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**PETITION FOR THE WITHDRAWAL OF THE NATIONAL POLLUTANT
DISCHARGE ELIMINATION SYSTEM PROGRAM
IN THE COMMONWEALTH OF VIRGINIA**

The Environmental Integrity Project, the Assateague Coastal Trust, Virginia Eastern Shorekeeper, Potomac Riverkeeper, Shenandoah Riverkeeper, and Waterkeepers Chesapeake (“Petitioners”) respectfully petition the U.S. Environmental Protection Agency (EPA) to initiate formal proceedings pursuant to section 1342(c)(3) of the Clean Water Act to withdraw its approval of the Commonwealth of Virginia’s authorized National Pollutant Discharge Elimination System (NPDES) permitting program and assume administration and enforcement thereof. Petitioners make this request based on the failure of the Virginia Department of Environmental Quality (DEQ) to comply with EPA’s and the Clean Water Act’s requirements for the implementation and administration of an adequate NPDES program for concentrated animal feeding operations (CAFOs).

Petitioners raise deficiencies in two main categories that DEQ must correct to achieve a compliant NPDES program: (1) permitting, and (2) enforcement and inspections. There are multiple issues under each of these headings, as described in the text and summarized in the bulleted list below, but the primary issue is one that connects across both categories: DEQ must require permits for and issue permits to discharging CAFOs. Although the decisions in *Waterkeeper Alliance, Inc. v. EPA* (“*Waterkeeper*”) and *National Pork Producers Council v. EPA* (“*NPPC*”) have altered certain elements of EPA’s regulation of CAFOs, both decisions strongly reaffirmed the core duty of a discharging CAFO to apply for a permit.

First, DEQ must address its permitting scheme to ensure that *all* discharging CAFOs are covered by federally compliant NPDES permits. To accomplish this, DEQ must identify and

promptly issue permits to all discharging CAFOs, whether or not such CAFOs have applied for NPDES permits. Despite the presence of a significant cohort of CAFOs in Virginia subject to the Clean Water Act's NPDES requirements, there are currently no NPDES-permitted CAFOs in Virginia. Based on communications with DEQ and EPA, it appears that DEQ has prepared or is in the process of preparing draft permits for eight discharging swine CAFOs (the "Murphy Brown CAFOs"). Additionally, there may be as many as eighty-five outstanding permit applications, the vast majority of which were submitted under the previous general permit and have been awaiting a decision for five years. For those CAFOs, DEQ must act on all permit applications promptly, either issuing a NPDES permit or rejecting the application.

DEQ must also ensure that the permits it issues meet all minimum federal requirements. However, DEQ is moving in the opposite direction. DEQ has proposed an individual permit template on which all individual permits are to be based, including the eight forthcoming Murphy Brown permits, that removes many of the most important terms of the nutrient management plan—the heart of a CAFO permit—and transfers them to a document that a CAFO operator would not be required to submit until *after* permit issuance. This approach means that the full federally required nutrient management plan will neither be available for review by DEQ for compliance with all federal requirements prior to permit issuance, nor be subject to public review. Both of these are fatal flaws according to the U.S. Court of Appeals for the Second Circuit's *Waterkeeper* decision. DEQ must revise its individual permit template to address these deficiencies.

Second, DEQ must properly inspect CAFOs to determine which are discharging CAFOs subject to NPDES permitting. In its current state, DEQ's inspection program does not provide the agency with adequate information to make the necessary determinations as to which CAFOs require NPDES permits. To bring its inspection program into compliance with federal requirements, DEQ must standardize its inspection forms, include inquiries that will determine whether a CAFO requires a NPDES permit, and ensure adequate funding and staffing for inspections.

In short, DEQ must:

1. Revise its permitting scheme to:
 - Promptly identify and issue permits to all discharging CAFOs;
 - Include all federally required terms in the nutrient management plan in order to guarantee full review by DEQ prior to permit issuance, include all effluent limitations in the permit, and provide for the opportunity for public review of the permit prior to permit issuance;
 - Include prompt corrective action provisions in compliance with EPA regulations;
2. Revise its inspection program to determine which CAFOs are subject to NPDES permitting, by:
 - Standardizing annual inspection forms;
 - Including inquiries appropriate to the determination of CAFOs that require NPDES permitting; and
 - Ensuring adequate funding and staffing.

The Environmental Integrity Project (EIP) is a nonpartisan, nonprofit organization dedicated to more effective enforcement of environmental laws and to the prevention of political interference with those laws. EIP's research and reports shed light on how environmental laws affect public health and welfare. With offices in Washington, D.C. and Texas, EIP works closely with communities nationwide who seek to improve their local environments through the enforcement of environmental law.

The Assateague Coastal Trust's (ACT) mission is to promote and encourage the protection of the health, productivity, and sustainability of the coastal bays watershed of Delmarva through advocacy, education and conservation. ACT's vision is that the coastal bays watershed of Delmarva will have a healthy watershed and a strong, sustainable economy that thrives on swimmable, fishable, drinkable water. ACT's Assateague COASTKEEPER program is an on-the-water advocate for the coastal bays and works collaboratively with coastal bay communities, as well as local, state, and federal governments and agencies to identify threats to coastal bay water quality and to support monitoring and conservation efforts. Associated with the Waterkeeper Alliance (a grassroots environmental advocacy organization with over 150 Waterkeeper programs worldwide), the Assateague Coastkeeper is dedicated to protecting the quality of the coastal bays for generations to come.

Virginia Eastern Shorekeeper is a local water quality advocacy non-profit organization, and a member of the international Waterkeeper Alliance. Virginia Eastern Shorekeeper is dedicated to the preservation, protection, and enhancement of the exceptional coastal waters of Virginia's Eastern Shore. Virginia Eastern Shorekeeper and its over 200 members seek to achieve these goals through a multi-faceted approach to water-quality advocacy that involves on-the-water monitoring, community outreach and education, and participation in local government committees.

Potomac Riverkeeper, Inc. (PRK), through its branches, Potomac Riverkeeper, Upper Potomac Riverkeeper, and Shenandoah Riverkeeper, works to protect the public's right to clean water in the rivers and streams of the Potomac watershed. PRK aims to stop pollution to promote safe drinking water, protect healthy river habitats, and enhance public use and enjoyment.

WATERKEEPERS Chesapeake is a coalition of eighteen independent programs working to make the waters of the Chesapeake and Coastal Bays swimmable and fishable. Waterkeepers Chesapeake amplifies the voices of each Waterkeeper and mobilizes these organizations to fight pollution and champion clean water. The members of Waterkeepers Chesapeake work locally, using grassroots action and advocacy to protect their communities and their waters. They work regionally to share resources and leverage individual organization strengths to expand each Waterkeeper's capacity for on the water, citizen-based enforcement of environmental laws in the Chesapeake region.

I. INTRODUCTION

Virginia has a long history of administering NPDES permitting within the Commonwealth, having first received authority to administer the NPDES base program in 1975 and various other components of NPDES permitting up through 1991.¹ However, despite the fact that discharging CAFOs have been subject to NPDES permitting requirements for decades, there are no NPDES-permitted CAFOs in Virginia.

This issue is of particular importance to the multi-state effort to reduce nutrient pollution to the Chesapeake Bay and the commitments Virginia has made. While Virginia is but one of six states and the District of Columbia that share the Chesapeake Bay watershed, it contributes 27 percent of the nitrogen reaching the Bay, the second-largest contribution behind Pennsylvania; 44 percent of the phosphorus, the largest contribution; and 41 percent of the sediment, the largest contribution.²

Moreover, Virginia is also home—at least in part—to two of the “three major animal production regions in the watershed, according to livestock concentration”: the Shenandoah Valley and the Delmarva Peninsula.³ Agriculture is “the largest single source of nitrogen, phosphorus, and sediment loading to the Bay,” contributing approximately 44 percent of the Bay’s nitrogen and phosphorus loads and about 65 percent of sediment load.⁴

Focusing on data within Virginia, the issue is more apparent. For example, according to Virginia’s 2025 Chesapeake Bay total maximum daily load (TMDL) allocations, agriculture contributes nearly a third of nitrogen (15.421 million pounds/year of 53.662 million pounds/year total) and well over a third of phosphorus (2.097 million pounds/year of 5.357 million pounds/year total).⁵ And these proportions are far higher in basins, such as the Eastern Shore, where agriculture and specifically CAFOs are highly concentrated.⁶

To meet its goals and obligations under the Bay TMDL, it is therefore clear that Virginia will need to regulate and reduce nutrient discharges from CAFOs. As of 2010, Virginia contained approximately 898 animal feeding operations (AFOs) in the Chesapeake Bay watershed, 116 of which were large CAFOs.⁷ An earlier estimate from 2005 places the number of CAFOs statewide at 1,175.⁸ EPA has estimated that there are approximately 188 “facilities defined as CAFOs under NPDES” statewide.⁹ And this number of CAFOs is likely to increase

¹ See EPA, *NPDES Profile: Virginia* 1 (2005).

