STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of the Application of the
THE TOWN OF WHEATFIELD, NEW YORK, and THE TOWN BOARD OF THE TOWN OF WHEATFIELD, NEW YORK,

Petitioners/Plaintiffs,

v.

RICHARD BALL, as Commissioner of the New York State Department of Agriculture and Markets, and THE NEW YORK STATE DEPARTMENT OF AGRICULTURE AND MARKETS, MILLEVILLE BROTHERS FARMS, INC., and SUSTAINABLE BIOELECTRIC, LLC,

Respondents/Defendants.

DECISION AND ORDER/JUDGMENT
Index No.: 903925-17
RJI No.: 01-17-ST8837

For a Judgment Pursuant to Article 78 of the CPLR and Declaratory Judgment Pursuant to § 3001 of the CPLR

(Supreme Court, Albany County, All Purpose Term)

(Justice Kimberly A. O'Connor, Presiding)

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O'CONNOR, J.:

Petitioners/plaintiffs The Town of Wheatfield, New York and The Town Board of the Town of Wheatfield, New York (collectively the "Town") commenced this combined CPLR Article 78 proceeding and declaratory judgment action seeking a judgment of this Court: (1) annulling, in its entirety, the May 22, 2017 Amended Determination and Order[1] issued to the Town by respondent/defendant Richard Ball, as Commissioner ("Commissioner") of respondent/defendant the New York State Department of Agriculture and Markets ("Department" or "AGM"), pursuant to Agriculture and Markets Law ("AML") § 36; and (2) declaring the Amended Determination and Order improper, *ultra vires*, void and of no legal effect, inconsistent with the purpose and intent of the Agriculture and Markets Law, contrary to the Town's constitutionally protected police powers and its express authority under New York's Municipal Home Rule Law ("MHRL"), Town Law, and Environmental Conservation Law ("ECL"), and as lacking any rational basis. AGM, respondent/defendant Milleville Brother Farms, Inc. ("Milleville Farms" or "Milleville") and respondent/defendant Sustainable Bioelectric, LLC ("SBL") (collectively respondents/defendants have answered the petition/complaint and oppose the requested relief. The Town has replied to the opposition.

[1] An Amended Determination and Order was issued to correct a typographical error in the original Determination and Order, dated May 19, 2017.

BACKGROUND

To implement the State's policy of "encourag[ing] the development and improvement of its agricultural lands for the production of food and other agricultural products" (NY Const., art. XIV, § 4), the Legislature enacted Article 25-AA of the Agriculture and Markets Law in 1971 "to provide a locally-initiated mechanism for the protection and enhancement of New York [S]tate's agricultural land as a viable segment of the local and state economies and as an economic and viable resource of major importance" (AML § 300). In enacting Article 25-AA, "the Legislature specifically found that 'many of the agricultural lands in New York [S]tate are in jeopardy of being lost for any agricultural purposes' due to local land use regulations inhibiting farming, as well as various other deleterious side effects resulting from the extension of nonagricultural development into farm areas" (*Town of Lysander v. Hafner*, 96 N.Y.2d 558, 563 [2001], quoting AML § 300 and citing L. 1987, ch. 774, § 1). Thus, "to foster the socio-economic vitality of agriculture in New York, the Legislature gave county legislative bodies the power to create 'agricultural districts[2]'" (*Town of Lysander v. Hafner*, 96 N.Y.2d at 563, citing AML § 303). Lands falling within "agricultural districts" receive various statutory benefits and protections[3] (*id.* at 563).

AML § 305-a(1)(a), which governs the coordination of local land use planning and regulation with the State's agricultural districts program, "mandates that, when exercising their powers to regulate land use activities, local governments must do so in a manner consistent with the policy objectives of [A]rticle 25-AA" (*Town of Lysander v. Hafner*, *supra*). To that end, "the

[2] Agricultural districts are created based on local landowner interest, county review, county adoption, and State certification. According to the record, as of January 1, 2017, there were approximately 210 agricultural districts statewide, containing approximately 25,316 farms and over 9 million acres (about 25 percent of the State's total land area).

[3] The record indicates that the benefits include partial real property tax relief (i.e., agricultural assessment and limitation on the power to impose special benefit assessments). Agricultural district lands also receive protections against overly restrictive local laws, government-funded acquisition or construction projects, and private nuisance suits involving agricultural practices.

statute directs that local governments 'shall not unreasonably restrict or regulate farm operations within agricultural districts in contravention of the purposes of . . . [A]rticle [25-AA] unless it can be shown that the public health or safety is threatened" (*id.*, citing AML § 305-a[1][a]). Pursuant to AML § 305-a(1)(b), "[u]pon the request of any . . . farm owner or operator, the [AGM] [C]ommissioner shall render an opinion to the appropriate local government officials, as to whether farm operations would be unreasonably restricted or regulated by proposed changes in local land use regulations, ordinances or local laws pertaining to agricultural practices and to the appropriate local land use enforcement officials administering local land use regulations, ordinances or reviewing a permit pertaining to agricultural practices."

"The [AGM] [C]ommissioner, upon his or her own initiative or upon receipt of a complaint from a person within an agricultural district, may bring an action to enforce the provisions of [AML § 305-a]" (AML § 305-a[1][c]). Furthermore, where it appears, after an investigation or hearing, that "any person, association, or corporation has failed to comply with or is guilty of a violation of the provisions of [the AML] or a rule of the [D]epartment, or of any other general or special law relative to any matter within the jurisdiction of the [D]epartment," the Commissioner is authorized to issue an order "compelling . . . compliance with such law or rule" (AML § 36[1]). An order issued in accordance with AML § 36(1) is reviewable in a CPLR Article 78 proceeding (*see* AML § 37; *Matter of Town of Butternuts v. Davidsen*, 259 A.D.2d 886, 888 [3d Dep't 1999]).

