

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

RIVERKEEPER, INC.; CORTLAND-ONONDAGA
FEDERATION, INC.; CORTLAND-ONONDAGA
INC.; SIERRA CLUB; THEODORE GORDON
FLYFISHERS, INC.; and WATERKEEPER ALLIANCE
INC.,

Index No: 902103-17

Petitioners/Plaintiffs,

- v. -

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

Respondents/Defendants.

**BRIEF OF AMICI CURIAE TOWNS OF CAMILLUS, ITHACA,
LAFAYETTE AND ULYSSES AND CITY OF ITHACA**

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PRELIMINARY STATEMENT

The underlying Petition challenges the General Permit for Concentrated Animal Feed Operations (“CAFOs”) issued by the New York Department of Environmental Conservation (“DEC”) on the grounds that it fails to conform to the Clean Water Act (“CWA”) and its implementing regulations. Specifically, Petitioners allege that the General Permit, in violation of federal law, does not require CAFOs to set adequate and enforceable restrictions in their Comprehensive Nutrient Management Plans (“CNMPs”) or DEC to review and approve the CNMPs before granting coverage under the General Permit. Moreover, notwithstanding the CWA mandate, the General Permit also does not allow elected officials, members of the public, or even neighbors that might be harmed by the animal waste pollution created by the CAFOs to review the CNMPs. Proposed Amici submit this brief to provide the Court with important information about the everyday impacts of those legal violations on the people and communities in New York.

STATEMENT OF INTEREST

The Proposed Amici are cities and towns located throughout upstate New York that are concerned about the impacts on their communities that likely will result from the legal insufficiency of the General Permit at issue in this case. Proposed Amici have an interest in this case because if DEC does not meet its obligations under the Clean Water Act, they will not be able to ensure the clean water needed for drinking, recreating and other endeavors to their residents, and thus cannot ensure protection of the health, safety,

and welfare of their constituents. These local governments and many others all across the state, spend significant resources in providing clean and safe water for their residents. When those resources are threatened, it often is the local governments that must take immediate action. Thus, the Proposed Amici are uniquely situated to provide this Court with important information regarding the local impacts of manure management and disposal practices and the burdens placed on municipal governments as a result.

Ulysses

The Town of Ulysses is located in Tompkins County in southern New York. *Affirm.* of Elizabeth Thomas, dated June 12, 2017, in Support of Motion to Appear Amicus (“Ulysses *Affirm.*”). It is a town of approximately 5,000 people. *Id.* at 1. There is one CAFO located within Ulysses. *Id.* at 2. At least one CAFO whose operations are located outside of Ulysses has purchased property within the town limits to spread their manure. *Id.* In addition, Ulysses is located downstream from at least one CAFO whose operations impact the town’s water quality. *Id.* at 1.

Ulysses residents have raised concerns over manure spreading practices on multiple occasions. *Id.* at 2. In May 2016, an out-of-town CAFO owner spread 10,000 gallons of liquid manure per acre on his Ulysses property. *Id.* The town immediately received complaints from nearby residents, who reported health symptoms, including one that was compelled to go to the hospital. *Id.* As a result of those complaints, the CAFO operator agreed to cover the slurry and switch to standard fertilizer. *Id.*

Ulysses recently became aware of a nearby CAFO’s plan to take water from the Trumansburg Creek for manure management, and to discharge the water back to within

about 500 feet from the creek. *Id.* 2-3. Though this operation is located outside of Ulysses, the Trumansburg Creek and its tributaries run through the town, and ultimately flow into Cayuga Lake, which serves as the water source for two water districts in the Town of Ulysses as well as the Village of Trumansburg and many other municipalities that draw drinking water from Cayuga Lake. *Id.* The town received notice of this plan from the Cayuga Lake Watershed Network.

When Ulysses has received complaints or tips about pollution associated with CAFOs or manure spreading, it has tried to respond to them. *Id.* at 2. It has learned, however, that its ability to respond to these issues is extremely limited by the N.Y. State Agriculture and Market Law. *Id.* For example, the town tried to zone part of its land to limit the number of animals allowed per acre to the accepted industry standard, and was informed by the Agriculture and Markets department that such actions conflicted with State law. *Id.* The town also attempted to require CAFOs and farms to plant grass buffer zones between their farming or spreading operations and water sources to minimize the risk of water contamination but this is not allowed by New York State Agriculture and Market Law. *Id.* As a result, when a problem associated with CAFOs arises, Ulysses town officials are unable to respond and must rely on state regulatory and enforcement agencies like Ag and Markets or the DEC which in this case failed to fulfill its legal obligations under the Clean Water Act. The county's Soil and Water Conservation Service is charged with encouraging compliance with state laws, but has no enforcement authority.

