

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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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.,

**VERIFIED PETITION
AND COMPLAINT**

Petitioners/Plaintiffs,

Index No. _____

for a judgment pursuant to Article 78 of the Civil Practice Law
and Rules,

-against-

**ORAL ARGUMENT
REQUESTED**

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

Respondents/Defendants.

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Petitioners/Plaintiffs Riverkeeper, Inc. (“Riverkeeper”), Cortland-Onondaga Federation
of Kettle Lake Associations, Inc. (“C-OFOKLA”), Sierra Club, Theodore Gordon Flyfishers,
Inc. (“TGF”), and Waterkeeper Alliance, Inc. (“Waterkeeper”) (collectively, “Petitioners”), for
their verified petition for judgment pursuant to Article 78 of the New York Civil Practice Law
and Rules (“CPLR”) and their complaint seeking a declaratory judgment pursuant to section
3001 of the CPLR, by their attorneys, Earthjustice, allege as follows:

PRELIMINARY STATEMENT

1. Petitioners challenge, as violating the Clean Water Act (“CWA”), the CWA
CAFO General Permit (“General Permit”) recently issued by the New York State Department of
Environmental Conservation (“DEC”) for the approximately 250 medium and large

Concentrated Animal Feeding Operations (“CAFOs”) in the State that have a history or likelihood of discharging animal waste into the State’s waters. A true and correct copy of the General Permit is annexed to the Affirmation of Eve C. Gartner, sworn March 27, 2017, submitted herewith (“Gartner Aff.”), as Exhibit 1.

2. CAFO is the legal term for large animal factories, where at least hundreds of animals – in New York, mostly dairy cows – are maintained in confined areas for at least part of the year with food being brought in. This challenge does not involve the vast majority of dairies in New York – approximately 5,000 – that are not covered by a CWA permit because they have fewer than 300 mature dairy cows and/or do not discharge pollutants into the waters of the State.

3. An average dairy cow produces well over 100 pounds of manure a day – about 100 times what an average human produces. According to DEC, each of these industrial-scale facilities has the “pollution potential of a major sewage treatment plant.” But unlike towns, where the human sewage is handled by a wastewater treatment plant that decomposes and disinfects the waste to produce a non-polluting discharge, CAFOs transfer the animal sewage usually into huge pits where it is held until it is spread, without any significant prior treatment, onto fields.

4. Because these major facilities produce enormous volumes of animal sewage year-round, and because there are usually no impervious barriers between fields and watercourses, there is a high probability that the CAFO system of field-spreading large amounts of untreated animal sewage can contaminate nearby surface and ground waters used for drinking or recreation.

5. For this reason, the CWA requires that medium and large CAFOs with a history of discharging into nearby waters be subject to a permit that contains important enforceable

safety restrictions, is reviewed and approved by impartial state experts, and is available to the public, including nearby residents. As set forth in detail below, New York's General Permit challenged here does not meet these standards.

6. Instead, the General Permit requires medium and large discharging CAFOs to develop plans, but does not require those plans to set adequate enforceable restrictions. Moreover, the General Permit fails to address potential discharges from all facets of the CAFOs operations, as called for by the CWA and its implementing regulations. The General Permit also allows private contractors to oversee those plans, without DEC experts receiving them, reviewing them, or approving them. And the plans also would not be available to neighbors whose waters and lives could be affected by pathogenic or harmful pollution from this animal waste.

7. By omitting these mandates, the General Permit fails to ensure that the manure is kept out of surface waters. The General Permit thus violates the CWA and the N.Y.S. Environmental Conservation Law ("ECL").

FACTUAL BACKGROUND

8. The CAFOs covered by the General Permit are large and produce prodigious amounts of waste. In 2010, there were 245 dairy CAFOs with over 500 cows each. *See* Wayne A. Knoblauch et al., *Dairy--Farm Management*, at Table 7-3, ch. 7 in Cornell Univ., New York Economic Handbook 2012 (based on data from New York Dairy Farm Business Summary and Analysis Project), attached to the Gartner Affirmation as Exhibit 2. These facilities house, on average, 950 cows. *Id.* (Table 7-3; totaling the number of cows and dividing by number of facilities of this size).

9. Because an average dairy cow produces over 120 pounds of manure per day, the

average large industrial dairy in New York with approximately 950 cows produces over 110,000 pounds of animal waste per day. By contrast, according to the U.S. Environmental Protection Agency (“EPA”), the average household of four people produces about one pound of sewage waste per day. Thus, the waste from *just one* of the smallest of the CAFOs covered by the General Permit (with 200 cows) is comparable to that from a city of 96,000 – about the same amount of sewage as produced by Albany’s estimated 2016 population of 98,000. A CAFO with 950 cows, the average size of the 245 New York CAFOs with over 500 cows, produces more waste than every city in New York other than New York City.

10. Human waste, especially that generated in large cities, is treated in wastewater treatment plants that operate year-round. Dairy cow sewage, by contrast, is usually held in lagoons until it is spread on fields. Since the law allows manure spreading only at “agronomic rates” – i.e., at such times and amounts that the nutrients in the waste can be usefully taken up by the crops – guidelines recommend that waste should generally not be applied in the fall or winter when plants are not growing. Thus, a large CAFO must often store the waste generated over many days during long periods when they cannot spread that manure on fields. This storage demands massive lagoons that pose a significant risk to the environment, a risk that is heightened by the fact that many lagoons are unlined and, thus, can leach pollutants into the groundwater.

