

# Appendix E

Memorandum from DEC  
Commissioner Joe Martens  
to Assistant Secretary for Energy and  
the Environment

2012

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STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION  
ALBANY, NEW YORK 12233-1010

## MEMORANDUM

TO: Tom Congdon, Assistant Secretary for Energy and the Environment

FROM: Commissioner Martens

RE: New York Dairy Farm Expansion Transition Program

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New York's dairy industry provides a strong foundation for the state's economy and is its largest agricultural industry, generating nearly \$3 billion annually in farm gate revenue and upwards of \$9 billion overall. According to Cornell University, new and expanded growth of New York dairy processing plants (e.g., Great Lakes Cheese, Chobani Yogurt, FAGE Yogurt, Alpina, etc.) will require 15% more milk to operate profitably. Cornell projects this will create approximately 3,400 new jobs on New York dairies, their supporting businesses and rural communities. Some have asserted that the Concentrated Animal Feeding Operation (CAFO) program is a barrier to meeting the expanding demands of the New York dairy processing plants and the associated economic development. As individual small and medium-sized farms consider expanding their herds to become medium or large-sized CAFOs it is important that the economic and environmental aspects be considered together. New York can meet this challenge through targeted use of the existing Agricultural Environmental Management (AEM) program and deployment of the Cornell PRO-DAIRY program specialists.

### **New York Dairy Farm Expansion Transition Program**

Step 1. Provide increased funding for Cornell PRO-DAIRY to complete surveys of New York dairy farmers who have either successfully completed the expansion from small farm to medium CAFO or are considering such an expansion. The AEM status of each farm would also be recorded to understand how to encourage completion of all five AEM tiers.

Step 2. Use increased EPF funds in the Agricultural Waste Category for Cornell PRO-DAIRY to develop or update Comprehensive Nutrient Management Plans (CNMPs) on farms considering an expansion. Provide funds for completion of the Annual Compliance Report. The Cornell PRO-DAIRY specialists would then incorporate the CNMP into a farm-specific economic projection for expansion identifying the costs of CAFO compliance along with the other farm-specific costs of expansion.

Cost Estimate: \$10,000 / farm

Step 3. Provide increased funding for Cornell PRO-DAIRY to provide manure applicator training and compliance assistance visits to small and medium farms to increase compliance and



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develop the management capacity of these smaller farms.

Cost Estimate: \$500 / event

Step 4. Direct increased EPF funds through the AEM Agricultural Nonpoint Source Abatement and Control program to provide cost-share grant assistance exclusively to expanding small and existing medium farms to complete the AEM process and to implement the structural practices necessary for full CAFO compliance (e.g., manure storage, feed waste handling, etc.).

Cost Estimate: \$100,000 - \$250,000+ / small farm (~100-150 farms)

Cost Estimate: \$22M / existing medium CAFO (~240 farms)

Step 5. Use the current CAFO permit provisions to allow 6 months for transitioning CAFOs to develop a CNMP and implement the non-structural components. The CAFO permit also would provide until the end of the permit term (2014) for transitioning farms to achieve full implementation, including structural practices.

Step 6. Outreach and program rollout. Develop an outreach program in coordination with NY Farm Bureau and Cornell PRO-DAIRY to include:

Empire Farm Days – panel discussion and booth to allow for anonymous questions

Medium CAFO Roadshow – provide staff for on-farm educational opportunities

Webinars – work to provide web-based opportunities for farmers to ask questions and be given examples of how best to achieve compliance

#### **Additional Benefits**

Funding provided to transitioning farms to complete the AEM tiers and implement practices will be tracked and submitted for credit under the Chesapeake Bay and Lake Champlain TMDLs. Additional reductions from agriculture will lessen the burden and expense for other sectors including municipal wastewater treatment plants. The cost / pound reduction for agriculture is estimated to be between two and ten-fold less than for the equivalent wastewater treatment pound reductions.

#### **Background**

Cornell PRO-DAIRY specialists provide the predominant statewide expertise in farm-level economic development, environmental stewardship, on-farm renewable energy and work to develop the future leaders of the New York dairy industry. Their \$822,000 annual budget provides critical support to many existing DEC programs including the Chesapeake Bay TMDL, CAFO program and renewable energy development. An increase in the PRO-DAIRY budget would position them to provide key leadership in this dairy transition program to integrate the elements of economic and environmental analysis to allow farms to meet the increased milk demands of New York State.

