



EARTHJUSTICE



January 22, 2013

Robert Simson  
Division of Water  
New York State Department of Environmental Conservation  
625 Broadway, 4th Floor  
Albany, NY 12233-6510

Re: New York State Department of Environmental Conservation State Pollution Discharge Elimination System (SPDES) General Permit for Concentrated Animal Feeding Operations (CAFOs), General Permit No. GP-0-09-001

Dear Mr. Simson:

Citizen's Campaign for the Environment, Earthjustice, Environmental Advocates of New York, Environment New York, Riverkeeper, Inc., Sierra Club Atlantic Chapter and Waterkeeper Alliance, Inc. respectfully submit this letter to comment on the proposed modifications to the SPDES ECL General Permit for CAFOs (GP-0-09-001), issued December 19, 2012 ("proposed permit modifications").<sup>1</sup> We write separately to highlight certain proposed permit modifications that apply to all CAFOs in the state, and which are inconsistent with – and less protective than – the Clean Water Act. Consistent with the Clean Water Act, these proposed permit modifications cannot be adopted.

NYSDEC did not properly notice the proposed permit modifications highlighted below. Instead of informing the public that proposed changes would apply broadly to all CAFOs, purportedly exempting them from federal and state statutory SPDES permit requirements, NYSDEC instead stated only that:

The regulatory amendments clarify requirements of the CAFO program, exempt non-discharging medium CAFOs with 200 to 299 mature dairy cows from obtaining SPDES permit coverage, and eliminate duplicative regulatory

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<sup>1</sup> This letter supplements and is incorporated by reference into, the comments we are also submitting today regarding the Draft Environmental Impact Statement for the Dairy Industry Rulemaking Proposed Action, State Pollutant Discharge Elimination System (SPDES) Permits for Concentrated Animal Feeding Operations (CAFOs), Land Application & Anaerobic Digesters, published for public comment by the New York State Department of Environmental Conservation ("NYSDEC"), on December 5, 2012; the draft regulations (Proposed Express Terms 6 N.Y.C.R.R. Parts 360 and 750), issued December 5, 2012; and the proposed permit modifications.

requirements under Part 360. This ECL General Permit has been modified to conform to changes in the proposed rulemaking, to clarify the Department's expectations of permittees, to correct grammatical and typographical errors, while continuing to maintain terms and conditions adequately protective of the environment.

NYSDEC, Fact Sheet for NYSDEC New York State Pollutant Discharge Elimination System General Permit for Concentrated Animal Feeding Operations, Permit No. GP-0-09-001.

## **I. NYSDEC Lacks the Authority to Finalize Certain Modifications to the General Permit That Are Less Protective of Water Quality Than Are Legally Required**

NYSDEC lacks the authority to finalize the two proposed modifications to the State General Permit for CAFOs described below.<sup>2</sup> Although NYSDEC is delegated to implement the federal Clean Water Act, New York cannot implement its delegated NPDES program in a manner that is less protective of regulated waters than federal law. *See* 33 U.S.C. § 1370 (“[A state] may not adopt or enforce any . . . limitation, effluent standard, prohibition, . . . or standard of performance which is less stringent than [what is prescribed] under this chapter.”); *see also Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 451 F.3d 77, 79 (2d Cir. 2006) (“[S]tates retain the primary role in . . . regulating water pollution, as long as those state regulations are not less stringent than the requirements set by the CWA, [33 U.S.C.] § 1370.”). Thus, because the state's permit program must be at least as protective of water quality as the standards set under the federal regulations, the following less protective proposed modifications cannot stand.

### **A. The Proposed Definition of Discharge Is Not Consistent with Federal or State Law**

NYSDEC's proposed definition of discharge, if finalized, would impermissibly limit the set of discharges for which CAFOs must obtain a permit. Under federal and state law, CAFOs are prohibited from discharging any pollutant without first obtaining a NPDES permit, or a permit under an authorized state program. However, the proposed definition of discharge in the State General Permit is improperly limited to releases of particular substances from the CAFOs. Thus, the proposed definition is improperly narrow, and must be modified to meet the floor set under the federal Clean Water Act, and otherwise recognized under state law. In addition, the proposed definition of discharge also targets only discharges that enter surface waters of the state, as opposed to all waters of the state. This limitation also impermissibly narrows the scope of permit program.

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<sup>2</sup> Other concerns about the proposed permit modifications are described in the other joint comments submitted by our organizations, described in footnote 1, above.

The federal Clean Water Act expressly prohibits the discharge of *any* pollutant from a point source, such as a CAFO, into navigable waters. In particular, the Act provides that, absent special circumstances such as authorization under a NPDES permit or a permit under an authorized state program, “the discharge of *any* pollutant by any person shall be unlawful.” 33 U.S.C. 1311(a) (emphasis added). The term “discharge of a pollutant” and “discharge of pollutants” each means “*any* addition of *any* pollutant to navigable waters from any point source.” *Id.* § 1362(12)(A) (emphasis added). Pollutant is further defined to mean “dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.” *Id.* §1362(6). In addition, CAFOs are statutory point sources under 33 U.S.C. § 1362(14) (“The term ‘point source’ means any discernible, confined and discrete conveyance, including but not limited to any . . . concentrated animal feeding operation . . . from which pollutants are or may be discharged.”). Take together, CAFOs cannot discharge any pollutant without first obtaining a permit, a construct recognized in the federal CAFO Rule. 40 C.F.R. § 122.23(d)(1) (“A CAFO must not discharge unless the discharge is authorized by an NPDES permit.”).