The relevant facts set forth in the record are as follows. On July 28, 2014, the Town adopted Local Law No. 3-2014, amending Chapter 161 of the Town of Wheatfield Code ("Town Code"), to add a new Article III, termed the "Biosolids Management Law of the Town of Wheatfield." Among other things, the Biosolids Management Law prohibits the "collect[ion], accept[ance], stor[age], process[ing], treat[ing], handl[ing], generat[ing], apply[ing] to the land or dispos[ing] of biosolids, digestate or other liquid, solid or semi-solid waste, any of which contains human waste

or any pathogenic organism, or which are derived from materials containing human waste, pathogenic organisms and/or municipal wastewater, at any location within the Town of Wheatfield." Subsequently, on August 11, 2014, the Town adopted Local Law No. 4-2014, amending Chapter 161 of the Town Code to incorporate into Article III of the Biosolids Management Law a notice and penalty system for violations, provisions related to existing facilities, and special use permit standards.[4]

On or about September 23, 2014, Milleville Farms, an 80 herd dairy farm consisting of 1500 acres of owned land and approximately 2500 acres of rented land located in Niagara County Agricultural District Nos. 6, 7, and 8 that grows field crops (corn, wheat, soybeans, oats and hay), requested that the Department conduct of a review the Town of Wheatfield's Biosolid Management Law for compliance with AML § 305-a(1) in connection with Milleville's proposed application of "*Equate*" on lands used for field crop production. *Equate* is the byproduct of anaerobic digestion of food waste (fats, oils and grease) and biosolids (sewage sludge), and is produced by SBL at its anaerobic digestion facility located in the Town of Wheatfield. In October 2012, SBL applied for a permit from the New York State Department of Environmental Conservation ("DEC") to land apply *Equate* on nine parcels of land owned by Milleville Farms, including a parcel located in the Town of Wheatfield. DEC granted SBL's land application permit in July 2013, and the permit was modified in May 2014.[5]

[4] The Town of Wheatfield Local Law Nos. 3-2014 and 4-2014 will collectively be referred to herein as the "Biosolids Management Law" or "Biosolids Law."

[5] When this action/proceeding was commenced, the rules and regulations governing the land application of biosolids and biosolids storage facilities were codified at 6 NYCRR Part 360, Subpart 360-4. Subpart 360-4 was repealed, and pursuant to amendments, which took effect in November 2017, the rules and regulations governing the land application of biosolids and biosolids storage facilities can now be found at 6 NYCRR Part 361, Subpart 361-2. However, for purposes of this determination and consistency of the record, the Court's reference to the rules and regulations governing the land application of biosolids and biosolids storage facilities will be to former 6 NYCCRR Part 360, Subpart 360-4.

By letter dated October 7, 2014, the Department notified the Town Board that AGM had received a copy of the Town's "Determination of Non-Significance" completed in connection with the Town's SEQRA (State Environmental Quality Review Act) review of its Biosolids Management Law, and advised the Town Board that the Biosolids Management Law might unreasonably regulate a farm operation within a county-adopted, State-certified agricultural district. AGM included a copy of its *Guidelines for Review of Local Laws Affecting Nutrient Management Practices (i.e. Land Application of Animal Waste, Recognizable and Non-Recognizable Food Waste, Sewage Sludge and Septage; Animal Waste Storage/Management* ("Guidelines") as an enclosure to the letter.

Two weeks later, the Department wrote to the Town's Supervisor informing him that AGM had received a request from Milleville Farms asking the Department to review the Town's Biosolids Management Law for compliance with AML § 305-a in connection with Milleville's proposed application of *Equate* on land used for crop production within Niagara County Agricultural District No. 7. In its letter, the Department noted, among other things, that it "performs all reviews on a case-by-case basis, based on the specific facts of the situation," that it "considers several factors, including, but not limited to: . . . whether the requirements adversely affect the farm operator's ability to manage the farm operation effectively and efficiently"; "whether the farm requirements restrict production options which could affect the economic viability of the farm"; and "the availability of less onerous means to achieve the localities objective," and "considers whether a State law, regulation or standard applies to the regulated activity."

The Department also indicated that prior to making a decision as to whether a local law unreasonably restricts a farm operation within an agricultural district, it "considers all pertinent information submitted by the affected farm operator, and the local law involved," and takes "into

account any facts or circumstances that the locality may wish to bring to [its] attention regarding the issue presented." The Department encouraged the Town to submit information or documentation that it would like the Department to consider in its review, advised the Town Supervisor that it would inform the Town of its determination and, "if it is concluded that an unreasonable restriction exists, [AGM] [would] ask the Town to provide any evidence it may have of a threat to the public health or safety," and provided the Town with a copy of AML § 305-a, its guidance document, titled *Local Laws and Agricultural Districts: How Do They Relate?*, and AGM's Guidelines.

The Town Supervisor responded by letter dated November 19, 2014. The Town Supervisor indicated, among other things, that the Town Board found that the findings and conclusions detailed in the Town's SEQRA determination, prepared in consultation with its environmental consultant, Matrix Environmental Technologies, Inc. ("Matrix") and outside legal counsel, and following a detailed review of information obtained from the public, SBL's parent company (Quasar Energy Group), regulatory agencies, and numerous other sources, "demonstrate that the land application of Biosolids as defined in Local Law No. 3-2014 within the Town of Wheatfield and the development of new or expanded facilities that process, treat, or store [b]iosolids within the Town of Wheatfield pose a threat to public health and the environment" due to exposure to pathogens, metals, and other contaminants present in biosolids.

Among other things, the Supervisor's letter referred to findings and observations made by Matrix, including Matrix's "determin[ation] that the vast majority (i.e. over 99%) of the land in the Town of Wheatfield is unsuitable and unsafe for land applications of biosolids" due to the Town's "hydrogeological and soil conditions." The Town Supervisor further asserted that "despite the prevalence of conditions in the Town of Wheatfield that are unsuitable and unsafe for land application of biosolids," it was Matrix's position that the DEC had not (1) "undertaken a detailed

review of the soil or hydrogeology in the Town"; (2) "required any site-site specific baseline soil or groundwater data for proposed Part 360 land application sites in the Town of Wheatfield, other than soil samples for analysis of PH and 10 metals"; (3) "exercised its discretion under existing Part 360 regulations to require expanded testing of the feedstock supplied to [SBL's anaerobic digestion facility located in the Town]"; or (4) "engaged in meaningful public outreach concerning Part 360 applications involving biosolids storage, handling or land application in the Town of Wheatfield or with respect to potential adverse health effects associated with unregulated pollutants known to be present in [b]iosolids."