11. On information and belief, many of the 267 (as of 2016) industrial dairies covered by the General Permit, all of which have over 200 cows and a history or likelihood of discharging to surface waters, are among the 245 (as of 2010) CAFOs with over 500 cows.

12. If not properly managed, stored, and disposed of, waste generated by CAFOs has the potential to cause significant harm to human health and the environment. Improper management of waste from dairy CAFOs is associated with the release of nitrogen, phosphorus,

ammonia, and human pathogens. Such releases can contaminate ground and surface water, impact drinking water supplies, and cause algal blooms, fish kills, and human illness.

13. This environmental pollution creates economic harms as well. When CAFO pollution enters source waters for drinking water supplies, the downstream drinking water provider must often incur significant expenses to ensure the drinking water meets federal and state safety standards.

14. DEC identified numerous environmental and public health risks posed by improper storage and management of manure from dairy CAFOs in a Final Environmental Impact Statement issued by DEC on March 6, 2013 (“Dairy FEIS”), in connection with a rulemaking involving dairy CAFOs with fewer than 300 cows that are not regulated under the CWA. DEC also made findings regarding these environmental and public health risks in a State Environmental Quality Review Findings Statement, dated March 29, 2013 (“Dairy Findings Statement”). The Dairy FEIS and the Dairy Findings Statement are annexed to the Gartner Affirmation as Exhibits 3 and 4, respectively.

15. Industrial dairies have been responsible for numerous water contamination incidents in New York State. During the spring of 2014, DEC investigated no less than forty incidents of ground and surface water contamination resulting from industrial dairies disposing manure and other wastes on frozen, snow-covered ground. These incidents are listed in a spreadsheet obtained from DEC through a Freedom of Information Law (“FOIL”) request by several Petitioners, a copy of which is annexed to the Gartner Affirmation as Exhibit 5.

16. Incidents involving discharges from dairy CAFOs during the winter and spring of 2015, as reflected in responses to a FOIL request to DEC by several petitioners, are summarized in a spreadsheet that is annexed to the Gartner Affirmation as Exhibit 6.

17. Most dramatically, a discharge from one industrial facility caused a 25-by-75 foot plume of liquid manure to enter Lake Owasco, a source of drinking water for 44,000 residents in central New York. This incident was described in an article entitled “Owasco Lake Advocates Decry Runoff of Manure Into Water” written by Carrie Chantler and published in the Auburn Citizen on April 6, 2014, a copy of which is annexed to the Gartner Affirmation as Exhibit 7. Several other articles documenting environmental and health harms arising from discharges from industrial dairies in New York and other major dairy states are annexed to the Gartner Affirmation as Exhibits 8-12.

PARTIES

18. Petitioner Riverkeeper, Inc. (“Riverkeeper”), is a 501(c)(3) not-for-profit corporation headquartered at 20 Secor Road, Ossining, New York 10562. Riverkeeper is a member-supported watchdog organization with approximately 3,388 active members, many of whom reside near and/or fish, swim, and recreate in the Hudson River Watershed and the New York City (“NYC”) Drinking Water Watershed. Riverkeeper is dedicated to defending the Hudson River and its tributaries and to protecting the drinking water supply of nine million NYC and Hudson Valley residents, including from pollution from dairies and other animal feeding operations, which are common in parts of the watersheds. For more than 45 years, Riverkeeper has stopped polluters, championed public enjoyment of the Hudson River and its tributaries, influenced land use decisions, and restored habitat, benefiting the natural and human communities of the Hudson River and its watershed. As a signatory to the 1997 NYC Watershed Memorandum of Agreement (see <https://www.dos.ny.gov/watershed/nycmoa.html>), Riverkeeper has a unique public role to ensure that the Agreement succeeds and special authority to enforce and oversee its implementation, including the success of the Watershed Agricultural Program,

which leverages NYC, New York State, federal and private funds to reduce agriculture-related pollution in the NYC Watershed. The Affidavit of Patricia Packer, a member of Petitioner Riverkeeper, is annexed to the Gartner Affirmation as Exhibit 13. A copy of the Comments submitted by Riverkeeper (and others) to DEC regarding the draft version of the General Permit is annexed to the Gartner Affirmation as Exhibit 14.

19. Petitioner Cortland-Onondaga Federation of Kettle Lake Associations, Inc. (“C-OFOKLA” or “Association”) is a coalition of four kettle lake associations from Crooked Lake, Little York Lake, Song Lake, and Tully Lake, all in central New York, each of which are membership organizations. C-OFOKLA was formed in 2009 to advocate for and educate others about watersheds and their protection. It promotes stewardship of the kettle lakes, surrounding waters and watershed regions in Cortland and Onondaga Counties. The Affidavit of Tarki Heath, President and member of C-OFOKLA, is annexed to the Gartner Affirmation as Exhibit 15. The Comments submitted by C-OFOKLA to DEC regarding the draft version of the General Permit is annexed to the Affidavit of Tarki Heath.

