



TOWN OF WHEATFIELD

NIAGARA COUNTY

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July 11, 2016

Via Federal Express

Mr. Michael Latham
Director
Division of Land and Water Resources
NYS Department of Agriculture and Markets

RE: AML §305-a(1) Review of the Town of Wheatfield's Local Law No. 3 and No. 4 of 2014

Dear Mr. Latham:

This is in response to your June 9, 2016 letter addressed to Steven J. Ricca, Esq., special counsel to the Town, concerning the Department's review of the Town of Wheatfield's Local Laws Nos. 3 and 4 of 2014, which, among other things, collectively prohibits the land application within the Town of Wheatfield of specified wastes containing or derived from human waste, pathogenic organisms and/or municipal wastewater (hereinafter, "Town Biosolids Law"). In your June 9th letter, you conclude that the Town's Biosolids Law, as applied to certain lands owned or leased by Milleville Brothers Farms, "unreasonably restrict[s] the Milleville Farms farm operation in violation of AML §305-a(1) and that the Town has not demonstrated that public health or safety is threatened by the farm operation's land application of Equate biosolids on land used for crop production." You also requested that the Town confirm that it will not apply the Town Biosolids Law to the Milleville property.

For the reasons previously established during the our Town Board's consideration of the Town Biosolids Law and in numerous written communications with your office, as well as those set forth below and in the enclosed letter from the Town's environmental consultant, Matrix Environmental Technologies, Inc. ("Matrix Letter"), the Town respectfully disagrees 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 within the Town. Nevertheless, we also respectfully disagree 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 also respectfully declines the Department's request to confirm that it will not seek to apply the Town Biosolids Law throughout Wheatfield, including to the Milleville property.

AML §305-a Does Not Preempt the Town's Biosolids Law As Applied to Farm Operations in An Agricultural District.

Throughout this process, the Department has consistently expressed the view that AML §305-a preempts virtually any local restrictions on the disposal through land application of various waste materials, including biosolids and sewage sludge, on farm properties within a State certified Agricultural District to the extent those local regulations do not mirror (and thus needlessly duplicate) NYSDEC regulations of this practice. While we are rightly proud of our strong agricultural heritage and remain committed to respecting and protecting the lawful rights of its many operating farms, the Town clearly has the right -- and the responsibility -- to ensure that no solid waste disposal activities within the Town threaten the environment or the health and safety of the Town's residents.

As we have previously noted, Article IX of the New York State Constitution broadly confers "home rule" authority to local governments, which authority includes the power to enact laws both for the "protection and enhancement of [their] physical and visual environment" and for the "government, protection, order, conduct, safety, health and well-being of persons or property therein." Consistent with this home rule power, the New York State Environmental Conservation Law expressly empowers local governments to enact solid waste regulations more stringent than those adopted by NYSDEC. These cornerstone principles recently were recognized by Supreme Court Justice Frank Caruso in upholding the Town Biosolids Law against a challenge by Sustainable Bioelectric, LLC (Quasar), the generator of this waste material:

Environmental Conservation Law §27-0711 makes clear that such laws passed by a town shall not be superseded by the state statute so long as they are not inconsistent. The state gave broad powers to local municipalities to manage their own waste ... and it is not required to allow an actions simply because it has been approved by the [NYS]DEC... . In fact the Town remains free to impose additional standards or prohibit the action altogether.

Sustainable Bioelectric LLC v. Town of Wheatfield, Index No. 155291 (Sup. Ct. Niagara Co. 2016). See also *Wallach v. Town of Dryden*, 23 N.Y.3d 728, 742-43 (2014) (holding that towns could prohibit oil and gas exploration, including high volume hydraulic fracturing, pursuant to their home rule authority). Although Judge Caruso was speaking specifically about the preemptive effect (or lack thereof) of the Environmental Conservation Law, his holding applies with equal force to the AML and its requirement that local land use regulations must be "coordinated" (AML §305-a) with the Agricultural Districts Program.

Simply stated, the Department's attempt to abrogate the Town's constitutionally protected home rule powers by administrative fiat has no legal authority under the New York State Constitution or the AML. Significantly, while the State Constitution authorizes State legislation to protect agricultural lands, it also expressly mandates that any such legislation "shall include [among other things] adequate provision for the abatement of air and water pollution...." NYS Const. Art. XIV §4. The Department's adherence to a simplistic blanket approach that deems unreasonable any local regulations that do not mirror NYSDEC permitting requirements, and its failure to meaningfully consider local conditions or the growing body of scientific evidence regarding unregulated pollutants, not only skirts this mandate, but misapplies AML §305-a in a manner that unlawfully impinges on the Town's home rule and police power authorities.

