January 22, 2013

Via Email

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

Dear Mr. Simson,

Enclosed please find the joint comments of Citizens Campaign for the Environment, Earthjustice, Environment New York, Environmental Advocates of New York, Riverkeeper, Inc., Sierra Club Atlantic Chapter, and Waterkeeper Alliance on the Draft Environmental Impact Statement for the Proposed Dairy Industry Rulemaking and modifications to the State Pollutant Discharge Elimination System (SPDES) General Permit for Concentrated Animal Feeding Operations (CAFOs); the proposed modifications to the regulations governing CAFOs in New York State, (proposed amendments to provisions of 6 N.Y.C.R.R. Subpart 750-1, 6 N.Y.C.R.R. Subpart 360-4, and 6 N.Y.C.R.R. Subpart 360-5), and the Draft Modified General Permit GP-0-09-001.

Thank you for your consideration of these comments. We look forward to continuing to work with NYSDEC to promote an agricultural industry that plays a key role in this state's vibrant economy while remaining protective of the health and environment of New Yorkers.

Sincerely,

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INTRODUCTION

The following joint comments are submitted on behalf of Citizen's Campaign for the Environment, Earthjustice, Environmental Advocates of New York, Environment New York, Riverkeeper, Inc., Sierra Club Atlantic Chapter and Waterkeeper Alliance, Inc., regarding the Draft Environmental Impact Statement for the Dairy Industry Rulemaking Proposed Action, State Pollutant Discharge Elimination System ("SPDES") Permits for Concentrated Animal Feeding Operations ("CAFOs"), Land Application & Anaerobic Digesters, published for public comment by the New York State Department of Environmental Conservation ("NYSDEC") on December 5, 2012 ("DEIS"); the draft regulations (Proposed Express Terms 6 N.Y.C.R.R. Parts 360 and 750), issued December 5, 2012 ("proposed regulations"); and the proposed modifications to the SPDES Environmental Conservation Law ("ECL") General Permit for CAFOs (GP-0-09-001), issued December 19, 2012 ("proposed permit modifications").[1] These comments include and incorporate by reference our separate letter dated January 22, 2013, submitted herewith, which addresses proposed modifications to the SPDES ECL General Permit applicable to all CAFOs. These comments also rely on, and incorporate by reference, the technical and scientific comments presented in *Report to Riverkeepers; Analysis of the Impact of*

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

> The regulatory amendments clarify requirements of the CAFO program, exempt non-discharging medium CAFOs with 200 to 299 mature dairy cows from obtaining SPDES permit coverage, and eliminate duplicative regulatory requirements under Part 360. This ECL General Permit has been modified to conform to changes in the proposed rulemaking, to clarify the Department's expectations of permittees, to correct grammatical and typographical errors, while continuing to maintain terms and conditions adequately protective of the environment.

NYSDEC, Fact Sheet for NYSDEC New York State Pollutant Discharge Elimination System General Permit for Concentrated Animal Feeding Operations, Permit No. GP-0-09-001, *available at*: http://www.dec.ny.gov/docs/water_pdf/cafoeclfactpublicdraft.pdf.

Proposed Changes to New York CAFO Rules, 6 NYCRR parts 360 and 750, prepared by Lithochimeia, Inc. (Jan. 21, 2013) (the "Lithochimeia Report") and *A Review of the December 5, 2012 Draft Environmental Impact Statement*, prepared by Dr. William J. Weida, Emeritus Professor of Economics, The Colorado College (Jan. 19, 2013) (the "Weida Report"), which are set forth in the attached Appendix.

NYSDEC has proposed a rulemaking (the "proposed deregulation") that would: (1) exempt medium dairy CAFOs with between 200 and 299 dairy cows from its Part 750 regulations, meaning these CAFOs would not have to operate under the SPDES permit; (2) exempt facilities that land apply, store, and/or digest food processing waste from permitting requirements under the Part 360 regulations, if the facilities are permitted under Part 750; and (3) exempt digesters from the Part 360 approval process if located on a CAFO. If the DEIS is correct that the proposed rulemaking would add 25,000 mature cows to New York's dairy herd, the deregulation would result in more than three million additional pounds of urine and feces produced each day by dairies in the state, or more than one billion additional pounds of cow waste produced each year. Without doubt, some of this urine and feces will pollute surface and groundwater and air.

The fundamental policy questions raised by the proposed rulemaking and the proposed permit modifications are: how much environmental damage and what level of human health risk is New York willing to endure in the hope of increasing milk production to lure yogurt production to the state and possibly creating 900 new jobs, and who would pay the costs of this. These questions need not ever be answered, however, because the proposed rulemaking is directly at odds with the ECL, and thus exceeds NYSDEC's authority. The proposed deregulation is also flatly disallowed under the antidegradation and anti-backsliding mandates of

the federal Clean Water Act ("CWA"). Furthermore, the proposed rulemaking will cause NYSDEC to violate its duty under the CWA to protect downstream water quality and undermine its ability to meet its total maximum daily load ("TMDL") obligations to the U.S. Environmental Protection Agency ("EPA") for the Chesapeake Bay. In addition, the proposed permit modifications are inconsistent with state and federal law. Even if NYSDEC were to get past these legal bars, it cannot move forward based on the current DEIS, which is wholly inadequate because its assumption that deregulated CAFOs will voluntarily take all appropriate measures to handle waste responsibly is unfounded, and its impacts analysis does not include a realistic evaluation of the likelihood or severity of the environmental impacts and human health risks because it is premised on the insupportable notion that deregulation will not result in relaxed standards of waste management, and does not even discuss impacts from the broad proposed changes to the SPDES General Permit. The DEIS is also flawed because the alternatives analysis overlooks any options that do not involve converting traditional dairies to medium CAFOs.

Finally, as explained below, state and federal law requires NYSDEC to seek EPA review and approval of its proposed modification to its SPDES program, and to hold an adjudicatory hearing on its proposed CAFO SPDES permit modifications before it can make any final decisions on its proposal.

I. NYSDEC Has No Authority to Exempt Medium Dairy CAFOs from Statutory SPDES Permit Requirements

A. NYSDEC Lacks the Authority to Exempt Medium CAFOs from the Statutory Definition of Point Source.

NYSDEC's proposed regulatory changes to 6 N.Y.C.R.R Part 750 would explicitly define CAFOs as "an [animal feeding operation ("AFO")] that meets the criteria of either a

Large, Medium or Small CAFO. . . . A Medium CAFO means an AFO that stables or confines as many as or more than . . . 200 to 699 dairy cows, whether milked or dry."[2] NYSDEC further proposes that Medium CAFOs with 200-299 mature dairy cows, whether milked or dry, without a discharge are not required to get a SPDES permit because "for the purposes of ECL § 17-0105(16) these CAFOs are not considered a point source."[3] By declaring through this proposed rulemaking that these medium CAFOs are not point sources, NYSDEC is proposing to exempt them from the requirement of operating under a SPDES permit, which flows from their designation as a point source. Specifically, ECL § 17-0701(1)(a) requires "a written SPDES permit . . . to make or cause to make or use any . . . point source."

However, CAFOs are defined as point sources by state law.[4] NYSDEC 's proposed rule-making would create a regulatory exemption based on removing dairy CAFOs with between 200-299 cows that NYSDEC presumes will not discharge from the statutory definition of point source. As the executive agency mandated to implement and interpret New York's Environmental Conservation Law, NYSDEC inherently lacks the authority to promulgate a regulation that alters what the ECL says. NYSDEC's attempt to exempt this category of CAFO from the requirements of the statutory definition, and the resulting proposed exemption from being subject to SPDES permit compliance, fails because of this lack of authority.[5]

NYSDEC readily admits that "[ECL] provisions detail that a CAFO is a point source even if there is no discharge and that the owner of a CAFO must obtain coverage under one of the CAFO SPDES permits prior to operating the CAFO. . . . [U]nlike the federal rule, the

[2] DEIS at 20-21.

[3] *Id.* at 22.

[4] N.Y. ENVTL. CONSERV. LAW § 17-0105(16). CAFOs also are defined as point sources under federal law. *See* 33 U.S.C. § 1362(14).

[5] N.Y. C.P.L.R § 7803.

Department[] regulates CAFOs that do not discharge."[6] NYSDEC is correct that the statutory definition of the term "point source" provides that a CAFO is one type of point source, and that such CAFO requires a permit whether it discharges or not.[7] Moreover, ECL Article 17 clearly prohibits the creation or use of a point source, whether or not there is a discharge, until that point source is covered by a SPDES permit.[8] Here, NYSDEC is attempting to circumvent the unambiguous statutory intent of the ECL to treat CAFOs as point sources which NYSDEC has deemed subject to SPDES permit requirements, regardless of whether they discharge or not. NYSDEC cannot rely on its assertion that only non-discharging CAFOs are exempt from these requirements, simply 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 of the statute through rulemaking.

B. NYSDEC Lacks the Authority to Categorically Exempt CAFOs from the SPDES Program Without Assessing Whether Pollution and/or Pollutants Will Discharge or Run into Waters of the State from an Outlet, a Point Source or Any Source Which Impairs Water Quality.

NYSDEC is required to use all known available and reasonable methods to prevent and control the pollution of the waters of the state.[9] ECL § 17-0501 broadly prohibits any person from, directly or indirectly, throwing, draining, running, or otherwise discharging into waters

[6] DEIS at x-xi.

[7] *Id.* at x; N.Y. ENVTL. CONSERV. LAW §§ 17-0105(16) & 17-0701(1)(a); N.Y. COMP. CODES R. & REGS. tit. 6, § 750 1.2(a)(65).

[8] N.Y. ENVTL. CONSERV. LAW §§ 17-0105(16), 17-0505, & 0701(1)(a); *see id.* §§ 17-0501, 17-0511, & 17-0807.

[9] N.Y. ENVTL. CONSERV. LAW § 17-0101.

organic or inorganic matter that shall cause or contribute to a condition in contravention of water quality standards.[10]

Here, NYSDEC has failed to provide any supporting analysis for its determination that CAFOs with 200-299 cows will not discharge waste into the state's waters if the proposed regulatory revisions are implemented. In contrast, our analysis and that of our experts herein show that this category of CAFOs has discharged in the past, and that the voluntary compliance measures proposed by NYSDEC will actually allow discharges to continue or increase in the future, in the absence of SPDES permit requirements.

The critical disconnect associated with the proposed exemptions is the lack of any provisions in the rules that clarify which medium CAFOs are "dischargers"' that will require permits, and the lack of any process or applicable criteria whereby NYSDEC would make such determinations. Instead, the proposed revisions are premised upon an impermissible, unreasonable, and unsupported presumption that statutorily defined point sources are not in fact discharging and, as a consequence, should be released from the obligation to implement the nutrient management planning and structural best management practices which are required in

10 New York's ECL broadly defines effluent limitations to mean "any" federal or state "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. . . ." N.Y. ENVTL. CONSERV. LAW § 17-0105(15) (emphasis added). ECL § 17-0501 is a water quality based effluent limitation. Discharges which could cause or contribute to a violation of water quality standards require water quality based effluent limitations under the CWA. 33 U.S.C. § 1311(b)(1)(C); N.Y. ENVTL. CONSERV. LAW § 17-0811(5). NYSDEC cannot exempt CAFOs categorically in the absence of any analysis as to whether any effluents which are "discharged into or allowed to run from an outlet or a point source" associated with a particular CAFO will cause and/or contribute to a violation of water quality standards. Discharges which cause or contribute to water quality violations are prohibited, regardless of whether they come from a point source. 33 U.S.C. § 1311(b)(1)(C); N.Y. ENVTL. CONSERV. LAW § 17-0811(5).

order to prevent CAFO discharges.[11] Accordingly, NYSDEC has an obligation under ECL §§ 17-0101 and 17-0501 to require permits for these facilities in the absence of individualized proof that the facilities will not discharge.

NYSDEC's presumption of no discharge from CAFOs is also inconsistent with EPA's interpretation of the CWA that "CAFOs that have discharged in the past *will discharge in the future.*"[12] EPA applies a rebuttable presumption that is based on requiring a CAFO that has discharged in the past to obtain a NPDES permit, unless the CAFO demonstrates that "the conditions that led to the discharge are fully remedied."[13] NYSDEC instead proposes to presume (without any standards or findings) that all medium CAFOs with 200-299 dairy cows have not illegally discharged, and therefore can be granted an exemption from permitting requirements without any demonstration that they will not discharge in the future. NYSDEC lacks the authority to authorize through state regulation this violation of federal law.

In addition, NYSDEC lacks the authority to exempt certain CAFOs from being subject to the SPDES program in order to stimulate the expansion of CAFOs with less than 200 cows into the category of CAFOs with 200-299 cows, because this runs afoul of the state statutory prohibition against increasing or altering the content of wastes discharged through an outlet or a

[11] See *Waterkeeper Alliance, Inc.* v. EPA, 399 F.3d 486, 508 (2d Cir. 2005); *Concerned Area Residents for the Env't v. Southview Farm*, 34 F.3d 114, 121 (2d Cir. 1994); *Nat'l Pork Producers Council v. EPA*, 635 F.3d 738, 751 (5th Cir. 2011); 40 C.F.R. § 122.23(e). NYSDEC has not addressed how it proposes to differentiate discharging from non-discharging CAFOs as a threshold matter. To be sure, some conditions that cause unpermitted discharges from CAFOs (including proximity to waters, CAFOs being located upslope from waters, production area drainage, etc.) are beyond the operators' control and will result in discharges. Similarly, CAFOs that require waste storage systems upgrades to prevent a discharge will continue to discharge and thus require a NPDES permit. Of paramount concern, however, is the lack of permitting requirements, which include technical standards for land application that will minimize or eliminate nutrient pollution from CAFO land application areas and ensure proper agronomic utilization of CAFO waste.

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

[13] Id.

point source into waters of the state without a SPDES permit.[14] Small CAFOs that expand into the 200-299 category and are thus exempted from SPDES compliance will produce more waste that, when discharged into the state's waters, will increase the amount of waste discharge without the required SPDES permit oversight.

C. NYSDEC Cannot Relieve Medium CAFOs of the Obligation to Prepare and Implement a Nutrient Management Plan and at the Same Time, Presume That Such CAFOs Will Not Discharge.

While CAFO pollutants can infiltrate the surface waters in a variety of ways including spills and other dry-weather discharges such as overflows from storage lagoons, perhaps the most common way by which such pollutants reach the surface waters is through improper land application.[15] In *Waterkeeper Alliance, Inc. v. EPA*, the Second Circuit held that where CAFOs land-apply waste in accordance with site-specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in that waste in accordance with 40 C.F.R. § 122.23(e), any subsequent "precipitation-related" discharge is considered to be an "agricultural stormwater discharge." Such discharges are thus exempt from regulation under the CWA because they are excluded from the definition of point source.[16] Where runoff is primarily caused by the over-saturation of fields with manure rather than rain, such that excess quantities of manure are included in the runoff, such a discharge cannot be classified as agricultural

[14] N.Y. ENVTL. CONSERV. LAW §§ 17-0507 & 17-0701(1)(c).

[15] *Waterkeeper*, 399 F.3d at 494 n.11 (citing EPA estimates indicating that 90% of CAFO waste is land applied).

[16] Id. at 496 (citing 33 U.S.C. § 1362(14)); cf. N.Y. ENVTL. CONSERV. LAW § 17-0105(16) (specifically including CAFOs in the definition of point source); N.Y. COMP. CODES R. & REGS. tit. 6, § 750-1.2(65) (specifically including CAFOs in the definition of point source).

stormwater, and therefore requires a NPDES permit.[17] In those circumstances, a discharging CAFO has the duty to apply for a CAFO permit under the federal CWA.[18]

EPA's CAFO regulations expressly require CAFOs to land-apply waste in accordance with a nutrient management plan that meets the requirements of 40 C.F.R. § 122.23(e) in order to qualify for the agricultural stormwater exception.[19] In contrast, NYSDEC's proposal relies upon voluntary CAFO utilization of a nutrient management plan. The CWA prohibits states from adopting less stringent standards and restrictions than those contained in the Act itself.[20]

NYSDEC also lacks the authority to apply the CWA agricultural stormwater exemption to point source or non-point source discharges from CAFOs. The exemption from NPDES permitting addressed by the Second Circuit in *Waterkeeper* and in EPA's CAFO regulations is the "agricultural stormwater" exemption from the definition of a point source.[21] Unlike the CWA, however, New York's ECL requires permits for discharges from both point sources and "outlets." ECL § 17-0505 prohibits the "making or use of an outlet or point source discharging into the waters of the state, and the operation or construction of disposal systems, without a valid SPDES permit." Discharges are broadly defined under New York law to include both point and

[17] *Waterkeeper*, 399 F.3d at 508 (quoting Concerned Area Residents for the Env't v. Southview Farm, 34 F.3d 114, 121 (2d Cir. 1994)); accord Nat'l Pork Producers Council v. EPA, 635 F.3d 738, 751 (5th Cir. 2011).