² See EPA, *Chesapeake Bay TMDL 4-1 - 4-2* (2010).

³ *Id.* at 4-29.

⁴ *Id.*

⁵ See Commonwealth of Virginia, *Chesapeake Bay TMDL Phase I Watershed Implementation Plan* 17 Tbl. 2-1, 18 Tbl. 2-2 (Nov. 29, 2010) [hereafter *Virginia Phase I WIP*].

⁶ See *id.*

⁷ *Id.* at 23.

⁸ EPA, *NPDES Profile: Virginia* at 13.

⁹ Memorandum from James A. Hanlon, Director, Office of Wastewater Mgmt., to Water Division Directors, Regions 1-10, *Concentrated Animal Feeding Operation Program Update*

in coming years. While the overall number of farms—i.e., the broader set including AFOs and CAFOs—has actually declined greatly over the years, the number of animals per facility has increased.¹⁰ Accordingly, the animal feeding operations that remain are much more likely to meet the threshold for regulation as “CAFOs” under the Clean Water Act, which will increase the number that must be covered by NPDES permitting.¹¹

While Virginia is well aware that this is a problem for the Commonwealth’s implementation of the Bay TMDL, having identified it in its Watershed Implementation Plan “Gap Analysis,” it has continued to miss even its own timeframes to rectify these “gaps,” with no definite deadlines in the immediate future.

II. PROCEDURAL BACKGROUND

On April 12, 2013, the Environmental Integrity Project sent a letter to DEQ director David Paylor on behalf of the Assateague Coastal Trust and Virginia Eastern Shorekeeper.¹² The letter identified deficiencies regarding DEQ’s NPDES program for CAFOs in three broad categories: (1) legal authorities, (2) NPDES permitting of CAFOs, and (3) enforcement and inspections. As a point-by-point list, we raised the following areas of DEQ’s NPDES program that required revision:

1. DEQ must revise its legal authority to:
 - Remove the “no-discharge certification” provision,
 - Clearly state that discharging CAFOs have a duty to apply for NPDES permits,
 - Include standards for the identification of discharging CAFOs, and
 - Properly incorporate the effluent limitations’ “additional measures” to be required of CAFO permittees;

2. DEQ must revise its permitting scheme to:
 - Promptly issue permits to discharging CAFOs,
 - Include all federally required terms in the nutrient management plan in order to guarantee full review by DEQ, inclusion of all effluent limitations in the permit, and the opportunity for public review prior to permit issuance,
 - Include prompt corrective action provisions in compliance with EPA regulations;

after National Pork Producers Council v. EPA, Attachment, at 1 (Dec. 8, 2011) [hereafter Hanlon Memo].

¹⁰ See *Virginia Phase I WIP* at 52-53.

¹¹ *Id.*

¹² See Letter from Eric Schaeffer, EIP, *et al.* to David Paylor, DEQ, Re: Virginia’s National Pollutant Discharge Elimination System Program for Concentrated Animal Feeding Operations (April 12, 2013) [hereafter 2013 Letter] (on file with EIP).

3. DEQ must revise its inspection program to determine which CAFOs discharge and are subject to NPDES permitting, by:
 - Standardizing annual inspection forms,
 - Including inquiries appropriate to the determination of discharging CAFOs that require NPDES permitting, and
 - Ensuring adequate funding and staffing.

The overarching issue that we raised, cutting across all three identified areas of deficiency, was that DEQ was not issuing NPDES permits to discharging CAFOs.¹³

On May 10, 2013, Mr. Paylor sent a letter in response.¹⁴ Mr. Paylor responded to the deficiencies we raised with respect to legal authorities and the issuance of permits to discharging CAFOs, stating that “[i]t is DEQ’s intent to modify the Virginia Pollutant Discharge Elimination System (VPDES) Permit regulation to align with federal regulation, and continue implementation of a permitting strategy that ensures that facilities whose activities require a VPDES CAFO permit to obtain one.”¹⁵ With respect to the issue of including all effluent limitations in the permit—i.e., the nutrient management plan—to allow for DEQ and public review, Mr. Paylor stated, “We agree that nutrient management plans (NMPs) should be available for public review and comment; to that end, the VPDES permit regulation already requires submittal of an approved NMP with the permit application, which then becomes available for public comment as part of the draft permit.”¹⁶ Mr. Paylor did not directly respond to our concern regarding transfer of the substantive terms from the NMP to the new post-permit-issuance Farm Operating Manual.

In response to our comments regarding the need for standardized inspections with appropriate inquiries and adequate funding, Mr. Paylor stated that medium and large CAFOs permitted under the Virginia Pollution Abatement program “are inspected regularly and corrective action is mandated to eliminate discharges that could affect state waters.”¹⁷ For small animal feeding operations (AFOs), Mr. Paylor discussed the implementation of a “Small AFO Strategy.”¹⁸

On September 30, 2013, Virginia’s State Water Control Board (SWCB) voted unanimously to adopt final amendments to the VPDES regulations “to implement changes to federal regulations.”¹⁹ These amendments included the removal of all reference to CAFOs that “propose to discharge” and the no discharge certification, as well as “clarification that CAFO owners and operators are prohibited from discharging unless the discharge is authorized by a

¹³ *Id.* at 1-3.

¹⁴ *See* Letter from David K. Paylor, DEQ, to Eric Schaeffer, EIP, Re: April 12, 2013 letter concerning Virginia’s National Pollutant Discharge Elimination System (NPDES) Program for Concentrated Animal Feeding Operations (CAFOs) (May 10, 2013) (on file with EIP).

¹⁵ *Id.* at 1.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *See* State Water Control Board, Tentative Agenda and Minibook 10 (Sep. 30, 2013).

VPDES permit.”²⁰ The final amendments were published in the Virginia Register on October 21, 2013.²¹

Subsequent to DEQ’s correction of the deficiencies raised in our 2013 letter regarding legal authorities, EIP continued to contact DEQ permitting staff to ascertain when the agency would begin to issue individual permits to discharging CAFOs. EIP first learned of DEQ’s plans to issue permits to the eight Murphy Brown facilities in late September and early October 2013, at which time DEQ was awaiting the submittal of information by the operators prior to finalizing the drafts.²² EIP requested that we be added to the contact list for the permits, in order that we would have the opportunity to review and provide comments once the draft permits were available for public review.²³ On December 6, 2013, EIP learned that DEQ was still awaiting information from the Murphy Brown operators before the applications could be considered complete, and on April 1, 2014, DEQ staff had nearly completed reviewing the applications.²⁴

As of April 16, 2014, the Regional Office considered the Murphy Brown applications complete, and DEQ was in the process of finalizing the drafts as of May 1, 2014.²⁵ DEQ submitted at least some of the draft permits for EPA’s review in late May 2014.²⁶

On May 21, 2014, EIP sent a second letter to DEQ director David Paylor, on behalf of the Assateague Coastal Trust, Virginia Eastern Shorekeeper, Shenandoah Riverkeeper, and Waterkeepers Chesapeake.²⁷ In the letter, we noted that DEQ had taken “positive steps toward bringing its CAFO NPDES program in line with federal requirements,” including the amendment of the regulations in fall 2013 and the progress toward drafting and issuing permits to the Murphy Brown operations.²⁸ We also stated that DEQ’s program had a number of outstanding issues, including “the substantive content of the permits, the issuance of permits to other CAFOs, and DEQ’s inspection program.”²⁹ We requested a telephone call with Mr. Paylor “to discuss the actions DEQ has already taken, its plans for the future, and our remaining issues,” and specifically to obtain answers to the following questions:

²⁰ *Id.*

²¹ *See* 30 Va. Reg. 331, 360-91 (Oct. 21, 2013).

²² *See, e.g.*, Email from Betsy Bowles, DEQ, to Adam Kron, EIP (Sep. 26, 2013); Email from Betsy Bowles, DEQ, to Adam Kron, EIP (Oct. 4, 2013).

²³ *See* Email from Adam Kron, EIP, to Betsy Bowles, DEQ (Oct. 3, 2013).

²⁴ *See* Email from Betsy Bowles, DEQ, to Adam Kron, EIP (Dec. 6, 2013); Email from Betsy Bowles, DEQ, to Adam Kron, EIP (April 1, 2014).

²⁵ Email from Betsy Bowles, DEQ, to Adam Kron, EIP (May 1, 2014).

²⁶ Email from Betsy Bowles, DEQ, to Adam Kron, EIP (May 15, 2014).