20. Petitioner Sierra Club is a 501(c)(4) organization founded in 1892 and headquartered in Oakland, California. Sierra Club’s mission is to explore, enjoy, and protect the wild places of the Earth; to practice and promote the responsible use of the Earth’s resources and ecosystems; to educate and enlist humanity to protect and restore the quality of the natural and human environment; and to use all lawful means to carry out these objectives. Sierra Club’s Atlantic Chapter is a 501(c)(3) non-profit, has 38,000 members statewide dedicated to protecting New York’s air, land, water and remaining wild places. Sierra Club Atlantic Chapter volunteers have long worked to ensure CAFOs do not pollute communities, including assisting communities and training activists to protect water quality and citizen rights in the context of unregulated or

under-regulated factory farms. In 2005, the Atlantic Chapter, along with Citizens Environmental Coalition, published the report “The Wasting of Rural New York State: Factory Farms and Public Health” and followed the publication with a series of workshops. From 2009 through 2011, the Chapter participated in stakeholder meetings with DEC that resulted in CAFO permit revisions that demonstrated better water quality controls from farm runoff from manure application and management. The Affidavit of Suzanne Miller, a member of Sierra Club, is annexed to the Gartner Affirmation as Exhibit 16.

21. Petitioner Theodore Gordon Flyfishers, Inc. (“TGF”) is a 501(c)(3) domestic not-for-profit corporation organized under the laws of New York State and based in New York County in New York State. TGF is a conservation and fly-fishing group whose dual mission is to preserve and enhance the cold-water fisheries of the Catskills and Delaware regions. TGF focuses on proper stream management, protection of wild trout, and promoting catch and release practices. Formed in 1962, TGF earned its reputation as an advocate of clean waters and healthy fisheries in critical legal fights; notably: defeating a pumped storage plan for Schoharie Creek, which would have destroyed the fishery; protecting the Bashakill wetlands at the entrance to the Catskills; defeating the proposed dam at Tocks Island; and helping to write the Wild and Scenic Rivers Law. Members of TGF use and enjoy many waterways in New York State and other states for a number of activities, including, but not limited to, fishing. The Affidavit of Herbert Darrow, President and member of TGF, is annexed to the Gartner Affirmation as Exhibit 17.

22. Petitioner Waterkeeper Alliance, Inc., is a 501(c)(3) not-for-profit environmental organization headquartered at 180 Maiden Lane, Suite 603, New York, New York 10038. Waterkeeper Alliance is a global movement of on-the-water advocates who patrol and protect over 100,000 miles of rivers, streams and coastlines in North and South America, Europe,

Australia, Asia, and Africa. The organization seeks to protect every major watershed around the world, and to restore and maintain all waterways as fishable, swimmable, and drinkable waters. To champion clean water and strong communities, Waterkeeper Alliance: (1) supports and empowers member Waterkeeper organizations to protect communities, ecosystems and water quality; (2) promotes the member Waterkeeper organizations; and (3) advocates for issues common to Waterkeeper organizations. Waterkeeper Alliance works towards this vision through the grassroots advocacy of more than 200 member organizations, including Petitioner Riverkeeper. The Affidavit of Daniel E. Estrin, General Counsel and Legal Director of Waterkeeper, is annexed to the Gartner Affirmation as Exhibit 18.

23. Respondent Basil Seggos is the Commissioner of DEC. His principal office is located in Albany County.

24. Respondent DEC is an agency of the State of New York with the powers and duties set forth in the ECL. The principal office of DEC is located in Albany County.

JURISDICTION AND VENUE

25. This Court has jurisdiction pursuant to CPLR sections 3001, 7801, and 7803(3) and ECL section 17-0909(2).

26. Petitioners timely initiated this special proceeding and declaratory judgment action by properly filing their Notice of Petition, Verified Petition and Complaint, and all supporting affidavits and other exhibits on March 27, 2017.

27. Venue lies in the Supreme Court, Albany County, pursuant to CPLR § 7804(b), because the principal office of Respondents DEC and Commissioner Seggos is located there, *id.* § 505(a), and it is where Defendants/Respondents DEC and Commissioner Seggos made the determinations challenged in this proceeding, *id.* § 506(b).

LEGAL BACKGROUND

The Clean Water Act and Federal Regulations

28. Congress passed the CWA in 1972 “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). The Act protects all navigable waters of the United States, including surface waters that supply drinking water, support fish and wildlife, and provide aesthetic and recreational opportunities for current and future generations of Americans.

29. The CWA’s goal is to eliminate all discharges of pollution into navigable waters. *See* 33 U.S.C. § 1251(a)(1). To that end, the Act establishes the National Pollutant Discharge Elimination System (“NPDES”), which is managed by EPA in partnership with state environmental agencies, including DEC, which are authorized to issue NPDES Permits. *See* 33 U.S.C. § 1342; ECL §§ 17-0801 *et seq.*

30. The CWA prohibits point sources from discharging pollutants except in compliance with a NPDES permit. 33 U.S.C. §§ 1311(a), 1342(a).

