SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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In the Matter of the Application of

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

Petitioners/Plaintiffs,

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

-against-

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

Respondents/Defendants.

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Index No. 4166-13

Oral Argument Requested

PETITIONERS'/PLAINTIFFS' OPENING MEMORANDUM OF LAW IN SUPPORT OF PETITION AND COMPLAINT

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July 26, 2013

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PRELIMINARY STATEMENT

Petitioners-Plaintiffs Riverkeeper, Inc., Waterkeeper Alliance, Inc., Citizens Campaign for the Environment, Inc., Sierra Club Atlantic Chapter, Buffalo Niagara Riverkeeper, Inc., Lower Susquehanna Riverkeeper, Inc., and Theodore Gordon Flyfishers, Inc., (collectively, "Petitioners") challenge the adoption by Respondents-Defendants New York State Department of Environmental Conservation ("NYSDEC") and its Commissioner, Joe Martens (collectively, "Respondents"), of "Parts 750 and 360 of 6 NYCRR Rulemaking," noticed in the New York State Register on May 8, 2013 ("Final Rulemaking"). Petitioners also challenge the adequacy of the "Final Environmental Impact Statement on the Dairy Industry Rulemaking Proposed Action: State Pollutant Discharge Elimination System (SPDES) Permits for animal feeding operations ("AFOs") and concentrated Animal Feeding Operations ("CAFOs"), [and] Land Application & Anaerobic Digesters," noticed in the NYSDEC Environmental Notice Bulletin ("ENB") on March 6, 2013 (the "FEIS"); and the "State Environmental Quality Review Findings Statement," noticed in the April 24, 2013 ENB (the "Findings Statement").[1]

This case involves NYSDEC's permitting requirements under 6 NYCRR Part 750 for concentrated animal feeding operations ("CAFOs")[2] with between 200 and 299 mature dairy cows.[3] It also involves NYSDEC's regulation under 6 NYCRR Part 360 of the disposal of food processing wastes, including acid whey, a by-product of yogurt production. CAFOs in New

[1] Copies of these documents are appended to the accompanying Affirmation of Daniel E. Estrin dated July 25, 2013 ("Estrin Affirmation") submitted herewith as Exhibits 1, 2 and 3, respectively. All exhibits to the Estrin Affirmation will hereinafter be referred to simply as "Ex. #."

[2] AFOs and CAFOs, sometimes called factory farms, are livestock facilities that confine large quantities of animals for more than 45 days during a growing season in an area that does not produce vegetation. The difference between AFOs and CAFOs is that …

[3] CAFOs that have confirmed discharges must obtain coverage under State Pollutant Discharge Elimination System (SPDES) General Permit GP-04-02. CAFOs that claim to be "non-discharging" must obtain coverage under SPDES General Permit GP-0-09-001.

York generate millions of tons of animal manure every year, much of which is spread on fields as agricultural fertilizer (a practice referred to as "land application"), often on fields owned by the CAFOs where the manure was generated. Acid whey, too, is applied to fields as agricultural fertilizer, often at dairy CAFOs that accept acid whey from yogurt processors for disposal on their fields in exchange for tipping fees. There is, of course, a limit to how much organic fertilizer is needed on agricultural lands, a critical issue because if manure and acid whey are ***over-applied*** they will run off the land into surface waters and will leach into groundwater, especially during rain or snow, with potentially devastating environmental consequences. Whether intentional or not, and regardless of amount, the addition of pollutants from CAFOs to waterbodies are "discharges," and they are illegal under the federal Clean Water Act ("CWA") and New York's Environmental Conservation Law ("ECL").

Manure and acid whey contain a number of potentially harmful pollutants including disease-causing pathogens, as well as nutrients, such as phosphorous and nitrogen, which can cause eutrophication or significant increases in algae. These algae blooms harm water quality, food resources and habitats, and decrease the oxygen that fish and other aquatic life need to survive. To protect water quality, the storage and land application of manure and acid whey must be properly managed to prevent these substances from entering surface and ground waters (called "discharges"). The U.S. Environmental Protection Agency ("U.S. EPA") recently found that twenty-eight percent of the nation's rivers and streams have excessive levels of nitrogen, and forty percent have high levels of phosphorus.[4] Many of New York's waterways have been found to be "impaired" by excess phosphorus, and some for excess nitrogen.

[4] Ex. 7, EPA, OFF. OF WETLANDS, OCEANS & WATERSHEDS, OFFICE OF RESEARCH & DEV., NATIONAL RIVERS & STREAMS ASSESSMENT: 2008-2009, 30-31 (2013).

NYSDEC regulates CAFOs, and their potential to discharge, by means of the State Pollutant Discharge Elimination System ("SPDES") permit program. All CAFOs in the state must operate under a SPDES permit which requires CAFOs to implement controls to prevent pollutant discharges, including implementation of a comprehensive nutrient management plan ("CNMP"), and to operate under NYSDEC oversight, which includes requirements for recordkeeping, reporting and inspection, and monitoring. A CNMP is a set of practices developed by a certified planner that set site-specific best management practices ("BMPs") involving waste storage and nutrient application to agricultural fields to provide for adequate crop growth while protecting water quality. New York is delegated by U.S. EPA under the CWA to operate the SPDES program, which must be consistent with the National Pollutant Discharge Elimination System ("NPDES") program run by U.S. EPA, and at least as protective of water quality as the NPDES program.

In the Final Rulemaking, NYSDEC exempts from SPDES permit coverage purportedly "non-discharging" AFOs with between 200 and 299 mature dairy cows, relieving them from the duty to operate under CNMPs and regulatory oversight. This was done despite NYSDEC's knowledge that many of the 72 dairy AFOs currently at this size have a documented history of discharging pollutants and of poor waste management practices. NYSDEC expects 285 dairies to grow into the exempted size category in addition to the 72 dairy AFOS of this size already operating in the state. In a document submitted by NYSDEC to EPA last year, NYSDEC correctly stated that the "smallest medium CAFO has the pollution potential of a major sewage treatment plant."[5] Each mature dairy cow produces approximately 125 pounds of manure per

[5] Ex. 10, NYSDEC, DRAFT PHASE II WATERSHED IMPLEMENTATION PLAN FOR NEW YORK SUSQUEHANNA AND CHEMUNG RIVER BASINS AND CHESAPEAKE BAY TOTAL MAXIMUM DAILY LOAD, 28 (July. 6, 2012) (emphasis added) (hereinafter "DRAFT CHESAPEAKE WIP").

day. At this rate, the projected 357 dairies that were deregulated as a result of the Final Rulemaking will together produce over three million pounds of manure per day, which may now be disposed of without a CNMP or regulatory oversight, threatening the waters of the state. The rulemaking also eases regulations governing the storage and disposal of food processing wastes, including acid whey, some of which will also be disposed of at the newly-deregulated dairies.

This rulemaking was first disclosed at the August 15, 2012 "New York State Yogurt Summit," convened by Governor Andrew Cuomo, at which New York State Department of Agriculture and Markets Commissioner Darrell Aubertine announced, prior to NYSDEC's initiation of State Environmental Quality Review Act ("SEQRA") review for such an action, that the state was "immediately increasing the animal threshold required for the CAFO permit from 200 to 300."[6] The premise of the Final Rulemaking is to increase milk production in the state in the hope that it will lure more yogurt manufacturing. Indeed, at the Yogurt Summit, the Governor told attendees that he wants New York to become the yogurt capital of the United States.[7] Less than a year later, the state kept its promise to the dairy industry and completed a CAFO rulemaking dismantling its existing pollution prevention scheme for numerous dairy CAFOs.

The elimination of regulatory oversight for CAFOs with 200 to 299 dairy cows—which NYSDEC undertook for purely political and economic purposes, not scientific or technical ones, in order to increase milk production and lure more yogurt production to the state—is

[6] Ex. 9, Karen DeWitt, "Cuomo Makes a Moo-ve for More Cows at 'Yogurt Summit,'" WNYC NEWS (Aug. 15, 2012).

[7] Ex. 9, Freeman Klopott, *Cuomo Says Dairy Industry Can Make New York U.S. Yogurt Capital*, Bloomberg Businessweek (Aug. 15, 2012).

likely to result in the discharge of animal waste and associated pollutants to the waters of the state, impairing water quality and threatening public health. The crux of this case is whether NYSDEC exceeded its authority when it carved out an exemption from its carefully constructed CAFO regulatory program for a select category of medium dairy CAFOs, despite their acknowledged enormous pollution potential, for purely economic reasons, and in defiance of the core purposes of the agency and the ECL (to protect human health and the environment). These actions were taken by NYSDEC with limited consideration of the true scope of the impacts or alternatives, including: (1) ***no*** consideration of the environmental impacts of disposing of all the acid whey that will be produced if NYSDEC gets its way and more yogurt is produced in state); (2) limited credible explanation for its far-fetched theory that this deregulation will not result in significant degradation of the state's waters because dairies will voluntarily undertake expensive measures that NYSDEC has now told them they need not do (purportedly because the cost of compliance is too high); (3) with limited public participation; (4) without adhering to its obligations to operate a CAFO program that is consistent with the federal NPDES program; (5) without honoring its commitment under the CWA to avoid actions that degrade the water quality of the state; and (6) without getting approval from EPA as required under federal law.

For all of these reasons, as more fully explained below, NYSDEC's adoption of the Final Rulemaking was in violation of lawful procedure, was affected by an error of law and was arbitrary and capricious and an abuse of discretion insofar as its actions are in violation of: the ECL; Article IV, section 3 of the New York Constitution (separation of powers); SEQRA; and the State Administrative Procedure Act ("SAPA"). In addition, by adopting the Final Rulemaking, NYSDEC failed to perform duties enjoined upon it by the federal Clean Water

Act ("CWA"). Accordingly, the Final Rulemaking should be invalidated under New York Civil Practice Law and Rules sections 7803(1-3).

STANDARD OF REVIEW

A. Standard of Review under CPLR § 7803(3).

1. Arbitrary and Capricious Determination.

In an Article 78 proceeding, the courts may review "whether [an agency] determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed." CPLR § 7803(3) (2013). An administrative regulation can be upheld only if it has a rational basis and is not unreasonable, arbitrary or capricious. *N.Y. State Ass'n of Counties v. Axelrod*, 78 N.Y.2d 158, 166-67 (1991); *Consolidation Nursing Homes, Inc. v. Comm'r N. Y. State Dep't of Health*, 85 N.Y.2d 326, 331-32 (1995). Administrative regulations are scrutinized for reasonableness and rationality in the context in which they were passed. *Bates v. Toia*, 45 N.Y.2d 460, 464 (1978). The challenger to a regulation must demonstrate that the regulation "is so lacking in reason for its promulgation that it is essentially arbitrary." *Marburg v. Cole*, 286 N.Y. 202, 212 (1941).

The two-step examination inquires into (1) the reasonableness of the action and (2) whether the alleged action is arbitrary and capricious. *Hispanic Chambers of Commerce v. New York City Dep't of Health & Mental Hygiene*, No. 653584/12, 2013 WL 1343607, at *19 (Sup. Ct. N.Y. Cnty. Mar. 11, 2013).[8] If the grounds upon which NYSDEC has based its actions and determinations are inadequate or improper, there is no room for a court to impose

[8] A Copy of this unreported decision is provided for the Court's convenience as Ex. 59.

its own version of a more adequate measure or proper determination. *Scherbyn v. Wayne Finger Lakes Bd. of Coop. Educ. Servs.*, 77 N.Y.2d 753, 758 (1991).

2. Determination Affected by an Error of Law.

In an Article 78 proceeding, an "error of law" analysis is appropriate if a petitioner alleges that the agency improperly interpreted or applied a statute or regulation. *See, e.g., N.Y. Times v. City of N.Y. Comm'n on Human Rights*, 41 N.Y.2d 345, 349 (1977); *Dubb Enters. Inc. v. N.Y. State Liquor Auth.*, 187 A.D.2d 831, 832 (3d Dep't 1992). It is the function of the reviewing court in an Article 78 proceeding to see that a determination of a body or officer was made in accordance with law. *See, e.g., Diocese of Rochester v. Planning Bd. of Town of Brighton*, 1 N.Y.2d 508, 520-21 (1956); *Clark v. Bd. of Zoning Appeals of Town of Hempstead*, 301 N.Y. 86, 90-91 (1950); *White Plains Nursing Home v. Axelrod*, 131 A.D.2d 24, 25-26 (3d Dep't 1987).

3. Determination Affected by a Violation of Lawful Procedure.

It is the function of the reviewing court to confirm that a determination of a body or officer was made in the manner prescribed by law. *Laureano v. Kuhlmann*, 75 N.Y.2d 141, 145-46 (1990); *Voelckers v. Guelli*, 58 N.Y.2d 170, 172-73 (1983). An administrative policy or act which contravenes procedures explicitly mandated by statute or regulation will be annulled. *Laureano*, 75 N.Y.2d at 146-47; *De Carlo v. Comm'r of Social Servs. of State*, 131 A.D.2d 31, 35 (3d Dep't 1987); *Swanteson v. Bd. of Educ. of City School Dist. of City of New York*, 88 A.D.2d 907, 908 (2d Dep't 1982).

B. Standard of Review for Declaratory Judgment under CPLR § 3001.

Pursuant to CPLR § 3001, the Court "may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed." Granting declaratory judgment— which is a "nonextraordinary" remedy—is left to the Court's discretion. *Morgenthau v. Eribaum*, 59 N.Y.2d 143, 148 (1983). Once the Court has assumed jurisdiction, it has the power to grant declaratory relief and supplement it with proper coercive relief, whether requested, or not specifically requested, in the complaint. *New York Cent. R.R. v. Lefkowitz*, 12 N.Y.2d 305, 310 (1963).

STATEMENT OF FACTS

Petitioners respectfully refer the Court to the detailed facts set forth in the Verified Petition and Complaint dated July 26, 2013 ("Verified Petition"), which is incorporated by reference herein.

ARGUMENT

POINT I

NYSDEC LACKS THE AUTHORITY TO OVERTURN NEW YORK'S STATUTORY PROHIBITION ON THE CREATION OF UNPERMITTED CAFO POINT SOURCES, OR AT A MINIMUM, ITS INCONSISTENT REGULATORY TREATMENT OF CAFOS IS ARBITRARY AND CAPRICIOUS.

NYSDEC lacks the authority to promulgate a regulation that alters the content of the ECL. Yet through the Final Rulemaking, NYSDEC has attempted to circumvent the unambiguous statutory intent of the ECL to consider CAFOs as point sources subject to SPDES permit requirements, regardless of whether they have been proven to "discharge."

The New York State Legislature intended the New York State Water Pollution Control Law, codified at ECL Article 17, to be preventive, not merely responsive to pollution discharges. It is the declared public policy of New York State "to maintain reasonable standards of purity of the waters of the state . . . and to that end . . . ***prevent*** and control the pollution of the waters of the state of New York." ECL § 17-0101 (emphasis added). Likewise, the stated purpose of ECL Article 17 is "to safeguard the waters of the state from pollution by ***preventing*** any new pollution. . . ." ECL § 17-0103 (2013) (emphasis added). NYSDEC's deregulation contravenes the broad policy and purpose of ECL Article 17, as preventive measures for all point sources are required prior to discharge, and is therefore unsupported by the statute.

The statutory and regulatory framework implementing the New York State Water Pollution Control Law explicitly mandates that all point sources of pollutants, including all CAFOs, *see* ECL § 17-0105(16), obtain permits at the time of their creation, not after a discharge occurs. Specifically, ECL § 17-0701(1)(a) requires "a written SPDES permit . . . to . . . make or cause to make or use any . . . outlet or point source." *See also* ECL § 17-0505. According to NYSDEC:

> one of the primary goals of ECL Article 17 is to require permit coverage before a discharge occurs so that adequate safeguards are in place to mitigate the effects of any discharge. This is reflected in ECL § 17-0701(1)(a) which prohibits the creation of a point source for the discharge of waste to waters of the State without a SPDES permit. Furthermore, ECL §§ 17-0101 and 17-0103 indicate a legislative intent to "prevent" pollution from adversely impacting the waters of the State.[9]

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

Whereas all other point sources in New York State are regulated upon construction prior to discharge, NYSDEC has attempted to create, via administrative fiat, an exception from the statutory SPDES permit requirement for a select group of dairy CAFOs, a subset of the larger agricultural industry. This deregulation unjustifiably distinguishes between dairy CAFOs with 200 to 299 cows and equivalently sized CAFOs with hogs, chickens, and other types of livestock.

NYSDEC's attempt to exempt this category of CAFO from the requirements of the statute, and the resulting proposed exemption from SPDES permit coverage and compliance, fails because of this lack of authority. CPLR § 7803(2). NYSDEC cannot rely on its assertion that only non-discharging CAFOs are exempt from these requirements, because the ECL makes no such distinction. Without support in the statute for its actions, NYSDEC cannot now step into the shoes of the Legislature and change the plain meaning and intent of the ECL through agency rulemaking.

At a minimum, the exemption of this one category of dairies from the CAFO definition is arbitrary and capricious. An agency rule is arbitrary and capricious when it will lead to uneven enforcement, even between facilities in close proximity, and has loopholes that effectively defeat the purpose of the rule. *Hispanic Chambers of Commerce*, at *20. In *Hispanic Chambers of Commerce*, the court found New York City's Portion Cap Size Rule on sugary beverages arbitrary and capricious because "it applie[d] to some but not all food establishments in the City, [and] it exclude[d] other beverages that have significantly higher concentrations of sugar sweeteners" with no technical or scientific justification. Because the exclusions and loopholes effectively swallowed the rule, the court found the portion size control arbitrary and capricious. *Id.*

Here, NYSDEC is purposely and explicitly creating a loophole to allow pollution, stymieing the purpose of its SPDES program. The deregulation will lead to a regulatory structure in which all point sources are required to obtain permit coverage at creation and prior to discharge ***except for*** CAFOs with between 200 and 299 cows. Even equivalently sized livestock CAFOs that have the same pollution potential as the deregulated dairy CAFOs must obtain permits at creation, resulting in a system that now treats neighboring CAFO facilities of similar size and with similar pollution potential differently.

NYSDEC did not provide an adequate justification for this inconsistent regulatory treatment of CAFOs that pose the same or similar risks of environmental degradation. In the FEIS, NYSDEC admits that removing permit requirements for CAFOs with ***more than*** 300 cows would (1) "greatly restrict the Department's ability to track compliance by CAFOs . . . because there would not be any specific permit requirements to monitor;" (2) remove the "guarantee that BMP implementation would occur, or that the CAFO will make progress towards implementation;" and (3) endanger New York's waterbodies since "as farms grow, they are at an increased risk of having a discharge because they store more silage, more manure, and produce more milk processing waste."[10] Yet, the Final Rulemaking causes the very same adverse impacts; after all, the pollution potential of CAFOs with up to 299 cows is not meaningfully different than that of CAFOs with 300 cows. NYSDEC's only explanation for its arbitrary regulatory carve-out is its claimed interest in an undefined "balance" between economic stimulation of the dairy industry and environmental protection.[11] But, as discussed in Point II, immediately below, NYSDEC lacks authority to promote the economy at the expense

[10] Ex. 2, FEIS at 117-121.

[11] *Id.* at 120-21.

of New York's waters. This purported justification for its arbitrary regulatory carve-out is therefore legally insufficient.

POINT II

NYSDEC'S DEREGULATION OF CAFOS FOR PURELY ECONOMIC AND POLITICAL PURPOSES RUNS AFOUL OF THE NEW YORK STATE CONSTITUTION'S SEPARATION OF POWERS DOCTRINE AND THE AGENCY'S ENABLING STATUTE.