²⁷ *See* Letter from Eric Schaeffer, EIP, *et al.* to David Paylor, DEQ (May 21, 2014) [hereafter 2014 Letter].

²⁸ *Id.* at 2.

²⁹ *Id.*

- A. DEQ's plans for issuing permits to additional CAFOs:
 - Once DEQ has finalized the permits for the first round of eight CAFOs, how will it select additional CAFOs for permitting? What is DEQ's timeline?
 - Will DEQ issue permits to the CAFOs that applied for coverage under the previous general permit?

- B. The substantive terms of the permits:
 - Has DEQ reincorporated the nutrient management plan's substantive provisions?
 - If not, will the Farm Operating Manual be available for review by DEQ and the public before permit issuance?

- C. DEQ's CAFO inspection program:
 - Will DEQ standardize the forms to be used by inspectors?
 - Will the inspectors make appropriate inquiries in the course of their annual VPA inspections to determine if a CAFO is discharging and requires coverage under a NPDES permit?
 - Will the inspection program receive adequate funding to accomplish these items?³⁰

On May 29, 2014, Mr. Paylor sent a response to our letter, in which he provided answers to some of these questions.³¹ First, with respect to the Murphy Brown permits, Mr. Paylor stated that "VPDES CAFO permits for eight swine CAFOs are currently being processed. EPA and owner review of the permit content has commenced, and opportunity for public comment is forthcoming. These eight facilities represent 40 percent of the total swine permitted in Virginia."³² Second, with respect to the timeline for issuing permits to other discharging CAFOs, Mr. Paylor stated that "DEQ has also communicated with EPA regarding a timeline for processing of additional VPDES CAFO permits," starting with four poultry facilities that had received Administrative Orders from EPA.³³ "DEQ expects to have the first draft permit to EPA and the owner for review by September 1, 2014, followed by the public involvement process before issuance."³⁴

Furthermore, "DEQ will also be evaluating 72 additional facilities" that had applied for coverage under the previous general permit. Mr. Paylor stated that "DEQ plans to complete the evaluations to determine which of these facilities need a permit and begin the issuance process

³⁰ *Id.* at 2-3.

³¹ *See* Letter from David K. Paylor, DEQ, to Eric Schaeffer, EIP, Re: May 21, 2014 letter concerning Virginia's National Pollutant Discharge Elimination System (NPDES) Program for Concentrated Animal Feeding Operations (CAFOs) (May 29, 2014) [hereafter 2014 Paylor Letter] (on file with EIP).

³² *Id.* at 1.

³³ *Id.*

³⁴ *Id.*

by October 31, 2014.”³⁵ Third, in response to our questions regarding the CAFO inspection program, Mr. Paylor directed that we contact Amy Owens, DEQ’s Shenandoah Valley Regional Director, who could answer such questions, as well as questions regarding the timeline.³⁶

On July 22, 2014, EIP contacted Amy Owens by telephone, along with Neil Zahradka, Manager of the Office of Land Application Programs. Ms. Owens and Mr. Zahradka largely confirmed the permit issuance and evaluation timeline that Mr. Paylor had provided in his letter: that the draft Murphy Brown permits would be available for public review following EPA’s review; that DEQ would then begin to issue permits for four Eastern Shore poultry CAFOs; and that DEQ is in the process of evaluating whether the seventy-two facilities that had applied for coverage under the expired general permit would require individual permits, with an expected end to this evaluation by October 1, 2014.³⁷

With respect to the substance of the forthcoming permits—i.e., whether DEQ still intended to move substantive terms of the nutrient management plans to the post-permitting Farm Operating Manual—Ms. Owens and Mr. Zahradka stated that this was still the case and that little had substantively changed from the individual permit template that EIP reviewed.³⁸ Specifically, Ms. Owens and Mr. Zahradka stated that the permittee would provide the Farm Operating Manual to DEQ within ninety days after the issuance of the permit. Although DEQ would have the opportunity to review and approve the Farm Operating Manual, the public would not. According to Ms. Owens and Mr. Zahradka, this provision has been the primary issue for EPA in its review of the draft Murphy Brown permits, but DEQ is unwilling to remove the provision based on the belief that it would require an additional revision of DEQ’s regulations. Ms. Owens and Mr. Zahradka stated that such a revision would take roughly two years.³⁹

With respect to our questions regarding DEQ’s inspection program for CAFOs, Ms. Owens and Mr. Zahradka stated that the DEQ regional offices still use different, non-standardized inspection forms, but that inspectors are aware of the requirement to look for discharges. DEQ has plans to incorporate “consistent measures,” but these are on hold until challenges to EPA’s revised CAFO rule abate.⁴⁰ DEQ has also begun to move toward a “risk-based strategy” of inspections, away from the DEQ’s previous practice of evaluating all VPA-permitted AFOs annually. Finally, these representatives indicated that DEQ has begun to incorporate new and innovative methods in its inspection and compliance program, including regular collaboration with the U.S. Department of Agriculture’s Natural Resources Conservation Service, the development of a “CEDDS database,” and the Small AFO Strategy to improve best management practices at unpermitted small operations.⁴¹

³⁵ *Id.* at 1-2.

³⁶ *Id.* at 2.

³⁷ Telephone call between Adam Kron, EIP, and Amy Owens and Neil Zahradka, DEQ (July 22, 2014).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

On September 2, 2014, EIP spoke by telephone with Mark Zolandz of EPA, Region III.⁴² Mr. Zolandz stated that Region III is still in the process of reviewing two of the draft Murphy Brown permits. According to Mr. Zolandz, the other six draft permits are in another DEQ regional office, but are being held until EPA completes its review of the first two draft permits. Mr. Zolandz confirmed that the Farm Operating Manual remains the primary issue in EPA's review of the permits and that EPA is specifically evaluating whether the provision complies with the regulatory requirement that a nutrient management plan include nine minimum elements. At the time of the call, EPA was scheduled to meet with DEQ the week of September 8, 2014, to discuss these issues further.⁴³

III. CRITERIA FOR A DELEGATED STATE NPDES PROGRAM

EPA has established regulations governing the delegation of state NPDES program authority that establish the minimum criteria for establishing, implementing, and enforcing permits in authorized states. These regulations describe when a state program "no longer complies with requirements,"⁴⁴ and include:

(1) Where the State's legal authority no longer meets the requirements of this part, including:

(i) Failure of the State to promulgate or enact new authorities when necessary; or

(ii) Action by a State legislature or court striking down or limiting State authorities.

(2) Where the operation of the State program fails to comply with the requirements of this part, including:

(i) Failure to exercise control over activities required to be regulated under this part, including failure to issue permits;

(ii) Repeated issuance of permits which do not conform to the requirements of this part; or

(iii) Failure to comply with the public participation requirements of this part.

(3) Where the State's enforcement program fails to comply with the requirements of this part, including:

(i) Failure to act on violations of permits or other program requirements;

⁴² Telephone call between Adam Kron, EIP, and Mark Zolandz, EPA (Sep. 2, 2014).

⁴³ *Id.*

⁴⁴ 40 C.F.R. § 123.63(a).

(ii) Failure to seek adequate enforcement penalties or to collect administrative fines when imposed; or

(iii) Failure to inspect and monitor activities subject to regulation.

(4) Where the State program fails to comply with the terms of the Memorandum of Agreement required under § 123.24 (or, in the case of a sewage sludge management program, § 501.14 of this chapter).

(5) Where the State fails to develop an adequate regulatory program for developing water quality-based effluent limits in NPDES permits.⁴⁵

As this petition demonstrates, DEQ's CAFO NPDES program falls short of EPA's criteria.

IV. DEQ HAS NOT ISSUED PERMITS TO DISCHARGING CAFOS, PROPOSES TO ISSUE NONCONFORMING PERMITS, AND FAILS TO COMPLY WITH PUBLIC PARTICIPATION REQUIREMENTS

EPA's second criterion for when a delegated state program "no longer complies with requirements" concerns instances "[w]here the operation of the State program fails to comply with the requirements of this part," which includes: (i) failure to exercise control over activities required to be regulated, including through the failure to issue permits; (ii) repeated issuance of nonconforming permits; and (iii) failure to comply with public participation requirements.⁴⁶

In different ways, DEQ's permitting program falls short of all three requirements. DEQ has failed to issue NPDES permits to discharging CAFOs; is in the process of drafting an individual permit template that does not conform to EPA requirements; and is preparing to issue permits that do not meet public participation requirements.

A. DEQ Does Not Exercise Control over Discharging CAFOs by Issuing Permits

First, DEQ has not issued NPDES permits to discharging CAFOs. As discussed above, DEQ has not processed dozens of applications, submitted as long as five years ago, for coverage under the previous general NPDES permit, and has only recently begun the process of finalizing its first individual draft permits for a group of eight swine CAFOs. As of the date of this Petition, there is not a single CAFO in Virginia covered by a NPDES permit.