31. Under the CWA, “point source” means “any discernible, confined, and discrete conveyance . . . from which pollutants are or may be discharged” and is explicitly defined to include “concentrated animal feeding operation[s]”. 33 U.S.C. § 1362(14). A “discharge” is the “addition of any pollutant to navigable waters from any point source.” 33 U.S.C. § 1362(12).

32. A “concentrated animal feeding operation” (“CAFO”) is an “animal feeding operation” (“AFO”) surpassing certain size thresholds. 40 C.F.R. § 122.23(b)(2). An AFO “means a lot or facility . . . where . . . (i) “Animals (other than aquatic animals) have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period, and (ii) Crops, vegetation, forage growth, or post-harvest residues are not sustained in the

normal growing season over any portion of the lot or facility.” 40 C.F.R. § 122.23(b)(1).

33. Under federal law, an industrial dairy facility qualifies as a “Large CAFO” if it houses 700 or more mature dairy cows. 40 C.F.R. § 122.23(b)(4). An industrial dairy facility qualifies as a “Medium CAFO” if it houses 200 to 699 mature dairy cows and discharges into the waters of the United States. 40 C.F.R. § 122.23(b)(6).

34. The CWA requires that all NPDES permits “prescribe conditions . . . to assure” that any “discharge will meet . . . all applicable requirements.” 33 U.S.C. § 1342(a)(1) and (2).

35. These conditions include “effluent limitations” to control the discharge of pollutants. 33 U.S.C. § 1311(e). An “effluent limitation” is “any restriction established by a State or the Administrator on quantities, rates, and concentrations” of discharges. 33 U.S.C. § 1362(11). This includes both numeric limitations and non-numeric limitations, including specific and enforceable best management practices. All applicable effluent limitations must be included in each NPDES permit as enforceable restrictions.

36. EPA’s federal regulations implementing the CWA include procedural and substantive requirements specific to NPDES permits for CAFOs.

37. Any NPDES permit issued to a CAFO must meet mandatory minimum requirements. 40 C.F.R. § 122.42(e). This includes a requirement to implement a nutrient management plan (“NMP”) containing specific and enforceable best management practices necessary to meet the requirements of 40 C.F.R. § 122.42(e)(1) as well as applicable effluent limitations and standards, including those specified in 40 C.F.R. part 412.

38. The NMP must, *inter alia*, “ensure adequate storage of manure, litter, and process wastewater, including procedures to ensure proper operation and maintenance of the storage facility”; “identify appropriate site specific conservation practices to be implemented . . . to

control runoff of pollutants”; and “establish protocols to land apply manure, litter or process wastewater in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter or process wastewater.” 40 C.F.R. § 122.42(e)(1)(i), (vi), (viii). The NMP must also include background information necessary to help the permitting authority understand and evaluate any effluent limitations and standards, such as the historic crop yield data used to calculate appropriate rates of application.

39. Authorizations for CAFOs to operate under a NPDES general permit must follow the procedures of 40 C.F.R. § 122.23(h).

40. First, CAFOs seeking coverage under a general permit must submit to the permitting agency a notice of intent that it is seeking such coverage, and that notice – essentially an application for coverage – must meet the requirements of 40 C.F.R. § 122.21(i)(1). These requirements include an NMP satisfying the requirements of 40 C.F.R. § 122.42(e) and applicable effluent limitations and standards, including those specified in 40 C.F.R. part 412. *See* 40 C.F.R. § 122.23(h)(1).

41. The permitting agency must review the submitted information and, if proposing to grant coverage to the CAFO, must “notify the public” of that proposal and “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 C.F.R. § 122.23(h)(1).

42. Federal regulations also prescribe procedures for altering CAFO NMPs following initial permit issuance. Any proposed revisions to an approved NMP must be reviewed – and approved – by the permitting agency prior to implementation in order “to ensure that [the revised NMP] meets the requirements of [EPA’s regulations] and applicable effluent limitations and

standards”. 40 C.F.R. § 122.42(e)(6).

43. If revision to the terms of the NMP is necessary, DEC must make the revised NMP “publicly available . . . and inform the public of any changes to the terms of the nutrient management plan that are incorporated into the permit.” 40 C.F.R. § 122.42(e)(6)(ii).

44. If the changes to the terms of the NMP are substantial, DEC must also “notify the public and make the proposed changes and the information submitted by the CAFO owner or operator available for public review and comment, [and] . . . hearing requests.” 40 C.F.R. § 122.42(e)(6)(ii).

45. The CWA defines “substantial changes” broadly, with a focus on increases in nitrogen and phosphorous, to mean: (1) addition of new land application areas not previously included in the NMP (with a few exceptions); (2) changes to the field-specific maximum annual rates for land application; (3) changes to the maximum amounts of nitrogen and phosphorus derived from all sources for each crop; (4) addition of any crop or other uses not included in the terms of the NMP and corresponding field-specific rates of application; and, (5) “[c]hanges to site-specific components of the CAFO’s nutrient management plan, where such changes are likely to increase the risk of nitrogen and phosphorus transport to waters of the U.S.” 40 C.F.R. § 122.42(e)(6)(iii).