Through its Final Rulemaking, NYSDEC has crossed the line between administrative rulemaking and legislative policymaking, usurping the New York State Legislature's prerogative and violating the constitutional separation of powers doctrine. NYSDEC's action to deregulate dairy facilities for purely economic and political reasons "improperly assumed for itself '[the] open-ended discretion to choose ends' . . . , which characterizes the elected Legislature's role in our system of government." *Boreali v. Axelrod*, 71 N.Y.2d 1, 11 (1987) (citation omitted). New York State's Constitution stipulates that "[t]he legislative power of [New York State is] vested in the senate and assembly," not in the governor. N.Y. Const., art. III, § 1. In contrast, the governor, and his executive agencies "shall take care that the laws are faithfully executed." N.Y. Const., art. IV, § 3. Since NYSDEC is an administrative agency in the New York State executive branch, it must operate within the limitations set by its statutory grant of authority.

New York State courts recognize that "an administrative agency may not, in the exercise of its rule-making authority, promulgate a regulation out of harmony with the plain meaning of the statutory language." *Festa v. Leshen*, 145 A.D.2d 49, 55 (1st Dep't 1989) (citations omitted); *see Boreali v. Axelrod*, 71 N.Y.2d 1, 15 (1987). Likewise, "an agency may not, in excess of its lawfully delegated authority, promulgate rules and regulations for

application to situations not within the intendment of the statute." *Festa*, 145 A.D.2d at 55 (citing *Boreali v. Axelrod*, 71 N.Y.2d 1 (1987); *Trump-Equitable Fifth Ave. Co. v. Gliedman*, 57 N.Y.2d 588, 595 (1982); *Bates v. Toia*, 45 N.Y.2d 460, 464 (1978); *Lower Manhattan Loft Tenants v. New York City Loft Bd.*, 104 A.D.2d 223, 225 (1st Dep't 1984). According to the Court of Appeals, the separation of powers doctrine "gives the Legislature considerable leeway in delegating its regulatory powers"; however, statutory authority conferred on administrative agencies "in broad or general terms must be interpreted in light of the limitations that the Constitution imposes." *Boreali*, 71 N.Y.2d at 9 (citing N.Y. Const., art III, § 1). Thus, "[e]ven under the broadest and most open-ended of statutory mandates, an administrative agency may not use its authority as a license to correct whatever societal evils it perceives." *Id.* (citing *Council for Owner Occupied Hous. v. Abrams*, 125 A.D.2d 10 (3d Dep't 1987)); *see Hispanic Chambers of Commerce*, 2013 WL 1343607, at *7.

As the Court of Appeals noted in *Boreali*, "courts have previously struck down administrative actions undertaken under otherwise permissible enabling legislation where the challenged action could not have been deemed within that legislation without giving rise to a constitutional separation of powers problem." *Boreali*, 71 N.Y.2d at 11. (citing *Indus. Union Dep't v. Am. Petroleum Inst.*, 448 U.S. 607, 645-646 (1979); *Nat'l Cable Tel. Ass'n v. United States*, 415 U.S. 336, 341-342 (1974); *Moore v. Bd. of Regents*, 44 N.Y.2d 593, 602 (1978); *Natilson v. Hodson*, 264 A.D. 384 (1st Dep't 1942), *aff'd* 289 N.Y. 842 (1963); *Kent v. Dulles*, 357 U.S. 116 (1958)).

The *Boreali* Court laid out a four-factor test to determine when an agency has crossed the line between administrative rulemaking and legislative policymaking. While no one factor standing alone is "sufficient to warrant the conclusion that the [agency] has usurped the

Legislature's prerogative," *id*., a measure of all of the factors taken together indicates when the line has been crossed. As recently applied by Supreme Court, New York County, in *Hispanic Chambers of Commerce*, the four *Boreali* factors are:

> (1) whether the challenged regulation is based upon concerns not related to the stated purpose of the regulation, i.e., is the regulation based on other factors such as economic, political or social concerns?
>
> (2) was the regulation created on a clean slate thereby creating its own comprehensive set of rules without the benefit of legislative guidance?
>
> (3) did the regulation intrude upon ongoing legislative debate? In other words, did the regulation address a matter the legislature has discussed, debated or tried to address prior to this regulation?
>
> (4) did the regulation require the exercise of expertise or technical competence on behalf of the body passing the legislation.

Hispanic Chambers of Commerce at *8. As demonstrated below, each of these factors weighs heavily against the validity of NYSDEC's rulemaking.

A. NYSDEC has no authority to prioritize economic stimulus above environmental concerns.

"The first factor in *Boreali* probes whether the challenged regulation carves out exemptions based on economic, political and social considerations." *Id.*; *see Health Ins. Ass'n of Am. v. Concoran*, 154 A.D.2d 61, 73 (3d Dep't 1990). In *Boreali*, the New York State Public Health Commission ("PHC") passed an ordinance banning indoor smoking in certain establishments but carved out exemptions for bars, convention centers, small restaurants, and the like. *See Boreali*, 71 N.Y.2d at 7. The Court of Appeals found that such exemptions had no foundation in considerations of public health. Rather, "they demonstrate the agency's own

effort to weigh the goal of promoting health against its social cost and to reach a suitable compromise." *Id.* at 12.

Even more striking than in the case of *Boreali*, where the PHC "constructed a [new] regulatory scheme laden with exceptions based solely upon economic and social concerns" instead of public health concerns, 71 N.Y.2d at 11-12, here NYSDEC's rulemaking has disrupted an already existing regulatory scheme in order to create new exemptions for a small interest group of dairy CAFOs, a subset of the larger agricultural industry, based admittedly on solely economic considerations instead of environmental protection.

As repeatedly explained by NYSDEC, "[t]he proposed action aims to remove certain regulatory requirements that cause economic barriers to allow New York dairy farms to meet th[e] demand [for increased milk production]."[12] In fact, the intent of NYSDEC's rulemaking was to "reduc[e] costs associated with the current regulatory scheme by eliminating the required development and implementation of a CNMP pursuant to a permit" in order to encourage 285 traditional dairies to "increase their herd size to greater than 200 mature milking cows over the next decade."[13]

While NYSDEC did not provide any technical or scientific justification for its deregulation, it admits the action substantially increases the risk of environmental harm:

> as farms grow, they are at an increased risk of having a discharge because they store more silage, more manure, and produce more milk processing waste. Given the larger volumes of potential pollutants, any unintended discharge has the potential to be more environmentally significant. As CAFOs

[12] Ex. 3, Findings Statement at 5; *see id.* at 22 (The goal of the proposed action is to "provid[e] regulatory relief to encourage expansion in the dairy industry."); *see id.* at 25 ("The department finds that the need to provide regulatory relief to allow for the expansion of dairies is necessary to meet the growing demand for milk and provides a significant economic benefit without a significant impact on the environment.").

[13] *Id.* at 5.

> grow in size, it becomes increasingly important for them to implement BMPs and to have the benefit of oversight, not only from Department staff during inspections, but also from an AEM [Agricultural Environmental Management] certified planner who would regularly provide guidance to the farmer.[14]

NYSDEC's rulemaking not only prioritizes the consideration of economic concerns, but also admittedly sacrifices environmental protection in the process. Due to NYSDEC's improper consideration of economic concerns, the first *Boreali* factor weighs in favor of invalidating the deregulation of dairy CAFOs.

B. NYSDEC's rulemaking was promulgated on a "clean slate" without legislative guidance.

The second prong of *Boreali* inquires "whether the regulation was written on a clean slate," where the regulation "does not merely fill in the details of a broad legislation, but instead creates its own set of comprehensive rules without the benefit of legislative guidance." *Hispanic Chambers of Commerce* at *9. NYSDEC's CAFO deregulation violates the separation of powers doctrine because the agency has only been granted authority to protect the environment, *not* to take regulatory action for the sole purpose of providing economic stimulation. Article XIV, section 4, of the New York State Constitution tasks the New York State Legislature with, among other things, the duty to "conserve and protect its natural resources and scenic beauty and encourage the development and improvement of its agricultural lands . . . ." N.Y. Const. art. XIV, § 4. "The legislature, in implementing this policy, shall include adequate provision for the abatement of air and water pollution . . . , the protection of agricultural lands, wetlands and shorelines, and the development and regulation

[14] *Id*. at 23.

of water resources." *Id.* Accordingly, the Legislature has declared its policy to protect the environment for the benefit of the state's economy:

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

ECL § 1-0101 (emphasis added). This statutory language is reflected verbatim in NYSDEC's mission statement.[15] The Legislature has thus prescribed NYSDEC's purpose to improve and protect the environment for the economic and social benefit of all New Yorkers, and it is beyond the scope of NYSDEC's authority to pursue the inverse policy, that is, to purportedly enhance economic conditions to the detriment of the environment in order to stimulate the dairy industry. *See Hispanic Chambers of Commerce*, at *15-16 (although the New York City Department of Health and Mental Hygiene (DOHMH) has broad powers to "prevent and protect against communicable, infectious, and pestilent diseases," and to "call for any food to be destroyed if it was deemed unwholesome," these powers do not authorize it to adopt a sugary beverage Portion Cap Size Rule); *Health Ins. Ass'n of Am. v. Concoran*, 154 A.D.2d 61 at 68-70 (decision by the New York State Superintendent of Insurance to prohibit the use of HIV test results to determine applicant's qualifications for coverage was invalid because despite the Superintendent's general "authority to issue regulations to establish minimum standards for the form, content and sale of, *inter alia*, health insurance policies" and his authority to prohibit unfair discrimination in the provision of insurance, the Superintendent had no authority to prohibit the "sound" underwriting practice of considering risk when determining insurability).

[15] Ex. 29, NYSDEC, About DEC; Ex. 2, FEIS at 47-48.

Unlike the agencies in *Hispanic Chamber of Commerce*, which had broad authority to regulate both food supplies and disease, and in *Concoran*, which had broad authority to establish standards for the sale of insurance and prevent discrimination—and yet both agencies were found to have exceeded their respective statutory authority—NYSDEC has no authority whatsoever to take regulatory action for the sole purpose of providing economic stimulation. In fact, NYSDEC admits that it lacks the authority to resolve economic concerns: "economic barriers will not be addressed in the EIS, as the Department has no influence in this area."[16]

In an attempt to justify its rulemaking, NYSDEC leaned for support upon the powers of the NYSDEC Commissioner "to carry out the environmental policy of the state set forth in section 1-0101," claiming the Commissioner has the power to:

> [f]oster and promote ***sound practices*** for the use of agricultural land . . . ; [and] [e]ncourage industrial, commercial, residential and community development which provides the ***best use*** of land areas, ***maximizes*** environmental benefits, and ***minimizes*** the effects of less desirable environmental conditions.[17]

However, this provision does not grant NYSDEC the authority to remove existing environmental regulation of certain CAFOs in order to promote theoretical economic development. To the contrary, it gives the Commissioner authority to ensure only "sound" environmental standards for agricultural practices and to encourage development that maximizes environmental benefits while minimizing environmental harms.

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[16] Ex. 2, FEIS at 20 (emphasis omitted). While NYSDEC's enabling legislation provides no authority to carve economic exemptions from environmental regulation, as explained in Point I, *supra*, the statutory and regulatory framework implementing the New York State Water Pollution Control Law, enumerated at ECL Article 17, explicitly mandates that all point sources of pollutants, including all CAFOs, *must* obtain permits at creation, not after a discharge occurs. Since the regulation violates the plain language and legislative intent of Article 17 it is therefore in violation of Separation of Powers doctrine as well.

[17] Ex. 2, FEIS at 47 (quoting ECL §§ 3-0301(1)(f)-(g)) (emphasis added).

As readily admitted by NYSDEC,[18] the New York State Legislature has not provided the agency with any guidance detailing how to determine economic priorities for the state, and NYSDEC's unsupported attempt to create its own policy violates its statutory duties. Because NYSDEC has acted without legislative guidance, the second *Boreali* factor weighs in favor of invalidating NYSDEC's deregulation of dairy CAFOs.

C. NYSDEC's rulemaking impermissibly intrudes upon the New York State Legislature's ongoing consideration of the necessity to provide financial aid to dairy CAFOs.

The third *Boreali* factor is whether "the agency acted in an area in which the legislature has repeatedly tried—and failed—to reach agreement in the face of substantial public debate and vigorous lobbying by a variety of interested factions." *Hispanic Chambers of Commerce* at *17 (finding that the legislature had tried—and failed—to address the issue of regulating sugary drinks where the New York City Council rejected three resolutions specifically targeting sugar sweetened beverages and the New York State Assembly had also introduced three bills regarding the sale of sugary drinks in vending machines and in certain establishments as well as a proposed tax on items including sugary drinks, and despite the fact that the State Assembly had never addressed portion size directly); *Concoran*, 154 A.D.2d at 74 (where legislative proposals to ban HIV testing to determine applicants' insurability had been formulated on three occasions, but only one had been introduced and was not voted out of committee, court found that the legislature was aware of the issue, and the legislative indecisiveness weighed in favor of invalidating an administrative ban on HIV testing).

[18] Ex. 2, FEIS at 20.

Here, the New York State Legislature has introduced two bills intended to directly address the economic burdens on dairy CAFOs[19] and one bill that would promote economic development for agricultural operations.[20] Additionally, the Legislature has recently considered a bill that would repeal 1,000 state regulations that purportedly hinder economic development.[21]

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[19] In 2010, New York State Assemblyman Peter D. Lopez introduced Assembly Bill No. 11284 titled "An act to amend the agriculture and markets law, in relation to the establishment of the dairy assistance program . . . ." Ex. 30, A.11284, 233d N.Y. Leg. Sess. (2010). As the legislative intent section of the bill makes clear, the New York State Legislature has considered the dairy industry's need for financial assistance.

> The legislature hereby finds that this state's dairy farmers continue to labor under a combination of extremely low milk prices well below those of twenty-five years ago, along with very high fuel, feed, energy, fertilizer and other operating costs. These conditions have resulted in unprecedented losses for dairy farms. The price of milk continues to be well below the cost of production. . . . This article is enacted to assist the dairy farmers of this state and their industry in a time of great need and to prevent further loss in the dairy industry and its infrastructure which are critical to the state's agricultural economy.

Id. at § 1. In the same legislative session, Assemblyman William Magee introduced Assembly Bill No. 9226 titled, "An act to amend the agriculture and markets law, in relation to establishing a dairy assistance program . . . ." Ex. 30, A.9226, 233d N.Y. Leg. Sess. (2010). An identical bill was introduced in the Senate as Senate Bill 6140. Ex. 30, *See* S.6140, 233d N.Y. Leg. Sess. (2010). The legislative intent of Assembly Bill No. 9226 is identical to that of Assembly Bill No. 11284, but with a different proposed funding source. Ex. 30, A.9226, 233d N.Y. Leg. Sess. § 1 (2010).

[20] The Senate passed Senate Bill No. 4240A, titled, "An act . . . in relation to authorizing industrial development agencies to provide assistance to agricultural producers." Ex. 30, S.4240A, 234th N.Y. Leg. Sess. (2011), which would allow state industrial development agencies to provide loan assistance to agricultural enterprises, including dairies. Although the bill failed to pass the Assembly, it would have relieved some of the economic burdens on CAFOs, allowing them to continue to implement environmental protections.

[21] This past June, Senator Kathleen Marchione introduced Senate Bill No. 5166, S.5166, 236th N.Y. Leg. Sess. (2013), which, along with an identical bill introduced in the Assembly by David DiPietro as A.7986, 236th N.Y. Leg. Sess. (2013), would require the governor to repeal 1,000 regulations or rules that hinder job creation and economic development in New York. Ex. 30, Though the bill was not voted out of committee, it would have required the governor to weigh the necessity of NYSDEC's CAFO regulations against regulation in other industries in order to achieve the beneficial deregulation. And while it was introduced after the NYSDEC issued its final rulemaking, the bill shows that the legislature is aware of the regulatory burdens in the state but has not yet come to a consensus on how to resolve the issue.

The four bills indicate that the New York State Legislature has tried—but failed—to ameliorate the dairy industry's economic burdens through subsidies or loan programs and also has tried, but failed, to roll back regulations. Because NYSDEC impermissibly has attempted to resolve the New York State Legislature's inability to agree on an economic policy, the third *Boreali* factor strongly weighs in favor if invalidating NYSDEC's deregulation of dairy CAFOs.

D. In its attempt to remove economic burdens on dairy CAFOs, NYSDEC did not posit any scientific or technical justification, but instead cited factors outside its area of expertise.

The fourth *Boreali* factor is "whether the regulation requires the exercise of expertise or technical competence on behalf of the body passing the legislation." *Hispanic Chambers of Commerce* at *18. In *Boreali*, the Court found that the mounting evidence proving adverse health effects to bystanders from all indoor smoking was clear, and therefore held that the PHC's code describing the locales in which smoking would be prohibited and providing exemptions for various special interest groups was "simple" and did not involve technical or special competence. *Boreali*, 71 N.Y.2d at 14.

The facts in *Boreali* are perfectly analogous to NYSDEC's recent deregulation of dairy CAFOs. The *Boreali* court determined regulation of smoking is clearly a public health issue, but no special expertise or technical competence was involved in the granting of exemptions to special interest groups for economic reasons. Here, although regulation of CAFOs is unquestionably a human health and environmental issue, no special expertise or technical competence in the field of environmental pollution was involved in granting a categorical exemption from environmental regulation to the dairy industry. As explained above, NYSDEC's only stated justification for the regulatory modification is economic, not scientific.

In fact, when NYSDEC applied its technical expertise less than two months prior to Department of Agriculture and Markets Commissioner Darrel Aubertine's announcement of the dairy deregulation at the August 15, 2012 "Yogurt Summit," NYSDEC concluded that a non-regulatory scheme for medium-sized dairy CAFOs would be ineffective:

> New York State regulates medium-size CAFOs in the same manner as it regulates large-size CAFOs, in that, medium CAFOs are required to obtain permit coverage. Most other states nationwide regulate medium-size CAFO [sic] under a separate program that is often voluntary in nature. ***A nonregulatory approach, for a sector that has a significant pollution potential (the smallest medium CAFO has the pollution potential of a major sewage treatment plant), is neither credible nor effective***. Professional management of waste at these facilities is critical to protection of water quality. That professional management is ensured by the New York CAFO permit program.[22]

NYSDEC reaffirmed this position less than one month before the close of the public comment period on the rulemaking, claiming, "it is important to note that the New York CAFO program covers all farms with as few as 200 cows with binding permits," and conceding "this type of science-based, risk reduction approach to CAFO regulation should be considered the national standard; anything less is inconsistent with the Clean Water Act's 'best technology' requirements."[23]

Yet, despite these clear and unambiguous pronouncements by NYSDEC about the importance of regulating medium CAFOs with permits and CNMPs, upon Commissioner Aubertine's announcement at Governor Cuomo's "Yogurt Summit," and without providing any scientific or technical justification, NYSDEC chose to disregard its own repeatedly stated scientific opinion and simply removed numerous dairy CAFOs from its regulatory program.

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[22] Ex. 10, DRAFT CHESAPEAKE WIP at 28 (emphasis added).

[23] Ex. 10-A, NYSDEC, FINAL PHASE II WATERSHED IMPLEMENTATION PLAN FOR NEW YORK SUSQUEHANNA AND CHEMUNG RIVER BASINS AND CHESAPEAKE BAY TOTAL MAXIMUM DAILY LOAD, 27-28 (Jan. 7, 2013) (hereinafter "FINAL CHESAPEAKE WIP").

Because NYSDEC clearly did not rely on its special or technical expertise, the fourth *Boreali* factor weighs heavily in favor of invalidating the deregulation of dairy CAFOs.

As confirmed by the *Boreali* analysis, NYSDEC has crossed the line between administrative rulemaking and legislative policymaking, usurping the New York State Legislature's prerogative. Its deregulation of dairy CAFOs violates the New York State Constitution by running afoul of the constitutional separation of powers doctrine, thereby invalidating the Final Rulemaking.

POINT III

THE FINAL RULEMAKING MUST BE INVALIDATED BECAUSE NYSDEC DID NOT COMPLY WITH SEQRA.

