SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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In the Matter of the Application of

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

Petitioners/Plaintiffs,

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

-against-

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

Respondents/Defendants.

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Index No. 4166-13

Oral Argument Requested

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

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September 27, 2013

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PRELIMINARY STATEMENT

Petitioners-Plaintiffs Riverkeeper, Inc., Waterkeeper Alliance, Inc., Citizens Campaign for the Environment, Inc., Sierra Club Atlantic Chapter, Buffalo Niagara Riverkeeper, Inc., Lower Susquehanna Riverkeeper, Inc., and Theodore Gordon Flyfishers, Inc., (collectively, "Petitioners") challenge the adoption by Respondents-Defendants New York State Department of Environmental Conservation ("NYSDEC") and its Commissioner, Joe Martens (collectively, "Respondents"), of "Parts 750 and 360 of 6 NYCRR Rulemaking," noticed in the New York State Register on May 8, 2013 ("Final Rulemaking")[1] and the modified "State Pollutant Discharge Elimination System (SPDES) General Permit for Concentrated Animal Feeding Operations (CAFOs), General Permit No. GP-0-09-001," noticed in the Environmental Notice Bulletin ("ENB") on July 31, 2013 ("CAFO Permit Modification").[2] Petitioners also challenge the adequacy of the "Final Environmental Impact Statement [on the] Dairy Industry Rulemaking Proposed Action: State Pollutant Discharge Elimination System (SPDES) Permits for Concentrated Animal Feeding Operations (CAFOs), [and] Land Application & Anaerobic Digesters," noticed in NYSDEC's ENB on March 6, 2013 ("FEIS")[3]; and the "State

[1] A copy of this document is appended to the accompanying Affirmation of Daniel E. Estrin in Support of First Amended Verified Petition and Complaint, dated Sept. 27, 2013 ("Amended Estrin Affirmation") submitted herewith as Exhibit 1, NYSDEC, Notice of Adoption [to] Revise 6 NYCRR Subpart 750-1 and 6 NYCRR Subparts 360-1, 360-4 and 360-5, XXXV N.Y. Reg. 24 (May 8, 2013) [hereinafter Final Rulemaking]. All exhibits to the Amended Estrin Affirmation will hereinafter be referred to simply as "Ex. #."

[2] Ex. 4, Modified State Pollutant Discharge Elimination System (SPDES) General Permit for Concentrated Animal Feeding Operations (CAFOs), General Permit No. GP-0-09-001 (July 31, 2013) [hereinafter Modified ECL CAFO General Permit].

[3] Ex. 2, NYSDEC, FINAL 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 51 (Mar. 6, 2013) [hereinafter FEIS].

Environmental Quality Review (SEQR) Findings Statement," noticed in the ENB on April 24, 2013 ("Findings Statement").[4]

This case involves NYSDEC's permitting requirements under Title 6 of the New York Codes, Rules and Regulations ("NYCRR") subpart 750 for dairies with between 200 and 299 mature dairy cows ("dairies (200-299)"). It also involves NYSDEC's regulation under 6 NYCRR Part 360 of the disposal of food processing wastes, including acid whey, a by-product of yogurt production. Dairy operations in New York generate millions of tons of animal manure every year, much of which is spread on fields as agricultural fertilizer (a practice referred to as "land application"), often on fields owned by the facility where the manure was generated. Acid whey, too, is applied to fields as agricultural fertilizer, often at dairies that accept the food waste from yogurt processors for disposal on their fields in exchange for tipping fees. There is, of course, a limit to how much organic fertilizer is needed on agricultural lands, a critical issue because if manure and acid whey are ***over-applied***, the excess nutrients will run off the land into surface waters and will leach into groundwater, especially during rain or snow, with potentially devastating environmental consequences. Whether intentional or not, and regardless of amount, the addition of pollutants to waterbodies from point sources, which include many livestock feeding operations, are "discharges," and they are illegal under the federal Clean Water Act ("CWA") and New York's Environmental Conservation Law ("ECL").

[4] Ex. 3, NYSDEC, STATE ENVIRONMENTAL QUALITY REVIEW (SEQR) FINDINGS STATEMENT 22 (2013) [hereinafter Findings Statement].

Manure and acid whey contain a number of potentially harmful pollutants including disease-causing pathogens, as well as nutrients, such as phosphorous and nitrogen, which can cause eutrophication and significant increases in algae in surface waters. These algae blooms harm water quality, food resources, and habitats, and decrease the oxygen that fish and other aquatic life need to survive. To protect water quality, the storage and land application of manure and acid whey must be properly managed to prevent these substances from entering waterbodies (a result defined under federal and state law as a "discharge"). The U.S. Environmental Protection Agency ("EPA") recently found that 28% of the nation's rivers and streams have excessive levels of nitrogen, and 40% percent have high levels of phosphorus.[5] Many of New York's waterways have been found to be "impaired" by excess phosphorus, and some for excess nitrogen.[6]

NYSDEC regulates CAFOs,[7] and their potential to discharge, by means of the State Pollutant Discharge Elimination System ("SPDES") permit program. All CAFOs in the state must operate under a SPDES permit that requires them to implement controls to prevent pollutant discharges, including implementation of a comprehensive nutrient management plan ("CNMP"), and to operate under NYSDEC oversight, which includes requirements for

[5] Ex. 11, EPA, OFF. OF WETLANDS, OCEANS & WATERSHEDS, OFF. OF RESEARCH & DEV., NATIONAL RIVERS & STREAMS ASSESSMENT: 2008-2009, 30-31 (2013).

[6] *See* Ex. 2 FEIS at 64, 65 t.3-2, 66.

[7] Animal Feeding Operations ("AFOs"), sometimes called factory farms, are livestock feeding facilities that confine large quantities of animals for more than 45 days during a growing season in an area that does not produce vegetation. Under federal law related to dairy operations, regulated "Medium CAFOs" are AFOs with between 200 and 699 mature dairy cows that discharge pollutants to waters of the United States. New York statutes distinguish CAFOs from AFOs only based on number of livestock, and do not distinguish between "discharging" and "non-discharging" operations.

recordkeeping, reporting and inspection, and monitoring.[8] A CNMP is a set of site-specific best management practices ("BMPs") developed by a certified planner to manage waste storage and nutrient application to agricultural fields to provide for adequate crop growth while protecting water quality. CNMPs are necessary "to assure [the] proper use of manure and fertilizers and to reduce the risk of runoff [to surface waters] and leaching to groundwater."[9] NYSDEC has repeatedly acknowledged in official documents the critical importance of CNMPs for ensuring that dairies with between 200 and 699 mature dairy cows are managed and operated without improper discharges.[10]

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

[9] *See* Ex. 6, Exhibit A to Affidavit of Dr. Michael D. Smolen sworn to on July 23, 2013, at 8 [hereinafter Smolen Aff.]; *see* Ex. 6, Smolen Aff. ¶¶ 7, 9, 10, 18, 31, 32. Petitioners' expert has explained that NYSDEC's previously-mandated permit coverage for dairy farms with between 200-299 mature cows "assure[d] that the dairy operator [was] responsible for managing the facility without discharge" and that "land application areas [were] managed under a nutrient management plan." Ex. 6, Exhibit A to Smolen Aff., at 1; s*ee* Ex. 6, Smolen Aff. ¶ 7 ("In the absence of a required CNMP, there is no assurance that land application areas are not being overloaded with waste, resulting in polluted runoff and discharges to New York's waters"); *id.* ¶ 9 ("The treatment and land application of food processing wastes, particularly whey from dairy processors, should be governed by a permit, CNMP, recordkeeping, and reporting in order to prevent discharges to New York's waters"); *id.* ¶ 3 ("A CNMP is essential to good management and preventing discharges and polluted runoff when anyone land applies animal waste.").

[10] For example, NYSDEC has explained that, in order to maintain coverage under a "non-discharge" SPDES permit, permitees must maintain a "'no discharge" status which "means: Continuously following a nutrient management plan that meets NRCS Conservation Practice Standard NY-590 on all fields where manure and process wastewater is applied." Ex. 43, NYSDEC, Medium CAFO Designations for Animal Feeding Operations (AFOs), at 6; Ex. 17, NYSDEC, Fact Sheet for NYSDEC SPDES Permit for CAFOs, Permit No. GP-0-09-001, at 3-4, 8-9 (June 12, 2009) (explaining that in order to be eligible for coverage under the ECL General SPDES Permit for CAFOs claiming non-discharging status, permitees must have and fully implement a CNMP, which "includes having all BMPs implemented that are required in the site-specific CNMP," and that a facility's "[f]ailure to appropriately operate and maintain a BMP is a violation of the ECL General Permit . . . and could cause or contribute to a discharge or violation of State water quality standards"); Ex. 44, NYSDEC, CAFO Compliance Success Story: Hudson Valley Foie Gras, NYWEA Clear Waters - Summer 2010, at 1 ("Key among the permit's many requirements is the development, implementation and maintenance of a current Comprehensive Nutrient Management Plan (CNMP), written by a New York State certified

In its Final Rulemaking and CAFO Permit Modification, NYSDEC exempts from SPDES permit coverage what it calls "non-discharging AFOs" with between 200 and 299 mature dairy cows, relieving them from the duty to operate under CNMPs and regulatory oversight. This was done despite NYSDEC's knowledge that many of the 72 dairies (200-299) in New York State have a documented history of discharging pollutants and of poor waste management practices, in direct violation of their permits.[11] In addition to the 72 existing dairies (200-299), NYSDEC expects 285 dairies to grow into the exempted size category as a result of its Final Rulemaking and CAFO Permit Modification.[12]

The deregulation directly contradicts NYSDEC's previous position, as memorialized in a document submitted by NYSDEC to EPA last year, which correctly explains:

> New York State regulates medium-size CAFOs in the same manner as it regulates large-size CAFOs, in that medium CAFOs are required to obtain permit coverage. Most other states nationwide regulate medium-size CAFO [sic] under a separate program that is often voluntary in nature. ***A nonregulatory approach, for a sector that has a significant pollution***

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planner and conforming to the technical standards established by the federal Natural Resources Conservation Service (NRCS). These standards mitigate pollution sources on the farm through implementation of farm-specific best management practices (BMPs). CAFO implementation involves . . . coordinated efforts" and when "a farm is missing part of this implementation team . . . non-compliance often results.").

[11] Ex. 16, NYSDEC, Inspection Reports and Notices of Violation. An examination of one of the deregulated dairies with a history of discharge illustrates the serious pollution threat. As described in the Affidavit of Suzanne R. Miller, a member of Petitioner Sierra Club Atlantic Chapter, who lives in Hornell, New York, a dairy with between 200 and 300 dairy cows, which has been deregulated as a result of the Final Rulemaking and CAFO Permit Modification, is located directly between, and within one-half mile, of two City of Hornell drinking water reservoirs. Ex. 50, Affidavit of Suzanne R. Miller, dated July 23, 2013, ¶ 3. The dairy is at a higher elevation than the reservoirs, so any runoff or leaching will discharge to the drinking water supply. *Id.* ¶ 3; *see* Ex. 16, Letter from Sam Hendee, Hendee Homestead Farms to Jacqueline Lendrum, Division of Water Permits RE: Hendee Homestead Farms, app. E, at 6 (Oct. 15, 2008). This now-deregulated dairy reported a serious discharge in 2008, and then in a 2012 inspection, NYSDEC found that the facility was only in "marginal compliance" with its permit requirements, meaning that it has not remedied the situation that led to the earlier discharge. *See* Ex. 16, Letter from Brian K. Lee, Environmental Engineer Division of Water, to Sam & Jack Hendee, at 1 (Apr. 13, 2012).

[12] Ex. 2, FEIS at 22.

> ***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. [13]

Each mature dairy cow produces approximately 120 pounds of manure per day.[14] At this rate, the projected 357 dairies (200-299) that were or will be deregulated as a result of the Final Rulemaking will together produce over eight million pounds of manure per day, which may now be disposed of without a CNMP or regulatory oversight, threatening the waters of the state. The Final Rulemaking also eases regulations governing the storage and disposal of food processing wastes, including acid whey, some of which will also be disposed of at the newly-deregulated dairies.

