SUPREME COURT
STATE OF NEW YORK

DAVID A. WEINSTEIN
ACTING JUSTICE

EMPIRE STATE PLAZA
P.O. BOX 7344, CAPITOL STATION
ALBANY, NEW YORK 12224
TELEPHONE (518) 242-3706
FACSIMILE (518) 242-3708

April 24, 2018

VIA E-MAIL AND FIRST CLASS MAIL

Eve C. Gartner, Esq.
Earth Justice
48 Wall Street, 19th Floor
New York, New York 10005

Re: Riverkeeper, Inc. v. Seggos
Index No. 902103-17

Dear Counsel:

Enclosed is the executed Decision and Order with regard to the above matter. The original is being forwarded to you for filing and service. A copy of the Decision and Order with all original supporting papers will be sent to the County Clerk for placement in the file, following the conference scheduled for April 30.

Should you have any questions or require anything further, please do not hesitate to contact chambers.

Sincerely,

Kelli A. Desnoyers
Secretary to Judge Weinstein

Enclosure

cc:

By Email Only

Andrew G. Frank, AAG.
Office of the Attorney General
28 Liberty Street
New York, New York 10005

PRESENT: HON. DAVID A. WEINSTEIN
Acting Justice

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of the Application of

RIVERKEEPER, INC., CORTLAND-ONONDAGA FEDERATION of KETTLE LAKE ASSOCIATIONS, INC., SIERRA CLUB, THEODORE GORDON FLYFISHERS, INC., and WATERKEEPER ALLIANCE, INC.,

Petitioners/Plaintiffs,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules

-against-

BASIL SEGGOS, in his capacity as the Commissioner of the NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Respondent/Defendant.

DECISION AND ORDER
Index No. 902103-17
RJI No.: 01-17-ST8618

(Supreme Court, Albany County, Article 78 Term)

APPEARANCES: EarthJustice
Attorneys for Petitioners/Plaintiffs
By: Eve C. Gartner, Esq.
48 Wall Street, 19th Floor
New York, New York 10005

Eric T. Schneiderman, New York State Attorney General
Attorney for Respondents/Defendants
By: Andrew G. Frank, Assistant Attorney General
Office of the Attorney General
28 Liberty Street
New York, New York 10005

Weinstein, J.

In this hybrid CPLR article 78 proceeding/declaratory judgment action,[1] petitioners/plaintiffs Riverkeeper, Inc., Cortland-Onondaga Federation of Kettle Lake Associations, Inc., Sierra Club, Theodore Gordon Flyfishers, Inc. and Waterkeeper Alliance, Inc. challenge a Concentrated Animal Feeding Operation ("CAFO") general permit[2] (the "Permit") issued by respondent New York State Department of Environmental Conservation ("DEC") on January 25, 2017, on the grounds that it violates the federal Clean Water Act ("CWA"), its implementing regulations, and New York State Environmental Conservation Law ("ECL"). Petitioners are not-for profit corporations or organizations that have among their stated purposes advocacy for environmental protection or conservation generally, and for clean water in particular. In addition to DEC, petitioners name the agency's commissioner, Basil Seggos, as a respondent.

I. BACKGROUND

A. Procedural History

On March 27, 2017, petitioners commenced this proceeding, asserting three causes of action, namely that DEC violated the CWA and ECL by issuing the Permit without: (1) a CWA compliant "Nutrient Management Plan" (First Cause of Action); (2) federally-mandated agency review (Second Cause of Action); and (3) federally-mandated public participation (Third Cause

[1] While the pleadings are styled as a hybrid petition/complaint, there is no separate cause of action for a declaratory judgment under CPLR 3001, although a declaration of the permit's invalidity is included in the relief sought. For simplicity's sake, in the remainder of this Decision and Order, the pleading is referred to as a "petition," and the parties as "petitioners" and "respondents."

[2] On the same day that DEC issued the subject permit bearing DEC identification number GP-0-16-002, DEC also issued a second general permit (GP-0-16-001), which regulates CAFOs that are not subject to the Clean Water Act (Resp Mem of Law at 11). By this action, petitioners solely challenge the former, and although there are occasional references to the second general permit in the record, it is not at issue here.

of Action).[3] Petitioners subsequently filed an amended notice of petition and amended petition/complaint, pleading essentially the same three claims (Am Pet/Compl, ¶¶ 74-93). Petitioners request that the Court enter judgment against respondents pursuant to CPLR 3001 and 7806 as follows: (1) adjudging and declaring that DEC's issuance of the Permit was in violation of lawful procedure, affected by errors of law, arbitrary and capricious, and an abuse of discretion; (2) declaring the Permit void; (3) directing DEC to commence a proceeding within 30 days to revise the Permit to conform to the requirements of the CWA, ECL and implementing regulations, and to issue a revised general permit no later than a specified date; and (4) granting petitioners the costs and disbursements of this proceeding (*id.* p. 25-26).

Respondents filed an answer and objections in point of law opposing the relief sought, together with an administrative record comprised of two volumes containing nearly 3,000 pages (NYSCEF Doc Nos. 28, 32-33). Oral argument was held on September 26, 2017.[4] At the Court's direction, petitioners and respondents made post-argument submissions (NYSCEF Doc Nos. 44 and 45).

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[3] Although the petition alleges violations of the ECL, there are no independent state law claims for the Court's consideration because the provisions of the ECL cited by petitioners simply mandate compliance with the CWA (*see* ECL § 17-0801 [purpose of statute is to "create a state pollutant discharge elimination system (SPDES) to insure that the State of New York shall possess adequate authority to issue permits regulating the discharge of pollutants from new or existing outlets or point sources into the waters of the state, upon condition that such discharges will conform to and meet all applicable requirements of the Federal Water Pollution Control Act"]). Respondents do not challenge the authority of this Court to rule on the compliance of the Permit with federal regulations, and in light of their incorporation into New York law, such falls within this Court's authority.

[4] In the interim, I granted a motion on behalf of the Towns of Lafayette and Ulysses, New York to file a brief as amici (NYSCEF Doc No. 35). In their brief, the amici assert that DEC has failed to adequately enforce the requirements of the CWA and its implementing regulations, thereby resulting in increased water pollution, and health and safety issues at the local and community level (NYSCEF Doc No. 35). They further argue that local governments are limited in their ability to regulate CAFO-related pollution, but unduly bear the consequences of remedying water pollution and related contamination (*id.*).

B. CAFOs Generally

Animal feeding operations are defined by regulation as farms where large numbers of animals are kept and raised in confinement (*see* 40 CFR § 122.23[b][1]). The animals held in such facilities include dairy and beef cattle, swine, horses, sheep, chickens, turkeys and ducks (Latessa Aff ¶ 10). CAFOs are a subset of animal feeding operations defined as those that discharge to surface waters and surpass certain size thresholds, as well as those that might be smaller but are nonetheless a significant contributor of pollutants to waterbodies (*see* 40 CFR § 122.23[b][2]).

Of particular relevance here are dairy cow CAFOs, which support New York's milk industry and yogurt manufacturing facilities (Gartner Aff, Ex 3 at 9, 20). CAFOs generate manure and other natural waste that contains plant nutrients.[5] Such waste is commonly stored in large pits and later spread on farm fields to fertilize crops. If excessive amounts of manure are applied to fields, it can leach into groundwater or be picked up by rainwater or snowmelt, resulting in contaminated runoff that can pollute lakes, rivers or other waters.