NYSDEC adopted the Final Rulemaking without complying with the strict procedural requirements of SEQRA, and without complying with SEQRA's substantive mandate to take a "hard look" at the actual public need and benefits of its action, as well as at the likely environmental impacts, reasonable alternatives, or meaningful mitigation. In addition, the documents reflecting NYSDEC's SEQRA review do not contain a reasoned elaboration of the basis for its determinations. Because NYSDEC's adoption of the Final Rulemaking violated lawful procedure, was affected by an error of law and was arbitrary and capricious and an abuse of discretion, the Final Rulemaking should be invalidated under CPLR section 7803(3). *See Chinese Staff & Workers Ass'n v. City of New York*, 68 N.Y.2d 359, 369 (1986) (annulling a special permit because of deficiencies in environmental review).

A. SEQRA Requires Agencies to Conduct a Full Environmental Review of Proposed Agency Actions and to Use All Practicable Means to Minimize or Avoid Adverse Environmental Impacts.

The purpose of SEQRA is to ensure that when public agencies regulate activities that affect the quality of the environment—such as dairy farming and land applying dairy waste and food waste generated by the processing of dairy products—"due consideration is given to preventing environmental damage." ECL § 8-0103(9). Under SEQRA, all regulatory agencies must "conduct their affairs with an awareness that they are stewards of the air, water, land, and living resources, and that they have an obligation to protect the environment for the use and enjoyment of this and all future generations." ECL § 8-0103(8). Agencies must use "all practicable means to realize the policies and goals set forth in [SEQRA], and shall act and choose alternatives which, consistent with social, economic and other essential considerations, to the maximum extent practicable, minimize or avoid adverse environmental effects." ECL § 8-0109(1). The purposes of SEQRA "are achieved by the imposition of both procedural and substantive requirements upon agency decision making." *Town of Henrietta v. Dep't of Envtl. Conservation*, 76 A.D.2d 215, 220 (4th Dep't 1980); *see also Akpan v. Koch*, 75 N.Y.2d 561, 570 (1990) ("SEQRA also imposes substantive requirements").

1. SEQRA Imposes Strict Procedural Requirements.

For any action that may have a significant effect on the environment—as NYSDEC admits is the case with the Final Rulemaking—SEQRA requires an agency to prepare an environmental impact statement ("EIS") and specifies the elements that must be included in the EIS. In particular, SEQRA requires an EIS to include "a detailed statement setting forth . . . a description of the proposed action . . . ; the environmental impact of the proposed action including short-term and long-term effects; . . . alternatives to the proposed action; . . . [and]

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

New York courts require strict, not substantial, compliance with SEQRA's procedural requirements. *Brander v. Town of Warren Town Bd.*, 18 Misc.3d 477, 479 (Sup. Ct. Onondaga Cnty. 2007) ("'the substance of SEQRA cannot be achieved without its procedure and . . . departures from SEQRA's procedural mechanisms thwart the purposes of the statute. Thus it is clear that strict not substantial compliance is required.'") (quoting *King v. Saratoga Cnty. Bd. of Supervisors*, 89 N.Y.2d 341, 347-48 (1996) (noting that strict compliance is not "a meaningless hurdle," but insures that agencies "will err on the side of meticulous care in their environmental review")); *see also Pyramid Co. of Watertown v. Planning Bd. of Town of Watertown*, 24 A.D.3d 1312, 1313 (4th Dep't 2005) (SEQRA requires strict compliance with procedural requirements; failure to comply "cannot be deemed harmless"); *Golten Marine Co. v. N.Y. State Dep't of Envtl. Conservation*, 193 A.D.2d 742, 743 (2d Dep't 1993) ("literal compliance with both the letter and spirit of SEQRA is required and substantial compliance will not suffice") (citations omitted). Thus, failure to include any of the required elements in an EIS is a fatal flaw, requiring invalidation of agency action premised on the deficient EIS.

As shown below, in this case NYSDEC failed to fulfill the strict procedural requirements of SEQRA. In particular, the FEIS omits any statement or evaluation of the

environmental impacts of the disposal of acid whey generated from increased yogurt production, and in particular the impacts of newly deregulated dairies land applying the acid whey without a CNMP. In addition, its description of the public need and benefits of the Final Rulemaking, as well as its discussion of mitigation and alternatives is so lacking in substance or logical reasoning that it is tantamount to not even including these required sections in the EIS.

2. SEQRA Requires Agencies to Take a "Hard Look" at Their Actions and Provide A Reasoned Elaboration of their Decisionmaking.

SEQRA substantively requires agencies to take environmental concerns into account to the fullest extent possible as part of their decisionmaking. ECL § 8-0103 (SEQRA's mandates are substantive as well as procedural); *Town of Henrietta*, 76 A.D.2d at 222-23 (an EIS is "not a mere disclosure statement" but is a substantive part of an agency's decisionmaking, which must take into account environmental concerns "to the fullest extent possible"). "The EIS, the heart of SEQRA, . . . is to be viewed as an environmental 'alarm bell' whose purpose is to alert responsible public officials to environmental changes before they have reached ecological points of no return." *Id.* at 220 (citation omitted). For an EIS to serve its purposes, it must take a "hard look" at all the relevant areas of environmental concern, and make a "'reasoned elaboration' of the basis for its determination." *Jackson v. N.Y. State Urban Dev. Corp.*, 67 N.Y.2d 400, 417 (1986) (quoting *Aldrich v. Pattison*, 107 A.D.2d 258, 265 (2d Dep't 1985)). After finalizing the EIS, SEQRA requires a decisionmaker to "balance the benefits of a proposed project against its unavoidable environmental risks in determining whether to approve the project." *Town of Henrietta*, 76 A.D.2d at 222. Before it can approve a project, the agency must make an "explicit finding" in writing that, "to the maximum extent practicable, adverse environmental effects . . . will be minimized or avoided." ECL § 8-0109(8).

B. NYSDEC Did Not Fulfill Its Obligation To Take Environmental Concerns Into Account To The Fullest Extent Possible Before Finalizing Any Rulemaking.

NYSDEC failed to take a "hard look" at: (1) the potentially significant environmental impacts of disposing of the acid whey produced by increased yogurt production in the state, especially disposal by land application on deregulated dairies; (2) the likelihood that waste disposal at deregulated dairies without a CNMP will have potentially significant adverse environmental impacts; (3) the cumulative impacts of adding additional phosphorus (in the form of manure and whey) to soil where phosphorus is already at high levels without a CNMP and regulatory oversight; (4) whether the Final Rulemaking indeed serves a "public need" or offers a "public benefit"; (5) a "range of reasonable alternatives" before opting for the Final Rulemaking; and finally (6) whether the mitigation it proposes is realistic. Even under the relatively deferential review afforded to an agency's SEQRA review, NYSDEC's efforts here fall far short of what the law requires and cannot be sustained.

1. NYSDEC Failed to Identify and Evaluate All of the Potential Significant Adverse Environmental Impacts of the Final Rulemaking.

NYSDEC did not fulfill SEQRA's requirement that the EIS include "a statement and evaluation of the potential significant adverse environmental impacts at a level of detail that reflects the severity of the impacts and the reasonable likelihood of their occurrence," including the "cumulative impacts and other associated environmental impacts." 6 NYCRR § 617.9(b)(5)(iii). SEQRA requires lead agencies to take a "hard look" not only at the immediate environmental impacts of the proposed action, but also at the "other associated environmental impacts," *id.*, including the environmental impacts of the consequences of the proposal. *See H.O.M.E.S. v N.Y. State Urban Dev. Corp*., 69 A.D.2d 222, 232 (4th Dep't 1979) (Urban

Development Corporation violated SEQRA by failing to take a "hard look" at the consequences of a proposed sports stadium, including the immediate adverse potential effects on traffic stoppage, parking, air pollution, noise level, and so on, but also on the "unplanned 'subsequent action'" that would be generated by additional parking facilities); *see also Cnty. of Orange v. Vill. of Kiryas Joel*, 11 Misc.3d 1056(A) at *5 (Sup. Ct. Orange Cnty. 2005) (village's unexplained position, counter to logical reasoning, that connecting the village to large source of water will not affect growth fails "hard look" test).

There are four critical flaws in the environmental impacts discussion in the FEIS. First, while the FEIS describes some of the potential significant adverse environmental impacts of the storage and land application of manure from deregulated dairies, its analysis fails to state and evaluate the potential significant adverse environmental impacts of any "unplanned 'subsequent action,'" *H.O.M.E.S.*, 69 A.D.2d at 232 (citing *City of Davis,* 521 F.2d 661, 675-76 (9th Cir. 1975)), specifically, the need to dispose of the additional acid whey that will result from the increased yogurt production that is the stated goal of the deregulation. Thus, for example, the FEIS describes the potential adverse impacts to waterbodies from phosphorus, nitrogen and pathogens "caused by unmanaged manure,"[24] but says nothing about the adverse impacts of phosphorus and nitrogen from the unmanaged food processing waste created during yogurt production.[25] Second, the FEIS fails to realistically assess the likelihood that deregulated CAFOs will discharge pollutants degrading water quality as a result of the Final Rulemaking.[26] Third, the FEIS fails to evaluate the cumulative impact of land applying the nutrient

[24] *See* Ex. 2, FEIS at 56-58.

[25] *See* Ex. 4, Affidavit of Dr. Michael D. Smolen sworn to on July 23, 2013, at ¶ 32 [hereinafter "Smolen Aff."].

[26] *See id*. ¶¶ 7, 9, 27.

phosphorus without a CNMP or regulatory oversight on lands where phosphorus is already present at high levels.[27] Fourth, the EIS omits any discussion of the Final Rulemaking's complete deregulation of the land application of fish hatchery waste.[28]

a. Failure to Consider Disposal of Acid Whey.

If the deregulation of dairies succeeds in increasing yogurt production in New York to the extent predicted in the FEIS, it will result in increased production of acid whey, a liquid by-product of yogurt production.[29] Acid whey contains nitrogen and phosphorus in similar proportions to animal manure, but it has a much higher Biological Oxygen Demand and chloride content, as well as a much lower pH.[30] To prevent water pollution, this by-product of yogurt production must be disposed of pursuant to a CNMP and the plan must provide specific limitations on timing of application, rest periods to prevent soil clogging, and mechanisms to prevent soil degradation from chlorides and impairment of soil infiltration which can increase pollutant runoff.[31] Because acid whey is heavy and expensive to transport, it is likely to be disposed of in close proximity to the yogurt plants, meaning the burdens of acid whey disposal will be focused in certain areas of the state.[32] Because acid whey contains nutrients, its disposal must be managed so that it does not get into surface and ground waters where it can

[27] *See id*. ¶¶ 10-11, 23.

[28] *See id*. ¶ 33.

[29] *See id*. ¶ 32; *see also* Ex. 2, FEIS at 22-23 (estimating that the Final Rulemaking will result in an additional 25,000 cows, producing an additional 500,000,000 pounds of milk per year, of which approximately 10% will be used for greek yogurt production); Ex. 5, Affidavit of Dr. William J. Weida sworn to on July 18, 2013 at ¶ 8 [hereinafter "Weida Aff."] (production of greek yogurt results in significant amounts of acid whey).

[30] *See* Ex. 4, Smolen Aff. ¶ 32.a.

[31] *Id*.

[32] *See* Ex. 5, Weida Aff. ¶ 9.

degrade water quality and cause fish kills.[33] Further, because acid whey contains the same nutrients as manure, by definition, applying whey on fields will lower the amount of manure that can be applied consistent with agronomic rates.[34]

NYSDEC regulations allow dairies to land apply food processing waste in addition to cow manure. 6 NYCRR § 360-4.2(b)(1). If a dairy operates under a SPDES permit, then the CNMP required by that permit would have to take into account the land application of both the acid whey and the manure. But,in the Final Rulemaking, there is no provision in either Part 360 or Part 750 that requires a dairy with 200 to 299 cows to obtain a permit or to follow a CNMP in order to land apply both manure and unlimited quantities of whey. Such facilities have to be "registered" pursuant to 6 NYCRR § 360-1.8(h), and comply with the requirements for registration under 6 NYCRR §§ 360-4.2(b)(1) and 360-4.6, but these generic provisions are not as protective of water quality as operating in accord with a site-specific CNMP under an enforceable permit.[35] The FEIS acknowledges that it has become "more prevalent" for dairies to accept acid whey for disposal,[36] but does not consider how much acid whey will be land-applied in the state as a result of the Final Rulemaking, nor the impacts of land-applying millions of gallons per year of acid whey, likely in close proximity to the yogurt plants, and likely on at least some dairies that do not operate under CNMPs. The failure to include a detailed analysis of how the acid whey generated by increased yogurt production will be

[33] *See* Ex. 4 Smolen Aff. ¶¶ 32.a, 32.c; Ex. 5, Weida Aff. ¶ 8.

[34] *See* Ex. 5, Weida Aff. ¶ 8.

[35] *See* Ex. 4, Smolen Aff. ¶¶ 32, 32.c (explaining that registration requirements are less protective of water quality than a CNMP and permit because they do not require agronomic application, rest periods, timing intervals, seasonal limits or soil temperature requirements).

[36] Ex. 2, FEIS at 7.

disposed of, and the environmental impacts of disposal of acid whey at facilities that are not governed by a CNMP, is a fatal flaw in the EIS.[37]

Not only does the FEIS fail to consider the environmental impacts of land applying the additional acid whey created as a by product of increased yogurt production in general, it also fails to consider that in two respects the Final Rulemaking will make it more likely that acid whey will be land applied at facilities that do not operate under CNMPs or permits, thus increasing the likelihood that acid whey will pollute waters of the state.[38] First, if, as NYSDEC predicts, the Final Rulemaking results in more dairies with 200 to 299 cows, there will likely be more dairies that operate lagoon and sprayfield waste systems (as such systems become more necessary as dairies expand in size), but without a permit. Dairies that use this type of waste system, but that are not required to operate under a CNMP and other requirements of a permit, are the most suitable (from the standpoint of the dairy and yogurt industries, not from Petitioners' standpoint) for accepting acid whey for disposal because there is no limit *per se* as to how much acid whey could be spread.[39]

Second, the Final Rulemaking loosens restrictions on storage of food processing waste, making it more practical for deregulated dairies to accept acid whey for disposal since land applying an entire truck-load of whey at one time will often be ill-advised. In particular, one of the newly adopted regulations allows land application and manure storage facilities with an anaerobic digester ("AD") on site to accept for disposal up to 50 tons per day of food

[37] *Cf*. Ex. 4, Smolen Aff. ¶ 19 ("The treatment and land application of food processing wastes, particularly whey from dairy processors, should be governed by a permit, CNMP, recordkeeping, and reporting in order to prevent discharges to New York's waters.").

[38] *See id*. ¶¶ 32.a, 32.c.

[39] *See* Ex. 5, Weida Aff. ¶ 10 (explaining that changes in the regulatory structure that reduce the regulation of whey disposal are likely to increase the number of facilities that accept whey for disposal, and that dairies with sprayfields are in a position to accept whey for disposal).

processing waste, and to store the waste and then land apply the digestate—without a permit. 6 NYCRR § 360-5.3(b)(3) ("AD facilities that accept less than 50 tons of waste per day" do not need a permit, but are subject to the registration provisions of section 360-1.8); 6 NYCRR § 360-5.3(b)(3)(i)(a) ("land application of the solids and/or liquid emanating from an AD facility requires registration . . . unless land application occurs on a CAFO, permitted pursuant to Part 750"). Thus, digested food processing waste (at an original weight of up to 50 tons per day) could be stored at a newly deregulated dairy with 200 to 299 cows and then land applied—along with the manure generated by the dairy—without a CNMP and without triggering the need for a permit under either Part 750 or Part 360.

Yet, the FEIS does not account for the fact that, as a result of the Final Rulemaking, the amount of waste that may be land applied without a permit at a dairy with 200 to 299 cows may be significantly more than the amount of manure generated by 200 to 299 cows, and significantly more than any dairy can responsibly manage without a CNMP. In the opinion of Petitioners' expert, Dr. Smolen: "The water quality impacts of allowing dairies with 200-299 cows to land apply manure without a CNMP are likely to be quite significant, but to also allow these facilities to land apply large or unlimited amounts of acid whey in addition to manure could be devastating to water quality."[40] This deficiency is especially notable because NYSDEC recently provided EPA with a document entitled "Land Application of Manure, Food Processing Waste, and Digestate," in which NYSDEC advised EPA that anaerobic digestion of waste, which it is encouraging through the revisions to the Part 360 regulations, resulted in a "noticeable increase in [nitrogen and phosphorus] concentrations . . . [which] need to be

[40] Ex. 4, Smolen Aff. ¶ 32.

accounted for in each farm's comprehensive nutrient management plan . . . ."[41] NYSDEC simply cannot reconcile its statement to EPA that CNMPs are needed with the conclusions in the EIS that the Final Rulemaking, which promotes use of anaerobic digestion and allows the digestate to be land applied in very high quantities without a CNMP, will not have significant environmental impacts.

Instead of considering the environmental impacts of unregulated dairies land applying both manure and acid whey, NYSDEC focused on the aspect of the Final Rulemaking that removes double permitting requirements on dairies that operate under Part 750 permits. It says:

> if a farm accepts other wastes, such as whey, for land application or other purposes, Part 360 criteria apply. Over the last few years, as the import of nutrient wastes onto farms has become more prevalent, the Department has become aware of an overlap between Part 750 and Part 360 for some farms. For example, the land application of whey on a permitted CAFO with a CNMP is subject to both Part 750 and Part 360. Dual regulation of the same activity does not provide additional environmental protection, just additional burden on the affected farms.[42]

But the emphasis on eliminating duplicative permitting requirements obscures the fact that the Final Rulemaking allows dairies with 200 to 299 cows to land apply both manure and whey with ***no permit***. In sum, NYSDEC's failure to consider the water quality impacts of acid whey disposal in general, and the likelihood that dairies with 200 to 299 cows will land apply both manure and large amounts of whey without a permit and thus without a CNMP in particular, with likely devastating water quality impacts, is both a procedural and substantive flaw in the FEIS that cannot be excused.

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[41] Ex. 24, E-mail from Thomas Berkman, NYSDEC Office of General Counsel, to Christopher Saporita, U.S. EPA Region 2 Assistant Regional Counsel RE: ECL CAFO General Permit (Apr. 29, 2013 9:55 EST), attachment at 5.

[42] Ex. 2, FEIS at 7.

b. Failure to Properly Assess the Likelihood of Adverse Environmental Impacts

The FEIS is also substantively deficient because NYSDEC failed to take a "hard look" at "the severity of [all of] the impacts [of the Final Rulemaking] and the reasonable likelihood of their occurrence." 6 NYCRR § 617.9(b)(5)(iii). NYSDEC identifies several very significant potential adverse environmental impacts arising from the land application of manure on deregulated dairies, including:

- "the potential risk for public health impacts, primarily through ingestion of contaminated drinking water"[43];
- "the potential for increased adverse environmental impacts from runoff caused by the unmanaged manure"[44];
- "an increased potential for adverse environmental impacts from the overflow or discharge of silage leachate"[45];
- "risk [that] impacts to water from nutrients and pathogens [from poorly managed animal mortalities] could increase"[46];
- "[e]nvironmental impacts in the Chesapeake Bay watershed as a result of the proposed action could be significant"[47]; and
- "the potential [that an] increase in dairy herd sizes from the implementation of [the Final Rulemaking] without manure management practices may increase the likelihood that runoff containing nutrients and sediment . . . could adversely impact fish and other aquatic life."[48]

However, NYSDEC discounts the likelihood that these impacts will occur because it assumes, without basis, that potentially significant environmental impacts of the Final

[43] Ex. 2, FEIS at 73.

[44] *Id*. at 52-53, 56-58.

[45] *Id*. at 54.

[46] *Id*. at 60.

[47] *Id*. at 67.

[48] *Id*. at 69.