EPA's CAFO regulations require that any discharging CAFO have coverage under a NPDES permit.⁴⁷ While certain aspects of the Clean Water Act's jurisdiction over CAFOs have been clarified by the Second Circuit's decision in *Waterkeeper*, the Fifth Circuit's decision in

⁴⁵ *Id.*

⁴⁶ 40 C.F.R. § 123.63(a)(2).

⁴⁷ 40 C.F.R. § 122.23(d).

National Pork Producers Council v. EPA (“*NPPC*”) and EPA’s subsequent regulatory revisions and guidance have confirmed “the well-established principle that discharges of pollutants, whether continuous or intermittent or sporadic, require NPDES permit coverage.”⁴⁸ In a guidance memorandum to EPA Regions, James Hanlon noted that the *NPPC* court upheld the duty to apply and stated in particular that “*NPPC* does not relieve EPA or authorized states from our responsibilities under the CWA to issue NPDES permits to CAFOs that discharge,” and that “*NPPC* does not affect the well-established principle that discharges of pollutants, whether continuous or intermittent or sporadic, require NPDES permit coverage.”⁴⁹

DEQ staff members have confirmed on several occasions that no Virginia CAFO currently has coverage under a NPDES permit.⁵⁰ However, this is not because there are no discharging CAFOs in Virginia subject to permitting requirements. As of June 2011, EPA has estimated that there are at least 188 facilities in Virginia “defined as CAFOs under NPDES,” none of which possesses NPDES permit coverage.⁵¹ Furthermore, as of November 2012, there are at least eighty-five CAFO facilities that have applied for—and not yet received—NPDES permit coverage.⁵² In fact, a previous version of the applicant list dated November 2, 2011 has eighty-two of the same applicants.⁵³ Based on DEQ communications, it appears that seventy-five of these applicants applied as long ago as February 2009.⁵⁴

While there is no reason to assume that DEQ’s permitting obligations extend only to the eighty-five CAFOs that have elected to apply, DEQ is certainly required to permit or, if appropriate, affirmatively decline to permit these facilities. As EPA has stated in the context of reviewing another state’s CAFO permitting program: “[i]n general, where a facility applies for an NPDES permit, that action indicates the need for a permit, and [the state permitting authority]

⁴⁸ See *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486 (2d Cir. 2005) [hereafter *Waterkeeper*]; *Nat’l Pork Producers Council v. EPA*, 635 F.3d 738 (5th Cir. 2011) [hereafter *NPPC*]; National Pollutant Discharge Elimination System Permit Regulation for Concentrated Animal Feeding Operations: Removal of Vacated Elements in Response to 2011 Court Decision, 77 Fed. Reg. 44,494 (July 30, 2012); Hanlon Memo at 2.

⁴⁹ See Hanlon Memo at 2.

⁵⁰ See email from Betsy Bowles, DEQ, to Tarah Heinzen, EIP (June 20, 2012); Email from Diana Adams, DEQ, to Adam Kron, EIP (Nov. 19, 2012); see also Part II., *supra*.

⁵¹ Hanlon Memo, Attachment, at 1; see also EPA, *NPDES Profile: Virginia* at 13 (estimating “150 livestock and poultry operations will have to convert from their existing VPA permits to VPDES permits based on the number of animals”).

⁵² DEQ, AFO VPDES Applicants (current Nov. 2012) (on file with EIP).

⁵³ DEQ, List of VPDES Applicants (rev. Nov. 2, 2011) (attachment to email from Betsy Bowles, DEQ, to Mark Zolandz, EPA (Nov. 3, 2011)) (on file with EIP).

⁵⁴ Email from Betsy Bowles, DEQ, to Mark Zolandz, EPA (Nov. 3, 2011) (“This list includes owners/operators that submitted applications . . . in order to meet the Feb. 2009 compliance deadline”); Email from Mark Zolandz, EPA, to Betsy Bowles, DEQ (Oct. 28, 2011) (“[Y]ou mentioned that approximately 75 facilities had applied for the CAFO GP by February 23, 2009.”).

is obligated to either issue or deny a permit after reviewing the application and providing for public comment.”⁵⁵ DEQ has not met this obligation.

1. DEQ Has a Long History of Not Issuing Permits to CAFOs

As discussed in this petition’s procedural history above, DEQ is currently working with EPA and the CAFO operators to finalize its first round of individual NPDES permits, to be issued to the eight Murphy Brown swine CAFOs.⁵⁶ However, this process began nearly four years ago—if not longer—with DEQ’s development of the individual permit template, on which it could base individual NPDES permits. As EPA is aware, DEQ has pushed back the expected dates for completion of the template and issuance of individual permit issuance on many occasions over the years. Moreover, given that DEQ has not addressed the substantive deficiency in the draft permits and individual permit template—namely the transfer of the substantive permit requirements from the NMP to the Farm Operating Manual—and has claimed that any fix of this deficiency will require lengthy rulemaking, genuine progress toward permit issuance is uncertain.

For example, in July 2011, DEQ responded to an EPA inquiry regarding the permit issuance timeline, estimating that, “[f]or those who have already applied for the VPDES permit for CAFOs, I feel we are still on target to get the permit process completed in early 2012, as outlined in the WIP.”⁵⁷ As DEQ referenced, Virginia’s Phase I WIP for the Chesapeake Bay TMDL estimated, as of November 29, 2010, that discharging CAFOS will be “converted to VPDES permit coverage over the next 18 months.”⁵⁸ In June 2012—the approximate eighteen-month mark—DEQ estimated that the individual permit template “will be finalized before the beginning of next month.”⁵⁹

In fact, even putting aside the individual permit template delays and acknowledged deficiencies, the permitting process for the Murphy Brown facilities alone has extended almost a year from when Petitioners first learned of it. As described above, Petitioners first received word of DEQ’s intent to issue individual permits to the eight Murphy Brown facilities on September 26, 2013.⁶⁰ Nearly one year later, only two of the permits are under EPA review, where they have been since May 2014, and it appears that serious substantive issues are preventing timely completion of this process.

⁵⁵ EPA, *Initial Results of an Informal Investigation of the National Pollutant Discharge Elimination System Program For Concentrated Animal Feeding Operations in the State of Illinois* 13 (Sep. 2010) [hereafter *Illinois Initial Results*].

⁵⁶ See, e.g., 2014 Paylor Letter, *supra*, at 1.

⁵⁷ Email from Betsy Bowles, DEQ, to Mark Zolandz, EPA (July 1, 2011) (on file with EIP).

⁵⁸ See *Virginia Phase I WIP* at 22-23.

⁵⁹ See Email from Betsy Bowles, DEQ, to Tarah Heinzen, EIP (June 20, 2012) (on file with EIP); see also Commonwealth of Virginia, *January 1, 2012 – December 31, 2013 Programmatic Two-Year Milestones 2* (setting target date of September 1, 2012, for “Convert[ing] CAFO VPA permits to VPDES permits”).

⁶⁰ See Email from Betsy Bowles, DEQ, to Adam Kron, EIP (Sep. 26, 2013).

2. Even Where EPA Has Required Discharging CAFOs to Apply for Permits, DEQ Has Failed to Issue Permits

Case studies of specific discharging facilities demonstrate the need for DEQ to begin issuing permits. As EPA has continually restated, “a CAFO that has discharged without a permit remains in violation of the CWA so long as there is a continuing likelihood that intermittent or sporadic discharges will recur.”⁶¹ Moreover, “CAFOs that have discharged in the past will discharge in the future, and are therefore expected to obtain a permit, unless the conditions that led to the discharge are fully remedied.”⁶²

In 2010, EPA ordered three such discharging CAFOs in Virginia to obtain NPDES permits. Although the facilities’ operators have applied for permits and DEQ has acknowledged that the facilities require permits, DEQ has yet to issue any permits, nearly four years later.⁶³

On September 29, 2010, EPA issued three separate orders for compliance to three large poultry CAFOs, primarily due to the deposition of manure, dust, and feathers by ventilation fans into ditches and drainage pathways that would discharge to waterways.⁶⁴ On this basis, EPA found that the CAFOs proposed to discharge without a NPDES permit, and ordered the CAFOs to submit a registration statement for coverage under DEQ’s then-effective VPDES General Permit for CAFOs.⁶⁵

All three facilities applied for NPDES permit coverage within a few weeks to a few months of EPA’s orders, and all prior to the expiration of DEQ’s NPDES general permit.⁶⁶

⁶¹ See *Iowa Preliminary Results* at 17 (citing *Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield*, 890 F.2d 690, 693 (4th Cir. 1989)).