C. The CWA and its Implementing Regulations

The CWA "is a cornerstone of the federal effort to protect the environment," and "the principal legislative source of EPA's authority – and responsibility – to abate and control water pollution" (*Waterkeeper Alliance, Inc. v EPA*, 399 F3d 486, 490-491 [2d Cir 2005] [internal citations omitted]; *see also* 33 USC § 1251[a] [purpose of CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters"]). Specifically, the CWA

[5] An average dairy cow produces over 120 pounds of manure per day, and the average large New York dairy CAFO, which confines approximately 950 cows, produces over 110,000 pounds of animal waste per day (*see* Gartner Aff, Ex 2, at table 7-3).

prohibits the "discharge of any pollutant"[6] from a "point source" to "navigable waters" except when authorized by permit (33 USC §§ 1311[a]; 1342[a] & [b]; 1362[7], [12] & [14]). CAFOs are one of many point sources identified in the CWA (*see* 33 USC § 1362[14]).

1. National Pollutant Discharge Elimination System Permits

The CWA establishes the permitting program at issue in this litigation known as the National Pollutant Discharge Elimination System ("NPDES"), which is managed by EPA in partnership with delegated state environmental agencies (*see* 33 USC § 1342). While NDPES permits "authoriz[e] some water pollution," they "place important restrictions on the quality and character of that licit pollution" (*Waterkeeper Alliance*, 399 F3d at 491; *see Matter of Natural Resources Defense Council, Inc. v New York State Dept. of Envtl. Conservation*, 25 NY3d 373, 380-381 [2015]). Accordingly, NPDES permits "prescribe conditions . . . to assure" that any "discharge will meet . . . all applicable requirements" (33 USC § 1342[a][1], [2]). Congress explicitly included CAFOs among the entities subject to NPDES permitting requirements (33 USC § 1362[14]).

The conditions set forth in NPDES permits include "effluent limitations," which are defined as "any restriction . . . on quantities, rates, and concentrations" of discharges (33 USC § 1362[11]; *see also Sierra Club v Shell Oil Co.*, 817 F2d 1169, 1173 [5th Cir 1987] [defining effluent limits as the "actual restrictions on discharges"]). Some effluent restrictions consist of numeric limitations, while others are narrative provisions that prescribe certain outcomes, or require best management practices for pollution control (*see Waterkeeper Alliance*, 399 F3d at 502). Once a state agency has drafted a NPDES permit containing discharge conditions, the

[6] "Pollutant" is defined to include, among other contaminants, sewage, sewage sludge, industrial and agricultural waste (33 USC § 1362[6]).

CWA requires that the public receive notice of the draft permit and an opportunity to request a public hearing before the permit may be issued (*see* 33 USC § 1342[b][3]).

There are two categories of NPDES permits: individual permits and general permits. An individual permit is typically issued to a particular individual discharger, and contains conditions specific to that discharger based on information provided in the discharger's application (*see* EPA, NPDES Permit Basics, "What are the primary differences between an NPDES individual permit and an NPDES general permit," ["Permit Basics"] at https://www.epa.gov/npdes/npdes-permit-basics#pane-15). In contrast, general permits establish a common set of effluent limitations and other permit conditions that will apply to a number of "substantially similar" operations with the "same types" of waste and that "[r]equire the same effluent limitations [and] operating conditions" (40 CFR § 122.28[a]).

2. EPA's CAFO Regulations

In 2003, EPA promulgated a CWA rule that updated its then-existing NPDES regulations for CAFO general permits (68 Fed Reg 7176 [2003]). Various groups challenged that rule and, in 2005, the Second Circuit held, *inter alia*, that the rule failed to meet certain requirements of the CWA relating to agency review of NMPs and public participation (*Waterkeeper Alliance*, 399 F3d at 498-504). Thereafter, in 2008, EPA promulgated revised regulations to address the *Waterkeeper* decision (*Revised National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines for Concentrated Animal Feeding Operations in Response to the Waterkeeper Decision*, 73 Fed Reg 70418 [2008]). Industry groups challenged the 2008 regulations and the Fifth Circuit partially vacated them (*see National Pork Producers Council v EPA*, 635 F3d 738, 756 [5th Cir 2011]).[7] Finally, in 2012, EPA promulgated further

[7] The Fifth Circuit held that EPA exceeded its authority by attempting to regulate CAFOs without an actual discharge (*see National Pork Producers Council*, 635 F3d at 751). *National Pork Producers* also limited EPA's

revisions to its CAFO regulations to comply with the *National Pork Producers* decision (*see National Pollutant Discharge Elimination System Permit Regulation for Concentrated Animal Feeding Operations: Removal of Vacated Elements in Response to 2011 Court Decision*, 77 Fed Reg 44494 [2012]).

At present, EPA regulations provide as follows: a CAFO subject to regulation under the Permit obtains permit coverage by submitting a notice of intent ("NOI"), which includes a nutrient management plan ("NMP") with site-specific effluent limitations (*see* 40 CFR § 122.23[h][1]; *see also* Permit Basics at https://www.epa.gov/npdes/npdes-permit-basics#pane-16). By signing and submitting the NOI, the discharger agrees to comply with the requirements of the Permit, and provides certain basic information about the source(s) of any planned discharge (*id.*). Should the permitting authority make a preliminary determination that the NOI complies with the applicable EPA regulations, the NOI is "ma[de] available for public review and comment" and the public is afforded the opportunity to request a hearing (40 CFR § 122.23[h][1]).

If the NOI is ultimately approved, the NMP's site-specific effluent limitations are incorporated as terms and conditions of the Permit and are subject to enforcement by both the permitting authority and private citizens (*see id.*).

D. New York Environmental Conservation Law

DEC regulates CAFOs under the statutory water pollution control provisions of ECL article 17, as implemented by DEC through regulations, permits, inspections, and enforcement actions.

ability to levy additional penalties for a CAFO that fails to apply for a permit, even though it may ultimately face liability for an unpermitted discharge (*see id.* at 753).

1. State Pollutant Discharge Elimination System Permitting Program

The CWA relies on a federal-state partnership to achieve its purposes. Under the statute, states have the opportunity to apply to EPA for the authority to implement the CWA through their own state-law permitting program in lieu of EPA's NPDES program (*see* 33 USC § 1342[b]). Since 1975, DEC has had an EPA-approved program, known as the State Pollutant Discharge Elimination System ("SPDES") program (*see* 6 NYCRR § 750-1.1[a]; *see also Matter of Natural Resources Defense Council, Inc.*, 25 NY3d at 381). Its permits are referred to as SPDES permits and they must "meet all applicable requirements" of the CWA and all "rules, regulations, guidelines, criteria, standards and limitations adopted pursuant thereto", including federal provisions specific to CAFOs (ECL § 17-0801; *see* 6 NYCRR § 750-1.1[a][3], [9]). Prior to issuance, SPDES permits are subject to public notice, a 30-day public comment period, and at DEC's discretion, a public hearing (*see* ECL § 17-0805[1]).

