



October 11, 2018

Via e-mail to cafoinfo@dec.ny.gov

Douglas Ashline
NYDEC – Division of Water
625 Broadway, 4th Floor
Albany, NY 12233-3505

Re: Comments on Draft CWA CAFO General Permit GP-0-19-001

Dear Mr. Ashline,

On behalf of Riverkeeper, Inc., Cortland-Onondaga Federation of Kettle Lake Associations, Inc., Sierra Club Atlantic Chapter, and Waterkeeper Alliance, Inc., we submit the following comments on the draft Clean Water Act General Permit for Concentrated Animal Feeding Operations: Permit No. GP-0-19-001 (“Draft Permit”), recently published by the New York Department of Environmental Conservation (“DEC”). While we applaud DEC for strengthening the protections provided under the prior permit (GP-0-16-002) (“Prior Permit”), we are concerned that the Draft Permit continues to pose an unacceptable risk of water pollution and inappropriately restrict opportunities for public comment. We urge DEC to consider these comments in revising the Draft Permit to ensure that manure and other waste from CAFOs do not contaminate waters and threaten public health in violation of the Clean Water Act (“CWA”), 33 U.S.C. § 1251 *et seq.*, and the New York Environmental Conservation Law (“ECL”).

LEGAL & FACTUAL BACKGROUND

Concentrated Animal Feeding Operations (“CAFOs”) are industrial facilities that confine hundreds, thousands, or even millions of animals used for the production of meat, milk, and eggs. *See* 40 C.F.R. § 122.23(b)(1) (defining an “animal feeding operation” or “AFO” as “a lot or facility . . . where . . . [a]nimals . . . 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 . . . [c]rops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility”); *id.* § 122.23(b)(4), (6) (defining a CAFO as an AFO that surpasses a certain size threshold—for example, a large dairy CAFO confines at least 700 cows). New York is the country’s third-highest milk-producer and home to more than 620,000 dairy cows.¹

¹ Press Release, Governor Andrew Cuomo, “Governor Cuomo Announces New York State Reclaims Its Status as the Third Highest Producer of Milk in the Nation (Jan. 29, 2014), *available at* <https://www.governor.ny.gov/news/governor-cuomo-announces-new-york-state-reclaims-its-status-third-highest-producer-milk-nation>; New York State Department of Agriculture and Markets, “New York State Dairy Statistics 2016 Annual Summary,” 2016,

However, only about 500 of New York's approximately 5,500 dairies qualify as CAFOs.²

As DEC has acknowledged, CAFOs confining hundreds of cows have the "pollution potential of . . . major sewage treatment plant[s]" serving large cities.³ But unlike major sewage treatment plants, CAFOs do not process and disinfect waste prior to disposal. Instead, these facilities store animal urine and feces in vast uncovered pits, before applying it directly to land as "fertilizer." Improper manure management at CAFOs, such as land application before heavy rainfall, increases the risk of manure runoff from disposal sites and contamination of water bodies with infectious pathogens such as *E.coli* and *Campylobacter*.⁴ This raises serious concerns for human health and water quality, especially for the approximately 10% of New Yorkers who self-supply their drinking water.⁵

Incidents of CAFO-caused water contamination are not infrequent. In 2015, there were 40 documented incidents.⁶ Only one year earlier, a DEC-regulated large CAFO discharged a plume of liquid manure, measuring 25-by-75 feet, into Lake Owasco, a water body that provides drinking water for 44,000 residents in central Cayuga County, New York.⁷ Also in 2014, DEC fined a Genesee County dairy for contaminating six residential wells with *E. coli*.⁸ More recently, in 2017, snowmelt led to a manure spill in Cayuga Lake, after a CAFO with storage

<https://www.agriculture.ny.gov/DI/NYSAnnStat2016.pdf>

² See USDA, Table 12: "Cattle and Calves – Inventory" in 2012 Census of Agriculture (2012), https://www.nass.usda.gov/Publications/AgCensus/2012/Full_Report/Volume_1,_Chapter_1_State_Level/New_York/st36_1_012_013.pdf.

³ DEC, Final Phase I Nutrient and Sediment Water Quality Improvement and Protection Plan at 18 (2010), http://www.dec.ny.gov/docs/water_pdf/finalphaseiwip.pdf.