This rulemaking was first disclosed at the August 15, 2012 "New York State Yogurt Summit," convened by Governor Andrew Cuomo, at which New York State Department of Agriculture and Markets Commissioner Darrell Aubertine announced, months prior to NYSDEC's initiation of State Environmental Quality Review Act ("SEQRA") review for such an action, that the state was "immediately increasing the animal threshold required for the CAFO permit from 200 to 300."[15] The premise of the rulemaking is to increase milk production in the state in the hope that it will promote more yogurt manufacturing. Indeed, at the Yogurt Summit, the Governor told attendees that he wanted New York to become the

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[13] Ex. 8, NYSDEC, DRAFT PHASE II WATERSHED IMPLEMENTATION PLAN FOR NEW YORK SUSQUEHANNA AND CHEMUNG RIVER BASINS AND CHESAPEAKE BAY TOTAL MAXIMUM DAILY LOAD, 28 (July 6, 2012) (emphasis added) [hereinafter DRAFT CHESAPEAKE WIP].

[14] Ex. 15, EPA Region 9, Animal Waste: What's the Problem?, http://www.epa.gov/region9/animalwaste/problem.html (last visited Sept. 23, 2013).

[15] Ex. 13, Karen DeWitt, "Cuomo Makes a Moo-ve for More Cows at 'Yogurt Summit,'" WNYC NEWS (Aug. 15, 2012).

yogurt capital of the United States.[16] Less than a year later, the state kept its promise to the dairy industry and completed the Final Rulemaking, dismantling its existing pollution prevention scheme for numerous dairy CAFOs.

The elimination of regulatory oversight for dairies (200-299)—which NYSDEC indisputably undertook for purely political and economic purposes, not scientific or technical ones, in order to increase milk production and lure more yogurt production to the state—is almost certain to result in the discharge of animal waste and associated pollutants to the waters of the state, impairing water quality and threatening public health. The crux of this case is whether NYSDEC exceeded its authority when it carved out an exemption from its carefully constructed CAFO regulatory program for a select category of dairies, despite their acknowledged enormous pollution potential, for economic reasons, and in defiance of the core purposes of the agency and the ECL (to protect human health and the environment). These actions were taken by NYSDEC with limited consideration of the true scope of the impacts or alternatives, including: (1) ***no*** consideration of the environmental impacts of disposing of all the acid whey that will be produced if NYSDEC gets its way and more yogurt is produced in state; (2) limited credible explanation for its far-fetched theory that this deregulation will not result in significant degradation of the state's waters because dairies (200-299) will voluntarily undertake expensive measures that NYSDEC has now told them they need not do (purportedly because the cost of compliance is too high); and (3) without adhering to its obligations to operate a CAFO program that is consistent with the federal National Pollutant Discharge Elimination System ("NPDES") program.

[16] Ex. 13, Freeman Klopott, *Cuomo Says Dairy Industry Can Make New York U.S. Yogurt Capital*, BLOOMBERG BUSINESSWEEK (Aug. 15, 2012).

For all of these reasons, as more fully explained below, NYSDEC's adoption of the Final Rulemaking and CAFO Permit Modification was in violation of lawful procedure, was affected by an error of law, and was arbitrary and capricious and an abuse of discretion insofar as its actions are in violation of: the ECL; Article IV, section 3 of the New York Constitution (separation of powers); and SEQRA. In addition, by adopting the Final Rulemaking and CAFO Permit Modification, NYSDEC failed to perform duties enjoined upon it by the federal Clean Water Act ("CWA"). Accordingly, the Final Rulemaking and CAFO Permit Modification should be invalidated under New York Civil Practice Law and Rules ("CPLR") sections 7803(1)-(3).

STANDARD OF REVIEW

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

1. Arbitrary and Capricious Determination

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

The two-step examination inquires into: (1) the reasonableness of the action and (2) whether the alleged action is arbitrary and capricious. *N.Y. Statewide Coalition of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene*, No. 653584/12, 2013 WL 1343607, at *19 (Sup. Ct. N.Y. Cnty. Mar. 11, 2013) ("*Hispanic Chambers of Commerce I*"), *aff'd*, 970 N.Y.S.2d 200 (1st Dep't 2013) ("*Hispanic Chambers of Commerce II*").[17] If the grounds upon which NYSDEC has based its actions and determinations are inadequate or improper, there is no room for a court to impose its own version of a more adequate measure or proper determination. *Scherbyn v. Wayne Finger Lakes Bd. of Coop. Educ. Servs.*, 77 N.Y.2d 753, 758 (1991).

2. Determination Affected by an Error of Law

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

[17] A copy of this unreported decision is provided for the Court's convenience as Ex. 55.

3. Determination Affected by a Violation of Lawful Procedure

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

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

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

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Petitioners respectfully refer the Court to the detailed statement of facts and procedural history set forth in the First Amended Verified Petition and Complaint dated September 27, 2013 ("Amended Verified Petition"), which is incorporated by reference herein.

ARGUMENT

POINT I

NYSDEC LACKS THE AUTHORITY TO OVERTURN NEW YORK'S STATUTORY PROHIBITION ON THE CREATION OF UNPERMITTED POINT SOURCES.

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

The New York State Legislature intended the New York State Water Pollution Control Law, codified at ECL Article 17, to be preventive, not merely responsive, to past pollutant discharges. It is the declared public policy of New York State "to maintain reasonable standards of purity of the waters of the state . . . and to that end . . . ***prevent*** and control the pollution of the waters of the state of New York." ECL § 17-0101 (emphasis added).

Likewise, the stated purpose of ECL Article 17 is "to safeguard the waters of the state from pollution by ***preventing*** any new pollution. . . ." ECL § 17-0103 (2013) (emphasis added). Since NYSDEC's deregulation contravenes the broad policy and purpose of ECL Article 17, which requires NYSDEC to prevent pollution from all point sources prior to discharge, it is unsupported by the statute.

Moreover, the statutory and regulatory framework implementing the New York State Water Pollution Control Law explicitly mandates that all point sources of pollutants, including all CAFOs, *see* ECL § 17-0105(16), obtain permits at the time of their creation, not after a discharge occurs. Specifically, ECL § 17-0701(1)(a) requires "a written SPDES permit . . . to

. . . make or cause to make or use any . . . outlet or point source." *See* ECL § 17-0505; 6 NYCRR § 750-1.21(b). According to NYSDEC:

> one of the primary goals of ECL Article 17 is to require permit coverage ***before*** a discharge occurs so that adequate safeguards are in place to mitigate the effects of any discharge. This is reflected in ECL § 17-0701(1)(a) which prohibits the creation of a point source for the discharge of waste to waters of the State without a SPDES permit. Furthermore, ECL §§ 17-0101 and 17-0103 indicate a legislative intent to "prevent" pollution from adversely impacting the waters of the State.[18]

Despite the fact that all other point sources in New York State are regulated upon construction and prior to discharge, NYSDEC has attempted to create, via administrative fiat, an exception from the statutory SPDES permit requirement for a select group of dairy operations, a subset of the larger agricultural industry. The select dairy operations, unlike all other point sources, would be regulated only after they have been found to discharge, resulting in an unjustifiably uneven enforcement scheme between dairies (200-299) and equivalently sized livestock operations with hogs, chickens, and other types of animals.

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

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

At a minimum, the exemption of this one category of dairies from the CAFO definition is arbitrary and capricious. An agency rule is arbitrary and capricious when it will lead to uneven enforcement, even between facilities in close proximity, and has loopholes that effectively defeat the stated purpose of the rule. *Hispanic Chambers of Commerce I*, 2013 WL 1343607, at *20. In *Hispanic Chambers of Commerce I,* the court found New York City's Portion Cap Size Rule on sugary beverages arbitrary and capricious because "it applie[d] to some but not all food establishments in the City, [and] it exclude[d] other beverages that have significantly higher concentrations of sugar sweeteners" with no technical or scientific justification. Because the exclusions and loopholes effectively swallowed the rule, the court found the portion size control rule arbitrary and capricious. *Id.*

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

NYSDEC did not provide an adequate justification for this inconsistent regulatory treatment of livestock operations that pose the same or similar risks of environmental degradation. In the FEIS, NYSDEC admits that removing permit requirements for CAFOs with more than 300 cows would: (1) "greatly restrict the Department's ability to track compliance by CAFOs . . . because there would not be any specific permit requirements to monitor"; (2) remove the "guarantee that BMP implementation would occur, or that the CAFO

will make progress towards implementation"; and (3) endanger New York's waterbodies since "as farms grow, they are at an increased risk of having a discharge because they store more silage, more manure, and produce more milk processing waste."[19] Yet, the Final Rulemaking and CAFO Permit Modification cause the very same adverse impacts; after all, the pollution potential of dairies with 299 cows is not meaningfully different than that of dairies with 300 cows. It is also notable that in its Draft Environmental Impact Statement ("DEIS"), NYSDEC described the exclusion of dairies (200-299) from the definition of "medium CAFO" as an option that it had considered but ruled out because it "could lead to confusion since non-discharging CAFOs with 300 or more mature dairy cows are still required to maintain ECL permit coverage."[20]

NYSDEC's only explanation for its arbitrary regulatory carve-out is its claimed interest in an undefined "balance" between economic stimulation of the dairy industry and environmental protection.[21] But, as discussed in Point II, immediately below, NYSDEC lacks authority to promote a sector of the economy at the expense of New York's waters and public health. Additionally, if NYSDEC is correct in its assumption that dairies (200-299) will forego the economic benefit that NYSDEC intends this deregulation to create, which is doubtful,[22] the purpose of the rulemaking will be nullified. This purported justification for this arbitrary regulatory carve-out is therefore legally insufficient.

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

[20] Ex. 21, DEIS at 94, (classifying dairies (200-299) as medium CAFOs, but exempting them from the definition of "point source," is preferable because it avoided unnecessary complication); *see* Ex. 2, FEIS at 122.

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

[22] *See* discussion *infra* at Point III.B.4 (discussing NYSDEC's failure to recognize the necessary trade-off between regulatory cost and environmental cost).

POINT II

NYSDEC'S DEREGULATION OF DAIRIES (200-299) FOR PURELY ECONOMIC AND POLITICAL PURPOSES RUNS AFOUL OF THE NEW YORK STATE CONSTITUTION'S SEPARATION OF POWERS DOCTRINE AND THE AGENCY'S ENABLING STATUTE.

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

New York State courts recognize that "an administrative agency may not, in the exercise of its rule-making authority, promulgate a regulation out of harmony with the plain meaning of the statutory language." *Festa v. Leshen*, 145 A.D.2d 49, 55 (1st Dep't 1989) (citations omitted); *see Boreali*, 71 N.Y.2d at 15. Likewise, "an agency may not, in excess of its lawfully delegated authority, promulgate rules and regulations for application to situations not within the intendment of the statute." *Festa*, 145 A.D.2d at 55 (citing *Boreali*, 71 N.Y.2d 1; *Trump-Equitable Fifth Ave. Co. v. Gliedman*, 57 N.Y.2d 588, 595 (1982); *Bates v. Toia*, 45

N.Y.2d 460, 464 (1978); *Lower Manhattan Loft Tenants v. N.Y.C. Loft Bd.*, 104 A.D.2d 223, 225 (1st Dep't 1984)). According to the Court of Appeals, the separation of powers doctrine "gives the Legislature considerable leeway in delegating its regulatory powers"; however, statutory authority conferred on administrative agencies "in broad or general terms must be interpreted in light of the limitations that the Constitution imposes." *Boreali*, 71 N.Y.2d at 9 (citing N.Y. Const., art III, § 1). Thus, "[e]ven under the broadest and most open-ended of statutory mandates, an administrative agency may not use its authority as a license to correct whatever societal evils it perceives." *Id*. (citing *Council for Owner Occupied Hous. v. Abrams*, 125 A.D.2d 10 (3d Dep't 1987)); *see Hispanic Chambers of Commerce I*, 2013 WL 1343607, at *7. As the Court of Appeals noted in *Boreali*, "courts have previously struck down administrative actions undertaken under otherwise permissible enabling legislation where the challenged action could not have been deemed within that legislation without giving rise to a constitutional separation of powers problem." *Boreali*, 71 N.Y.2d at 11 (citations omitted).