Under ECL § 17-0803, it is illegal to discharge from a point source to surface waters of the State without a duly-issued SPDES permit. Article 17 also mandates that all SPDES permits shall contain effluent limitations required by the CWA or DEC and such other terms, provisions, requirements or conditions as may be necessary to meet the requirements of the CWA (see ECL §§ 17-0809[1]; 17-0815[7]). DEC's regulations further provide that SPDES permits are required for point source discharges and must contain appropriate effluent limitations (*see* 6 NYCRR §§ 750-1.3[d]; 750-1.4; 750-1.11[a][3], [9]).

2. New York's CAFO Permitting History

Since 1999, New York has had a general permit in effect regulating CAFOs pursuant to the CWA (Latessa Aff ¶ 22). In 2004, DEC issued a SPDES general permit for CAFOS with a

June 2009 expiration date.[8] In light of the federal regulatory developments discussed above, DEC began drafting a new permit and conducting outreach efforts with EPA, farm groups, environmental groups and other stakeholders (*id.* ¶¶ 26-28).

In December 2015, DEC published a notice that a draft renewal and modification of the 2004 permit was available for public review and comment (*id.* ¶ 29).[9] Following a 45-day public comment period, which ended February 7, 2016, DEC prepared written responses to the points raised in the comments, and made various changes to the draft permit based on that input (*id.* ¶¶ 30-31; R177-R265).

In addition, DEC received comments from the EPA, discussed in more detail below.

E. The General Permit at Issue

1. Standards Imposed

One of the principal means by which the Permit imposes pollution control requirements on a CAFO is by requiring that the CAFO comply with a set of standards for farm operations developed by the National Resource Conservation Service ("NRCS"), a federal agency located within the U.S. Department of Agriculture (Latessa Aff ¶ 38). For each state, the NRCS has a State Conservationist, whose responsibilities include establishing state specific policies, standards and procedures regarding soil, water and natural resource issues (*id.* ¶ 39). EPA has suggested that permitting authorities rely on NRCS standards when developing land application effluent guidelines for large CAFOs and to ensure appropriate design and construction of storage structures (*see* 68 Federal Register 7209, 7215 [Feb. 12, 2003] ["The permitting authority may

[8] That permit ultimately remained in effect until July 24, 2017 pursuant to the State Administrative Procedure Act § 401(2) (Latessa Aff ¶ 23).

[9] Although the relevant state statutes and regulations provide for a 30-day comment period (*see* ECL § 17-0805[1][b]; 6 NYCRR §§ 621.7[b][6]; 750-1.21[d]), DEC provided additional time, allowing comments until February 2016 (*id.* ¶ 30).

use the ["NRCS"] Nutrient Management Conservation Practice Standard, Code 590, or other appropriate technical standards, as guidance for development of the applicable technical standard"]; *id.* ["EPA encourages CAFOs to consider relevant ASAE and NRCS standards as one method to ensure appropriate design and construction"]).

In its permitting program, DEC has adopted a number of NRCS standards that set forth best management practices relating to subjects such as nutrient management, waste storage facilities, anaerobic digestion processes, waste transfer, vegetated treatment areas, treatment of dead animals and composting (Latessa Aff ¶ 41). Altogether, DEC incorporated 10 NRCS standards into the Permit as legally binding effluent limitations (*id.* ¶ 44). The Permit also imposes certain more stringent restrictions notwithstanding what the NRCS standard might allow (*id.* ¶¶ 46-47).

2. <u>Nutrient Management Plans</u>

Under the Permit, the owner/operator of a CAFO must prepare two NMPs: (1) the comprehensive nutrient management plan ("CNMP"), and (2) the annual nutrient management plan ("ANMP") (*id.* ¶ 48).

i. CNMP

The CNMP is a CAFO-specific document that contains a detailed analysis of its pollution generation possibilities and identifies pollution control practices to meet the Permit's requirements. The CNMP is an outgrowth of the State's Agricultural Environmental Management ("AEM") program, which is a voluntary process for farmers to develop and implement a management plan to protect natural resources (*see* Agriculture and Markets Law §§ 150 - 151-i; New York State Soil & Water Conservation Committee, Agricultural Environmental Management at 2, *at* http://www.nys-soilandwater.org /aem/ AEM_Brochure. pdf). Indeed, the

ECL specifically provides: "To the extent practical and consistent with the purposes of this title and title seven of this article, SPDES permits for farm operations participating in the agricultural environmental management (AEM) program as set forth in article eleven-A of the agriculture and markets law shall incorporate as part of the SPDES permit terms and conditions any AEM plan prepared for the permit applicant" (ECL § 17-0816). DEC explains that in developing the Permit, it elected to build on the existing AEM structure, rather than create a separate regulatory regime for meeting the CWA's requirements (Latessa Aff ¶ 54).

Under the Permit, all CNMPs must be developed or reviewed by an AEM certified planner hired by the permit applicant but certified by the State (*id.* ¶ 58; *see* Ag & Mkts Law § 151-a).[10] In addition, both the CAFO owner/operator and the AEM certified planner must certify in writing that the CNMP was prepared in accordance with all applicable NRCS standards and the terms of the Permit (Latessa Aff ¶ 59). DEC attributes its determination that CNMPs should be confidential and not subject to public disclosure to the policy set forth in Agriculture and Markets Law § 151-g (*see id.* ¶ 61), which provides: "AEM plans and on-farm surveys and assessments filed with the [Department of Agriculture & Markets] or filed with or prepared by county soil and water conservation districts shall be considered confidential and not subject to public disclosure, except such documents shall not be considered confidential as deemed necessary by the [Commissioner of Agriculture & Markets] or the district to implement the purposes of this article."

The application of the AEM program to the CNMP – and in particular its confidentiality requirement and the fact that the Plan is subject to approval by a privately contracted party

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[10] To become an AEM certified planner, an individual must: (a) complete certain training courses; (b) obtain certification by the American Society of Agronomy as a Certified Crop Advisor; and (c) be the subject of a determination by the State Department of Agriculture and Markets and the NRCS Conservationist that the individual is qualified to develop and review CNMPs (Latessa Aff ¶ 57).

certified by the State rather than by DEC itself – is at the heart of the challenge to the State permitting regime made by the present petition.

ii. ANMP

According to DEC, it developed the ANMP in an effort to harmonize the statutory confidentiality afforded to AEM plans under state law with the CWA requirement that NMPs be subject to agency review and public participation (Latessa Aff ¶ 63; Oral Arg Tr 5-6). The ANMP is submitted to DEC for review and public disclosure and comment, but it contains only a subset of information set forth in the CNMP (Latessa Aff ¶ 63). More particularly, the ANMP requires that the CAFO owner/operator list, on a field-by-field basis, the specific pollution control practices that were identified in the CNMP (*id.* ¶¶ 67-68). It is DEC's position that the ANMP contains the farm-specific effluent limitations prescribed in the federal regulations, and provides for the appropriate public disclosure required by those regulations.

The AMNP is subject to the following process: Initially, to obtain coverage under the Permit, a CAFO owner/operator must submit an NOI and an ANMP to DEC for review and approval (*id.* ¶ 64). The ANMP must be signed and certified by both the CAFO owner/operator and an AEM certified planner (*id.* ¶ 69). After DEC approves an initial submission, the Permit requires annual submission of a new, updated ANMP to DEC for review by March 31 of each subsequent year (*id.* ¶ 70). With regard to public participation, upon making a preliminary determination that the ANMP meets the minimum requirements contained in the Permit, DEC notifies the public[11] that the NOI and ANMP are available and provides a 30-day period for submission of public comments (*id.* ¶¶ 73-74). DEC then reviews the NOI and ANMP a second

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[11] DEC publishes the public notice in the New York State Environmental Bulletin, which it characterizes as a widely used online resource, the purpose of which is to notify the public of regulatory events relating to the environment and the availability of materials regarding those events (Latessa Aff ¶ 75).

time in conjunction with the public comments and determines whether to grant or deny coverage under the Permit (*id.* ¶ 76).