⁴ Cooperative Extension, "Pathogens and Potential Risks Related to Livestock or Poultry Manure," from USDA and National Institute of Food and Agriculture, March 19, 2015, <https://articles.extension.org/pages/8967/pathogens-and-potential-risks-related-to-livestock-or-poultry-manure>.

⁵ U.S. Env't Prot. Agency, Estimated Nitrate Concentrations in Groundwater Used for Drinking, <http://www2.epa.gov/nutrient-policy-data/estimated-nitrate-concentrations-groundwater-used-drinking> (last updated Dec. 24, 2015).

⁶ See Press Release, Riverkeeper, *NY Supreme Court strikes down DEC's permit for mega-dairies*, Apr. 25, 2018, <https://www.riverkeeper.org/news-events/news/preserve-river-ecology/new-york-supreme-court-strikes-down-department-of-environmental-conservations-permit-for-mega-dairies/>.

⁷ Carrie Chantler, *Owasco Lake Advocates Decry Runoff of Manure into Water*, Auburn Citizen, Apr. 6, 2014, http://auburnpub.com/news/local/owasco-lake-advocates-decry-runoff-of-manure-intowater/article_498bd2fe-a7ec-5994-b4ed-005111da2e89.html.

⁸ Nancy Sanders, *Dairy Farm Fined for Manure Contamination in March*, WIBV, Oct. 8, 2014, <http://wivb.com/2014/10/08/dairy-farm-fined-for-manure-contamination-in-march/>; see also Steve Orr, *NY, Genesee Officials Probe Water Contamination*, Democrat & Chronicle, Mar. 19, 2014, <http://www.democratandchronicle.com/story/news/2014/03/19/genesee-county-water-contamination/6612105/>.

problems land-applied manure.⁹ During this incident, state and county officials advised residents to avoid direct contact with lake waters.

Once in surface water, excess nutrients—particularly phosphorus—from runoff and manure can trigger a harmful algal bloom (“HAB”).¹⁰ Cyanobacteria, a type of blue-green algae, produce a suite of toxins that cause skin rashes and irritation, upset stomach and nausea, fever, and other neurologic symptoms upon contact or ingestion.¹¹ Anyone who drinks contaminated water or participates in activities as innocuous as swimming in a contaminated lake could be exposed to these cyanotoxins.¹² Since the devastating 2014 spill, Lake Owasco continues to experience frequent HAB outbreaks. In 2016, cyanotoxins were discovered in the city of Auburn’s drinking water supply.¹³ The following year, cyanotoxins were reported in Skaneateles Lake, which is the raw water source for the city of Syracuse.¹⁴ The blooms in these critical water bodies not only raise concerns about drinking water safety, but also threaten the livelihoods of nearby communities that rely on recreation and tourism.¹⁵ Nationally, damages due to algal blooms range from \$1.3 to 4.2 billion.¹⁶ These include: commercial and recreational fishing losses (\$189-589 million), depreciated property value (\$0.3-2.8 billion), and bottled water costs due to undrinkable public water supply (\$813 million).¹⁷

To ensure that CAFOs do not unnecessarily and unlawfully degrade New York waters, DEC administers two general permits for CAFOs: an ECL permit and a CWA permit. *See, e.g.,*

⁹ Matt Weinstein, *DEC: Manure Runoff Affecting Cayuga Lake*, Ithaca Journal, Feb. 20, 2017, <https://www.ithacajournal.com/story/news/local/2017/02/20/dec-manure-runoff-impacting-cayuga-lake/98152244/>.

¹⁰ Hans W. Paerl and Timothy G. Otten, *Harmful Cyanobacterial Blooms: Causes, Consequences, and Controls*, 65 *Microbial Ecology* 995 (2013), <http://www.unc.edu/ims/paerllab/research/cyanohabs/me2013.pdf>.

¹¹ Elizabeth D. Hilborn et al., *Algal Bloom-Associated Disease Outbreaks Among Users of Freshwater Lakes—United States, 2009-2010*, 63 *Morbidity and Mortality Weekly Report* 11 (2014). <https://www.cdc.gov/mmwr/preview/mmwrhtml/mm6301a3.htm>.

¹² EPA, *Epidemiology and Health Effects of Cyanobacteria*, Nov. 9, 2017, <https://www.epa.gov/water-research/epidemiology-health-effects-cyanobacteria>.