⁶² *Id.*; see also Hanlon Memo at 1.

⁶³ See, e.g., 2014 Paylor Letter, *supra*, at 1.

⁶⁴ See In the Matter of Ryan L. Brady, EPA Reg. III, Docket No. CWA-03-2010-0416DN, Findings of Violation and Order for Compliance, at 4 (Sep. 29, 2010) [hereafter Brady Order]; In the Matter of FPNA Farms, Inc., EPA Reg. III, Docket No. CWA-03-2010-0400DN, Findings of Violation and Order for Compliance, at 3 (Sep. 29, 2010) [hereafter FPNA Order]; In the Matter of Ben F. Hall, Jr., EPA Reg. III, Docket No. CWA-03-2010-0399DN, Findings of Violation and Order for Compliance, at 4 (Sep. 29, 2010) [hereafter Hall Order].

⁶⁵ See Brady Order at 5; FPNA Order at 4; Hall Order at 4. Although EPA officially found that the CAFOs “proposed to discharge,” this was prior to the *NPPC* decision overturning that basis for regulation, and EPA has since affirmed that these CAFOs are actual dischargers that require permit coverage in the aftermath of the *NPPC* decision. See, e.g., Email from Mark Zolandz, EPA, to Betsy Bowles, DEQ (July 1, 2011) (inquiring “when VPDES permits will be able to be issued to Ben Hall and the other facilities that have applied for VPDES CAFO permit coverage”).

⁶⁶ See Fayyaz Mukhtar, NPDES Permit Application for FPNA Farms (Oct. 19, 2010) (on file with EIP); Ben Hall, NPDES Permit Application for Consolidated Farm (Nov. 16, 2010) (on file with EIP); Ryan Brady, NPDES Permit Application for Ryan Brady Farm (Dec. 9, 2010) (on file with EIP); Letter from James R. McConathy, DEQ, to FPNA Farm – Punjab Farm – Fayyaz Mukhtar (January 5, 2011) (on file with EIP); Letter from James R. McConathy, DEQ, to

Instead of granting NPDES coverage, however, DEQ responded by granting each of the facilities coverage under the non-NPDES-compliant VPA general permit in January 2011. To date, and in spite of the fact that EPA has intermittently queried “when VPDES permits will be able to be issued to Ben Hall and the other facilities that have applied for VPDES CAFO Permit coverage,” DEQ has yet to approve or reject any of the applications for NPDES coverage.⁶⁷

The example of a fourth Eastern Shore CAFO for which EPA also administered enforcement proceedings further illustrates the point that “CAFOs that have discharged in the past will discharge in the future, and are therefore expected to obtain a permit,” as well as the need for DEQ to issue NPDES permits to such discharging CAFOs.⁶⁸ In 2010, EPA determined that David Yutzy/Windcrest Farms facility “discharges pollutants directly into Waters of the United States” via cattle and manure in and in proximity of water bodies.⁶⁹ Although EPA did not require the facility to obtain a VPDES permit at that time, it required cessation of discharges and the submittal of a compliance plan.⁷⁰

A little over a year later, in October 2011, DEQ inspected the facility and found that it had subsequently discharged between 24,000 and 120,000 gallons of cattle manure to a water of the United States.⁷¹ Even after this repeat discharge, DEQ did not require the facility to obtain a NPDES permit, instead requesting a meeting with the facility owner to reach a remedy.⁷² DEQ ultimately finalized a compliance order with the facility, but again with no requirement that the discharging CAFO obtain a NPDES permit.⁷³ Although DEQ determined the case to be closed on August 7, 2012, a warning letter dated the next day indicates that DEQ had observed an “apparent Nitrogen overapplication of poultry waste” on August 1, 2012.⁷⁴ At some point, through no apparent requirement of DEQ, the David Yutzy/Windcrest Farms facility applied for a NPDES permit, but continues to operate without one.⁷⁵

Holdens Creek – Hall – H and H – Consolidated Farms (January 5, 2011) (on file with EIP); Letter from James R. McConathy, DEQ, to Brady Poultry Farm – Ryan Lee Brady (January 5, 2011) (on file with EIP).

⁶⁷ See Email from Mark Zolandz, EPA, to Betsy Bowles, DEQ (July 1, 2011) (on file with EIP).

⁶⁸ See *Iowa Preliminary Results* at 17; see also Hanlon Memo at 1.

⁶⁹ See *In the Matter of David E. & Jewel M. Yutzy*, EPA Reg. III, Docket No. CWA-03-2010-0416DN, Findings of Violation and Order for Compliance, at 3-4 (June 1, 2010) [hereafter *Yutzy Order*]

⁷⁰ *Id.*

⁷¹ Letter from Gary A. Flory, DEQ, to David Yutzy, Windcrest Holsteins, Inc., Re: NOV No. W2011-10-V-1005, at 2 (Oct. 18, 2011) [hereafter *Yutzy NOV*].

⁷² *Id.* at 3.

⁷³ See DEQ, Order by Consent Issued to Windcrest Holsteins, Inc., VPA Permit No. VPG100208, App. A (Jan. 12, 2012) [hereafter *Yutzy DEQ Consent Order*].

⁷⁴ See Letter from Gary A. Flory, DEQ, to David Yutzy, Windcrest Holsteins, LLC, Re: WL No. W2012-08-V-001, at 2 (Aug. 8, 2012).

⁷⁵ See DEQ, List of VPDES Applicants (rev. Nov. 2, 2011) (attachment to email from Betsy Bowles, DEQ, to Mark Zolandz, EPA (Nov. 3, 2011)) (on file with EIP); Email from Diana Adams, DEQ, to Adam Kron, EIP (Nov. 19, 2012) (on file with EIP).

As of the date of this Petition, DEQ has acknowledged that all four of these CAFOs require NPDES coverage and has announced that it plans to issue permits to the facilities.⁷⁶ However, while DEQ anticipated in May 2014 that it would provide the first of these four draft permits for review by EPA and the operators, this schedule apparently has been put on hold pending the outcome of EPA's review of the Murphy Brown permits.⁷⁷

3. Through Its Repeated Failure to Issue Conforming Permits to All Discharging CAFOs, DEQ is Not Exercising Control over Activities Required to be Regulated

Although DEQ has made some progress toward issuing NPDES permits to discharging CAFOs, it is clear that DEQ has demonstrated an unwillingness to meet its programmatic requirements in a timely manner. Delays have persisted for years, efforts are stalled, and the few draft permits that have been developed contain significant deficiencies for which DEQ indicates there are no immediate corrections. Consequently, under EPA's criteria for delegated state programs, DEQ is not "exercis[ing] control over activities required to be regulated."⁷⁸

B. The Draft VPDES Individual Permit Template Does Not Conform to the Requirements of 40 C.F.R. Part 123

An additional subpart of EPA's second criterion is the "[r]epeated issuance of permits which do not conform to the requirements of Part 123."⁷⁹ As discussed above, DEQ has yet to issue a NPDES permit to a CAFO and there is no NPDES permit for CAFOs, general or otherwise, in effect. However, given that DEQ has been in the process of developing an "individual permit template" over the past four years,⁸⁰ with some review by EPA, and plans to issue individual permits based on this template, the major deficiencies and nonconforming elements of the current template are relevant to whether DEQ is meeting the state program requirement to issue adequate permits.

The development of the individual permit template coincided with the expiration of DEQ's VPDES general permit for CAFOs, which was effective between 2006 and 2010.⁸¹ During the development of the individual permit template, DEQ provided EPA with the opportunity to review and provide comments on several drafts.⁸² As discussed below, DEQ incorporated many of EPA's suggested edits, but rejected others that are critical to issuance of

⁷⁶ See, e.g., 2014 Paylor Letter, *supra*, at 1.

⁷⁷ See Telephone call between Adam Kron, EIP, and Amy Owens and Neil Zahradka, DEQ (July 22, 2014).

⁷⁸ 40 C.F.R. § 123.63(a)(2)(i).

⁷⁹ 40 C.F.R. § 123.63(a)(2)(ii).

⁸⁰ See DEQ, Individual Permit Template, Draft 1.1 (Dec. 17, 2010) (on file with EIP).

⁸¹ See 9 VAC25-191-50; 21 Va. Reg. 1, 4 (Oct. 4, 2004).