As former Governor Rockefeller emphasized when these home rule protections were added to the State Constitution, home rule authority was intended to "strengthen the governments closest to the people so they may meet the present and emerging needs of our times." The Town Board, as the government closest to the people and most familiar with local conditions, conducted a thorough investigation of the appropriateness of biosolids disposal and rightfully concluded that, based on the significant and growing body of scientific literature raising serious questions concerning the safety of the practice and, very importantly, upon the soil and hydrologic conditions prevailing within Wheatfield, the land application of biosolids could not be conducted safely anywhere within its boundaries.

In response, the Department has largely ignored the mounting scientific evidence concerning the inadequacy of the Federal and State governments' outdated biosolids regulations and completely failed to address the scientific evidence of the unfavorable local soil conditions within the Town. As such, we strongly disagree with the Department's conclusion that its authority under AML §305-a preempts the Town Biosolids Law.

The Department Has Not Established That the Town Biosolids Law Unreasonably Restricts Any Farming Operation Within the Town.

As the Town has repeatedly maintained in its prior submissions, it is patently illogical for the Department to conclude that the restriction on *one type* of "fertilizer" that can be used within the Town amounts to an unreasonable restriction on farming operations. As far as the Town is aware, the only evidence presented to the Department concerning the alleged impact of the Town Biosolids Law on a farming operation is the wholly unverified claim (originating, we believe, from the non-farming industrial concern generating the biosolids waste) that such material is less expensive to use than other commercial fertilizers. It cannot be disputed that the purpose of the Agricultural District Program (ADP) is to conserve and protect agricultural land from

"being lost for any agricultural purposes," and to "conserve and protect agricultural lands as valued natural and ecological resources which provide needed open spaces for clean air sheds, as well as for aesthetic purposes." AML §300. Nothing in the statutory language indicates that the intent of the legislation is to maximize the profits of farm operations at the expense of environmental and health protections. Perhaps more to the point, the Legislature clearly did not intend that the ADP be used to maximize the profits of non-farming industrial concerns (such as Quasar) or to provide a cheap and convenient method of disposing of an industrial by-product, as is the case here.

The record is devoid of any credible evidence establishing that Wheatfield's Biosolids Law will threaten the viability of existing farm operations within the Town. On the contrary, the fact that farming has been conducted within the Town for generations without the need to resort to the practice of biosolids disposal amply demonstrates that this practice is not necessary for a vibrant and sustainable agricultural industry within the Town. Likewise, the protections afforded by the Town Biosolids Law are expected to reinforce public trust in agricultural products produced locally and the growing demand for healthy, organic produce and livestock.

The Town Has Established That the Land Application of Biosolids Cannot Be Safely Conducted Anywhere Within the Town of Wheatfield

There can be no doubt that, prior to enacting the Town Biosolids Law, we considered extensive, credible scientific evidence, including, among other things, site specific analysis by its environmental consultant and scholarly research from Cornell University's renowned Department of Soil and Crop Sciences, one of the leading authorities on agricultural science in the nation. The evidence considered raises very serious questions concerning the inability of existing sewage treatment works to remove all potentially harmful contaminants from domestic sewage, and that these untreated contaminants are often present at significant levels in biosolids derived from municipal sewage sludge. Federal and State regulations governing the land application of biosolids, developed in the 1990s, simply have not kept up with this science. The fact that EPA "continues to study" the potential health effects associated with biosolids disposal merely underscores that its current understanding of those effects is inadequate and incomplete.

On the other hand, it is clear that the Department has not undertaken its own independent evaluation of the health threats posed by biosolids, but rather has adopted wholesale the equivocal opinions of other agencies. The Department's conclusion that the Town Biosolids Law is not necessary to protect public health and safety is premised almost exclusively upon the opinions expressed by a single NYSDEC employee that the land application of biosolids is "generally" safe, so long as the farm operation complies with the Part 360 regulations (NYSDEC March 14, 2016 letter to A&M), and by NYSDOH that no health study regarding biosolids land application is warranted in the absence of "clear evidence of significant human exposures or unusual adverse health effects caused by biosolids land application" (NYSDOH June 25, 2015 letter to Hon. John Ceretto). There are numerous problems with these analyses, several of which

have been addressed previously and are further addressed in the accompanying Matrix Letter. These need not be repeated here. Fundamentally, however, the Department's conclusion is flawed for two main reasons.