The *Boreali* Court laid out a four-factor test to determine when an agency has crossed the line between administrative rulemaking and legislative policymaking. While no one factor standing alone is "sufficient to warrant the conclusion that the [agency] has usurped the Legislature's prerogative," *id*., a measure of all of the factors taken together indicates when the line has been crossed. As recently applied by Appellate Division, First Department, in *Hispanic Chambers of Commerce II*, the four *Boreali* factors are:

(1) whether "the [agency] had engaged in the balancing of competing concerns of [the agency's regulatory purpose] and economic costs, 'acting solely on [its] own ideas of sound public policy'";

(2) whether "the [agency] did not engage in the 'interstitial' rule making typical of administrative agencies, but had instead written 'on a clean slate, creating its own comprehensive set of rules without benefit of legislative guidance'";

(3) whether "the [agency's] regulations concerned 'an area in which the legislature had repeatedly tried—and failed—to reach agreement in the face of substantial public debate and vigorous lobbying by a variety of interested factions'"; and

(4) "whether any special expertise or technical competence was involved in the development of the regulation that is challenged."

Hispanic Chambers of Commerce II, 970 N.Y.S.2d at 207, 212 (quoting *Boreali*). As demonstrated below, each of these factors weighs heavily against the validity of NYSDEC's rulemaking.

A. NYSDEC Has No Legislative Authority to Prioritize Economic Stimulus Above Environmental Concerns.

The first factor in *Boreali* probes whether the agency improperly engaged in the "uniquely legislative function" of trying to "strik[e] the proper balance" between "the specific values [it] is mandated to promote" and their economic costs. *Boreali*, 71 N.Y.2d at 12. Carving out "exceptions and exemptions that reflect[] the agency's own balancing of economic and social implications of the regulations" is "clear evidence that the regulatory scheme was inconsistent with the agency's legislative authority." *Hispanic Chambers of Commerce II*, 970 N.Y.S.2d at 208; *see Health Ins. Ass'n of Am. v. Concoran*, 154 A.D.2d 61, 73 (3d Dep't 1990). In *Boreali*, the New York State Public Health Commission ("PHC") passed an ordinance banning indoor smoking in certain establishments but carved out exemptions for bars, convention centers, small restaurants, and the like. *See Boreali*, 71 N.Y.2d at 7. The Court of Appeals found that such exemptions had no foundation in considerations of public health. Rather, "they demonstrate the agency's own effort to weigh the goal of promoting health against its social cost and to reach a suitable compromise." *Id*. at 12.

Here, NYSDEC touts its goal to "narrowly tailor[] a ***balance*** between environmental protection and promoting New York's dairy industry."[23] As repeatedly explained by NYSDEC, however, the sole purpose of the rulemaking is economic: "[t]he proposed action aims to remove certain regulatory requirements that cause economic barriers to allow New York dairy farms to meet th[e] demand [for increased milk production]."[24] In fact, the intent of NYSDEC's rulemaking was to "reduc[e] costs associated with the current regulatory scheme by eliminating the required development and implementation of a CNMP pursuant to a permit" in order to encourage 285 traditional dairies to "increase their herd size to greater than 200 mature milking cows over the next decade."[25]

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

While NYSDEC did not provide any technical or scientific justification for its deregulation, it admits removing permit requirements from dairy operations substantially increases the risk of environmental harm:

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[23] Ex. 2, FEIS, at 48 (emphasis added).

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

[25] *Id.* at 5.

> as farms grow, they are at an increased risk of having a discharge because they store more silage, more manure, and produce more milk processing waste. Given the larger volumes of potential pollutants, any unintended discharge has the potential to be more environmentally significant. As CAFOs grow in size, it becomes increasingly important for them to implement BMPs and to have the benefit of oversight, not only from Department staff during inspections, but also from an AEM [Agricultural Environmental Management] certified planner who would regularly provide guidance to the farmer.[26]

Thus, NYSDEC's rulemaking not only prioritizes the consideration of economic concerns, but also undeniably sacrifices environmental protection in the process. Due to NYSDEC's

[26] *Id*. at 22-23 (discussing and rejecting the alternative of removing the CAFO SPDES permit program in its entirety). In fact, NYSDEC admits the significant role CNMPs play in preventing improper runoff and/or other discharges of waste from dairy operations. Ex. 2, FEIS, at 119 ("[E]liminating the ECL permit could lead to adverse environmental impacts if nondischarging [dairies] opt out of permit coverage and if participation in voluntary programs is not effective in mitigating potential adverse environmental impacts. The benefit of permit coverage is that medium CAFOs are legally obligated to demonstrate continued implementation of BMPs either as a prerequisite to obtaining permit coverage or during the course of permit coverage. With participation in a voluntary program, this obligation does not exist, and there is no guarantee that BMP implementation would occur, or that the [dairy] will make progress towards implementation."). NYSDEC also admits that its regulatory changes eliminating CNMP requirements unequivocally increases the risk of additional stormwater runoff pollution and unpermitted "discharges." *Id*. The record contains numerous admissions by NYSDEC about the increased risk of adverse environmental impacts and stormwater pollution discharges resulting from NYSDEC's deregulation and elimination of mandatory CNMP requirements. *See* Ex. 3, Findings Statement, at 9 (under NYSDEC's deregulation, without the requirement to implement BMPs via a CNMP, "there is the potential for increased adverse environmental impacts from runoff or other discharges caused by the improper management of farm activities"); *id.* at 10 ("failure to properly manage silage . . . could potentially cause significant adverse environmental impacts to water resources from the release of silage leachate through stormwater runoff"; "there is the potential for increased adverse environmental impacts from runoff caused by the unmanaged manure"); *id.* at 1, 6, 10, 24 (explaining that farms previously below the permitting threshold, are expected (and, in fact, encouraged) to grow as a result of NYSDEC's regulatory changes, and that such growth will increase the risk of pollution discharges). *See also* Ex. 2, FEIS, at 52-60, 66-69, (explaining that NYSDEC's regulatory exemption will likely increase the risk of discharge and may result in "increased adverse environmental impacts" to New York State waterways as a result of increased stormwater runoff and/or leachate overflow; acknowledging that the deregulation could "adversely impact fish and other aquatic life" since "fish and aquatic insects may die when oxygen is depleted due to excess nutrients in surface water due to runoff of water contaminated by dairy wastes" and "[s]tormwater discharges from deregulated dairy facilities containing silt and sediment can cause fish kills by clogging gills or depleting oxygen, and can impact spawning habitat."); *id.* at 73-75 (NYSDEC recognizing the risk of impacts to human health resulting from NYSDEC's deregulation of dairies (200-299) due to the ingestion of contaminated drinking water or exposure to pathogens as a result of recreational contact with impacted surface waters).

improper balancing of social and economic concerns against its mission to protect New York's environment, the first *Boreali* factor weighs in favor of invalidating the deregulation of dairy CAFOs.

B. NYSDEC's Rulemaking Was Promulgated on a "Clean Slate" Without Legislative Guidance.

The second prong of *Boreali* inquires "whether the [regulatory body] exceeded its authority by writing on 'a clean slate' rather than using its regulatory power to fill in the details of a legislative scheme." *Hispanic Chambers of Commerce II*, 970 N.Y.S.2d at 210. NYSDEC's CAFO deregulation violates the separation of powers doctrine because the agency has only been granted authority to protect the environment, and has ***not*** been granted authority to take regulatory action for the sole purpose of providing economic stimulation. Article XIV, section 4, of the New York State Constitution tasks the New York State Legislature with, among other things, the duty to "conserve and protect its natural resources and scenic beauty and encourage the development and improvement of its agricultural lands . . . ." N.Y. Const. art. XIV, § 4. "The legislature, in implementing this policy, shall include adequate provision for the abatement of air and water pollution . . . , the protection of agricultural lands, wetlands and shorelines, and the development and regulation of water resources." *Id.* Accordingly, the Legislature has declared its policy to protect the environment for the benefit of the state's economy:

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

ECL § 1-0101 (emphasis added). This statutory language is reflected verbatim in NYSDEC's mission statement.[27] The Legislature has thus prescribed NYSDEC's purpose to improve and protect the environment for the economic and social benefit of all New Yorkers, and it is beyond the scope of NYSDEC's authority to pursue the inverse policy, that is, to purportedly enhance economic conditions to the detriment of the environment in order to stimulate the dairy industry. *See Hispanic Chambers of Commerce II*, 970 N.Y.S.2d at 210-11 (despite broad authority granted to the New York City Department of Health and Mental Hygiene "to regulate 'all matters affecting the health of the city,'" and to "adopt sanitary regulations dealing with matters affecting the 'promotion and protection of health,'" these powers did not authorize it to adopt a sugary beverage Portion Cap Size Rule); *Concoran*, 154 A.D.2d at 68-70 (decision by the New York State Superintendent of Insurance to prohibit the use of HIV test results to determine applicant's qualifications for coverage was invalid because despite the Superintendent's general "authority to issue regulations to establish minimum standards for the form, content and sale of, *inter alia*, health insurance policies" and his authority to prohibit unfair discrimination in the provision of insurance, the Superintendent had no authority to prohibit the "sound" underwriting practice of considering risk when determining insurability).

Unlike the agencies in *Hispanic Chamber of Commerce II*, which had broad authority to regulate both food supplies and disease, and in *Concoran*, which had broad authority to establish standards for the sale of insurance and to prevent discrimination—and yet both agencies were found to have exceeded their respective statutory authority—NYSDEC has no authority whatsoever to take regulatory action for the sole purpose of providing economic stimulation. In fact, NYSDEC admits that it lacks the authority to resolve economic concerns:

[27] Ex. 31, NYSDEC, About DEC; Ex. 2, FEIS, at 47-48.

"economic barriers will not be addressed in the EIS, as the Department has no influence in this area."[28]

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

> [f]oster and promote ***sound practices*** for the use of agricultural land . . . ; [and] [e]ncourage industrial, commercial, residential and community development which provides the ***best use*** of land areas, ***maximizes*** environmental benefits, and ***minimizes*** the effects of less desirable environmental conditions.[29]

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

As readily admitted by NYSDEC,[30] the New York State Legislature has not provided the agency with any guidance detailing how to determine economic priorities for the state, and NYSDEC's unsupported attempt to create its own economic policy violates its statutory duties.

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

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

[30] Ex. 2, FEIS, at 20.

Because NYSDEC has acted without legislative guidance, the second *Boreali* factor weighs in favor of invalidating NYSDEC's deregulation of dairies (200-299).

C. NYSDEC's Rulemaking Impermissibly Intrudes upon the New York State Legislature's Ongoing Consideration of the Necessity to Provide Financial Aid to Dairy Operations.

The third *Boreali* factor is whether "the legislature had repeatedly tried to pass legislation [on the subject of the regulatory rulemaking], yet had failed to do so." *Hispanic Chambers of Commerce II*, 970 N.Y.S.2d at 211 (finding that the legislature had tried—and failed—to address the issue of regulating sugary drinks where the New York City Council rejected three resolutions specifically targeting sugar sweetened beverages and the New York State Assembly had also introduced several bills regarding the sale of sugary drinks in vending machines and in certain establishments as well as a proposed tax on items including sugary drinks, and despite the fact that the State Assembly had never addressed portion size directly); *Concoran*, 154 A.D.2d at 74 (where legislative proposals to ban HIV testing to determine applicants' insurability had been formulated on three occasions, but only one had been introduced and was not voted out of committee, court found that the legislature was aware of the issue, and the legislative indecisiveness weighed in favor of invalidating an administrative ban on HIV testing).