[18] *Waterkeeper*, 399 F.3d at 508; *Southview Farm*, 34 F.3d at 121; *Nat'l Pork Producers Council*, 635 F.3d at 751.

[19] See 40 C.F.R. § 122.23(e) (noting that the agricultural stormwater discharge exception applies only to precipitation-related discharges of manure, litter, or process wastewater from land areas under the control of a CAFO where manure, litter, or process wastewater has been land-applied "in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization" of the waste).

[20] 33 U.S.C. § 1370(1)(B).

[21] *Waterkeeper*, 399 F.3d at 496 (citing 33 U.S.C. § 1362(14)); cf. N.Y. ENVTL. CONSERV. LAW. § 17-0105(16); N.Y. COMP. CODES R. & REGS. tit. 6, § 750-1.2(65).

non-point "outlet" discharges.[22] An "outlet" is defined to include "the point of emergence of any water-borne sewage, industrial waste or other wastes or the effluent therefrom, into the waters of the state."[23] Non-point source pollution is "a pollution problem not involving a discharge from a point source."[24] While the ECL general prohibits *any* addition of pollution that will cause or contribute to a violation of water quality standards,[25] discharges from outlets specifically require SPDES permits in any event.[26] Under both state and federal law, the agricultural stormwater exemption applies (in appropriate circumstances[27]) only to point sources discharges.[28] NYSDEC thus lacks the authority to exempt non-point outlet CAFO discharges from SPDES permitting and regulation. Even if NYSDEC's had the authority to exempt 200-299 cow medium CAFOs from the permitting requirements, NYSDEC would still have an independent duty to regulate these sources under stricter state law.[29]

[22] N.Y. ENVTL. CONSERV. LAW § 17-0105(11) & (16); N.Y. COMP. CODES R. & REGS. tit. 6, § 750-1.2(26).

[23] N.Y. ENVTL. CONSERV. LAW § 17-0105(11); N.Y. COMP. CODES R. & REGS. tit. 6, § 750-1.2(58) & (59).

[24] Nat'l Wildlife Fed'n v. Gorsuch, 693 F.2d 156, 166 n.28 (D.C. Cir. 1982).

[25] N.Y. ENVTL. CONSERV. LAW § 17-0501.

[26] Id. §§ 17-0505, 17-0507, 17-0511, 17-0701(a), & 17-0807(4).

[27] See 40 C.F.R. § 122.23(e).

[28] 33 U.S.C. § 1362(14); N.Y. ENVTL. CONSERV. LAW § 17-0105(16).

29 N.Y. ENVTL. CONSERV. LAW § 17-0105(11) & (16); N.Y. Comp. Codes R. & Regs. tit. 6, § 750-1.2(26).

II. NYSDEC's Proposal to Deregulate Medium Dairy CAFOs with 200 to 299 Cows Violates the Clean Water Act's and New York State's Antidegradation Policies and the Clean Water Act's Anti-Backsliding Provisions and Impaired Waterbody Requirements.

A. The Proposed Deregulation of CAFOs Violates Antidegradation Protections

The objective of the CWA is to restore and maintain the chemical, physical, and biological integrity of the nation's waters.[30] This objective is to be achieved by compliance with the CWA, including compliance with permit requirements.[31] NYSDEC's NPDES regulations may be revised only if such revision is subject to and consistent with the CWA's antidegradation policy.[32] But, as is more fully set forth herein, NYSDEC's proposed deregulation of statutorily-defined point source CAFOs[33] violates the CWA's antidegradation policy. As explained in detail in the Lithochimeia Report, CAFOS that would be exempt from SPDES permit compliance under the proposed rulemaking and permit modification will, in fact cause unregulated and unpermitted discharges, resulting in pollution and impairment of the state's waters. Unpermitted discharges from any source which cause or contribute to a water quality violation (such as where pollutants of concern are added to an impaired water) are prohibited by both the CWA and the

[30] 33 U.S.C. § 1251(a).

[31] *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 315 (1982).

[32] 33 U.S.C. § 1313(d)(4); 40 C.F.R. § 131.12; N.Y. ENVTL. CONSERV. LAW §§ 17-0505, 17-0507, 17-0511, 17-0701(a), & 17-0807(4); Organization and Delegation Memorandum No. 85-40 (Sept. 9, 1985) [hereinafter "O&D Memo"]; Technical Operation Guidance Series 1.3.9, "Implementation of the NYSDEC Antidegradation Policy." [hereinafter "NYSDEC TOGS 1.3.9"]. Antidegradation prevents the degradation of water quality by requiring that (1) all existing in stream uses (and the water quality necessary to support them) are maintained and protected; (2) high levels of water quality (i.e., where the waterbody *exceeds* the assigned criteria) must be maintained and protected unless a review of reasonable alternatives and social and economic considerations justifies the degradation; and (3) where high quality waters constitute an outstanding state resource, such as waters of exceptional recreational or ecological significance, that water quality shall generally be maintained and protected at its current high quality level. 40 C.F.R. § 131.12(a)(1)-(3); Water Quality Standards Regulation, 48 Fed. Reg. 51,400 51,402 (Nov. 8, 1983); O&D Memo at 1-2.

[33] N.Y. ENVTL. CONSERV. LAW § 17-0105(16).

ECL. Accordingly, the proposed categorical deregulation of CAFO point sources cannot proceed.

EPA regulations establish three levels of antidegradation water quality protection: Tier One, Tier Two and Tier Three.[34] For "Tier I" waters, where the water quality necessary to support all existing uses must be maintained and protected, the antidegradation policy creates an "absolute floor of water quality."[35]

> If a planned activity [such as the unregulated operation of dairy CAFOs] will forseeably [sic] lower water quality to the extent that it no longer is sufficient to protect and maintain the existing uses in that waterbody, such an activity is inconsistent with EPA's antidegradation policy. . . . In such a circumstance the planned activity must be avoided or adequate mitigation or preventive measures must be taken to ensure that the existing uses and the water quality to protect them will be maintained.[36]

1. The Proposed Deregulation of CAFOs Violates Tier One Antidegradation Protections

Tier I protection establishes the minimum water quality standard for all of a state's waters by requiring that "[e]xisting in stream water uses and the level of water quality necessary to

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[34] *Kentucky Waterways Alliance v. Johnson*, 540 F.3d 466, 471 (6th Cir. 2008) (citing 40 C.F.R. § 131.12(a)). *Kentucky Waterways* held that EPA's approval of Kentucky's plan to exempt certain permits, including general stormwater permits, from antidegradation review was arbitrary, capricious, and contrary to law. The court annulled the approval because EPA: "(1) fail[ed] to ensure that each exemption only allowed individual pollution discharges that would not reduce more than ten percent of a Tier II water body's assimilative capacity; (2) fail[ed] to provide for a cumulative cap on the loss of assimilative capacity caused by the combined effect of discharges allowed under these exemptions; and (3) bas[ed] its determination of the effect of these exemptions on non-binding assurances made by the Cabinet, rather than on the text of the Kentucky regulation itself. *Id.* at 483; *see Ohio Valley Envtl. Coalition v. Horinko*, 279 F. Supp. 2d 732, 757-62 (S.D. W. Va. 2003) (finding that EPA's approval of a regulatory provision which required Tier II antidegradation review only at the time the general permit was issued was arbitrary and capricious, and held that site-specific antidegradation analysis was required prior to granting coverage under the general permit). Tier Three protections apply to outstanding resource waters and are not at issue here.

[35] Water Quality Standards Regulation, 48 Fed. Reg. 51,400, 51,402 (Nov. 8, 1983).

[36] U.S. EPA, QUESTIONS AND ANSWERS ON ANTIDEGRADATION 7 (1983), *available at* http://water.epa.gov/scitech/swguidance/standards/upload/2002_06_11_standards_handbook_handbookappxG.pdf; *see* 40 C.F.R. § 131.12(a)(1).

protect the existing uses shall be maintained and protected."[37] Tier One antidegradation protections for existing use apply to all waters.[38]

Antidegradation policies are implemented for Tier One protection by reviewing and determining whether a discharge would impair an existing use.[39] No activity which could partially or completely eliminate an existing use may be authorized consistent with the antidegradation policy.[40]

States must compile a list—known as the "303(d) list"—of waterbodies which fail to support their designated uses and thus do not meet their water quality standards.[41] The state must identify those waters for which technology-based effluent limitations are not stringent enough to achieve any water quality standard applicable to such waters."[42] As is set forth more fully in the accompanying Lithochimeia Report over 50 New York waterbodies are impaired in whole or in part by agricultural discharges.[43] As a matter of law, such waters are not supporting their designated and existing uses.

Deregulating statutorily-defined point source CAFOs which are the identified cause and/or contributor to use impairments violates the Tier One protection afforded by the

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[37] *Kentucky Waterways*, 540 F.3d at 471 (quoting 40 C.F.R. § 131.12(a)).

[38] *Horinko*, 279 F. Supp. 2d at 740 (citing 40 C.F.R. § 131.12(a)(1)-(3)); *see* O&D Memo at 1-2 (requiring the protection of existing uses and noting that the SPDES process "serves the intended function of preventing degradation").

[39] Revisions to the National Pollutant Discharge Elimination System Program and Federal Antidegradation Policy in Support of Revisions to the Water Quality Planning and Management Regulation, 64 Fed. Reg. 46,058, 46,063 (Aug. 23, 1999).

[40] *PUD No. 1 of Jefferson Cnty. v. Washington Dep't of Ecology*, 511 U.S. 700, 718-19 (1994) (citing 40 C.F.R. § 131.12(a)(1)).

[41] 33 U.S.C. § 1313(d)(1)(A).

[42] *Id.* § 1313(d)(4)(B).

[43] S*ee* NYSDEC, 2012 SECTION 303(D) LIST OF IMPAIRED WATERS REQUIRING A TMDL/OTHER STRATEGY, *available at* http://www.dec.ny.gov/docs/water_pdf/303dlistpropfnl2012.pdf.

antidegradation policy.[44] In addition, point sources discharging pollutants of concern to impaired waters must apply water quality-based effluent limitations (over and above baseline technology-based effluent limitations ("TBELs")) to ensure that the level of water quality to be achieved is derived from and complies with water quality standards, and is consistent with the assumptions and requirements of any available TMDL waste load allocation for the discharge pursuant to 40 C.F.R. § 130.7.[45]

ECL § 17-0811(5) similarly requires SPDES permits to include more stringent water quality-based effluent limitations (WQBELs) in order to ensure compliance with water quality standards and TMDL load allocations.[46] In other words, NYSDEC is required by both state and federal law to impose more stringent WQBELs on CAFOs discharging pollutants of concern to impaired waters, rather than to exempt such point sources from SPDES permitting requirements altogether.

Accordingly, each SPDES permit must include—in addition to TBELs—requirements "in addition to or more stringent than" TBELs,[47] including WQBELs "developed to protect a narrative water quality criterion, a numeric water quality criterion, or both" which must be "consistent with the assumptions and requirements of any available waste load allocation for the discharge" as part of a TMDL.[48] WQBELs are also required when a permitting agency determines a discharge "will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard."[49]

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[44] *See* 40 C.F.R. § 131.12(a)(1); O&D Memo at 1-2.

[45] 40 C.F.R. § 122.44(d)(1)(vii)(A) & (B).

[46] *See* N.Y. COMP. CODES R. & REGS. tit. 6, § 750-1.11(a)(5).

[47] 40 C.F.R. § 122.44(d).

[48] *Id.* § 122.44(d)(1)(vii); *see* N.Y. COMP. CODES R. & REGS. tit. 6, § 750-1.11(a)(5).

[49] 40 C.F.R. § 122.44(d)(1)(i).

For impaired "Tier One" waters where TMDLS are in place (or basins which discharge to such waters), NYSDEC cannot deregulate CAFOs consistently with antidegradation. NYSDEC recognized deregulation would cause significant degradation water bodies on Page 15 of its March 23, 2012 Draft Phase II Watershed Implementation Plan for New York Susquehanna and Chemung River Basins and Chesapeake Bay Total Maximum Daily Load, which states:

> A non-regulatory 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.

NYSDEC has failed to offer any justification or support for its radical change in position, from March 2012 to the promulgation of the proposed rulemaking and permit modification at issue here.

Where TMDLs are in place (or basins which discharge to such waters), or where waters are in danger of impairment due to high levels of nitrogen or phosphorous, NYSDEC cannot deregulate CAFOs consistently with its antidegradation policy. It logically follows that NYSDEC cannot exempt certain CAFOs that may discharge into impaired waters that currently do not have TMDLs from the requirements of the CAFO General Permit, since those waters are under less regulatory protection.[50] Proper implementation of Tier One antidegradation protections would instead prohibit additional degradation of water bodies which are listed as impaired under section 303(d)of the CWA.[51]

[50] *See Friends of Pinto Creek v. EPA*, 504 F.3d 1007, 1012 (9th Cir. 2007), *cert. denied sub nom Carlota Copper Co. v. Friends of Pinto Creek*, 555 U.S. 1097 (2009).

[51] EPA Final Rule: Water Quality Standards for Puerto Rico, 72 Fed. Reg. 70517, 70520 (Dec. 12, 2007).

2. The Proposed Deregulation of CAFOs Violates Tier Two Antidegradation Protections

Tier Two antidegradation protections preserve existing water quality which is sufficient to support designated uses.[52] As New York's Court of Appeals has explained:

> water quality standards are provisions of State and Federal law, which define the quality goals of a water body or some portion of it, by designating the use or uses to be made of the water, by setting criteria necessary to protect the uses, and by incorporating an antidegradation policy designed to prevent the gradual deterioration of the quality of the water body.[53]

For "Tier Two" waters where the quality of such 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 [Section 303 of the CWA]."[54]

Degradation of water quality which is still high enough to support designated uses cannot be authorized under the antidegradation policy absent a balancing of the potential adverse environmental impacts of the proposed project against its social and economic benefits.[55] EPA's antidegradation regulation provides (at a minimum) that:

> Where the quality of the waters exceed levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality

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[52] 40 C.F.R. § 131.12(a)(2); O&D Memo at 1-2.

[53] *Niagara Mohawk Power Corp. v. State Dep't of Envtl. Conservation*, 82 N.Y.2d 191, 194 (1993); *see also Islander E. Pipeline Co., LLC v. Conn. Dep't of Envtl. Prot.*, 482 F.3d 79, 120-21 (2d Cir. 2006). N.Y. ENVTL. CONSERV. LAW § 17-0501 similarly prohibits activities which cause or contribute to a violation of water quality standards, and is "broadly written and any activity which, in fact, results in or contributes to a violation of water quality standards is within its ambit." *In the Matter of Niagara Mohawk Power Corp*., Decision of the Commissioner (May 1, 1991), 1991 N.Y. ENV LEXIS 36 at *3-*4.

[54] 33 U.S.C. § 1313(d)(4).

[55] *See In re Athens Generating Co.*, Interim Decision of the Commissioner (June 2, 2000), 2000 N.Y. ENV LEXIS 49 at *36-*38; 40 C.F.R. § 131.12(a)(2); O&D Memo at 1-2.

> shall be maintained and protected unless the State finds, after full satisfaction of the intergovernmental coordination and public participation provisions of the State's continuing planning process, that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located. In allowing such degradation or lower water quality, the State shall assure water quality adequate to protect existing uses fully. Further, the State shall assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint source control.[56]

Tier Two of antidegradation protection provides that water quality can only be lowered where the "highest statutory and regulatory requirements" are required "for all new and existing point sources . . . ."[57] NYSDEC instead seeks to exempt new and existing CAFOs (which currently are point sources as a matter of law[58]) from statutory and regulatory requirements under the CWA and ECL. In order to lower existing water quality, NYSDEC also would need to assure that all cost-effective and reasonable best management practices ("BMPs") are achieved for non-point source control.[59] Deregulating CAFOs does nothing to "assure" that such non-point source BMPs will be achieved.

The proposed CAFO regulation revisions also must be supported by the socioeconomic justification required by 40 C.F.R. § 131.12(a)(2). NYSDEC has not presented any socioeconomic justification analysis to permit the lowering of existing water quality via the deregulation of CAFOs as required by 40 C.F.R. § 131.12(a)(2), O&D Memo, and NYSDEC TOGS 1.3.9. To the extent NYSDEC has offered any economic analysis, it has based its analysis on inaccurate assumptions and failed to account for significant adverse socioeconomic impacts, as is set forth more fully in the accompanying Weida Report.