⁸² See, e.g., Email from Betsy Bowles, DEQ, to Mark Smith EPA (Oct. 13, 2011) ("we recognize the importance of obtaining EPA's feedback on this VPDES CAFO individual permit template"); Email from Mark Zolandz, EPA, to Betsy Bowles, DEQ (Nov. 21, 2011); Email from Mark Zolandz, EPA, to Betsy Bowles, DEQ (March 21, 2012); Email from Mark Zolandz, EPA, to Betsy Bowles, DEQ (April 24, 2012)

permits that meet minimum federal requirements. In fact, it appears that these rejected edits are the basis of the major issues in EPA's review of the draft Murphy Brown permits.⁸³

The latest draft of the template available at the time of EIP's FOIA request was dated October 5, 2012.⁸⁴ The analysis herein is based on that draft, as well as recent conversations with DEQ EPA staff indicating that the terms of the draft Murphy Brown permits have not changed significantly from the individual permit template.⁸⁵

The individual permit template—as well as the individual permits drafted in conformance with it—contains several deficiencies that are in violation of the Clean Water Act and EPA's implementing regulations.

1. The Individual Permit Template's Nutrient Management Plan Provisions Do Not Comply with the Clean Water Act or EPA's Regulations

Under the Clean Water Act's CAFO permitting program, the nutrient management plan (NMP) serves as the substantive heart of the permit, containing the site-specific terms that constitute effluent limitations. As such, the NMP's terms must be (1) reviewed by the permitting authority prior to permit issuance, (2) included in the permit itself, and (3) subject to public notice and comment prior to permit issuance.

The *Waterkeeper* court laid out each of these requirements clearly and invalidated EPA's 2003 CAFO rule for its failures on all three counts.⁸⁶ Although EPA addressed each of these failures in its 2008 revised CAFO rule,⁸⁷ DEQ's individual permit template proposes to repeat them. By removing substantive terms from the NMP and placing them instead in a "Farm Operating Manual" that is not submitted until several months after permit issuance, the template precludes DEQ review of all NMP terms prior to permit issuance, fails to require that the permit includes all terms required by EPA regulations, and deprives the public of the opportunity to participate in the regulatory process.

Specifically, the individual permit template removes many of the most important and site-specific requirements of the NMP, such as best management practices (BMPs), from the

⁸³ See, e.g., Telephone call between Adam Kron, EIP, and Amy Owens and Neil Zahradka, DEQ (July 22, 2014); Telephone call between Adam Kron, EIP, and Mark Zolandz, EPA (Sep. 2, 2014).

⁸⁴ See DEQ, Individual Permit Template, Draft 2.5.2 (Oct. 5, 2012) [hereafter Individual Permit Template].

⁸⁵ See Telephone call between Adam Kron, EIP, and Amy Owens and Neil Zahradka, DEQ (July 22, 2014).

⁸⁶ See *Waterkeeper*, 399 F.3d at 498-504.

⁸⁷ See 73 Fed. Reg. 70,437-44.

permit.⁸⁸ Most of these removed provisions will now reside in the Farm Operating Manual, which the permittee would submit to DEQ up to ninety days after the permit's effective date.⁸⁹

Pursuant to both EPA and DEQ regulations, a NMP must, "at a minimum, contain[] best management practices necessary to meet the requirements of this paragraph and applicable effluent limitations and standards, including those specified in 40 CFR part 412."⁹⁰ These consist of nine "minimum elements," addressing:

- (i) adequate storage of manure, litter, and process wastewater;
- (ii) proper management of mortalities;
- (iii) diversion of clean water from the production area;
- (iv) preventing direct contact of confined animals with waters;
- (v) proper disposal of chemicals and other contaminants;
- (vi) appropriate site-specific conservation practices to control pollutant runoff, including buffers;
- (vii) protocols for testing of manure, litter, process wastewater, and soil;
- (viii) protocols for land application in accordance with site-specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter or process wastewater; and
- (ix) recordkeeping to document the implementation and management of the minimum elements.⁹¹

Further, the referenced effluent limitations and standards specified in 40 C.F.R. Part 412 expressly list best management practices that CAFOs must develop and implement when land applying manure, litter, or process wastewater. Such practices include requirements related to land application, determination of application rates, manure and soil sampling, inspection of land application equipment for leaks, and setback requirements.⁹²

Rather than the nine minimum elements and standards of Part 412, DEQ's proposed individual permit template now requires that the NMP contain "at a minimum the following information":

- a. Site map indicating the location of the waste storage facilities and the fields where waste will be applied, unless the fields are exempted in Part I C.6. or Part I C.7.;
- b. Site evaluation and assessment of soil types and potential productivities;
- c. Nutrient management sampling including soil and waste monitoring;
- d. Storage and land area requirements;
- e. Calculation of waste application rates;

⁸⁸ See Individual Permit Template, Part II.C.1.

⁸⁹ See *id.*; Telephone call between Adam Kron, EIP, and Amy Owens and Neil Zahradka, DEQ (July 22, 2014); Telephone call between Adam Kron, EIP, and Mark Zolandz, EPA (Sep. 2, 2014).

⁹⁰ 40 C.F.R. § 122.42(e)(1); 9VAC25-31-200.E.1; see also 40 C.F.R. § 412.4(c).

⁹¹ 40 C.F.R. § 122.42(e)(1)(i)-(ix); 9VAC25-31-200.E.1.a-i.

⁹² 40 C.F.R. § 412.4(c)(1)-(5); 9VAC25-31-100.C.I.1.i.

- f. Waste application schedules; and
- g. A plan for waste utilization in the event the facility is discontinued.⁹³

Missing from these provisions are certain key requirements for site-specific best management practices, such as “site-specific conservation practices to control pollutant runoff, including buffers,” or best management practices for the “diversion of clean water from the production area.”⁹⁴ This is because these and other best management practices and site-specific requirements have been transferred to the Farm Operating Manual, which the permittee is not required to submit until ninety days *after* the permit’s effective date, thereby excluding it from public review.⁹⁵

This proposed reworking of the NMP requirements fails to comply with EPA’s and DEQ’s regulations in that the individual permit template requires a more substantively bare NMP. Instead of including the site-specific requirements and best management practices designed to comply with the effluent limitations of 40 C.F.R. Part 412, a NMP now need only contain the limited information listed above, focused more narrowly on land application and waste storage.

As a consequence of shifting these requirements from the NMP to a post-issuance document, the template precludes DEQ review of the full terms of the NMP prior to permitting, fails to require that the permit includes all terms required by EPA regulations, and deprives the public of the opportunity to participate in the regulatory process—the very shortcomings that led the *Waterkeeper* court to overturn EPA’s 2003 CAFO rule.⁹⁶

a. DEQ Will Not Have the Opportunity to Review the Full Terms of the NMP prior to Issuing the Permit

First, under the provisions of the individual permit template, DEQ will not have the opportunity to review the full terms of the NMP prior to issuing the permit. The *Waterkeeper* court noted the Clean Water Act’s clear requirement that “permits authorizing the discharge of pollutants may issue only where such permits *ensure* that every discharge of pollutants will comply with all applicable effluent limitations and standards.”⁹⁷ This is the case whether EPA or a delegated state is the permitting authority.⁹⁸

As the *Waterkeeper* court stated, for CAFOs, “the requirement to develop and implement a nutrient management plan *is* an effluent limitation,” as it is one of the “best management practices” identified in the CAFO rule.⁹⁹ In addition to the plan itself, “the terms of the nutrient management plan constitute effluent limitations,” as they serve as the “restriction[s] . . . on

⁹³ Individual Permit Template, Part III.A.1.

⁹⁴ 40 C.F.R. § 122.42(e)(1)(i)-(ix); 9VAC25-31-200.E.1.a-i; *see also* 40 C.F.R. § 412.4(c).

⁹⁵ Individual Permit Template, Parts II.C.1, III.B.2.

⁹⁶ *See Waterkeeper*, 399 F.3d at 498-502.

⁹⁷ *Id.* at 498.

⁹⁸ *Id.* at 498-99 (quoting 33 U.S.C. § 1342(a)(2), (b)).