Here, the New York State Legislature has introduced two bills intended to directly address the economic burdens on dairies[31] and one bill that would promote economic

[31] In 2010, New York State Assemblyman Peter D. Lopez introduced Assembly Bill No. 11284 titled "An act to amend the agriculture and markets law, in relation to the establishment of the dairy assistance program . . . ." Ex. 32, A.11284, 233d N.Y. Leg. Sess. (2010). As the legislative intent section of the bill makes clear, the New York State Legislature has considered the dairy industry's need for financial assistance:

development for agricultural operations.[32] Additionally, the Legislature has recently considered a bill that would repeal 1,000 state regulations that purportedly hinder economic development.[33]

The four bills indicate that the New York State Legislature has tried—but failed—to ameliorate the dairy industry's economic burdens through subsidies or loan programs and also has tried, but failed, to roll back state regulations. Because NYSDEC impermissibly has attempted to resolve the New York State Legislature's inability to agree on an economic

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

Id. at § 1. In the same legislative session, Assemblyman William Magee introduced Assembly Bill No. 9226 titled, "An act to amend the agriculture and markets law, in relation to establishing a dairy assistance program . . . ." Ex. 32, A.9226, 233d N.Y. Leg. Sess. (2010). An identical bill was introduced in the Senate as Senate Bill 6140. *See* Ex. 32, S.6140, 233d N.Y. Leg. Sess. (2010). The legislative intent of Assembly Bill No. 9226 is identical to that of Assembly Bill No. 11284, but with a different proposed funding source. Ex. 32, A.9226, 233d N.Y. Leg. Sess. § 1 (2010).

[32] The Senate passed Senate Bill No. 4240A, titled, "An act . . . in relation to authorizing industrial development agencies to provide assistance to agricultural producers." Ex. 32, S.4240A, 234th N.Y. Leg. Sess. (2011), which would allow state industrial development agencies to provide loan assistance to agricultural enterprises, including dairies. Although the bill failed to pass the Assembly, it would have relieved some of the economic burdens on dairies, allowing them to continue to implement environmental protections.

[33] This past June, Senator Kathleen Marchione introduced Senate Bill No. 5166, S.5166, 236th N.Y. Leg. Sess. (2013), which, along with an identical bill introduced in the Assembly by David DiPietro as A.7986, 236th N.Y. Leg. Sess. (2013), would require the governor to repeal 1,000 regulations or rules that hinder job creation and economic development in New York. Ex. 32, S.5166, 236th N.Y. Leg. Sess. (2013); A.7986, 236th N.Y. Leg. Sess. (2013). Though the bill was not voted out of committee, it would have required the governor to weigh the necessity of NYSDEC's CAFO regulations against regulation in other industries in order to achieve the beneficial deregulation. And while it was introduced after the NYSDEC issued its Final Rulemaking, the bill shows that the Legislature is aware of the regulatory burdens in the state but has not yet come to a consensus on how to resolve the issue.

policy, the third *Boreali* factor strongly weighs in favor if invalidating NYSDEC's deregulation of dairies (200-299).

D. In Its Attempt to Remove Economic Burdens on Dairies, NYSDEC Did Not Posit Any Scientific or Technical Justification, but Instead Cited Factors Outside Its Area of Expertise.

The fourth *Boreali* factor is "whether any special expertise or technical competence was involved in the development of the regulation that is challenged." *Hispanic Chambers of Commerce II*, 970 N.Y.S.2d at 212. In *Boreali*, the Court found that the mounting evidence proving adverse health effects to bystanders from all indoor smoking was clear, and therefore held that the PHC's code describing the locales in which smoking would be prohibited and providing exemptions for various special interest groups was "simple" and did not involve technical or special competence. *Boreali*, 71 N.Y.2d at 14.

The facts in *Boreali* are perfectly analogous to NYSDEC's recent deregulation of dairy operations. The *Boreali* court determined regulation of smoking is clearly a public health issue, but no special expertise or technical competence was involved in the granting of exemptions to special interest groups for economic reasons. Here, although regulation of CAFOs is unquestionably a human health and environmental issue, no special expertise or technical competence in the field of environmental pollution was involved in granting, at the Governor's behest, a categorical exemption from environmental regulation to the dairy industry. As explained above, NYSDEC's only stated justification for the regulatory modification is economic, not scientific. In fact, when NYSDEC applied its technical expertise less than two months prior to the Cuomo Administration's announcement of the dairy deregulation at the August 15, 2012 "Yogurt Summit," NYSDEC concluded that a non-regulatory scheme for medium-sized dairy CAFOs would be ineffective:

> New York State regulates medium-size CAFOs in the same manner as it regulates large-size CAFOs, in that medium CAFOs are required to obtain permit coverage. Most other states nationwide regulate medium-size CAFO [sic] under a separate program that is often voluntary in nature. ***A nonregulatory approach, for a sector that has a significant pollution potential (the smallest medium CAFO has the pollution potential of a major sewage treatment plant), is neither credible nor effective***. Professional management of waste at these facilities is critical to protection of water quality. That professional management is ensured by the New York CAFO permit program.[34]

NYSDEC reaffirmed this position less than one month before the close of the public comment period on the rulemaking, claiming, "it is important to note that the New York CAFO program covers all farms with as few as 200 cows with binding permits," and conceding "this type of science-based, risk reduction approach to CAFO regulation should be considered the national standard; anything less is inconsistent with the Clean Water Act's 'best technology' requirements."[35]

Yet, despite these clear and unambiguous technical pronouncements by NYSDEC about the importance of regulating dairies (200-299) with permits and CNMPs, upon the Administration's announcement at Governor Cuomo's "Yogurt Summit," and without providing any scientific or technical justification, NYSDEC chose to disregard its own repeatedly stated scientific opinion and simply removed numerous dairies (200-299) from its regulatory program. Because NYSDEC clearly did not rely on its special or technical expertise, the fourth *Boreali* factor weighs heavily in favor of invalidating the deregulation of dairies (200-299).

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[34] Ex. 8, DRAFT CHESAPEAKE WIP, at 28 (emphasis added).

[35] Ex. 9, NYSDEC, FINAL PHASE II WATERSHED IMPLEMENTATION PLAN FOR NEW YORK SUSQUEHANNA AND CHEMUNG RIVER BASINS AND CHESAPEAKE BAY TOTAL MAXIMUM DAILY LOAD 27-28 (Jan. 7, 2013) [hereinafter FINAL CHESAPEAKE WIP].

As confirmed by the *Boreali* analysis, NYSDEC has crossed the line between administrative rulemaking and legislative policymaking, usurping the New York State Legislature's prerogative. Its deregulation of dairies (200-299) violates the New York State Constitution by running afoul of the constitutional separation of powers doctrine, thereby invalidating the Final Rulemaking and CAFO Permit Modification.

POINT III

THE FINAL RULEMAKING AND CAFO PERMIT MODIFICATION MUST BE INVALIDATED BECAUSE NYSDEC DID NOT COMPLY WITH SEQRA.

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

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

The purpose of SEQRA is to ensure that when public agencies regulate activities that affect the quality of the environment—such as dairy farming and land applying dairy waste and

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

1. SEQRA Imposes Strict Procedural Requirements.

For any action that may have a significant effect on the environment—as NYSDEC admits is the case with the Final Rulemaking and CAFO Permit Modification[36]—SEQRA requires an agency to prepare an environmental impact statement ("EIS") and specifies the elements that must be included in the EIS. In particular, SEQRA requires an EIS to include "a detailed statement setting forth . . . a description of the proposed action . . . ; the environmental impact of the proposed action including short-term and long-term effects; . . . alternatives to the proposed action; . . . [and] mitigation measures proposed to minimize the environmental impact." ECL § 8-0109(2). NYSDEC regulations further require that a draft EIS include: (1)

[36] Ex. 18, NYSDEC, STATE ENVIRONMENTAL QUALITY REVIEW SHORT ENVIRONMENTAL ASSESSMENT FORM [FOR] CAFO RULEMAKING AND MODIFICATIONS TO GENERAL PERMIT 1-2 (2012).

"a concise description of the proposed action, its purpose, public need and benefits"; (2) "a statement and evaluation of the potential significant adverse environmental impacts at a level of detail that reflects the severity of the impacts and the reasonable likelihood of their occurrence"; and (3) a "description and evaluation of the range of reasonable alternatives to the action that are feasible." 6 NYCRR § 617.9(b)(5)(i), (iii) & (v).

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

As shown below, in this case NYSDEC failed to fulfill the strict procedural requirements of SEQRA. In particular, the FEIS omits any statement or evaluation of the environmental impacts of the disposal of acid whey generated from increased yogurt production, and in particular the impacts of newly deregulated dairies land applying the acid

whey without a CNMP. In addition, its description of the public need and benefits of the Final Rulemaking, as well as its discussion of mitigation and alternatives is so lacking in substance or logical reasoning that it is tantamount to not even including these required sections in the FEIS.

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

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

B. NYSDEC Did Not Fulfill Its Obligation to Take Environmental Concerns Into Account to the Fullest Extent Practicable Before Finalizing Any Rulemaking.

NYSDEC failed to take a "hard look" at: (1) the potentially significant environmental impacts of disposing of the acid whey produced by increased yogurt production in the state, especially disposal by land application on dairies (200-299); (2) the likelihood that waste disposal at dairies (200-299) without a CNMP will have potentially significant adverse environmental impacts; (3) the cumulative impacts of adding additional phosphorus (in the form of manure and whey) to soil where phosphorus is already at high levels without a CNMP and regulatory oversight; (4) whether the Final Rulemaking indeed serves a "public need" or offers a "public benefit"; (5) a "range of reasonable alternatives" before opting for the Final Rulemaking; and finally (6) whether the mitigation it proposes is realistic. Even under the relatively deferential review afforded to an agency's SEQRA review, NYSDEC's efforts here fall far short of what the law requires and cannot be sustained.

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

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

Development Corporation violated SEQRA by failing to take a "hard look" at the consequences of a proposed sports stadium, including the immediate adverse potential effects on traffic stoppage, parking, air pollution, noise level, and so on, but also on the "unplanned 'subsequent action'" that would be generated by additional parking facilities); *see also Cnty. of Orange v. Vill. of Kiryas Joel*, 11 Misc. 3d 1056(A) at *5-6 (Sup. Ct. Orange Cnty. 2005) (village's unexplained position, counter to logical reasoning, that connecting the village to large source of water will not affect growth fails "hard look" test).

There are four critical flaws in the environmental impacts discussion in the FEIS. First, while the FEIS describes some of the potential significant adverse environmental impacts of the storage and land application of manure from dairies (200-299), its analysis fails to state and evaluate the potential significant adverse environmental impacts of any "unplanned 'subsequent action,'" *H.O.M.E.S.*, 69 A.D.2d at 232 (citing *City of Davis,* 521 F.2d 661, 674-76 (9th Cir. 1975)), specifically, the need to dispose of the additional acid whey that will result from the increased yogurt production that is the stated goal of the deregulation.[37] Thus, for example, the FEIS describes the potential adverse impacts to waterbodies from phosphorus, nitrogen and pathogens "caused by unmanaged manure,"[38] but says nothing about the adverse impacts of phosphorus and nitrogen from the unmanaged food processing waste created during yogurt production.[39] Second, the FEIS fails to realistically assess the likelihood that dairies (200-299) will discharge pollutants degrading water quality as a result of the Final Rulemaking.[40] Third,

[37] Ex. 3, Findings Statement, at 22 (The goal of the proposed action is to "provid[e] regulatory relief to encourage expansion in the dairy industry.").

[38] *See* Ex. 2, FEIS, at 54-58.

[39] *See* Ex. 6, Smolen Aff. ¶ 32.

[40] *See id*. ¶¶ 7, 9, 27.

the FEIS fails to evaluate the cumulative impact of land applying the nutrient phosphorus without a CNMP or regulatory oversight on lands where phosphorus is already present at high levels.[41] Fourth, the FEIS omits any discussion of the Final Rulemaking's complete deregulation of the land application of fish hatchery waste.[42]

a. Failure to Consider Disposal of Acid Whey.

If the deregulation of dairies succeeds in increasing yogurt production in New York to the extent predicted in the FEIS, it will result in increased production of acid whey, a liquid by-product of yogurt production.[43] Acid whey contains nitrogen and phosphorus in similar proportions to animal manure, but it has a much higher Biological Oxygen Demand and chloride content, as well as a much lower pH.[44] To prevent water pollution, this by-product of yogurt production must be disposed of pursuant to a CNMP, and the plan must provide specific limitations on timing of application, rest periods to prevent soil clogging, and mechanisms to prevent soil degradation from chlorides and impairment of soil infiltration which can increase pollutant runoff.[45] Because acid whey is heavy and expensive to transport, it is likely to be disposed of in close proximity to the yogurt plants, meaning the burdens of acid whey disposal will be focused in certain areas of the state.[46] Because acid whey contains nutrients, its

[41] *See id*. ¶¶ 10-11, 23.