New York SPDES Permitting Program

46. EPA has delegated to DEC authority to implement the NPDES permitting program under the CWA. A copy of the delegation agreement is annexed to the Gartner Affirmation as Exhibit 19. Thus, a New York State Pollutant Discharge Elimination System (“SPDES”) permit is required for any discharge of pollutants from a point source in New York into waters of the United States. *See* ECL §§ 17-0801 *et seq.*

47. Permits issued by DEC through the SPDES program must meet all applicable requirements of the CWA and federal regulations. *See, e.g.*, ECL §§ 17-0801, 17-0805(1), 17-0807(4), 17-0809(1); 6 N.Y.C.R.R. 750-1.1, 750-1.3, 750-1.11. This expressly includes federal provisions specific to CAFOs. 6 N.Y.C.R.R. 750-1.11(a)(3), (9) (SPDES permits shall ensure compliance with 40 C.F.R. § 122.23 and the effluent limitations of 40 C.F.R. part 412).

CAFO Permitting History

48. CAFOs are subject to federal CWA requirements if they discharge pollutants to surface waters. DEC has issued a separate general permit, not at issue here, for CAFOs not subject to federal CWA requirements that covers CAFOs with 300 or more dairy cows that do not discharge pollutants to surface waters. Non-discharging CAFOs with fewer than 300 dairy cows are not required to seek coverage under either permit.

49. New York CAFOs subject to the CWA must presently receive permit coverage through General Permit No. GP-04-02, which DEC issued in 2004. General Permit No. GP-04-02 expired on June 30, 2009, and has been “administratively continued” since that time. A copy of General Permit No. GP-04-02 is annexed to the Gartner Affirmation as Exhibit 20.

50. On December 23, 2015, DEC provided notice of the availability for public review and comment of the draft CWA general permit for CAFOs in New York State with 300 or more cows that discharge pollutants to surface water: draft Permit No. GP-0-16-002. A copy of the draft Permit No. GP-0-16-002 (“draft General Permit”) is annexed to the Gartner Affirmation as Exhibit 21.

51. More than 50 sets of comments were submitted to DEC by government bodies, individuals, and organizations. In addition, almost 5,000 individuals signed onto form comments expressing concerns with the draft General Permit.

52. Comments from the Onondaga County Council on Environmental Health, Cayuga County Health Department, Water Department of the City of Watertown, New York State Federation of Lake Associations, Owasco Lake Watershed Management Council, and the Onondaga Nation are annexed to the Gartner Affirmation as Exhibits 22-27. DEC's response to the comments is annexed to the Gartner Affirmation as Exhibit 28.

53. EPA submitted comments alerting DEC that the draft General Permit failed to comport with the requirements of the CWA. EPA's comments on the draft General Permit are annexed to the Gartner Affirmation as Exhibit 29. In particular, EPA advised DEC: the CNMP "does not satisfy the nine minimum requirements of 40 C.F.R. § 122.42(e)(1)"; the ANMP "does not contain all of the elements of the required NMP"; the "distinction between ANMP and CNMP should be avoided, as all NMP requirements must be contained in one publicly available document"; DEC should clarify that the NMP must be submitted to, and reviewed by, DEC when a CAFO seeks coverage under the general permit; DEC must approve the NMP before implementation; there must be DEC review and public notice before a CAFO can revise its NMP; and NMPs cannot be considered confidential since they are part of the permit terms and therefore must be public. *See* Gartner Aff. Ex. 29 at Preface & 4-6, 31.

54. Many of EPA's concerns with the draft General Permit tracked concerns EPA had previously expressed to DEC about its ongoing implementation of its CAFO program in a February 2015 report entitled *New York State Animal Agriculture Program Assessment*, which is annexed to the Gartner Affirmation as Ex. 30.

55. DEC issued final CWA General Permit No. GP-0-16-002 on January 25, 2017, with an effective date of July 24, 2017. *See* Gartner Aff. Ex. 1. The Notice of Issuance published in the Environmental Notice Bulletin is annexed to the Gartner Affirmation as Ex. 31.

56. Following the issuance of the General Permit, on March 10, 2017, EPA again wrote to DEC advising the agency of continued permit deficiencies with respect to “transparency, state oversight, and opportunities for public participation” and recommending that DEC revise the permit. *See* [CITE]Letter from Alyssa Arcaya, EPA, to Jacqueline Lendrum, DEC (Mar. 10, 2017), annexed to the Gartner Affirmation along with attachments as Ex. 32.

57. To Petitioners’ knowledge, DEC has not modified the General Permit since the permit’s issuance on January 25, 2017.

The General Permit

58. The General Permit requires CAFOs seeking coverage to develop and maintain a document referred to as a Comprehensive Nutrient Management Plan (“CNMP”). The CNMP must be developed or reviewed by an Agricultural Environmental Management (“AEM”) Certified Planner. General Permit Section III.D.

59. The General Permit sets forth the minimum content CNMPs must contain and it requires CNMPs to “describe and document the implementation of the practices that are to be used to assure compliance with the conditions of” the General Permit. General Permit, Gartner Aff. Ex. 1, Sections III, III.A, III.B. The General Permit does not mandate that these descriptions and documentation be converted into binding restrictions.