First, even if we were to accept (which we do not) that there is insufficient scientific evidence to indicate the potential for serious environmental and public health and safety risks associated with the land application of biosolids *in general*, neither the Department, nor the agencies upon which it relies (NYSDEC and NYSDOH), has attempted to conduct any site specific evaluation of the soil and hydrologic conditions within the Town (*i.e.*, the prevalence of a thin layer of silty clay loam soil overlying silty clay and clay soils, as well as a very shallow water table) in determining the level of risk posed by the disposal of biosolids via land application here in Wheatfield. NYSDEC has simply accepted what is clearly erroneous, incomplete and/or irrelevant information contained in the Quasar/Milleville permit application without undertaking an independent review of the actual site conditions, and its reliance on self-monitoring and reporting by the applicant clearly calls into serious question the conclusion that the existing regulations are sufficient to ensure that no risk to public health or the environment will result from potentially improper application. It is also clear that NYSDOH neither considered nor investigated local conditions before concluding that no health study regarding biosolids land application was warranted. In light of local conditions, the numerous scientific studies raising serious concerns regarding the adequacy of the 20 year old regulatory scheme, and the refusal of State regulatory agencies to meaningfully address these concerns, the we were left with no choice but to prohibit the land application of biosolids within the Town to protect both the environment and the health and safety of our residents.

Second, the State's apparent lack of concern regarding the potential environmental and public health and safety risks associated with the spreading of biosolids on poorly drained soils underlain by shallow groundwater is disturbing and striking, particularly when compared to its much more sensible and proactive approach to the risks associated with hydraulic fracturing and other emerging environmental risks. Here, both NYSDEC and NYSDOH (and therefore the Department) have concluded that the land application of biosolids presents no public health threat based on the reported absence of "conclusive evidence" of such risks, despite the admitted absence of comprehensive health impact studies. This passive posture simply cannot be reconciled with NYSDEC's and NYSDOH's conclusion, after seven years of study, that the practice of hydraulic fracturing cannot be safely allowed in New York, not because of "conclusive" evidence that harm would result, but due to continued "uncertainty" regarding the science and potential risks. See NYSDEC Final SGEIS On The Oil, Gas and Solution Mining Regulatory Program Findings Statement (June 2015) at pp. 35-36 (outlining "uncertainties" regarding various potential impacts) and 42 (concluding that "scientific uncertainties and risks to public health" justified prohibiting fracking); NYSDOH Public Health Review of High Volume Hydraulic Fracturing for Shale Gas Development (December 2014) (concluding that, despite fact that "absolute scientific certainty regarding the relative contributions of positive and negative impacts of HVHF on public health is unlikely to ever be attained," the "overall weight of the evidence ...

demonstrates that there are **significant uncertainties** about [potential public health impacts]. Until the science provides sufficient information to determine the level of risk to public health from HVHF to all New Yorkers and whether risks can be adequately managed, DOH recommends that HVHF should not proceed in NYS.").

Wheatfield respectfully submits that its residents are entitled to at least the same level of protection regarding the proposal to allow biosolids to be disposed of in the Town through land application. It cannot seriously be disputed that great scientific uncertainty currently exists regarding the safety to biosolids land application and the adequacy of existing regulations. As with fracking, unless and until those uncertainties are answered, conclusively establishing that the practice is safe, the activity must not be allowed. Accordingly, absent State action in this area, the Town properly exercised its constitutional home rule authority to take such action as is necessary to protect its people and its natural resources.

The State's recent experience with another class of unregulated contaminants is also instructive and provides a profound precautionary example. Until very recently, New York State did not regulate perfluorooctanoic acid (PFOA) or perfluorooctanesulfonic acid (PFOS). As has been widely reported, NYSDOH and NYSDEC, among others, initially declined to take or recommend any actions when elevated levels of these chemicals were detected in the drinking water in Hoosick Falls and Newburgh, respectively. This administrative failure to heed existing scientific literature notwithstanding the lack of regulation, and the failure to proceed with timely, proactive regulation, resulted in tragic consequences for those communities. It was only after the serious environmental and health impacts were revealed through local initiative and EPA intervention that the State belatedly was forced to issue an emergency rulemaking regulating these chemicals as hazardous substances and declaring the impacted areas Superfund sites. Incidents such as these highlight the danger of overly passive environmental regulation to which the Department, NYSDEC and NYSDOH have continued to subscribe with respect to biosolids. The Town Board members simply are unwilling and unable to place the health and safety of our residents at risk while the State agencies wait for "conclusive" proof of harm. The fact that the Department seeks to actively bar the Town's efforts to fill this void therefore is both unlawful and unconscionable.