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[56] 40 C.F.R. § 131.12(a)(2); *see* O&D Memo at 2.

[57] 40 C.F.R. § 131.12(a)(2); *see* O&D Memo at 2.

[58] N.Y. ENVTL. CONSERV. LAW § 17-0105(16).

[59] 40 C.F.R. § 131.12(a)(2); *see* O&D Memo at 2.

Not surprisingly, the regulatory consequences of allowing the degradation of waters would create negative economic impacts on the CAFO sector. The consequences of CAFO deregulation would lead to more waters impaired by agricultural discharges, and inhibit the restoration of water currently managed under TMDLs. New discharges of pollutants of concern to impaired waters (which will unquestionably cause and/or contribute to the violation of water quality standards) may not be permitted unless a TMDL has been established, sufficient waste load allocations are available and all existing dischargers are subject to schedules of compliance to meet water quality standards.[60] As noted previously, this same prohibition would apply to Tier One waters.

In *Pinto Creek*, the Ninth Circuit ruled that a new discharge of dissolved copper into a waterway that was already impaired by an excess of the copper pollutant violated both the intent and purpose of the CWA and its implementing regulation at 40 C.F.R. § 122.4(i), which "addresses the situation where a new source seeks to permit a discharge of pollutants into a stream already exceeding its water quality standards for that pollutant."[61] 40 CFR § 122.4(i) states that no permit may be issued to a new source or a new discharger if the discharge from its construction or operation will cause or contribute to the violation of water quality standards.[62] ECL § 17-0501 more broadly prohibits any person from directly or indirectly throwing draining, running or otherwise discharging any organic or inorganic matter into waters which will "cause or contribute to a condition in contravention of" water quality standards.[63]

As the Ninth Circuit explained with regard to 40 C.F.R. § 122.4(i):

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[60] *See Pinto Creek*, 504 F.3d at 1012-13 (9th Cir. 2007).

[61] *Id.* at 1011.

[62] 40 C.F.R. § 122.4(i).

[63] N.Y. ENVTL. CONSERV. LAW § 17-0501.

> The regulation does provide for an exception *where a TMDL has been performed and the owner or operator demonstrates that before the close of the comment period two conditions are met, which will assure that the impaired waters will be brought into compliance with the applicable water quality standards.* The plain language of this exception to the prohibited discharge by a new source provides that the exception does not apply unless the new source can demonstrate that, under the TMDL, the plan is designed to bring the waters into compliance with applicable water quality standards.[64]

Accordingly, a permit may be authorized for a new discharger proposing to discharge into a water segment which does not meet applicable water quality standards or is not expected to meet those standards (and for which the state has performed a TMDL to allocate pollutants loads) only where the discharger can demonstrate that: (1) there are sufficient remaining pollutant load allocations to allow for the discharge; and (2) the existing dischargers into that segment are subject to compliance schedules designed to bring the segment into compliance with applicable water quality standards.[65]

The plain language of this exception to the prohibited discharge by a new source provides that the exception does not apply unless the new source can demonstrate that, under a TMDL, there is a cleanup plan designed to bring the waters into compliance with applicable water quality standards, and that other (existing) discharges are subject to compliance schedules designed to bring the segment into compliance with applicable water quality standards.[66]

Under the scenario proposed by NYSDEC in the instant rulemaking and permit modification, existing degradation of impaired waters would be exacerbated, additional degradation of currently non-impaired waters would likely lead to additional waters becoming impaired, and no new CAFO (large or medium) could be permitted since all the existing medium

[64] *Pinto Creek*, 504 F.3d at 1012 (emphasis added).

[65] *See id.* at 1012-13.

[66] *See id.*

CAFOs, having eluded SPDES obligations, would have neither TMDL waste load allocations nor compliance schedules in place.[67] Such a result is not only at odds with the CWA and ECL, but would *prevent* significant or "important economic or social development"[68] whether such development would involve new CAFOs or other point sources discharging similar pollutants (nutrients, total suspended solids, and bacteria), such as construction sites, publicly owned treatment works and mining operations. Existing non-CAFO dischargers, as the NYSDEC Regulatory Impact Statement explains, would bear the burden of "stricter wasteload allocations . . . in order to meet TMDL requirements," which could result in "increased costs to local governments" and taxpayers.[69] Furthermore, NYSDEC has not taken into account potential negative socioeconomic impacts on commercial and recreational fisheries.[70]

B. NYSDEC's Proposal to Revise 6 NYCRR Part 750 and the General Permit to Relieve Medium CAFOs of Permit Requirements that Ensure Compliance with Effluent Limitations, and to Relieve Currently Permitted Medium CAFOs From Existing Effluent Limitations, Violates the Clean Water Act's Anti-Backsliding Provision

The CWA and ECL both prohibit the renewal, modification, or re-issuance of an NPDES permit with less stringent effluent limitations than those contained in a previous permit.[71] While there are some exceptions to this general rule (discussed in detail below), such exceptions are inapplicable where the less stringent effluent limitation would result in a violation of water

[67] *See id.* (articulating the exception to 40 C.F.R. § 131.12(a)(2), which allows dischargers that will contribute to violations of existing water quality standards to obtain permits if they meet TMDL waste load allocations and have sufficient compliance schedules in place).

[68] 40 C.F.R. § 131.12(a)(2); *see* O&D Memo at 1.

[69] *See Regulatory Impact Statement for 6 NYCRR Parts 360 & 750*, NYSDEC, http://www.dec.ny.gov/regulations/87505.html (last visited Jan.22, 2013).

[70] *See* Section VI.C.4, *infra*.

[71] 33 U.S.C. §1342(o); N.Y. ENVTL. CONSERV. LAW § 17-0809(3).

quality standards, such as a discharge of a pollutant of concern to an impaired water.[72] Every NPDES permit is statutorily required to set forth, at a minimum, effluent limitations that restrict the quantities, rates, and concentrations of chemical, physical, biological, and other constituents discharged from point sources into waters.[73]

As the U.S. Supreme Court has observed, "[g]enerally speaking, the NPDES *requires dischargers to obtain permits* that place limits on the type and quantity of pollutants that can be released into the Nation's waters."[74] The requirement for CAFOs to *develop* and *implement* nutrient management plans, which include, *inter alia*, a waste application rate that minimizes phosphorus and nitrogen transport from the field to surface waters, is an effluent limitation.[75] Thus, the requirement to develop and implement a nutrient management plan *is* an effluent limitation.[76]

As the Second Circuit observed in *Waterkeeper*, effluent limitations are defined as "any restriction" on the quantities, rates and concentrations of pollution discharges.[77] New York defines effluent limitations even more 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."[78] NYSDEC's proposal to relieve medium

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[72] 33 U.S.C. § 1342(o)(3).

[73] *See Waterkeeper*, 399 F.3d at 491 (quoting *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 102 (2004)).

[74] *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. at 95, 102 (emphasis added) (citing 33 U.S.C. § 1362(12 & 14)).

[75] *See Waterkeeper*, 399 F.3d at 496, 501 (citing 40 C.F.R. § 412.4(c)(2)).

[76] *See id.* at 502.

[77] *See id.* (quoting 33 U.S.C. § 1362(11)).

[78] N.Y. ENVTL. CONSERV. LAW § 17-0105(15) (emphasis added).

CAFOs from the requirement to develop and implement nutrient management plans accordingly constitutes anti-backsliding in violation of the CWA.[79] In this regulatory context, the requirement of a nutrient management plan is an effluent limitation required under the SPDES General Permit. By exempting CAFOs with 200-299 cows from this permit requirement, NYSDEC's proposed major modification of the SPDES General Permit would result in less stringent effluent limitations than those contained in the current permit, resulting in a violation of the anti-backsliding policy.

NYSDEC's proposal also violates NYSDEC's obligation to administer the delegated SDPES program in lieu of the federal NPDES program by applying, and ensuring compliance with, effluent limitations (including water quality-based effluent limitations) applicable to medium CAFOs.[80]

The CWA includes further anti-backsliding (and antidegradation) restrictions on revisions to effluent limitations.[81] For impaired waters, any effluent limitation based on a TMDL or other waste load allocation may be revised only if: (1) the cumulative effect of all such revised effluent limitations based on such TMDL or waste load allocation will assure the attainment of water quality standards; or (2) the designated use which is not being attained is removed in accordance with a use attainability analysis.[82] For unimpaired waters, effluent limitations (and other standards, including the NPDES regulations themselves) can only be revised if they are subject to and consistent with the antidegradation policy.[83] As is set forth more fully above,

[79] 33 U.S.C. § 1342(o).

[80] *Id.* § 1342(b)(1).

[81] *Id.* § 1313(d)(4).

[82] *Id.* § 1313(d)(4)(A); *see* 40 C.F.R. § 131.10 (outlining the requirements for designated use determinations).

[83] 33 U.S.C. § 1313(d)(4)(B).

NYSDEC's proposed deregulation of medium size CAFOs would violate Tier One and Tier Two of the antidegradation policy.

While NYSDEC's proposal to deregulate medium CAFOs would violate anti-backsliding for all CAFOs across the board (new and existing), removing effluent limitations from existing CAFOs only could be accomplished consistent with the CWA's limited exceptions to the anti-backsliding provision.[84] But NYSDEC's proposal includes no process (and therefore lacks any requisite public participation requirements[85]) for revising CAFO effluent limitations on a case-by-case basis to consider whether a particular CAFO would qualify for an exception from anti-backsliding pursuant to 33 U.S.C. § 1342(o)(2).

When EPA revised its NPDES stormwater regulations in 1999, it noted that revisions to that program, which included a process for permitted industrial facilities to demonstrate "no exposure" in order to obviate the need for MS4 general permit coverage, provided that such existing permitted dischargers could show they qualified for the exceptions to the anti-backsliding rule provided by 33 U.S.C. § 1342(o)(2).[86] EPA also noted that anti-backsliding requirements would apply when a general NPDES permit was re-issued, renewed or modified.[87]

NYSDEC's proposal thus would violate anti-backsliding on three separate and independent grounds: (1) revisions to the Part 750 SPDES regulations that remove the effluent

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[84] *Id.* § 1342(o); *see* N.Y. ENVTL. CONSERV. LAW § 17-0809(3) (requiring that established effluent limitations must be at least as stringent as previous effluent limitations).

[85] As the Second Circuit observed in *Waterkeeper*, "[t]he [CWA] unequivocally and broadly declares, for example, that 'public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this Act shall be provided for, encouraged, and assisted by the Administrator and the States.'" *Waterkeeper*, 399 F.3d at 503 (citing 33 U.S.C. § 1251(e)); *accord Envtl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 856-57 (9th Cir. 2003).

[86] *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).

[87] *See id.* at 68,790.

limitation for all medium CAFOs to develop and implement a nutrient management plan; (2) modification of the SPDES General Permit for CAFOs, GP-0-09-001, to exempt non-discharging Medium CAFOs with 200 to 299 mature dairy cows, whether milked or dry, from permit coverage; and (3) relieving existing, SPDES permitted CAFOs of the obligation to renew permit coverage with applicable effluent limitations.

III. NYSDEC's Deregulation of Medium CAFOs Would Violate NYSDEC's Duty to Protect Downstream Water Quality and Will Undermine New York's Ability to Meet Its TMDL Obligations to EPA Under the Phase II Watershed Implementation Plan for Chesapeake Bay.

On December 29, 2010, EPA established a TMDL to reduce the loading of phosphorus, nitrogen and sediment to the Chesapeake Bay.[88] The TMDL is intended to reduce the amount of pollution being discharged into the watershed and to restore water quality in the Chesapeake Bay and the region's streams, creeks and rivers by 2025.[89] The final TMDL was "shaped by an extensive two-year public involvement effort and, in large part, by final Phase I Watershed Implementation Plans ("WIPs") developed by the six Bay states and the District of Columbia, which detail how and when the jurisdictions will meet pollution allocations."[90] It also includes "targeted 'backstop allocations' for the few areas where the WIPs did not meet the allocations or EPA's expectations of reasonable assurance that those allocations would be met, and a plan for enhanced oversight and contingency actions to ensure progress."[91]

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[88] *See Chesapeake Bay TMDL*, U.S. EPA, http://www.epa.gov/chesapeakebaytmdl/ (last visited Jan. 22, 2013).

[89] *Id.*

[90] *Fact Sheet: Chesapeake Bay Total Maximum Daily Load (TMDL); Driving Actions to Clean Local Waters and the Chesapeake Bay*, U.S. EPA 1 (Dec. 29, 2010), http://www.epa.gov/reg3wapd/pdf/pdf_chesbay/BayTMDLFactSheet8_6.pdf

[91] *Id.* at 2.

To fulfill its legal obligation to provide EPA with reasonable assurances under the Chesapeake Bay TMDL with regard to AFOs, NYSDEC submitted Phase I and Phase II Watershed Implementation Plans ("WIPs"). According to the Upper Susquehanna Coalition, a coalition 19 Soil and Water Conservation Districts formed to work on non-point source pollution issues in the New York and Pennsylvania portion of the Chesapeake Bay:

> The Bay states were required by the EPA to develop a [WIP] that both met the target allocations and provided reasonable assurance that reductions will be achieved and maintained, particularly for non-permitted sources like runoff from agricultural lands (non point source). If they could not, the EPA threatened backstops actions to ensure progress. Suggested EPA mandated practices for agriculture included: *farms of any size being regulated as CAFOs; farms of any size required to develop a Comprehensive Nutrient Management Plan (CNMP)*; large farms required to use Precision Feed Management; farms of any size required to have a manure storage and be prohibited to spread manure during the winter; manure applied to crop fields required to be injected; and all farms required to have ammonia emission controls on their facilities. . . . The EPA worked with New York conservation partners such as the [NYSDEC], USC, Cornell, Ag and Markets, NRCS, NY Farm Bureau, and the Northeast Dairy Producers Association during the past several months to address what the EPA perceived to be deficiencies in New York's draft WIP. . . . *One of the key improvements in the final plan compared to the draft plan was demonstrating the strength of New York's Agricultural Environmental Management and CAFO programs described in detail in the WIP* and two-year milestones. This plan "reasonably assured" the EPA that New York's voluntary approach with regulation for larger farms is working to conserve water quality in New York's portion of the Chesapeake Bay watershed. For now, the EPA removed backstop measures for the Agricultural sector. However, as with all sectors, they will regularly monitor the state's programs to make sure they implement the pollution control plans, remain on schedule for meeting water quality goals and achieve two-year milestones. This oversight will include program review, denying permits, and targeting compliance and enforcement actions as necessary to meet water quality goals[.][92]

On March 23, 2012, NYSDEC submitted its Final Phase II WIP for the Chesapeake Bay. The Phase II WIP provided EPA with the required reasonable assurances that the mandatory

[92] *The Upper Susquehanna River and the Chesapeake Bay Pollution Diet*, UPPER SUSQUEHANNA COALITION, http://www.u-s-c.org/html/documents/NYWIPannouncement1.pdf (last visited Jan. 22, 2013) (emphasis added).

pollutant loadings would be achieved, in large part, by describing its extensive regulatory system for large and medium CAFOs under state and federal law.[93]

In particular, NYSDEC emphasized that its strong regulatory program for large and medium dairy CAFOs is a "science-based, risk reduction approach to CAFO regulation, developed and implemented by New York since 1999, [that] should be considered the national standard . . . ."[94] NYSDEC further noted that its "CAFO program covers all farms with as few as 200 cows with binding permits" meeting scientifically supported standards and stated that "*anything less is inconsistent with the Clean Water Act's 'best technology' requirements*."[95] The Phase II WIP emphasized both the importance of the mandatory regulatory system and the scientific, risk-based approach to preventing pollution from large and medium CAFOs as follows:

> New York State's CAFO program is clear, actively implemented and enforced, of state-wide applicability, practical and scientifically supported. New York recognizes the need for farm-specific, technical evaluations by qualified professionals, in the form of Certified Planners and Professional Engineers, to ensure that the farm understands and implements the latest developments in land grant university guidelines, United States Department of Agriculture Natural Resources Conservation Services (USDA-NRCS) technical standards and State regulatory requirements. . . . As such, CAFO farms must utilize professional engineers in the design and implementation of their waste management and storage structures, must adhere to stringent setbacks for nutrient applications in farmlands adjacent to New York's waters, must control erosion on crop fields and must make nutrient applications in accordance with science-based nutrient management plans. The CAFO program ensures that manure nutrients from medium and large livestock farms are recycled to grow crops rather than allowing those nutrients to reach the waters of New York State. It is these stringent technical standards and the CAFO program's proven rate of implementation and enforcement that protects water quality.[96]

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[93] *See* NYSDEC, DRAFT PHASE II WATERSHED IMPLEMENTATION PLAN FOR NEW YORK SUSQUEHANNA AND CHEMUNG RIVER BASINS AND CHESAPEAKE BAY TOTAL MAXIMUM DAILY LOAD (2012), *available at* http://www.epa.gov/reg3wapd/pdf/pdf_chesbay/PhaseIIWIPS/NYWIPPhase2Final3_23_12.pdf

[94] *Id.* at 30.