60. A CAFO must maintain a copy of its CNMP on-site. General Permit Section III.F. Under the General Permit, the CNMP is not provided to DEC and is not reviewed or approved by DEC. *Id.* Section II.A.

61. Because the CNMP is retained on-site by the CAFO and not disclosed to DEC, it is not available to the public even via a state FOIL request.

62. The General Permit also requires CAFOs to complete a document referred to as

an Annual Nutrient Management Plan (“ANMP”). *Id.* Section IV.F. The General Permit defines the ANMP as an informational document that must include the information required in Appendix C of the General Permit. Appendix C requires the inclusion of numbers of animals, maps, and other descriptions. DEC describes the ANMP as an “outline” of the CNMP. Neither Appendix C nor any other provision of the General Permit requires the ANMP to include enforceable restrictions.

63. Furthermore, an ANMP does not include background information necessary to help the permitting authority understand and evaluate any effluent limitations and standards, such as the historic crop yield data used to calculate appropriate rates of application, information required in a CWA-compliant NMP.

64. Neither the CNMP nor the ANMP constitutes an adequate nutrient management plan under the CWA and its implementing regulations. In addition to its other deficiencies, the General Permit fails to require the CNMP and/or the ANMP to conform to the federal requirements set forth in 40 C.F.R. § 122.42(e) and 40 C.F.R. part 412. For example:

- A. The General Permit fails to satisfy 40 C.F.R. § 122.42(e)(1)(i), which requires NMPs to contain enforceable best management practices to “ensure adequate storage of manure, litter, and process wastewater.” Instead, the General Permit requires only that ANMPs include maps showing the locations of existing and planned *manure* storage facilities. *See id.* at 49, App’x C. Obviously, maps of existing storage facilities do not ensure adequacy of storage capacity. The General Permit does not even require ANMPs to disclose the location of facilities for litter and process wastewater storage.
- B. The General Permit fails to satisfy 40 C.F.R. § 122.42(e)(1)(ii), which requires NMPs to contain site specific effluent limitations to “[e]nsure proper management of mortalities.” The General Permit instead mandates only that ANMPs contain maps of “mortality management facilities, *if utilized.*” *See id.* (emphasis added). There is no other requirement for a CAFO to manage mortalities appropriately.
- C. The General Permit fails to satisfy 40 C.F.R. § 122.42(e)(1)(iv), which requires that the NMP “[p]revent direct contact of confined animals with waters of the United States.” While the CNMP requires that “[a]nimals confined in the animal

feeding operation must be prevented from coming in contact with the surface waters of the State while in the confinement area,” *see id.* Section III.B.9, there is no provision at all in the ANMP regarding contact of animals with surface waters.

- D. The General Permit fails to satisfy 40 C.F.R. § 122.42(e)(1)(viii), which requires NMPs to “[e]stablish protocols to land apply manure, litter or process wastewater in accordance with site specific nutrient management practices that ensure appropriate agricultural *utilization of the nutrients* in the manure, litter or process wastewater,” (emphasis added) and 40 C.F.R. § 122.42(e)(5), which specifies the two acceptable methods to “ensure appropriate agricultural *utilization of the nutrients*.” (Emphasis added.) The General Permit does not adopt either of the prescribed methods nor does it require the ANMP to follow any other method to ensure appropriate utilization of nutrients, and instead only seeks to limit runoff. The General Permit authorizes “[f]arm personnel [to] manage application rates and timing so as to prevent runoff from leaving crop fields during any application event,” *see* Permit III.A.7, and does not ensure appropriate agricultural utilization of the nutrients applied.
- E. The General Permit further fails to satisfy 40 C.F.R. § 122.42(e)(1)(viii), which requires that NMPs limit application of manure and “ensure appropriate agricultural utilization of the nutrients,” through rate and timing *limitations*. The General Permit requires only that the ANMP *describe* application timing, with no enforceable limitations.
- F. The General Permit fails to satisfy 40 C.F.R. § 122.42(e)(1)(v), which requires that a CAFO’s NMP must “[e]nsure that chemicals and other contaminants handled on-site are not disposed of in any manure, litter, process wastewater, or storm water storage or treatment system unless specifically designed to treat such chemicals and other contaminants.” However, the General Permit authorizes the placement of food processing waste, such as acid whey, in animal waste storage and treatment systems without regard to whether the system was designed to treat food processing waste. *See id.* Section III.B.3.c. Indeed, the General Permit allows up to 50% of the waste added to a manure storage facility to be food processing waste such as digested fats, oils and greases without any requirement in the General Permit that the CNMP or ANMP ensure that the “manure storage” facility is designed to treat this waste stream.

Application for Coverage Under The General Permit

65. In order to obtain coverage under the General Permit, CAFOs must submit to DEC a Notice of Intent (“NOI”) and an ANMP that includes a certification that a CNMP has been developed in accordance with the General Permit. *Id.* Section II.A; *id.* App’x C. DEC’s NOI template is annexed to the Gartner Affirmation as Exhibit 33.