Should a CAFO propose a "significant"[12] change to its ANMP during the one-year term, the Permit requires the immediate submission of an amended ANMP (*id.* ¶¶ 77-78). Upon receipt of the amended ANMP incorporating the significant change, DEC follows the procedure outlined above for public notice and comment, and for agency review and approval (*id.* ¶ 78). In the event a CAFO proposes to make a change to its operations that does not qualify as "significant," the Permit requires that it be incorporated into the regular March 31 annual submission of the ANMP and into another document – the annual compliance report – which provides DEC with information regarding implementation of the ANMP over the previous year (*id.* ¶ 79). The regularly submitted ANMPs and annual compliance reports are available to the public upon request (*id.*).

3. Input from the EPA

In March 2016, DEC received a letter from EPA, which appended detailed comments on the draft permit (Latessa Aff ¶ 32). EPA noted, among other things, that the draft permit did not fully address the nine minimum measures for implementing an NMP, including ensuring adequate storage of manure, litter, and process wastewater, diversion of clean water and identification of protocols for appropriate testing of manure, litter, process wastewater and soil (*see* 40 CFR 122.42[e][1]; R0290; R0726-R0730); and failed to "clarify that the CNMP is required to be subject to public notice, comment and DEC review and approval before coverage becomes effective," and that the CNMP must "remain publicly available throughout the term of the permit" (*id.* ¶ 32; R0290). DEC avers that it reviewed and addressed EPA's comments

[12] The permit lists certain specific changes which qualify as "significant" (*see infra* p.27).

before issuing the final Permit on January 25, 2017 (*id.* ¶ 33), although it did not alter the confidential nature of the CNMP, nor did it subject it to DEC approval.

On March 10, 2017, EPA sent another letter to DEC, this time with comments on the final Permit. It recommended that DEC reconsider a few points, "particularly with respect to transparency, state oversight and opportunities for public participation" (*id.* ¶ 34; R0028). For instance, in regard to the matter of advanced notification of significant operational changes, EPA pointed out:

> [A]ll changes that affect the NMP must be reviewed, approved and publicized before being implemented, and substantial changes must be reviewed, approved, publicized, and subject to public comment/hearing. Neither the permit nor fact sheet clarify how members of the public will be notified about proposed NMP changes. The NYSDEC should provide clarification about how the public can learn about these opportunities to comment.

(R0037; *see* 40 CFR 122.42[e][6]).

EPA further stated:

> We recommend that the NYSDEC revise the proposed permit to address these matters. Short of that, we recommend the development of a public guidance document, which may include answers to Frequently Asked Questions, prior to the effective date of the permit. Such a document would explain how the permit will be interpreted and enforced consistent with the federal requirements we have identified and which will provide clarity to the public about how the public participation and state oversight processes will function.

(R0028).

In response, on May 31, 2017 DEC posted a Frequently Asked Questions ("FAQs") document pertaining to the Permit on its website (Latessa Aff ¶ 36; R0001-R0018). None of the FAQs addressed the specific concerns raised in EPA's March 2016 or March 2017 letters regarding subjecting the CNMP or any changes thereto to public comment or agency approval.

Notwithstanding the foregoing, upon EPA's review of the FAQs, it sent a brief letter to DEC on May 25, 2017, in which it stated: "We believe these FAQs demonstrate that the NYSDEC's Clean Water Act CAFO General Permit is consistent with the federal requirements" (R0019). EPA further noted that its "earlier concerns" had been "satisf[ied]" (Latessa Aff ¶ 37; R0019). The letter provided no citation to any specific FAQ, nor did it indicate how that document had resolved the concerns described above.

II. DISCUSSION

Petitioners argue that the Permit fails to meet key requirements of the CWA and its implementing regulations and is therefore invalid. Specifically, they allege that DEC's issuance of the Permit constitutes an "error of law" because it: (1) fails to require DEC review and approval of a CWA-compliant NMP and NOI before granting coverage to a CAFO (Am Pet/Compl ¶¶ 80-88); (2) provides no opportunity for the public to review and comment on a CWA-compliant NMP (*id.* ¶¶ 89-93); and (3) does not require the CNMPs and ANMPs to set forth enforceable, site-specific restrictions covering the full range of a CAFO's operations that are at high risk for polluting water (*id.* ¶¶ 74-79).

A. Standard of Review

As previously noted, EPA has the ultimate authority to administer the CWA, its implementing regulations and the related CAFO program. Thus, federal law controls whether DEC's construction of the statute and regulations at issue reflect an error of law (*see Matter of Natural Resources Defense Council, Inc*, 25 NY3d at 395 ["Unless and until EPA revises its 1999 regulations, DEC's SPDES general permitting program . . . must comply with them"]). Indeed, DEC acknowledges that it is required to follow the EPA regulations (Resp Mem of Law at 23). It contends, however, that it has done so.

In determining whether DEC's interpretation of the CWA and its implementing regulations is permissible, I must follow the principles reiterated by the Court of Appeals in *Matter of Natural Resources Defense Council, Inc.* As stated by the Court: "the construction given statutes and regulations by the agency responsible for their administration, if not irrational or unreasonable, should be upheld" and courts should not "second-guess[] the experience and expertise of state agencies charged with administering statutes and regulations" (*id.* at 397 [citations and internal quotation marks omitted]; *see also Matter of Lamar Cent. Outdoor, LLC v State of New York*, 64 AD3d 944, 947-948 [3d Dept 2009]). Inasmuch as EPA granted DEC the authority to implement the CWA through the SPDES program, DEC's interpretation of that program is entitled to deference (*see e.g. Matter of Entergy Nuclear Operations, Inc. v New York State Dept. of State,* 28 NY3d 279, 289 [2016]).

Nevertheless, where "the question is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise" on the part of DEC "[a]nd, of course, if [DEC's interpretation] runs counter to the clear wording of a statutory provision, it should not be accorded any weight" (*Matter of New York State Superfund Coalition, Inc. v New York State Dept. of Envtl. Conservation*, 18 NY3d 289, 296 [2011] [internal quotation marks and citation omitted]).

Further, where the regime at issue is one of "cooperative federalism," which requires a state or locality to "comply with the Federal administrative agency's regulations and rulings," it is the federal agency that is entitled to deference – when such is appropriate -- in interpreting its own regulations (*see Matter of Rodriguez v Perales*, 86 NY2d 361, 367 [1995]). The same principle applies to DEC's construction of the federal regulations at issue, which respondents are responsible for administering, but did not draft. That is, while DEC is entitled to deference in

matters falling with its expertise, there is no reason to defer to its construction of federal regulations, and deference does not extend so far as to prevent this Court from determining whether DEC's interpretation runs contrary to the specific language promulgated by the EPA.