[95] *Id.* at 22, 30 (emphasis added).

[96] *Id.* at 30.

What is clear from New York's Phase II WIP is that, as recently as March of 2012, NYSDEC's very strongly held opinion was that regulation and permitting of both medium and large dairy CAFOs was essential to water quality protection. NYSDEC acknowledged that it was critical to take a risk-based approach to these facilities through regulation and stringent technical standards in order to prevent pollution, rather than simply responding to pollutant discharges from unregulated and poorly managed and designed facilities after the pollution has already occurred. This is because of the tremendous pollution potential of medium and large CAFOs and the extensive waste management design, construction, and implementation requirements necessary to prevent it.[97] NYSDEC itself stated that anything less than the requirements in the existing regulatory program would be inconsistent with the requirements of the CWA. NYSDEC's position, based on regulation of the medium CAFOs since 1999, is most clearly stated in the Phase II WIP as follows:

> 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 under a separate program that is often voluntary in nature. *A non-regulatory 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.[98]

Only a few months later, NYSDEC notified the public of the instant proposal to stop regulating smaller medium dairy CAFOs and, although it acknowledges significant environmental and public health risk associated with the proposed deregulation in the EIS,[99]

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[97] *Id.*

[98] *Id.* at 30-31 (emphasis added).

[99] *See* DEIS at 25-52.

NYSDEC is now pursuing a voluntary, non-regulatory approach to dealing with the significant pollution potential at these facilities. NYSDEC is proposing this action in spite of, and in direct contradiction with, its publicly stated position in March of last year: that the voluntary approach to dealing with pollution from medium dairy CAFOs is "neither credible nor effective." Our organizations urge NYSDEC to stand behind its earlier, scientifically sound views that regulation of medium CAFOs is necessary to protect water quality. We further urge NYSDEC to maintain the commitments it made to EPA in its Chesapeake Phase II WIP which are founded on the assumption that regulation of all medium dairies under the existing permitting and enforcement system based on mandatory, scientifically based standards is essential to preventing and responding to pollution from these facilities.

NYSDEC's proposed deregulation of medium dairy CAFOs will seriously undermine its ability to fulfill the commitments it made to EPA less than a year ago pursuant to the Chesapeake Bay Phase II WIP. There are 65 permitted dairy CAFOs in the New York portion of the Chesapeake Bay Watershed. NYSDEC provided the EPA with "reasonable assurances" that it would meet the TMDL loading reductions through implementation and enforcement of the existing regulatory program for these CAFOs in the Phase II WIP. If NYSDEC adopts the proposed amendments to 6 N.Y.C.R.R. Part 750, thereby entirely exempting some of these medium dairy CAFOs in the Chesapeake Bay from the regulatory system, it will severely undermine effectiveness the Phase II WIP in meeting mandatory pollutant load reduction and will invalidate one of the major bases for EPA's approval of the plan. The existence and enforcement of NYSDEC's regulatory program for both medium and large dairy CAFOs was essential to EPA's approval of the Phase II WIP after EPA found the Phase I WIP plan for

agriculture to be "seriously deficient."[100] The existing regulatory system for large and medium CAFOs appears to be the primary reason that New York was able to avoid the adoption of more stringent EPA "back stops" for agricultural programs, which were estimated to cost greater than $350 million and were believed likely to impact small farm viability.[101]

Section 303(d) of the CWA requires that a TMDL be "established at a level necessary to implement the applicable water quality standard."[102] For the Chesapeake Bay TMDL, when a waterbody is impaired by both point and non-point sources, reasonable assurances that water quality standards will be achieved are determined by evaluating:

> whether practices capable of reducing the specified pollutant load: (1) exist; (2) are technically feasible at a level required to meet allocations; and (3) have a high likelihood of implementation. Where there is a demonstration that nonpoint source load reductions can and will be achieved, a TMDL writer can determine that reasonable assurance exists and, on the basis of that reasonable assurance, allocate greater loadings to point sources. Without a demonstration of reasonable assurance that relied-upon nonpoint source reductions will occur, the Bay TMDL would have to assign commensurate reductions to the point sources.[103]

The Chesapeake Bay TMDL includes heightened requirements for reasonable assurances and accountability, and EPA engaged in an extensive process with the states to develop the WIPs to meet the mandatory load reductions.[104] EPA has clearly expressed its intention to take additional federal action where necessary to implement the TMDL, including the use of discretionary residual delegation authority to expand the number of "sources, operations, or

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[100] *See DRAFT: New York State Watershed Implementation Plan for Chesapeake Bay Total Maximum Daily Load*, NYSDEC, http://www.epa.gov/reg3wapd/pdf/pdf_chesbay/pubmtgagendas2010/NYDraftCBayPlan.pdf (last visited Jan. 22, 2013).

[101] *See id.*

[102] 33 U.S.C. § 1313(d)(1)(C); *see* U.S. EPA, CHESAPEAKE BAY TMDL (2010), *available at* http://www.epa.gov/reg3wapd/pdf/pdf_chesbay/FinalBayTMDL/CBayFinalTMDLSection7_final.pdf.

[103] *Id.* at 7-1 to 7-2.

[104] *Id.* at 7-2.

communities regulated under the NPDES permit program."[105] The proposed amendments to 6 N.Y.C.R.R. Part 750 will result in substantial changes to the Phase II WIP that undermine the reasonable assurances that the plan will achieve the mandatory loading reductions in the Chesapeake Bay TMDL. Not only does this proposal invalidate substantial provisions of the Phase II WIP, it could shift the burden for reducing pollutant loading to other regulated sources, including municipalities and other CAFOs, and potentially result in new federal regulatory requirements for other sources, communities and operations, including NPDES permits for all dairies regardless of their size. This is inconsistent with the Chesapeake Bay TMDL itself and violates the requirements of Section 303(d) of the CWA.

IV. NYSDEC's Proposed Amendments to Part 360 and the CAFO General Permit to Allow Commingling of Food Processing and Other Wastes with CAFO Waste Under Standards Designed Solely for the Management of CAFO Waste Will Adversely Impact Human Health and the Environment and Are Contrary to Applicable State and Federal Law

NYSDEC is proposing to amend both its Part 360 Rules and the CAFO General Permit in a manner that will authorize CAFOs to accept food processing waste from the yogurt industry, as well as other undefined waste streams, and alter the existing requirements for treatment and land application of these wastes. According to the Regulatory Impact Statement for the Part 360 Revisions, "[t]hese changes anticipate the increased production of dairy products, such as yogurt, in New York State, and the increased recycling of whey and similar food processing wastes through land application and other means."[106] Among other things, NYSDEC proposes to revise Part 360 to "create an exemption from registration or permitting under Part 360 for a land application facility, manure storage facility, or an anaerobic digestion (AD) facility on a Part 750

[105] *Id.*

[106] *Regulatory Impact Statement for 6 NYCRR Parts 360 & 750*, NYSDEC, http://www.dec.ny.gov/regulations/87505.html (last visited Jan.22, 2013).

permitted CAFO that also involves food processing waste or other waste, if the waste handling is addressed in a Comprehensive Nutrient Management Plan (CNMP)."[107]

Accordingly, this revision would allow food processing waste or "other waste" to be commingled with manure, litter and process wastewater at a CAFO and the management of that waste would be governed by rules currently applicable only to CAFO wastes. These Part 750 rules and the proposed General Permit were designed to address the human health and environmental impacts of CAFO waste, primarily nutrients, under the NPDES program and state law, and were not designed to address not the unique issues associated with the management and disposal of food processing wastes and "other wastes."[108] Because "other wastes" are not defined, the rule could arguably be interpreted to allow a myriad of other waste streams, including hazardous or solids wastes, to be commingled with CAFO waste and regulated solely under the Part 750 Rules for CAFOs. Similarly, the proposed CAFO General Permit simply adds food processing waste and digestate to the waste streams governed by the permit and applies the regulatory standards designed solely for the management of CAFO waste, primarily nutrients, to the commingled waste stream.

These proposals do not adequately address the human health and environmental impacts associated with the storage and disposal of food processing wastes, digestates or "other wastes" either separately or when commingled with CAFO waste. For example:

> Wastewaters at food processing facilities are generated during slaughter operations, chilling, further processing, and plant sanitation. These wastewaters contain a variety of pollutants (blood, feathers, soluble solids, cleaners, sanitizers, etc.) and are regulated by federal, state, and sometimes local government agencies under the federal Clean Water Act (CWA). Pollutants regulated under the CWA

[107] *Id.*

[108] *See National Pollutant Discharge Elimination System (NPDES): Concentrated Animal Feeding Operations (CAFO)-Final Rule*, EPA, http://cfpub.epa.gov/npdes/afo/cafofinalrule.cfm (last updated July 21, 2012).

> include "priority" pollutants, including various toxic pollutants; "conventional" pollutants, such as biochemical oxygen demand (BOD), total suspended solids (TSS), fecal coliform, oil and grease, and pH; and "non-conventional" pollutants, any pollutant not identified as either conventional or priority. As part of the NPDES permit application, you will be required to analyze your industrial wastewater for BOD, COD, total organic carbon (TOC), TSS, ammonia (as N), temperature and pH. In addition, your food processing facility will likely be required to analyze your industrial wastewater for oil and grease, and may be required to analyze for additional parameters (e.g. total phosphorus or total nitrogen) based on water quality standards applicable to the receiving water, and any applicable state regulations. While the effluent limits and other requirements in your permit will be specific to your facility, there are conditions applicable to all permits, sample collection, and sample analysis.[109]

Further, food processing waste and other waste streams are regulated under the CWA and other federal laws that are not addressed or incorporated into the proposed changes to Part 360 and the proposed General Permit. For example, 40 C.F.R. Part 405 applies to the regulation of food processing wastes associated with the dairy industry under the CWA, however, none of those requirements are addressed in the proposals. There are numerous other provisions of federal law that apply to other food processing waste and other waste streams that would need to be evaluated and addressed in order to appropriately implement this proposal.

In addition, NYSDEC lacks the authority to proceed with this proposal under state law and it is contrary to numerous other federal laws that govern the management and disposal of industrial and other wastes. If NYSDEC wants to authorize the management and disposal of wastes other than animal manure, litter, and process wastewater at and by CAFOs, then a full evaluation of the nature of the commingled wastes must be completed and a regulatory system needs to be designed to adequately address the human health and environmental impacts associated with the management and disposal of the new, commingled waste stream. The federal CAFO rule and the applicable state CAFO regulations in Part 750 were not designed to address

[109] *Clean Water Act (CWA)*, FOOD PROCESSING ENVTL. ASSISTANCE CTR., http://www.fpeac.org/cwa.html (last visited Jan. 22, 2013).

these issues and there is no basis for assuming that the regulatory and permitting system for CAFOs would adequately protect human health and the environment for the commingled waste streams.

V. NYSDEC's Proposal to Deregulate Medium Dairy CAFOs Constitutes a Substantial Revision to Its SPDES Program Requiring EPA Review and Approval Following Public Notice and Comment

As described below, the applicable legal framework governing delegated state SPDES programs dictates that NYSDEC's proposed modifications to CAFO permitting in New York, as program revisions that alter NYSDEC's regulatory authority and procedures, must receive prior review by and approval from EPA. Relevant law and guidance further indicate that NYSDEC's proposed regulatory changes are properly characterized as "substantial." As a result, EPA must subject the modification to public notice and comment prior to its determination on whether to deny or approve such changes.

Pursuant to 40 C.F.R. § 123.62(a), either EPA or a state with an approved SPDES permitting program "may initiate program revision."[110] Such "[p]rogram revision may be necessary when the controlling Federal or State statutory or regulatory authority is modified or supplemented."[111] An approved state must "keep EPA fully informed of any proposed modifications to its basic statutory or regulatory authority, its forms, procedures, or priorities."[112] EPA guidance explains that "[p]rogram modification is often necessary to avoid inconsistencies between the State program and the CWA, and to assure the continuing validity of EPA's

[110] 40 C.F.R. § 123.62(a).

[111] *Id.*; *see* U.S. EPA, 1 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), at 2-10 (1986) [hereinafter "NPDES 1986 GUIDANCE"] ("Revisions to State programs may be necessary any time the State or federal programs change, such as the addition of a new program component (i.e., pretreatment, federal facilities or general permits), . . . other changes to State laws, . . . and the adoption of revised State forms.").

[112] 40 C.F.R. § 123.62(a).

approval of the State program."[113] NYSDEC's proposed modifications to CAFO permitting in New York State are appropriately categorized as "program revisions," as contemplated by federal regulations and guidance, since the proposed changes would plainly alter NYSDEC's regulatory authority, forms, procedures and priorities.[114]

To accomplish a program revision, a state "must request a modification to their approved program . . . ."[115] The state must submit to EPA a modified program description and other relevant documents for review and approval.[116] 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."[117] EPA must then review a proposed program modification and make a determination regarding whether such revision is substantial or non-substantial.[118]

In accordance with this framework, NYSDEC is obliged to fully inform and seek approval from EPA regarding NYSDEC's proposed program revision concerning CAFO permitting in New York. This requirement applies regardless of whether the proposed changes are deemed a substantial modification. For example, states' earlier adoption of revised federal

[113] *See* NPDES 1986 GUIDANCE at 2-11.

[114] 40 C.F.R. § 123.62(a).

[115] NPDES 1986 GUIDANCE at 2-10.

[116] 40 C.F.R. § 123.62(b)(1); *see* NPDES 1986 GUIDANCE at 2-11.

[117] 40 C.F.R. § 123.62(d).

[118] *See* NPDES 1986 GUIDANCE at 2-12 to 2-13 ("Program modifications may be considered either substantial or non-substantial. . . . [EPA] will determine whether any . . . proposed modification is substantial . . . ."); *see also* 40 C.F.R. § 123.62(b)(4).

regulations related to CAFOs were required to be done in accordance with 40 C.F.R. § 123.62.[119] It is manifest that NYSDEC's proposed regulatory changes, which substantively alter NYSDEC's programmatic structure and requirements related to CAFO permitting in New York, would similarly necessitate compliance with the federal regulations requiring EPA review and approval. To the extent NYSDEC has failed to date, or in the future fails, to initiate EPA review of its proposed program changes, EPA can, and should, initiate the necessary program change review.[120]

EPA's review must involve a determination regarding whether the proposed program changes are "substantial." Applicable guidance and precedent indicate that NYSDEC's proposed changes are properly characterized as a "substantial modification." EPA guidance explains that "[t]he Regional Administrator, with the concurrence of EPA Headquarters, will determine whether any other proposed modification is substantial by considering its scope, programmatic impact, and potential to arouse public interest or concern."[121] In other words, EPA makes "a case-by-case determination for each modification as to whether it is 'substantial' . . . . The basis for making this determination . . . is (1) the degree of public interest and (2) the magnitude of change to the State's program."[122] EPA guidance further explains that "[m]inor changes in

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[119] *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. 70,418, 70,457 (Nov. 20, 2008) (stating that EPA's revised regulations pertaining to CAFO operations require authorized states to adopt the new requirements and revise their NPDES regulations in accordance with 40 C.F.R. § 123.62).

[120] 40 C.F.R. § 123.62(d). Indeed, to the extent NYSDEC fails to comply with its clear obligation to seek approval from EPA for the proposed regulatory changes, our organizations, by copy of these comments to EPA, hereby apprise EPA of the circumstances, and will pursue the matter such that EPA undertakes the required review.

[121] NPDES 1986 GUIDANCE at 2-12.

[122] Notice of Data Availability; National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines and Standards for Concentrated Animal Feeding Operations, 66 Fed. Reg. 58,556, 58,599 (Nov. 21, 2001); *see* NPDES 1986 GUIDANCE at 2-12.

forms, procedures, and regulations will generally be considered non-substantial modifications."[123]

EPA has found that proposed 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 "substantive" program revisions. For example, EPA determined that proposed amendments to regulations addressing the issuance and administration of NPDES permits, as well as proposed changes to effluent testing and discharge permit limits, both constituted substantial revisions to state SPDES permit programs.[124] By contrast, EPA found that non-substantial changes include mere administrative changes, such as state assumption of general permit authority, which "established no new substantive requirements" and did not alter regulatory control over any industrial activity, and the reorganization and consolidation of state administrative agencies by executive order, which resulted in no substantive changes to the NPDES program besides revision to the agency exercising program authority.[125] Notably, proposed program revisions pertaining to the regulation of CAFOs have been found to be a "substantial" modification.[126]

[123] NPDES 1986 GUIDANCE at 2-13.