¹³ Peter Mantius, *Are manure spills spurring algae outbreaks?* The Observer, May 8, 2018, <http://www.observer-review.com/are-manure-spills-spurring-algae-outbreaks--cms-6085>

¹⁴ Glenn Coin, *New algae outbreak on Skaneateles Lake has residents nervous*, Syracuse.com, Aug. 7, 2018, https://www.syracuse.com/news/index.ssf/2018/08/new_algae_outbreak_on_skaneateles_lake_has_residents_worried.html.

¹⁵ Melissa Gomez, *Algae Bloom in Florida Prompts Fears About Harm to Health and Economy*, New York Times, Jul. 9, 2018, <https://www.nytimes.com/2018/07/09/us/algae-blooms-florida-nyt.html?>

¹⁶ *See* Walter K. Dodds et al. *Eutrophication of U.S. Freshwaters: Analysis of Potential Economic Damages*, 43 *Envtl. Sci. and Tech.* 12 (2009).

¹⁷ *Id.*

See EPA Region 2, New York State Animal Agriculture Program Assessment 3 (2015) (“EPA Animal Ag. Assessment”), https://www.epa.gov/sites/production/files/2015-07/documents/new_york_animal_agriculture_program_assessment_final_2.pdf. Coverage under the ECL permit is available only to CAFOs that are designed, constructed, operated, and maintained not to discharge. *Id.*¹⁸ CAFOs that discharge pollutants under narrow circumstances must obtain coverage under the CWA permit. *Id.*¹⁹ In administering both permits, DEC has the duty and authority to “require the use of all known available and reasonable methods to prevent and control the pollution of the waters of the state of New York.” E.C.L. § 17-0101; *see also id.* § 3-0301 (“It shall be the responsibility of [DEC] . . . to carry out the environmental policy of the state set forth in [E.C.L. § 17-0101].”).

In 2017, a coalition of environmental organizations challenged the Prior Permit for failure to satisfy federal requirements for government oversight and public participation. *See Riverkeeper v. Seggos*, 75 N.Y.S. 3d 854 (N.Y. Sup. Ct. 2018). Before this suit, 267 industrial dairies had coverage under New York’s CWA Permit, while 295 had coverage under the ECL permit. EPA Animal Ag. Assessment at 3. The environmental organizations prevailed in April 2018, and the New York Supreme Court in Albany ordered DEC to revise its CWA permit to comply with federal law. *See Riverkeeper*, 75 N.Y.S. 3d at 876. However, based on records received in response to a recent public records request, it appears that 228 CAFOs formerly covered under the CWA permit have chosen to seek coverage under the ECL permit instead.²⁰ **In other words, more than 85% of CAFOs previously designed, constructed, operated, and maintained to discharge pollutants now claim they no longer discharge any pollutants at all.** (Despite submitting a public records request for relevant information, we have seen no evidence that all or even a majority of these facilities have undergone substantial modifications that would reduce their potential to discharge.)

At least 30 CAFOs that switched to the ECL permit have been subject to enforcement actions as a result of permit violations since 2012, per records received in response to a 2017 FOIL request. Another 33 facilities reported compliance problems within the last five years. While details are scarce for many of these violations, a handful are linked to manure runoff and at least three involve well contamination or water quality violations, according to records submitted by those facilities. At least 23 CAFOs now covered under the ECL permit

¹⁸ Some pollution—including precipitation-related discharges of manure, litter, or process wastewater—may be permitted, even at facilities that purport not to “discharge.” *See* 40 C.F.R. § 122.23(e).

¹⁹ Pursuant to E.C.L. § 17-0701(1)(b), a CWA permit might also be required for CAFOs that expand.

²⁰ This number comes from a spreadsheet produced by DEC as part of its response to a June 2018 Freedom of Information Law records request. *See* Exhibit A. The request sought, *inter alia*, a list of facilities covered under GP-04-02—that is, the iteration of the CWA permit that preceded the Prior Permit—that later obtained coverage under the ECL permit. That spreadsheet, titled “GP-04-02,” lists 228 facilities by name and Current SPDES ID. All SPDES IDs indicate coverage under the ECL permit.

indicated that their manure management plans—known as nutrient management plans or NMPs—are not yet fully implemented.