The Town Supervisor also asserted that "the potential threats presented by [b]iosolids are exacerbated by [the] existing federal and New York State regulatory program which is out of date," and cited scientific research that the Town maintained showed potentially serious and adverse environmental and health consequences and effects associated with the land application of biosolids. According to the Supervisor, the Town Board determined that "Local Law 3-2014 will not unreasonably restrict existing farming operations, and in fact, will benefit them" by protecting the Town's agricultural soils, as a "unique and valuable resource," and "by providing significant environmental and health protection to consumers of agricultural products grown in the Town . . . [and] farmworkers themselves." The Supervisor cited the Town's "express statutory authority under Municipal Home Rule Law § 10 and E.C.L. § 2-0711" as the basis for its adoption of the Town's Biosolids Management Law.

On February 19, 2015, AGM Associate Environmental Analyst Matthew Brower ("Brower") conducted a site visit of Milleville Farms, during which he observed the farm, four proposed land application sites, including a 37.6 parcel of farmland in the Town of Wheatfield, and the surrounding areas. During his visit, Brower "performed [his] own independent analysis of the soils located at Milleville Farms," including an analysis of the soil characteristics and

hydrogeology of the proposed land application site in the Town of Wheatfield. Brower "also calculated the economic savings associated with Milleville Farm's use of *Equate* over traditional fertilizers."

In order to assess the Town's claims regarding the potential health and safety risks posed by the proposed land application of biosolids on Milleville Farms pursuant to SBL's land application permit, Brower and AGM staff consulted with Dr. Sally Rowland ("Dr. Rowland"), employed by the DEC as a Professional Engineer 2 and, since 1995, as Chief of the Organics Reduction and Recycling Section, Bureau of Waste Reduction and Recycling ("BWRR"), Division of Materials Management, and other DEC representatives with expertise in the DEC's biosolids program. As Chief of BWRR's Organics and Recycling Section, Dr. Rowland is responsible for, among other things, development and implementation of regulations for organic waste recycling facilities, including anaerobic digestion, land application, and storage facilities associated with organic waste recycling. She is also responsible for reviewing Part 360 permit applications for composting, anaerobic digestion, storage, land application, and other similar facilities.

Dr. Rowland assisted AGM in evaluating the technical issues raised by the Town Supervisor in his November 19, 2014 letter. In addition, Dr. Rowland furnished the Department with a document, titled "Anaerobic Digestion, Digestate and Land Application," which, among other things, provided background information concerning SBL's anaerobic digestion facility in the Town of Wheatfield and its land application permitting history, and a link to the DEC's website where additional details and the regulatory documents could be found. The document also included the answers to common questions regarding biosolids recycling, which were developed in response to "concerns of opponents to land application of biosolids."

In a letter to the Town Supervisor, dated May 1, 2015, the Department notified the Town that "Local Laws No. 3-2014 and 4-2014 and their administration by the Town, which prohibit the

land application of biosolids, unreasonably restricts the Milleville Brothers farm operation in possible violation of AML § 305-a(1)." AGM's letter provided a detailed response to the issues and concerns raised by the Town in its November 19, 2014 letter,[6] and set forth the Department's basis for its preliminary determination that Milleville Farms met AGM's standard for AML § 305-a protection. The Department enclosed a copy of the Guidelines and a prior AML § 308(4) agricultural in nature opinion in which AGM "determined . . . that the digestion of animal waste, recognizable and non-recognizable food waste, sludge and septage materials is a beneficial biological process that produces valuable soil amendments for crop production."

In its letter, AGM asserted that "[n]utrient [m]anagement [p]ractices are an essential component of any farm operation[,] and include land application of sewage sludge and septage," which "have beneficial uses as fertilizer and soil amendments for crop purposes," and that "the Department has determined that land application of sewage sludge and septage, and recognizable and non-recognizable food waste," and, by extension, the spreading of *Equate* "by farm operations located within county adopted, State certified agricultural districts is protected under AML § 305-a from unreasonable local restrictions." AGM explained, in detail, the Department's approach to reviewing local laws affecting agricultural land use and nutrient management practices. And the Department noted that "[i]n addition to AML § 305-a, the limitations on local authority in Town Law § 283-a[7] were enacted to ensure that agricultural interests are taken into consideration during

[6] The Department noted that it had reviewed the Town's letters to AGM dated December 3, 2014 and January 30, 2015 concerning the DEC notices of violation issued for SBL's anaerobic digestion facility, but because the facility is not in an agricultural district, it was not part of the Department's AML § 305-a review.

[7] Consistent with AML § 305-a(1), Town Law § 283-a(1) provides that "[l]ocal governments shall exercise their powers to enact local laws, ordinances, rules or regulations that apply to farm operations in an agricultural district in a manner which does not unreasonably restrict or regulate farm operations in contravention of the purposes of [A]rticle [T]wenty-[F]ive-AA of the [A]griculture and [M]arkets law, unless it can be shown that the public health or safety is threatened."

the review of specific land use proposals," and that Town Law § 283-a is consistent with AML § 305-a regarding a showing of a threat to public health or safety.

The Department also informed the Town that it had consulted with Dr. Rowland and other DEC staff concerning the Milleville Farms land application permit, the issues raised in the Town's letter, and matters with which DEC staff has technical expertise. Based on those consultations, AGM addressed, in detail, the Town's concerns regarding the suitability of Town soils for biosolids application as well as its concerns regarding the potential adverse impacts to groundwater and surface water from nutrients, pathogens, heavy metals, and unregulated contaminants and potential exposure to humans from contaminant migration from treatment, storage, and application sites. The Department also addressed the Town's claims regarding the inadequacy of DEC's soil/hydrogeology review, the inadequacy of DEC's monitoring and testing requirements, and the lack of any meaningful public engagement. Moreover, the AGM suggested alternatives to the blanket prohibitions contained in the Town's Biosolids Management Law, such as differentiating between Class A and Class B biosolids and prohibiting land application on unfavorable sites during unfavorable conditions, among others. AGM invited the Town to comment on the issues raised, and to provide documentation and other evidence of a threat to public health or safety from the farm operation's land application of biosolids.