LaFayette

The Town of LaFayette, with a population of approximately 5,000 people, is located in Onondaga County in central New York. Affirm. of Andrew Ohstrom, dated June 13, 2017, in Support of Motion to Appear Amicus (“LaFayette Affirm.”).

LaFayette has become the host community for a number of farm fields owned by out of town farmers and used for the disposal of manure. *Id.* at 1. The liquid manure is trucked into LaFayette where it is spread on these fields. There have been spills of the waste as it is transported raising significant health and safety concerns for both residents and others using the local roads. *Id.* at 3. On occasion, the manure has been spread so thickly on the farm fields that rain water cannot penetrate the soil. *Id.* at 1-2.

The waste spreading has increased over the last several years. Residents have raised concerns over the manure disposal practices and its attendant hazards. In one case, residents felt compelled to notify DEC and other authorities regarding the spreading practice of a particular CAFO operator. *Id.* Although the residents were initially assured that the facility was adhering strictly to its CNMP, which was neither shared with the residents nor with the local government, it soon became apparent that such assurance was misplaced. *Id.* at 2. Ultimately, DEC took enforcement action against the CAFO and a consent order was entered between them that required the CAFO to amend the CNMP to incorporate a number of best practices that apparently had been omitted from the CNMP when it was originally drafted. *Id.* Since LaFayette and its residents were prevented from ever obtaining the CNMP, there was no way to determine whether there were other best practices omitted from the plan as well. *Id.*

LaFayette currently is facing a threat from the proposed construction of a lagoon that is designed to hold approximately 2 million gallons of liquid manure. *Id.* The CAFO operator intends to construct the lagoon in a residential neighborhood. Based on the information available, it appears that the lagoon would be located in very close proximity to the nearest home where a young family lives with a 3-year-old and another child expected. *Id.* Neither the municipal government nor residents were informed of the plan, nor were they able to review the construction plans for the facility. *Id.* It only learned about it because facility neighbors, who learned of construction from talking to a CAFO employee, asked the Township to become involved. *Id.* LaFayette has been denied access to the plans and to the facility's CNMP. *Id.* Its requests to several agencies for these documents through the Freedom of Information Law have not been satisfied. *Id.*

Camillus

The Town of Camillus is located in Onondaga County in central New York. Affirm. of Mary Ann Coogan, dated June 12, 2017, in Support of Motion to Appear Amicus ("Camillus Affirm."). It is a town of approximately 24,000 people. *Id.* at 1. Like Lafayette and Ulysses, CAFO operators from other towns have purchased property in the town that they use for manure spreading. *Id.* One CAFO operator places the liquid manure slurry directly on top of the soil on this property and does not cover it. *Id.* This practice creates an extremely unpleasant odor, and the Town receives numerous complaints from its residents every time manure is spread. *Id.* Residents complain that they cannot sit outside or open windows in their homes because of the smell. *Id.* In

addition, a resident who suffers from asthma has complained that the strong odor irritates her respiratory system and aggravates her asthma. *Id.* 1-2. Furthermore, the CAFO operator often gives the town only one day's notice before spreading manure, severely limiting Camillus's ability to even inform its citizens of an impending spreading. *Id.* at 2. Camillus cannot regulate manure spreading due to the N.Y. Ag. & Market Law. *Id.* Its only recourse has been to contact the Department of Agriculture and Markets and DEC, which it has done repeatedly. *Id.* Both agencies have informed the town that there is nothing to be done about the disruptive and unpleasant manure spreading practices occurring in the town. *Id.*

Town of Ithaca

The Town of Ithaca, located in Tompkins County in the Finger Lakes region, is home to approximately 20,000 people. Affirm. of William Goodman, dated June 12, 2017, in Support of Motion to Appear Amicus ("Town of Ithaca Affirm."). Ithaca is concerned primarily about the impact CAFOs have on the water quality of Cayuga Lake, which serves as its municipal water source and an important source of economic and recreational activity for the town. *Id.*