The above recitation of applicable standards gives rise to one key question I must answer before I may turn to determining whether the DEC's permitting program complies with federal law: what is the impact of the EPA's determination in its May 25, 2017 letter, which indicated that the Permit is "consistent with the federal requirements" [R0019]? The short answer is: very little.

While courts must generally give deference to an agency's interpretation of its own regulations, interpretations contained in such documents as opinion letters, policy statements and manuals lack the force of law and, therefore, are not entitled to such deference (*see Christensen v Harris County*, 529 US 576, 587 [2000]). Rather, "opinion letters are entitled to respect . . ., but only to the extent that those interpretations have the power to persuade" (*id.* at 587 [internal quotation marks omitted]; *see Skidmore v Swift & Co.*, 323 US 134, 140 [1944]). Indeed, counsel for respondents agreed that each of the various EPA pronouncements should be given the same "the same level of consideration" (Oral Arg Tr 47), although he later asserted that the letter should receive "slightly more" weight, as it was the result of a dialogue between the state and federal agencies (*id.* at 54).

Upon consideration of the record before me, I find that EPA's letter has no persuasive force. In particular, I note that the agency's initial pronouncement appears to say the opposite of its ultimate conclusion as to the matters of confidentiality and public participation. Although an agency is permitted to change its administrative determinations, it "is obligated to supply a reasoned analysis for the change beyond that which may be required . . . in the first instance"

(*Motor Vehicle Mfrs. Ass'n v State Farm Mut. Auto. Ins. Co.*, 463 US 29, 42 [1983]; *see also National Cable & Telecommunications Assn. v Brand X Internet Services*, 545 US 967, 981-982 [2005]). Moreover, an "[u]nexplained inconsistency" in agency policy is "a reason for holding an interpretation to be an arbitrary and capricious change from agency practice" (*National Cable & Telecommunications Assn. v Brand X Internet Services*, 545 US 967, 981 [2005]; *see also Huntington Hosp. v Thompson*, 319 F3d 74, 79 [2d Cir 2002] ["While an agency is not locked into the first interpretation of a statute it embraces, it cannot simply adopt inconsistent positions without presenting some reasoned analysis"] [internal quotation marks and citation omitted]). In other words, where an agency's interpretation of a statute is inconsistent with the agency's past pronouncements and the agency does not set forth any reasonable justification for its change in course, the persuasiveness of that agency's interpretation is severely undermined (*see Matter of Terrace Court, LLC v New York State Div. of Hous. & Community Renewal*, 18 NY3d 446, 453 [2012]).

Here, EPA offered no explanation for its change of heart. The exceptionally brief, conclusory language contained in the May 25, 2017 correspondence says nothing about how DEC resolved the deficiencies EPA had previously identified. The lack of an explanation for EPA's change in position is particularly salient given that it had undertaken an extensive analysis in both March 2016 and March 2017, advised DEC that the Permit was legally insufficient, and specifically called out its failure to allow for public comment or agency review of the CNMP. While EPA's final letter indicated that prior shortcomings had been remedied via the FAQ, it in no way indicated how the FAQ document had "satisf[ied]" its "earlier concerns." Nor did EPA reference any particular FAQ in adopting its new position regarding the Permit's compliance

with the CWA. And whatever the nature of the "dialogue" between state and federal agency, no reference or reflection to it is contained in the May 25 letter.

In sum, I find that I cannot place any weight on EPA's May 25, 2017 letter in my ensuing analysis regarding the legal sufficiency of the Permit. I turn then, to assess petitioners' challenges on their merits.

B. DEC's Oversight of CAFO Permitting and Public Disclosure

Under EPA regulations, a permitting authority may not grant permit coverage without first reviewing the CAFO's NOI and NMP, and providing the public an opportunity for notice and comment (*see* 40 CFR § 122.23[h][1]; *Waterkeeper Alliance, Inc.*, 399 F3d at 502, 524 [invalidating portions of the EPA's 2003 CAFO Rule because it would have "allow[ed] permitting authorities to issue permits without reviewing the terms of [CAFOs' NMPs]" and, therefore, "[did not ensure that [regulated] CAFOs will, in fact, develop [NMPs] . . . that comply with applicable effluent limitations and standards"]). Specifically, the regulation provides that the State Director (defined as the "chief administrative officer of any State or interstate agency operating an 'approved program'" [40 CFR § 122.2]) must review the NOI to determine if it includes "a nutrient management plan that meets the requirements of § 122.42(e)," which sets forth various CAFO regulatory requirements and applicable effluent limitations and standards"; request additional information if necessary; notify the public of a preliminary determination to grant coverage under the Permit to the CAFO; make available for public review and comment the NOI "including the CAFO's nutrient management plan, and the draft terms of the nutrient management plan to be incorporated into the permit"; establish a time for the public to comment; respond to significant comments received; and, if necessary, require the CAFO owner or operator to revise the NMP (40 CFR § 122.23[h][1]).

DEC seeks to meet these mandates, while maintaining the confidential process of consultation with and approval by AEM planners, through its dual CNMP/ANMP structure. For the reasons set forth below, however, the CNMP clearly does not provide for the requisite agency oversight and public disclosure, while the information contained in the truncated ANMP is insufficient to meet the regulatory minimum set by the EPA. The Permit, therefore, falls short of the federal requirements on these points.

1. <u>The CNMP</u>

Preliminarily, I note that the CNMP is treated in a confidential manner (i.e. not subject to public notice and comment) and, for that reason alone, cannot qualify as an NMP under the CWA and EPA regulations (*see* 40 CFR § 122.23[h][1] [DEC must "make available for public review" the CAFO's NMP]).[13] Even if the CNMP were publicly available, however, the process by which an AEM planner reviews and certifies the contents thereof does not satisfy the agency oversight requirement (*see* R0113-114, R0116, R0120, R0130). Respondents portray AEM planners as a "corps of experts," certified by the State after a rigorous testing process and subject to a professional code of ethics (Resp Mem of Law at 15; Oral Arg Tr 25-26). But they are, nevertheless, private consultants retained and compensated by the CAFOs, and there is no apparent legal reason why a CAFO cannot discharge a planner if it is unhappy with its review, or decline to hire one with a reputation for stringency. In short, AEM planners have an inherent conflict of interest in undertaking the role of determining whether a CNMP complies with the

[13] In a 2015 EPA Animal agriculture assessment report, which pre-dates the issuance of the draft permit, EPA cautioned DEC regarding its "confidential treatment of CAFO CNMPs." It described such treatment as "not consistent with the 40 C.F.R. § 122.23(h) federal CAFO requirement, which requires [DEC] review of the CAFO's NMP and an adequate opportunity for public review of both a CAFO's NMP and the terms of the NMP incorporated into the draft permit (Gartner Aff, Ex 30 at 32). EPA concluded that "New York State's position of not requiring [DEC] review and public notice of CAFO CNMPs . . . is not in accordance with the federal CAFO requirements" (*id.*).

CWA. I cannot see how the use of private actors hired by the regulated entities meets the requirement for state agency review and approval.