In recognition of the above, New York State’s regulations governing the SPDES permit program broadly define discharge as follows: “[d]ischarge means any addition of any pollutant to waters of the State through an outlet or point source.” 6 N.Y.C.R.R. § 750-1.2(a)(26). As under federal law, the term pollutant is defined as:

dredged spoil, filter backwash, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand and industrial, municipal, agricultural waste and ballast discharged into water; which may cause or might reasonably be expected to cause pollution of the waters of the State in contravention of the standards or guidance values adopted as provided in Parts 700, et seq. of this Title.

*Id.* § 750-1.2(a)(66). Likewise, as under federal law, CAFOs are considered point sources. *See id.* § 750-1.2(a)(65) (“Point source means any discernible, confined and discrete conveyance, including but not limited to any . . . concentrated animal feeding operation . . . from which pollutants are or may be discharged.”).

While taken together federal law and governing state law broadly prohibit CAFOs from discharging any pollutant without a permit, the proposed modification to New York’s General Permit for CAFOs only requires a permit for a discharge of certain pollutants. In particular, the modification defines discharge as “any release of manure, litter, process wastewater, food processing waste, digestate, or releases from feed storage areas into the surface waters of New York State.” Proposal, App’x A(R). By defining discharge as the release of certain pollutants, not any pollutant (as under 33 U.S.C. § 1362(6); 6 N.Y.C.R.R. § 750-1.2(a)(66)), the proposal

limits the discharges for which CAFOs must obtain a permit. As such, the definition of discharge must be modified to encompass the release of any pollutant, *including but not limited to* “manure, litter, process wastewater, food processing waste, digestate, or releases from feed storage areas.” Any narrower definition conflicts with federal and state law and is unlawful.

In addition to narrowly defining the set of discharges for which CAFOs must be permitted, the proposed definition of discharge is also unlawfully limited to discharges into surface waters of New York State. Proposal, App’x A(R). However, under New York law, permits are required to prevent discharges to all waters of the state, not just surface waters. *See, e.g.,* N.Y. Env’tl. Conserv. Law § 17-0803 (“[I]t shall be unlawful to discharge pollutants to the waters of the state from any outlet or point source without a SPDES permit issued pursuant hereto or in a manner other than as prescribed by such permit.”). New York Law defines waters of the state as including “lakes, bays, sounds, ponds, impounding reservoirs, springs, wells, rivers, streams, creeks, estuaries, marshes, inlets, canals, the Atlantic ocean within the territorial limits of the state of New York and all other bodies of surface or underground water, natural or artificial, inland or coastal, fresh or salt, public or private (except those private waters which do not combine or effect a junction with natural surface or underground waters), which are wholly or partially within or bordering the state or within its jurisdiction.” *Id.* § 17-0105. Notwithstanding state law to the contrary, under the proposed modifications, permits would only be required to prevent discharges from CAFOs to surface waters, not the broader set of waters of the state. So limiting the definition of discharge could have serious implications for water quality.

#### **B. The Proposed Definition of Agricultural Stormwater Is Not Consistent with Federal Law**

NYSDEC’s proposed definition of “agricultural stormwater,” is impermissibly broad, and, if finalized, would illegally allow CAFOs greater authority to discharge without permits than granted under federal law.

The federal Clean Water Act expressly defines the term “point source” to include CAFOs, although it also expressly *excludes* from the “point source” definition “agricultural stormwater discharges and return flows from irrigated agriculture.” 33 U.S.C. § 1362(14). The federal Clean Water Act does not define the term “agricultural stormwater discharge.” However, the agricultural stormwater exemption as it relates to NPDES regulated discharges from land application areas is defined by the federal CAFO Rule as follows:

For purposes of this paragraph, where the manure, litter or process wastewater has been applied in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter or process wastewater, as specified in § 122.42(e)(1)(vi)-(ix), a precipitation-related discharge of manure, litter or

process wastewater from land areas under the control of a CAFO is an agricultural stormwater discharge.

40 C.F.R. § 122.23(e). Section 122.42(e)(1)(vi)-(ix) of the federal CAFO Rule provides that these site specific nutrient management practices must:

- Identify appropriate site specific conservation practices to be implemented, including as appropriate buffers or equivalent practices, to control runoff of pollutants to waters of the United States;
- Identify protocols for appropriate testing of manure, litter, process wastewater, and soil;
- Establish 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; and
- Identify specific records that will be maintained to document the implementation and management of the minimum elements described in paragraphs (e)(1)(i) through (e)(1)(viii) of this section.