Rulemaking will be mitigated due to deregulated dairies voluntarily developing and implementing CNMPs and BMPs.[49]

NYSDEC's proposed mitigation, which assumes that deregulated dairies will voluntarily take all necessary safeguards to protect water quality, despite the significant cost, even if not required to do so, is completely unrealistic. Petitioners' expert, Dr. Smolen, confirms that:

> the assumption that these effects will be mitigated by voluntary state and federal programs is unfounded . . . . Voluntary programs should be utilized to support, not replace the regulatory oversight of the CAFO permit program. Voluntary programs provide important support for the pollution control in the dairy industry. . . , but it will not be sufficient to keep pressure on producers as evidenced by the low rate of participation in Tiers 4 and 5 of AEM. Although many problems have been addressed by such programs, the total impact is small, and few systems are addressed to the level required by the CAFO permit.[50]

Because NYSDEC's assessment of potential adverse environmental impacts is predicated on the baseless and illogical assumption that voluntary compliance-mitigation will eliminate, or significantly minimize the significant impacts, its environmental impacts analysis is fundamentally flawed.

Indeed, the very premise that the deregulation of dairy CAFOs will save dairies money, yet will cause no environmental harm, makes no sense; responsible waste management costs virtually the same whether those practices are mandated by NYSDEC or adopted voluntarily. As Dr. Smolen explains:

> If Medium CAFOs manage their waste appropriately, there will be no substantial cost savings associated [with] the proposed deregulation. If Medium

[49] *See* Ex. 3, Findings Statement at 9 (because the "potential significant adverse environmental impacts from the proposed action . . . would not occur ***if*** a [deregulated dairy facility] implements BMPs, including developing a CNMP or Nutrient Management Plan (NMP), potential impacts are arguably speculative") (emphasis added).

[50] Ex. 4, Exhibit A to Smolen Aff., at 1, *see also* Ex. 4, Smolen Aff. ¶¶ 14, 26.

> CAFOs do not manage their waste in the manner required by the [now superseded] regulations, those costs associated with the environmental impacts will be shifted to the public and/or other regulated entities . . . the cost of operating an effective pollution control system would [be] virtually the same with or without the permit.[51]

Thus, if dairies expand, yet pay less for waste management practices than what is required by a CNMP and a permit, they will likely discharge pollutants and impair water quality.[52]

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

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

In addition, the EIS analysis does not consider the cumulative impacts of (1) newly deregulated dairies' land applying the nutrient phosphorus ("P") without a CNMP and regulatory oversight (and thus likely over-applying P), and (2) the fact that P is already present at very high, sometimes excess, levels in many counties where dairies are located.[53] Because of

[51] Ex. 4, Exhibit A to Smolen Aff., at 2, 3; *see also* Ex. 4, Smolen Aff. ¶ 15; Ex. 5, Weida Aff. ¶ 6 ("If operators of CAFOs in the deregulated category continue to implement the practices necessary to prevent runoff or discharges of animal waste or acid whey to waters of the state, they will gain little or no cost savings. If the operators fail to implement those preventive practices, the costs of runoff and discharges of pollution will fall on state taxpayers.").

[52] Ex. 4, Exhibit A to Smolen Aff., at 1 ("To assure there is no discharge from a dairy, engineering and management are necessary"); Ex. 4, Smolen Aff. ¶ 7 ("Without the permit and its corresponding design, recordkeeping, reporting, and inspections, there is likely to be pollutant runoff and discharges. . . ."); *id*., at ¶ 9 ("In the absence of [permit] requirements, it is highly unlikely that the deregulated dairy CAFOs will not discharge animal waste and associated pollutants in New York's waters").

[53] Ex. 4, Exhibit A to Smolen Aff., at 2, 18-24, Ex. 4, Smolen Aff. ¶¶ 10-11, 22, 24. The FEIS errs in assuming that the potential environmental impacts of applying fertilizers and manure to agricultural land are limited to immediate erosion, runoff, and leaching issues. Ex. 2, FEIS at 13. Research has

the already high levels of P in many dairy counties, there may be limited capacity for dairies to add additional cows or to import food processing waste, such as acid whey, without over-applying P.[54] This is highly problematic because increasing levels of soil P lead to increased P runoff and leaching losses from agricultural fields to surface and groundwater.[55] Given the prevalence of high levels of P in soils where dairies are likely to expand—coupled with the fact that high levels of soil P leads to discharge of P into waterbodies—allowing dairies to expand without developing and following CNMPs and without regulatory oversight poses environmental risks. The need for oversight is all the greater if acid whey and other food processing wastes are added to the mix.[56]

NYSDEC admits that excess P already "is a leading contributor to water quality impairments in watersheds of New York and other areas of the nation."[57] It also admits that P "can have negative impacts on public drinking water reservoirs and potentially public health."[58] Nonetheless, the FEIS fails to consider the cumulative environmental impacts of allowing dairies to land-apply wastes containing P (such as manure and acid whey) without a CNMP and without regulatory oversight, especially in areas where P is already present at high levels.

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consistently shown that accumulation of excess nutrients in soils (especially phosphorus) increases runoff losses of this nutrient even without active erosion or catastrophic loss in storm events. Ex. 4, Exhibit A to Smolen Aff., at 11-12.

[54] Ex. 4, Exhibit A to Smolen Aff., at 2, 18-24, Ex. 4, Smolen Aff ¶ 11.

[55] Ex. 4, Exhibit A to Smolen Aff., at 2, 18, Ex. 4, Smolen Aff. ¶ 10.

[56] Ex. 4, Exhibit A to Smolen Aff., at 24, Ex. 4, Smolen Aff. ¶ 32.

[57] Ex. 2, FEIS at 54; *see also id*. at 64 ("Phosphorus has caused widespread impacts across the state"); *id*. at 116 ("many waterbodies in New York State are impaired due to excess phosphorus").

[58] *Id*.

In response to the Comment Letter from Petitioners and other public interest organizations to NYSDEC regarding this issue,[59] NYSDEC briefly addressed the issue of existing P levels in New York's soils, concluding: "many New York dairy farms have sufficient land base to reasonably recycle phosphorus."[60] But, as Dr. Smolen explains in his affidavit, NYSDEC's analysis is unsupported by any citations, is contradicted by published findings, and errs by focusing exclusively on the amount of P at state levels when what matters is the P levels in the areas where dairies are located and on the particular fields that will receive the manure and whey generated by the Final Rulemaking.[61] In the absence of the nutrient analysis and planning required by a CNMP and regulatory oversight, it is likely that some deregulated dairies will apply too much P in light of the existing levels in the soil, leading to discharges of nutrients to waterbodies.[62]

NYSDEC's failure to discuss the "cumulative impacts" of applying P to soils that have already reached their limit of P violates the procedural and substantive requirements of SEQRA. 6 NYCRR § 617.9(b)(5)(iii)(a) (EIS must evaluate cumulative impacts).

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

Finally, the EIS omits any discussion of the potential environmental impacts of its Part 360 rule change that completely deregulates the land application of fish hatchery-related food and fecal waste. Under prior law, a facility that land applies "undigested food and fecal

[59] Ex. 19, Comment Letter from Citizens Campaign for the Env't, Earthjustice, Env't N.Y., Envtl. Advocates of N.Y., Riverkeeper, Sierra Club, and Waterkeeper Alliance, to Robert Simson, Div. of Water, NYSDEC (Jan. 22, 2013) (hereinafter "Petitioners' Joint Comments").

[60] Ex. 2, FEIS at 55.

[61] *See* Ex. 4, Smolen Aff. ¶¶ 23-25.

[62] *Id*. ¶ 11.

material emanating from a New York State owned or licensed fish hatchery" had to be registered. 6 NYCRR § 360-4.2(b)(1) (regulations in effect until June 17, 2013). As amended by the Final Rulemaking, the Part 360 regulations completely exempt facilities that land-apply food and fecal waste from fish hatcheries from regulation. 6 NYCRR § 360-4.2(a)(4).

In response to comments pointing out the likely environmental impacts of this deregulation, NYSDEC noted only that the risk of adverse environmental impacts is "slight" because currently all of the land application of fish hatchery waste occurs at NYSDEC facilities, is limited in amount, and has low nutrient content.[63] NYSDEC's theory that there is only a slight risk from completely unregulated land application of fish hatchery waste is not supported, and the impacts of this deregulation should have been assessed in the environmental review process. First, fish hatchery waste does in fact contain nutrients.[64] Second, disposal of waste with "low nutrient content" can have significant impacts if enough of it gets into water. What matters is the quantity of waste or the total mass of nutrients associated with the waste stream, not the level of nutrients that are in each increment of the waste.[65] NYSDEC contends that the amount of fish hatchery waste currently land applied is slight, but it does not provide any data to support that assertion. Nor is there any guarantee that the amount will always be slight (if indeed it is slight now). Finally, NYSDEC's claim that there will be no environmental impacts from this deregulation because land application of fish hatchery waste currently occurs only at state run facilities makes little sense. First, there is no requirement of state management, so this could change at any time; and second, a CNMP "is essential to good

[63] Ex. 21, FEIS, app. D, at 42.

[64] Ex. 4, Smolen Aff. ¶ 32.

[65] *Id*.

management and preventing discharges and polluted runoff when anyone land applies animal waste."[66] The omission from the EIS of any "statement and evaluation of the potential significant adverse environmental impacts," 6 NYCRR § 617.9(b)(5)(iii), of the fish hatchery waste deregulation, and the failure to take *any* look, let alone a "hard look," at the impacts of this aspect of the Final Rulemaking is a procedural and substantive defect under SEQRA.

* * *

In sum, the discussion in the EIS of the potential environmental impacts of the Final Rulemaking neither meets the strict procedural requirements of SEQRA nor reflects that NYSDEC took a "hard look" at the likely effects of its action. Accordingly, the Court should invalidate the rulemaking. *See Chinese Staff & Workers Ass'n*, 68 N.Y.2d at 369 (annulling a special permit because of deficiencies in environmental review).

2. The EIS Fails to Include an Evaluation of the "Public Need and Benefits" of the Final Rulemaking That Takes Into Account Its Costs To Taxpayers and Other Industries.

In violation of the procedural and substantive mandates of SEQRA, the EIS does not provide an accurate description of the "public need and benefits" of the dairy deregulation. 6 NYCRR § 617.9(b)(5)(i). NYSDEC's discussion of "public need and benefits" is flawed because, as explained below: (1) it fails to address why environmental deregulation will lead to dairy expansions in the face of all the other pressing economic reasons that dairies have chosen not to expand; (2) it ignores established research showing that pushing traditional dairies to expand their herds will not strengthen the upstate economy; (3) despite the fact that the entire benefit of the Final Rulemaking is economic, the EIS does not evaluate the "net benefits" of the

[66] *Id*.

Final Rulemaking, meaning it does not take into account the costs of increasing the size of this category of dairy— such as subsidies to dairies that participate in the AEM program, remedying environmental damage to water and air, and costs shifted to municipal dischargers in impaired watersheds.

As discussed in Point II, *supra*, the primary purpose of the Final Rulemaking is "to promote and foster" the dairy and yogurt industry.[67] According to NYSDEC, the primary benefit from the dairy growth it hopes to achieve is the creation of approximately 700-875 new jobs, and the potential that over the next ten years dairy deregulation "***could*** result in nearly $150 million in additional economic activity."[68]

NYSDEC's claim that the Final Rulemaking by itself will spur 285 traditional dairies to grow their herds to over 200 mature cows over the next decade rests on the unsupported assumptions that the primary impediment to expansion of dairies in New York is environmental regulation of dairies with 200 to 299 cows.[69]

Contrary to NYSDEC's portrayal, however, environmental regulations are not the critical barrier to dairy expansion in New York. Rather, the key factors that contribute to dairies choosing not to expand are: rising costs of feed; higher fixed costs associated with expansion; cost of additional cows; farmers have little or no control over their profits due to

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[67] Ex. 2, FEIS at 8, 9; *see also* Ex. 3, Findings Statement at 1.

[68] *See* Ex. 2, FEIS at 10, 27; Ex. 21, FEIS, app. D at 9; Ex. 3, Findings Statement at 6-7; Ex. 21, FEIS, app. D, at 9 (emphasis added).

[69] Ex. 3, Findings Statement at 24 ("[w]hile there are numerous factors that influence the potential growth of dairy farms, . . . the most significant difficulty is financial – the structural best management practices (BMPs) can be very costly, and can entail large construction projects. . . . [Dairy] farms also indicate that they are reluctant to expand because of the anxiety of regulatory inspections and the perceived threat of enforcement"); Ex. 2, FEIS at 10 (claiming that deregulation will "reduc[e] costs associated with the current regulatory scheme – required development and implementation of a CNMP" and will encourage traditional dairies to "increase their herd size to greater than 200 mature milking cow over the next decade").

price controls[70]; mergers between dairy cooperatives reduce competition; vertical integration in the dairy industry; transportation costs; monopsony issues with single milk buyers; and difficulties finding farm labor.[71]

In response to Petitioners' assertion in their Joint Comments that economic and market forces are more significant barriers to dairy expansion than environmental regulation (and thus the deregulation is likely to be ineffective at spurring milk production), NYSDEC took a head-in-the-sand approach, stating: "The economic barriers will not be addressed in the EIS, as the Department has no influence in this area."[72] Despite NYSDEC's refusal to take a "hard look" at the most salient barriers to dairy expansion in New York—itself a fatal flaw in the EIS

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[70] This point was made to NYSDEC in comments submitted on the draft EIS from the Lake Champlain Committee, opposing the Final Rulemaking:

> New York is encouraging dairy expansion at a time when milk prices seem to be decreasing. While prices have improved tremendously since the nadir of 2009, there was a decrease last month. The January 15, 2013 Dairy Reporter cited the December Class III milk prices at $18.66 per hundredweight, a decrease over the last two months which had shown record highs and a 10-15% decrease over the highs of 2011. Since the mid-1990s, we have seen tremendous volatility in the price paid to farmers for milk, and the December prices could well be a harbinger of an on-coming trough. Though demand for milk has increased in New York State because of the yogurt market, it does not appear to affect the price farmers here receive for their milk.

Ex. 20, FEIS, app. B, Part 2 excerpt. One of the reports relied on by NYSDEC also acknowledges that a "major challenge to projecting any kind of financial results for a dairy farm is milk price and input volatility." *See* Ex. 31, FARM CREDIT EAST & CORNELL PRO-DAIRY, FINANCIAL IMPLICATIONS OF A DAIRY FARM EXPANSION – 190 COWS TO 290 COWS, at 2 (2012). Volatility around milk prices is a disincentive to dairies to increase their fixed costs, such as by building the infrastructure necessary for expansion.

[71] *See* Ex. 5, Exhibit A toWeida Aff., at 2-3; Ex. 4, Smolen Aff. ¶ 17 ("it is not the cost of compliance with the CAFO permitting program that limits the expansion of many small dairy farms but other market forces"); *id*. ¶ 29; *see also* Ex. 25, Andrew Grossman, *Yogurt Boom Leaves Dairy Farmers Behind: As Greek-Style Product's Popularity Takes Off, New York State Milk Producers Can't Keep Up With Escalating Demand*, WALL ST. J. (June 26, 2012); Ex. 31, FARM CREDIT EAST & CORNELL PRO-DAIRY, FINANCIAL IMPLICATIONS OF A DAIRY FARM EXPANSION – 190 COWS TO 290 COWS (2012); Ex. 32, Steve Kadel, *New York Dairyman: Many Producers Shut Out of Chobani Market*, TWIN FALLS TIMES-NEWS (June 10, 2012). These articles were cited in Ex. 19, Petitioners' Joint Comments at notes 153-59.

[72] Ex. 2, FEIS at 20; *see also* Ex. 21, FEIS, app. D, at 15 ("discussing . . . economic barriers to [dairy] expansion in the EIS would be beyond the intended scope").

analysis—the facts call into serious doubt whether environmental deregulation will in fact spur much increase in herd size because non-regulatory factors make expansion financially risky.[73] Rather, the only certain result of the Final Rulemaking is that dairies that already have 200 to 299 cows and were already operating under CNMPs and BMPs (or that were working toward it) have been deregulated—a result that serves no valid governmental purpose.

Given NYSDEC's failure to address why environmental deregulation will lead to dairy expansions in the face of all the other pressing reasons that dairies have recently chosen not to expand, it has not fulfilled its obligation to describe the "public need" and "benefit" for deregulating some dairy CAFOs, or to take a "hard look" and provide a "reasoned elaboration," *Jackson*, 67 N.Y.2d at 417, of the basis for its determination that deregulation will generate sufficient benefits to make it worth the significant environmental costs.

In addition, NYSDEC's theory that growing traditional dairies to more than 200 cows will strengthen the upstate economy is contradicted by the evidence, and thus cannot be invoked as a "public need" or "benefit" of the deregulation. Longstanding research shows that the presence of large farms actually ***reduces*** the economic growth and health of rural regions.[74] This is because large dairies are designed to use as little labor as possible and, thus, fewer jobs are created by larger dairies than would have been provided by the traditional dairies they replace.[75]

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[73] *See* Ex. 5, Exhibit A toWeida Aff., at 3-4, Ex., 4 Smolen Aff. ¶¶ 17, 29.

[74] Ex. 5, Exhibit A toWeida Aff., at 5-6.

[75] The Adirondack Council made the same point to NYSDEC in its comments on the DEIS opposing the Final Rulemaking and permit modifications:

> While we understand that the ultimate goal is to increase employment in our state, we do not agree with the simple equation that more cows equal more jobs. There is more to this equation. With increased farm-size comes increased mechanization of farm processes. As it has with the logging industry, mechanization has drastically cut into the

Studies show that large dairies do not spend the same amounts of money locally as traditional dairies, reducing the number of secondary jobs that might be created in the local economy.[76] National studies showing negligible economic stimulus resulting from the presence of large farms are borne out by a recent analysis of the impact of dairies on the economy in upstate New York, which compares economic trends in Yates and St. Lawrence Counties between 1982 and 2007.[77]

Even if NYSDEC were correct that deregulation would spur the growth of dairies and the upstate economy in general, the FEIS is deficient because it does not attempt to evaluate the direct costs to the taxpayers of creating dairy-related jobs—such as the cost of subsidizing dairies' development of responsible waste management practices and remedying environmental damage to water and air and the degradation of the value of polluted properties, as well as costs shifted to municipal dischargers in impaired watersheds. These costs would likely be significant. In Dr. Smolen's expert opinion:

> Any savings gained by failure to manage waste properly at the deregulated Dairy CAFOs will be costs borne by the public through degradation of water, air, and soil resources. . . . [C]osts will be transferred from dairy operators and dairy processing facilities to the public and the environment. The public will pay the price in declining water quality, degraded recreational opportunities, and declining ecosystems. Where a Phosphorus TMDL exists for a watershed containing dairies, there will be a direct shift of waste treatment costs from the dairy industry to the permit-holding industries and municipalities. This will

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> need for living, breathing employees. The Adirondack Council would rather see MORE farms than LARGER farms. Small farms not only provide a higher ratio of jobs, they enrich their community, feed their neighbors, and better protect open space character and water quality. For this reason amongst others, the Council cannot support the proposed modifications to the General Permit.

Ex. 20, FEIS, app. B, Part 2 excerpt (emphasis in original).

[76] *Id.*

[77] *See* Ex. 33, FOOD & WATER WATCH, THE ECONOMIC COST OF FOOD MONOPOLIES (2012), which is discussed in detail in Ex. 19, Petitioners' Joint Comments at 46-47.