Imagine the following hypothetical scenario: Federal law requires that state tax authorities review and approve a taxpayer's filing. To comply, the state tax department issues regulations allowing the taxpayer's accountant or tax attorney to approve the submission instead, and justifies such on the ground that accountants and attorneys are experts in the field and must comply with ethical standards. It would be apparent to all and sundry that such oversight, carried out by "regulators" hired and paid by the regulated party, would not be equivalent to regulation by the appropriate governmental agency. Yet respondents' argument is premised on just such an equivalence between AEM planners and the DEC itself. Moreover, DEC represents that the AEM planners will "as a general rule . . . prepare these plans" (Oral Arg Tr 26), and thus will both draft the CNMPs, and then review their own handiwork for compliance (*see* FAQ *in* R0017 ["The planner is certified to develop and review CNMPS for CAFOs"]). That process simply does not comport with the federal regulatory requirement that the NMP be subject to state agency review and approval.

Indeed, EPA explicitly rejected such a scheme in devising 40 CFR § 122.23(h)(1) -- the regulation setting forth the procedures for CAFOs to seek coverage under a general permit" (*see* 73 Fed Reg 70,440 [2008]). EPA explained that while state permitting authorities could seek advice or assistance from State-certified nutrient management planners, ultimately "[t]he permitting authority is responsible for reviewing NMPs and for ensuring that the terms of the NMP meet the applicable requirements of the NPDES process" (*id.*).

DEC attributes the lack of CNMP transparency to the requirements of Ag & Mkts Law § 151-g, which provides that certain materials prepared under the AME planner program are to be

kept confidential. Respondents contend this sets forth a "State policy of confidentiality" (*see* Resp Mem of Law at 16). That argument is unavailing, however, for four reasons.

First, the State cannot evade the requirements of federal regulations by pointing to an inconsistent state law. Were there in fact such a conflict, the state law would be subject to a challenge on preemption grounds (*see Guice v Charles Schwab & Co.*, 89 NY2d 31, 39 [1996], *cert denied* 520 US 1118 [1997] [preemption may arise when federal and state law conflict]). But there is no such conflict here as the confidentiality concern is entirely the product of DEC's own decision to use the AEM program to review the CNMPs. To the extent the confidentiality prescribed by that program is at odds with federal law, DEC must adopt a different, federally-compliant mechanism for the program, not insist that the rules of the vehicle it has adopted trump federal law.

Second, the statute itself allows the Commissioner of Agriculture and Markets to waive the confidentiality requirements when "deemed necessary" (Ag & Mkts Law § 151-g). Respondents present no reason why that could not have been done here.

Third, the notion that this State has a general policy of "confidentiality" in any context outside the particular rules applicable to certified AEM planners is simply wrong.[14] To the contrary, the overarching policy of the State of New York is "that government is the public's business and that the public, individually and collectively and represented by a free press, should have access to the records of government" (Public Officers Law § 84; *see also Matter of Social Serv. Empls. Union, Local 371 v Cunningham*, 109 Misc 2d 331, 336 [Sup Ct, NY County 1981],

[14] In respondents' post-argument submission, they note that a CNMP should be kept confidential since it may contain sensitive, non-public information, such as "the location of ammonia tanks that may be targets of methamphetamine manufacturers" (Resp Post-Arg Ltr at 3). Nothing in this Decision, Order and Judgment is meant to preclude DEC from adopting narrowly tailored confidentiality rules to shield information whose disclosure would endanger public safety, or reveal legitimate trade secrets. That said, in no way do these concerns require that the entire CNMP be kept confidential.

affd without opinion, 90 AD2d 696 [1st Dept 1982] ["It is clear that the public policy of this State favors accessibility by the public to decisions reached by government and to processes by which those decisions are reached"]). The confidentiality afforded to farmers in their consultations with AEM planners is the exception, not the rule.

Indeed, in commenting on the original AEM planner legislation, the Office of the Attorney General noted precisely this conflict:

> The confidentiality provision is in marked contrast to existing law governing SPDES permits (ECL § 17-0805), which provides for public notice and comment during the permitting process as well as full public access to the effluent data and the permits themselves, excepting only trade secrets. It also stands in stark opposition to the state policy favoring public access embodied in the Freedom of Information Law . . . and SEQRA . . . .

(Bill Jacket, Chapter 136 of the Laws of 2000, at 13).[15]

While the AEM program was enacted over this objection, it was as a "voluntary, incentive-based program" (Chapter 136 of the Laws of 2000, § 2). Under the Permit, it has become the sole vehicle for evaluating the CNMP, and thus the means for ensuring compliance with federal regulation. But federal law does not endorse a policy which elevates confidentiality over public access to information. To the contrary, the CWA emphasizes the importance of "[p]ublic participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the [EPA] Administrator or any State" (33 USC § 1251[e]).

Given all of the foregoing, I find that the CNMP does not comply with the CWA requirements for agency oversight, disclosure and public participation. I consider, then, whether these defects are remedied by the ANMP.

[15] The bill jacket is available at http://digitalcollections.archives.nysed.gov/index.php/Detail/Object/Show/object_id/20394.

2. The ANMP

Under the terms of the Permit, the only documents DEC must approve before granting coverage to a CAFO are its ANMP and NOI form (R0112-R0114). In reviewing the ANMP, DEC must consider whether it is "site-specific" (40 CFR § 122.42[e][5]) and contains "at a minimum . . . best management practices necessary to meet the [requirements set forth in the regulations]" for preventing discharges (40 CFR § 122.42[e][1]).[16] An NMP's "best management practices" constitute that CAFO's site-specific effluent limitations and standards (*id.*).

Although the Permit devotes 17 pages to describing the inner workings of the CNMP (R0115-R0132), it offers scant detail as to the content of the ANMP. In fact, the ANMP is simply defined as "the document containing the critical information of the . . . CNMP" (R0144), but the Permit does not offer any explanation of the meaning of the term "critical information."

In any case, CAFOs are directed to prepare their respective ANMPs using a template format, which reports the following: a statement of the maximum number of each animal planned to be confined, maps and/or narrative descriptions of the facility, and descriptions of the nutrient management practices to be employed (R0158-R0161). DEC acknowledges that an ANMP is a mere "outline" that reflects a "subset of the information contained in the CNMP" (Resp Mem of Law at 16-17).

This "outline" is clearly inconsistent with EPA's position that a CWA-compliant NMP is a "comprehensive . . . tool[] used to guide a wide range of practices regarding nutrient production, storage, and use" (73 Fed Reg 70443 [2008]). The EPA highlighted this precise concern on at least two occasions during the permit writing process. First, in March 2016 when

[16] Large CAFOs, including those with at least 700 mature cows, must also comply with the best management practices set forth in 40 CFR § 412.4.

providing comments on the draft permit, EPA remarked that "the ANMP does not contain the comprehensive NMP requirements" (R0332). It also directed that a "distinction between [an] ANMP and CNMP should be avoided, as all NMP requirements must be contained in one publicly available document" (R0307 [Comment 1]). The two-tiered CNMP/ANMP scheme clearly contravenes this instruction.

Then, in an August 2016 email exchange with DEC personnel, an EPA representative noted:

> "With just the ANMP template to go on, it seems that, as an abbreviation of the CNMP, the ANMP will necessarily be lacking some of the detail required in a CNMP. This detailed, site-specific information is what constitutes site-specific limitations. If this isn't required in the publically [sic] available ANMP, it makes it difficult for farms to be held accountable for those limitations."

(Second Gartner Aff, Ex. 5).

Nothing DEC has done subsequently, and in particular nothing set forth in the FAQs which ostensibly remedied the EPA's concerns, did anything to address this defect. The ANMP's inadequacies are particularly striking given that the CNMP is not subject to agency oversight and, therefore, DEC has no opportunity to undertake a meaningful review to determine if a CWA-compliant NMP was ever developed in the first place.