Accordingly, in order for pollutant discharges from a CAFO to qualify under the “agricultural stormwater” exemption, the discharges must be: (1) Precipitation related discharges of manure, litter or process wastewater and (2) that manure, litter or process wastewater must have been applied pursuant to site specific management practices that ensure the appropriate agricultural utilization of the nutrients, including conservation practices to control runoff; testing protocols for manure, litter, process wastewater, and soil; protocols for ensuring agronomic application; and recordkeeping.

Contrary to the express requirements of the federal CAFO Rule, the proposed CAFO General Permit proposes a new and much broader definition of the “agricultural stormwater” exemption than is permitted under federal law. Section B of the proposed General Permit states that:

Discharges composed entirely of stormwater from a land area upon which manure, litter, food processing waste, digestate, and process wastewater has been applied in accordance with a site-specific nutrient management plan is agricultural stormwater. As such, this discharge is exempt from CWA permit requirements.

Similarly, Appendix A of the proposed General Permit defines the “agricultural stormwater” exemption as follows:

C. *Agricultural Stormwater Discharge* means a discharge composed entirely of stormwater from a land area upon which manure and/or wastewater has been applied in accordance with proper agricultural practices, including land application of manure, litter, food processing waste, digestate, fertilizer and process wastewater in accordance with a site-specific nutrient management plan.

These definitions of the “agricultural stormwater” exemption would apply to all CAFOs that are subject to the proposed General Permit, not just medium dairy CAFOs, and would impermissibly expand the scope of the permitting exemption.

First of all, it would exempt discharges of food processing waste, digestate and fertilizer whereas the federal exemption only applies to manure, litter and process wastewater. This is important because the provisions of the federal CAFO Rule that must be met in order to qualify for the exemption are not designed to address the human health and environmental impacts associated with land applying food processing waste, digestate and fertilizer. Second, the federal CAFO Rule requires that land application of manure, litter and process wastewater be conducted in manner that meets very specific requirements designed to ensure appropriate agricultural utilization of nutrients, runoff controls, waste and soil testing, and recordkeeping. Contrary to these very detailed and specific requirements, the proposed General Permit exempts land application discharges from permitting requirements if the wastes are applied in accordance with “proper agricultural practices” including a “site specific nutrient management plan.” This would exempt land application discharges from permitting requirements without requiring the waste to be managed as required by the federal CAFO Rule and is less stringent than required by federal law. Lastly, the definition of “agricultural stormwater” in the proposed General Permit exempts discharges “composed entirely of stormwater” from a land application area where manure, litter, food processing waste, digestate, fertilizer, and process wastewater have been applied whereas the federal CAFO Rule is narrower, exempting “precipitation-related” discharges from land application areas where “manure, litter or process wastewater” have been applied, as long as those discharges meet the other requirements of the CAFO Rule.

NYSDEC should adopt the federal definition of the “agricultural stormwater” exemption verbatim to ensure that its delegated NPDES Program is at least as stringent as the federal requirements and that only those discharges from CAFOs that qualify as “agricultural stormwater” discharges from land application areas are exempted from the permitting requirements.

## **II. Conclusion**

For all of the reasons set forth above, Citizen’s Campaign for the Environment, Earthjustice, Environmental Advocates of New York, Environment New York, Riverkeeper, Inc., Sierra Club Atlantic Chapter and Waterkeeper Alliance, Inc. respectfully submit that

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NYSDEC cannot finalize the proposed permit definitions of discharge and agricultural stormwater, because it lacks the authority to modify its SPDES permitting program for CAFOs in a manner that conflicts with the minimum requirements of the federal Clean Water Act and state law.

Sincerely,

Sarah Eckel  
Legislative and Policy Director  
Citizens Campaign for the Environment

Eve Gartner  
Staff Attorney  
Earthjustice

Marianne Engelman Lado  
Staff Attorney  
Earthjustice

Eric Whalen  
Field Organizer  
Environment New York

Katherine Nadeau  
Water & Natural Resources Program Director  
Environmental Advocates of New York

Kate Hudson  
Watershed Program Director  
Riverkeeper, Inc.

Phillip Musegaas  
Hudson River Program Director  
Riverkeeper, Inc.

Roger Downs  
Conservation Director  
Sierra Club Atlantic Chapter

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Marc A. Yaggi  
Executive Director  
Waterkeeper Alliance

cc: Mr. Curt Spalding  
Regional Administrator  
U.S. Environmental Protection Agency, Region I

Ms. Ann H. Williams  
Senior Assistant Regional Counsel  
U.S. Environmental Protection Agency, Region I

Ms. Judith Enck  
Regional Administrator  
U.S. Environmental Protection Agency, Region II

Ms. Joan Leary Matthews  
Director of Clean Water Division  
U.S. Environmental Protection Agency, Region II

Mr. Shawn M. Garvin  
Regional Administrator  
U.S. Environmental Protection Agency, Region III

Ms. Nancy Stoner  
Acting Assistant Administrator for Water  
U.S. Environmental Protection Agency

Mr. Marc Gerstman  
Executive Deputy Commissioner  
New York State Department of Environmental Conservation

Mr. James Tierney  
Assistant Commissioner  
New York State Department of Environmental Conservation

Mr. Basil Seggos  
Deputy Secretary for the Environment  
Office of the Governor