Conclusion

For all of the foregoing reasons, the Town Board rejects the Department's conclusion that the Town Biosolids Law unreasonably restricts any farm operation within Wheatfield and that the threat to public health and safety posed by the land application of biosolids fails to justify the prohibition of that activity on farms within an agricultural district. For these same reasons, please be advised that the Town Board intends to vigorously defend the Town Biosolids Law against any challenge by the Department or others.

Very truly yours,


ROBERT B. CLIFFE
Supervisor

Enclosure

Cc: Senator Charles E. Schumer
Senator Kirsten Gillibrand
Congressman Christopher Collins
Senator Robert G. Ort
Assemblyman John D. Ceretto
NYS Association of Towns
Niagara County Legislator David Godfrey
Niagara County Legislator Kathryn Lance Palka
Niagara County Legislator Rebecca Wydysch

July 6, 2015

Hon. Robert B. Cliffe
Supervisor
Town of Wheatfield
2800 Church Road
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**RE: Town of Wheatfield Supplemental Response to Final AML 305-a(1)
Opinion re Town of Wheatfield Biosolids Law**

This letter is in partial response to the June 9, 2016 letter, including attachments, from the New York State Department of Agriculture & Markets ("A&M") expressing the opinion that the Town of Wheatfield's Local Laws No. 3-2014 and No. 4-2014 (collectively, the "Biosolids Law") unreasonably restricts the Milleville Brothers' farm operations in violation of AML §305-a(1) (the "A&M Letter)." These comments are intended to supplement my July 14, 2015 letter in response to A&M's preliminary opinion, as well as the Town's SEQRA Determination supporting the enactment of the Biosolids Law and the extensive public record incorporated into that SEQRA Determination. Specifically, this letter addresses the technical views expressed in the March 14, 2016 letter to A&M from New York State Department of Environmental Conservation ("NYSDEC") employee Sally Rowland, Ph.D., P.E., including appendices.

NYSDEC Letter

Much of Dr. Rowland's letter reiterates earlier NYSDEC opinion that, while all organic wastes present potential environmental threats and acknowledging increasing scientific concern over unregulated emerging contaminants within biosolids, NYSDEC's existing regulations (assuming they are complied with) are sufficient to ensure that land application of biosolids will not pose an unreasonable risk to human health and the environment. The scientific shortcomings of this opinion have been addressed in my prior correspondence, as well as in the scientific literature cited in the Town's Negative Declaration and Dr. McBride's presentation "Concerns with Application of Sewage Sludge Products on Farm Land", and need not be reiterated here. It is important to note, however, that nowhere in Dr. Rowland's letter does she substantively address the specific soil and hydrologic conditions prevailing within the Town of Wheatfield that renders virtually all land within the Town inappropriate for land application, *based on NYSDEC's own criteria*. Dr. Rowland's specific critique of the Town's technical position, as set forth in the appendices to her letter, are addressed below.

1. USEPA Process Design Manual (Appendix A)

Dr. Rowland notes that the 1997 United States Environmental Protection Agency ("USEPA") Process Design Manual for Land Application of Biosolids precedes the adoption of USEPA's biosolids regulations and does not necessarily preclude the land application of biosolids on unfavorable soil types. However, this critique ignores the fact that the Design Manual was developed "for use by municipal wastewater treatment and sewage sludge management authorities, project planners and designers, regional, state and *local governments* concerned with permitting and enforcement of federal sewage sludge regulations, and consultants in relevant disciplines such as engineering, soil science, and agronomy." The Town is using the USEPA guidance precisely as intended by the USEPA. Since the regulations do not adequately address all site-specific conditions, the use of the USEPA guidance by the Town in determining that virtually all soil within the Town is unfavorable for land application is entirely appropriate. The NYSDEC commonly uses guidance documents in numerous regulatory programs as a supplement to its regulations¹. Wheatfield has the type of soil and groundwater conditions where the NYSDEC should be using the USEPA guidance for detailed site-specific evaluations and not brushing it aside because it was reviewed while developing the Part 360 regulations. The failure of the NYSDEC to use USEPA guidance on a site-specific basis does not mean the Town's use of the guidance is irrelevant or unnecessary.