The Town of Ithaca co-owns and operates the Southern Cayuga Lake Intermunicipal Water Commission, located in the Village of Lansing, with four other local municipalities. *Id.* The facility treats water from Cayuga Lake and supplies clean water to seven municipalities, including Ithaca, through individual water distribution

systems. *Id.* Though there is only limited CAFO activity in Ithaca, CAFOs and manure spreading fields located outside of Ithaca have, in the past, drained into the Lake and the surrounding watershed, and seriously impaired water quality. *Id.* at 1-2. One such event occurred in February 2017, when a manure spill in the Town of Lansing contaminated Salmon Creek and reached Cayuga Lake. Though DEC informed the press that the spill would not adversely affect municipal water supplies, other state and county officials advised otherwise. *Id.* Tompkins County advised against use and consumption of beach, well, or lake water until more information became available, and State and county officials advised against direct contact with waters on Cayuga's shore near the Salmon Creek inlet.¹

In addition to serving as the water source for Ithaca and seven other municipalities, Cayuga Lake also provides the Town with valuable economic and recreational opportunities. *Id.* at 1. Ithaca, however, is concerned that CAFOs, without proper oversight and public participation, can and will diminish those opportunities. Property values in Ithaca are relatively high, largely due to the desirability of lakefront property. *Id.* In addition, tourists and residents are drawn by a wealth of recreational activities including boating, fishing, swimming, and watersports on the Lake. *Id.* Ithaca is concerned that CAFOs, as a major source of phosphorous loading in Cayuga Lake,

¹ *DEC: Manure runoff affecting Cayuga Lake*, Ithaca Journal (Feb. 20, 2017); Glenn Coin, *DEC: Manure spill that reached Cayuga Lake won't hurt supplies*, The Post-Standard (Feb. 20, 2017)

contribute to the rampant growth of algae and aquatic plants in the Lake. *Id.* at 2. The vegetation decreases access to the lake by impeding people's ability to swim, boat, fish, or otherwise recreate on the lake. *Id.* Because aquatic plant growth peaks in the summer it negatively impacts tourists' ability to recreate on Lake Cayuga. *Id.* Property owners are concerned that potential buyers and renters may be wary of the increased vegetation. *Id.*

City of Ithaca

The City of Ithaca ("Ithaca" or "the City") is the seat of Tompkins County and home to over 30,000 people. Ithaca is located on the Southern shore of Cayuga Lake. The City relies on the Six Mile Creek, part of the Cayuga Lake Watershed as its primary source of clean drinking water. The Creek runs through significant areas of farmland before reaching the City's water plant after which it runs into Lake Cayuga. The Lake is also an economic driver of the community. City of Ithaca Resolution Authorizing to Request Amicus Curiae Status, June 13, 2017, ("Ithaca Resolution"). Ithaca is concerned that the legally deficient General Permit illegally curtails the City's ability to receive notice of and provide comment on CAFO CNMPs. *Id.* If the General Permit comported with the CWA's requirements, and provided for public access to MNPS, the City would likely review CNMPs to determine their impacts on Six Mile Creek, Fall Creek, and Cayuga Lake Watershed. *Id.* Further, Ithaca would be able to assess the impact CAFOs have on the City's municipal water sources and treatment plants, and environmental and water quality management plans. *Id.* With access to this information, the City would likely provide comments to DEC. *Id.*

ARGUMENT

The responsibility for the management of clean and safe water in New York is carefully distributed among and between the various levels of federal, state, and local government. Adequate protection of water sources depends on decision makers at each level fully discharging their duties in accordance with law. It also depends on local governments and the public's access to critical information. A failure at any level, or denial of access to information, eliminates the environmental protection guaranteed by state and federal law. In this case, DEC's failure to adequately enforce the requirements of the CWA and its implementing regulations is likely to result in increased water pollution, and health and safety issues at the local and community level.

Compounding DEC's failure to enforce the CWA, municipalities are limited in the actions they can take to prevent or remedy environmental threats, but must manage the consequences. In many cases, municipalities' power to affirmatively address CAFO-related water pollution and other community impact is restricted. Nevertheless, local governments are required by their own legal obligations to deal with the results – contaminated water, traffic and road impacts and safety, odor, safety and other quality of life concerns, and of course, increased costs associated with such pollution. DEC's failure to require enforceable limitations; its failure to require CAFO operators to submit a CNMP; its failure to require DEC review of the CNMP; and its failure to allow public review and comment on the CNMPs will force municipalities to respond after the fact and absorb the costs for water treatment, pollution cleanup and response to other related concerns.