[42] *See id*. ¶ 33.

[43] *See id*. ¶ 32; *see also* Ex. 2, FEIS, at 22-23 (estimating that the Final Rulemaking will result in an additional 25,000 cows, producing an additional 500,000,000 pounds of milk per year, of which approximately 10% will be used for greek yogurt production); Ex. 7, Affidavit of Dr. William J. Weida sworn to on July 18, 2013 at ¶ 8 [hereinafter Weida Aff.] (production of greek yogurt results in significant amounts of acid whey).

[44] *See* Ex. 6, Smolen Aff. ¶ 32.a.

[45] *Id*.

[46] *See* Ex. 7, Weida Aff. ¶ 9.

disposal must be managed so that it does not get into surface and ground waters where it can degrade water quality and cause fish kills.[47] Further, because acid whey contains the same nutrients as manure, by definition, applying acid whey on fields will reduce the amount of manure that can be applied consistent with agronomic rates.[48]

NYSDEC regulations allow dairies to land apply food processing waste in addition to cow manure. 6 NYCRR § 360-4.2(b)(1). If a dairy operates under a SPDES permit, then the CNMP required by that permit would have to take into account the land application of both the acid whey and the manure. But, in the Final Rulemaking, there is no provision in either Part 360 or Part 750 that requires a dairy (200-299) to obtain a permit or to follow a CNMP in order to land apply both manure and unlimited quantities of acid whey. Such facilities have to be "registered" pursuant to 6 NYCRR § 360-1.8(h), and comply with the requirements for registration under 6 NYCRR §§ 360-4.2(b)(1) and 360-4.6, but these generic provisions are not as protective of water quality as operating in accord with a site-specific CNMP under an enforceable permit.[49] The FEIS acknowledges that it has become "more prevalent" for dairies to accept acid whey for disposal,[50] but does not consider how much acid whey will be land applied in the state as a result of the Final Rulemaking, nor the impacts of land applying millions of pounds per year of acid whey, likely in close proximity to the yogurt plants, and likely on at least some dairies (200-299) that do not operate under CNMPs. The failure to include a detailed analysis of how the acid whey generated by increased yogurt production will

[47] *See* Ex. 6, Smolen Aff. ¶¶ 32.a, 32.c; Ex. 7, Weida Aff. ¶ 8.

[48] *See* Ex. 7, Weida Aff. ¶ 8.

[49] *See* Ex. 6, Smolen Aff. ¶¶ 32, 32.c (explaining that registration requirements are less protective of water quality than a CNMP and permit because they do not require agronomic application, rest periods, timing intervals, seasonal limits or soil temperature requirements).

[50] Ex. 2, FEIS, at 7.

be disposed of, and the environmental impacts of disposal of acid whey at facilities that are not governed by a CNMP, is a fatal flaw in the FEIS.[51]

Not only does the FEIS fail to consider the environmental impacts of land applying the additional acid whey created as a by-product of increased yogurt production in general, it also fails to consider that in two respects the Final Rulemaking and CAFO Permit Modification will make it more likely that acid whey will be land applied at facilities that do not operate under CNMPs or permits, thus increasing the likelihood that acid whey will pollute waters of the state.[52] First, if, as NYSDEC predicts, the Final Rulemaking results in more dairies (200-299), there will likely be more dairies that operate lagoon and sprayfield waste systems (as such systems become more necessary as dairies expand in size), but without a permit. Dairies that use this type of waste system, but that are not required to operate under a CNMP and other requirements of a permit, are the most suitable (from the standpoint of the dairy and yogurt industries, not from Petitioners' standpoint) for accepting acid whey for disposal because there is no limit *per se* on how much acid whey could be spread.[53]

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

[51] *Cf*. Ex. 6, Smolen Aff. ¶ 19 ("The treatment and land application of food processing wastes, particularly whey from dairy processors, should be governed by a permit, CNMP, recordkeeping, and reporting in order to prevent discharges to New York's waters.").

[52] *See id*. ¶¶ 32.a, 32.c.

[53] *See* Ex. 7, Weida Aff. ¶ 10 (explaining that changes in the regulatory structure that reduce the regulation of whey disposal are likely to increase the number of facilities that accept whey for disposal, and that dairies with sprayfields are in a position to accept whey for disposal).

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

Yet, the FEIS does not account for the fact that, as a result of the Final Rulemaking and CAFO Permit Modification, the amount of waste that may be land applied without a permit at a dairy (200-299) may be significantly more than the amount of manure generated by 200 to 299 cows, and significantly more than any dairy can responsibly manage without a CNMP. In the opinion of Petitioners' expert, Dr. Smolen: "The water quality impacts of allowing dairies with 200-299 cows to land apply manure without a CNMP are likely to be quite significant, but to also allow these facilities to land apply large or unlimited amounts of acid whey in addition to manure could be devastating to water quality."[54] This deficiency is especially notable because NYSDEC recently provided EPA with a document entitled "Land Application of Manure, Food Processing Waste, and Digestate," in which NYSDEC advised EPA that anaerobic digestion of waste, which it is encouraging through the revisions to the Part 360 regulations, resulted in a "noticeable increase in [nitrogen and phosphorus] concentrations . . . [which] need to be

[54] Ex. 6, Smolen Aff. ¶ 32.

accounted for in each farm's comprehensive nutrient management plan . . . ."[55] NYSDEC simply cannot reconcile its statement to EPA that CNMPs are needed with the conclusions in the FEIS that the Final Rulemaking, which promotes use of anaerobic digestion and allows the digestate to be land applied in very high quantities without a CNMP, will not have significant environmental impacts.

Instead of considering the environmental impacts of unregulated dairies (200-299) land applying both manure and acid whey, NYSDEC focused on the aspect of the Final Rulemaking that removes double permitting requirements on dairies that operate under Part 750 permits. It says:

> if a farm accepts other wastes, such as whey, for land application or other purposes, Part 360 criteria apply. Over the last few years, as the import of nutrient wastes onto farms has become more prevalent, the Department has become aware of an overlap between Part 750 and Part 360 for some farms. For example, the land application of whey on a permitted CAFO with a CNMP is subject to both Part 750 and Part 360. Dual regulation of the same activity does not provide additional environmental protection, just additional burden on the affected farms.[56]

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

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[55] Ex. 33, E-mail from Thomas Berkman, NYSDEC Office of General Counsel, to Christopher Saporita, EPA Region 2 Assistant Regional Counsel RE: ECL CAFO General Permit (Apr. 29, 2013 9:55 EST), attachment at 5.

[56] Ex. 2, FEIS, at 7.

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

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

- "the potential risk for public health impacts, primarily through ingestion of contaminated drinking water"[57];
- "the potential for increased adverse environmental impacts from runoff caused by the unmanaged manure"[58];
- "an increased potential for adverse environmental impacts from the overflow or discharge of silage leachate"[59];
- "risk [that] impacts to water from nutrients and pathogens [from poorly managed animal mortalities] could increase"[60];
- "[e]nvironmental impacts in the Chesapeake Bay watershed as a result of the proposed action could be significant"[61]; and
- "the potential [that an] increase in dairy herd sizes from the implementation of [the Final Rulemaking] without manure management practices may increase the likelihood that runoff containing nutrients and sediment . . . could adversely impact fish and other aquatic life."[62]

[57] Ex. 2, FEIS, at 73.

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

[59] *Id*. at 54.

[60] *Id*. at 60.

[61] *Id*. at 67.

[62] *Id*. at 69.

However, NYSDEC discounts the likelihood that these impacts will occur because it assumes, without basis, that potentially significant environmental impacts of the Final Rulemaking will be mitigated due to dairies (200-299) voluntarily developing and implementing CNMPs and BMPs.[63]

NYSDEC's proposed mitigation, which assumes that dairies (200-299) will voluntarily take all necessary safeguards to protect water quality, despite the significant cost, even if not required to do so, is irrational and unrealistic. Petitioners' expert, Dr. Smolen, confirms that:

> the assumption that these effects will be mitigated by voluntary state and federal programs is unfounded . . . . Voluntary programs should be utilized to support, not replace the regulatory oversight of the CAFO permit program. Voluntary programs provide important support for the pollution control in the dairy industry. . . , but it will not be sufficient to keep pressure on producers as evidenced by the low rate of participation in Tiers 4 and 5 of AEM. Although many problems have been addressed by such programs, the total impact is small, and few systems are addressed to the level required by the CAFO permit.[64]

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

Indeed, the very premise that the deregulation of dairies (200-299) will save dairies money, yet will cause no environmental harm, makes no sense; responsible waste management costs virtually the same whether those practices are mandated by NYSDEC or adopted voluntarily. As Dr. Smolen explains:

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

[64] Ex. 6, Exhibit A to Smolen Aff., at 1; *see* Ex. 6, Smolen Aff. ¶¶ 14, 26.

> If Medium CAFOs manage their waste appropriately, there will be no substantial cost savings associated [with] the proposed deregulation. If Medium CAFOs do not manage their waste in the manner required by the [now superseded] regulations, those costs associated with the environmental impacts will be shifted to the public and/or other regulated entities . . . the cost of operating an effective pollution control system would [be] virtually the same with or without the permit.[65]

Thus, if dairies (200-299) expand, yet pay less for waste management practices than what is required by a CNMP and a permit, they will discharge pollutants and impair water quality.[66]

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

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

In addition, the FEIS analysis did not consider the cumulative impacts of (1) dairies (200-299) land applying the nutrient phosphorus ("P") without a CNMP and regulatory oversight (and thus likely over-applying P), and (2) the fact that P is already present at very

[65] Ex. 6, Exhibit A to Smolen Aff., at 2, 3; *see* Ex. 6, Smolen Aff. ¶ 15; Ex. 7, Weida Aff. ¶ 6 ("If operators of CAFOs in the deregulated category continue to implement the practices necessary to prevent runoff or discharges of animal waste or acid whey to waters of the state, they will gain little or no cost savings. If the operators fail to implement those preventive practices, the costs of runoff and discharges of pollution will fall on state taxpayers.").

[66] Ex. 6, Exhibit A to Smolen Aff., at 1 ("To assure there is no discharge from a dairy, engineering and management are necessary"); Ex. 6, Smolen Aff. ¶ 7 ("Without the permit and its corresponding design, recordkeeping, reporting, and inspections, there is likely to be pollutant runoff and discharges. . . ."); *id*., at ¶ 9 ("In the absence of [permit] requirements, it is highly unlikely that the deregulated dairy CAFOs will not discharge animal waste and associated pollutants in New York's waters.").

high, sometimes excess, levels in many counties where dairies are located.[67] Because of the already high levels of P in many dairy counties, there may be limited capacity for dairies (200-299) to add additional cows or to import food processing waste, such as acid whey, without over-applying P.[68] This is highly problematic because increasing levels of soil P lead to increased P runoff and leaching losses from agricultural fields to surface and groundwater.[69] Given the prevalence of high levels of P in soils where dairies (200-299) are likely to expand—coupled with the fact that high levels of soil P lead to discharges of P into waterbodies—allowing dairies (200-299) to expand without developing and following CNMPs and without regulatory oversight obviously poses environmental risks. The need for oversight is all the greater if acid whey and other food processing wastes are added to the mix.[70]

NYSDEC admits that excess P already "is a leading contributor to water quality impairments in watersheds of New York and other areas of the nation."[71] It also admits that P "can have negative impacts on public drinking water reservoirs and potentially public health."[72] Nonetheless, the FEIS fails to consider the cumulative environmental impacts of allowing dairies (200-299) to land apply wastes containing P (such as manure and acid whey) without a

[67] Ex. 6, Exhibit A to Smolen Aff., at 2, 18-24, Ex. 6, Smolen Aff. ¶¶ 10-11, 22, 24. The FEIS errs in assuming that the potential environmental impacts of applying fertilizers and manure to agricultural land are limited to immediate erosion, runoff, and leaching issues. Ex. 2, FEIS, at 13. Research has consistently shown that accumulation of excess nutrients in soils (especially phosphorus) increases runoff losses of this nutrient even without active erosion or catastrophic loss in storm events. Ex. 6, Exhibit A to Smolen Aff., at 11-12.