[124] *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, 6289-90 (Feb. 10, 2004) (EPA finding that proposed amendments to Delaware's regulations focused on the "*issuance and administration of NPDES permits* in the State of Delaware" and "constitute[d] a substantial revision to Delaware's authorized NPDES program" (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. 59,724, 59,724-25 (Nov. 10, 1993) (EPA determining that proposed program revisions, including, *inter alia*, amendments to Maryland's requirements for effluent testing and discharge permit limits, were substantial).

[125] *See* Revision of New York State's National Pollutant Discharge Elimination System Program to Issue General Permits, 58 Fed. Reg. 12,035, 12,036 (Mar. 2, 1993) (EPA determining that New York's assumption of general permit authority was a non-substantial revision of its NPDES program, explaining:

In accordance with this relevant guidance and precedent, NYSDEC's proposed changes to CAFO permitting in New York clearly constitute a "substantial modification." This is evident, since the proposed changes implicate a clear and substantial programmatic impact to New York State's CAFO permitting program by exempting farms with fewer than 299 cows from existing mandatory permitting requirements. Indeed, the magnitude of the proposed changes is significant. For example, under NYSDEC's new regulations, three million pounds of wet manure per day would go unregulated and exempted facilities posing significant pollution potential would not be required to implement critical structural controls that are necessary to protect environmental resources.[127] Moreover, the proposed permit modifications seek to implement regulations that are at odds with, and less protective than the ECL and the CWA require.

> 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. 61,170, 61,170 (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 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)).

[126] *See* Commonwealth of Pennsylvania's Submission of a Substantial Program Revision to Its Authorized National Pollutant Discharge Elimination System (NPDES) Program, 67 Fed. Reg. 55,841, 55,842 (Aug. 30, 2002) (proposed program revisions, including, *inter alia*, "the addition of regulations 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" (emphasis added)).

[127] *Pacific Southwest, Region 9: Animal Waste; What's the Problem?*, U.S. EPA, http://www.epa.gov/region9/animalwaste/problem.html (last updated June 2, 2011) (noting that each cow produces 120 pounds of wet manure per day; therefore, 25,000 cows will produce 3 million pounds of wet manure per day).

Moreover, a significant degree of public interest and concern over NYSDEC's proposed regulation revisions is patent, as evidenced by our comments herein and supporting appendices attached hereto from a broad coalition of concerned public interest organizations. NYSDEC's proposed changes are far from ministerial, minor amendments to forms or procedures that have been classified as non-substantial. To the contrary, the proposed revisions relate directly to the issuance and administration of state permits and change the duties and functions of NYSDEC under New York State's rules. The modifications would fundamentally change the substantive requirements contained in New York law, and would alter NYSDEC's regulatory control over medium sized CAFOs. As such, the proposed changes are clearly "substantial" as that term is understood under federal regulations and guidance. Moreover, as noted above, regulations relating to the adoption of CAFO permitting regulations have previously been deemed to be "substantial" in nature by EPA.[128] NYSDEC's proposed regulatory changes, which substantively alter NYSDEC's programmatic structure and requirements related to CAFO permitting in New York, should similarly be deemed "substantial."

EPA's decision regarding whether proposed program revisions are "substantial" determines whether such proposed changes are subject to public notice and comment: 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

[128] *See* Commonwealth of Pennsylvania's Submission of a Substantial Program Revision to Its Authorized National Pollutant Discharge Elimination System (NPDES) Program, *supra* note 126, at 55,842.

modification.[129] In the case of substantial modifications, after EPA considers "the public comments and the requirements of the CWA, the Regional Administrator, with the concurrence of EPA Headquarters, will determine whether to approve or deny the modification."[130] Moreover, proposed modifications do "not become effective as a matter of federal law until approved by EPA."[131] As NYSDEC's proposed program revision concerning CAFO permitting in New York constitutes a "substantial" modification, EPA must subject the changes to public notice and comment in the Federal Register, in accordance with the procedures set forth in 40 C.F.R. § 123.62. Only after this public process can EPA decide whether to deny or approve NYSDEC's proposed changes. As the foregoing clearly establishes, NYSDEC's proposed regulatory changes to the CAFO permitting scheme and the proposed permit modifications themselves *cannot* become effective until such changes undergo this review and approval by EPA.

VI. NYSDEC Cannot Adopt its Proposed Rule-Making and SPDES Permit Modifications Because Its Deregulation Proposal Does Not Comport with the Requirements of SEQRA

The State Environmental Quality Review Act ("SEQRA") requires NYSDEC to give "due consideration . . . to preventing environmental damage," when it seeks to take an action that

[129] 40 C.F.R. § 123.62(b)(2); *see id.* § 132.5(e) ("If a Great Lakes State or Tribe submits criteria, methodologies, policies, and procedures pursuant to this part to EPA for review that contain substantial modifications of the State or Tribal NPDES program, EPA shall issue public notice and provide a minimum of 30 days for public comment on such modifications."); *see also* Notice of Proposed Revisions to the Approved Program to Administer the National Pollutant Discharge Elimination System Permitting Program in New York Resulting in Part from Adoption of the Water Quality Guidance for the Great Lakes System, 63 Fed. Reg. 19,490, 19,491 (Apr. 20, 1988) ("Under 40 CFR 123.62(b)(2) and 132.5(e), whenever EPA determines that a proposed revision to a State NPDES program is substantial, EPA must provide notice and allow public comment on the proposed revisions."); NPDES 1986 GUIDANCE at 2-12.

[130] NPDES 1986 GUIDANCE at 2-12.

[131] *Id.*

could result in significant risks to the environment.[132] The lead agency charged with preparing the EIS must take a "hard look" at all the relevant areas of environmental concern;" and take "those concerns into account 'to the fullest extent possible.'"[133] Given the potential that the proposed deregulation of certain CAFOs will create significant environmental damage, as the DEIS partially documents,[134] NYSDEC cannot approve the proposal unless it can certify that deregulating certain medium CAFOs will have benefits that outweigh the harms and that it "minimize[s] or avoid[s] adverse environmental effects" to "the maximum extent practicable."[135] As shown below, in the Lithochimeia Report and the Weida Report, the facts here will preclude NYSDEC from making such a finding. The proposed deregulation therefore cannot be found to meet the substantive requirements of SEQRA.

In addition, as documented below, the DEIS does not comport with SEQRA because it: (a) does not adequately describe the "public need and benefits"[136] of the proposed deregulation, insofar as it fails to identify all of the costs, including costs shifted to others, which must be deducted from any economic benefits of the proposed rulemaking to provide an accurate statement of the true "public need and benefits"; (b) does not include a statement setting forth valid mitigation measures to minimize the environmental impact; rather, the proposed mitigation has no basis in fact and is insupportable; (c) omits certain impacts, and fails to give a realistic

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[132] N.Y. ENVTL. CONSERV. LAW § 8-0103(9).

[133] *Glen Head-Glenwood Landing Civic Council, Inc. v. Town of Oyster Bay*, 453 N.Y.S.2d 732, 737 (N.Y. App. Div. 1982) (citing to *Schenectady Chems., Inc. v. Flacke*, 446 N.Y.S.2d 418 (N.Y. App. Div. 1981) and *Town of Henrietta v. NYSDEC*, 430 N.Y.S.2d 440, 447 (N.Y. App. Div. 1980)); *see also Jackson v. N.Y. Urban Dev. Corp.*, 494 N.E.2d 429, 436, (N.Y. 1986) (agency must look at relevant areas of environmental concern and take a "hard look" at them); *H.O.M.E.S. v. N.Y. Urban Dev. Corp.*, 418 N.Y.S.2d 827, 832 (N.Y. App. Div. 1979) (same).

[134] See discussion in DEIS, at 25-52.

[135] N.Y. ENVTL. CONSERV. LAW § 8-0109(1).

[136] N.Y. COMP. CODES R. & REGS. tit. 6, § 617.9(b)(5)(i).

assessment of the likelihood and severity of any environmental impacts; and (d) fails to evaluate "a range of reasonable alternatives,"[137] but instead considers how to increase milk production exclusively by converting traditional dairies to medium CAFOs. At a minimum, NYSDEC cannot make the required SEQRA findings until it supplements the DEIS, pursuant to SEQRA, to remedy these defects.

A. The DEIS Overstates the Economic Benefits of the Proposed Deregulation and Fails To Offset Any Benefits by Taking Into Account Its Full Costs

Under SEQRA, any action that poses risks to human health and the environment must be justified by a "public need" and offer "benefits."[138] The "purpose, public need and benefits, including social and economic considerations" of the proposal must be described in the DEIS.[139] In this case, the "public need" and the asserted "benefit" are purely economic: the projection that deregulation will improve the state economy both by "encouraging dairy farmers and CAFO owner/operators to expand their herds[140] to increase milk production," and by supporting expansion of the yogurt industry.[141] According to the DEIS, the deregulation proposal is estimated to lead to approximately 25,000 more milking cows – a 4% increase in the number of dairy cows in the state,[142] which the DEIS asserts "could create" 500 to 625 new on-farm jobs, and 200 to 250 agricultural service jobs in the state "over the course of the next several years."[143]

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[137] *Id.* § 617.9(b)(5)(v).

[138] *Id.* § 617.9(b)(5)(i).

[139] *Id.*

[140] It is not clear how the deregulation proposal would encourage existing CAFO owner/operators to expand.

[141] DEIS at 24.

[142] *Id.* at 3.

[143] *Id.* at 24.

The DEIS also vaguely projects "job growth potential" in Greek yogurt processing plants.[144] As explained below, deregulation is unlikely to generate the level of job growth projected by the DEIS, in part because there are significant barriers to increased milk production, besides environmental regulation, that are likely to inhibit dairy expansion, even if the state exempts the targeted CAFOs from the SPDES program. In addition, the DEIS fails to identify and take into account many of the significant costs and human health impacts that will likely follow from deregulation in order to accurately describe the actual benefits of the proposal.

1. The DEIS Overstates the Likely Level of Job Creation from Deregulation

The assertions in the DEIS about job growth – the primary benefit of deregulation touted by the DEIS – are severely flawed. Notably, the primary source on which the DEIS relies for its assertion that for every 40 to 50 cows added to a dairy farm, one on-farm job is created – *Agriculture-Based Economic Development in NYS: Trends and Prospects*[145] – actually says nothing about levels of employment generated per cow.

The source document that the DEIS cites for its herd growth estimates – *Dairy – Farm Management* – has some information about jobs created by dairies. The information in this document, however, is based on surveys of a range of dairy operations in the state.[146] The document finds that on average, dairies in New York have employed approximately 42 to 44 workers per cow.[147] Because 88 percent of dairies in New York contain fewer than 200 mature

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[144] *Id.* at 6.

[145] TODD M. SCHMIT & NELSON L. BILLS, AGRICULTURE-BASED ECONOMIC DEVELOPMENT IN NYS: TRENDS AND PROSPECTS (Sept. 2012), *available at* http://dyson.cornell.edu/outreach/extensionpdf/2012/Cornell-Dyson-eb1211.pdf, cited in DEIS at 5-7, and notes 10 and 12.

[146] Wayne A. Knoblauch, George C. Conneman & Linda D. Putnam, *Dairy – Farm Management*, *in* NEW YORK ECONOMIC HANDBOOK 2012 OUTLOOK 7-1, 7-6 to 7-7 (2011).

[147] *Id.*

cows, it is not clear how this data applies to the 12 percent of larger dairies in the state with more than 199 cows. Indeed, the *Dairy Farm Management* source shows that employment per cow drops as dairy size increases.[148] The DEIS jobs analysis is flawed to the extent that it relies on jobs numbers from small farms to calculate the jobs effect of creating larger dairies that employ fewer workers per cow. The true employment effect of the deregulation proposal will be significantly smaller than the DEIS projects.[149] NYSDEC must, at a minimum, clarify the basis for its jobs projection given that the source it cites does not support or even address the DEIS's conclusion, and we are aware of no data that supports a one job per 40 to 50 cow rule of thumb for larger dairies in particular. Absent such a clarification, the DEIS has not adequately described how the proposed rulemaking will serve a "public need" or provide any "benefits," as required by SEQRA.[150]

2. The DEIS Fails to Analyze Several Significant Barriers to Expansion That Will Likely Limit How Many Traditional Dairies Become CAFOs, Even With Deregulation

The DEIS errs in assuming that deregulation by itself will spur 285 traditional dairies to become medium CAFOs over the next decade.[151] The DEIS analysis rests on the unsupported assumption that the primary impediment to increased milk production in New York is the environmental regulation of CAFOs. The DEIS fails to give anything but passing mention to the other barriers to dairy expansion in the state.[152] Given these other significant barriers, even if the deregulation proposal is finalized, the DEIS presents no factual basis for its central premise– that milk production will increase if certain CAFOs are deregulated. Such a premise is unjustified.

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[148] Weida Report at 5.

[149] *Id.*

[150] N.Y. COMP. CODES R. & REGS. tit. 6, § 617.9(b)(5)(i).

[151] *See* DEIS at 2.

[152] *See id.* at 1.

A recent article in the Wall Street Journal describes many of the true barriers to expansion encountered by dairies in New York.[153] These include high fixed costs of operating a dairy, such as the high price of land and property taxes in New York and the rising cost of feed, as well as of the cows.[154] An additional barrier is that dairy farmers have little or no control over their profits because milk prices are set by government formulas and market forces over which they have little control.[155] Because the price of milk is so volatile, farmers are hesitant to take on additional fixed costs, including the costs associated with expansion.[156]

Moreover, the volatility of milk prices is exacerbated when dairy farms join large, national dairy cooperatives, which set their own prices for milk and are not obligated to pay the federal minimum price.[157] Because Chobani only contracts with large, national dairy cooperatives,[158] for New York dairy farmers to benefit from any expansion of Chobani's operations, they would have to join one of these co-ops, which could further undermine the control they have over the price they receive for their milk.[159]

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[153] *See* 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 STREET J. (June 26, 2012) ("Wall Street Journal yogurt article"); *see also* Weida Report at 3-4.

[154] *Id.*

[155] *Id.* In addition, one of the DEIS source documents, the Farm Credit East and Cornell Pro-Dairy Report, found a "major challenge to projecting any kind of financial results for a dairy farm is milk price and input volatility." FARM CREDIT EAST & CORNELL PRO-DAIRY, FINANCIAL IMPLICATIONS OF A DAIRY FARM EXPANSION – 190 COWS TO 290 COWS (2012).

[156] *See* Wall Street Journal yogurt article, *supra* note 153. Notably, this article does not mention environmental regulation as a reason that dairy farmers prefer to remain small.

[157] Marc Heller, *Co-Opted: Are Dairy Co-ops Hurting Small Farms?* WATERTOWN DAILY TIMES (Jan. 1, 2006), *available at* http://www.highbeam.com/doc/1G1-140463841.html.

[158] Steve Kadel, *New York Dairyman: Many Producers Shut Out of Chobani Market*, TWIN FALLS TIMES-NEWS (June 10, 2012), *available at* http://magicvalley.com/news/local/new-york-dairyman-many-producers-shut-out-of-chobani-market/article_522554fa-b2c1-11e1-a6c2-0019bb2963f4.html.

[159] Heller, *supra* note 157.

The deregulation proposal does nothing to address these barriers, or others identified in the Weida Report.[160] Rather, the deregulation proposal would create the precise risks of taking on additional fixed costs despite price volatility that the New York dairy farmers interviewed for the Wall Street Journal yogurt article said they were trying to avoid. The DEIS must be supplemented to provide a realistic assessment of whether, and to what extent, the deregulation proposal will actually further the goals of increasing milk production, given the barriers to expansion that will remain, despite any deregulation. Absent such an analysis, the DEIS has not satisfied the SEQRA requirement that it describe the "public need" and "benefits" of the proposed deregulation.[161]

3. The DEIS Errs in Assuming that Medium CAFOs Promote Economic Growth More than Traditional Dairies

The DEIS assumes without support that converting traditional dairies into medium CAFOs will strengthen the upstate economy in general. While the idea that bigger farms lead to a stronger economy might seem intuitively true, longstanding research shows that the presence of large farms actually *reduces* the economic growth and health of rural regions.[162] Large dairies are designed to use as little labor as possible and, as noted above, fewer jobs are created by larger dairies than would have been provided by the traditional dairies they replace. In addition, studies

[160] Weida Report at 3. Research in this area has shown that the following factors also inhibit both expansion and entry into the dairy market: reduced competition due to mergers between dairy cooperatives; vertical integration in the dairy industry; transportation costs; and monopsony issues with single milk buyers. *Id.*

[161] N.Y. COMP. CODES R. & REGS. tit. 6, § 617.9(b)(5)(i).