Even more alarming, at least three facilities now covered under the ECL permit have indicated that they are “daily spread” operations with no or minimal manure storage. Facilities without storage could have no alternative but to land-apply waste during conditions that pose a high risk of water contamination. While some of these facilities are under consent orders to address their lack of storage, the actual implementation of those orders—and, thus, compliance with federal and state law—appears to be contingent on adequate funding, which the facilities might never obtain.

ARGUMENT

I. DEC Must Ensure that all CAFOs Obtain Appropriate Permit Coverage.

We are very concerned that many CAFOs designed, constructed, operated, and maintained to discharge manure and other pollutants into New York’s waters have improperly sought and obtained coverage under the ECL Permit. At a minimum, DEC must ensure that CAFOs seek, obtain, and maintain the proper permit coverage. CAFOs operating without the appropriate permit could be liable for significant penalties. We strongly urge DEC to revise the Draft Permit to include a description of the characteristics of CAFOs that must seek coverage under the CWA permit, as opposed to the ECL permit. DEC should not allow a CAFO formerly covered under the CWA permit to obtain coverage under the ECL permit without clear evidence that the CAFO has implemented substantial changes so that it is no longer designed, constructed, operated, or maintained to discharge pollutants.

DEC can and must do more to protect New York’s waters. State governments have authority to implement water protection standards that are more stringent than those required under federal law. *See* 40 C.F.R. § 123.1(i). For example, Michigan requires all CAFOs to seek coverage under a general or individual NPDES permit. The Michigan Court of Appeals has upheld this rule, finding that state law authorizes the Michigan Department of Environmental Quality (“MI DEQ”) to “prevent any pollution” of the waters of the state. *Mich. Farm Bureau v. DEQ*, 292 Mich. App. 106, 137 (2011) (citing MCL § 324.3106). The court reasoned that, “because the powers conferred upon [MI] DEQ by [state law] . . . are broader than the powers conferred upon the EPA by the CWA” and because states have authority to adopt more stringent standards than federal law requires, MI DEQ could regulate potential discharges of animal waste from CAFOs. *See id.* at 127, 137.

Like MI DEQ, DEC has the duty and authority to impose standards that go beyond the bare minimum required under the CWA. Specifically, as explained above, DEC is charged with

“prevent[ing], abat[ing] and control[ing] water . . . pollution, in order to enhance the health, safety and welfare of the people.” E.C.L. § 1-0101. This grant of authority, analogous to that at issue in *Michigan Farm Bureau*, empowers DEC to address potential discharges *before* pollution occurs. Accordingly, DEC can and must require all CAFOs that *could* discharge pollutants to obtain coverage under a CWA permit. Although EPA may lack authority to regulate CAFOs that do not meet the legal definition of “discharging” facilities (even if they do, in fact, pollute), DEC is not so constrained. Given that the CWA offers significant advantages as compared to the ECL permit, DEC must exercise its authority to enhance government oversight, increase opportunities for public engagement, prevent unnecessary and illegal water pollution, and protect public health.

I. The Draft Permit’s Restrictions on Manure Spreading in “Winter Weather” and “Wet Weather” Fail to Satisfy Federal Law.

Federal law requires that permits issued to CAFOs include NMPs designed to prevent nutrient pollution by implementing site specific “practices that *ensure* appropriate agricultural utilization of the nutrients in . . . manure [and other waste].” 40 C.F.R. § 122.42(e)(1)(viii) (emphasis added). Despite incorporating this requirement, *see* Draft Permit at III.A.2(h), the Draft Permit nonetheless purports to authorize manure spreading in “winter weather” and “wet weather” conditions that pose significant risks of runoff and pollution. Nutrients that wash off fields with forecasted thaws and precipitation are not “agricultural[ly] utiliz[ed].” Similarly, nutrients applied to frozen fields well before crops begin to grow are unlikely to be utilized. By failing to adequately restrict winter weather and wet weather applications, the Draft Permit falls short of federal law. We urge DEC to revise the Draft Permit to include manure spreading provisions that adequately protect New York’s waters.

Our comments on DEC’s previous draft Clean Water Act General Permit for Concentrated Animal Feeding Operations, No. GP-0-16-002, explained our concerns about winter weather and wet weather spreading at length. To avoid redundancy, we attach and incorporate those comments to the extent they are relevant to the current Draft Permit. *See* Exhibit B. We also include several important concerns and recommendations below.

