

# THE DAILY RECORD

WESTERN NEW YORK'S SOURCE FOR LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

## Environmental LAW

# Yogurt triggers new battles in environmental regulation war

Does economic development only come at a cost to the environment? This old question has dominated environmental news of late, but most of the attention has focused on the acrimonious and technologically mysterious subject of hydrofracking. Garnering less public attention has been the longstanding tension between maintaining and improving water quality and sustaining and promoting the family farm.

We have enjoyed huge successes in improving water quality over the past 40 years. Yet, as those who enjoy beaches and waterways know too well, our rivers, streams and lakes remain impaired and threatened. Beach closings and lakes choked with weeds and algae are all too common. It is obvious that the work of protecting our waterways is far from over. We also know that much of the problem that remains stems from pesticides and fertilizers used by homeowners and farms, and from animal waste.

To address the part of this problem attributable to newer "industrial" scale farming, EPA set out to regulate concentrated animal feeding operations (CAFOs) by requiring permits and changes designed to minimize or eliminate discharges of animal waste to waterways. To maintain local control over this program and to have the primary role in protecting local resources, it was essential for states to adopt their own CAFO regulations. The New York State Department of Environmental Conservation did just that by adopting a permit program in New York state. As applied to dairy farms, the state's rules have required farms with 200 or more dairy cows to obtain permits and invest in compliance programs. Many in the farming community complained that the additional costs were prohibitive for farms just above the threshold, so many opted to keep the size of their herds at less than 200 cows to avoid the additional administrative and capital costs of complying with the CAFO regulations.

This barrier to expansion collided head-on with the state's economic development plan to take advantage of the new opportunity presented by surging public demand for yogurt. As a leading dairy producing state, this new opportunity to get on the

yogurt bandwagon has been tantalizing — except that New York, albeit a leading dairy producer, does not produce enough milk to supply its traditional markets, let alone the burgeoning yogurt industry.

Moreover, for other policy reasons, the state's Agriculture and Markets Department wants to encourage the growth and economic viability of smaller family dairies and not simply encourage more large CAFOs. The yogurt boom presents an obvious opportunity for dairy farmers to reap higher prices while increasing production, in contrast to the economic pressures which have persisted for decades and have forced many smaller dairy farmers out of farming.

Cornell University researchers prepared an economic study, relied on by NYSDEC, which makes the case for new jobs in farming and the multiplier effects of new jobs outside of farming that should result from increased production. A financial analysis prepared for the dairy industry by Cornell University "Pro-Dairy," a state-funded program, and Farm Credit East added that it is difficult for a dairy farm to expand from

190 to 290 cows, and that the added expense of triggering CAFO permits and requirements tipped the scales against expansion in many cases.

Against this background, Gov. Cuomo convened a "Yogurt Summit" in August 2012. The commissioner of Agriculture and Markets promised at the summit that the state would increase the threshold for CAFO permits from 200 to 300 cows. However, the burden fell on NYSDEC to make this happen. This was awkward as NYSDEC had touted the fact that it was regulating more farms as CAFOs than the EPA required when it adopted its CAFO program and gave reasons, which it now needed to revisit, why the 200 cow threshold was necessary.

Nevertheless, NYSDEC undertook to revise its regulations and prepared an environmental impact statement to study the consequences of such a modification. The New York Farm Bureau supported the change while a consortium of environmental organi-

*Continued ...*



By **RONALD G. HULL**

Daily Record  
Columnist

# THE DAILY RECORD

WESTERN NEW YORK'S SOURCE FOR LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

## *Continued ...*

zations lined up in opposition, including the Waterkeeper Alliance, Riverkeeper, Inc., the Buffalo Niagara Riverkeeper and the Lower Susquehanna Riverkeeper. The environmental organizations accused the state of backsliding on its commitment to water quality in violation of the federal Clean Water Act.

NYSDEC adopted changes to the state's CAFO program which took effect on May 8, 2013. The amendment reclassifies a dairy farm with less than 300 dairy cows "that does not cause a discharge," and exempts it from having to obtain a CAFO permit, unless specifically designated as a CAFO by the NYSDEC. Permits are still required for all such farms that discharge liquids from a point source.

NYSDEC estimates that of the 855 dairy farms that currently have 100-199 dairy cows, approximately 285 of the farms will now increase the size of their herds by an average of 90 cows, resulting in 25,000 more cows statewide and bringing an additional 5,000 farm and food processing jobs to New York state. NYSDEC concluded that the change met the objectives of helping to expand milk production to foster the yogurt industry in New York and would not lead to significant adverse environmental impacts.

The New York Farm Bureau applauded the change as making the regulatory program "leaner, streamlined and more user-friendly" and providing flexibility for "smaller family farms to achieve economic sustainability while incorporating long-term investments in conservation management into their farm business model."

On July 25, the environmental organizations opposed to the change sued the NYSDEC in an Article 78 proceeding filed in *Albany County. Matter of Riverkeeper, Inc., et al. v. Martens*, Albany County, Index No. 2013-4166.

The petition asserts 13 causes of action in three major groupings: that NYSDEC violated its legislated mandate and exceed its authority; that the agency violated the procedural and sub-

stantive requirements of the State Environmental Quality Review Act; and that NYSDEC's action violates the Clean Water Act and wrongly evaded federal oversight of the state's program.

The claims under SEQRA assert that damage to the state's waterways is inevitable from more cows and that the NYSDEC failed to take a "hard look" at the inevitability of discharges and environmental harm or at the cumulative impacts of additional runoff of phosphorus.

The petition's point seems to be that since the purpose of the regulation is to reduce the cost for dairy farms to expand, we should not expect that they will voluntarily spend money on environmental controls. The environmental groups claim that "illegal discharges, permit violations and non-compliance ... are the norm at CAFOs with 200 to 299 cows," in support of their claims that environmental concerns have been ignored in favor of economic objectives.

Petitioners also raise multiple claims that NYSDEC has violated its obligations under the Clean Water Act. These arguments were raised and addressed by NYSDEC as part of the rulemaking, but have been raised again in the lawsuit and essentially ask how much discretion the state has to relax the requirements of an approved permit program under the Clean Water Act.

The concern that 25,000 cows, a very small incremental addition to the state's dairy herd, divided among 285 farms across the entire state will cause significant harm to the environment is clearly exaggerated, although there is a real possibility that individual farms will have difficulty adjusting to having 50 percent more cows on the farm.

The case bears watching as a test of how much flexibility the state has to relax permit requirements in order to encourage specific economic development.

*Ronald G. Hull is a senior attorney in Underberg & Kessler LLP's Environmental and Litigation practice groups. He has more than 25 years' experience in the areas of environmental and municipal law and litigation.*