[162] Weida Report at 5-6.

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.[163]

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.[164] In 1982, Yates County had very few dairy farms (124) and St. Lawrence County had a large number (1,115). By 2007, each of these counties had the same number of dairy farms – 262.[165] Whereas in 1982, the average size farm in both counties was the same (42 and 43 cows, respectively), by 2007, the farms in St. Lawrence county had grown dramatically to an average of 120 cows, with 37 percent of the farms having more than 500 dairy cows.[166] In Yates County, however, the average size of the dairies remained relatively constant at 46 cows, with no farm having more than 500 cows.[167] An analysis of the economic trends in Yates and St. Lawrence Counties bears out the national research: in 1982, both counties had approximately the same real median income, but by 2007, real median income in Yates County, with the smaller farms, increased 3.7 percent, whereas in St. Lawrence County, with the advent of larger farms and CAFOs, real median household income declined .5 percent.[168] Over the 25-year period studied, real total personal income rose 56 percent in Yates County, but only 43 percent in

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[163] *Id*. Buildings on large farms are normally constructed from materials brought into the region from the outside, often by a crew brought into the region from the outside. Feed is imported from the cheapest source and most major purchases come from the outside. The money made by the large dairies (and the yogurt industry) goes out of the region. *Id.*

[164] FOOD & WATER WATCH, THE ECONOMIC COST OF FOOD MONOPOLIES (2012), *available at* http://documents.foodandwaterwatch.org/doc/CostofFoodMonopolies.pdf.

[165] *Id.* at 25.

[166] *Id.*

[167] *Id.*

[168] *Id.*

St. Lawrence County.[169] In addition, the report found that "the number of small businesses in Yates County increased five times more than in St. Lawrence County, which is consistent with the literature that found higher levels of commercial activity in areas with more, smaller farms."[170]

In sum, the assumption in the DEIS that increasing the size of dairies will benefit the economy in general is without basis. Based on the economic literature, it is more likely that increasing the size of dairies will depress economic trends in the affected area. The DEIS should be revised to take this literature into account. As it stands, the DEIS does not accurately portray the "benefits" of the proposed rulemaking, in violation of SEQRA.[171]

4. The DEIS Does Not Satisfy SEQRA Because It Does Not Offset Projected Economic Benefits with the Significant Costs of Expanding Dairies Without Environmental Regulation

Even if the rosy picture of job growth and economic benefits due to increased milk production portrayed in the DEIS were correct, the DEIS not satisfy SEQRA's requirement that the DEIS describe the "benefits" of the proposed rulemaking because it fails to take into account the costs of expanding and deregulating dairies, which must be offset against the projected economic benefits to gauge the true "public need" and "benefits" of the proposed rulemaking.[172]

The DEIS recognizes that deregulation has the potential to pose risks to the environment and human health:

- "Under the proposed action, newly expanded and unpermitted CAFOs … would no longer be required to hire a [professional engineer] to design and construct new manure storage structures. These manure storage structures, which may not be

[169] *Id.*

[170] *Id.* at 25.

[171] N.Y. COMP. CODES R. & REGS. tit. 6, § 617.9(b)(5)(i).

[172] *Id.*

properly designed, are at increased risk of structural failure, and *could pose an increased risk to the environment*."[173]

- "Because [deregulated CAFOs] would no longer be required by permit to spread manure in accordance with a CNMP, there is the *potential for increased adverse environmental impacts from runoff caused by the unmanaged manure*."[174]

- "Because [deregulated CAFOs] would no longer be required by permit to adhere to NRCS standards, there is an *increased potential for adverse environmental impacts from the overflow or discharge of silage leachate*."[175]

- "[B]ecause [deregulated CAFOs] would no longer be required by permit to develop and implement a CNMP to address manure management, there is *the potential for increased adverse environmental impacts from runoff caused by unmanaged manure*."[176]

- Because of the risk of well-water contamination from deregulated CAFOs, especially in karst areas, NYDEC and the New York State Department of Health ("NYSDOH") "have prepared guidance to be implemented by the local health units …. when [notably, the DEIS does not say "if"] a well is impacted, to reduce *risk to public health*."[177]

- The "increase in dairy herd sizes from [deregulation] without manure management practices may increase the likelihood that runoff containing nutrients and sediment … *could adversely impact fish and other aquatic life*."[178]

Yet the DEIS does not attempt to compare the economic benefits that underlie the proposal with the costs of dealing with the environmental damage that will likely result from deregulating certain medium CAFOs. These costs include, at a minimum, the cost of remedying water and air pollution, and the degradation of the value of polluted properties. Nor does the DEIS estimate any costs for handling what it identifies as the "small but potential risk for public

[173] DEIS at 28-29 (emphasis added).

[174] *Id.* at 29 (emphasis added).

[175] *Id.* at 30 (emphasis added).

[176] *Id.* at 33 (emphasis added); *see also id.* at 30-34 (discussing discharges of phosphorous, nitrogen and pathogens).

[177] *Id.* at 37-38 (emphasis added).

[178] *Id.* at 45 (emphasis added).

health impacts" due to ingestion of disease-causing, waterborne pathogens, especially drug-resistant pathogens – which has the potential to be a public health catastrophe.[179] In addition to failing to consider the environmental and public health costs of the deregulation proposal, the DEIS omits any consideration of costs to third parties who will bear burdens caused by this proposed deregulation, including the costs to non-CAFO dischargers in watersheds with TMDLs, the costs to those who recreate on affected rivers and streams, and the costs to communities whose roads and infrastructure will be more heavily used and degraded by medium CAFOs than by traditional dairies. Because the exclusive "benefits" of the proposed deregulation are economic, SEQRA requires NYSDEC to assess the costs of remediating and/or otherwise addressing these environmental harms and human health impacts, and to offset these costs against the claimed economic benefits of the deregulation proposal.[180]

i. Failure to Offset Costs of Environmental Damage

The DEIS estimates *no* costs for dealing with the environmental damage that will likely result from the deregulation of medium CAFOs with 200-299 dairy cows. As the DEIS notes, "[f]ailure by dairy farms to implement proper management practices could result in potentially significant environmental impacts,"[181] which would "primarily [affect] water resources, although air may also be impacted."[182] Remediating and/or otherwise handling these impacts would have significant costs. At a minimum, NYSDEC must analyze the likely costs of addressing the environmental impacts of the deregulation proposal, taking into account a realistic assessment of the degree to which deregulated medium CAFOs will actually adopt the same level of

[179] *Id.* at 49.

[180] N.Y. COMP. CODES R. & REGS. tit. 6, § 617.9(b)(5)(i).

[181] DEIS at 27.

[182] *Id.* at 25. *See also* text accompanying notes 163 through 178, *supra*.

responsible waste management practices that would be required if they were covered by the SPDES program.[183] To the extent that deregulated CAFOs will not handle waste as appropriately as they would if they were regulated, the DEIS must take into account the costs of the inevitable pollution that will result.[184] At the barest minimum, even if it were somehow credible that *every* CAFO with 200-299 dairy cows would voluntarily adopt the same level of protection for the environment that is now required by law, a proposition that is insupportable (see Section VI.B, *infra*), the DEIS must include, as a cost of this proposal, the additional cost of mitigation subsidies to encourage dairy farms to address the various sources of pollution from their cows.[185]

ii. Failure to Offset Costs of Health Impacts and Monitoring Costs Related to the Potential for Well Water Contamination

The DEIS is also deficient because it does not take into account the potential costs of residential well water contamination, including the resulting potential for drug-resistant human illness. This omission is particularly notable because the DEIS admits that deregulating CAFOs with 200-299 cows could result in contamination to residential wells from uncontrolled runoff of manure, and acknowledges this risk is especially real in areas with karst terrain where there is a history of residential well contamination from CAFOs.[186] Indeed, NYSDEC and NYSDOH are sufficiently concerned about well water contamination to "have prepared guidance to be implemented by the local health units …*when* a well is impacted, to reduce risk to public

[183] *See* discussion of likelihood that mitigation measures will be effective, Section VI.B, i*nfra*.

[184] Lithochimeia Report at 8.

[185] *See* Weida Report at 10.

[186] DEIS at 50-51 (describing two "dramatic" recent incidents of private well contamination from CAFO manure in karst areas).

health."[187] This would not be done if the risk to public health were non-existent or de minimis. The potential cost of responding to such a public health emergency must offset any supposed economic benefits of the deregulation proposal.

Moreover, given the recent history of residential well contamination in karst areas due to CAFOs, and the potential for serious health impacts, if certain medium CAFOs are deregulated, NYSDOH, which is responsible for ensuring safe drinking water in the state, will have to increase its monitoring of residential wells near unregulated CAFOs.[188] These increased costs to NYSDOH must be taken into account in assessing the "benefits" of the proposed deregulation.

iii. Failure to Offset Impacts on Other Dischargers, and Taxpayers, in Watersheds Covered by TMDLs

The DEIS is also insufficient because it does not factor in the costs of the deregulation proposal in TMDL watersheds due to the fact that increases in discharges from deregulated medium CAFOs to impaired waters "would have to be accounted for by reductions in loads from other sources."[189] The DEIS acknowledges that this reduction in load "is likely to be significant in some areas of the state," that it "could result in expensive upgrades to wastewater treatment plants that discharge within these watersheds," and that these costs are likely to be "passed on to taxpayers as increases in sewer bills."[190] These are plainly very significant costs that must be quantified and then offset against any potential economic benefits of the proposed deregulation.

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[187] *Id.* at 37-38 (emphasis added).

[188] In this part of the DEIS, DEC drops its assertion that all deregulated CAFOs will handle their waste properly, and acknowledges that, at best, "*some* of these [deregulated] farms" will voluntarily implement BMPs. DEIS at 51 (emphasis added). This is certainly a matter of concern for the neighbors of deregulated CAFOs in karst areas – and for NYSDOH.

[189] DEIS at 43.

[190] *Id.*

iv. Failure to Offset Potential Impacts on Aquatic Life and Related Costs of Decline in Tourism and Recreation Opportunities

The DEIS acknowledges that increased nutrient loading in streams as a result of improper management of waste from deregulated medium dairy CAFOs "could adversely impact fish and other aquatic life," that "[t]rout streams are particularly sensitive to these impacts," and that "even a small input" can have an "important impact," including contributing to fish kills.[191] It also acknowledges that its deregulation proposal could impact recreational waters.[192] Nonetheless, the DEIS fails to account for the costs of the loss of aquatic life, the costs of lost tourism revenues in communities that are popular fishing destinations, or the loss of other recreational opportunities because water is contaminated by pollution from CAFOs, and offset those costs against the alleged economic benefits of the proposal, in order to give an accurate "description of the proposed action, its purpose, public need and benefits," as required by SEQRA.[193]

v. Failure to Offset Road and Infrastructure Costs

Finally, the DEIS fails to consider the added costs of road and infrastructure maintenance and repair in any region that sees significantly increased milk production.[194] As part of its analysis of the economic benefits of the deregulation proposal, the DEIS must take into account the fact that for local and county governments to retain the same level of road and infrastructure maintenance, despite the increase in commercial traffic, property taxes will likely increase,

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[191] *Id.* at 45.

[192] *Id.* at 51.

[193] N.Y. COMP. CODES R. & REGS. tit. 6, § 617.9(b)(5)(i).

[194] *See* Weida Report at 8-9 (reporting that an Iowa community estimated that its gravel costs alone increased by about 40% (about $20,000 per year) due to truck traffic due to a large CAFO, and that Colorado counties that have experienced increases in livestock operations have also reported increases in the costs of roads).

which may depress potential in-migration of other residents and industries to the region.[195]

In sum, the DEIS overstates the economic benefits of the proposed deregulation while ignoring many of the significant costs of the proposal. Because the alleged public need for deregulating medium CAFOs with 200-299 dairy cows is purely economic, the likely costs of deregulation must be included in the DEIS. Absent this information, the description of the "benefits" of the proposed action, as required,[196] is not adequate or accurate.

B. NYSDEC's Mitigation Analysis Is Fundamentally Flawed Because Its Assumption That CAFOs Will Voluntarily Take All Steps Necessary for Responsible Waste Management Is Unfounded

SEQRA requires a DEIS to include "a detailed statement setting forth . . . mitigation measures proposed to minimize the environmental impact."[197] Here, DEC says that mitigation will be achieved because it "*expects* 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 avoiding enforcement actions under statutes and regulations that protect public health and the environment.[198] Even under the relatively deferential standards applied to an agency's mitigation analysis, the DEIS does not withstand scrutiny.

The DEIS is based on two fundamentally inconsistent premises: first, that deregulation is necessary because the cost of the responsible waste handling measures required by the SPDES permit prevents traditional dairies from becoming medium CAFOs; and second, that deregulated dairy CAFOs will voluntarily adopt responsible waste handling measures even if not required to

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[195] *Id.*at 9.

[196] N.Y. COMP. CODES R. & REGS. tit. 6, § 617.9(b)(5)(i).

[197] N.Y. ENVTL. CONSERV. LAW § 8-0109(2)(f).

[198] DEIS at 52-53 (emphasis added).

do so. But these statements cannot both be right: if CAFOs were willing to incur the costs necessary for responsible waste-handling, the cost of regulation would not be an impediment to traditional dairies growing to become medium CAFOs. Under the key premise of this proposed rulemaking, deregulation only promotes increased milk production if it actually results in cost-saving to deregulated CAFOs. But, as the Lithochimeia Report confirms: the cost of proper waste handling is the same whether it is done under mandate or voluntarily.[199] The DEIS mitigation analysis rests on entirely circular reasoning and does not meet the requirements of SEQRA: There is no basis for assuming that deregulated CAFOs will voluntarily take on the costs that NYSDEC is trying to free them from though this proposed rulemaking.

1. The Mitigation Measures Rest on the Completely Unfounded and Unsubstantiated Assumption that CAFOs Will Voluntarily Undertake Costly Waste Management Practices

The fact that the proposed mitigation measures are not adequate, and that even the smallest medium dairy CAFOs cannot be left to handle its wastes without regulation and oversight, should be clear to NYSDEC. Indeed, it took the same position just last year. In the Phase II WIP for the Chesapeake Bay, NYSDEC explained to EPA the importance of its decision to regulate dairy CAFOs with 200 or more cows:

> 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 non-regulatory 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.[200]

[199] Lithochimeia Report at 8.

[200] NYSDEC, DRAFT PHASE II WATERSHED IMPLEMENTATION PLAN FOR NEW YORK SUSQUEHANNA AND CHEMUNG RIVER BASINS AND CHESAPEAKE BAY TOTAL MAXIMUM DAILY LOAD 30-31 (Mar.

NYSDEC was entirely right in the Chesapeake Bay WIP, and wrong here: a voluntary, non-regulatory approach to managing even the smallest medium CAFO is "neither credible nor effective. Professional management of waste at these facilities is critical to protection of water quality."

NYSDEC's representation to EPA is well supported by the Lithochimeia Report, which describes in detail why it is necessary to mandate professional management of waste at medium dairy CAFOs. Among other things, the Lithochimeia Report notes that:

> "New York State is in the humid part of the country, with considerably more precipitation than evaporation, and frequent runoff events…. Operation of these facilities [waste storage facilities] to prevent discharge and handle emergencies requires planning and diligent operation."[201]

> "[L]ack of the requirement to hire a (professional engineer) to properly design and build new or expand existing storage for a period between land applications, may potentially impose environmental risk and jeopardize worker and animal safety due to structure failure and waste spills."[202]

While professional management of dairy CAFO waste is necessary, there is no basis for the speculation in the DEIS that medium dairy CAFOs will take on this significant expense voluntarily. Indeed, to the contrary, "there is a large body of evidence form actual experience in areas all across the U.S. that shows voluntary, altruistic acts are highly unlikely in this industry."[203] The fact that voluntary compliance is unrealistic is borne out by the current rate of voluntary participation in the NY Agricultural Environmental Management ("AEM") program.

23,2012), *available at* http://www.epa.gov/reg3wapd/pdf/pdf_chesbay/PhaseIIWIPS/NYWIPPhase2Final3_23_12.pdf (emphasis added).

[201] Lithochimeia Report at 11.

[202] *Id.* at 31.

[203] Weida Report at 6-7.