On May 11, 2015, the Town's attorney wrote to the Department, requesting all relevant information concerning the four proposed land application sites referenced in the AGM's May 1, 2015 letter, and any related Milleville Farms DEC permit applications and/or modifications that may have been submitted, processed, and/or granted after the adoption of the Town's Local Law. By his letter, counsel also proposed a conference call with the Department, the Town, and its consultant to discuss technical issues related to the propose land application sites.

The Town subsequently responded to the AGM's preliminary determination by letter of its attorney. In his July 14, 2015 letter, the Town's attorney reiterated arguments previously raised in defense of the Town's Biosolids Management Law, and set forth the legal basis for the Town's enactment of its biosolids ban. Enclosed with the Town attorney's letter was a supplemental response to the AGM's May 1, 2015 letter from Matrix to the Town Supervisor, dated July 14, 2015, with attachments.

On December 7, 2015, AGM staff participated in a meeting/conference call with Town representatives and representatives from the DEC, including Dr. Rowland, to discuss the Town's concerns. The Department again recommended changes to the Town's Biosolids Management Law to bring it into compliance with AML § 305-a, but the Town rejected the recommendations.

By letter of its attorney dated December 21, 2015, the Town forwarded presentation materials to the AGM that were produced by Dr. Murray McBride, a professor of Soil and Crop Sciences at Cornell University, for a local government workshop regarding environmental and health concerns related to the usage of biosolids as a crop fertilizer, and the failure of EPA (Environmental Protection Agency) and DEC regulations to protect natural resources, livestock and humans from exposure to unregulated contaminants. The materials also discussed *The Case for Caution*, a critical review of the EPA's Part 503 biosolids regulations, first published by Cornell in 1997, and updated in 2009.

On March 14, 2016, Dr. Rowland advised AGM, in a letter, that she would assist the Department, as the technical resource at the DEC, with respect to "the scientific and technical criteria that apply to the beneficial use of biosolids and the specific concerns raised by the Town of Wheatfield in [the Department]'s AML § 305-a review." Dr. Rowland's letter provided a general overview of organic waste recycling in New York State, and discussed biosolids management in New York and the EPA and DEC's biosolids regulations. In her letter, Dr.

Rowland also described EPA's risk assessment process, discussed recent research on emerging organic contaminants of concern, and addressed specific concerns raised by the Town and Matrix in the Town's July 14, 2015 letter.

Additionally, Dr. Rowland identified, and appended to her letter, EPA technical support documents concerning the land application of biosolids, as well letters from the DEC and Department of Health ("DOH"), which speak to biosolids recycling, and particularly land application, as "an important component of New York's solid waste management hierarchy," and the lack of "credible evidence of adverse health effects associated with biosolids land application sites" Dr. Rowland concluded her letter by stating:

> The recycling of biosolids is a viable method to provide nutrients and organics matter for farmers to promote the growth of crops. New York has a long and successful program for the recycling of biosolids in an environmentally sound manner. For environmental protection, DEC has regulations found in 6 NYCRR Part 360 that control the use of biosolids. It is the DEC's opinion that the regulations are protective of human health and the environment[,] and that biosolids recycling on farmland in New York State provides nutrients to farmers without undue risks.

On June 9, 2016, AGM notified the Town, by letter to its attorney, that the Department had completed review of the Town's Biosolids Management Law for compliance with AML § 305-a review, and "[found] that Wheatfield's Local Laws No. 3-2014 and No. 4-2014, as administered, unreasonably restricts the Milleville Farms[ ] farm operation in violation of AML § 305-a(1) and that the Town ha[d] not demonstrated that the public health or safety is threatened by the farm operation's land application of *Equate* biosolids on land used for crop production." The Department noted that it was "adher[ing] to the substantive analysis contained in its May 1, 2015 [letter] with respect to the Town's [Biosolids Management Law] and its application to Milleville Farm," and that "[its] letter assumes familiarity with the Department's May 1 findings and

analysis" and "addresses the arguments raised on behalf of the Town in the July 14, 2015 and December 21, 2015 letters."

The AGM's authority under AML § 305-a to preempt local laws unreasonably restricting a farm operation in an agricultural district was set forth in AGM's June 9, 2016 letter, and the Department specifically addressed the Town's assertions regarding the risks to public health and safety posed by the land application of biosolids. The Department enclosed Dr. Rowland's March 14, 2016 letter, memorializing her technical analysis of the Town's claims, with appendices, as an attachment to its decision, and requested that the Town confirm within 30 days that it would not seek to enforce its Biosolids Management Law against Milleville Farms. AGM advised the Town that if steps to comply were not taken, the Department would take appropriate action to enforce AML § 305-a(1).

In a letter from the Town Supervisor to AGM dated July 11, 2016, the Town "disagree[d] with the Department's conclusions that the Town Biosolids Law unreasonably restricts Milleville Brother's farm operations in the first instance, and that the Town has any obligation to demonstrate that public health and safety is threatened by the land application of biosolids in the Town." The Town also "disagree[d] with the Department's conclusions that the Town has failed to demonstrate that such public health and safety threats exist given the extraordinary level of scientific research conducted by the Town and its consultants on this issue, the unique soil and hydrologic conditions within Wheatfield, and the extensive supporting documents in the record. "Consequently, the Town Board . . . decline[d] the Department's request to confirm that it will not seek to apply the Town Biosolids Law throughout Wheatfield, including to the Milleville property." The Town advised the AGM that "the Town Board intends to vigorously defend the Town Biosolids Law against any challenge by the Department."

