and Wet Weather Manure Spreading Guidelines to Reduce Water Contamination Risk at 6 (2015) (emphasis

added), annexed hereto as Attachment T. This general explanation is just informative; it is not an enforceable site-specific effluent limitation. While EPA rules require CAFOs to adopt measure that ensure attainment of specific protective outcomes, *see* 40 C.F.R. § 122.42(e)(1)(vi), the General Permit merely offers some information; no CAFO could ever be found to violate this provision, no matter how egregious the pollution discharge.

* * *

The General Permit thus does not require CNMPs to address a number of critical operations with a high risk of discharge for which EPA requires CAFOs to implement site-specific effluent limitations. These shortcomings significantly reduce the ability of these plans—which "serve as the primary mechanism for water quality protection under the CAFO permit system"[82]—to achieve their objective to protect New York's waters from contamination. The CNMP—like the ANMP—is not an "NMP" within the meaning of the CWA regulations leaving the General Permit with a fatal flaw: it does not require CAFOs to even *develop*, let alone make subject to oversight and public review, an NMP in accordance with EPA regulations. Thus, issuance of the General Permit was an "error of law."

CONCLUSION

For the foregoing reasons, Petitioners/Plaintiffs respectfully ask the Court to:

a) declare that Respondent DEC's issuance of General Permit No. GP-0-16-002 was in violation of lawful procedure, affected by errors of law, arbitrary and capricious, and an abuse of discretion;

[82] Onondaga County Council on Environmental Health Comments, Gartner Aff. Ex. 22, at 1.

b) direct Respondent DEC, within 30 days, to commence a proceeding to revise General Permit No. GP-0-16-002 to conform to the requirements of the CWA, ECL, and implementing regulations, and to issue a revised CWA CAFO general permit; and

c) direct that, until such time that Respondent DEC issues the revised General Permit in accordance with this Court's order, DEC may not grant coverage to a CAFO under General Permit No. GP-0-16-002 unless and until

   i. the CAFO submits its CNMP to DEC;

   ii. DEC makes the CNMP available to the public; and

   iii. DEC approves the CNMP.

Dated: New York, New York
April 11, 2017

Respectfully submitted,

By: ___________________________

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**motion for admission pro hac vice to be filed*