

Responsiveness Summary for the Interim ECL CAFO General Permit GP-0-14-001

The proposed interim of State Pollutant Discharge Elimination System (SPDES) Concentrated Animal Feeding Operations (CAFO) General Permit was publicly noticed statewide on 12/18/13. The comment period ended on 1/17/14.

Two sets of comments were received. The first, from a group of environmental organizations, Earthjustice, Environment New York, Lower Susquehanna Riverkeeper, Riverkeeper Inc., Sierra Club Atlantic Chapter, Theodore Gordon Flyfishers, and Waterkeeper Alliance Inc, the second from a concerned citizen, Juanita Ball.

I. Environmental Organizations' Comments

Comment: The Draft Permit would renew the expiring general permit, GP-0-09-001, which went into effect on July 1, 2009, and was modified on July 29, 2013. The July 29, 2013 modifications (“2013 Permit Modifications”) to Permit GP-09-001 (“2013 Modified Permit”) were challenged by many of the undersigned organizations in an Amended Petition and Complaint filed in the Albany County Supreme Court on September 27, 2103.¹ The Draft Permit will keep in place the provisions of the 2013 Modified Permit that have been challenged as unconstitutional and illegal. For the reasons set forth below and in the memorandum of law accompanying the Amended Petition and Complaint challenging DEC’s May 8, 2013 CAFO rulemaking and 2013 Permit Modifications, the Draft Permit is seriously flawed.² Section A below sets forth why the Draft Permit runs afoul of the New York Constitution and New York and federal laws. Section B suggests amendments to the Draft Permit that would strengthen water quality protections and ensure that the permit is consistent with all applicable laws.

Response: *As indicated in the comment, the Draft Permit would renew expiring general permit, GP-0-09-001, which went into effect on July 1, 2009, and was modified on July 29, 2013 (2013 Modified Permit). The Draft Permit would be issued as an Interim Permit and would continue the provisions in the 2013 Modified Permit to allow DEC more time to discuss potential permit modifications with stakeholders and to wait for a court decision on the current lawsuit on the 2013 CAFO rulemaking and permit modifications. The Draft Permit would not change any provisions of the 2013 Modified Permit other than the expiration date of the permit and the permit number. Additionally, these comments have previously been addressed through DEC’s Verified Answer and Memorandum of Law in opposition to the First Amended Verified Petition and Complaint that was filed by environmental groups in Albany County Supreme Court (Index No. 4166-13). Copies of DEC’s Verified Answer and Memorandum of Law are available upon request.*

A. The Draft Permit replicates what is unconstitutional and illegal in the 2013 Modified Permit

Comment: DEC has no authority to alter the statutory and regulatory framework implementing the New York State Water Pollution Control Law (“WPCL”), which explicitly mandates that all point sources of pollutants, including all CAFOs,³ obtain permits prior to operation, 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.”⁴ As currently proposed, the Draft Permit would illegally continue to exempt animal feeding operations (“AFOs”) that stable or confine 200-299 mature dairy cows, whether milked or dry that “do not cause a discharge” from the requirement to maintain SPDES permit coverage.⁵ Thus, like the 2013 Modified Permit, the Draft Permit would directly violate the WPCL.⁶

In addition to the WPCL’s express prohibition on operation of a point source without a permit, under the Separation of Powers doctrine of the New York State Constitution, DEC may not issue regulations or modify SPDES permits for purely economic purposes. N.Y. Const., art. III, § 1. DEC has repeatedly explained that the sole purpose of its May 8, 2013 CAFO rulemaking and 2013 Permit Modifications was 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].”⁷ Consequently, the 2013 Permit Modifications are unconstitutional, as is DEC’s proposed Draft Permit, which would leave the 2013 Permit Modifications unchanged.

Moreover, as a result of the recent CAFO rulemaking and 2013 Permit Modifications, DEC’s CAFO program is now less stringent than federal law if DEC determines that an unregulated dairy with between 200 and 299 mature dairy cows is discharging. Under the Clean Water Act 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). DEC, on the other hand, has created a less stringent regulatory scheme. Under the recent CAFO rulemaking and modifications to General Permit GP-0-09-001, if a dairy with between 200 and 299 mature dairy cows is found to be discharging, DEC has the discretion to allow the discharging dairy to continue operating without a permit and without regulatory oversight.⁸ For the same reasons that the 2013 Permit Modifications failed to meet minimum CWA standards,⁹ the Draft Permit, if finalized, would continue to violate those standards. Finally, although permit renewals are typically categorized as Type II actions that do not require the preparation of an environmental impact statement,¹⁰ here DEC never undertook a legally sufficient environmental review of the underlying 2013 Permit Modifications.¹¹ Because the terms of the 2013 Permit Modifications are included verbatim in the Draft Permit, DEC cannot finalize this permit without satisfying SEQRA’s requirements.