> result because any increasing load from the dairy industry will have to be made up by the permit holders. This could result in substantial costs to the public and other industries.[78]

NYSDEC recognizes that one of the purposes of the EIS is "to evaluate whether the risks posed to the environment by the proposed regulation would outweigh potential economic benefits."[79] But here, where the exclusive "benefits" of a proposed agency action are economic, the only way for NYSDEC to estimate the true "public benefit" of the dairy deregulation is to deduct the direct on-going costs to the taxpayers of the state from its projection of economic benefit to come up with a calculation of "net public benefits." NYSDEC's failure to evaluate and describe the net public benefits of the Final Rulemaking violates SEQRA's procedural mandate to include in the EIS a "description of the . . . public need and benefits" of the Final Rulemaking. NYSDEC's failure to take a hard look at the net public need and benefits of its action, and to include in the EIS a reasoned elaboration of the basis for its determination that there will in fact be ***any*** net benefit to the New York State public from deregulating dairies, violates SEQRA's substantive mandates. *Jackson*, 67 N.Y.2d at 417 (requiring reasoned elaboration of SEQRA determinations).

3. The EIS Did Not Consider Any Options For Increasing Milk Production from Dairy CAFOs With More Than 300 Cows, Thus Failing to Evaluate a Range of Reasonable Alternatives.

The EIS does not fulfill the requirement of SEQRA to "descri[be] and evaluat[e] . . . the range of reasonable alternatives to the action that are feasible," 6 NYCRR § 617.9(b)(5)(v), because it fails to consider a genuine "range" of reasonable options. While SEQRA does not require consideration of every possible alternative, it does require consideration of feasible

[78] Ex. 4, Smolen Aff. ¶ 17.

[79] Ex. 21, FEIS, app. D, at 6.

alternatives that avoid environmental harm. Thus, for example, in *Village of Ossining v. Planning Board of the Town of Ossining*, No. 88-16248, slip op. at 7, 10-12 (Sup. Ct. Westchester Cnty. 1989),[80] the court found that a town planning board considering a subdivision on a lot that was partially in the Indian Brook Reservoir watershed violated SEQRA by not considering an alternative plot layout that would avoid siting homes within the watershed. So, here, as explained below, NYSDEC violated SEQRA by not considering any alternative approaches to increasing the state's milk supply that do not involve environmental deregulation and degradation.

The FEIS poses four alternatives to the proposed action: (1) the no-action alternative; (2) deregulating dairies with 200 to 299 cows, but mandating their enrollment in the AEM program; (3) deregulating dairies with 200 to 299 cows, but mandating that any deregulated facility located in a watershed with an impaired waterbody enroll in the AEM program; and (4) terminating the State's ECL permit program in its entirety and simply administering the federal Clean Water Act permit. In sum, NYSDEC considered two alternatives that were not realistically on the table: doing nothing and fully dismantling its CAFO regulations.[81] The only

[80] A copy of this unreported decision is provided for the Court's convenience as Ex. 58.

[81] Ex. 2, FEIS at 111-21. Doing nothing was never a genuine option because the State committed to deregulating dairies before the SEQR process ever began. On August 15, 2012, Governor Andrew M. Cuomo hosted a "New York State Yogurt Summit." *See* Ex. 8, Press Release from Governor's Press Office (Aug. 15, 2012) ("Governor's press release"). The Governor told summit attendees that he wants New York to become the yogurt capital of the United States. Ex. 9, Freeman Klopott, *Cuomo Says Dairy Industry Can Make New York U.S. Yogurt Capital*, BLOOMBERG BUSINESSWEEK (Aug. 15, 2012), At the summit, New York State Department of Agriculture and Markets Commissioner Darrell Aubertine announced that the state was "immediately increasing the animal threshold required for the CAFO permit from 200 to 300," thereby exempting dairy farms within that size category from environmental permitting requirements. Ex. 9, Karen DeWitt, *Cuomo Makes a Moo-ve for More Cows at 'Yogurt Summit,'* WNYC NEWS (Aug. 15, 2012). This high-level commitment to deregulating dairies with 200 to 299 cows predetermined the alternative NYSDEC would choose, in violation of the purpose of SEQRA that environmental review be a substantive part of the agency's decisionmaking, not merely a statement disclosing decisions that have already been made—as was the case here.

options it truly considered were slight variations on the proposal it did adopt: requiring all or some deregulated dairies to participate in the AEM program—a result that NYSDEC claims will occur anyway, even if not required.

NYSDEC did not consider any alternative involving increasing milk production from the many New York dairies with more than 300 cows, which already operate under CNMPs and regulatory oversight, and thus already have structural and non-structural practices in place to handle large amounts of cow waste.[82] The EIS also did not consider any alternative involving retaining the regulatory structure that had been in place, but providing additional financial assistance to dairies with 200 to 299 cows to help them comply with the requirements of the permit. Indeed, the alternatives analysis is fundamentally flawed because it starts from the premise that any increased milk production in the state must come as a result of expanding small, unregulated farms to a size that would be considered a medium CAFO under federal law. By assuming that small unregulated dairies must bear the brunt of increasing the state's milk production, NYSDEC violated SEQRA's mandate that the EIS "evaluat[e] . . . the *range* of reasonable alternatives to the action that are feasible." 6 NYCRR § 617.9(b)(5)(v) (emphasis added). *See* Ex. 58, *Vill. of Ossining*, slip op. at 10-11 (planning board violated SEQRA by approving subdivision in which houses would be built in watershed without looking at alternative plot layouts in which homes would be built outside the small portion of the plot within the watershed); *Brander*, 18 Misc.3d 477 at 481 (town failed to consider all reasonable alternatives to construction of turbine wind farm where it did not consider alternative sites, alternative project size, alternative turbine size, or alternative design).

[82] Ex. 5, Exhibit A to Weida Aff., at 2-3.

Because there was no genuine "range" to the alternatives considered, and because of the failure to consider any alternative approach to milk production that did not involve dairies with 200 to 299 cows, NYSDEC violated the strict procedural requirements of SEQRA. At a minimum, NYSDEC failed to take a hard look at true alternatives for increasing the state's milk supply, and failed to provide a "reasoned elaboration" for its determination that deregulation is needed to reach the state's milk production goals. *Jackson*, 67 N.Y.2d at 417.

4. There Is No Reasonable Basis to Conclude That NYSDEC's Mitigation Theory—That Dairies Will Voluntarily Adopt the Costly Practices that the Deregulation Was Designed to Make Optional—Will Be Effective.

In addition to all of the other flaws in its environmental review, NYSDEC also violated SEQRA's requirement that an EIS include "a detailed statement setting forth . . . mitigation measures proposed to minimize the environmental impact." ECL § 8-0109(2)(f). In assessing the adequacy of proposed mitigation measures, the New York Court of Appeals has looked at whether the agency has a "reasonable basis to conclude" the measures will "in fact minimize those adverse effects." *Jackson*, 67 N.Y.2d at 426. Here, NYSDEC has no "reasonable basis to conclude" that its proposed mitigation "will in fact minimize" the serious water quality impairments caused by the Final Rulemaking. *Id.*[83]

The SEQRA documents describe the required "mitigation measures" as consisting of NYSDEC's "*expect[ation]* that *many* of the exempted CAFOs . . . would take advantage of" the "numerous voluntary programs that promote best management practices and industry guidelines," both "because of available funding, as well as the farm's economic self-interest" in

[83] *See generally* Ex. 4, Smolen Aff. ¶ 26.

avoiding enforcement actions under statutes and regulations that protect public health and the environment.[84]

NYSDEC's mitigation proposal is based on two fundamentally inconsistent premises: first, that deregulation is necessary because the cost of the responsible waste handling measures required by operating under the CAFO General Permit prevents traditional dairies from increasing their herd size to more than 199 cows; and second, that deregulated dairy CAFOs will voluntarily adopt responsible waste handling measures even if not required to do so, which will mitigate any potential environmental impact. These statements cannot both be right.[85] The FEIS provides no "reasoned elaboration" explaining why NYSDEC "expect[s]" that dairy facilities will voluntarily develop responsible waste management practices, including CNMPs and BMPs, when the stated purpose of deregulating these facilities is to enable these facilities to avoid the significant financial costs of developing CNMPs and BMPs to manage waste if

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[84] Ex. 2, FEIS at 77 (emphases added) (strikethrough in original); *see also* Ex. 3 Findings Statement at 16 (NYSDEC "*expects* that CAFOs exempt from permit coverage by this proposed action would either voluntarily elect to retain or seek permit coverage, which the proposed action allows, or enroll in the AEM program, which offers *many* of the same environmental protections as the Department's permit program") (emphases added).

[85] This point was made in comments on the draft EIS submitted to NYSDEC by New York legislators Robert K. Sweeney, Chair, Assembly Standing Committee on Environmental Conservation and Charles D. Lavine, Assembly Chair, Administrative Regulations Review Commission. They stated:

> We are troubled by the Department's logic in crafting the proposed rules. The Department indicates that the rules are being proposed because the existing permit requirements are perceived as being overly burdensome for the medium-sized CAFOs. At the same time, the Department argues that any environmental impact will be mitigated because despite the repeal of the required permit, medium CAFOs are still going to comply with the Comprehensive Nutrient Management Plan and Agricultural Environmental Management (AEM) in order to receive additional legal protection. Essentially the Department seems to be saying we have to do this because providing this level of environmental protection is too expensive, but the public shouldn't worry because farms will keep providing the same level of environmental protection anyway.

Ex. 20, FEIS, app. B, Part 2 excerpt.

their herds grow to between 200 and 299 cows.[86] *Jackson*, 67 N.Y.2d at 417 (requiring "reasoned elaboration" of determinations required by SEQRA).

In direct contravention of NYSDEC's Alice-in-Wonderland mitigation theory, there is a large body of evidence from actual experience, as well as surveys of dairy owners, showing that voluntary, altruistic acts are highly unlikely in this industry.[87] Consistent with this

[86] *See* Ex. 3, Findings Statement at 24. The responsible waste management practices that are no longer required as a result of the Final Rulemaking, and thus which NYSDEC's mitigation proposal suggests deregulated dairies will undertake voluntarily, include:

- Technical evaluation of open manure storage structures by a professional engineer (one time)—dairies that expand will generally need additional waste storage capacity to maintain proper freeboard to prevent overtopping or structural failure and avoid discharge.
- Annual evaluation of storage adequacy by the CNMP planner.
- A requirement that a CNMP is prepared and implemented – a thorough technical nutrient management plan that considers collection of manures and waste water and storage and application of all nutrients to lands in a crop production system. The objective of the CNMP is to assure proper use of manure and fertilizers and to reduce the risk of runoff and leaching to groundwater.
- A requirement that silage leachate collection and control facilities are implemented, operated and maintained in accordance with NRCS standards to prevent overflow or discharge of concentrated, low-flow leachate.
- A requirement that fields be soil tested at least once every three years, and the Phosphorus (P) and Nitrogen (N) indexes be calculated to manage the risk of P and/or N contamination of runoff.
- A requirement for emergency planning to respond to spills or unanticipated discharge of pollutant. This is very much needed for wet weather, when there may be no nearby location where material from storage may be pumped when overflow is imminent.
- Recordkeeping to assure proper management of waste and nutrient handling systems.

Ex. 4, Exhibit A to Smolen Aff., at 7-8.

[87] Ex. 5, Exhibit A to Weida Aff., at 6-7; Ex. 4, Exhibit A to Smolen Aff., at 29, Ex. 4, Smolen Aff. ¶¶ 14, 25; Ex. 34, Gregory L. Poe, et al., *Will Voluntary and Educational Programs Meet Environmental Objectives? Evidence from a Survey of New York Dairy Farms*, 23 REV. OF AGRIC. ECON. 473, 473-91 (Dec. 2001) ("Based on our analysis, it appears that agricultural environmental policy in New York and elsewhere will need to extend or move beyond the present voluntary program approach to meet water quality objectives."), Ex. 5, Exhibit A to Weida Aff., at 7; Ex. 19, Petitioners' Joint Comments at 57-58, n.210.

evidence, currently only about one-half of New York dairies with 100-199 cows have implemented best management practices for managing waste through participation in AEM.[88]

To the extent that NYSDEC's mitigation theory rests on the "expectation" that deregulated dairy facilities will voluntarily develop responsible waste management practices because the state will provide them with funding to do so,[89] the EIS does not provide a "reasoned elaboration" for why the state will not or could not make these funds available to assist ***regulated*** dairy facilities to come into compliance with the requirements of the Part 750 regulations and the CAFO General Permit. *Jackson*, 67 N.Y.2d at 417 (requiring "reasoned elaboration"). In other words: why is the state willing to make funds available to dairies with 200 to 299 cows if they are deregulated, but not to assist such dairies to comply with environmentally protective regulatory requirements?

Nor is it clear whether the state's asserted commitment to funding responsible waste management practices at dairies with 200 to 299 cows will go beyond 2013, or if this year's largesse is merely a temporary infusion of money designed to help the Final Rulemaking and permit modifications withstand scrutiny. What is clear is that this year's funding level is highly atypical. In recent years, many New York dairy farms have been denied cost-sharing money for waste management. For example, New York State Soil and Water Conservation Committee minutes show that in the 2012-2013 fiscal year, only a little over half of requests for funding were granted.[90] The FEIS lists numerous sources of federal funding for conservation practices. However, these programs are also severely underfunded and in some cases not applicable to the

[88] Ex. 2, FEIS at 107 (the overall AEM participation rate for dairy farms with 100 to 199 cows is 63%; 53% have implemented best management practice systems); *see also* Ex. 4, Smolen Aff. ¶ 25.

[89] Ex. 3, Findings Statement at 23.

[90] Ex. 35, N.Y. SOIL & WATER CONSERVATION COMMITTEE, STATE COMMITTEE MINUTES (Feb. 14, 2012).

waste management structures and practices needed on dairy farms. For instance, the Farm and Ranch Lands Protection Program ("FRPP") provides funding for the purchase of development rights and has no connection to a farm's waste management practices. The Environmental Quality Incentives Program ("EQIP"), likely the only listed program that would supply any significant funding for structural waste management improvements, only funded between 15 and 67 percent of applications in each year between 2000 and 2009.[91]

NYSDEC's theory that deregulated dairies will voluntarily adopt responsible waste management practices due to the threat of enforcement is unrealistic given both the fact that many discharges are not easily detectable and that NYSDEC has limited capacity to adequately monitor the newly deregulated dairies to determine if they are discharging wastes.[92] As Dr. Smolen explains: "The enforcement option is only likely to be effective in the most egregious cases, where direct discharge has resulted in visible catastrophic damage. Most impacts are likely to be lower level and generally out of sight."[93] Yet such low level, chronic discharges "often lead to cumulative downstream water quality impairments."[94]

NYSDEC admits that it has limited resources to monitor regulated CAFOs, let alone unregulated AFOs. It acknowledges that "staffing is limited, and staff will not be on the ground specifically searching to identify dischargers. Staff will respond to complaints and suspected violations if made aware of them, but likely will not be able to seek out and search

[91] Ex. 36, MEGAN STUBBS, CONG. RESEARCH SERV., ENVIRONMENTAL QUALITY INCENTIVES PROGRAM (EQIP): STATUS AND ISSUES 8 (Aug. 3, 2012).

[92] It is even more implausible that the threat of enforcement by private citizens would spur deregulated CAFOs to voluntarily incur the costs of responsible waste management.

[93] Ex. 4, Exhibit A to Smolen Aff., at 9.

[94] Ex. 4, Smolen Aff. ¶ 26.

for dischargers."[95] NYSDEC's lack of enforcement is confirmed by documents Petitioners obtained through a Freedom of Information Law request for records of all inspections conducted by NYSDEC of, and all notices of violation issued to, dairy CAFOs with fewer than 300 dairy cows since January 1, 2008. We determined from the records that of the apparently 75 dairies that are immediately impacted by this program revision, 52% have not been inspected in the last six years and 74% have not been inspected in the last two years. Of the 36 facilities that have been inspected in the last six years, 35 facilities have either discharged or failed to implement the NYSDEC-mandated practices necessary to prevent discharges.[96] Yet NYSDEC has issued Notices of Violations related to these violations at only eight facilities.[97] Notably, since January 2008, NYSDEC has not inspected any dairy that was not subject to a SPDES permit, suggesting that unregulated dairies do not have realistic fears of enforcement efforts. Nor is it plausible that the threat of inspection by EPA will compel deregulated dairies to voluntarily develop and follow CNMPs. EPA's website indicates that between 2008 and 2010, its enforcement actions were limited to only two medium dairies in New York, and the only dairy that was fined was covered by a SPDES permit.[98]

Under NYSDEC's view, deregulation will incentivize traditional dairies to grow to over 200 cows insofar as it lowers the costs of expansion. But the "costs of operating an effective

[95] Ex. 21, FEIS, app. D, at 35; *see also* Ex. 2, FEIS at 119 ("Department staffing in the CAFO program is limited, making it difficult to allocate resources necessary to identify dischargers.").

[96] *See* Ex. 6., NYSDEC, Inspection Reports and Notices of Violation

[97] *See id.*

[98] *See* Ex. 37, U.S. EPA, National Enforcement Initiatives for Fiscal Years 2008-2010, Clean Water Act: Concentrated Animal Feeding Operations.

pollution control system are virtually the same with or without a permit."[99] As Dr. Smolen explains, there is a necessary trade-off between regulatory cost and environmental cost:

> if the industry maintains the necessary level of pollution control the only significant cost savings would be those of the regulatory agency, which would no longer be called on to review and grant permits. . . . If the industry achieves a significant cost saving, it will be at a cost to the environment and other industries and municipalities that remain under permit. If the industry chooses to avoid the costs of designing and operating proper waste handling, treatment, and storage systems, and land application, the pollution of the state's waterbodies will increase.[100]

In other words, the only way for deregulated dairies to expand their herd size at a lower cost is ***not*** to adopt the same level of responsible waste management practices that the Part 750 regulations and the CAFO General Permit requires. Thus, NYSDEC has no "reasonable basis to conclude" that its purported mitigation "w[ill] in fact minimize" the environmental impacts of the Final Rulemaking. *Jackson*, 67 N.Y.2d at 426.

In response to public comments about the shortcomings in NYSDEC's "expectation" of mitigation, NYSDEC amended the EIS to "clarify that the Department may designate AFOs as Small CAFOs, which would enable the Department to effectively regulate AFOs that pose a threat to water quality."[101] The proposal to rely on designation of discharging AFOs with 200 to 299 cows as Small CAFOs is inconsistent with NYSDEC's obligations under the Clean Water Act, as discussed in Point V.B, *infra*. This therefore provides no mitigation.

NYSDEC's mitigation plan (or more correctly, its wishful ***expectation***) is so far-fetched and so unlikely to result in meaningful protection for the environment that it is as if the EIS had no discussion of mitigation at all, a result that clearly would not comport with the strict

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[99] Ex. 4, Smolen Aff. ¶ 15.

[100] Ex. 4, Exhibit A to Smolen Aff., at 8, *see also* Ex. 5, Weida Aff. ¶ 6.

[101] Ex. 21, FEIS, app. D, at 6.

procedural requirements of SEQRA. ECL § 8-0109(2)(f); 6 NYCRR § 617.9(b)(5)(iv). At a minimum, NYSDEC did not take a "hard look" at mitigation measures that would actually minimize the environmental impact, and did not provide a "***reasoned*** elaboration" for why voluntary compliance is realistic or for how if deregulated dairies continue to implement responsible waste handling measures there would be any net cost-saving statewide (meaning that costs may be shifted to taxpayers or municipal dischargers, but will still occur). Given these failures in the mitigation analysis, NYSDEC failed to undertake the kind of meaningful environmental review that SEQRA requires. *See Jackson*, 67 N.Y.2d at 426 (court considered whether agency had "reasonable basis to conclude" the measures will "in fact minimize those adverse effects").

5. NYSDEC's Finding—That From Among the Reasonable Alternatives, the Final Rulemaking Minimizes or Avoids Adverse Environmental Effects to the Maximum Extent Practicable—is Insupportable.