⁹⁹ *Id.* at 501 (citing 40 U.S.C. § 412.4(c)(1)) (emphasis in original).

quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources.”¹⁰⁰ As EPA’s current CAFO rule describes it, these “terms of the nutrient management plan are the information, protocols, best management practices, and other conditions in the nutrient management plan determined by the Director to be necessary to meet the requirements of paragraph (e)(1) of this section”—i.e., the nine “minimum elements” listed above—and the above-cited “requirements of [section 412](c)(2) through (c)(5)” related to land application.¹⁰¹

The *Waterkeeper* court additionally made clear that “permitting authorities [must] review the nutrient management plans developed by CAFOs *before* issuing a permit that authorizes land application discharges.”¹⁰² And EPA’s rulemaking in the aftermath of *Waterkeeper* codified this requirement: “[a]ny permit issued to a CAFO must require compliance with the terms of the CAFO’s site-specific nutrient management plan.”¹⁰³

By shifting many of these terms from the NMP to the Farm Operating Manual or removing them altogether, DEQ proposes to circumvent the Clean Water Act’s clear requirement that any permit issued by DEQ must ensure compliance with effluent limitations.¹⁰⁴ Since the terms of the NMP are in fact the effluent limitations, the proposed permitting scheme will make it impossible for DEQ to insure compliance. Essentially, this new framework turns the clear requirements of *Waterkeeper* and EPA regulations on their head: DEQ will not know how effluent limitations will be met until months after the discharges are authorized.¹⁰⁵

b. The Individual Permit Template Fails to Include the Terms of the NMP in the Permit

Second, DEQ’s proposed permitting scheme under the individual permit template violates the requirement that the terms of the NMP be included in the permit. As the *Waterkeeper* court stated, “[t]he Clean Water Act unquestionably provides that *all applicable effluent limitations* must be included in each NPDES permit.”¹⁰⁶ Similarly, EPA regulations and DEQ regulations provide that “[a]ny permit issued to a CAFO must require compliance with the terms of the CAFO’s site-specific nutrient management plan.”¹⁰⁷

By removing critical terms from the NMP from the permit and shifting them to the post-approval Farm Operating Manual, DEQ proposes to violate this clear mandate. While the individual permit template requires the implementation of a NMP and makes the NMP “enforceable through the permit,” it does not clearly incorporate the terms of the NMP into the

¹⁰⁰ *Id.* at 502; 33 U.S.C. § 1362(11) (defining “effluent limitation”).

¹⁰¹ 40 C.F.R. §§ 122.42(e)(5), (e)(1), 412(c)(1), (2)-(5).

¹⁰² *See Waterkeeper*, 399 F.3d at 499 (emphasis added).

¹⁰³ 40 C.F.R. § 122(e)(5).

¹⁰⁴ 33 U.S.C. § 1342(b).

¹⁰⁵ Individual Permit Template, Parts II.C.1, III.B.2.

¹⁰⁶ *See Waterkeeper*, 399 F.3d at 502 (citing 33 U.S.C. §§ 1311(a), 1311(b), 1342(a)).

¹⁰⁷ 40 C.F.R. § 122.42(e)(5); 9VAC25-31-200.E.5.

permit or require “compliance with” the plan.¹⁰⁸ Although there are similarities between “compliance with” and “enforceable through,” the former is the language of the regulations and was important enough for EPA to advise that the individual permit template clearly state that “compliance with the NMP is required by the permit.”¹⁰⁹ Moreover, *Waterkeeper* expressly requires that the NMP’s terms be incorporated into the permit.¹¹⁰

No matter the language, the fact remains that many of the NMP’s terms have been shifted to a post-approval document or otherwise removed entirely. It is clear that these terms are no longer part of the NMP and are not incorporated into the permit.

c. The Individual Permit Template Violates Public Participation Requirements

Third, the individual permit template thwarts the requirement that the public be able to review the full terms of the NMP prior to the approval of the permit. By transferring substantive terms out of the NMP to the Farm Operating Manual, which will be available only after permit issuance (and hence, after the public comment period), DEQ forecloses the ability of the public to review, comment on, and if necessary appeal substantive terms of the NMP.

The *Waterkeeper* court invalidated EPA’s 2003 rule on the basis that it “effectively shields the nutrient management plans from public scrutiny and comment.”¹¹¹ Specifically, the court found that the public must have pre-approval access to the NMP in order to allow the opportunity to review, comment on, call for a hearing on, and bring citizen suits with respect to the plan.¹¹² More notably, the court found that this opportunity for public participation must extend to “the terms of the nutrient management plan,” given their status as effluent limitations.¹¹³

In the aftermath of the *Waterkeeper* ruling, EPA revised its CAFO rule in order that “the public will have access to the [nutrient management plan] prior to permit issuance and will also have full opportunity to comment on the adequacy of the plan and on the nutrient management terms in the draft NPDES permit developed for the specific CAFO facility.”¹¹⁴

Furthermore, a subpart of EPA’s second criterion is “[f]ailure to comply with the public participation requirements of this part.”¹¹⁵ And as stated by the Clean Water Act, “[p]ublic participation in the development, revision, and enforcement of any . . . effluent limitation . . . shall be provided for, encouraged, and assisted by the Administrator and the States.”¹¹⁶

¹⁰⁸ Individual Permit Template, Parts I.A.2, III.A.1.

¹⁰⁹ Individual Permit Template, Part III.B.2 (Nov. 11, 2011) (on file with EIP).

¹¹⁰ See *Waterkeeper*, 399 F.3d at 502.

¹¹¹ *Waterkeeper*, 399 F.3d at 503.

¹¹² *Id.*

¹¹³ *Id.* at 503-04.

¹¹⁴ 73 Fed. Reg. at 70,440.

¹¹⁵ 40 C.F.R. § 123.63(a)(2)(iii).

¹¹⁶ 33 U.S.C. § 1251(e).

Under the individual permit template, DEQ proposes to violate these public participation requirements. Only a stripped-down version of the NMP will be available for full public review, lacking the full required terms as described above. While some of these terms will appear in the Farm Operating Manual, they will only become available months after the issuance of the permit—and therefore months or longer after the public comment period—thereby impermissibly evading public review. That is, by the time the Farm Operating Manual and the terms that are required to be in the NMP are accessible, the facility will already have received permit approval, and the opportunity for public review, comment, permit appeal, and judicial review will have closed.

EPA repeatedly raised each of these issues in its comments on drafts of the individual permit template and in meetings with DEQ, and it appears that EPA has continued to raise these long-running issues in its review of the draft Murphy Brown permits, and yet DEQ has failed to make the necessary corrections. For example, in comments on the individual permit template as of November 21, 2011, EPA commented that “DEQ should identify the 9 minimum elements of NMP somewhere in the permit or in the permit fact sheet for easy reference by permit writers/reviewers.”¹¹⁷ And in Part III.B.2, which discusses best management practices, EPA commented, “DEQ should include a list of BMPs/Site Specific Requirements required by the NMP within this section of the Permit.”¹¹⁸ Additionally, EPA staff raised concerns in several meetings with DEQ as to the public participation implications of moving the minimum elements and BMPs out of the NMP. Specifically, EPA was “concerned that not all elements would be available to public for comment.”¹¹⁹ Yet three years later, DEQ continues to seek EPA approval of draft permits that contain these same deficiencies.

If DEQ continues forward as it proposes in the individual permit template and the draft Murphy Brown permits, it will result in a substantively weaker NMP in violation of EPA’s regulatory requirements, as well as a noncompliant CAFO NPDES program. Furthermore, these proposed changes will also violate the Clean Water Act’s requirements, as restated by *Waterkeeper*, with respect to permitting authority review, the content of permits, and public participation.

Although EPA has attempted to work constructively with DEQ for years through the development of the individual permit template and the draft Murphy Brown permits in order to bring the terms in compliance with *Waterkeeper* and EPA’s regulations, DEQ has consistently resisted the necessary changes. For this reason, EPA is now in a position where it is legally unable to approve the draft Murphy Brown permits or any other permits based on the individual permit template, and DEQ is in clear violation of the requirements of the Clean Water Act and EPA’s regulations.

¹¹⁷ Individual Permit Template, Part III.A.1 (Nov. 11, 2011) (on file with EIP).

¹¹⁸ *Id.*, III.B.2.

¹¹⁹ See Betsy Bowles, Meeting Notes (May 11, 2012) (on file with EIP).

2. The Individual Permit Template Fails to Comply with EPA’s Requirements for Corrective Actions

EPA’s Clean Water Act regulations require that CAFOs implement “corrective actions” for any issues identified during the required visual inspections.¹²⁰ Specifically, “[a]ny deficiencies found as a result of these inspections must be corrected as soon as possible.”¹²¹

While the individual permit template does include several provisions with respect to “corrective actions” in response to visual inspections, these provisions do not require expediency or establish a timeline by which a permittee must act after discovering a deficiency. For example, for visual inspections of best management practices, “[t]he Permittee shall correct any deficiencies found as a result of the visual inspections and document any actions taken to correct deficiencies in accordance with Part I C.2.b.”¹²² And for visual inspections of all other features, “[t]he Permittee shall correct any deficiencies found as a result of the visual inspections and document any actions taken to correct deficiencies in accordance with Part I C.2.c.”¹²³

The only reference to a timeframe occurs with respect to recordkeeping of visual inspections of other features, under which a permittee must include an explanation as to why certain deficiencies were not corrected within thirty days.¹²⁴ This explanation provision is not included in the similar recordkeeping requirement for best management practices.¹²⁵

EPA addressed this deficiency in its edits to the individual permit template, adding “as soon as possible” to the visual inspection requirements in Parts I.B.1.b and c, and DEQ’s annotations acknowledged that “this is in [EPA’s] reg[ulations].”¹²⁶ Nonetheless, the individual permit template failed to incorporate these changes.

