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NY Supreme Court strikes down DEC's permit for mega-dairies

Illegal permit allowed industrial animal operations to prepare pollution prevention plans without agency oversight or public input, threatening drinking and recreational waters

ALBANY, N.Y. — Yesterday, the New York Supreme Court struck down the General Permit for large concentrated animal feeding operations (CAFOs) issued by the New York Department of Environmental Conservation (DEC), ruling in favor of environmental and conservation organizations represented by the environmental law firm Earthjustice: Waterkeeper Alliance, Riverkeeper, Cortland – Onondaga Federation of Kettle Lake Associations, Sierra Club, and Theodore Gordon Flyfishers, Inc.

The Court ruled that the General Permit fails to comply with the fundamental requirements of the federal Clean Water Act (CWA) related to agency oversight and public participation in the permitting process.

CAFOs typically store liquid animal manure in a large pit before spreading it on nearby fields. Because these practices pose a significant risk of water pollution, the CWA requires CAFOs to obtain a permit. Under federal law, a CAFO permit must include the facility's "nutrient management plan" setting forth how it will manage its waste so as not to pollute waters.

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The CWA requires state agencies like DEC to review and approve those pollution prevention plans before the CAFO begins activities that pose a high risk of discharge. The CWA also requires that the public have access to these plans so that they may comment on them and help to identify deficiencies before pollution occurs.

Under New York's General Permit, CAFOs were directed to develop comprehensive nutrient management plans (CNMPs) in consultation with a paid private engineer who certifies that the plan complies with the CWA. But these comprehensive plans were neither submitted to DEC and nor made available to the public. Instead, the permit allowed CAFOs to submit a far less detailed annual nutrient management plan (ANMP) to DEC for advance approval and public comment.

The Court found this scheme does not follow the CWA requirements for oversight and public participation. According to the Court, oversight by paid consultants cannot substitute for agency review. To the contrary, the Court found that this system of oversight presents "an inherent conflict of interest" similar to one that would allow a tax lawyer to stand in for the IRS in ensuring that her client was following the law. The Court noted that it "would be apparent to all and sundry" that such mechanisms are in no way equivalent to independent state review.

The permit governs about 250 animal facilities in New York State with 200 or more animals, which are classified as CAFOs. The Court highlighted that the average large NY dairy CAFO has over 950 cows and produces over 110,000 pounds of animal waste per day. Unlike towns and cities, which have sewage treatment plants that are strictly regulated and tested to create a non-polluting discharge, CAFO animal waste is not monitored and can be disposed of in close proximity to public drinking water supplies.

New York is the country's fourth largest milk-producing state with more than 600,000 dairy cows, each of which produces about 120 pounds of waste per day. The way this manure is stored and disposed of can have serious implications for human health and water quality. Over the last several years, industrial-sized dairies have been responsible for numerous water contamination incidents.

In 2015 alone there were over 40 documented cases of water contamination caused by CAFO animal waste. Last year one of the largest facilities in the state was responsible for two manure spills in the span of one week — one of the spills entered Cayuga Lake and was found to be “precariously close” to local water supplies.

“It’s DEC’s responsibility to protect New York’s waters, and the public has a right to make sure that DEC is doing its job,” said **Earthjustice Attorney Suzanne Novak**, who served as counsel on the suit. “The Court recognized that DEC cannot outsource environmental protection to private planners paid for by industrial agriculture and keep pollution prevention plans secret from the public. We are glad the Court upheld transparency, one of the central mandates of the Clean Water Act.”

“By dismantling the secretive, self-regulatory system for industrial-sized dairies, Justice Weinstein’s well-considered decision will help keep manure out of New York’s rivers and lakes,” said **Riverkeeper staff attorney Mike Dulong**. “This is a tremendous victory for the health of New Yorkers. Each of the roughly 250 large dairy facilities has the same pollution potential as the City of Albany, and now their manure handling operations will be subject to review by the state and the public.”

As a cold water fisheries conservation organization, we are acutely aware of the interdependence of rivers and their surroundings in maintaining a healthy aquatic ecosystem for fish and the invertebrates they depend on for food,” said **Theodore Gordon Flyfishers Inc.** president Bert Darrow. “By maintaining healthy nitrogen levels in rivers through improved safeguards, such as those upheld in the NY CAFO GP case, fish and insects will thrive, and where wildlife can thrive, potable drinking water can be found.”

“Transparency and public engagement are key elements to any environmental permitting program,” said **Roger Downs, conservation director for the Sierra Club Atlantic Chapter**. “We applaud Judge Weinstein’s decision in recognizing that the Clean Water Act cannot not be administered in secrecy and that factory farms that hide their manure management plans from public scrutiny are more likely to pollute our rivers, streams, lakes and aquifers.”

“We’re extremely gratified that the Court recognized the fatal flaws in New York’s CAFO permit, and has now remanded the permit to the DEC to make it more protective and compliant with federal and state law,” explained **Kelly Hunter Foster, Waterkeeper Alliance senior attorney**. “It is unfortunate that 13 years after the Second Circuit’s decision in *Waterkeeper Alliance v. EPA*, we still have states taking the position that the public does not have a fundamental right to know about, and take action to address, the dangerous polluting activities being permitted at CAFOs around the country. We hope this decision will help reinforce public’s vital role in permitting CAFOs under the Clean Water Act.”

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The Cortland – Onondaga Federation of Kettle Lake Associations, Inc. (C-OFOKLA) is dedicated to the preservation of the kettle lakes, surrounding waters and watershed regions in Cortland and Onondaga counties. C-OFOKLA does so by advocating awareness of lake resources, educating communities about watersheds and their protection and promoting stewardship of those waterways.

Earthjustice, the nation’s premier nonprofit environmental law organization, wields the power of law and the strength of partnership to protect people’s health, to preserve magnificent places and wildlife, to advance clean energy and to combat climate change. Because the earth needs a good lawyer.

Riverkeeper is a member-supported watchdog organization dedicated to defending the Hudson River and its tributaries, and protecting the drinking water supply of nine million New York City and Hudson Valley residents. Since its beginnings more than 50 years ago, Riverkeeper has helped to establish globally-recognized standards for waterway and watershed protection and serves as the model and mentor for the growing Waterkeeper movement that includes more than 300 Waterkeeper programs around the world.

Sierra Club is America’s largest and most influential grassroots environmental organization. Inspired by nature, we are 2.1 million of your friends and neighbors, working together to protect our communities and the planet.

Theodore Gordon Flyfishers, Inc. is a not for profit angling organization, founded on American fly fishing traditions, promoting stream and river protection and self-sustainable salmonid populations through conservation, environmental oversight, activism, catch-and-release practices, and education.

Waterkeeper Alliance is a global movement uniting more than 300 Waterkeeper Organizations and Affiliates around the world, focusing citizen advocacy on issues that affect our waterways, from pollution to climate change. Waterkeepers patrol and protect over 2.5 million square miles of rivers, streams and coastlines in the Americas, Europe, Australia, Asia and Africa.

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