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

at the same time minimizing any potential environmental impacts."[102] NYSDEC also perfunctorily makes the finding required by ECL section 8-0109(8), that "from among the reasonable alternatives," the Final Rulemaking "minimizes or avoids adverse environmental effects to the maximum extent practicable."[103] For all of the reasons above, these findings are belied by the facts in the record, are undermined by the significant omissions in NYSDEC's analysis, and lack credibility due to the logical shortcomings of NYSDEC's reasoning and assumptions. In addition, NYSDEC's conclusions are not supported by any "reasoned elaboration."

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

POINT IV

NYSDEC VIOLATED THE STATE ADMINISTRATIVE PROCEDURE ACT BY NOT GIVING THE PUBLIC AN OPPORTUNITY TO COMMENT ON ITS SUBSTANTIALLY REVISED RULEMAKING.

The New York State Administrative Procedure Act ("SAPA") requires agencies to submit proposed rules to the Secretary of State for publication in the *State Register* in order to afford the public notice of the proposal and an opportunity for comment prior to adoption of a rule. SAPA § 202(1). If, after such notice and comment, the agency proposes to adopt a rule that "contains a substantial revision" from the initially proposed rulemaking, the agency "shall submit a notice of revised rule making to the secretary of state for publication in the state

[102] Ex. 3, Findings Statement at 25.

[103] *Id*. at 26.

register." SAPA § 202(4-a). For purposes of this requirement, a "substantial revision" is "any addition, deletion or other change in the text of a rule proposed for adoption, which materially alters its purpose, meaning or effect. . . ." SAPA § 102(9); *Motor Vehicles Mfrs. Ass'n of U.S., Inc. v. Jorling*, 152 Misc. 2d 405, 409 (Sup. Ct. Albany Cnty. 1991), *aff'd* 181 A.D.2d 83 (3d Dep't 1992). When analyzing SAPA claims, New York State courts find federal case law analyzing the federal Administrative Procedure Act (APA), codified at 5 U.S.C. §§ 500 *et seq*., to be persuasive. *See Industrial Liaison Comm. of Niagara Falls Area Chamber of Commerce v. Williams*, 131 A.D.2d 205, 212 (3d Dep't 1987), *order aff'd* 72 N.Y.2d 137 (1988) (citing *Am. Iron & Steel Inst. v. EPA*, 568 F.2d 284, 293 (3d Cir. 1977)); *Motor Vehicles Mfrs. Ass'n of U.S.*, 152 Misc. 2d at 409 (citing *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983)).

In determining compliance with the APA, federal courts have "phrased the test as whether the final rule is a 'logical outgrowth' of the proposed rule, or if the notice provided would 'fairly apprise interested persons of the 'subjects and issues.'" *Motor Vehicles Mfrs. Ass'n of the U.S.*, 152 Misc. 2d at 409. Here, NYSDEC's rulemaking was illogical and the initial notice of rulemaking did not inform the public of the issues ultimately adopted in the final rule making. NYSDEC thus failed to substantially comply with SAPA because it did not submit a notice of revised rule making for publication even though the differences between the proposed and Final Rulemaking materially altered the effect of its rulemaking so as to make it confusing and more difficult for NYSDEC to commence regulation of deregulated dairies that are shown to be causing water pollution. For this reason, the Final Rulemaking must be invalidated.

NYSDEC's proposed regulation would have adopted the definitions of "CAFO" that are established under federal law, as codified at 40 C.F.R. § 122.23(b)(6).[104] Under the proposed regulation, as under federal law, dairy AFOs with between 200 to 299 mature dairy cows would have been considered "medium CAFOs;" however, under the proposal, medium dairy CAFOs with between 200 to 299 mature dairy cows would "not [be] considered a point source."[105] By proposing to define certain medium dairy CAFOs as "not . . . a point source," NYSDEC was proposing to exempt such facilities from permitting requirements because being a "point source" triggers the requirement of a permit. *See* ECL § 17-0701 (it is unlawful to make or use a point source without a SPDES permit).

In contrast, the adopted Final Rulemaking deviates from the federal definitions of CAFO. Unlike the federal regulations, NYSDEC's Final Rulemaking states that non-discharging dairy AFOs with between 200 to 299 mature dairy cows are "not . . . considered a Medium CAFO."[106] The Final Rulemaking "materially altered" the effect of NYSDEC's rulemaking. SAPA § 102(9). In the Final Rulemaking, non-discharging dairies with 200 to 299 cows are considered AFOs, not CAFOs, as they would have been under the proposed regulations.

Removing dairies with 200 to 299 cows from the "medium CAFO" category has consequences for how these facilities are regulated under the Clean Water Act. Under federal law, a medium CAFO that discharges ***must*** operate under a permit. *See* 33 U.S.C. § 1311(a)

[104] *See* Ex. 15, Draft 6 NYCRR § 750-1.2 (21).

[105] *See* Ex. 15, Draft 6 NYCRR § 750-1.5 (12).

[106] *See* 6 NYCRR § 750-1.2(a)(21) ("[a] Medium CAFO means an AFO that stables or confines as many as or more than the numbers of animals in any of the following categories: (i) 200-699 mature dairy cows, whether milked or dry, except that an AFO that stables or confines 200-299 mature dairy cows, whether milked or dry that does not cause a discharge would not be considered a Medium CAFO").

(requiring a permit for "the discharge of any pollutant from a point source"); *id*. § 1362(14) (defining the term '"point source" to include any CAFO). In contrast, under federal law, ***an AFO*** that discharges need only operate under a permit if it meets the rigorous requirements for "designation" set forth in 40 C.F.R. § 122.23(c)(2). *See* discussion at Point V.B, *infra*. Thus, revising the regulations to define dairies with 200 to 299 cows as AFOs, not CAFOs, has made it significantly less likely that these facilities can be required to operate under CWA permits if they discharge pollutants. The public should have been given the opportunity to comment on this significant revision to the proposed regulations, which has significant implications for water quality in the state, before it was adopted by NYSDEC.

It is also notable that the DEIS described the exclusion of non-discharging AFOs with 200 to 299 mature dairy cows from the definition of "medium CAFO" as an option NYSDEC considered but ruled out because it "could lead to confusion since non-discharging CAFOs with 300 or more mature dairy cows are still required to maintain ECL permit coverage."[107]

To determine whether a regulatory revision is a "logical outgrowth" of the proposed rule, courts "consider whether the complaining party *should have anticipated that a particular requirement might be imposed*. The test is whether a new round of notice and comment would provide the first opportunity for interested parties to offer comments that could persuade the agency to modify its rule." *Envtl. Def. Center, Inc. v. EPA*, 344 F.3d 832, 851 (9th Cir. 2003) (citing *Am. Water Works Ass'n v. EPA*, 40 F.3d 1266, 1274 (D.C. Cir. 1994)) (emphasis added). Here, where the Final Rulemaking adopted an option that was considered in the draft EIS ("DEIS,") but rejected by NYSDEC as "unnecessarily complicated," this revision could

[107] Ex. 14, DEIS at 94; *see also* Ex. 2, FEIS at 122 (classifying non-discharging AFOs with 200 to 299 dairy cows as medium CAFOs, but exempting them from the definition of "point source," is preferable because it avoided unnecessary complication).

not have been anticipated by the public. There is sound reason to give the public opportunity to comment before a state agency adopts a regulation that it had previously ruled out in its proposed as too complicated and confusing to be seriously considered.

Given that NYSDEC's revisions between the proposed rule and Final Rulemaking materially alter their effect in a way that will make it harder to protect the waters of this State from pollution from deregulated dairies, SAPA required NYSDEC to submit the substantially revised regulations to the Secretary of State for publication in the *State Register* in order to afford the public an opportunity for public notice and comment on the revised rulemaking. SAPA §§ 202(4-a), 102(9).

NYSDEC's failure to substantially comply with the clear mandate of SAPA section 202(4-a) renders its adoption of the Final Rulemaking invalid, null and void and, as a matter of law, NYSDEC's adoption of the Final Rulemaking without allowing the public to comment on the regulation it adopted was arbitrary, capricious and an abuse of discretion. *Cf. Med. Soc'y of State of N.Y., Inc. v. Levin*, 185 Misc. 2d 536, 548 (Sup. Ct. N.Y. Cnty. 2000), *aff'd sub nom.*, 280 A.D.2d 309 (1st Dep't 2001).

POINT V

NYSDEC HAS FAILED TO ENSURE ITS STATE PERMIT PROGRAM FOR CAFOS IS AT LEAST AS STRINGENT AS THE FEDERAL PROGRAM.

CWA section 510 prohibits states that operate federally-delegated SPDES programs, such as New York, from "adopt[ing] or enforc[ing] any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is ***less stringent than*** the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under [the CWA]." 33 U.S.C. § 1370; *see* 6

NYCRR §§ 750-1.11(5)(i)-(iii); *Natural Res. Def. Council, Inc. v. EPA*, 859 F.2d 156, 186 (D.C. Cir. 1988). Furthermore, federal law requires NYSDEC to properly exercise control over activities required to be regulated under the CWA, issue SPDES permits, act on violations of permits or other program requirements, and inspect and monitor activities subject to the CWA. 33 U.S.C. § 1370; 40 C.F.R. §§ 123.63(a)(2), (3) & (5).

A. NYSDEC's Improper Presumption of No Discharge for CAFOs with Histories of Discharge Does Not Meet Minimum CWA Standards and Requirements.

NYSDEC's presumption, as reflected in the FEIS, that dairy facilities with histories of discharge will not discharge in the future sets a less protective standard than EPA has established, in contravention of the State's obligations under the CWA. Under the CWA and federal CAFO regulations, CAFOs that have discharged pollutants in the past must obtain NPDES permits unless they can affirmatively demonstrate that the conditions leading to the discharge have been corrected. The EPA has stated that:

> CAFOs that have discharged without a permit only cease to be in violation of the Act when circumstances that led to their discharge have been changed or corrected. CAFOs that have discharged in the past will discharge in the future, and are therefore expected to obtain a permit, unless the conditions that led to the discharge are fully remedied.[108]

The U.S. EPA has further clarified its position:

> [A] CAFO that has discharged without a permit remains in violation of the CWA so long as there is a continuing likelihood that intermittent or sporadic discharges will recur . . . . [*National Pork Producers Council v. EPA, 635 F.3d 738 (5th Cir.* 2011)] does not affect the well-established principle that discharge of pollutants, whether continuous or intermittent and sporadic, require NPDES permit coverage. CAFOs that have discharged without a permit only cease to be in violation of the Act when circumstances that led to their discharge have

[108] Ex. 45, Memorandum from James A. Hanlon, EPA, Concentrated Animal Feeding Operation Program Update after *National Pork Producers Council v. EPA*, at 2 (Dec. 8, 2011).

> changed or been corrected. CAFOs that have discharged in the past will discharge in the future, and are therefore expected to obtain a permit, unless the conditions that led to the discharge are fully remedied.[109]

U.S. EPA guidance is clear that history of discharge is critical in determining if a CAFO must operate under a permit; U.S. EPA presumes that a CAFO that has discharged in the past will continue to discharge in the future until a demonstrated change in the conditions leading to the discharge has been adequately demonstrated to the regulator.

In contrast, under its rulemaking NYSDEC ignores the question of past discharges and instead has chosen to regulate only currently discharging CAFOs by determining through its new regulation that a "'Medium CAFO' is 'an AFO that stables or confines . . . 200 to 699 mature dairy cows, whether milked or dry, except that an AFO that stables or confines 200-299 mature dairy cows, whether milked or dry that ***does not cause*** a discharge would not be considered a Medium CAFO.'"[110] According to NYSDEC, "[a]ll farms ***with*** a discharge, regardless of size or location, will be required to ***maintain*** CWA CAFO permit coverage."[111] NYSDEC's regulatory proposal thus appears to require a permit only for medium dairy CAFOs that NYSDEC knows to be ***presently*** discharging without regard to the relevance under federal law of the history of discharge, and the presumption of a continued discharge.

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[109] Ex. 27, U.S. EPA REGION 7, PRELIMINARY RESULTS OF AN INFORMAL INVESTIGATION OF THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PROGRAM FOR CONCENTRATED ANIMAL FEEDING OPERATIONS IN THE STATE OF IOWA 17 (2012); *see* U. S. EPA REGION 1'S INTERIM RESPONSE TO PETITION TO WITHDRAW VERMONT'S NPDES PROGRAM APPROVAL 7 (2013) (citing *Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield*, 890 F.2d 690, 693 (4th Cir. 1989), and *Carr v. Alta Verde Indus.*, 931 F.2d 1055, 1062 (5th Cir. 1991)) ("A CAFO that has discharged without a permit remains in violation of the Act so long as there is a continuing likelihood that intermittent or sporadic discharges will recur.").

[110] Ex. 2, FEIS at 41 (emphasis added).

[111] *Id.* at 111, Ex. 21, FEIS, app. D, at 30 (emphasis added); *see id.* at 11 (mischaracterizing federal requirements by stating "the Department must continue to issue a SPDES permit for facilities that meet the federal definition of a CAFO and *have* a discharge" (emphasis added)).

NYSDEC's approach not only is less protective than the federal standard but overlooks important facts about discharging CAFOs. It is well known and acknowledged by NYSDEC that the failure to follow a CNMP when land applying manure may cause discharges of pollutants.[112] Although NYSDEC repeatedly concedes only the "potential" for increased adverse environmental impacts, it clearly recognizes that runoff from CAFOs is caused by unmanaged manure that is not spread in accordance with a CNMP.[113] Thus, if certain dairy CAFOs that have discharged in the past are not required to follow CNMPs, it is inevitable that they will discharge some manure into surface and ground waters. NYSDEC's Final Rulemaking ignores this reality.

Moreover, NYSDEC is aware that there are AFOs in New York with between 200 to 299 mature dairy cows with a history of discharge that were considered Medium CAFOs before the deregulation occurred. According to NYSDEC, of the approximate 75 CAFOs with 200-299 cows, 51 are currently covered under the CAFO SPDES General Permit GP-0-09-001, which is the general permit administered for CAFOs that purportedly do not discharge.[114] It stands to reason, then, that the approximately 25 CAFOs of this size that are covered by the CAFO CWA General Permit 04-02 for "discharging" CAFOs have a history of discharge. This is confirmed by NYSDEC's own enforcement records, which show that of the 36 CAFOs that have been inspected in the last seven years, 35 facilities have either discharged or failed to

[112] Ex. 2, FEIS at 52-53, 58.

[113] *Id*. at 52-53 ("Because ~~C~~AFOs with between 200 and 299 mature dairy cows would no longer be required by permit (as they would no longer be considered a CAFO unless designated) to spread manure in accordance with a CNMP, there is potential for increased adverse environmental impacts from runoff caused by the unmanaged manure." (strikethrough in original)).

[114] *Id.* at 50.

implement mandatory practices that NYSDEC has found necessary to prevent discharges.[115] Moreover, at least 12 of these facilities have had confirmed discharges within the past seven years.[116] These CAFOs currently in operation with a history of discharge have been deregulated by NYSDEC's rulemaking.

An examination of one of the deregulated CAFOs with a history of discharge illustrates the serious problem with NYSDEC's disregard of EPA's history of discharge presumption. As described in the Affidavit of Suzanne R. Miller, a member of Petitioner Sierra Club Atlantic Chapter, who lives in Hornell, New York, a dairy with between 200 and 300 dairy cows, which has been deregulated as a result of the Final Rulemaking, is located directly between, and within one-half mile, of two City of Hornell drinking water reservoirs.[117] The dairy is at a higher elevation than the reservoirs, so any runoff or leaching will discharge to the drinking water supply.[118] This now-deregulated dairy reported a serious discharge in 2008, and then in a 2012 inspection, NYSDEC found that the facility was only in "marginal compliance" with its permit requirements, meaning that it has not remedied the situation that led to the earlier discharge.[119] Given this facility's history of discharge and non-compliance and its very close proximity to a major drinking water source, DEC's failure to require this facility to operate under a discharge permit, as EPA would under its regulations and policies, could have catastrophic consequences, and certainly runs afoul of the CWA.

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[115] *See* Ex. 6, Select NYSDEC Inspection Reports and Notices of Violation.

[116] *Id.*

[117] Ex. 53, Affidavit of Suzanne R. Miller, dated July 23, 2013, ¶ 3.

[118] *Id.* ¶ 3; *see* Ex. 6, Letter from Sam Hendee, Hendee Homestead Farms to Jacqueline Lendrum, Division of Water Permits RE: Hendee Homestead Farms, app. E, at 6 (Oct. 15, 2008).

[119] *See* Ex. 6, Letter from Brian K. Lee, Environmental Engineer Division of Water to Sam & Jack Hendee at 1 (Apr. 13, 2012),

In addition to deregulating 75 CAFOs with between 200 and 299 cows, NYSDEC will not require the 285 CAFOs that it expects to increase their herd sizes to surpass the 200 cow threshold, to notify the agency or to provide information that the facility is eligible for the "no discharge" permit exemption.[120] This lack of oversight could potentially affect over 850 small dairy operations in New York with 100 to 199 cows.[121] NYSDEC has not developed a self-audit policy to determine whether facilities discharge pollutants regardless of whether they are under or over the 199 cow threshold.[122]

In sum, NYSDEC has essentially created a programmatic presumption of no-discharge for AFOs with between 200 to 299 mature dairy cattle and for every AFO which NYSDEC's deregulation will allow to expand beyond the 199 threshold without permit requirements.[123] Such an approach is less protective of water quality than EPA's interpretation of the federal CAFO rule. Whereas the NPDES program would require a Medium CAFO that has a history of past discharges to obtain a CAFO permit unless and until it demonstrates to the regulator that conditions leading to the discharge have been fully remedied, NYSDEC's Final Rulemaking allows such a facility to operate without a permit and a CNMP, despite a history of past discharges and absent any showing that conditions associated with those discharges have been addressed. NYSDEC has therefore violated the requirement of the CWA that delegated state programs be as stringent in their protection of water quality as EPA would be. This failure to "perform a duty enjoined upon it by law," CPLR § 7803(1), renders the Final Rulemaking invalid.

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[120] Ex. 21 FEIS, app. D, at 36.

[121] Ex. 41, USDA, 2007 Census of Agriculture.

[122] Ex. 21 FEIS, app. D, at 36.

[123] *See id.* at 34-36.

B. NYSDEC's Retention of Agency Discretion to Designate Discharging Facilities With Over 199 Cows as CAFOs Does Not Meet the Minimum CWA Requirements.

As revised by the Final Rulemaking, NYSDEC's CAFO program is less stringent than federal law in the way NYSDEC may respond if it determines that an unregulated dairy with 200 to 299 cows is discharging. Under the CWA and the federal CAFO regulations, 40 C.F.R. §§ 122, 123, 412, a dairy facility qualifying numerically as a Medium CAFO (i.e., an AFO with between 200 and 699 mature dairy cows) that is found to be discharging pollutants in any amount ***must*** obtain a NPDES permit and *is* subject to enforcement, by operation of law. 40 C.F.R. §§ 122.23(b)(6), (d)(1) (2013). NYSDEC, on the other hand, has created a less stringent regulatory scheme. Under the Final Rulemaking, if a facility with 200 to 299 dairy cows is found to be discharging, NYSDEC has the discretion to allow the discharging dairy to continue operating without a permit and without regulatory oversight. At least twice in the FEIS, NYSDEC states that when it determines an "AFO" with the requisite number of animals to qualify as "medium-sized" has discharged, it has the discretion to designate such "AFOs" as CAFOs. For example, NYSDEC claims, "[a]n AFO with 200-299 mature dairy cows found to be discharging ***can*** be designated as a Small CAFO and ***could*** be subject to enforcement actions."[124] The CWA regulations contain no such conditional language.

Moreover, under the Final Rulemaking, if NYSDEC opts to regulate a discharging dairy with 200 to 299 cows under the SPDES program, it must do so by first designating the facility as a Small CAFO. DEC concedes that a discharging AFO would not be considered a CAFO required to obtain a permit unless designated:

[124] Ex. 2, FEIS at 81 (emphasis added).