A. The Draft Permit’s Restrictions on Winter Spreading Do Not Ensure Appropriate Agricultural Utilization of the Nutrients in Manure and Other Waste.

The Draft Permit prohibits “[a]pplications . . . made on . . . fluid-saturated or frozen-saturated soil[s]” and “[a]pplications . . . made at a rate that creates or causes the soil to become fully saturated at the time of that application.” Draft Permit at III.A.7(a)(1). In addition, the

Draft Permit provides that “[a]pplications during periods that meet *winter spreading conditions* . . . must adhere to the following conditions:

- (1) Must utilize the 2015 Cornell Guide, “Revised winter and wet weather manure spreading guidelines to reduce water contamination risk”, as well as the NRCS NY590 Standard, to develop specific winter application procedures to be included in the NMP; and
- (2) NMP must identify low-risk fields to be used for winter weather applications.

Id. at III.A.7(c). “Winter spreading conditions” exist if “soil is frozen (4”+), snow covered (4”+), or encumbered by significant surface icing.” *Id.* at Appx. A. While we applaud DEC for strengthening protections set out in the previous Draft Permit, these provisions remain insufficient to ensure appropriate agricultural utilization of the nutrients in manure and other waste applied during winter weather.

According to a recent public records request, at least four CAFOs granted coverage under the Prior Permit are “daily spread” operations with little to no manure storage. Without adequate storage or funding to transport waste off-site, these facilities could choose to land-apply manure and other waste in conditions that present an unacceptable risk of dangerous and illegal water pollution. We urge DEC to revise the Draft Permit to clarify that, in almost every instance, daily land application of manure and other wastes during the winter months is impermissible.

1. The Draft Permit’s Definition of “Winter Spreading Conditions” Is Impermissibly Narrow and Inconsistent with Relevant Guidance.

As explained above, the Draft Permit requires CAFOs to “utilize” guidance from Cornell University and the Natural Resources Conservation Service (“NRCS”) to develop winter application procedures. Requiring enforceable, site specific restrictions on winter spreading is an important step—but even the authorities on which DEC directs CAFOs to rely recognize that winter spreading is an inherently risky activity. *See, e.g.,* Karl Czymmek et al., Cornell Univ., Animal Science Publication Series No. 245, Revised Winter and Wet Weather Manure Spreading Guidelines to Reduce Water Contamination Risk at 8 (2015) (“Cornell Guidance”) (“The guidelines in this document cannot prevent all runoff.”); NRCS NY 590 at 5 (clarifying that “[n]utrients must not be mechanically surface-applied if a high probability of offsite nutrient loss is identified” and explaining that, under most circumstances, “this precludes spreading [on] frozen and/or snow covered soils”). To ensure appropriate agricultural utilization of the nutrients in manure and other waste—and prevent nutrient pollution from winter spreading—DEC must *mandate* compliance with the Cornell Guidance and NRCS NY 590, and prohibit land

application of manure in any conditions either authority deems “high-risk,” “very risky,” “higher risk,” “risky,” and “should-be-avoided.”

At a minimum, DEC must revise its definition of “winter spreading conditions” to accord with the NRCS NY590 Standard and encompass *all* of the manure spreading scenarios the Cornell Guidance identifies as “should be avoided,” “very risky,” “high risk,” or “higher risk.” It is unclear why the Draft Permit strictly limits the term “winter spreading conditions” to circumstances when “soil is frozen (4”+), snow covered (4”+), or encumbered by significant icing.” This definition is inconsistent with the NRCS NY590 Standard, which explains that application to “frozen and/or snow-covered soils” is generally impermissible, without reference to the depth of snow or frozen soil. NRCS NY 590 at 5. Similarly, the Cornell Guidance identifies a variety of high-risk manure-spreading scenarios that do not necessarily fall within the proposed definition of “winter spreading conditions.” These include “concrete frost” (if that term has a different meaning from frozen-saturated); ice layers on soil of 0.5 inches or more (if that is different than “significant icing”); and applications made “late in the season just before snowmelt,” even if the snow is less than 4 inches. *See* Cornell Guidance at 3–4.

2. DEC Should Revise the Draft Permit to Reflect Expert Guidance, Including EPA’s Advice to Permit Writers, and More Protective Practices Required in Other States.