[68] Ex. 6, Exhibit A to Smolen Aff., at 2, 18-24, Ex. 6, Smolen Aff. ¶ 11.

[69] Ex. 6, Exhibit A to Smolen Aff., at 2, 18, Ex. 6, Smolen Aff. ¶ 10.

[70] Ex. 6, Exhibit A to Smolen Aff., at 24, Ex. 6, Smolen Aff. ¶ 32.

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

[72] *Id*.

CNMP and without regulatory oversight, especially in areas where P is already present at high levels.

In response to the Comment Letter from Petitioners and other public interest organizations to NYSDEC regarding this issue,[73] NYSDEC briefly addressed the issue of existing P levels in New York's soils, concluding: "many New York dairy farms have sufficient land base to reasonably recycle phosphorus."[74] But, as Dr. Smolen explains in his affidavit, NYSDEC's analysis is unsupported by any citations, is contradicted by published findings, and errs by focusing exclusively on the amount of P at state-wide levels when what matters is the P levels in the areas where dairies (200-299) are located and on the particular fields that will receive the manure and whey generated by the Final Rulemaking.[75] In the absence of the nutrient analysis and planning required by a CNMP and regulatory oversight, it is likely that some deregulated dairies (200-299) will apply too much P in light of the existing levels in the soil, leading to discharges of nutrients to waterbodies.[76]

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

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[73] Ex. 26, Comment Letter from Citizens Campaign for the Env't, Earthjustice, Env't N.Y., Envtl. Advocates of N.Y., Riverkeeper, Sierra Club, and Waterkeeper Alliance, to Robert Simson, Div. of Water, NYSDEC (Jan. 22, 2013) [hereinafter Petitioners' Joint Comments].

[74] Ex. 2, FEIS, at 55.

[75] *See* Ex. 6, Smolen Aff. ¶¶ 23-25.

[76] *Id*. at ¶ 11.

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

Finally, the FEIS omits any discussion of the potential environmental impacts of its Part 360 rule change that completely deregulates the land application of fish hatchery-related food and fecal waste. Under prior law, a facility that land applies "undigested food and fecal material emanating from a New York State owned or licensed fish hatchery" had to be registered. 6 NYCRR § 360-4.2(b)(1) (regulations in effect until June 17, 2013). As amended by the Final Rulemaking, the Part 360 regulations completely exempt facilities that land apply food and fecal waste from fish hatcheries from regulation. 6 NYCRR § 360-4.2(a)(4).

In response to comments pointing out the likely environmental impacts of this deregulation, NYSDEC noted only that the risk of adverse environmental impacts is "slight" because currently all of the land application of fish hatchery waste occurs at NYSDEC facilities, is limited in amount, and has low nutrient content.[77] NYSDEC's theory that there is only a slight risk from completely unregulated land application of fish hatchery waste is not supported, and the impacts of this deregulation should have been assessed in the environmental review process. First, fish hatchery waste does in fact contain nutrients.[78] Second, disposal of waste with "low nutrient content" can have significant impacts if enough of it gets into water. What matters is the quantity of waste or the total mass of nutrients associated with the waste stream, not the proportion of nutrients that are in each increment of the waste.[79] NYSDEC contends that the amount of fish hatchery waste currently land applied is slight, but it does not provide any data to support that assertion. Nor is there any guarantee that the amount will

[77] Ex. 29, FEIS, app. D, at 42.

[78] Ex. 5, Smolen Aff. ¶ 33.

[79] *Id*.

always be slight (if indeed it is slight now). Finally, NYSDEC's claim that there will be no environmental impacts from this deregulation because land application of fish hatchery waste currently occurs only at state run facilities makes little sense. First, there is no requirement of state management, so this could change at any time, and second, a CNMP "is essential to good management and preventing discharges and polluted runoff when anyone land applies animal waste."[80] The omission from the FEIS of any "statement and evaluation of the potential significant adverse environmental impacts," of the fish hatchery waste deregulation, and the failure to take ***any*** look, let alone a "hard look," at the impacts of this aspect of the Final Rulemaking is a procedural and substantive defect under SEQRA. 6 NYCRR § 617.9(b)(5)(iii).

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

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

In violation of the procedural and substantive mandates of SEQRA, the FEIS does not provide an accurate description of the "public need and benefits" of the dairy deregulation. 6 NYCRR § 617.9(b)(5)(i). NYSDEC's discussion of "public need and benefits" is flawed

[80] *Id*.

because, as explained below: (1) it fails to address why environmental deregulation will lead to dairy expansions in the face of all the other pressing economic reasons that dairies have chosen not to expand; (2) it ignores established research showing that pushing traditional dairies to expand their herds will not strengthen the upstate economy; and (3) despite the fact that the entire benefit of the Final Rulemaking is economic, the FEIS does not evaluate the "net benefits" of the Final Rulemaking, meaning it does not take into account the costs of increasing the size of this category of dairy—such as subsidies to dairies (200-299) that participate in the AEM program, remedying environmental damage to water and air, and costs shifted to municipal dischargers in impaired watersheds.

As discussed in Point II, *supra*, the stated purpose of the Final Rulemaking is "to promote and foster" the dairy and yogurt industry.[81] According to NYSDEC, the primary benefit from the dairy growth it hopes to achieve is the creation of approximately 700-875 new jobs and the potential that over the next ten years dairy deregulation "***could*** result in nearly $150 million in additional economic activity. . . ."[82]

NYSDEC's claim that the Final Rulemaking by itself will spur 285 traditional dairies to grow their herds to over 200 mature cows over the next decade rests on the unsupported assumptions that the primary impediment to expansion of dairies in New York is environmental regulation of dairies (200-299).[83] Contrary to NYSDEC's portrayal, however, environmental

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

[82] *See* Ex. 29, FEIS, app. D, at 7 (emphasis added); Ex. 2, FEIS, at 10, 27; Ex. 3, Findings Statement, at 6-7.

[83] Ex. 3, Findings Statement, at 24 ("[w]hile there are numerous factors that influence the potential growth of dairy farms, . . . the most significant difficulty is financial – the structural best management practices (BMPs) can be very costly, and can entail large construction projects. . . . [Dairy] farms also indicate that they are reluctant to expand because of the anxiety of regulatory inspections and the perceived threat of enforcement"); Ex. 2, FEIS, at 10 (claiming that deregulation will "reduc[e] costs

regulations are not the critical barrier to dairy expansion in New York. Rather, the key factors that contribute to dairies choosing not to expand are: rising costs of feed; higher fixed costs associated with expansion; cost of additional cows; farmers have little or no control over their profits due to price controls[84]; mergers between dairy cooperatives reduce competition; vertical integration in the dairy industry; transportation costs; monopsony issues with single milk buyers and multiple sellers; and difficulties finding farm labor.[85]

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associated with the current regulatory scheme – required development and implementation of a CNMP" and will encourage traditional dairies to "increase their herd size to greater than 200 mature milking cows over the next decade").

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

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

Ex. 28, FEIS, app. B, Part 2 excerpt. One of the reports relied on by NYSDEC also acknowledges that a "major challenge to projecting any kind of financial results for a dairy farm is milk price and input volatility." *See* Ex. 34, FARM CREDIT EAST & CORNELL PRO-DAIRY, FINANCIAL IMPLICATIONS OF A DAIRY FARM EXPANSION – 190 COWS TO 290 COWS, at 2 (2012). Volatility around milk prices is a disincentive to dairies to increase their fixed costs, such as by building the infrastructure necessary for expansion.

[85] *See* Ex. 7, Exhibit A to Weida Aff., at 2-3; Ex. 6, Smolen Aff. ¶ 18 ("it is not the cost of compliance with the CAFO permitting program that limits the expansion of many small dairy farms, but rather other market forces"); *id*. ¶ 29; *see also* Ex. 35, Andrew Grossman, *Yogurt Boom Leaves Dairy Farmers Behind: As Greek-Style Product's Popularity Takes Off, New York State Milk Producers Can't Keep Up With Escalating Demand*, WALL ST. J. (June 26, 2012); Ex. 34, FARM CREDIT EAST & CORNELL PRO-DAIRY, FINANCIAL IMPLICATIONS OF A DAIRY FARM EXPANSION – 190 COWS TO 290 COWS (2012); Ex. 36, Steve Kadel, *New York Dairyman: Many Producers Shut Out of Chobani Market*, TWIN FALLS TIMES-NEWS (June 10, 2012). These articles were cited in Ex. 26, Petitioners' Joint Comments, at nn. 153-59.

In response to Petitioners' assertion in their Joint Comments that economic and market forces are more significant barriers to dairy expansion than environmental regulation (and thus that deregulation is unlikely to effectively spur milk production), NYSDEC took a head-in-the-sand approach, stating: "The economic barriers will not be addressed in the EIS, as the Department has no influence in this area."[86] Despite NYSDEC's refusal to take a "hard look" at the most salient barriers to dairy expansion in New York—itself a fatal flaw in the FEIS analysis—the facts call into serious doubt whether environmental deregulation will in fact spur much increase in herd size because non-regulatory factors make expansion financially risky.[87] Rather, the only certain result of the Final Rulemaking is that dairies that already have 200 to 299 cows and were already operating under CNMPs and BMPs (or that were working toward compliance) have been deregulated—a result that serves no valid governmental purpose.

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

In addition, NYSDEC's theory that growing traditional dairies to more than 200 cows will strengthen the upstate economy is contradicted by the evidence, and thus cannot be invoked as a "public need" or "benefit" of the deregulation. Longstanding research shows that the presence of large farms actually "***reduces*** the economic growth and health of rural

[86] Ex. 2, FEIS, at 20; *see* Ex. 29, FEIS, app. D, at 15 ("discussing . . . economic barriers to [dairy] expansion in the EIS would be beyond the intended scope").

[87] *See* Ex. 7, Exhibit A to Weida Aff., at 3-4; Ex., 6 Smolen Aff. ¶¶ 18, 30.

regions."[88] This is because large dairies are designed to use as little labor as possible and, thus, fewer jobs are created by larger dairies than would have been provided by the traditional dairies they replace.[89]

Studies show that large dairies do not spend the same amounts of money locally as traditional dairies, reducing the number of secondary jobs that might be created in the local economy.[90] 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.[91]

Even if NYSDEC were correct that deregulation could spur the growth of dairies and the upstate economy in general, the FEIS is deficient because it does not attempt to evaluate the direct costs to the taxpayers of creating dairy-related jobs—such as the cost of subsidizing dairies' development of responsible waste management practices and remedying environmental damage to water and air and the degradation of the value of polluted properties, as well as costs

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[88] Ex. 7, Exhibit A to Weida Aff., at 5-6 (emphasis added).

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

> While we understand that the ultimate goal is to increase employment in our state, we do not agree with the simple equation that more cows equal more jobs. There is more to this equation. With increased farm-size comes increased mechanization of farm processes. As it has with the logging industry, mechanization has drastically cut into the need for living, breathing employees. The Adirondack Council would rather see MORE farms than LARGER farms. Small farms not only provide a higher ratio of jobs, they enrich their community, feed their neighbors, and better protect open space character and water quality. For this reason amongst others, the Council cannot support the proposed modifications to the General Permit.

Ex. 28, FEIS, app. B, Part 2 excerpt (emphasis in original).