DEC adopted the 2013 Permit Modifications 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 likely environmental impacts, reasonable alternatives, or meaningful mitigation. Specifically, DEC 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; (2) the likelihood that waste disposal at deregulated dairy AFOs without a comprehensive nutrient management plan (“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 CAFO rulemaking and permit modification indeed serve a

“public need” or offer a “public benefit”; (5) a “range of reasonable alternatives” before opting for the CAFO rulemaking and permit modification; and finally (6) whether the mitigation proposed was realistic. DEC’s Draft Permit would be invalid because DEC has yet to undertake a sufficient environmental review of the 2013 Permit Modifications.

***Response:** The Draft Permit would be issued as an Interim Permit and would continue the provisions in the 2013 Modified Permit. These comments were adequately addressed previously when the 2013 Modified Permit was issued. Additionally, these comments raise the same issues that are being litigated between DEC and environmental groups regarding the 2013 rule change and permit modifications. The commenters are referred to DEC’s Verified Answer and Memorandum of Law in Opposition to Petitioners’ First Amended Verified Petition and Complaint filed by environmental groups in Albany County Supreme Court (Index No. 4166-13). Copies of these documents are available upon request.*

B. DEC should amend the Draft Permit in order to comply with federal and state law and to ensure sufficient environmental protection.

Comment: DEC should amend the Draft Permit to explicitly require CAFOs with between 200 and 299 mature dairy cows to obtain permit coverage.

As outlined above, the exemption for medium CAFOs with between 200 and 299 mature dairy cows from permit coverage is illegal. Currently, the General Permit requires all other CAFOs to obtain permit coverage prior to operation and thus prior to discharge. Draft Permit GP-0-14-001 section II.A requires, “[n]otifications [of intent] for a new or expanded facility must be made at least 15 days prior to commencing operation of the new facility or the facility expansion, respectively.” *Id.* (emphasis added). Only dairy CAFOs with between 200 and 299 cows are exempt from the requirement to obtain coverage prior to operation. DEC should remedy this unlawful deregulation by removing the exemption contained in Appendix A of GP- 0-14-001 section K that relieves any “AFO that stables or confines 200-299 mature dairy cows, whether milked or dry that does not cause a discharge” from the duty to maintain permit coverage.

***Response:** These comments were adequately addressed previously with the issuance of the 2013 Modified Permit. Additionally, these comments are the same issues being litigated between DEC and environmental groups in Albany County Supreme Court (Index No. 4166-13). The commenters are referred to DEC’s Verified Answer and Memorandum of Law in Opposition to the First Amended Verified Petition and Complaint that was filed by environmental groups in Albany County Supreme Court. These documents are available upon request. Furthermore, all discharging CAFOs, regardless of size, must have permit coverage under CWA CAFO SPDES Permit GP-04-02.*

Comment: DEC should amend the Draft Permit to prevent discharges to both surface and underground Waters of the State.

In some sections of the Draft Permit, DEC includes protections that are limited to only surface waters. These protections must be extended to underground Waters of the State as well.¹² For instance, the draft revised permit would exclude from coverage “Small or Medium CAFOs that

discharge to surface waters.”¹³ DEC has not provided technical or scientific justification to suggest that discharges to underground Waters of the State will have no impact on the environment. In lieu of any such justification, DEC should exclude from coverage under the general permit all “Small or Medium CAFOs that discharge to waters of the State.” Similarly, Draft Permit GP-0-14-001 section I.C.b.5 would exclude from coverage under the general permit only “Large CAFOs that discharge to surface waters.” Id. (emphasis added). DEC should extend this protection to underground Waters of the State by excluding from coverage under the general permit all “Large CAFOs that discharge to waters of the State.”

Draft Permit GP-0-14-001 section III.D.b states:

[t]he permittee shall amend the CNMP, under the direction of an AEM [Agricultural Environmental Management] certified planner, prior to any: change in design, construction, operation, or maintenance that has the potential to impact the discharge of pollutants from the operation to the surface waters of the State; expanding operations beyond the contingencies specified in the CNMP. . . .

CNMPs function to protect underground waters in addition to surface waters from contamination due to misapplication or mishandling of CAFO wastes. CAFOs in areas of New York underlain by Karst formations present a heightened contamination threat to underground waters and drinking water supplies. Full consideration of these risks by a certified nutrient management planner is necessary prior to any change in design, construction, operation, or maintenance of a CAFO. Therefore, section III.D.b should apply to all Waters of the State, not only surface waters.