This program has a 63% participation rate for dairy farms with 100-199 cows. Only 53% of those farms participating have reached Tier 4 and implemented any best management practices.[204]

The DEIS devotes many pages to documenting state and federal programs "aimed at supporting best management practices for CAFOs,"[205] suggesting that subsidies will cover the cost of waste handling at deregulated CAFOs. However, these programs are underfunded and inadequate. As the Weida Report states: "mitigation money is not costless; it comes from increasingly scarce tax revenues."[206] 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 showed that in the 2012-2013 fiscal year, only a little over half of requests for funding were granted.[207] The DEIS lists numerous sources of federal funding for conservation practices. However, these programs are also severely underfunded and in some cases not applicable to the 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

[204] Lithochimeia Report at 27.

[205] DEIS at 69; *see generally* DEIS at 69-82.

[206] Weida Report at 9.

[207] N.Y. SOIL & WATER CONSERVATION COMMITTEE, STATE COMMITTEE MINUTES (Feb. 14, 2012), *available at* http://www.nys-soilandwater.org/about_us/minutes/SWMin2012-02.pdf.

improvements, only funded between 15 and 67 percent of applications in each year between 2000 and 2009.[208]

The Lithochimeia Report captures the quixotic nature of the DEIS mitigation analysis, stating:

> Good intentions are generally not sufficient to assure water quality benefits, when one or two bad actors can create almost as many problems as the entire cohort. To date there have been very few successful nonpoint source programs that are dependent entirely on financial incentives and the conservation ethic of producers. Pollution control is rarely achieved without commitment and expenditure of funds. Although intentions are often good, the level of commitment needed is rarely achieved and maintained without rules and enforcement.[209]

The conclusion that dairy CAFOs will not voluntarily take on expensive waste handling measures is confirmed by a detailed survey of nearly 500 dairy farmers in New York undertaken by researchers at Cornell University and University of Nebraska-Lincoln.[210] The authors of the study asked dairy CAFO operators in New York if they would voluntarily undertake the costs of responsible waste handing, and if so, how much cost, merely because it is the right thing to do. The authors of the study summarized their conclusions as follows, calling for more regulation because voluntary programs were not working:

> [T]he critical question to ask for farms outside the CWA regulatory scope is, can voluntary and educational programs be expected to generate adequate participation to meet CNMP performance standards? The answer to this question is strongly in the affirmative if adequate cost sharing is provided: over 78% of respondents indicated that they would participate in such a program if it was 100% cost shared. Yet, once even nominal costs are imposed, participation levels drop dramatically in a manner that is consistent with the economic notion of free-riding that has prevailed since Samuelson's

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[208] MEGAN STUBBS, CONG. RESEARCH SERV., ENVIRONMENTAL QUALITY INCENTIVES PROGRAM (EQIP): STATUS AND ISSUES 8 (Aug. 3, 2012), *available at* http://www.nationalaglawcenter.org/assets/crs/R40197.pdf.

[209] Lithochimeia Report at 29.

[210] 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), *available at* http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1011&context=biosysengfacpub.

> seminal article on public goods. As such, the results provided thus far suggest that attaining the CNMP performance standard will be difficult at best.
> ….
> Given our data and estimated participation functions, we believe that our results raise a considerable challenge to present efforts that rely on educational programs and voluntary participation in order to meet stated performance standards on the majority of AFOs not directly subject to CWA regulations. 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. Either substantial additional resources or an extension of regulations will be needed to accomplish CNMP performance standards by 2009.[211]

Although the Cornell/Nebraska paper was written in 2001, there is no reason to think that CAFO owners are significantly more likely to incur optional costs than they were a decade ago. Indeed, it is notable that in this study, over 20% of responding farms indicated that they would not voluntarily adopt waste management practices *even if they were wholly paid for*.

2. The Threat of Enforcement Will Not Compel Deregulated CAFOs to Voluntarily Adopt Expensive Waste-Handling Measures

There is also no realistic basis for the speculation in the DEIS that the threat of enforcement actions and potential liability is sufficiently strong to induce CAFOs to recalibrate their economic self-interest, and incur significant expenses that are not required. We submitted a public records request under New York's Freedom of Information Law ("FOIL") for records of all inspections conducted by NYSDEC of, and all notices of violation issued to, dairy farms and CAFOs with fewer than 300 dairy cows since January 1, 2008.[212] According to documents we received in response, NYSDEC conducted only 53 inspections in that five-year time period, and none of these inspections covered farms that did not operate under SPDES permits.[213] Moreover, more than half of these inspection reports revealed "marginal," or "unsatisfactory" waste

[211] *Id.* at 488, 489.

[212] Letter from Abraham Allison, Earthjustice, to Records Access Officer, DEC (Dec. 19, 2012), Appendix C hereto.

[213] *See* Inspection Reports provided in response to FOIL request, Appendix E through Appendix H hereto.

handling practices in at least some respect, yet in most cases these did not result in notices of violation.[214] Indeed, during this five-year time period, according to the FOIL response, only nine notices of violation were issued to dairy facilities with fewer than 300 cows, and none of those were issued to farms that were not covered by SPDES permits.[215] Given the limited number of inspections that NYSDEC conducts of permitted CAFOs, the fact that CAFOs are generally given an opportunity to correct problems before they are found in violation, and the fact that over the last five years NYSDEC has not inspected or issued a notice of violation to an unpermitted dairy farm, it seems highly doubtful that unpermitted CAFOs would feel threatened by the risk that a NYSDEC inspection of their facility would result in a notice of violation.[216]

The DEIS also suggests that deregulated CAFOs may voluntarily opt to undertake the significant expense of designing and implementing responsible waste handling systems in order to avoid citizen suits for unpermitted discharges . However, Westlaw searches in databases for New York cases, New York civil trial court orders, and New York federal court orders involving wastes or waste-related nuisances from CAFOs over the last ten years reveals only a single case. That case involved one of the largest dairies in the state, and all of the claims against it were thrown out by the United States Court of Appeals for the Second Circuit.[217] Based on this informal survey, it is doubtful that deregulated CAFOs will be motivated to incur hundreds of thousands of dollars in waste management systems to avoid the risk of private litigation.

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[214] *See id.*

[215] *See* Notices of Violation provided in response to FOIL request, Appendix D hereto.

[216] EPA's website indicates that between 2008 and 2010, it inspected and initiated formal enforcement actions against two medium dairies near Bath, New York for permit violations. Penalties were assessed against only one of those dairies. National Enforcement Initiatives for Fiscal Years 2008-2010, Clean Water Act: Concentrated Animal Feeding Operations, EPA, http://www.epa.gov/oecaerth/data/planning/priorities/cwacafo.html. That dairy was covered by a SPDES permit.

[217] *See Coon v. Willet Dairy, LP*, 536 F.3d 171 (2d Cir. 2008).

For all of the preceding reasons, the DEIS does not present a remotely plausible case that deregulated CAFOs will take on the significant expense of responsible waste handling if they are not required to do so. *Indeed, the very premise of the proposal undermines this claimed mitigation measure: if the costs of responsible waste handling are so high that CAFOs with fewer than 300 cows must be exempt from the requirement, why would those CAFOs voluntarily incur that expense?* The minimal funding available through tax-payer-funded programs for "cost-sharing" these expenses is nowhere near sufficient to overcome the pure economics that small farms and medium CAFOs are unlikely to incur significant expenses that do not further their own bottom line. Accordingly, the mitigation measures suggested in the DEIS are unlikely to have a meaningful impact in reducing environmental degradation and human health risks caused by the deregulation of CAFOs with 200-299 dairy cows.

3. Anaerobic Digestion Provides Only Partial Mitigation and It Carries Its Own Environmental Risks Unless Ammonia Scrubbing Is Mandated

The DEIS also claims that increased use of anaerobic digesters as a result of the proposed changes to the Part 360 regulations, which are a part of NYSDEC's proposed rule-making, would mitigate potential adverse greenhouse gas impacts from the deregulation proposal. There are several flaws in this reasoning. First, it is not realistic that anaerobic digesters are economically feasible on CAFOs with 200-299 dairy cows. As the Lithochemia Report documents, capital costs for farms can be between "$540,000 and $850,000 for complete mix and plug flow digesters, respectively. USEPA recommends biogas recovery systems only for operations with herd sizes of 500 or more dairy cows."[218] Second, digesters produce significant amounts of ammonia along with methane. The methane burns at such a low temperature that the

[218] Lithochimeia Report at 32.

ammonia is allowed to escape directly to the atmosphere, making the digester a point source for greenhouse gas emissions unless the gas is scrubbed for ammonia.[219] Since the cost and primitive nature of most dairy digesters makes scrubbing highly unlikely, the DEIS must discuss the mechanism NYSDEC believes would insure scrubbing is used on every digester, what methods they would use to insure the scrubbers are properly maintained, and the cost of installing, using and maintaining the scrubbers–before it can claim that use of digesters would mitigate the greenhouse gas impacts of the proposed deregulation.[220]

Finally, it is also important to note that anaerobic digesters do not eliminate or even address issues related to disposal of the nutrients in the waste that is subject to digesting. All phosphorous and most nitrogen is retained through the anaerobic digestion process, and the effluent must still be disposed of responsibly.[221]

In sum, anaerobic digesters are unlikely to provide much, if any, mitigation of the environmental harms caused by the proposed deregulation of certain medium dairy CAFOs.

C. The DEIS Does Not Meet the Requirements of SEQRA Because It Fails To State and Evaluate All of the Potential Impacts, Their Likelihood and Severity

The DEIS discussion of environmental impacts does not meet the standards of SEQRA, which requires the DEIS to 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

[219] Weida Report at 4.

[220] *Id.* at 4-5. Digesters are attractive to dairies because they are heavily subsidized by the federal government even though dairy waste contains too much liquid to be suitable for digestion and requires expensive manure pressing just to be prepared for digester use. While digester subsidies initially produce a favorable economic impact on the dairies, they also create a considerable cost for the taxpayer when used as a mitigating technology. *Id* at 4. Thus, an accurate accounting of the costs and benefits of the proposed DEIS course of action should include as a cost all digester subsidies awarded to farmers who follow the alternative suggested by the DEIS.

[221] Lithochimeia Report at 33.

reasonable likelihood of their occurrence," including the "cumulative impacts and other associated environmental impacts."[222] It also utterly fails to state and evaluate the significant adverse environmental impacts of the proposed permit modifications, as described below and in a separate set of joint comments submitted by our organizations.

The DEIS minimizes the likelihood that the deregulation proposal will have serious environmental impacts or human health risks based on the insupportable assumption that deregulated CAFOs will voluntarily adopt the same level of responsible waste management practices as would be required by the SPDES permit.[223] But, as discussed above, this assumption is unfounded.[224] The evaluation of environmental impacts in the DEIS, which is premised on the fallacy of full mitigation, does not accurately "reflect[] the reasonable likelihood of the[] occurrence" of those impacts or "the severity of the impacts," as are required by SEQRA.[225] In addition, the DEIS is inadequate because it does not state or evaluate the impacts of the changes to the Part 360 Regulations, it fails to consider the "cumulative impacts" of the proposed deregulation, and it fails to adequately state and evaluate the socio-economic impacts of the proposed rulemaking.[226]

1. The DEIS Does Not Accurately Evaluate or State the Reasonable Likelihood or Severity of the Environmental Impacts

To comply with SEQRA, NYSDEC must supplement the DEIS to include a realistic assessment of the likelihood of environmental impacts and human health risks, and the severity of those impacts. Our organizations retained three agricultural experts working for

[222] N.Y. COMP. CODES R. & REGS. tit. 6, § 617.9(b)(5)(iii); *id.* § 617.9(b) (5)(iii)[a].

[223] *See* discussion, Section VI.B, *supra*.

[224] *See also* Lithochimeia Report at 1 ("the assumption that these effects will be mitigated by voluntary state and federal programs is unfounded").

[225] N.Y. COMP. CODES R. & REGS. tit. 6, § 617.9(b)(5)(iii).

[226] *Id.* § 617.9(b)(5)(iii)[a].

Lithochimeia, Inc. to assess the likely impacts of the proposed changes to Part 750 and Part 360. The Lithochimeia Report documents several serious omissions in the environmental impacts section of the DEIS. "First, potential impacts of fertilizers and manure applied to agricultural land are not limited to immediate erosion, runoff and leaching issues."[227] Excess nutrients in soils increase runoff "even without active erosion or catastrophic loss in storm events."[228] "Second, air-related issues associated with CAFOs are not limited to odor. Ammonia (NH3) and Hydrogen Sulfide (H^2S) are common airborne contaminants released from animal facilities. Ammonia volatized from livestock operations can be deposited in nearby waterbodies and contribute to nutrient enrichment."[229]

The Lithochimeia Report also concludes that the DEIS understates the likelihood of environmental damage resulting from the proposed rulemaking, noting that discharges from CAFOs "often contain the most damaging pollutants, with high BOD and biological contaminants as well as high concentrations of nutrients." It further explains that without proper manure management systems, the likelihood of a severe discharge is much higher than estimated in the DEIS, because "[o]peration of these facilities to prevent discharge and handle emergencies requires planning and diligent operation. Absent permit conditions that require all of this, there is little factual basis for DEC's implicit assumption that medium CAFOs with 200-299 cows will not be the source of discharges."[230]

[227] Lithochimeia Report at 11.

[228] *Id.* This is discussed in more detail in Section VI.C.3, *infra*.

[229] *Id.* at 12.

[230] *Id.* at 11.

In addition, while the DEIS gives short shrift to the potential for water quality degradation and human health risks arising from the proposed rulemaking, the Lithochimeia Report concludes that:

- "[R]educ[tions in] the levels of control and accountability for waste management and stormwater controls . . . is likely to degrade water quality of New York State waterbodies."[231]

- "Human health risks are substantial if small dairies are allowed to operate without regulatory oversight."[232]

The failure of the DEIS to fully account for the environmental impacts of the proposed rulemaking and their reasonable likelihood and severity is a fatal flaw that must be corrected.

2. The DEIS Does Not Adequately State or Evaluate the Impacts of Proposed Changes to Part 360 Regulations

The DEIS states that "subdivisions 360-4.2(a) and 360-4.2(b) are being revised to exempt land application and storage on CAFOs that have a permit pursuant to Part 750."[233] In doing so, the Department seeks to "address the unnecessary overlap between the regulations governing land application in Part 360 and the Department's CAFO permit program…."[234] However, the proposed regulatory change would also add subdivision 360-4.2(a)(4), which would "exempt land application facilities for undigested food and fecal material emanating from New York State owned or licensed fish hatcheries from the requirements of Subpart 360-4 where the waste is applied at or below agronomic rates."[235] Additionally, subdivision 350-4.2(b)(1)(vii) "is revised to expand the eligibility for registration (rather than requiring a permit) by increasing the amount

[231] *Id.* at 1.

[232] *Id.* at 1-2.

[233] DEIS at 23

[234] *Id.* at 22-23

[235] NYSDEC, NYS REGISTER, PROPOSED RULEMAKING HEARING(S) SCHEDULED: AMEND PROVISIONS OF 6 NYCRR SUBPART 750-1, 6 NYCRR SUBPART 360-4 AND 6 NYCRR SUBPART 360-5 5 (Dec. 5, 2012), *available at* http://docs.dos.ny.gov/info/register/2012/dec5/pdfs/rules.pdf.

of nonrecognizable food processing waste that may be accepted at a manure storage facility from 10% to 40%. . . ."[236] Each of these represents a significant deregulation of land application of organic waste on properties other than permitted CAFOs. These major regulatory changes, which are likely to have significant adverse environmental impacts, are not mentioned or addressed in the DEIS. The failure of the DEIS to "state[] and evaluat[e] . . . the potential significant adverse environmental impacts," of the proposed changes to the Part 360 regulations, including their "severity…and the reasonable likelihood of their occurrence"[237] contravenes SEQRA, and must be corrected.

3. The DEIS Does Not Adequately Consider Cumulative Impacts

The DEIS is also insufficient insofar as it fails to take into account the cumulative impacts of the proposed deregulation, as mandated by SEQRA.[238] Among other cumulative impacts, the proposed rulemaking will result in significant cumulative impacts from increased phosphorus ("P") application that the DEIS did not "stat[e] and evaluat[e]" in sufficient detail in the DEIS.[239] Research has consistently shown that accumulation of excess nutrients in soils (especially P) increases runoff losses of P even without active erosion or catastrophic loss in storm events.[240] Phosphorus is building up in agricultural fields, and particularly those on or associated with small dairy farms. This is a nonpoint source affecting New York waterbodies.[241] Though the DEIS looks at increased phosphorus application, it does not do so in enough

[236] *Id.*

[237] N.Y. COMP. CODES R. & REGS. tit. 6, §617.9(b)(5)(iii).