> Because ~~C~~AFOs between 200 and 299 mature dairy cows would no longer be required by permit (as they would no longer be considered a CAFO ***unless designated***) to spread manure in accordance with a CNMP, there is the potential for increased adverse environmental impacts from runoff caused by the unmanaged manure.[125]

The requirement of designation before a discharging AFO can be regulated under the SPDES program adds an additional bureaucratic and discretionary step that is not present under federal law.

Moreover, under the Final Rulemaking, if NYSDEC, in its discretion, decides to designate a discharging AFO as a Small CAFO in order to bring it under the SPDES permit program, it will do so based on the factors listed in 40 CFR 122.23(c)(2).[126] Among other considerations, section 122.23(c) provides that a state may designate an AFO as a CAFO "upon determining that it is a significant contributor of pollutants to waters of the United States." 40 C.F.R. § 122.23(c) (2013). Thus, in order for NYSDEC to require a discharging AFO with 200 to 299 cows to obtain a SPDES permit, the facility must not only be discharging, it must be discharging to such an extent that it is a "significant contributor of pollutants." In contrast, under the Federal CAFO program, a dairy with 200 to 299 cows that discharges *any* pollutants would be required to obtain a NPDES permit. *See* 33 U.S.C. §§ 1311(a), 1342(a) (requiring a permit for "the discharge of *any pollutant*") (emphasis added). Thus, NYSDEC's addition of the additional step of "designating" discharging Medium AFOs as Small CAFOs weakens New York's SPDES CAFO program and makes it facially inconsistent with, and less stringent than, the federal NPDES program.

[125] *Id.* at 52-53, 58 (emphasis added) (strikethrough in original).

[126] *Id.* at 111.

Compounding this deficiency, NYSDEC openly admits that it will not be able to properly identify discharging dairies because "staffing is limited, and staff will not be on the ground specifically searching to identify dischargers. Staff will respond to complaints and suspected violations if made aware of them, but likely will not be able to seek out and search for dischargers."[127] NYSDEC has also recognized that the only way to know if a CAFO is discharging, or has discharged, is through its implementation of a CNMP.[128] Without NYSDEC staff available to seek out dischargers, or the requirement to implement a CNMP, NYSDEC will have no way to identify dairies that discharge or to verify that dairies are not discharging.

Consequently, NYSDEC has failed to regulate AFOs with 200 to 299 mature dairy cows as stringently as EPA would if it ran New York's CAFO program, in violation of CWA Section 510, 33 U.S.C. § 1370 (prohibiting states from enacting less stringent regulation). This failure to "perform a duty enjoined upon it by law," CPLR § 7803(1), renders the Final Rulemaking invalid.

[127] Ex. 21, FEIS, app. D at 35.

[128] Ex. 2, FEIS at 118 ("the Department's ability to track compliance by CAFOs of all sizes [depends on] specific permit requirements . . . . [T]he Department regularly inspects CAFOs with ECL permit coverage and mandates submittal of an Annual Report as part of tracking compliance with the ECL permit."); Ex. 43, NYSDEC, *Medium CAFO Designations for Animal Feeding Operations (AFOs)* at 6, (maintaining non-discharging status means "[c]ontinuously following a nutrient management plan"); Ex. 44, Jacqueline Lendrum, NYSDEC, *CAFO Compliance Success Story: Hudson Valley Foie Gras: NYWEA Clear Waters – Summer 2010* (asserting "[k]ey among the permit's many requirements is the development, implementation and maintenance of a current Comprehensive Nutrient Management Plan (CNMP) . . . .").

POINT VI

NYSDEC FAILED TO CONDUCT REQUIRED REVIEWS TO DETERMINE WHETHER THE DAIRY DEREGULATION IS CONSISTENT WITH CWA AND NEW YORK STATE ANTIDEGRADATION PROTECTIONS.

NYSDEC's deregulation of dairy farms with 200 to 299 mature dairy cows violates the requirement that any revision to "effluent limitations" undergo an "antidegradation review." In particular, NYSDEC's regulatory changes *eliminate* a significant "effluent limitation" for dairy farms with 200 to 299 mature dairy cows—the requirement that those farms maintain and implement CNMPs—without assessing whether this wholesale revision of effluent limitations is consistent with antidegradation protections required under federal and New York State law.

Antidegradation protections required under the CWA are "designed to prevent the gradual deterioration of the quality of" state waterbodies. *Niagara Mohawk Power Corp. v. State Dep't of Envtl. Conservation*, 82 N.Y.2d 191, 194 (1993). Federal regulations implementing the CWA establish three tiers of antidegradation protection based on existing water quality and existing uses of the water.[129] The CWA affords different levels of protection against the degradation of water depending on the tier.[130]

As required by the CWA, New York implements antidegradation requirements through various state laws, including through its SPDES permitting process and SEQRA environmental review process.[131] Consistent with the CWA and federal regulations, NYSDEC's

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[129] *See generally* Ex. 39, U.S. EPA, WATER QUALITY HANDBOOK - CHAPTER 4: ANTIDEGRADATION, at § 4.2 (hereinafter "U.S. EPA Handbook").

[130] *See id.* For a more comprehensive discussion of the applicable legal framework related to Federal and State antidegradation protections, *see* Verified Petition at ¶¶ 175-97.

[131] Ex. 42, NYSDEC, Organization and Delegation Memorandum No. 85-40, Water Quality Antidegradation Policy (Sept. 9, 1985), at 1, (hereinafter "NYSDEC O&D Memo"); *see also Niagara*

antidegradation policy states that, in all circumstances, "water quality will be adequate to meet the existing usage of a waterbody," and that "water uses and the level of water quality necessary to protect such uses shall be maintained and protected."[132] NYSDEC's antidegradation policy also incorporates the federal directive that "the highest statutory and regulatory requirements for all new point sources and costs effective and reasonable best management practices for non-point source control ***shall*** be achieved."[133]

NYSDEC was obligated to conduct an "antidegradation review" in relation to its deregulation. In particular, the CWA prohibits any revision of an "effluent limitation" unless the revision is first reviewed to determine if it is consistent with antidegradation policies. CWA section 303(d)(4)(B) provides that, for waterbodies

> where the quality of . . . waters equals or exceeds levels necessary to protect the designated use for such waters or otherwise required by applicable water quality standards, ***any effluent limitation based on*** a total maximum daily load or other waste load allocation established under this section, or any water quality standard established under this section, or ***any other permitting standard may be revised only if such revision is subject to and consistent with the antidegradation policy*** established under this section.[134]

Mohawk Power Corp., 82 N.Y.2d at 194 (State water quality standards established pursuant to the CWA must "incorporat[e] an antidegradation policy.").

[132] Ex. 42, NYSDEC O&D Memo at 1-2.

[133] *Id*. at 2. In addition, New York law prohibits any addition of materials to waters of New York State that would "cause or contribute to a condition in contravention of water quality standards," ECL § 17-0501, which encompass New York State's antidegradation requirements. Ex. 42, NYSDEC O&D Memo at 2; *see PUD No. 1 v. Wash. Dep't of Ecology*, 511 U.S. 700, 705 (1994) (explaining that state WQS include antidegradation policies); *See Niagara Mohawk Power Corp.*, 82 N.Y.2d at 194.

[134] This is consistent with the fact that New York State implements antidegradation requirements via its SPDES permitting process. *See* Ex. 42, NYSDEC O&D Memo at 2. That is, since the standards contained in SPDES permits serve to prevent degradation, *see id.*, any changes to the standards applicable to a given facility via such permits must likewise, and necessarily, continue to assure compliance with the New York State antidegradation policy. *Id.*

33 U.S.C. § 1313(d)(4)(B) (emphasis added).[135]

EPA has clarified that "[a]ntidegradation requirements are typically triggered when an activity is proposed that ***may*** have some effect on existing water quality." Water Quality Standards Regulation, 63 Fed. Reg. 36742 (July 7, 1998) (emphasis added). While this may encompass a broad universe of activities, EPA has further explained that, "at a minimum, States . . . ***must*** apply antidegradation requirements to activities that are 'regulated' under State, Tribal, or federal law" including "any activity subject to State or tribal nonpoint source control requirements or regulations." *Id*. (emphasis added). Notably, EPA has taken the position that "antidegradation principles can and should be considered in connection with a number of activities even where application of the antidegradation review requirements is not explicitly required by the regulation." *Id.*

The statutory language of the CWA plainly establishes that revisions to "effluent limitations" based on any "permitting standard" trigger antidegradation requirements, and are subject to a determination of consistency with state antidegradation policies and protections. *See* 33 U.S.C. § 1313(d)(4)(B).[136] Thus, revisions to "effluent limitations," including those relating to nonpoint source control requirements, must be "reviewed to determine, based on the level of antidegradation protection afforded to the affected waterbody segment, whether the proposed activity can be authorized." Water Quality Standards Regulation, 63 Fed. Reg. 36742 (July 7, 1998). "'Antidegradation reviews' under all three tiers of antidegradation should be

[135] Such antidegradation protections also apply to "impaired" waters, i.e., those waters that do not have quality which equals or exceeds levels necessary to protect designated uses. *See* Petition ¶¶ 178-81.

[136] The Supreme Court has also confirmed this understanding the of the plain language of the CWA. *See PUD No. 1 v. Wash. Dep't of Ecology*, 511 U.S. 700, 705 (1994) (explaining that revisions to certain effluent limitations or water quality standards are permitted "'only if such revision is subject to and consistent with the antidegradation policy established under [CWA § 303].'") (quoting 33 U.S.C. § 1313(d)(4)(B))).

documented and subjected to public review and comment (e.g., as part of the public review of the water quality certification, NPDES permit, or other regulatory action)." *Id.*

NYSDEC's deregulation clearly revises an "effluent limitation" applicable to dairy farms with 200 to 299 mature cows, thus, triggering the obligation to conduct an "antidegradation review." Specifically, the Final Rulemaking removes the requirement that dairies with 200 to 299 mature cows maintain coverage under a SPDES permit, and thereby eliminates for every one of these facilities the requirement in that permit that these facilities operate in accordance with facility-specific CNMPs.[137] It is well established that "the terms of [] nutrient management plans constitute effluent limitations" since such plans impose restrictions on waste application rates to minimize phosphorus and nitrogen transport to surface waters.[138] *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 502 (2d Cir. 2005). Indeed, CNMPs are necessary "to assure [the] proper use of manure and fertilizers and to reduce the risk of runoff and leaching to groundwater."[139] NYSDEC has repeatedly acknowledged in

[137] Under NYSDEC's previously existing permitting scheme, it is unequivocal that dairies with 200 to 299 mature cows were required to maintain SPDES permit coverage and maintain and implement CNMPs in accordance therewith. *See* Ex. 16, NYSDEC SPDES General Permit for CAFOS, General Permit No. GP-0-09-001, at 5, 9, 11, 29 (Effective Date: July 1, 2009) (still-applicable ECL permit, explaining obligation of "medium CAFOs," i.e., an AFO with 200 to 699 mature dairy cows, to apply for coverage under the permit, and that such facilities are only eligible to be covered if such a facility has developed and maintains a CNMP and has "fully implemented all of the non-structural practices identified in the CNMP" and "are appropriately operating and maintaining all implemented practices.").

[138] This is consistent with the fact that the CWA itself defines "effluent limitation" to mean "*any* restriction" on the "quantities, rates and concentrations" of pollution discharges. 33 U.S.C. § 1362(11). In addition, the ECL defines "effluent limitation" broadly to mean "any restriction on quantities, quality, rates and concentrations of chemical, physical, biological, and other constituents of effluents which are discharged into *or allowed to run from an outlet* or point source into waters of the state promulgated by the federal government." ECL § 17-0105(15) (emphasis added). Under this broad definition, the guidelines contained in CNMPs, which limit the amounts of manure that can be spread on farm fields in an effort to curb polluted runoff into surface waters, plainly constitute effluent limitations under New York State law.

[139] Ex. 4, Exhibit A to Smolen Aff., at 8; *see also* Ex. 4, Smolen Aff. ¶¶ 7, 9, 10, 18, 31, 32. Petitioners' expert has explained that NYSDEC's previously mandated permit coverage for dairy farms with

official documents the critical importance of CNMPs for ensuring that facilities, previously under permit, were managed and operated without improper discharges.[140]

Since the Final Rulemaking revises—indeed, eliminates—the CNMP "effluent limitations" previously applicable under New York law to all farms with 200 to 299 mature cows, such changes are "subject to," and must be "consistent with," antidegradation protections afforded by Federal and State law. 33 U.S.C. § 1313(d)(4)(B). That is, NYSDEC could properly revise its previously existing mandatory CNMP requirements "***only*** if such revision [was] subject to" and found to be "consistent with" antidegradation requirements.[141] 33 U.S.C.

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between 200-299 mature cows "assure[d] that the dairy operator [was] responsible for managing the facility without discharge" and that "land application areas [were] managed under a nutrient management plan." Ex. 4, Exhibit A to Smolen Aff., at 1; s*ee also* Ex. 4, Smolen Aff. ¶ 7 ("In the absence of a required CNMP, there is no assurance that land application areas are not being overloaded with waste resulting in polluted runoff and discharges to New York's waters"); *see id.* ¶ 18 ("The treatment and land application of food processing wastes, particularly whey from dairy processors, should be governed by a permit, CNMP, recordkeeping, and reporting in order to prevent discharges to New York's waters"); *see id.* ¶ 32 ("A CNMP is essential to good management and preventing discharges and polluted runoff when anyone land applies animal waste."); *see also id.* ¶¶ 9, 10, 31.

[140] For example, NYSDEC has explained that, in order to maintain coverage under a "non-discharge" SPDES permit, permitees must maintain a "'no discharge" status which "means: Continuously following a nutrient management plan that meets NRCS Conservation Practice Standard NY-590 on all fields where manure and process wastewater is applied." *See* Ex. 43, NYSDEC, Medium CAFO Designations for Animal Feeding Operations (AFOs); Ex. 17, NYSDEC, Fact Sheet for NYSDEC SPDES Permit for CAFOs, Permit No. GP-0-09-001, at 3-4, 8-9 (June 12, 2009) (explaining that in order to be eligible for coverage under the "non-discharge" ECL General SPDES permit, permitees must have and fully implement a CNMP, which "includes having all BMPs implemented that are required in the site-specific CNMP," and that a facility's "[f]ailure to appropriately operate and maintain a BMP is a violation of the ECL General Permit . . . and could cause or contribute to a discharge or violation of State water quality standards."); Ex. 44, NYSDEC, CAFO Compliance Success Story: Hudson Valley Foie Gras, NYWEA Clear Waters - Summer 2010, ("Key among the permit's many requirements is the development, implementation and maintenance of a current Comprehensive Nutrient Management Plan (CNMP), written by a New York State certified planner and conforming to the technical standards established by the federal Natural Resources Conservation Service (NRCS). These standards mitigate pollution sources on the farm through implementation of farm-specific best management practices (BMPs). CAFO implementation involves . . . coordinated efforts" and when "a farm is missing part of this implementation team . . . non-compliance often results.").

[141] This is consistent with NYS's antidegradation policy, which ensures antidegradation protections through the State's implementation of its SPDES program. *See* Ex. 42, NYSDEC O&D Memo at 2. This is also consistent with the fact that the state "*must* apply antidegradation requirements to activities

§ 1313(d)(4)(B) (emphasis added). Thus, NYSDEC's regulatory changes effectuating the elimination of the requirement that all farms with 200 to 299 mature cows operate in accordance with facility-specific CNMPs should have been "reviewed to determine, based on the level of antidegradation protection afforded to the affected waterbody segment, whether the proposed activity can be authorized." Water Quality Standards Regulation, 63 Fed. Reg. 36742 (July 7, 1998). This necessary "antidegradation review" should have been "documented and subjected to public review and comments . . . as part of the public review of [NYSDEC's] . . . regulatory action)." *Id.*

However, NYSDEC has demonstrably failed to subject its revision of effluent limitations to the necessary antidegradation review, much less demonstrate that its changes are consistent with antidegradation protections. NYSDEC has failed to conduct the review necessary to support a determination that the elimination of critically important CNMP requirements will not result in, or cause or contribute to, unacceptable degradation of water quality in New York State waterbodies, including that existing water uses will be maintained and protected, that there is otherwise adequate justification for any lowering of water quality in New York State waterbodies, or that the highest level of regulatory oversight and all reasonable and cost effective BMPs have been achieved.[142]

Petitioners' concerns regarding NYSDEC's failure to conduct required antidegradation reviews are well-founded due to the potentially significant environmental implications of NYSDEC's deregulation. That is, NYSDEC's failure to comply with lawful antidegradation

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that are 'regulated' under State, Tribal, or federal law" including "any activity subject to State or tribal nonpoint source control requirements or regulations." Water Quality Standards Regulation, 63 Fed. Reg. 36742 (July 7, 1998) (emphasis added).

[142] *See* Verified Petition at ¶¶ 182-89.

procedures allowed it to improperly understate the very real degradation that is likely to occur as a result of the elimination of CNMP requirements for farms with 200 to 299 mature cows.[143] In fact, NYSDEC admits the significant role CNMPs play in preventing improper runoff and/or other discharges of waste from dairy farms,[144] and that its regulatory changes eliminating CNMP requirements unequivocally increases the risk of additional stormwater runoff pollution and unpermitted "discharges."[145] These concessions are compounded by the fact that

[143] *See* Ex. 4, Smolen Aff. at ¶¶ 7, 19; Ex. 4, Exhibit A to Smolen Aff., at 1, 10-15. Petitioners' expert consultant's analysis regarding the impact of NYSDEC's regulatory changes confirms, as well as clarifies the fact that NYSDEC's withdrawal of permit requirements for purportedly non-discharging Medium CAFOs with fewer than 300 dairy cows will "likely result in increased environmental degradation of water" resources. *See* Ex. 4, Exhibit A to Smolen Aff., at 1; *see also id.* at 10-15; Ex. 4, Smolen Aff. ¶¶ 7, 19.

[144] NYSDEC has repeatedly touted the importance of an affirmative regulatory program and CNMP implementation. *See supra* notes 22-23, 140 and accompanying text; *see also, e.g.*, Ex. 10, DRAFT CHESAPEAKE WIP at 28 (stating NYSDEC's position that "[a] non-regulatory approach, for a sector that has a significant pollution potential . . . is neither credible nor effective," that "[p]rofessional management of waste at [dairy farm] facilities is critical to protection of water quality," and "[t]hat professional management is ensured by the New York CAFO permit program" which, *inter alia*, mandates the development and implementation of CNMPs); Ex. 10-B, DRAFT CHESAPEAKE WIP at 30-31; Ex. 2, FEIS at 119 ("[E]liminating the ECL permit could lead to adverse environmental impacts if nondischarging CAFOs opt out of permit coverage and if participation in voluntary programs is not effective in mitigating potential adverse environmental impacts. The benefit of permit coverage is that medium CAFOs are legally obligated to demonstrate continued implementation of BMPs either as a prerequisite to obtaining permit coverage or during the course of permit coverage. With participation in a voluntary program, this obligation does not exist, and there is no guarantee that BMP implementation would occur, or that the CAFO will make progress towards implementation.").

[145] The record contains numerous admissions by NYSDEC about the increased risk of adverse environmental impacts and stormwater pollution discharges resulting from NYSDEC's deregulation and elimination of mandatory CNMP requirements. *See* Ex. 3, Findings Statement at 9 (under NYSDEC's deregulation, without the requirement to implement BMPs via a CNMP, "there is the potential for increased adverse environmental impacts from runoff or other discharges caused by the improper management of farm activities"); *id.* at 10 ("failure to properly manage silage . . . could potentially cause significant adverse environmental impacts to water resources from the release of silage leachate through stormwater runoff"; "there is the potential for increased adverse environmental impacts from runoff caused by the unmanaged manure"); *id.* at 1, 6, 10, 24 (explaining that farms previously below the permitting threshold, are expected (and, in fact, encouraged) to grow as a result of NYSDEC's regulatory changes, that such growth will increase the risk of pollution discharges); *id.* at 22-23 (explaining that given the anticipated larger volumes of potential pollutants at CAFO sites, any unintended discharge has the potential to be more environmentally significant); *see also* Ex. 45, Memorandum from James A. Hanlon, EPA, Concentrated Animal Feeding Operation Program Update

NYSDEC now has a limited ability to monitor and track compliance of deregulated farms that are no longer subject to permit and, thus, mandatory CNMP requirements.[146] In light of the evidence of likely increases in discharges to, and attendant degradation of, waterbodies in New York State, that may occur as a result of NYSDEC's deregulation, the absence of the required antidegradation reviews is particularly egregious.