I. DEC Must Execute Its Delegated Authority in Accord with the Clean Water Act

A. The Clean Water Act Dictates the Requirements for CAFO Permits

In 1972, Congress enacted the Clean Water Act in an effort “to restore and maintain the chemical, physical and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). To achieve this goal, the CWA expressly prohibits the discharge of pollutants from any point source to water of the United States, except when in compliance with a permit issued under the National Pollution Discharge Elimination System (NPDES) program, and sections 301, 302, 307, 308, and 402 of the CWA. 33 U.S.C. §§ 1311, 1342, 1362; 40 C.F.R. § 401.12(a). Congress delegated the responsibility to implement the CWA to the Environmental Protection Agency (“EPA”), but established a system of cooperative federalism whereby states are given the option to regulate the water within their borders pursuant to their own laws provided they comply with the requirements of the CWA. 33 U.S.C. §§ 1251(d), 1342(a)(5); 40 C.F.R. § 123.25(a).

To be in compliance with the CWA, a delegated state must implement all aspects of the NPDES program, including issuing permits that conform to federal standards. 33 U.S.C. § 1342(b)(1)(A); 40 C.F.R. § 122.4(a) (“No permit may be issued when the conditions of the permit do not provide for compliance with the applicable requirements of CWA, or regulations promulgated under CWA.”)(Internal punctuation omitted); 40 C.F.R. § 123.25 (“All State Programs...must be administered in conformance with

[promulgated regulations], except that States are not precluded from omitting or modifying provisions to impose more stringent requirements.”). As discussed in detail in Petitioners’ Brief, this requirement extends to the CAFO specific federal provisions. 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. pt 412).

EPA adopted CAFO regulations in 2003. These rules were invalidated in part in *Waterkeeper Alliance, et al. v. EPA*, 399 F.3d 486 (2d Cir. 2005). The Second Circuit held that the rule impermissibly: (1) empowered permitting authorities to issue permits without any meaningful review of a CAFO's NMP, (2) failed to require that the terms of the nutrient management plan be included as effluent limitations in the NPDES permit, and (3) violated the CWA's public participation requirements. *Id.* at 499-502. The Court held, “The CAFO rule deprives the public of the opportunity for the sort of participation that the Act guarantees because the Rule effectively shields the nutrient management plans [NMPs] from public scrutiny and comment.” 399 F.3d at 503.

On June 30, 2006, EPA responded to the *Waterkeeper* decision by publishing a proposed rule to revise the agency’s regulations governing discharges from CAFOs. Revised National Pollutant Discharge Elimination System Permit Regulations for Concentrated Animal Feeding Operations; Supplemental Notice of Proposed Rulemaking, 73 Fed. Reg. 46, 12321, 12323 (Environmental Protection Agency Mar. 7, 2008) (to be codified at 40 C.F.R. pt. 122). After several rounds of notice and comment, including more than 4,000 comments on the proposed rule, EPA adopted the final rule in 2008 (the “Final Rule”). 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. 225, 70418 (Environmental Protection Agency Nov. 20, 2008). EPA observed on adoption, “This rule responds to the *Waterkeeper* decision by establishing public participation requirements that ensure adequate opportunity for public review of both a CAFO's NMP and the terms of the NMP to be incorporated into the permit prior to the CAFO obtaining authorization to discharge under the permit.” 73 Fed. Reg. 225, 70440. The Final Rule mandates that:

CAFO owners or operators must submit a notice of intent when seeking authorization to discharge under a general permit in accordance with § 122.28(b). The Director must ... ensure that the notice of intent includes a nutrient management plan that meets the requirements of § 122.42(e) and applicable effluent limitations and standards, including those specified in 40 CFR part 412... If the Director makes a preliminary determination that the notice of intent meets the requirements, **the Director must notify the public of the Director's proposal to grant coverage under the permit to the CAFO and make available for public review and comment the notice of intent submitted by the CAFO, including the CAFO's nutrient management plan.** 40 Fed. Reg. §122.23 (h)(1) (Nov. 20, 2008)(emphasis added).

The 2008 regulations also require that a CAFO notify the Director of any changes to the CAFO's NMP. 40 CFR 122.42(e)(6). Substantial change to the terms of a facility's NMP would trigger public notice and permit modification. Substantial changes include, but are not limited to, the addition of new fields for manure application and increase in the maximum application rates. 40 CFR 122.42 (e)(6)(iii).