2. Unfavorable Local Soil Conditions (Appendix B)

As has been pointed out to NYSDEC previously, the permitted Nash Road land application site has a thin layer of silty clay loam soil overlying silty clay and clay soils. As described in the Niagara County Soil Survey, the top 64 inches of Odessa silty clay loam includes no more than 8 inches of silty clay loam, or none at all, and is predominantly silty clay and clay. The NYSDEC has not specifically addressed this condition or indicated how Equate will not be land applied in silty clay and clay soils which are not allowable under the Part 360 regulations. There is also no safety zone to the 24-inch depth to groundwater regulation, as the overburden water table in Wheatfield is very shallow and the clay soils create perched groundwater conditions. I believe the intent of the regulation is to prevent land application during precipitation events and seasonal high water table conditions, and not to allow land application at shallow water table sites when the water level drops below 24-inches. Clearly locations like Wheatfield where depth to groundwater only meets the regulation by inches during low water table conditions, can rise rapidly to above the allowable depth from normal rainfall, and is prone to surface ponding and runoff, are not suitable for land application.

Neither Milleville nor the NYSDEC have provided the Town with design or operational details for monitoring depth to groundwater for regulatory compliance or preventing land application into the predominantly silty clay and clay soils, and Dr. Rowland's letter merely reiterates that based on NYSDEC's "review of the permit application" she believes the soils

at the site meet the Part 360 regulations. However, errors in the Milleville permit application have been pointed out to the NYSDEC including the use of depth to groundwater data from potable bedrock wells that are located outside of Wheatfield and do not provide data that is suitable for a biosolids land application permit. The NYSDEC has approved the use of bedrock groundwater data that is not relevant as land application is prohibited in bedrock and depth to groundwater in overburden soils, where land application is allowed, is not the same as depth to groundwater in the bedrock aquifer. The NYSDEC has not addressed this issue nor provided any details on a proper method for determining depth to groundwater at land application sites. The NYSDEC appears to be relying on the Permittee to measure and report depth to groundwater without overburden monitoring wells, instrumentation or training.

3. Unregulated Contaminants (Appendix B)

To date Quasar has not provided the Town with any Equate analytical reports beyond the parameters required by the Part 360 regulations. The NYSDEC has not denied that the soil and hydrology of Wheatfield are unfavorable for biosolids land application. The conditions in Wheatfield justify requiring Quasar to monitor Equate for unregulated or emerging contaminants and for expanded groundwater monitoring at land application sites. The failure to assess or monitor is not an appropriate regulatory response especially in light of the recent detection of unregulated contaminants in New York water supplies by the USEPA's unregulated contaminant monitoring program, resulting in expanded monitoring, remedial action and health advisories in Hoosick Falls² and Newburgh³.

The 2013 Cornell Guide for Integrated Field Crop Management recommends testing sewage sludge for unregulated contaminants. The NYSDEC requires testing for unregulated contaminants in groundwater and potable water supplies, such as tertiary butyl alcohol, and enforces the default standard for unregulated organic contaminants at 50 µg/L for groundwater and 100 µg/L for surface water. Testing of Equate for unregulated contaminants that have been detected by the USEPA in municipal sewage sludge⁴, and by the United States Geological Survey ("USGS") in groundwater and soil at biosolids land application sites⁵ is justified. Results published by the USEPA and USGS confirm that pretreatment programs are not effective at keeping unregulated contaminants out of municipal biosolids including New York facilities used by Quasar as feed stock.

The soil and hydrology in Wheatfield are not only unfavorable for land application of biosolids, but routes of exposure from contaminants in shallow soil have been documented in Wheatfield by the Niagara County Health Department from the chronic failure of residential septic systems and by responsible parties at petroleum and chemical spill sites under the direction of NYSDEC Region 9. The pathways include surface runoff and groundwater drainage into ditches and streams, and migration of contaminants from overburden soils into the shallow bedrock aquifer. These are the same pathways that

create a risk of human exposure to biosolids and contamination of surface and groundwater.

Conclusion

For the reasons set forth above, and those detailed in the Town's extensive SEQRA review of the Biosolids Law, the Biosolids Law serves to minimize threats to agriculture, public health and the environment in the Town of Wheatfield.

Sincerely,
Matrix Environmental Technologies Inc.



Sean R. Carter, P.E.
Principal Engineer

cc: Charles Grieco, Esq.

References

1. NYSDEC Guidance Documents <http://www.dec.ny.gov/regulations/397.html>
2. PFOA in Hoosick Falls, NY <http://www.dec.ny.gov/press/104704.html>
3. PFOS in Newburgh, NY <http://www.dec.ny.gov/press/106653.html>
4. USEPA Sludge Surveys <https://www.epa.gov/biosolids/sewage-sludge-surveys>
5. USGS Land Application of Biosolids
http://toxics.usgs.gov/regional/emc/municipal_biosolids.html