Based on the foregoing, NYSDEC's failure to conduct an anti-degradation review and to demonstrate that the deregulation is consistent with mandatory federal and state anti-degradation protections, constitutes a failure to "perform a duty enjoined upon it by law" and an error of law, and was arbitrary, capricious and an abuse of discretion in violation of CPLR § 7803(1) & (3). Accordingly, the Final Rulemaking should be declared invalid and without legal effect.

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after *National Pork Producers Council v. EPA*, at 2 (Dec. 8, 2011) (explaining that discharges caused by NYSDEC's deregulation would be difficult, if not impossible, to abate once they start); Ex. 2, FEIS at 52-60, 66-69, Ex. 21, FEIS, app. D at 559 (explaining that NYSDEC's regulatory exemption will likely increase the risk of discharge and may result in "increased adverse environmental impacts" to New York State waterways as a result of increased stormwater runoff and/or leachate overflow; acknowledging that the deregulation could "adversely impact fish and other aquatic life" since "fish and aquatic insects may die when oxygen is depleted due to excess nutrients in surface water due to runoff of water contaminated by dairy wastes" and "[s]tormwater discharges from deregulated dairy facilities containing silt and sediment can cause fish kills by clogging gills or depleting oxygen, and can impact spawning habitat."); Ex. 2, FEIS at 73-75 (NYSDEC recognizing the risk of impacts to human health resulting from NYSDEC's deregulation of certain CAFOs due to the ingestion of contaminated drinking water or exposure to pathogens as a result of recreational contact with impacted surface waters).

[146] NYSDEC concedes its now restricted ability to ensure that facilities no longer under permit are, in fact, not discharging. *See, e.g.*, Ex. 2, FEIS at 118-119 ("[T]his alternative [i.e., the alternative of ending the ECL permit program] would *greatly restrict the Department's ability to track compliance by CAFOs of all sizes because there would not be any specific permit requirements to monitor*. In contrast, the Department regularly inspects CAFOs with ECL permit coverage and mandates submittal of an Annual Report as part of tracking compliance with the ECL permit. Department inspections often reveal minor compliance issues that, if left uncorrected could pose significant future environmental risks. Many of these minor issues observed during inspections are not written up by the DEC Department inspector . . . but are pointed out to the farmer or certified planner, verbally and in a written inspection letter. *This interplay* allows the CAFO owner or operator to make necessary corrections *to avoid potential environmental impacts* and associated enforcement actions. In addition, the ECL permit requires that Annual Reports be completed . . . . This requirement ensures that the farmer is actively working with the planner to implement the CNMP.") (emphasis added).

POINT VII

NYSDEC'S DEREGULATION VIOLATES CLEAN WATER ACT AND NEW YORK STATE ANTI-BACKSLIDING REQUIREMENTS.

The CWA contains an anti-backsliding provision which provides that a permit issued pursuant to section 402 of the CWA "may not be renewed, reissued, or modified . . . subsequent to the original issuance of such permit, to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit." 33 U.S.C. § 1342(o)(1).[147] This requirement applies equally when a General NPDES permit is re-issued, renewed, or modified. *See* National Pollutant Discharge Elimination System: Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges, 64 Fed. Reg. 68,722, 68,784 (Dec. 8, 1999) (hereinafter "NPDES Regulations Addressing Storm Water Discharges, 64 Fed. Reg. 86,722").[148] New York law reflects the anti-backsliding protections afforded by the CWA, providing that "when effluent limitations are established they must be at least as stringent as the effluent limitations previously required unless . . . an exception is warranted as provided" under the CWA. ECL § 17-0809(3).

NYSDEC's exemption from SPDES permit coverage for dairy farms with 200 to 299 cows, and, thus, the requirement that each such facility develop, implement, and maintain a

[147] Limited exceptions exist whereby less stringent standards may be permissible in certain circumstances. *See* 33 U.S.C. § 1342(o)(1) (if effluent limitations are established under CWA § 303(d), such limitations may not be made less stringent "except in compliance with" CWA § 303(d)(4), which requires that any revisions to effluent limitations based on TMDLs for impaired waters must assure the attainment of water quality standards and that revisions to effluent limitations for unimpaired waters must be subject to and consistent with antidegradation protections); 33 U.S.C. § 1342(o)(2)(A)-(E) (articulating five exceptions to the general anti-backsliding prohibitions in the CWA).

[148] So, for example, in order to qualify for a certain type of exemption from general stormwater permit coverage, U.S. EPA has explained that permittees must demonstrate that they qualify for one of the five exceptions provided under the anti-backsliding provision. NPDES Regulations Addressing Storm Water Discharges, 64 Fed. Reg. at 68,784.

CNMP, violates antibacksliding since CNMPs are "effluent limitations," the elimination of which is obviously and impermissibly less stringent. For the reasons discussed above in the context of antidegradation protections of the CWA, the terms of a CNMP unequivocally constitute "effluent limitations" as that term is contemplated under Federal and state law. *See supra* section VI (citing *Waterkeeper Alliance, Inc.* v. *EPA*, 399 F.3d 486, 502 (2d Cir. 2005); 33 U.S.C. § 1362(11); NY ECL § 17-0105(15)). NYSDEC's elimination of the mandatory permit requirement that existing or new dairy farms with 200 to 299 cows have and carry out CNMPs results in less stringent effluent limitations than were previously applicable to such facilities, in violation of anti-backsliding requirements. 33 U.S.C. § 1342(o); NY ECL § 17-0809(3).

In particular, under NYSDEC's regulatory changes, new dairy farms with 200-299 cows will not be required to obtain a permit and develop and implement a CNMP, while existing dairy farms that fall within the exempted category that currently hold SPDES permits, have ostensibly been relieved of the obligation to renew permit coverage with applicable effluent limitations, including the requirement to develop and implement a CNMP. As discussed above, nutrient management plans impose tangible restrictions on the application of manure waste at dairy farms that are critical for preventing pollution discharges from such facilities. *See supra* section VI. The fact that CNMP requirements are no longer mandatory for the now-exempted facilities poses real risks of additional pollution discharges, and clearly results in less stringent limitations being applicable to the deregulated farms.

Because the elimination of mandatory CNMP requirements results in a less stringent "effluent limitation," removing this requirement can only be accomplished consistent with the limited exceptions to anti-backsliding outlined in the CWA. *See* 33 U.S.C. § 1342(o)(1); 33

U.S.C. § 1342(o)(2)(A)-(E). Based on the foregoing, NYSDEC's deregulation is inconsistent with, and violates anti-backsliding requirements.

POINT VIII

NYSDEC HAS IMPROPERLY FAILED TO OBTAIN U.S. EPA APPROVAL OF ITS REGULATORY REVISIONS TO NEW YORK STATE'S SPDES PERMITTING PROGRAM.

NYSDEC's deregulation of dairy farms with 200-299 mature dairy cows, as reflected in NYSDEC's Final Rulemaking is improper since NYSDEC has failed to obtain necessary approval of the regulatory changes from U.S. EPA.

A. Federal Regulations Require States To Obtain Approval for Substantial Revisions to Their Delegated Clean Water Act Permitting Programs.

Revisions to delegated State SPDES permitting programs require review and approval by the U.S. EPA. 40 C.F.R. § 123.62. Modifications to a State's "basic statutory or regulatory authority, its forms, procedures, or priorities" constitute program revisions for which States "shall keep EPA fully informed" and which are subject to U.S. EPA review and approval. *Id.*[149] To accomplish a program revision, a State must submit to U.S. EPA a modified program description and other relevant documents for review and approval. 40 C.F.R. § 123.62(b)(1).[150] U.S. EPA must review proposed program modifications and make a

[149] *See also* Ex. 38, National Pollutant Discharge Elimination System State Program Guidance for Development and Review of State Program Applications and Evaluation of State Legal Authorities (40 C.F.R. Parts 122-125 and 403), Volume One, July 29, 1986, at 2-10 to 2-11 (hereinafter "NPDES 1986 Guidance").

[150] *See also* Ex. 38, NPDES 1986 Guidance at 2-10 to 2-11. In addition, "[w]henever the [EPA] Administrator has reason to believe that circumstances have changed with respect to a State program, he may request, and the State shall provide, a supplemental Attorney General's statement, program description, or such other documents or information as are necessary." 40 C.F.R. § 123.62(d).

determination regarding whether such revisions are substantial. *Id.* § 123.62(b)(2).[151] U.S. EPA determines whether a proposed modification is substantial by considering its scope, programmatic impact, and potential to arouse public interest or concern.[152] While "[m]inor changes in forms, procedures, and regulations will generally be considered nonsubstantial modifications,"[153] program revisions that establish or affect substantive obligations and requirements, those altering regulatory control over an industrial category, or those changing the authorities and duties contained in a State's statues and rules, constitute "substantial" program revisions.[154]

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[151] *See* Ex. 38, NPDES 1986 Guidance at 2-12 ("[p]rogram modifications may be considered either substantial or non-substantial. . . [EPA] will determine whether any . . . proposed modification is substantial"); *see also Wis. Res. Prot. Council v. Flambeau Mining Co.*, 903 F. Supp. 2d 690, 717 (W.D. Wis. 2012) ("After the EPA reviews the submission, it will determine whether the revision is 'substantial' or not.").

[152] Ex. 38, NPDES 1986 Guidance at 2-12; *see also* National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines and Standards for Concentrated Animal Feeding Operations, Proposed Rule Notice of Availability, 66 Fed. Reg. 58556, 58586 (Nov. 21, 2001) (basis for "making this determination . . . is (1) the degree of public interest and (2) the magnitude of change to the State's program").

[153] Ex. 38, NPDES 1986 Guidance at 2-13

[154] *See* Region III Water Protection Division; Revision to Delaware's NPDES Program; State of Delaware's Submittal of a Substantial Program Revision to Its Authorized National Pollutant Discharge Elimination System (NPDES) Program, 69 Fed. Reg. 6289 (Feb. 10, 2004) (EPA finding that proposed amendments to State agency's regulations focused on the "*issuance and administration of NPDES permits* in the State of Delaware" "constitute[d] a substantial revision to Delaware's authorized NPDES program." (emphasis added)); *cf.* U.S EPA's determination in Revision of New York State's National Pollutant Discharge Elimination System Program To Issue General Permits, 58 Fed. Reg. 12035 (March 2, 1993) (U.S. EPA determining that New York State's assumption of general permit authority was a non-substantial revision of its NPDES program, explaining: "EPA has generally viewed approval of such authority as non-substantial because it does not *alter the substantive obligations* of any discharger under the State program, but merely simplifies the procedures by which permits are issued to a number of point sources . . . . [The] [a]pproval of New York's NPDES General Permits Program *established no new substantive requirements nor does it alter the regulatory control over any industrial category*. Approval of the New York State General Permits Program merely provides a simplified *administrative* process." (emphasis added)); Approval of Modifications to Michigan's Approved Program To Administer the National Pollutant Discharge Elimination System Permitting Program Resulting From the Reorganization of the Michigan Environmental Agencies, 62 Fed. Reg. 61170 (Nov. 14, 1997) (Michigan's adoption of an executive order which reorganized and consolidated Michigan's environmental agencies, and which did not eliminate or change any "*authority, power, duties and*

If "EPA determines that the proposed program revision is substantial, EPA shall issue public notice and provide an opportunity to comment" prior to making a final decision about the proposed modification. 40 C.F.R. § 123.62(b)(2); *see also id.* § 132.5(e). After EPA considers the public comments, "[t]he Administrator will approve or disapprove program revisions based on the requirements of this part . . . and of the CWA." 40 C.F.R. § 123.62(b)(3).[155] Importantly, Federal regulation "requires explicit approval, not lack of disapproval" by U.S. EPA. *Wis. Res. Prot. Council*, 903 F. Supp. 2d at 718; 40 C.F.R. § 123.62(b). Thus, merely submitting program changes to U.S. EPA without alerting it that the nature of the submission is a program modification and receiving explicit approval for such changes, runs afoul of federal requirements. *See id.* Proposed modifications do "not become effective as a matter of federal law until approved by EPA."[156]

B. NYSDEC Failed To Obtain Explicit U.S. EPA Approval for its Program Change.

NYSDEC's deregulation of dairy farms with 200 to 299 cows, which alters NYSDEC's regulatory authority and priorities, constitutes a "program revision" to New York's SPDES

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functions contained within [the State's] statutes and rules applicable to the NPDES program . . . except for the party responsible for carrying out such authority, powers, duties and functions," was determined by EPA to be, and ultimately upheld as a non-substantial program change (emphasis added)); State of Maryland's Submission of a Substantial Program Revision to Its Authorized National Pollutant Discharge Elimination System (NPDES) Program, 58 Fed. Reg. 59724 (Nov. 10, 1993) (EPA determining that proposed program revisions, including, *inter alia*, amendments to State requirements for effluent testing and discharge permit limits, were substantial).

[155] *See also* Ex. 38, NPDES 1986 Guidance at 2-12

[156] Ex. 38, NPDES 1986 Guidance at 2-12; *see also* 40 C.F.R. § 123.62(b)(4) ("A program revision shall become effective *upon the approval* of the Administrator") (emphasis added).

permitting program, and, thus requires EPA review and approval. 40 C.F.R. § 123.62; *see also* NPDES 1986 Guidance at 2-10 to 2-11; *Wis. Res. Prot. Council*, 903 F. Supp. 2d at 717-18.[157]

EPA has explicitly recognized that the Final Rulemaking constitutes a program revision requiring EPA review and approval. In particular, via letter to NYSDEC dated January 17, 2013, EPA exercised its authority to initiate a SPDES program revision review, by requesting NYSDEC to submit a modified program description and other relevant documents so that EPA could carry out the necessary review and thereby "ensure that the requirements of 40 CFR Part 123 are met."[158] In this letter, EPA advised NYSDEC:

> [p]ursuant to 40 CFR Part 123, subpart D, a revision of a State's existing approved program for administering the National Pollutant Discharge Elimination System (NPDES) is subject to federal requirements for approval or disapproval of program changes. Under 40 CFR 123.62, the State is required to submit to the U.S. Environmental Protection Agency a modified program description, an Attorney General's statement or other such documents as the EPA determines to be necessary. The EPA will approve or disapprove program revisions based on the requirements of 40 CFR 123.62 and the Clean Water Act. A program revision shall only become effective upon the approval of the EPA.[159]

It is thus undisputable that NYSDEC's regulatory changes are subject to EPA review and approval procedures and requirements.

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[157] When EPA revised its CAFO regulations in 2008, it required that any revisions to state programs to make them consistent with federal regulations must go through the review and approval process set forth in 40 C.F.R. § 123.62. *See* Revised National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines for Concentrated Animal Feeding Operations in Response to the *Waterkeeper* Decision, 73 Fed. Reg. 70418, 70457 (Nov. 20, 2008) (stating that EPA's revised regulations pertaining to CAFO operations, required authorized States to adopt the new requirements and revise their NPDES regulations in accordance with 40 C.F.R. § 123.62). NYSDEC's regulatory changes, which substantively alter NYSDEC's programmatic structure and requirements related to dairy farm SPDES permitting in New York State, would similarly implicate a "program revision" and, thus, necessitate compliance with federal regulations requiring EPA review and approval.

[158] *See* Ex. 46, Letter from Doug Pabst, Acting Chief, Clean Water Regulatory Branch, EPA Region 2, to Robert Simson, Division of Water, N.Y. State Dep't Envtl. Conservation (Jan. 17, 2013) at 1-2 (hereinafter "EPA Jan.17, 2013 Letter to NYSDEC").

[159] Ex. 46, EPA Jan. 17, 2013 Letter to NYSDEC at 1.

In addition, the Final Rulemaking is properly characterized as a "substantial modification," meaning that EPA must give public notice and seek comment before deciding whether to approve the program modifications, and before NYSDEC may finalize the modifications. As the facts above demonstrate, the program modifications reflected in the Final Rulemaking are "substantial" based on their scope, programmatic impact, and potential to arouse public interest or concern.[160] The scope and magnitude of the impact of the Final Rulemaking is discussed at length above and referred to in the EPA January 17, 2013 letter to NYSDEC, and must be deemed substantial. In addition, there has been such a high degree of public interest and concern over NYSDEC's revised regulations, as evidenced by the comments from a wide range of interested parties, including New York State legislators, submitted to NYSDEC as reflected in Appendix B to the FEIS. Moreover, it is notable that other proposed program revisions pertaining to the adoption of CAFO permitting regulations have previously been found to be a "substantial" modification by EPA.

Since NYSDEC's program revision concerning CAFO permitting in NYS constitutes a "substantial" modification, EPA's review and approval process required by Federal regulations must include a public notice and comment in the Federal Register, in accordance with the procedures set forth in 40 C.F.R. § 123.62. EPA cannot decide whether to deny or approve NYSDEC's regulatory changes until after such a public process, and NYSDEC's program revision cannot become effective until such changes undergo the required public notice and comment, and review and approval by EPA.[161]

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[160] Ex. 38, NPDES 1986 Guidance at 2-12.

[161] *See* Commonwealth of Pennsylvania's Submission of a Substantial Program Revision to Its Authorized National Pollutant Discharge Elimination System (NPDES) Program, 67 Fed. Reg. 55841 (Aug. 30, 2002) (proposed program revisions, including, *inter alia*, "the addition of regulations

However, NYSDEC has neither affirmatively sought, nor to date obtained the required EPA approval. In January 2013, EPA indicated that it had "not receive[d] a formal review package from New York State," and instead had initiated its own review based on publicly available documents on NYSDEC's website.[162] To date, there is no publicly available documentation indicating that NYSDEC has submitted the necessary formal review package requested by EPA. There has also been no publically documented approval of NYSDEC's regulatory changes to dairy farm permitting in by EPA.

Because NYSDEC has failed to obtain explicit approval of its regulatory modifications from EPA, the Final Rulemaking cannot be effective as a matter of federal law, and is null and void. 40 C.F.R. § 123.62(b)(4)("A program revision shall become effective ***upon the approval*** of the Administrator") (emphasis added); *Wis. Res. Prot. Council*, 903 F. Supp. 2d 690, 717-18; NPDES 1986 Guidance at 2-12.

CONCLUSION

For all the above reasons, as well as those set forth in the Verified Petition and Complaint and all supporting papers submitted therewith, Petitioners respectfully request judgment and an order: (1) declaring that Respondents have acted arbitrarily, capriciously, and contrary to law by issuing a Final Rulemaking that fails to conform to the requirements of federal and state law in the manner described herein; (2) annulling, voiding, and vacating the Final Rulemaking; (3) requiring immediate removal of the Final Rulemaking from the New York Codes, Rules, and Regulations; (4) directing the Respondents to issue immediately a

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addressing Concentrated Animal Feeding Operations (CAFOs), which are significant contributors to water quality impairments due to nutrients and excessive erosion and sediment," deemed by EPA to "constitute[] a substantial revision to Pennsylvania's authorized NPDES program").

[162] Ex. 46, EPA Jan.17, 2013 Letter to NYSDEC at 1.

press release notifying the public and the regulated community that the Rulemaking is not in effect; (5) awarding Petitioners reasonable attorneys' fees and the costs and disbursements of this proceeding; and (6) granting such other and further relief as the Court deems just and proper.

Respectfully submitted this 26th day of July, 2013,

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