Further, the CNMP/ANMP structure is simply not consistent with the specific language of the federal regulations, which provide that DEC "make available for public review and comment the notice of intent submitted by the CAFO, *including the CAFO's nutrient management plan, and the draft terms of the nutrient management plan* to be incorporated into the permit" (40 CFR [h][122.23[h][1] [emphasis added]). I cannot square this broad disclosure requirement with a state permit that allows a CAFO to produce what it characterizes as an "outline" of the plan, and permits it to shield the more comprehensive version of that plan -- the

CNMP -- from public view. It necessarily follows that members of the public are deprived of the opportunity to review and comment on a CWA-compliant NMP before coverage is granted, in violation of 40 CFR § 122.23(h).

Finally, DEC indicates various ways in which it allows for public participation, requires certain disclosures and is diligent about responding to CAFO-related complaints (Resp Mem of Law at 17-21). But all of this is besides the point. The issue here is not whether DEC allows for some general amount of openness or input, but whether its permitting scheme complies with the specific requirements of the EPA regulations. For reasons set forth above, I find it does not.

3. Proposed Revisions

Petitioners also contend that the Permit violates the CWA because it does not require DEC to independently review and approve CAFOs' proposed revisions to an ANMP or CNMP (see 40 CFR § 122.42[e][6][ii]). Specifically, the regulations require that the CAFO owner "provide the [DEC Commissioner] with the most current version of the CAFO's nutrient management plan and identify changes from the previous version" and the Commissioner "must review the revised nutrient management plan to ensure that it meets the requirements of this section and applicable effluent limitations and . . . and must determine whether the changes to the nutrient management plan necessitate revision to the terms of the nutrient management plan incorporated into the permit issued to the CAFO" (40 CFR § 122.42[e][6][i] -[ii]). If no such revision to the plan incorporated into the Permit is necessary, the Commissioner is to "notify the CAFO owner or operator and upon such notification the CAFO may implement the revised nutrient management plan" (40 CFR § 122.42[e][6][ii]). If changes to the underlying plan are necessary, the Commissioner must determine whether such changes are "substantial." If they are

not, then the new plan need only be made publicly available; if they are, then a new notice and comment period is required (40 CFR § 122.42[e][6][ii]).

In sum, the EPA regulations specifically require prior state agency approval of any changes to the plan before they are implemented, public disclosure of revisions to the plan incorporated into the Permit, and notice and comment for substantial changes.

The Permit at issue does not follow these requirements. It does not mandate prior approval for *any* changes to the CNMP. Indeed, even prior notice to DEC is limited to a few changes that are characterized as "major" (R0131). Otherwise, the Permit only requires that revisions be recorded in the CNMP (the only copy of which is maintained at the CAFO) and noted in the annual compliance report, which is due by March 31 of the subsequent year (R0130-R0131, R0133).

The Permit similarly fails to require prior DEC review and approval for most changes to an ANMP until the March 31 following implementation (R0133-R0134). More specifically, and in direct contravention of 40 CFR § 122.42(e)(6), the Permit only requires that CAFOs obtain prior approval for a small subset of "significant" changes, defined as: (1) addition of new land areas not previously included in the ANMP (with certain exceptions); (2) changes to field-specific application rates that do not comply with NRCS standards; and (3) implementation of any other required management practices that do not meet NRCS standards (R0134). Such an approach was rejected by the EPA in a 2008 rulemaking, wherein it explained that "the process and criteria in 40 CFR § 122.42(e)(6) are reasonable and necessary" to comply with federal law, and reiterated that CAFOs must submit proposed changes "to the permitting authority and receive approval before a change is made, *not annually or at the beginning of each new permit cycle*" (73 Fed Reg 70,454 [2008] [emphasis added]). Since the regulation clearly directs

CAFOs to submit all proposed revisions for agency review and approval prior to implementation, DEC's argument that there is no set deadline for the submission of changes is wholly unavailing. Accordingly, as EPA pointed out in both its March 2016 and March 2017 comments (R0031, R0065, R0329, R0333), the Permit's failure to require DEC review and approval of all changes to the ANMP and CNMP before they are implemented amounts to a violation of the EPA regulations.

Respondents' argument to the contrary is that DEC "does review all ANMPs and amendments to ANMPs" (Resp Mem of Law at 3). But this is sleight of hand. The regulations do not require any review for "ANMPs" (a term which does not exist in federal regulations) – they require that the CAFO has presented all revisions to its plan for prior review before they may be implemented. The Permit before me does not so provide, and thus does not comply with the governing federal rules.

The Permit also fails to meet the federal regulatory requirements for public disclosure, notice and comment regarding NMP amendments. Inasmuch as the public is not afforded any notice of proposed changes or opportunity for comment due to the CNMP's confidential nature, it fails to meet the requirement that there be an opportunity for notice and comment before substantial revisions may go into effect (R0130-R0132). Nor is the public assured that it will see all the proposed changes to an ANMP before they are adopted, since the public need not be made aware of ANMP revisions until March 31 of the following year, so long as the CAFO deems them "non-significant" (*see* Oral Arg Tr 27).

A delay of this nature, and the vesting of discretion in the CAFO and its AEM planner as to which revisions may be presented to the oversight agency and the public, is at odds with the regulatory provisions and with Congress's underlying policy goal that the public play a

meaningful role in the revision of NMPs (*see* 33 USC § 1251; *Waterkeeper Alliance*, 399 F3d at 503). To this end, on at least two occasions during the permit writing process, EPA admonished DEC regarding its failure to "clarify how members of the public will be notified about proposed NMP changes" (R0030; *see also* R0065 (Comment A3), R0314 [Comment 27]). Again, nothing subsequent to this comment addressed the issue.

Given the foregoing, I find that the Permit violates the federal regulatory provisions regarding nutrient management plan revisions.

4. <u>The NOI</u>

On the other hand, the deficiencies EPA raised with respect to the NOI itself (as opposed to the NMP appended to the NOI) have been cured by DEC. As petitioners correctly point out, at the time the Permit was issued, the NOI did not require CAFOs seeking coverage to supply all of the information set forth in 40 CFR § 122.21 (*see* 40 CFR § 122.28[b][2]). In particular, the required estimations of the amounts of manure, litter, and process wastewater generated per year; amounts of manure, litter, and process wastewater transferred to other persons per year; topographic map of the geographic area in which the CAFO is located; the total capacity of all waste storage structures; information regarding whether the facility is located on Indian lands; and listing of all permits or construction approvals received or applied for was absent from the NOI form (R0098-R0105; *see* 40 CFR §§ 122.21[f][5],[6] and [i][1][iv], [vi], [viii], [ix]).

In May 2017, however, DEC issued a revised NOI form, which contains questions requesting all the information required of applicants under 40 CFR § 122.21 (R0022-R0027). Accordingly, petitioners' claims on this point are now moot (*see Matter of NRG Energy, Inc. v Crotty*, 18 AD3d 916, 918 [3d Dept 2005] [challenge to emergency regulations moot, in part, because final regulations are "substantively different"]; *Matter of Smith v New York State Dept.*

of Labor, 306 AD2d 745, 746 [3d Dept 2003] ["The claimed procedural infirmity cited by petitioner having been cured," the proceeding was rendered moot]).