B. New York DEC Has Failed to Properly Exercise Its Delegated Authority Under the Clean Water Act

At New York's election, EPA has delegated it the authority to implement the standards established under the NPDES program. *See id.*; 6 N.Y.C.R.R. § 750-1.1(a). Within New York, DEC is charged with overseeing all state programs designed to protect and enhance the environment in accordance with the environmental policy of the state. *See* N.Y. Env'tl. Conserv. Law § 1-0101(1) (McKinney). New York exercises its NPDES authority through its Environmental Conservation Laws and the implementing regulations of DEC. DEC has the obligation to ensure that the state permitting program satisfies all requirements dictated by the CWA and its implementing regulations in order to adequately protect the waters within the State.

The CAFO General Permit issued by DEC must include, at the very least, every item required by the CWA and its implementing regulations. Notwithstanding this clear directive, the NY CAFO General Permit fails to satisfy fundamental requirements of the CWA. The Permit fails to comply with 40 C.F.R. § 122.23(h)(1) which requires DEC to review the CAFOs' CNMPs before approval to ensure it will prevent water pollution. It also fails to provide for "[p]ublic participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program" as mandated by the CWA, 33 U.S.C. § 1251(e) (2012), because it fails to provide for access to the CNMP by elected officials and other members of the public.

Indeed, in the rule adoption described above, EPA explicitly rejected key aspects of the DEC General Permit at issue in this case. For example, the DEC General Permit does not require the CNMP to be submitted to DEC for its review or for public notice and comment. While the DEC includes the requirement for an annual report to be submitted

to DEC, EPA was clear that this was not sufficient to satisfy the public notice requirement. EPA determined:

Providing the NMP terms to the public only in an annual report would not address the *Waterkeeper* requirement that the permitting authority must provide for public notice and the opportunity to comment on the NMP terms and that the NMP terms must be enforceable. 73 Fed. Reg. 225, 70442.

In its comments to the Final Rule, EPA also rejected DEC's preference, as included in the General Permit, that the review of a nutrient management plan for approval should be left to educated professionals. Instead, EPA was specific that "[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." 73 Fed. Reg. 225, 70440.

C. Local Governments Are Limited In Their Ability to Regulate CAFO-Related Pollution But Obligated to Manage It When It Happens

Municipalities are hampered in their efforts to independently regulate CAFO-related activities that occur within agricultural districts, and must rely upon DEC and other state agencies to ensure that the health and well-being of their citizens is not adversely impacted by farming practices. Though the State of New York generally delegates to local governments broad authority to protect their interests with respect to agricultural regulation, municipalities' powers are limited. Article IX of the New York State Constitution, known as the "Home Rule" provision, provides an affirmative grant of power to local governments over their own property, affairs, and government, and also restricts the power of the State Legislature from acting in relation to the same. N.Y. Const. art. IX § 2. However, New York's Agriculture and Markets Law ("N.Y. Ag.

Law”) curtails municipalities’ ability to regulate farming within their borders where agricultural districts have been designated. Agricultural Districts are created by the county legislature in response to requests made by landowners. N.Y. Agri. & Mkts. Law § 303 (McKinney 2016). The N.Y. Ag. Law provides that:

local governments, when exercising their powers to enact and administer comprehensive plans and local laws, ordinances, rules or regulations ... shall not unreasonably restrict or regulate farm operations within agricultural districts in contravention of the purposes of this article unless it can be shown that the public health or safety are threatened.

N.Y. Agri. & Mkts. Law § 305-a(1) (McKinney 2016).

Courts have interpreted the N.Y. Ag Law broadly as limiting municipalities’ ability to administer zoning ordinances and other local laws when they tread on or close to the policy objectives of the N.Y. Ag. Law or unreasonably restrict farming. *See Inter-Lakes Health, Inc. v. Town of Ticonderoga Town Bd.*, 786 N.Y.S.2d 643 (3 Dep’t. 2004) (When a municipality seeks to administer a zoning ordinance in a manner that conflicts with the N.Y. Ag. Law, the ordinance is superseded even if the ordinance predates the creation of the Agricultural District.); *Town of Lysander v. Hafner*, 733 N.Y.S.2d 358 (N.Y. 2001) (Buildings housing migrant farm workers are “on-farm” buildings and thus qualify as part of “farm operations” which the N.Y. Ag. Law protects from being unreasonably regulated by local governments.); *Village of Lacona v. State, Dept. of Agr. And Markets*, 858 N.Y.S.2d 833 (3 Dep’t. 2008) (Affirming a determination by the Department of Agriculture and Markets that a village ordinance prohibiting the use of liquid manure was unreasonably restrictive and therefore violated of the N.Y. Ag. Law).