On September 30, 2016, the Town supplemented its July 11, 2016 response to the AGM's June 9, 2016 letter with the transcript of the testimony of Dr. Howard Freed, the former Director of DOH's Center for Environmental Health ("CEH"), before the Legislature in a joint public hearing on water quality, addressed to the State's response to the PFOA contamination issue in Hoosick Falls, and in which Dr. Freed recommended "that NYSDOH and CEH adopt a 'precautionary approach to protecting public health, such that they act to protect the public when there is evidence of harm, and not wait for conclusive evidence of harm, especially when conclusive proof is unlikely to become available in the foreseeable future.'" The Town claimed that "the Department's review of the Town's Biosolids Law, which has relied so heavily on the mere existence of a NYSDEC permitting process and CEH's cursory assurances concerning health risks, suffers from the critical shortcomings identified in Dr. Freed's testimony," and urged the Department "to adopt the 'precautionary principle' recommended by Dr. Freed in evaluating the potential risks posed by biosolids land application in the Town."

On May 22, 2017, the Commissioner issued an Amended Determination and Order, making findings of fact and conclusions of law in connection with the Department's AML § 305-a review. Among other things, the Commissioner found that: Milleville Farms is a "farm operation" for purposes of AML § 305-a(1); Milleville proposes to apply *Equate* on one owned parcel of land located in the Town of Wheatfield and within Niagara County Agricultural District No. 7; the AGM supports a farm operation's lawful use of biosolids as part of its farm operation; *Equate* is the byproduct of anaerobic digestion of food waste and sewage sludge, which the AGM previously determined is a beneficial biological process that produces valuable soil amendments for crop production; and the Town of Wheatfield's Local Law 3-2014 prohibits the land application of biosolids at any location within the Town.

The Commissioner also found that: EPA's Part 503 regulations establish standards for the final use and disposal of biosolids generated during the treatment of domestic sewage, which include standards for biosolids applied to agricultural lands as a fertilizer; DEC's Part 360-4 regulations, which are more restrictive than the federal regulations, contain protective measures to minimize public exposure to pathogens and the risks of groundwater contamination from land application of nutrients; that the DEC conducts site-specific reviews when issuing permits for land application of *Equate* and other biosolids; based upon the lack of evidence that the biosolids land application regulations are inadequate for the protection of public, the DOH has concluded that additional health studies are not necessary; the EPA continually researches and assesses biosolids sources and has concluded that the risk potential associated with "unregulated contaminants" is low; and the Town of Wheatfield did not provide the Department with any correspondence, documentation, or information showing any public health or safety threat relating to the land application of biosolids by a farm operation. Based on his findings, the Commissioner "determined that the Town of Wheatfield violated AML § 305-a(1)," and, pursuant to AML § 36, ordered "the Town of Wheatfield to comply with the provisions of AML § 305-a(1) by permitting Milleville Brothers to land apply *Equate* biosolids on land which has received DEC permit approval for land application of biosolids."

The Town of Wheatfield was directed to notify the Department within ten business days of the service of the Commissioner's Amended Determination and Order whether the Order is accepted and will be obeyed. Although the Amended Determination and Order took immediate effect upon service of a copy of the same upon the Town's Supervisor, the Town did not accept the Amended Determination and Order. This litigation followed.

ARGUMENTS

The Town contends that the May 22, 2017 Amended Determination and Order should be annulled because: (1) the Commissioner lacked authority to enforce AML § 305-a(1) through an AML § 36 order; (2) the Department's application of its Guidelines was unconstitutional and amounted to improper rulemaking in violation of SAPA (State Administrative Procedures Act); (3) the AGM's Amended Determination and Order impermissibly interferes with the Town's constitutionally and statutorily protected powers to regulate solid waste disposal and land use; (4) the Department's conclusion that the Town's Biosolids Management Law, as applied to Milleville's farming operations, constitutes an unreasonable restriction on those operations "utterly fails to satisfy the standard for genuine reasonableness supported by the prevailing facts in this matter," and thus, is arbitrary and capricious; and (5) although it was not obligated to do so, the Town demonstrated that the land application of biosolids within the Town poses an unacceptable risk to public health and the environment. Respondents/defendants argue, in opposition, that AGM's determination was rationally-based, that the Town failed to meet its burden of establishing that its Biosolids Management Law was justified by a threat to public health and safety, and that the Town's remaining claims have no merit. The Town reasserts its principal arguments in reply, but also contends, among other things, that Milleville Farms and SBL's argument that its DEC land application permit preempts the Biosolids Law is barred by the doctrine of *res judicata*.

DISCUSSION

As an initial matter, the Court is not persuaded that the Commissioner's May 22, 2017 Amended Determination and Order was issued in excess of AGM's jurisdiction and in violation of lawful procedure. Pursuant to AML § 36(1), "[i]f it be ascertained after an investigation or hearing . . . that any person, association or corporation has failed to comply with . . . the provisions

of the [AML] or . . . a rule of the [D]epartment, an order may be made by the [C]ommissioner, under the seal of the [D]epartment, compelling . . . compliance with such law or rule." Thus, in accordance with his express authority under AML § 36, the Commissioner is empowered to issue an order requiring a town's compliance with AML § 305-a, and such orders have routinely been upheld (*see e.g.*, *Matter of Vil. of Lacona v. New York State Dep't of Agric. & Mkts.*, 51 A.D.3d 1319 [3d Dep't 2008]; *Town of Butternuts v. Davidsen*, 259 A.D.2d 886 [3d Dep't 1999]; *see also Anton El-Hage v. Town of Palermo*, Sup. Ct., Owsego County, May 24, 2000, McCarthy, J., index No. 99-101]).

Furthermore, the permissive language of AML § 305-a(1)(c), specifically that "[t]he [C]ommissioner . . . *may* bring an action to enforce the provisions of [that] subdivision," tends to defeat the Town's argument that commencement of a plenary action is mandatory and, therefore, the Commissioner's exclusive means of enforcing AML § 305-a(1) ([emphasis added]). And contrary to the Town's argument, the Third Department's holding in *Matter of Town of Butternuts v. Davidsen* does not stand for proposition that "subsequent to the enactment of § 305-a(1)(c), the only manner in which allegedly unreasonable restrictions on farming operations occurring in agricultural districts can be challenged by the AGM is through an action commenced by the Commissioner." Therefore, the Town' argument on this point fails.