C. Substantive Terms of the General Permit

Petitioners' remaining claim, set forth in its First Cause of Action, is that the Permit violates the CWA and its implementing regulations because it does not mandate that CAFOs develop and implement NMPs containing enforceable site-specific effluent limitations or "best management practices" (40 CFR § 122.42[e][1], [5]; *Waterkeeper Alliance*, 399 F3d at 504). In particular, petitioners cite the substantive terms of the Permit related to chemical handling, land application, nutrient utilization, waste storage and wet weather application in support of their argument regarding its alleged shortcomings (Pet Mem of Law at 41-47).

Respondents contest this claim on the ground that the Permit mandates that CAFOs comply with NRCS NY standards or imposes blanket prohibitions as the means of complying with the applicable EPA regulations (R0117-R0118). They contend that the NRCS standards "set out state-of-the-art, thoroughly evaluated, state-specific best management practices to ensure environmental protection and efficient agricultural operation" (Resp Mem of Law at 25; *see also* Latessa Aff ¶¶ 40-41). In their reply submission, petitioners assert that the NRCS standards are "not actually standards," but rather "considerations or methodologies" which "do[] not establish enforceable effluent limitations (Reply Mem of Law at 10-11). They provide as an example to support this claim language in NRCS 313 listing certain matters for a CAFO to "consider" as to siting of waste storage facilities (*id.* at 11).

A review of the terms of the Permit and the referenced NRCS standards, however, does not generally support petitioners' assertion, but rather reveals that the relevant standards contain numerous specific and enforceable requirements, as provided for in the EPA regulations. To wit:

- The aforementioned NRCS NY 313, governing waste storage, contains detailed requirements regarding manure storage facilities, including criteria relating to facility siting, design volume, engineering standards, and the development of an operation and maintenance plan (R1115-R1125). As to waste storage structures, NRCS NY 313 defines maximum operating levels, maximum slope requirements, minimum top widths, minimum elevation over seasonal high water tables, and design storage amounts. An additional standard, NRCS NY 590, references NRCS NY 313 in outlining siting requirements, including setbacks from wells and watercourses (R1106). The Permit further requires that a professional engineer evaluate existing open waste storage structures for use (R0118). In sum, the Permit sets forth enforceable requirements relative to the storage of manure, litter and process wastewater as required under 40 CFR § 122.42(e)(1)(i).
- As to nutrient application, the Permit requires compliance with NRCS NY 590, which provides that the "[t]iming and placement of all nutrients must correspond as closely as practical with plant nutrient uptake (utilization by crops)" (R1103). Standard 590 includes a lengthy set of detailed protocols governing "the amount (rate), source, placement (method of application), and timing of plant nutrients and soil amendments" (R1101-R1114). In essence, this standard requires that CAFOs account for all sources of nutrients, which then must be "budgeted" to the various fields and crops.[17] These budgeted calculations, in turn, become site-

[17] Notwithstanding each individual CAFO's calculations, the Permit does not allow application rates to exceed the generally applicable rates for a single manure, food processing waste, digestate or process wastewater application within any seven-day period (R0121-R0122).

specific, binding effluent limitations under the Permit. I find this sufficient to comply with 40 CFR §§ 122.42(e)(1)(viii) and 122.42(e)(5).

- The Permit bars confined animals from "coming in contact with the surface waters of the State while in the confinement area." (R0128). This addresses the requirement that the Permit "[p]revent direct contact of confined animals with waters of the United States" (*see* 40 CFR § 122.42[e][1][iv]).
- The Permit contains requirements that satisfy 40 CFR § 122.42(e)(1)(ii), which mandates that the Permit "[e]nsure proper management of mortalities (i.e., dead animals) to ensure that they are not disposed of in a liquid manure, storm water, or process wastewater storage or treatment system that is not specifically designed to treat animal mortalities." Indeed, the Permit prohibits "[t]he disposal of animal mortalities in stormwater or any liquid manure or process wastewater treatment system" (R0129) and imposes additional conditions regarding proper disposal and composting of dead animals in accordance with NRCS NY 316 (R0129). This appears on its face to be consistent with the regulatory command.
- The Permit sufficiently addresses the means by which a number of chemicals and other contaminants must be handled on-site to prevent them from being stored in waste storage areas, or conveyed through waste storage structures (*see* 40 CFR § 122.42[e][1][v]). Further, in FAQ 22, DEC clarified that this prohibition includes all the "chemicals and other contaminants" referenced in 40 CFR § 122.42(e)(1)(v) (R0004).

- The Permit bans application of manure when the soil is saturated (R0122). This standard, too, is consistent with the federal regulatory requirement (*see* 40 CFR § 122.42[e][1][vi]).

Ultimately, it is petitioners' burden to show that the manner in which DEC addressed these substantive requirements was arbitrary and capricious, or contrary to law. Petitioners' general critique of the regulatory regime set forth in the papers they have submitted does not suffice to meet this burden. To the contrary, I find that DEC has imposed enforceable limitations meeting the federal regulatory requirements for the substantive permit conditions identified above. As a result, the First Cause of Action set forth in the petition must fail.

D. Costs and Disbursements

Under CPLR 8101 and 8301, costs and disbursements are generally awarded to the prevailing party (*see Keiser v Goetz*, 235 AD2d 689, 692 [3d Dept 1997]). Here both parties have prevailed on certain issues. Under these circumstances, I find in the exercise of my discretion that an award of costs and disbursements to either party is not warranted (*see Raab v Dumblewski*, 226 AD2d 1021, 1024 [3d Dept 1996] [where "each party prevailed on significant issues . . . Supreme Court's denial of costs was not an abuse of discretion"]; *Purcell v Smith*, 23 Misc 3d 944, 946 [Sup Ct, Jefferson Cty 2009] [citations omitted] ["Where both parties prevail on significant issues, a denial of costs is proper"]).

Accordingly, it is hereby

ADJUDGED that the amended petition/complaint is granted in part and denied in part, in that petitioners' First Cause of Action is denied, and petitioners' Second and Third Causes of Action are granted to the extent set forth above; and it is further

ORDERED that DEC shall issue a revised Clean Water Act-compliant CAFO permit in accordance with this Decision, Order and Judgment no later than October 23, 2018; and it is further

ORDERED that DEC shall not grant coverage to any CAFO applicants pending issuance of a revised permit; and it is further

ORDERED that a conference call shall take place on April 30, 2018 at 3:30 pm to discuss the potential implications of this Decision, Order and Judgment for the status of the present Permit, GP-0-16-002, and any entities covered thereunder, and it is further

ORDERED that this Decision, Order and Judgment shall not be effective until after that call; and it is further

ORDERED that petitioners' application for costs and disbursements is denied.

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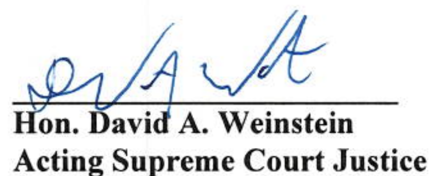

Dated: April 23, 2018
Albany, New York

Hon. David A. Weinstein
Acting Supreme Court Justice

Papers Considered:

(1) NYSCEF Doc. Nos. 1-46; and

(2) Transcript from Oral Argument held on September 26, 2017.