Though most of the case law involves zoning, the N.Y. Ag. Law also limits municipalities' ability "to enact and administer comprehensive plans and local laws, ordinances, rules or regulations" in general. *See* N.Y. Agri. & Mkts. Law § 305-a(1) (McKinney 2016).

Moreover, there is little recourse from determinations by the Department of Agriculture and Markets. Those decisions of the Department of determining the status of farming practices or municipal actions, have not been considered agency action subject to the State Environmental Quality Review Act. Further compounding the problem, decisions regarding farm management fall within Category II under the (SEQRA) which means they do not trigger an environmental review. 6 N.Y.C.R.R. § 617.5 (c)(3). *Pure Air & Water Inc. of Chemung Cty. v. Davidsen*, 668 N.Y.S.2d 248, 250 (1998)(concluding that the determination by the Commissioner of N.Y. Dep't of Ag & Markets was "merely an assessment of an agricultural practice. Therefore, its issuance was not an "action" within the meaning of SEQRA. Moreover, even if deemed an action, SEQRA exempts agricultural farm management practices from review.")

II. Proposed Amici and Other Similarly Situated Local Governments Are Adversely Impacted by the Unlawful General Permit

A. Local Governments Are Injured By the Denial of Information to Which They Have a Legal Right

The CWA requires that before receiving a permit, CAFOs must submit their

CNMPs to the permitting authority for approval and they must be made available for review and comment by the public. The information contained in it is critical to the ability of Proposed Amici to fulfill their duties. But the DEC General Permit denies them this opportunity. Proposed *Amici* would likely engage in the review and comment process for CAFO CNMPs impacting their communities and water quality if permitted to do so. Ithaca Resolution at 2; Ulysses Affirm. at 2; LaFayette Affirm. at 2; Ithaca Affirm. at 1. Their inability to learn the information and determine if they want to comment is injury in and of itself. Courts have recognized that denial of information to which there is a statutory right is a cognizable injury. *Federal Election Comm'n. v. Atkins*, 524 U.S. 11, 22 (1998); *see also Fund for Animals v. Norton*, 295 F.Supp.2d 1, 8 (D.D.C. 2003).

Second, the failure to make CNMPs available to Proposed Amici effectively makes citizens suits as authorized by the CWA impossible. A facility's failure to comply with the CNMP could subject it to a citizen suit alleging that the CAFO is "in violation of an effluent limitation or standard under this chapter." 33 U.S.C. § 1365(a)(1). But if elected officials and members of the public are denied access to the CNMP, they have no ability to determine compliance. As the Second Circuit stated in *Waterkeeper*, the CWA "demands regulation in fact, not only in principle." 399 F.3d 846, 499-502. If municipalities and their citizens are barred from CNMPs they are legally entitled to access, the CWA delegated authority is not "in fact" being properly executed.

Proposed Amici have, and will likely continue to experience injury associated with unlawful denial of information from DEC's failure to include a public review and comment requirement in the General Permit. Proposed Amicus, the town of Ulysses, did

not receive any warning in May 2016 before an out of town CAFO operator spread 10,000 gallons of uncovered liquid manure per acre of a field in Ulysses. Affirm. at 2. The operator did not warn Ulysses or its residents of this deviation from his standard procedure – later stating that he had run out of room in his out of town lagoon, and had left the manure uncovered in Ulysses because he did not want to pay to bring the equipment necessary to cover the waste to this lesser-used field. *Id.* CNMPs require that CAFO Operators specify the amount of manure they plan on applying to fields during a crop year. However, under the General Permit as approved by DEC, municipalities do not have access to these details. As a result, Ulysses had no knowledge of the facility’s manure-spreading plans; was unable to anticipate the May 2016 incident or make public comment on behalf of its citizens; and could not determine whether the incident violated the operator’s CNMP. Moreover, it could not even explain to its concerned residents why they were experiencing such distress from this episode of manure spreading.