The Town's claim that the Department's application of its Guidelines was unconstitutional and amounted to improper rulemaking in violation of SAPA also fails. Under SAPA, a "'[g]uidance document' means any guideline, memorandum or similar document prepared by an agency that provides general information or guidance to assist regulated parties in complying with any statute, rule or other legal requirement" (State Administrative Procedures Act § 102[14]). "For purposes of rule-making notice and filing requirements (*see* State Administrative Procedures Act § 202), a rule is defined [in SAPA] as 'the whole or part of each agency statement, regulation or

code of general applicability that implements or applies law, or prescribes . . . the procedure or practice requirements of any agency, including the amendment, suspension or repeal thereof'" (*Matter of Bd. of Educ. of the Kiryas Joel Vil. Union Free Sch. Dist. v. State of New York*, 110 A.D.3d 1231, 1233 [3d Dep't 2013], quoting State Administrative Procedure Act § 102[2][a]). Notably, only a rule or regulation "i.e., a fixed general principle applied without regard to the facts and circumstances of the individual case" (*Matter of Cordero v Corbisiero*, 80 N.Y.2d 771, 772-773 [1992]), is "required by N[ew] [ ] Y[ork] Constitution, article IV, § 8 to be filed in the office of the Department of State" (*Roman Catholic Diocese of Albany v. New York State Dep't of Health*, 66 N.Y.2d 948, 951 [1985]).

"Expressly excluded from the definition [of rule] are . . . 'forms and instructions, interpretive statements and statements of general policy which in themselves have no legal effect but are merely explanatory'" (*Matter of Bd. of Educ. of the Kiryas Joel Vil. Union Free Sch. Dist. v. State of New York*, 110 A.D.3d at 1233, quoting State Administrative Procedure Act § 102[2][b][iv]; *see Toledo v. Admin. for Children Servs.*, 112 A.D.3d 1209, 1210 [3d Dep't 2013]). While "there is no clear bright line between a 'rule' or 'regulation' and an interpretive policy" (*Cubas v. Martinez*, 8 N.Y.3d 611, 621 [2007]; *accord Matter of Bd. of Educ. of the Kiryas Joel Vil. Union Free Sch. Dist. v. State of New York*, *supra*), "[c]ourts have . . . found administrative directives to be interpretive statements when they rely on and constitute reasonable interpretations of existing regulations or statues" (*Matter of Bd. of Educ. of the Kiryas Joel Vil. Union Free Sch. Dist. v. State of New York*, *supra* at 1233-1234; *see Cubas v. Martinez*, 8 N.Y.3d at 621; *Matter of Elcor Health Servs. v. Novello*, 100 N.Y.2d 273, 279 [2003]).

A review of the Guidelines disclose that they provide general information and guidance concerning the AGM's review of local laws under AML § 305-a. Although the Guidelines state that "[i]n many instances, the Department has found local laws that exceed State standards

unreasonably restrictive," the Guidelines provide that "[e]ach law . . . is judged on its own merits and reviews are performed on a case-by-case basis" and that "[i]f a local government believes that local conditions warrant standards that differ from the DEC's, the Department considers those conditions in evaluating whether th[os]e standards are unreasonably restrictive." Also, the Court finds nothing in the Guidelines which would support a finding "that the AGM adopts a blanket position that any restriction on the land application of [b]iosolids beyond those set forth in the . . . Guidelines are, by definition, unreasonable restrictions on farming operation." Furthermore, the Department's determinations in the Town of Bennington and Town of Ellenburg do not, as the Town argues, demonstrate "that AGM treats the standards outlined in the ... Guidelines . . . as *de facto* rules," but instead reveal that the Department engaged in a case-specific review and nonetheless found that the local laws unreasonably restricted a farm operation in an agricultural district and that the towns had not demonstrated a threat to public health or safety relating to the proposed land application, just as it did here.

Next, the Town's claim that the May 22, 2017 Amended Determination and Order impermissibly interferes with the Town's constitutionally and statutorily protected powers to regulate solid waste disposal and land use has been reviewed and found to be without merit. As a general rule, local governments "have only the lawmaking powers the Legislature confers on them" (*DJL Restaurant Corp. v. City of New York*, 96 N.Y.2d 91, 94 [2001][internal quotation marks and citation omitted]. Under the "home rule" provision of the New York State Constitution, "every local government shall have the power to adopt and amend local laws not inconsistent with the provisions of th[e] constitution or any general law . . . except to the extent that the [L]egislature shall restrict the adoption of such a local law" (*Matter of Wallach v. Dryden*, 23 N.Y 3d 728, 742 [2014]; *see* NY Const., art. IX, § 2[c][ii]). "To implement [A]rticle IX, the Legislature enacted the Municipal Home Rule Law" (*DJL Restaurant Corp. v. City of New York*, 96 N.Y.2d at 94;

accord Matter of Wallach v. Dryden, 23 N.Y.3d at 742), which "[i]n addition to powers granted in the [C]onstitution, the statute of local governments or in any other law" (Municipal Home Rule Law § 10(1), "empowers local governments to pass laws both for the 'protection and enhancement of [their] physical and visual environment' (Municipal Home Rule Law § 10[1][ii][a][11]) and for the 'government, protection, order, conduct, safety, health and well-being of persons or property therein' (Municipal Home Rule Law § 10[1][ii][a][12])" (*Matter of Wallach v. Dryden*, *supra* at 742; *DJL Restaurant Corp. v. City of New York*, *supra* at 94). "The [L]egislature likewise authorized towns to enact zoning laws for the purpose of fostering 'the health, safety, morals, or the general welfare of the community'" (*Matter of Wallach v. Dryden*, *supra* at 742-743, citing Town Law § 261, Statute of Local Governments § 10[6]).