The Draft Permit’s lax restrictions on winter spreading of manure are inconsistent with expert guidance, including EPA’s NPDES Permit Writers Manual for CAFOs. In general, this Manual recognizes that “there could be an increased likelihood that runoff from CAFO land application areas could reach waters of the United States . . . when the soil is frozen or covered with ice or snow.” Accordingly, the Manual “strongly encourages states to *prohibit* application to frozen, snow-covered, or saturated ground.” EPA, *NPDES Permit Writers’ Manual for CAFOs*, EPA 833-F-12-001, at 6-16 (Feb. 2012) (“Permit Writers’ Manual”) (emphasis added); *see also id.* at 6-22 (“EPA encourages CAFOs to ensure adequate storage so that manure is *never* applied to frozen ground.” (Emphasis added.)); *see also id.* at 6-64 (“EPA encourages that no application occur by any method to ground that is frozen, snow covered, or saturated.”).

EPA’s consulting firm Tetra Tech recently reached similar conclusions about the risks of winter spreading. Tetra Tech conducted a comprehensive review of literature regarding winter manure spreading in order to develop guidance for EPA. Tetra Tech prepared a presentation based on its literature review, which was given to the Cayuga County Water Quality Management Association after the major winter spreading discharge into Lake Owasco in 2014. *See* Carrie Chantler, *County Water Quality Officials Continue Discussion About Winter Manure Spreading*, Auburn Citizen, Dec. 8, 2014, <http://auburnpub.com/news/local/county-water->

qualityofficials-continue-discussion-about-winter-manure-spreading/article_13f6dde6-504d-5381-8c35-c48745c859d1.html. In particular, Tetra Tech advised:

- “The comprehensive literature review found no published research to support agronomic factors as a basis for recommending winter manure application.”
- “Frozen soils decrease infiltration and increase runoff.” “Most (not all) frozen soils [are] virtually impervious,” and there is a “56% increase in runoff volume from frozen soils.”
- “Frozen soils and snowpack increase the risk of runoff from winter-applied manure,” further questioning the prudence of winter spreading at a time when “[d]ormant or absent crops provide no nutrient uptake,” when “[i]ncorporation [is] difficult or impossible,” and in light of the fact that “[f]reezing does not reliably kill all pathogens.”
- “The magnitude of nutrient losses from winter-applied manure appears to be controlled by a large number of factors whose relative influence is poorly understood. . . .”

Id. at slides 8–13. Tetra Tech advised that when manure is spread in the winter it is “extremely challenging” to avoid runoff and water quality impacts. *Id.* at slide 14. Tetra Tech also gave little credence to the idea that Best Management Practices (“BMPs”) reduce runoff rates, noting that “[t]here is currently no body of standards and specifications supported by research data for BMPs or other management measures to specifically mitigate potential impacts of winter manure application.” *Id.* at slide 18. (Tetra Tech specifically noted that BMPs such as “[v]egetation-based practices are largely dormant and less effective during critical mid-winter thaw and spring runoff periods when most nutrient loss occurs.” *Id.* at slide 19.) Due to the “[l]ack of agronomic benefit, [d]ocumented water quality impacts, and [a]bsence of effective BMPs,” Tetra Tech concluded with the strong directive: “avoid winter manure application.” *Id.* at slide 26.

Several states with weather patterns and geology similar to those in New York have adopted more protective measures to control runoff from winter spreading. For example, under Maine law, “a person may not spread manure on agricultural fields between December 1st of a calendar year and March 15th of the following calendar year” unless the commissioner grants a variance. Me. Rev. Stat. tit. 7, § 4207(1). To facilitate this prohibition, Maine requires CAFOs to provide for manure storage “for a minimum of 180 days, using containment structure(s) and/or stacking site(s).” 01-001 Me. Code R. ch. 565 § 6(1)(B)(4). Similarly, Wisconsin regulations denote February 1 through March 31 as a “high-risk runoff period” and prohibit surface application liquid manure unless there is a department- approved emergency. Wis. Admin. Code

NR § 243.14(7)(b)(3)(c). Surface application of solid manure is also prohibited during this time if the ground is frozen or there is one or more inches of snow present. *Id.* 243.14(6)(b)(3)(c).

We urge DEC to revise the Draft Permit to include adequately protective restrictions on winter spreading, in accordance with expert guidance and the examples set by other states.