[238] *Id.* §§ 617.7(c)(2), 617.9(b)(5)(iii)[a].

[239] *Id.* §617.9(b)(5)(iii).

[240] Lithochimeia Report at 11.

[241] *Id.* at 2.

detail.[242] In particular, it does not examine farm-by-farm existing phosphorus levels in the soil, which is in excess on numerous farms in many counties.[243] Use of a nutrient management plan – which would become optional for certain medium dairy CAFOs under the proposed deregulation – is vital to ensure that excess phosphorus does not build up in the soil or pollute surface waters, particularly on farms with excess phosphorus already.[244] The DEIS does not adequately take current phosphorus levels into account in its description of the effects the proposed deregulation may have on cumulative phosphorus levels in the soils and waters of the state.

4. The DEIS Does Not Adequately Consider Socio-Economic Impacts of the Proposed Deregulation

SEQRA requires the preparation of an environmental impact statement (EIS) with respect to any action that "may have a significant effect on the environment,"[245] a term that includes "existing community or neighborhood character."[246] Though community and neighborhood character is not defined under SEQRA, in practice courts routinely consider a range of potentially adverse impacts. For instance, courts typically review the lead agency's analysis of population, retail and commercial displacement[247] and potential increases in traffic[248] when

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[242] DEIS at 30-32.

[243] Lithochimeia Report at 20.

[244] *Id.* at 22.

[245] N.Y. ENVTL. CONSERV. LAW § 8-0109(2).

[246] *Id.* § 8-0105(6); N.Y. COMP. CODES R. & REGS. tit. 6, § 617.2(l). DEC's regulations under SEQRA repeatedly refer to social and neighborhood impacts. 6 NYCRR 617.7 (c)(1)(iv), (v). The criteria by which the significance of a project is determined include "the creation of a material conflict with a community's current plans or goals as officially approved or adopted" and "the impairment of the character or quality of important historical, archeological, architectural, or aesthetic resources or of existing community or neighborhood character." *Village of Chestnut Ridge v. Town of Ramapo*, 841 N.Y.S.2d 321, 339 (N.Y. App. Div. 2007).

[247] *See Chinese Staff & Workers Ass'n. v. City of New York*, 502 N.E.2d 176, 180-81 (N.Y. 1986)

[248] *See Baker v. Village of Elmsford*, 891 N.Y.S. 2d 133, 140 (N.Y. App. Div. 2009) (negative declaration annulled for failure of village to take a "hard look" at potential effect of road closure on local traffic and safety); *H.O.M.E.S.*, 418 N.Y.S.2d at 832; *Matter of McGrath v. Town Bd. of the Town of North*

determining whether the lead agency took a hard look at adverse impacts to community character. The proposed regulatory changes envision growth of small CAFOs into medium CAFOs. As explained more thoroughly in the Weida Report, the DEIS des not adequately review the impacts associated with CAFO growth on local economies, such as displacement of other industries, decreases in property values, blight, and crowding out of existing population concentrations.[249] The DEIS also does not consider traffic increases associated with CAFO growth, either cumulatively or at the local level. NYSDEC must, at a minimum, remedy these omissions and others in order to take a "hard look" at potential adverse impacts to neighborhood and community character. Such analysis is required to ensure that the DEIS gives environmental considerations "appropriate weight with social and economic considerations in determining public policy, and that those factors be considered together in reaching decisions on proposed activities."[250]

D. The DEIS Consideration of Alternatives Is Flawed Because It Does Not Consider a Range of Reasonable Alternatives

SEQRA requires a DEIS to "descri[be] and evaluat[e] . . . the range of reasonable alternatives to the action that are feasible."[251] This DEIS identifies four alternatives to deregulating dairy CAFOs with fewer than 300 cows: the no-action alternative; mandating that CAFOs with less than 300 dairy cows enroll in the AEM program; mandating that CAFOs with

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Greenbush, 678 N.Y.S.2d 834 (N.Y. App. Div. 1998); *Chatham Towers, Inc. v. Bloomberg*, 793 N.Y.S.2d 670 (N.Y. Sup. Ct. 2004), *aff'd*, 795 N.Y.S.2d 577 (N.Y. App. Div. 2005), *appeal denied*, 811 N.Y.S.2d 337 (N.Y. 2006) (finding EIS did not comply with SEQRA because it did not look at how closing streets would impede ambulances from getting to a nearby hospital); *McManus v. Planning Bd. of Town of Orchard Park*, Index No 2000/7843 (N.Y. Sup. Ct. Erie Cnty. 2001) (negative declaration annulled in part because of failure to consider need for third access road to improve emergency vehicle access).

[249] Weida Report at 5-6.

[250] N.Y. COMP. CODES R. & REGS. tit. 6, § 617.1(d).

[251] *Id.* § 617.9(b)(5)(v).

less than 300 dairy cows that are located in impaired watersheds enroll in the AEM program; and eliminating the ECL SPDES permit program in its entirety. The alternatives section of the DEIS does not satisfy the mandate of SEQRA because it fails to consider the most feasible, least costly, and least environmentally damaging alternative – encouraging dairies to increase herd-size within their regulatory class, based on availability of appropriate land and other resources -- and it does not accurately characterize the no-action alternative.

1. The DEIS Is Flawed Because It Does Not Consider Any Alternatives to Increase Milk Production that Involve Increasing Herd Size Without Altering Its Regulations

The alternatives analysis is fundamentally flawed because it starts from the premise that any increased milk production in the state must come from converting small, unregulated farms into medium CAFOs. Each of the proposed alternatives focuses on how to increase milk production from the subset of dairies that has between 100 and 199 dairy cows. By assuming that this particular class of dairy farm must bear the brunt of increasing the state's milk production, and must do so by growing so much that they become CAFOs, the DEIS fails to meet SEQRA's mandate that the DEIS "evaluat[e] . . . the range of reasonable alternatives to the action that are feasible."[252]

A proper evaluation of the range of reasonable, feasible alternatives would start with an analysis of the New York dairy industry as a whole to determine the critical barriers to herd expansion and then, in light of those barriers, the best approach to increasing milk production.[253] The DEIS, however, includes no analysis of barriers, other than the cost of environmental regulation, and no assessment of the capacity of dairy farms or CAFOs in different regulatory categories to increase their herd size by looking, for example, at which facilities have acreage

[252] *Id.*

[253] *See, e.g.*, Weida Report at 2-4.

that would allow expansion of their herd size. Instead of reasoned "evaluation of the range of reasonable alternatives to the action that are feasible,"[254] the DEIS assumes – without basis – that the only way to increase milk production in the state is for traditional dairies with 100-199 cows to expand to become medium CAFOs. It does not consider if, or how, milk production could be increased within the existing regulatory structure for dairies of all sizes. This is tantamount to seeking a complex zoning variance without first trying to determine if the goals for the proposed development can be satisfied within the existing zoning law. This makes no economic or regulatory sense.

The DEIS appears to implicitly assume that each dairy in the state is at the maximum size for dairies in its class, and thus that dairies cannot expand without changing regulations. But this is not the case. A state-wide survey of 204 dairies by researchers at Cornell University determined that, for example, dairies with between 60 and 99 cows have an average of 76 cows; dairies with between 100 and 199 cows have an average of 139 cows; dairies with between 200 and 399 cows have an average of 290 cows, and so on.[255] If New York dairy farms expanded to the maximum herd-size for farms in their category as reflected in the Cornell survey, in-state milk production would increase dramatically without any regulatory change.[256] Most

[254] N.Y. COMP. CODES R. & REGS. tit. 6, § 617.9(b)(5)(v).

[255] Knoblauch, *supra* note 146, at 7-1. The fact that farms within the 100-199 class average 139 cows shows there is no basis for the assumption that expansion in the class cannot occur without removal of the regulations that go into effect when the dairy reaches 200 cows. If they were inclined, these farms could expand their herds significantly without bumping into the current requirement to be covered by a SPDES permit. The fact that they do not do so is strong evidence that there are significant barriers to expansion other than environmental regulations.

[256] See Weida Report at 2-3, which explains that:

> Simple calculations …show that just the 204 dairy farms that were surveyed, as reflected in table 7-1 of the source document, could provide over 313 million gallons of additional milk if they expanded their herds to the maximum size within their class, and thus without changing any of the regulatory rules. If all 5,100 dairies in the state of New York are considered instead of the 204 in the survey, calculations show they could provide over 7.5 billions gallons of increased milk

importantly, if farms and CAFOs expanded production within their categories, increased production would entail only minimal increase in the cost of complying with regulations while still maintaining high environmental protection standards.

In sum, the exclusive focus in the alternatives analysis on growing unregulated farms to the size where they are considered CAFOs, rather than considering alternatives that encourage all dairies, including already-regulated CAFOs, to increase their milk production is so poorly justified that it raises the specter that New York is seeking to deregulate this class of CAFOs for some reason other than a pure interest in producing more milk statewide.

2. The DEIS Description of the No-Action Alternative Is Misleading

The description of the no-action alternative in the DEIS is both incomplete and misleading. First, the DEIS description of the no-action alternative fails to acknowledge that the Department has demonstrated significant flexibility in requiring compliance with the SPDES permit for CAFOs with 200-299 cows, and has generously granted extensions of time to comply with permit conditions, thereby mitigating the impact on these CAFOs of compliance, without absolving them of eventual responsibility for their waste. As the DEIS notes, 63 percent of CAFOs that currently have between 200 and 299 dairy cows have requested an extension to comply with the SPDES permit.[257] This is notable in two respects: first, it means that 37 percent of existing medium CAFOs that would be deregulated under this proposal have already come into compliance with the requirements of the permit. There is no reason to deregulate these

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production if each farm expanded to the maximum size within its class and without changing the regulatory rules. All these figures are very conservative because the largest class of dairy farm—900 cows and over—was not included in the above expansion calculations because the class is open- ended and those farms could theoretically add as many animals as they wanted. These largest dairies already account for a significant percentage of milk production in New York, and they could expand at minimal cost without significant changes in regulation.

[257] DEIS at 27.

CAFOs, and it would be bad policy to do so now that they have undertaken the expense and effort to comply with the permit.

Second, the requests for extension from medium dairy CAFOs reveal a more complex picture than the DEIS's discussion of the no-action alternative presents. In response to a request under FOIL,[258] NYSDEC provided us with an Excel spreadsheet with data about the compliance extensions requested by 36 medium CAFOs with 200-299 cows, which includes the reasons given for the extension request.[259] The rationales offered for seeking an extension are instructive. Some CAFOs – though fewer than half – stated that they lacked funding to fully comply, but many of these CAFOs reported on steps that were being taken to come into compliance given existing funding. Several CAFOs sought extensions because they were waiting for approval from NYSDEC to move forward with their plans, while others were waiting to receive funding they had applied for, in the process of hiring engineers, or waiting for vegetation to get established.[260] Overall, the spreadsheet describing the extension requests paints a picture of medium CAFOs with between 200 and 299 cows working to comply with the SPDES permit. Moreover, most CAFOs that described financial reasons for non-compliance were taking some steps to manage waste responsibly and advised NYSDEC that they are moving toward compliance as finances permit.[261]

In sum, the facts that NYSDEC is lenient in granting extensions, that a significant

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[258] Letter from Abraham Allison, Earthjustice, to Records Access Officer, DEC (Dec. 19, 2012), Appendix C hereto.

[259] The Excel spreadsheet, entitled *Requests for Compliance Extensions (12-3885 #3)*, is in Appendix I hereto.

[260] *Id.*

[261] E.g., Zielenieski Farms in Arcade, New York reported "owner is in process of obtaining bids and arranging conractors for completion of silage leachate collection. In the interim a temporary channel has been constructed to allow effluent to flow into manure storage facility. The animal compost site will be addressed as finances allow." *Id.*

percentage of medium CAFOs with 200-299 cows do not need extensions, that many of the CAFOs that sought extensions seem to be on the cusp of being in compliance, and that virtually all other extension requesters were taking steps to improve their waste handling and come into permit compliance, shows that the current system of regulation is far from broken and does not present an insuperable bar to compliance. By not taking into account the regulatory flexibility of the existing system, the DEIS misrepresents the no-action alternative. In addition, the limited number of extension requests, as well as their contents, further undermine the "public need" for the deregulation proposal, even if NYSDEC's unjustified hypothesis that small farms with 100-199 cows are the best dairies to target for herd expansion is correct.

Finally, the DEIS claims to reject the no-action alternative because it would not remove the overlap between Parts 750 and 360, and it would not clarify the regulatory requirements for anaerobic digesters. This is obviously a red herring. The Department could easily propose the Part 360 regulatory changes without deregulating medium dairy CAFOs with 200-299 cows from the SPDES permit program and causing the resulting potential for environmental and human health impacts. Suggesting that the proposed changes related to the Part 360 program are a reason to reject the no-action alternative is disingenuous and without basis.

VII. The Proposed Modifications to NYSDEC's SPDES General Permit for CAFOs Raise Substantive and Significant Issues, Including the Reasonable Likelihood that the Permit Modifications Will Be Denied or Can only Be Granted with Major Modifications Because they Do Not Meet Statutory or Regulatory Criteria or Standards, Requiring NYSDEC to Hold an Adjudicatory Hearing Before Any Final Decision Can Be Made.

Pursuant to 6 N.Y.C.R.R. § 621.8(b), where any comments received from members of the public or other interested parties raise substantive and significant issues relating to the application, and resolution of any such issue may result in denial of the permit application or the imposition of significant conditions thereon, NYSDEC must hold an adjudicatory public hearing

on this application.[262] Based on our legal and technical comments on NYSDEC's proposed rule-making, modifications to the CAFO General Permit, and associated DEIS, presented herein, as well as our January 22, 2013 supplemental comment letter on modifications to the SPDES General Permit GP-0-09-01, our organizations hereby request an adjudicatory hearing on NYSDEC's proposed modifications to NYSDEC's General Permit for CAFOs, GP-0-09-001.[263]

6 N.Y.C.R.R. Part 621 requires NYSDEC to hold an adjudicatory hearing on its proposed revisions regarding CAFO permitting because the comments herein "raise substantive and significant issues," the resolution of which "may result in denial [i.e., rejection] of the permit" modification.[264] NYSDEC must base its determination to hold an adjudicatory public hearing on whether the permit modification, "as proposed, may not meet statutory or regulatory criteria or standards."[265] The modifications that NYSDEC has proposed to its General Permit for CAFOs, GP-0-09-001, raise a number of "substantive and significant" issues not only related to its lack of statutory authority to initiate the modifications it has based on proposed regulatory changes, but also related to whether those modifications will result in violations of statutory and regulatory requirements posed as a result of the proposed permit changes.[266]

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[262] N.Y. COMP. CODES R. & REGS. tit. 6, § 621.8(b).

[263] *Id.* § 621.8; *see* NYSDEC State Pollutant Discharge Elimination System (SDPES) General Permit for Concentrated Animal Feeding Operations (CAFOs), General Permit No. GP-0-09-001, *available at* http://www.dec.ny.gov/docs/permits_ej_operations_pdf/eclcafopermit.pdf (last visited Jan. 22, 2013).

[264] N.Y. COMP. CODES R. & REGS. tit. 6, § 621.8(b); *see* In the Matter of the Department-Initiated Modification of State Pollutant Discharge Elimination System (SPDES) Permits Issued Pursuant to Environmental Conservation Law Article 17 and 6 NYCRR Parts 621, 624, and 750 for Fourteen Publicly Owned Sewage Treatment Plants, 2010 N.Y. ENV LEXIS 36, *35 (June 10, 2010) (explaining that where "comments received from the public on [the permit] modifications raise substantive and significant issues that may result in denial of or substantial revision to a proposed modification, the Department would hold an adjudicatory public hearing").

[265] N.Y. COMP. CODES R. & REGS. tit. 6, § 621.8(b).

[266] See Section V, *supra*, and the supplemental joint comments submitted by our organizations on the proposed permit modifications.

The threshold for proffering "substantive and significant" issues has clearly been met by the instant comments. Pursuant to applicable regulations, written comments can "raise substantive and significant issues" by "expressing objection or opposition" to a permit and by "explain[ing] the basis of that opposition and identify[ing] the specific grounds which could lead the department to deny [i.e., reject] or impose significant conditions on the permit."[267] We have met this burden here.

CONCLUSION

For the foregoing reasons, NYSDEC lacks authority to make the proposed regulatory amendments and changes to the General Permit. Even if NYSDEC had the legal authority to take the proposed action, it could not move forward with a decision to finalize these revisions until it modifies or supplements the DEIS to satisfy SEQRA requirements, requests and receives EPA approval after the appropriate public notice and comment period, and holds an adjudicatory hearing on proposed permit modifications.

[267] *Id.* § 621.8(d).