66. Following receipt of a CAFO's NOI and ANMP, DEC posts the availability of the NOI and ANMP to the Environmental Notice Bulletin. The public is afforded 30 days to review and comment on the NOI and ANMP, and to request a hearing. *Id.* Section II.A.

67. The General Permit does not specify how the public will obtain access to these documents; they may be available only via a FOIL request. The time required to process such a request and review any responsive documents would make it difficult, if not impossible, to meet a 30-day comment deadline.

Modifications to a CAFO's CNMP and ANMP

68. The General Permit requires neither DEC approval nor public notice of changes to the CNMP before such changes are implemented. Under the General Permit, "changes in the operation of the CAFO or implementation of the CNMP" are to be recorded in the CNMP retained on-site and subsequently "noted in the annual compliance report [submitted to DEC] as applicable." *Id.* Section III.E. The revised CNMP is disclosed neither to DEC nor to the public – either before or after implementation.

69. For a limited number of major changes to a CNMP, such as a 20% or greater increase in the number of animals or an expansion of a liquid storage facility by greater than one million gallons, a CAFO must submit to DEC a "Change in Operation" form, certified by an AEM planner, between 15 and 30 days before implementing the changes. *Id.* Section II.B.

70. The General permit requires neither DEC approval nor public notice of most changes to the ANMP before such changes are implemented. Most changes to the ANMP do not need to be reviewed or approved by DEC prior to implementation. Instead, changes to the ANMP "shall be reported in the Annual Compliance Report." *Id.* Section IV.F.

71. The General Permit characterizes a small subset of changes to the ANMP as

“significant” and, for such changes, requires “submission of a revised ANMP immediately.”

Significant changes under the General Permit consist only of: the addition of new land areas in some, but not all, circumstances; a “change to field specific maximum annual application rates that do not comply with [U.S. Department of Agriculture’s Natural Resources Conservation Service (“NRCS”)] standards”; and “implementation of any other required management practices that do not meet NRCS standards.” *Id.* Section IV.F.

72. Only that small subset of changes must receive DEC review and approval prior to implementation. For only that subset of changes, the availability of the revised ANMP is published in the Environmental Notice Bulletin and the public is afforded 30 days to comment and/or to request a hearing. General Permit Section IV.F.

73. Like a CAFO’s original submissions when seeking coverage under the General Permit, these documents may be available only via a FOIL request. The time required to process such a request and review any responsive documents would make it difficult, if not impossible, to meet a 30-day comment deadline.

FIRST CAUSE OF ACTION
(Issuance of CWA CAFO General Permit Without CWA-Compliant
“Nutrient Management Plan” in Violation of the
Clean Water Act and the Environmental Conservation Law)

74. Petitioners repeat and reallege the allegations set forth in paragraphs 1 through 73 as if fully set forth herein.

75. The Clean Water Act requires that NPDES permits include all applicable effluent limitations as enforceable restrictions on the discharge of pollutants. In particular, NPDES permits for CAFOs must include “nutrient management plans” that contain site-specific effluent limitations meeting the mandatory minimum requirements of 40 C.F.R. § 122.42(e) and 40 C.F.R. part 412.

76. The General Permit does not require that CAFOs develop an NMP containing enforceable site-specific effluent limitations. Instead, the General Permit requires that CAFOs develop an informational ANMP and a descriptive and documentational CNMP. The General Permit lists minimum content for inclusion in the ANMP and CNMP, but does not require that either document contain any actual restrictions on the discharge of pollutants.

77. The General Permit does not require that either the ANMP and/or the CNMP include many of the the mandatory minimum effluent limitations required by 40 C.F.R. § 122.42(e)(1) or, where applicable, 40 C.F.R. part 412.

78. Therefore, the General Permit does not require that CAFOs develop “nutrient management plans” that comply with the Clean Water Act.

79. DEC’s issuance of the General Permit does not conform with state and federal requirements and was therefore affected by an error of law, arbitrary and capricious, and an abuse of discretion, and should be set aside.

SECOND CAUSE OF ACTION

(Issuance of CWA CAFO General Permit Without Mandated Agency Review in Violation of the Clean Water Act and the Environmental Conservation Law)

80. Petitioners repeat and reallege the allegations set forth in paragraphs 1 through 73 as if fully set forth herein.

81. Before a CAFO can be covered by a general permit, the permitting authority must review the facility’s “nutrient management plan” to ensure that it “meets the requirements of § 122.42(e) and applicable effluent limitations and standards, including those specified in 40 C.F.R. part 412.” 40 C.F.R. § 122.23(h)(1). The General Permit violates this CWA requirement by failing to ensure proper DEC review of CAFOs applying for coverage under the CWA permit or covered by the permit.

82. The General Permit provides that the CNMP be developed or reviewed by an AEM-certified planner, but it is not presented to DEC for review and approval. Rather, the CNMP . Rather, the CNMP is kept on-site at the CAFO.

83. The General Permit requires that the ANMP be provided to DEC for review with the NOI. However, since the ANMP does not constitute an adequate NMP pursuant to federal and state law, provision to DEC of the ANMP does not satisfy the requirement of DEC approval of an adequate NMP as required by 40 C.F.R. § 122.23(h)(1).