Proposed Amici, the City of Ithaca, is similarly concerned about how its inability to view or participate in comment on NMPs may undermine its interest in maintaining Cayuga Lake’s water quality. Ithaca Resolution at 1. The City is dependent on Cayuga Lake both as a “foundation of natural beauty” but also “as a source of clean drinking water and an ecological driver of the community.” *Id.* at 2. As such, the City has a compelling interest in identifying and participating in decisions that have potential to affect the Lake. *Id.* If the General Permit complied with the CWA, the City would take advantage of its opportunity to review CNMPs, to determine their impacts on the Six Mile Creek, Fall Creek, and the Cayuga Lake Watersheds, and on the City’s municipal water sources and water treatment systems. *Id.* Moreover, Ithaca would likely provide

comment to DEC on plans, and work towards preserving the Lake and surrounding water resources. *Id.* DEC's failure to include the legally mandated requirement that CNMPs be subject to public review and comment concretely injures towns like Ulysses and Ithaca, for whom participation in the public comment process represents an opportunity to work with DEC to protect local resources and serve their communities.

B. DEC's Failure to Conform the General Permit to the Requirements of the Clean Water Act Threatens the Ability of Local Governments to Ensure the Health and Safety of Their Residents

Local governments are generally responsible for a number of services that are impacted by CAFOs. For example, they must maintain their public water systems in compliance with the Federal Safe Drinking Water Act's ("SDWA") standards. *See U.S. v. County of Westchester, N.Y.*, 2014 WL 1759798, *4 (S.D.N.Y. Apr. 28, 2014) (Holding that the SDWA applies to entities that directly or indirectly provide drinking water to more than twenty-five individuals); 42 U.S.C. § 300(f) (2016). Thus, despite municipalities' inability to regulate CAFO discharge under the N.Y. Ag. Law, they, along with county or water municipal water authorities, are responsible for ensuring that water quality continues to meet SDWA standards. Because their ability to prospectively regulate CAFO activities is so limited, municipalities are forced to deal with the consequences of water pollution retroactively, by increasing local water quality monitoring, investing in more effective treatment plants and adopting costly retroactive measures to minimize health risks to their citizens. *See Gwendolyn Craig, Auburn and*

Owasco Water Plants Consider Blue-Green Algae Toxin Treatments, Auburn Citizen, Dec. 26, 2016; *see also* DEC, State Environmental Quality Review (SEQR) Findings Statement (Mar. 29, 2013) (stating that waste discharged from dairy CAFOs causes algal blooms including growth of blue-green algae); Cayuga County, Resolution No. 37-16; City of Auburn, Resolution No. 23 of 2016; Town of Fleming, Resolution No. 1 of 2016; Onondaga County Health Dep't Comments on Draft SPDES General Permits for Concentrated Animal Feeding Operations ("While not all County Health Departments have regulatory authority with respect to private wells, local departments become intricately involved if a contamination event occurs. This may include water quality testing as well as providing technical guidance and information on treatment options and voluntary monitoring the homeowner may wish to pursue.").

Availability of CNMPs is important for local governments and residents because without that information and ability to comment on the plans and proposed modifications, they are unable to protect their communities. There are agricultural districts in each of the Proposed Amici, and each relies on agriculture for their economic success. Yet, each of the Proposed Amici has encountered significant problems with CAFO pollution that may have been avoided or better managed if the CAFO General Permit required DEC to review CNMPs and required the access and public participation mandated by the Clean Water Act.

Proposed Amicus the Town of LaFayette was completely unaware of a proposed building of a 2-million-gallon manure pit. LaFayette Affirm. at 2. As noted earlier, construction of the pit is proposed for a residential area. *Id.* The CAFO's plans regarding the transportation and storage of the liquid manure should have been included in a

CNMP, and any change in its operations would require an amendment to the CNMP.

Pursuant to the Clean Water Act regulations, both the original and amended CNMP should have been available to LaFayette officials and residents for review but they were not. As a result, LaFayette officials learned of the plans only from a neighbor to the site who had a conversation with the CAFO employee. *Id.* By the time LaFayette discovered the plan for the massive manure pit, it was too late to have substantive input. *Id.*

Moreover, once it discovered the operator's intention, it sought copies of the construction plans and the CNMP from DEC, Agriculture and Markets and the Soil Conservation Service under the Freedom of Information Law. But LaFayette's requests have not been granted. *Id.* At the time of this writing, LaFayette continues to be excluded from the development process for the manure pit – a facility that, given the history of CAFO operations – may well adversely impact the community.²