The AEM Program is:

- Administered by NYS Department of Agriculture and Markets
- Voluntary, incentive-based
- Coordinates technical assistance
- Five-tiered approach
  - Tier 1 Inventory environmental concerns
  - Tier 2 Document land stewardship; assess & prioritize
  - Tier 3 Conservation plan development
  - Tier 4 Implement

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o Tier 5 Evaluation

A small farm that has completed the AEM process has the fundamental components for complying with the CAFO program. An increase in funding for the EPF Agricultural Nonpoint Source Abatement and Control program for the exclusive use in this dairy transition program would help meet the increased milk demands in an environmentally sustainable manner.

*Why can't we align state CAFO rules with the federal rules? How did they separate to begin with and why?*

The difference between state and federal rules lies in whether a discharge is needed in order for permit coverage to be required. The CWA under §122.23 (b)(6)(ii) defines when a discharge occurs and therefore when permit coverage is required. ECL Sec 17-0801 requires that point sources have a SPDES permit regardless of discharge.

In ECL 17-0505 and 17-0701, the creation of a point source must be permitted under the State Pollutant Discharge Elimination System (SPDES). ECL 17-0105 defines Concentrated Animal Feeding Operation (CAFO) as a point source under SPDES. Thus, since 1972, when the NYS Legislature defined a CAFO as a point source, and mandated the DEC to regulate CAFO operations under the terms of a SPDES permit, a CAFO is required to obtain a SPDES permit regardless of a discharge.

In 6 NYCRR Part 750-1.2(a) the definition of Concentrated Animal Feeding Operation is reserved. In Part 750-1.11(a) the provisions of each issued SPDES permit must comply with the requirements of 40 C.F.R. 122.23 for CAFOs, this is incorporated by reference (750-1.24(c)) such that the size threshold for a medium CAFO is defined as 200 to 699 mature dairy cows. This definition is specifically included in both of the CAFO permits.

It appears that the original federal definition of 300 animal units (equivalent to 200 mature dairy cows) and 1000 animal units (equivalent to 700 mature dairy cows) thresholds were based on an ACOE study completed in the mid-1960s that compared waste strength and waste production for purposes of treatment. The Army Corps of Engineers (ACOE) sought to normalize waste values to some standard and arrived at animal units. USEPA used this animal unit concept and threshold in the 1972 CWA. A key distinction of the 1972 Act from earlier water quality acts was that EPA made determinations of the level at which particular sources were more like point sources and subject to the technology-based requirements of the CWA rather than nonpoint sources and not subject to these requirements.

New York's SPDES program was approved by EPA in 1975 to be equivalent to the federal National Pollutant Discharge Elimination System (NPDES) program. In the Memorandum of Understanding (MOU) dated October 28, 1975 between EPA and DEC, EPA retains the oversight authority of the SPDES program and reserves its rights to object to, review and receive draft permit information pursuant to Section 402 (d) of the CWA. To comply with the Clean Water Act, any changes with the CAFO Permit or CAFO Regulations must be reviewed by EPA. EPA will object to de-regulate the medium CAFOs in New York because it is inconsistent with the current federal CAFO rule. ECL 17-0809 directs the Department to issue SPDES permits which include effluent limitations. The Department has been regulating medium-sized CAFOs under a SPDES permit for more than a decade and requiring medium-sized CAFOs to comply with the effluent limitations that are identified in a *Comprehensive Nutrient Management Plan Certification* (CNMP Certification). NYS law bars the Department from allowing a SPDES permit to be more lenient than a previous permit in antibacksliding provisions enacted in 1988 (ECL 17-0809(3)). This conforms to provisions in the federal Clean Water Act. Releasing medium-sized CAFOs from the obligation to comply with the effluent limitations contained in the CAFO SPDES permit is backsliding and is a violation of ECL 17-0809(3) unless it is justified by material and substantial changes in circumstances or by new data.

Currently, DEC and Ag&Mkts are working to revise both of the CAFO permits. These revisions will address federal regulatory revisions, recent applicable federal court decisions and the recommendations of the CAFO workgroup<sup>1</sup>.

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<sup>1</sup> The CAFO workgroup was established in 1995 to address environmental regulation for New York farms. The workgroup consists of representatives from environmental and farm lobby groups, academic institutions, individual farmers, state and federal agency staff. This workgroup was originally tasked with deciding on a regulatory direction including regulation of medium CAFOs. The workgroup plays an advisory role to the Department and provides technical support on existing and emerging agricultural issues.