For all of these reasons, any permits based on the individual permit template will fail to conform to EPA’s regulations if DEQ does not make significant changes to include all necessary terms in every permit it issues.

V. DEQ HAS FAILED TO PROPERLY INSPECT ACTIVITIES SUBJECT TO REGULATION

EPA’s third criterion for when a delegated state program “no longer complies with requirements” concerns a state program’s “failure to inspect and monitor activities subject to regulation,” as required under Part 123.¹²⁷ 40 C.F.R. Part 123 includes the requirement that “a

¹²⁰ See 40 C.F.R. § 412.37.

¹²¹ 40 C.F.R. § 412.37(a)(3).

¹²² Individual Permit Template, Part I.B.1.b.(2).

¹²³ *Id.*, Part I.B.1.c.(1).

¹²⁴ *Id.*, Part I.C.2.c.

¹²⁵ *Id.*, Part I.C.2.b.

¹²⁶ Individual Permit Template, Part I.B.1.b, c (June 11, 2012) (on file with EIP).

¹²⁷ 40 C.F.R. § 123.63(a)(3)(iii).

state must have a program which is capable of making comprehensive surveys of all facilities and activities subject to the Director's authority to identify persons subject to regulation who have failed to comply with permit application or other program requirements."¹²⁸

While DEQ's previous commitment to completing annual inspections for all VPA-permitted facilities is commendable, its annual inspections to date have failed to provide the agency with adequate information to make permitting decisions and EPA's comprehensive survey requirements. Additionally, as discussed in the procedural history above, DEQ recently has begun to move away from guaranteed annual inspections toward a "risk-based model," where its inspectors will target certain facilities for more frequent inspections based upon chance or history of violations.¹²⁹ This may be a positive development, particularly as it appears to direct DEQ's limited inspectors and funding to the CAFOs that are most likely to have discharges and require NPDES permits. However, it is just as important that DEQ's inspections have enough funding in the first place and that these inspections be conducted in such a way so as to gather the information necessary to make appropriate permitting decisions.

In its review of the Illinois NPDES CAFO program, EPA Region 5 found that the Illinois Environmental Protection Agency's approach fell short of the inspection requirements of 40 C.F.R. § 123.26(b)(1).¹³⁰ EPA Region 5 concluded that the state agency failed to maintain any sort of comprehensive state survey, and a "majority of inspections conducted at livestock facilities are not comprehensive, and do not document whether or not a facility is in compliance with NPDES requirements or needs an NPDES permit."¹³¹

According to previous representations by DEQ and EPA, DEQ inspects (or used to inspect) every VPA-permitted facility at least once annually in a "routine inspection."¹³² However, records indicate that these routine inspections, like Illinois EPA's, fall short of EPA's requirement to inspect activities subject to regulation, and also indicate that DEQ is not capable of performing a comprehensive survey.

Publicly available records indicate that at least three different versions of DEQ's annual inspection form are in use in routine annual inspections, which include varying fields and requirements.¹³³ There are certain fields on the inspection forms that could be used to determine

¹²⁸ 40 C.F.R. § 123.26(b)(1); *see also* EPA, *Illinois Initial Results* at 14.

¹²⁹ Telephone call between Adam Kron, EIP, and Amy Owens and Neil Zahradka, DEQ (July 22, 2014).

¹³⁰ *Id.*

¹³¹ *Illinois Initial Results* at 36.

¹³² *See Virginia WIP* at 72; EPA, *NPDES Profile: Virginia* at 13.

¹³³ *See* Letter from Allen J. Newman, Southwest Regional Office, DEQ, to John and Jimmy Huffard, Huffard Dairy Farm, Re: AFO Inspection- Huffard Dairy Farm; Permit No. VPG100004 (Aug. 8, 2012); Letter from Clyde K. Gantt, Tidewater Regional Office, DEQ, to Chris Pope, Re: Inspection Report, Pope Hog Farm (VPG100166) (Sep. 14, 2011); Letter from Seth Mullins, Piedmont Regional Office, DEQ, to Sidney Brandon, Re: Confined Animal Feeding Operation Annual Inspection (FY12), Permits VPG100030, VPG100036, SJB Farms, Inc., Brunswick County (Feb. 28, 2012).

whether NPDES coverage is necessary, but these fields only appear on certain forms used by some regional offices, and they lack important considerations. For example, the Piedmont Regional Office uses an inspection form for swine and dairies that contains yes/no fields for “Housing Waste Storage Facilities,” including “Discharge,” “Evidence of Overflow,” and “Denuded with Potential to Impact State Waters.”¹³⁴ The Southwest Regional Office uses inspection forms for dairy and cattle AFOs containing similar fields with respect to discharges to state waters,¹³⁵ but the Tidewater Regional Office’s inspection forms for poultry and swine contain no fields addressing discharges to state waters.¹³⁶ And although this may be due to a failure to provide full records rather than a failure to conduct annual inspections, neither the Blue Ridge Regional Office nor the Valley Regional Office provided any annual inspection forms.

As discussed in the procedural history above, a DEQ official recently acknowledged that the DEQ regional offices still use non-standardized inspection forms, but stated that there are core elements among the different forms and that there are no current plans to provide the regional offices with a standardized form.¹³⁷ According to the official, although there is no current form in any DEQ inspection program that includes a checkbox to mark for a discharging facility, the inspectors have known to look for discharging facilities for years.¹³⁸

If DEQ is to make a comprehensive survey of CAFOs, it must start by ensuring that its regional offices and inspections staff are using standard inspection forms and asking the right questions. Furthermore, a facility’s history of discharges and violations should be considered in every inspection. As discussed previously, EPA’s 2010 guidance and *NPPC* provide numerous additional criteria to consider that affect whether a CAFO discharges, such as whether a past discharge has been fully remedied. Records provided to EIP indicate that some DEQ regional offices do not inquire about past discharges when conducting routine inspections, much less consider other factors that cause discharges. This, along with the fact that DEQ has never made a determination that a CAFO requires a permit, indicates that not only does DEQ fail to adequately inspect facilities subject to regulation, but it is also incapable of conducting a comprehensive survey to determine which facilities require permits.

In short, determining NPDES eligibility does not appear to be the aim of the inspections, and conducting a comprehensive survey is not yet within inspectors’ capabilities. To remedy

¹³⁴ See, e.g., Letter from Seth Mullins, Piedmont Regional Office, DEQ, to Sidney Brandon, Re: Confined Animal Feeding Operation Annual Inspection (FY12), Permits VPG100030, VPG100036, SJB Farms, Inc., Brunswick County (Feb. 28, 2012).

¹³⁵ See, e.g., Letter from Allen J. Newman, Southwest Regional Office, DEQ, to John and Jimmy Huffard, Huffard Dairy Farm, Re: AFO Inspection- Huffard Dairy Farm; Permit No. VPG100004 (Aug. 8, 2012).

¹³⁶ See, e.g., Letter from Clyde K. Gantt, Tidewater Regional Office, DEQ, to Chris Pope, Re: Inspection Report, Pope Hog Farm (VPG100166) (Sep. 14, 2011); Letter from Clyde K. Gantt, Tidewater Regional Office, DEQ, to Ronnie Matthews, Re: Inspection Report, R.W. Matthews Farms (VPG250041) (Sep. 20, 2012).

¹³⁷ Telephone call between Adam Kron, EIP, and Amy Owens and Neil Zahradka, DEQ (July 22, 2014).

¹³⁸ *Id.*

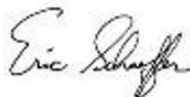
this, DEQ must standardize its inspection forms, include appropriate queries, and ensure adequate funding and staffing to conduct such inspections. Once this capacity is in place, DEQ must collect and centralize this information in such a way as to comprise a statewide survey.

Petitioners are aware that EPA has been in the process of working with DEQ to develop “a permit strategy to ensure that all CAFOs that need VPDES permits obtain coverage.”¹³⁹ However, until DEQ finalizes and implements this “permit strategy,” including the incorporation of all legally mandated requirements, and ensures adequate funding for inspections, it will continue to implement a NPDES program that does not meet the minimum requirements of the Clean Water Act or EPA’s implementing regulations.

VI. CONCLUSION

For the foregoing reasons, Petitioners request that EPA take prompt action to initiate formal proceedings pursuant to section 1342(c)(3) of the Clean Water Act to withdraw its approval of the Commonwealth of Virginia’s authorized NPDES permitting program and assume administration and enforcement thereof. Otherwise, Virginia’s program will continue with the current deficiencies and will be unable to meet its significant obligations under the Chesapeake Bay TMDL.

Sincerely,



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¹³⁹ See Email from Mark Zolandz, EPA, to Betsy Bowles, DEQ (March 21, 2012).

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