B. The Draft Permit’s Restrictions on Wet Weather Spreading Do Not Ensure Appropriate Agricultural Utilization of the Nutrients in Manure and Other Waste.

As explained above, the Draft Permit prohibits “[a]pplications . . . made on . . . fluid-saturated or frozen-saturated soil[s]” and “[a]pplications . . . made at a rate that creates or causes the soil to become fully saturated at the time of that application.” Draft Permit at III.A.7(a)(1). In addition, the Draft Permit suggests that CAFOs “should . . . follow[]” Cornell Guidance “[i]f applications of manure, litter, food processing waste, digestate, or process waste water during wet weather or forecasted wet weather are necessary.” *Id.* at III.A.7(d). These provisions are insufficient to ensure appropriate agricultural utilization of the nutrients in manure and other waste applied during winter weather.

In contrast to the Draft Permit’s provisions concerning winter spreading, this language does not require CAFOs to adopt enforceable site specific restrictions on wet weather applications of manure and other waste. For instance, the Cornell Guidance merely advises CAFOs that: “[i]f the expected precipitation amount is 0.25 inches or less, there is *usually* little risk of runoff,” “[p]recipitation amounts of 0.25 to 0.5 inches will likely produce *some* runoff,” and that “[i]t is difficult to simplify the runoff risk for different soil and site conditions when precipitation exceeds 0.5 inches.” Cornell Guidance at 6. In this absence of a requirement to adopt enforceable site specific restrictions, this general explanation about precipitation risks is merely informative. No CAFO could ever be found to violate this provision, no matter how egregious the pollution discharge. To ensure appropriate agricultural utilization of the nutrients in manure and other waste—and prevent nutrient pollution from wet weather spreading—DEC must require that CAFOs develop site specific restrictions on wet weather spreading that accord with Cornell Guidance and include those restrictions in their NMPs.

II. DEC Must Provide at least 30 Days for the Public to Comment on Substantial Changes to a CAFO’s NMP.

State and federal law require DEC to provide advance notice and *at least* 30 days for public comment before authorizing the discharge of pollutants. E.C.L. § 17-0805(1)(b); 40 C.F.R. § 124.10(b)(1). These requirements apply to all SPDES permit applications, including “modifications involving substantive changes in permit requirements or authorized activities.”

E.C.L. § 17-0805(1)(a); *see also* 40 C.F.R. § 122.42(e)(6)(ii)(B) (requiring permitting authorities to notify the public about substantial proposed changes to the terms of a CAFO’s NMP “and make the proposed changes and the information submitted by the CAFO owner and operator available for public review and comment”). Their purpose is not merely to make government processes transparent, but to encourage thorough public engagement. 33 U.S.C. § 1351(e) (directing permitting authorities to “provide[] for, encourage[], and assist[]” public participation in the permitting process); E.C.L. § 70-0119(1) (requiring DEC to evaluate public comments before determining whether to hold a public hearing). Accordingly, state and federal law authorize regulators to *extend* the 30-day comment period, if appropriate. *See* E.C.L. § 17-0805(1)(b) (“The period for comment may be extended at the discretion of the department.”); 40 C.F.R. § 124.13 (“A comment period *longer than 30 days* may be necessary to give commenters a reasonable opportunity to [raise all reasonably ascertainable issues and submit all reasonably available arguments supporting their position].” (Emphasis added)).

DEC has offered no justification for its decision to curtail the public’s opportunity to review and comment on proposed substantial changes to a CAFO’s NMP. Given the serious risks CAFOs pose to New York waters and the public’s strong interest in securing adequate oversight of these operations, it is unlikely that any compelling justification exists. We urge DEC to revise the Draft Permit to allow *at least* 30 days for the public to comment on substantial changes to a CAFO’s NMP.

III. Permit Program Change May Trigger Additional SEQRA Review

Prior to permit issue, DEC should review whether the changes in the CWA permit and its associated program may lead to significant environmental impacts, which would then trigger further SEQRA review. This issue is of particular concern because of the number of CAFOs seeking coverage under the ECL permit, as discussed above.

* * * *

CONCLUSION

We appreciate the opportunity to provide comments and we urge DEC to consider our concerns in finalizing the Draft Permit. Please don't hesitate to contact us if you have any questions about our concerns or recommendations.

Sincerely,

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