[90] *Id.*

[91] *See* Ex. 37, FOOD & WATER WATCH, THE ECONOMIC COST OF FOOD MONOPOLIES (2012), which is discussed in detail in Ex. 26, Petitioners' Joint Comments, at 46-47.

shifted to municipal dischargers in impaired watersheds. These costs would likely be significant. In Dr. Smolen's expert opinion:

> Any savings gained by failure to manage waste properly at the deregulated Dairy CAFOs will be costs borne by the public through degradation of water, air and soil resources. . . . [C]osts will be transferred from dairy operators and dairy processing facilities to the public and the environment. The public will pay the price in declining water quality, degraded recreational opportunities and declining ecosystems. Where a Phosphorus TMDL exists for a watershed containing dairies, there will be a direct shift of waste treatment costs from the dairy industry to the permit-holding industries and municipalities. This will be the result because any increasing load from the dairy industry will have to be made up by the permit holders. This could result in substantial costs to the public and other industries.[92]

NYSDEC recognizes that one of the purposes of the FEIS is "to evaluate whether the risks posed to the environment by the proposed regulation would outweigh potential economic benefits."[93] But here, where the purported "benefits" of a proposed agency action are solely economic, the only way for NYSDEC to estimate the true "public benefit" of the dairy deregulation is to deduct the direct on-going costs to the taxpayers of the state from its projection of economic benefit to come up with a calculation of "net public benefit." NYSDEC's failure to evaluate and describe the net public benefit of the Final Rulemaking violates SEQRA's procedural mandate to include in the FEIS a "description of the . . . public need and benefits" of the Final Rulemaking. NYSDEC's failure to take a "hard look" at the net public need and benefits of its action, and to include in the FEIS a reasoned elaboration of the basis for its determination that there will in fact be ***any*** net benefit to the public from deregulating dairies (200-299), violates SEQRA's substantive mandates. *Jackson*, 67 N.Y.2d at 417 (requiring reasoned elaboration of SEQRA determinations).

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[92] Ex. 6, Smolen Aff. ¶ 18.

[93] Ex. 29, FEIS, app. D, at 6.

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

The FEIS did not fulfill the requirement of SEQRA to "descri[be] and evaluat[e] . . . the range of reasonable alternatives to the action that are feasible," 6 NYCRR § 617.9(b)(5)(v), because it fails to consider a genuine "range" of reasonable options. While SEQRA does not require consideration of every possible alternative, it does require consideration of feasible alternatives that avoid environmental harm. Thus, for example, in *Vill. of Ossining v. Planning Bd. of the Town of Ossining*, No. 88-16248, slip op. at 7, 10-12 (Sup. Ct. Westchester Cnty. 1989),[94] the court found that a town planning board considering a subdivision on a lot that was partially in the Indian Brook Reservoir watershed violated SEQRA by not considering an alternative plot layout that would avoid siting homes within the watershed. So, here, as explained below, NYSDEC violated SEQRA by not considering any alternative approaches to increasing the state's milk supply that do not involve environmental deregulation and degradation.

The FEIS poses four alternatives to the proposed action: (1) the no-action alternative; (2) deregulating dairies (200-299), but mandating their enrollment in the AEM program; (3) deregulating dairies (200-299), but mandating that any deregulated facility located in a watershed with an impaired waterbody enroll in the AEM program; and (4) terminating the State's ECL permit program in its entirety and simply administering the federal Clean Water Act permit. In sum, NYSDEC considered two alternatives that were not realistically on the

[94] A copy of this unreported decision is provided for the Court's convenience as Ex. 54.

table: doing nothing and fully dismantling its CAFO regulations.[95] The only options it truly considered were slight variations on the proposal it did adopt: requiring all or some dairies (200-299) to participate in the AEM program—a result that NYSDEC claims will occur anyway, even if not required.

NYSDEC did not consider any alternative involving increasing milk production from the many New York dairies with more than 300 cows, which already operate under CNMPs and regulatory oversight, and thus already have structural and non-structural practices in place to handle large amounts of cow waste.[96] The FEIS also did not consider any alternative involving retaining the regulatory structure that had been in place, but providing additional financial assistance to dairies (200-299) to help them comply with the requirements of the permit. Indeed, the alternatives analysis is fundamentally flawed because it starts from the premise that any increased milk production in the state must come as a result of expanding small, unregulated farms to a size that would be considered a medium CAFO under federal law. By assuming that small unregulated dairies must bear the brunt of increasing the state's milk production, NYSDEC violated SEQRA's mandate that the FEIS "evaluat[e] . . . the ***range*** of

[95] Ex. 2, FEIS, at 111-21. Doing nothing was never a genuine option because the State committed to deregulating dairies before the SEQRA process ever began. On August 15, 2012, Governor Andrew M. Cuomo hosted a "New York State Yogurt Summit." *See* Ex. 12, Press Release from Governor's Press Office (Aug. 15, 2012). The Governor told summit attendees that he wants New York to become the yogurt capital of the United States. Ex. 13, Freeman Klopott, *Cuomo Says Dairy Industry Can Make New York U.S. Yogurt Capital*, BLOOMBERG BUSINESSWEEK (Aug. 15, 2012). At the summit, New York State Department of Agriculture and Markets Commissioner Darrell Aubertine announced that the state was "immediately increasing the animal threshold required for the CAFO permit from 200 to 300," thereby exempting dairy farms within that size category from environmental permitting requirements. Ex. 13, Karen DeWitt, *Cuomo Makes a Moo-ve for More Cows at 'Yogurt Summit,'* WNYC NEWS (Aug. 15, 2012). This high-level commitment to deregulating dairies with 200 to 299 cows predetermined the alternative NYSDEC would choose, in violation of the purpose of SEQRA that environmental review be a substantive part of the agency's decisionmaking, not merely a statement disclosing decisions that have already been made—as was the case here.

[96] Ex. 7, Exhibit A to Weida Aff., at 2-3.

reasonable alternatives to the action that are feasible." 6 NYCRR § 617.9(b)(5)(v) (emphasis added). *See* Ex. 54, *Vill. of Ossining*, slip op. at 10-11 (planning board violated SEQRA by approving subdivision in which houses would be built in watershed without looking at alternative plot layouts in which homes would be built outside the small portion of the plot within the watershed); *Brander v. Town of Warren Town Bd.*, 18 Misc. 3d 477, 481 (Sup. Ct. Onondaga Cnty. 2007) (town failed to consider all reasonable alternatives to construction of turbine wind farm where it did not consider alternative sites, alternative project size, alternative turbine size, or alternative design).

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

4. There Is No Reasonable Basis to Conclude That NYSDEC's Mitigation Theory—That Dairies (200-299) Will Voluntarily Adopt the Costly Practices That the Deregulation Was Designed to Make Optional—Will Be Effective.

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

to conclude" that its proposed mitigation "will in fact minimize" the serious water quality impairments that will result from the Final Rulemaking.[97] *Id*.

The SEQRA documents describe the required "mitigation measures" as consisting of NYSDEC's "***expect[ation]*** that ***many*** of the permit exempt~~ed C~~AFOs . . . would take advantage of" the "numerous voluntary programs that promote best management practices and industry guidelines," both "because of available funding, as well as the farm's economic self-interest" in avoiding enforcement actions under statutes and regulations that protect public health and the environment.[98]

NYSDEC's mitigation proposal is based on two fundamentally inconsistent premises: (1) that deregulation is necessary because the cost of the responsible waste handling measures required by operating under the CAFO General Permit prevents traditional dairies from increasing their herd size to more than 199 cows; and (2) that dairies (200-299) will voluntarily adopt responsible waste handling measures even if not required to do so, which will mitigate any potential environmental impact. These statements cannot both be correct.[99] The FEIS

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[97] *See generally* Ex. 6, Smolen Aff. ¶ 26.

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

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

> We are troubled by the Department's logic in crafting the proposed rules. The Department indicates that the rules are being proposed because the existing permit requirements are perceived as being overly burdensome for the medium-sized CAFOs. At the same time, the Department argues that any environmental impact will be mitigated because despite the repeal of the required permit, medium CAFOs are still going to comply with the Comprehensive Nutrient Management Plan and Agricultural Environmental Management (AEM) in order to receive additional legal protection. Essentially the Department seems to be saying we have to do this

provides no "reasoned elaboration" explaining why NYSDEC "expect[s]" that dairies (200-299) will voluntarily develop responsible waste management practices, including CNMPs and BMPs, when the stated purpose of deregulating these facilities is to enable dairies (200-299) to avoid the significant financial costs of developing CNMPs and BMPs to manage waste if their herds grow to between 200 and 299 cows.[100] *Jackson*, 67 N.Y.2d at 417 (requiring "reasoned elaboration" of determinations required by SEQRA).

> because providing this level of environmental protection is too expensive, but the public shouldn't worry because farms will keep providing the same level of environmental protection anyway.

Ex. 28, FEIS, app. B, Part 2 excerpt.

[100] *See* Ex. 3, Findings Statement, at 24. *See also* Ex. 6, Exhibit A to Smolen Aff., at 7-8. The responsible waste management practices that are no longer required as a result of the Final Rulemaking, and thus which NYSDEC's mitigation proposal suggests deregulated dairies will undertake voluntarily, include:

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

Id.

In direct contravention of NYSDEC's Alice-in-Wonderland mitigation theory, there is a large body of evidence from actual experience, as well as surveys of dairy owners, showing that voluntary, altruistic acts are highly unlikely in this industry.[101] Consistent with this evidence, currently only about one-half of New York dairies with 100-199 cows have implemented best management practices for managing waste through participation in AEM.[102]

To the extent that NYSDEC's mitigation theory rests on the "expectation" that dairies (200-299) will voluntarily develop responsible waste management practices because the state will provide them with funding to do so,[103] the FEIS does not provide a "reasoned elaboration" for why the state will not or could not make these funds available to assist ***regulated*** dairy facilities to come into compliance with the requirements of the Part 750 regulations and the CAFO General Permit. *Jackson*, 67 N.Y.2d at 417 (requiring "reasoned elaboration"). In other words: why is the state willing to make funds available to dairies (200-299) if they are unregulated, but not to assist such dairies to comply with environmentally protective regulatory requirements?

Nor is it clear whether the state's asserted commitment to funding responsible waste management practices at dairies (200-299) will go beyond 2013, or if this year's largesse is merely a temporary infusion of money designed to help the Final Rulemaking and CAFO

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[101] Ex. 7, Exhibit A to Weida Aff., at 6-7; Ex. 6, Exhibit A to Smolen Aff., at 29, Ex. 6, Smolen Aff. ¶¶ 14, 25; Ex. 38, 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, 489 (Dec. 2001) ("Based on our analysis, it appears that agricultural environmental policy in New York and elsewhere will need to extend or move beyond the present voluntary program approach to meet water quality objectives."); Ex. 26, Petitioners' Joint Comments, at 57-58 n.210.

[102] Ex. 2, FEIS, at 107 ("the overall AEM participation rate for dairy farms with 100 to 199 cows is 63%"; 53% have implemented best management practice systems); *see* Ex. 6, Smolen Aff. ¶ 25.

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

Permit Modification withstand scrutiny. What is clear is that this year's funding level is highly atypical. In recent years, many New York dairy farms have been denied cost-sharing money for waste management. For example, New York State Soil and Water Conservation Committee minutes show that in the 2012-2013 fiscal year, only a little over half of requests for funding were granted.[104] The FEIS lists numerous sources of federal funding for conservation practices. However, these programs are also severely underfunded and in some cases not applicable to the waste management structures and practices needed on dairy farms. For instance, the Farm and Ranch Lands Protection Program provides funding for the purchase of development rights and has no connection to a farm's waste management practices. The Environmental Quality Incentives Program, likely the only listed program that might supply any significant funding for structural waste management improvements, only funded between 15% and 67% of applications in each year between 2000 and 2009.[105]

NYSDEC's theory that dairies (200-299) will voluntarily adopt responsible waste management practices due to the threat of enforcement is unrealistic given the fact that many discharges are not easily detectable and that NYSDEC has limited capacity to adequately monitor the dairies (200-299) to determine if they are discharging wastes.[106] As Dr. Smolen explains: "The enforcement option is only likely to be effective in the most egregious cases, where direct discharge has resulted in visible catastrophic damage. Most impacts are likely to

[104] Ex. 39, N.Y. SOIL & WATER CONSERVATION COMMITTEE, STATE COMMITTEE MINUTES (Feb. 14, 2012).

[105] Ex. 40, MEGAN STUBBS, CONG. RESEARCH SERV., ENVIRONMENTAL QUALITY INCENTIVES PROGRAM (EQIP): STATUS AND ISSUES 8 (Aug. 3, 2012).