84. Federal CAFO regulations also mandate permitting agency oversight of any changes to a permitted CAFO's NMP. Proposed revisions to an approved NMP must be reviewed – and approved – by the permitting agency prior to implementation in order “to ensure that [the revised NMP] meets the requirements of [EPA’s regulations] and applicable effluent limitations and standards.” *Id.* § 122.42(e)(6).

85. The General Permit fails to satisfy this condition because it does not require *prior* approval of any changes to the CNMP. The General Permit directs that most changes to the CNMP need only be 1) “recorded” in the CNMP maintained on-site and 2) subsequently “noted” in an annual compliance report as applicable, and in that way eventually submitted to DEC. General Permit, Gartner Aff. Ex. 1, Section III.E. For a limited number of major changes, the General Permit also requires submission of a “Change of Operation” form between 15 and 30 days before the changes are implemented.

86. The General Permit likewise requires that most changes to the ANMP only need be reported to DEC on an annual basis. *Id.* Section IV.F. Only a small subset of changes – the addition of new land areas under certain circumstances, changes to field specific annual applications that are not compliant with NRCS standards, and implementation of other required

management practices that are not compliant with NRCS standards – must undergo a public comment period or receive DEC approval prior to implementation. *Id.* Section IV.F.

87. Because the General Permit does not require DEC oversight and review of a NMP meeting federal requirements, and because the General Permit does not require DEC review and approval prior to implementation of any revisions to the CNMP and most revisions to the ANMP, DEC’s approval of the General Permit does not conform with state and federal requirements and was therefore affected by an error of law, arbitrary and capricious, and an abuse of discretion, and should be set aside.

THIRD CAUSE OF ACTION

(Issuance of CWA CAFO General Permit Without Mandated Public Participation in Violation of the Clean Water Act and the Environmental Conservation Law)

88. Petitioners repeat and reallege the allegations set forth in paragraphs 1 through 73 as if fully set forth herein.

89. Whenever a CAFO seeks coverage under a general permit, and the permitting agency proposes to grant such coverage, the agency must “notify the public” of that proposal and “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 C.F.R. § 122.23(h)(1).

90. The General Permit does not adequately require DEC to make available for public review and comment an NMP meeting the requirements of the CWA and its implementing regulations.

- A. The General Permit does not require that the CNMP be made public at all, or even provided to DEC.
- B. While the General Permit requires that the ANMP be made available to the

public, the ANMP does not constitute an adequate “nutrient management plan [or] the draft terms of the nutrient management plan.” Thus, its public availability does not satisfy federal requirements.

- C. While the General Permit requires that ANMP be made available to the public, it does not specify how the public will obtain access to this document; it may be available only via a FOIL request. The time required to process such a request and review any responsive documents would make it difficult, if not impossible, to meet a 30-day comment deadline.

91. The General Permit does not require DEC to make publicly available and inform the public of all proposed revisions to an NMP that necessitate a revision to the terms of a CWA-compliant NMP that are incorporated into the permit, as required by 40 C.F.R. § 122.42(e)(6)(ii). Nor does it require DEC to notify the public and make the proposed changes and information by the CAFO available for public review, comment, and hearing requests when changes to the terms of the NMP are “substantial,” as required by 40 C.F.R. § 122.42(e)(6)(ii) and (iii).

- A. The General Permit does not require DEC to inform the public of proposed revisions to a CNMP or allow for public review, comment, and hearings when changes are proposed to the CNMP.
- B. The General Permit requires that revised ANMPs be made available to the public immediately for review, comment, and/or to request a hearing only when revised ANMPs contain changes the General Permit defines as “significant,” a category far narrower than “substantial” changes as defined at 40 C.F.R. § 122.42(e)(6)(iii).
- C. Revised ANMPs are made available to the public only through a FOIL request,

thus making an opportunity to review, comment and/or request a hearing within the 30-day allotted time period difficult, if not impossible, to meet.

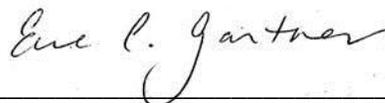
92. Because the General Permit does not require that an adequate nutrient management plan, or changes thereto, be made publicly available as required by the CWA, ECL, and implementing regulations, DEC's approval of the General Permit was affected by an error of law, arbitrary and capricious, and an abuse of discretion, and should be set aside.

WHEREFORE, Petitioners respectfully request that this Court enter judgment against Respondents pursuant to CPLR §§ 3001 and 7806 as follows:

1. Adjudging and declaring that Respondent DEC's issuance of General Permit No. GP-0-16-002 was in violation of lawful procedure, affected by errors of law, arbitrary and capricious, and an abuse of discretion;
2. Declaring General Permit No. GP-0-16-002 void;
3. Directing Respondent DEC, within 30 days, to commence a proceeding to revise General Permit No. GP-0-16-002 to conform to the requirements of the CWA, ECL, and implementing regulations, and to issue a revised CWA CAFO general permit no later than a specified date;
4. Granting Petitioners the costs and disbursements of this proceeding; and
5. Granting Petitioners such other and further relief as the Court deems just and proper.

Dated: New York, New York
March 27, 2017

Respectfully submitted,



By: _____

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**motion for admission pro hac vice to be
filed*