While "the [L]egislature has recognized that the local regulation of land use is '[a]mong the most important powers and duties granted . . . to a town government'" (*Matter of Wallach v. Dryden*, *supra* at 743, quoting Town Law § 272-a[1][b]), and the Court of Appeals has "designated the regulation of land use through the adoption of zoning ordinances as one of the core powers of local governance" (*id.*, citing *DJL Restaurant Corp. v. City of New York*, *supra* at 96), "a town may not enact ordinances that conflict with the State Constitution or any general law[8]" (*id.*, citing Municipal Home Rule Law § 10[1][i], [ii]). Indeed, "[u]nder the preemption doctrine, a local law promulgated under a municipality's home rule authority must yield to an inconsistent [S]tate law as a consequence of 'the untrammeled primacy of the Legislature to act with respect to matters of State concern'" (*id.*, quoting *Albany Area Bldrs. Ass'n v. Town of Guilderland*, 74 N.Y.2d 372,377 [1989]).

[8] Municipal Home Rule Law defines a "general law" as a "state statute which in terms and in effect applies alike to all counties, all counties other than those wholly included within a city, all cities, all towns or all villages" (Municipal Home Rule Law § 2[5]).

As previously noted, AML § 305-a(1)(a) requires that local governments, when exercising their powers to regulate land use activities, do so in a manner consistent with the policy objectives of Article 25-AA. Thus, where a municipality enacts a local law that unreasonably restricts or regulates a farm operation within an agricultural district and cannot demonstrate that such law is necessary to preserve public health and safety, the local law is preempted by Agriculture and Markets Law § 305-a(1) and the Department and its Commissioner are vested with the authority to take action against such local law (*see Matter of Vil. of Lacona v. New York State Dep't of Agric. & Mkts.*, 51 A.D.3d 1319, 1320-1321 [3d Dep't 2008]; *Matter of Inter-Lakes Health Inc. v. Town of Ticonderoga Town Bd.*, 13 A.D.3d 846, 847-848 [3d Dep't 2004); *Town of Lysander v. Hafner*, 96 N.Y.2d 558, 564-565 [3d Dep't 2001]). Contrary to the Town's assertions, the Commissioner's May 22, 2017 Amended Determination and Order, which limits the application of the Town's Biosolids Management Law against Milleville Farms, was a valid exercise of that authority.

Furthermore, and as the Department correctly asserts, "AML § 305-a(1) is a 'general law,' that evinces a clear expression of legislative intent to limit local governments from unreasonably restricting the use of agricultural lands," thereby addressing a matter of State concern – the preservation of farmland. While it is unquestioned that the Town "enjoy[s] broad police powers to advance the public health, safety and welfare," (*Moran v. Vil. of Philmont*, 147 A.D.2d 230, 233-234 [3d Dep't 1989]; *see* Municipal Home Rule Law § 10; *Town of Concord v. Duwe*, 4 N.Y.3d 870 [2005]), and, by virtue of that authority, may adopt and amend local laws governing the handling, storage, and disposal of solid waste (*see* ECL § 27-0711 and Town Law § 130[6]), which are more stringent than the DEC's solid waste regulations (*see Monroe-Livingtson Sanitary Landfill, Inc. v. Town of Caledonia*, 51 N.Y.2d 679, 683-684 [1980]), those local laws may not unreasonably restrict farming operations in an agricultural district in the absence of a showing that

the laws are necessary to protect public health and safety. To the extent they do, they are inconsistent with and preempted by AML § 305-a.[9]

Finally, the Department's determination that the Town's Biosolids Management Law unreasonably restricts Milleville's farming operation, and furthermore, that the Town failed to demonstrate that the public health or safety is threatened by Millville Farm's land application of *Equate* on land used for crop production within Niagara County Agricultural District No. 7 was rational, is supported by the record, and is entitled to deference.

"'In reviewing an administrative agency determination, [courts] must ascertain whether there is a rational basis for the action in question or whether it is arbitrary and capricious'" (*Matter of Murphy v. New York State Div. of Hous. & Community Renewal*, 21 N.Y.3d 649, 652 [2013], quoting *Matter of Peckham v. Calogero*, 12 N.Y.3d 424, 431 [2009]; *accord Matter of Gilman v New York State Div. of Hous. & Community Renewal*, 99 N.Y.2d 144, 149 [2002]). "'An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts'" (*Matter of Murphy v. New York State Div. of Hous. & Community Renewal*, 21 N.Y.3d at 652, quoting *Matter of Peckham v. Calogero*, 12 N.Y.3d at 431; *see Matter of Pell v. Bd. of Educ. of Union Free Sch. Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 N.Y.2d 222, 231 [1974]; *accord Matter of Heintz v. Brown*, 80 N.Y.2d 998, 1001 [1992]; *see Matter of Grella v. Hevesi*, 38 A.D.3d 113, 116 [3d Dep't 2007]).

In an Article 78 proceeding, the Court may not disturb underlying factual determinations (*see Matter of Heintz v. Brown*, 80 N.Y.2d at 1001), weigh the evidence (*see Matter of Pell v. Bd. of Educ. of Union Free Sch. Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester*

[9] Notably, the AGM's Amended Determination and Order does not invalidate the Town's Biosolids Management Law, and imposes no limits on its application to Town lands outside of certified agricultural districts. As such and in that regard, Local Law Nos. 3-2014 and 4-2014 are not inconsistent with the State's concern.

County, 34 N.Y.2d at 230), or substitute its judgment for that of the administrative official or agency (*id.* at 230-31; *see Matter of Sacandaga Park Civic Ass'n v. Zoning Bd. of Appeals of Town of Northampton*, 296 A.D.2d 807, 809 [3d Dep't 2002]). Therefore, "[i]f the [C]ourt finds that the determination is supported by a rational basis, it must sustain the determination even if the [C]ourt concludes that it would have reached a different result than the one reached by the agency" (*Matter of Peckham v. Calogero*, 12 N.Y.3d at 431; *see Matter of Pell v. Bd. of Educ. of Union Free Sch. Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, *supra* at 231). Further, "[w]here . . . the 'interpretation of a statute or *its application* involves knowledge and understanding of the underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom, the courts regularly defer to the government agency charged with the responsibility for administration of the statute'" (*Town of Lysander v. Hafner*, 96 N.Y.2d 558, 564-565 [2001], quoting *Kurcsics v. Merchants Mut. Ins. Co.*, 49 N.Y.2d 451, 459 [1980][emphasis in original]).