Finally, Draft Permit GP-0-14-001 section VI.E.f prohibits CAFO operators from building new facilities “in a surface water of the State.” This extension should prohibit construction or building of facilities in underground Waters of the State as well. Note that these changes should have no practical impact on permit coverage, but instead would make Draft Permit GP-0-14-001 internally consistent. Draft Permit GP-0-14-001 section I.B states, “[i]t shall be a violation of this General Permit, the [CWA], and the [ECL] for a facility with coverage under this General Permit to discharge. “Discharge” is defined by the permit to mean “any release of any pollutant . . . to waters of the State.”¹⁴ “Waters of the State includes “underground water.”¹⁵

Response: *The Department believes this permit to be protective of both surface and ground water quality. As such, the permittee must develop and implement a Comprehensive Nutrient Management Plan (CNMP) in accordance with Natural Resources Conservation Service - Conservation Practice Standard - Waste Management System (Number) Code NY312, to properly manage liquid and solid waste, including runoff from concentrated areas. Also, as stated in Part I.B. Maintaining Water Quality, "It shall be a violation of this General Permit, the Clean Water Act (CWA) and the Environmental Conservation Law (ECL) for a facility with coverage under this General Permit to discharge". A discharge is defined in Appendix A.R. of the Interim Permit, "Discharge means any release of any pollutant, including but not limited to manure, litter, process wastewater, food processing waste, digestate, or releases from feed*

storage areas to waters of the State.....". Further, Waters of the State are defined in Appendix RR of the Interim Permit.

Comment: DEC should require CAFO operators to comply with the most recent Natural Resources Conservation Service ("NRCS") standards.

Section III.A.d of Draft Permit GP-0-14-001 would allow CAFO operators to comply with "either the 2007 or the 2013 standard" for the U.S. Department of Agriculture's NRCS NY 590 standards. In many ways, the 2013 standards are more environmentally protective than the 2007 standards, and it is arbitrary and capricious for DEC to allow CAFO operators to elect to comply with out-of-date standards, as opposed to current standards, without providing a technical justification for its determination. Therefore, DEC should require compliance with the most recent standards.

Response: *DEC will address this issue with the next permit revision. It is impractical to require the new NY 590 Standard now as the software necessary for implementation of the new NRCS NY590 Standard has not yet been developed by USDA-NRCS.*

Comment: DEC should make clear that discharges of untreated food processing waste and digestate from food processing waste are illegal.

Section VI.E.a of Draft Permit GP-0-14-001 section insists that CAFO operators "prevent the discharge of all manure, litter, food processing waste, process wastewater and the contaminated runoff from a 25-year, 24-hour rainfall event for the location of the production area." The provision fails to make clear that all such discharges of food processing waste, whether during normal conditions or pursuant to an extreme weather event, are illegal.¹⁶ Similarly, section VI.E.b requires freeboard for waste storage structures that store manure, litter, food processing waste, digestate, and process waste water to protect against overflow during a 25-year, 24-hour discharge. Any renewal of the SPDES CAFO General Permit must clearly set forth the prohibition against all discharges of food processing waste regardless of weather conditions. Such an amendment to Draft Permit GP-0-14-001 would assist CAFO operators in avoiding potential legal and financial consequences of discharges of food processing waste or digestate.

Response: *Part I.B. of GP-0-14-001 states that CAFOs with coverage under this permit are not authorized to have a discharge. "It shall be a violation of this General Permit, the Clean Water Act (CWA) and the Environmental Conservation Law (ECL) for a facility with coverage under this General Permit to discharge." A discharge is defined in Appendix A.R. of the Interim Permit, "Discharge means any release of any pollutant, including but not limited to manure, litter, process wastewater, food processing waste, digestate, or releases from feed storage areas to waters of the State.....". Further, Waters of the State are defined in Appendix RR of the Interim Permit. No change is necessary.*

Comment: DEC should amend Draft Permit GP-0-14-001 to require Medium CAFOs to comply with all structural and non-structural best management practices prior to obtaining permit coverage.

Draft Permit GP-0-14-001 section I.B would establish different best management practice standards for Large and Medium CAFOs. The Draft Permit would require a Large CAFO to comply with all structural and non-structural controls, whereas a Medium CAFO would only be required to comply with non-structural controls.” There is no reasonable justification for this distinction. Indeed, as DEC recently stated, “the smallest medium CAFO has the pollution potential of a major sewage treatment plant.”¹⁷ DEC must require Medium CAFOs to achieve full compliance with structural and non-structural best management practices prior to operation.

Response: *The compliance deadline for medium CAFOs to fully implement all structural practices is June 30, 2014. That deadline is not being extended in the Interim Permit. No change is necessary.*

Juanita Ball’s Comments

Comment: The commenter disagrees with changes to the CAFO program, stating that there is no benefit to the majority of New York State residents. The commenter believes that CAFOs are detrimental to the environment, the animals involved, and human health.

Response: *DEC does not have authority to regulate how animals at CAFOs are handled. CAFOs are regulated by DEC for protection of the environment and public health. As such, the permittee must develop and implement a Comprehensive Nutrient Management Plan (CNMP) in accordance with Natural Resources Conservation Service - Conservation Practice Standard - Waste Management System (Number) Code NY312, to properly manage liquid and solid waste, including runoff from concentrated areas.*