Proposed Amicus, the Town of Ithaca, is similarly concerned about its ability to identify and respond to CAFO-related environmental problems in the absence of a requirement that CNMP be made available to the public. As a co-owner and operator of the Southern Cayuga Lake Intermunicipal Water Commission, Ithaca supplies and treats water obtained from Cayuga Lake to itself and six other municipalities. Ithaca Affirm. at 2. Though CAFO activities in the Town are limited, CAFOs, manure spreading fields, and lagoons outside of Ithaca have potential to contaminate the Lake directly or through

² In its comments on the CAFO General Permit, the City of Watertown, Dep't of Water described two similar experiences with the construction of multi-million gallon manure pits near Class A Surface Waters and unconfined aquifer without notice to the City. Letter from Michael J. Sligar, Superintendent, City of Watertown, to Douglas Ashline, DEC (Feb. 11, 2016).

the Cayuga Watershed, and impair the Town's water quality. *Id.* In February 2017, a liquid manure spill into Salmon Creek in the Town of Lansing contaminated Cayuga Lake. Though the DEC stated that the spill would not adversely affect municipal water supplies, Tompkins County temporarily advised against use and consumption of beach well or lake water. Matt Weinstein, *DEC: Manure runoff affecting Cayuga Lake*, Ithaca Journal (Feb. 20, 2017); Glenn Coin, *DEC: Manure spill that reached Cayuga Lake won't hurt supplies*, The Post-Standard (Feb. 20, 2017). State and county officials also advised against direct contact with the waters on Lake Cayuga's shore near the Salmon Creek inlet. *Id.*

This was not an isolated incident: In 2014 and 2015, DEC reported 79 incidents of water contamination related to manure runoff from farms. Gartner Aff. Ex. 5-6. In 2014, Lake Owasco, which provides drinking water for 44,000 people and is located just to the East of Cayuga Lake, was contaminated when a plume of liquid manure from a large CAFO leaked into the Lake. Carrie Chantler, *Owasco Lake Advocates Decry Runoff of Manure into Water*, Auburn Citizen (Apr. 6, 2014).

Thus, CAFOs, even when regulated, pose a serious threat to local water quality. Ithaca, and towns like it, rely on the Cayuga Lake Watershed for their municipal water supplies, so it is critical that the Town be informed about potential projects that could jeopardize that water supply. The General Permit's failure to require CNMPs to be made available to the public undermines Ithaca's ability to get notice of, and participate in discussion regarding, large-scale agricultural projects that could impact the quality of Cayuga Lake and its watershed.

Proposed Amicus the Town of Ulysses' ability to ensure the health and safety of its citizens is similarly threatened by the General Permit's failure to conform to the CWA requirements. Following the May 2016 incident in which an out of town farmer spread 10,000 gallons of liquid manure per acre on his property in Ulysses and waited several days before covering the manure, dozens of residents called the Town's offices complaining about the extreme discomfort they were experiencing from the strong odor of ammonia. Ulysses Affirm. at 2. Several residents reported symptoms such as epiphora – excessive tearing of the eyes. *Id.* One resident reportedly sought medical treatment at a hospital due to her symptoms. *Id.* Ulysses has twice attempted to implement modest regulations that would minimize the negative effects associated with CAFO waste disposal. The Town tried to limit the number of animals allowed per acre to industry standards but was informed by the Department of Agriculture and Markets that such ordinances violated the N.Y. Ag. Law, and the Town was forced to discontinue its efforts. Separately Ulysses has been told that requiring a grass barrier between manure laden agricultural fields and creeks or other water courses to prevent runoff is not allowed by the Department of Agriculture. *Id.* Lacking any authority to regulate CAFOs, Ulysses is entirely reliant upon DEC to ensure that manure spreading is conducted in a minimally harmful manner. DEC's failure to issue a General Permit that ensures the health and safety of farming and farming-adjacent communities undermines towns' ability to rely on the state and leaves Ulysses, and towns like it, powerless to protect its citizens.

Conclusion

DEC's failure to enforce the CWA and its implementing regulations disturbs the careful distribution of power and responsibility allocated between the Federal, State, and local governments. The N.Y. Ag. Law's restrictions on local governments' ability to regulate agricultural activities. Thus, local governments, which are responsible for ensuring that their citizens have access to safe, clean water, must and do depend on the State to enforce the CWA's standards. DEC's failure to do so unfairly and unlawfully prevents government entities from using their knowledge and expertise to help prevent water contamination from CAFO manure management, yet shifts the costs and burdens of remedying such contamination onto those entities.



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