The Court rejects the Town's argument that the ultimate question of whether the its Biosolids Management Law unreasonably restricts or regulates farm operations within agricultural districts in contravention of AML § 305-a is a question of pure statutory construction, and as such, "the Court need not defer to the AGM's interpretation of the AML and certainly not to its ultimate conclusion that the Town's constitutionally protected land use and sold waste regulations constitute an 'unreasonable' restriction on farming practices." There is no dispute here as to the plain language and meaning of AML § 305-a(1). The question in this case involves the Commissioner's interpretation and application of AML § 305-a(1) as it relates to the reasonableness of the Town's Biosolids Management Law and the Town's justification for enacting the law. Because resolution of that question necessarily involves "factual evaluations in the area of the [AGM's] expertise," its interpretation and application of AML § 305-a(1) "must be

accorded great weight and judicial deference" (*Flacke v. Onondaga Landfill Sys.*, 69 N.Y.2d 355, 363 [1987]).

Therefore, applying Article 78's limited standard of review and according the deference the law requires, the Court finds that the May 22, 2017 Amended Decision and Order was rationally based and is supported by the record. The record discloses, among other things, that as part of the Department's AML § 305-a investigation and review, AGM staff visited Milleville Farms' proposed land application site in the Town of Wheatfield and performed an independent evaluation of the soils and hydrogeologic conditions, and that the Department also independently confirmed Milleville's claim of increased costs associated with its compliance with the Town's Biosolids Law. The record also reveals extensive correspondence between the Department and the Town and its environmental consultant, in which AGM fully explained its positions on the issues presented by the Town, and its technical and legal bases supporting those positions. And there was at least one meeting/conference call of the parties to address the issues.

In addition, the Department consulted with DEC staff, including Dr. Rowland, who, as Chief of the BWRR Organics Reduction and Recycling Section, has expertise in the DEC's biosolids program and who is responsible for reviewing Part 360 land application permits, including SBL's permit to land apply *Equate* at Milleville Farms. The record establishes that Dr. Rowland provided the AGM with expert technical assistance on issues related to the DEC's biosolids program, and assisted the Department in substantively addressing the Town's specific concerns regarding the safety of biosolids land application in light of the local soil and hydrogeologic conditions, and the potential risks posed by unregulated contaminants. Based on its consultations with Dr. Rowland, it was not unreasonable for the Department to conclude that land application of biosolids pursuant to a DEC permit is a safe method of recycling organic wastes into valuable fertilizer for agricultural purposes, and that the DEC biosolids regulations are

protective of human health and the environment. Nor was it irrational for AGM to conclude that the papers and studies cited by the Town were either irrelevant or scientifically invalid.

For these reasons, the AGM's determination that the Town's Biosolids Law unreasonably restricts Milleville's farming operation and that the Town failed to meet its burden of showing that the public health or safety is threatened by Millville Farm's land application of *Equate* on land used for crop production within Niagara County Agricultural District No. 7 will not be disturbed.

The Town's substantial disagreement with the manner in which the AGM conducted its AML § 305-a investigation and review, and the Department's subsequent findings, determination, and order is not without significance to the Court. However, the Town is effectively asking this Court to disturb underlying factual determinations and to substitute its judgment for that of the AGM, which the Court simply cannot do.

Any remaining arguments not specifically addressed herein have been considered and found to be lacking in merit or need not be reached in light of this determination.

Accordingly, it is hereby

ORDERED AND ADJUDGED, that the petition is denied for the reasons stated herein.

This memorandum constitutes the Decision and Order/Judgment of the Court. The original Decision and Order/Judgment is being forwarded to the Attorney General. A copy of this Decision and Order/Judgment together with all papers in this proceeding/action are being forwarded to the Albany County Clerk for filing. The signing of this Decision and Order/Judgment, and delivery of the copy of the same to the County Clerk shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that rule with respect to filing, entry, and notice of entry of the original Decision and Order/Judgment.

SO ORDERED.

ENTER.

Dated: July 20, 2018
Albany, New York

Kimberly A. O'Connor

HON. KIMBERLY A. O'CONNOR
Acting Supreme Court Justice

8-1-18

Papers Considered:

1. Notice of Petition, dated June 20, 2017; Verified Petition and Complaint, verified June 16, 2017 and dated June 20, 2017; Exhibits 1-18;
2. Verified Answer of Respondents/Defendants Milleville Brothers Farms and Sustainable Bioelectric, LLC, dated October 11, 2017; Memorandum of Law on Behalf of Respondents/Defendants Milleville Brothers Farms and Sustainable Bioelectric, LLC, dated October 11, 2017;
3. Verified Answer of Respondents/Defendants Richard A. Ball and New York State Department of Agriculture and Markets, dated and verified October 11, 2017, with Index of Return; Exhibits 1-6, 7-7a, 8-8a, 9-9a, 9ai, 9b, 10-12, 12a-c, 13-14, 14a-b, 15-18, 18a-b, 19, 19a-b, 20, 20a-d, 21-21a, 22-22a, 23, 23a-b, 24; Affidavit of Matthew J. Brower, sworn to October 10, 2017, with Exhibits 1-2; Affidavit of Michael Latham, sworn to October 11, 2017; Affidavit of Dr. Sally Rowland, sworn to October 11, 2017, with Exhibits 1-2; Affidavit of Lisa Czechowicz, sworn to October 10, 2017, with Exhibits 1-3; Respondents/Defendants' Memorandum of Law, dated October 11, 2017; *and*
4. Memorandum of Law in Support of Petition and Complaint, dated November 6, 2017.