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

be lower level and generally out of sight."[107] Yet such low level, chronic discharges "often lead to cumulative downstream water quality impairments."[108]

NYSDEC admits that it has limited resources to monitor regulated CAFOs, let alone unregulated AFOs. It acknowledges that "staffing is limited, and staff will not be on the ground specifically searching to identify dischargers. Staff will respond to complaints and suspected violations if made aware of them, but likely will not be able to seek out and search for dischargers."[109] NYSDEC's lack of enforcement is confirmed by documents Petitioners obtained through a Freedom of Information Law request for records of all inspections conducted by NYSDEC of, and all notices of violation issued to, dairies with fewer than 300 dairy cows since January 1, 2008. Petitioners determined from the records that, of the apparently 75 dairies (200-299) that are immediately impacted by this program revision, 52% have not been inspected in the last six years and 74% have not been inspected in the last two years. Of the 36 facilities that have been inspected in the last six years, nearly all have either discharged or failed to implement the NYSDEC-mandated practices necessary to prevent discharges.[110] Yet NYSDEC has issued Notices of Violations related to these violations at only eight dairies (200-299).[111] Notably, since January 2008, NYSDEC has not inspected any dairy that was not subject to a SPDES permit, suggesting that unregulated dairies (200-299) do not have realistic fears of enforcement efforts. Nor is it plausible that the threat of inspection by EPA will compel dairies (200-299) to voluntarily develop and follow CNMPs. EPA's website

[107] Ex. 6, Exhibit A to Smolen Aff., at 9.

[108] Ex. 6, Smolen Aff. ¶ 26.

[109] Ex. 29, FEIS, app. D, at 35; *see* Ex. 2, FEIS, at 119 ("Department staffing in the CAFO program is limited, making it difficult to allocate resources necessary to identify dischargers.").

[110] *See* Ex. 16, NYSDEC, Inspection Reports and Notices of Violation.

[111] *See id*.

indicates that between 2008 and 2010, its enforcement actions were limited to only two medium dairy CAFOs in New York, and the only dairy that was fined was covered by a SPDES permit.[112]

Under NYSDEC's view, deregulation will incentivize traditional dairies to grow to over 200 cows insofar as it lowers the costs of expansion. But the "costs of operating an effective pollution control system are virtually the same with or without a permit."[113] As Dr. Smolen explains, there is a necessary trade-off between regulatory cost and environmental cost:

> if the industry maintains the necessary level of pollution control the only significant cost savings would be those of the regulatory agency, which would no longer be called on to review and grant permits. . . . If the industry achieves a significant cost saving, it will be at a cost to the environment and other industries and municipalities that remain under permit. If the industry chooses to avoid the costs of designing and operating proper waste handling, treatment, and storage systems, and land application, the pollution of the state's waterbodies will increase.[114]

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

In response to public comments about the shortcomings in NYSDEC's "expectation" of mitigation, NYSDEC amended the EIS to "clarify that the Department may designate AFOs as Small CAFOs, which would enable the Department to effectively regulate AFOs that pose a

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[112] *See* Ex. 41, EPA, National Enforcement Initiatives for Fiscal Years 2008-2010: Clean Water Act: Concentrated Animal Feeding Operations.

[113] Ex. 6, Smolen Aff. ¶ 15.

[114] Ex. 6, Exhibit A to Smolen Aff., at 8; *see* Ex. 7, Weida Aff. ¶ 6.

threat to water quality."[115] The proposal to rely on designation of discharging dairies (200-299) as Small CAFOs is inconsistent with NYSDEC's obligations under the Clean Water Act, as discussed in Point IV, *infra*. This therefore provides no mitigation.

NYSDEC's mitigation plan (or more correctly, its wishful expectation) is so far-fetched and so unlikely to result in meaningful protection for the environment that it is as if the FEIS had no discussion of mitigation at all, a result that clearly would not comport with the strict procedural requirements of SEQRA. ECL § 8-0109(2)(f); 6 NYCRR § 617.9(b)(5)(iv). At a minimum, NYSDEC did not take a "hard look" at mitigation measures that would actually minimize the environmental impact, and did not provide a "reasoned elaboration" for why voluntary compliance is realistic, or for how—if dairies (200-299) continue to implement responsible waste handling measures—there would be any net cost-saving statewide (meaning that costs may be shifted to taxpayers or municipal dischargers, but will still occur). Given these failures in the mitigation analysis, NYSDEC failed to undertake the kind of meaningful environmental review that SEQRA requires. *See Jackson*, 67 N.Y.2d at 426 (court considered whether agency had "reasonable basis to conclude" the mitigation measures will "in fact minimize those adverse effects").

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

Despite all of the failings in NYSDEC's environmental analysis—the failure to consider the environmental impacts of disposal of acid whey from yogurt manufacturing, irrationally

[115] Ex. 29, FEIS, app. D, at 6.

downplaying the likelihood of environmental impacts in reliance on a pipedream of voluntary compliance, omitting analysis of the cumulative impacts of applying P on saturated lands, the failure to evaluate net economic benefits of the Final Regulation, the complete failure to consider alternatives for increasing milk production that do not involve dairies with fewer than 300 cows, and the fallacies underlying the proposed mitigation—NYSDEC's Findings Statement irrationally concludes that deregulation of dairies (200-299) will "benefit New York State by promoting the dairy industry and increasing economic opportunities, while at the same time minimizing any potential environmental impacts."[116] NYSDEC also perfunctorily makes the finding required by ECL section 8-0109(8), that "from among the reasonable alternatives," the Final Rulemaking "minimizes or avoids adverse environmental effects to the maximum extent practicable."[117] For all of the reasons above, these findings are belied by the facts in the record, are undermined by the significant omissions in NYSDEC's analysis, and lack credibility due to the logical shortcomings of NYSDEC's reasoning and assumptions. In addition, NYSDEC's conclusions are not supported by any "reasoned elaboration."

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

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

[117] *Id*. at 26.

POINT IV

NYSDEC'S DECISION TO RELY ON DISCRETIONARY DESIGNATION OF DISCHARGING DAIRIES (200-299) AS SMALL CAFOS DOES NOT MEET THE MINIMUM CWA REQUIREMENTS.

Section 402(b) of the CWA authorizes a state to "administer its own permit program for discharges into navigable waters within its jurisdiction." 33 USC § 1342(b). However, for delegated CWA programs, such as New York's, federal law sets a legal floor beneath which its protections for the waters of the state may not fall. Section 510 of the CWA prohibits states that operate federally-delegated water permit programs from "adopt[ing] or enforc[ing] any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is ***less stringent than*** the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under [the CWA]." 33 USC § 1370; *cf. Natural Res. Def. Council, Inc. v. EPA*, 859 F.2d 156, 186-87 (D.C. Cir. 1988) (noting that in drafting the CWA, "Congress intended federal minima . . . to take precedence," and while "[s]tates are to be centrally involved in the Act's administration, . . . their involvement is to be in the achievement of federal goals."). New York law also is clear that federal law sets the floor for state regulation. *See* 6 NYCRR §§ 750-1.11(a)(1) and (9) (requiring each issued SPDES permit to ensure compliance with CWA effluent limitations and the provisions of 40 CFR § 122.23 relating to CAFOs).

As revised by the Final Rulemaking and CAFO Permit Modification, NYSDEC's CAFO program is less stringent than federal law in the way NYSDEC is authorized to respond if it determines that an unregulated dairy (200-299) is discharging. Under the CWA and the federal CAFO regulations, 40 CFR §§ 122, 123, 412, a dairy facility qualifying numerically as a Medium CAFO (i.e., an AFO with between 200 and 699 mature dairy cows) that is found to

be discharging pollutants in any amount ***must*** obtain a NPDES permit and ***is*** subject to enforcement, by operation of law. 40 CFR §§ 122.23(b)(6) & (d)(1). NYSDEC, on the other hand, has created a less stringent regulatory scheme. Under the Final Rulemaking and CAFO Permit Modification, if a dairy (200-299) is found to be discharging, NYSDEC has the discretion to allow the discharging dairy to continue operating without a permit and without regulatory oversight. At least twice in the FEIS, NYSDEC states that when it determines an "AFO" with the requisite number of animals to qualify as "medium-sized" has discharged, it has the discretion to designate it as a Small CAFO. For example, NYSDEC claims, "[a]n AFO with 200-299 mature dairy cows found to be discharging ***can*** be designated as a Small CAFO and ***could*** be subject to enforcement actions."[118] Moreover, NYSDEC concedes that a discharging dairy (200-299) would not be considered a CAFO that is required to obtain a permit unless designated:

> Because ~~C~~AFOs between 200 and 299 mature dairy cows would no longer be required by permit (as they would no longer be considered a CAFO ***unless designated***) to spread manure in accordance with a CNMP, there is the potential for increased adverse environmental impacts from runoff caused by the unmanaged manure.[119]

The requirement of designation before a discharging AFO can be regulated under the SPDES program adds an additional bureaucratic and discretionary step that is not present under federal law. If NYSDEC, in its discretion, decides to designate a discharging AFO as a Small CAFO in order to bring it under the SPDES permit program, it will do so based on the factors listed in the Modified ECL CAFO General Permit.[120] Among other considerations, the

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[118] Ex. 2, FEIS, at 81 (emphases added).

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

[120] Ex. 4, Modified ECL CAFO General Permit, at app. A – Definitions, § K.

Modified ECL CAFO General Permit provides that NYSDEC may designate an AFO as a Small CAFO upon assessing "the size of the AFO and the ***amount*** of waters reaching the State"; the "***means of conveyance*** of animal wastes and process waste waters into waters of the State"; and the factors "affecting the likelihood or ***frequency*** of discharge of animal wastes, manure and process waste waters into waters of the State."[121] Thus, in order for NYSDEC to require a dairy (200-299) to obtain a SPDES permit, the facility must not only be discharging, it must be discharging in excess volumes, through certain undefined means of conveyance, and/or in excess frequencies.

In contrast, under the federal CAFO program, a dairy with 200 to 299 cows that discharges ***any*** pollutants would be required to obtain a NPDES permit. *See* 33 USC §§ 1311(a), 1342(a) (requiring a permit for "the discharge of ***any pollutant***") (emphasis added). Thus, NYSDEC's addition of the additional step of "designating" discharging Medium AFOs as Small CAFOs weakens New York's SPDES CAFO program and makes it facially inconsistent with, and less stringent than, the federal NPDES program.

Compounding this deficiency, NYSDEC openly admits that it will not be able to properly identify discharging dairies (200-299) because "staffing is limited, and staff will not be on the ground specifically searching to identify dischargers. Staff will respond to complaints and suspected violations if made aware of them, but likely will not be able to seek out and search for dischargers."[122] NYSDEC has also recognized that the only way to know if

[121] *Id*.

[122] Ex. 29, FEIS, app. D at 35.

a CAFO is discharging, or has discharged, is through its implementation of a CNMP.[123] Without NYSDEC staff available to seek out dischargers, or the requirement to implement a CNMP, NYSDEC will have no way to identify dairies (200-299) that discharge or to verify that dairies (200-299) are not discharging.

Consequently, NYSDEC has failed to regulate dairies (200-299) as stringently as EPA would if it ran New York's CAFO program, in violation of CWA section 510, 33 USC § 1370 (prohibiting states from enacting less stringent regulation). This failure to "perform a duty enjoined upon it by law," CPLR § 7803(1), and the supporting "arbitrary and capricious" determinations made by NYSDEC, *id.* at § 7803(3), render the Final Rulemaking and CAFO Permit Modification invalid.

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

CONCLUSION

For all of the above reasons, as well as those set forth in the Amended Verified Petition and Complaint and all supporting papers submitted therewith, Petitioners respectfully request judgment and an order: (1) declaring that Respondents have acted arbitrarily, capriciously, and contrary to law by issuing a Final Rulemaking and CAFO Permit Modification that fail to conform to the requirements of federal and state law in the manner described herein; (2) annulling, voiding, and vacating the Final Rulemaking and CAFO Permit Modification; (3) requiring immediate removal of the Final Rulemaking from the New York Codes, Rules, and Regulations; (4) directing the Respondents to issue immediately a press release notifying the public and the regulated community that the Rulemaking and Permit Modification are not in effect; (5) awarding Petitioners reasonable attorneys' fees and the costs and disbursements of this proceeding; and (6) granting such other and further relief as the Court deems just and proper.

Respectfully submitted this 27th day of September, 2013,

Pace Environmental Litigation Clinic, Inc.

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