

**STATE OF NEW YORK
SUPREME COURT : COUNTY OF ALBANY**

In the Matter of the Application of

**THE TOWN OF WHEATFIELD, NEW YORK
and
THE TOWN BOARD OF THE TOWN OF
WHEATFIELD, NEW YORK**

**NOTICE OF VERIFIED
PETITION AND
COMPLAINT**

Petitioners/Plaintiffs,

Index No.:

vs.

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

Respondents/Defendants.

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

PLEASE TAKE NOTICE, that upon the annexed verified petition and complaint, an application will be made pursuant to CPLR §§ 7804(b) and 3001 at a Term of this Court, to be held at the Albany County Courthouse, 16 Eagle Street, Albany, New York, on the 18th day of August, 2017 or as the assigned Justice shall direct, at the opening of Court on that day, or as soon thereafter as counsel can be heard, for a judgment granting the relief set forth in said petition and complaint, and for such other and further relief as may be just, proper and equitable.

PLEASE TAKE FURTHER NOTICE, that the Petitioners request **ORAL ARGUMENT** to be held on the return date of the petition.

PLEASE TAKE FURTHER NOTICE, that a demand is hereby made for the service of answering papers, if any, upon the undersigned at least seven (7) days before the aforesaid date of hearing, since this notice is served at least twelve (12) days before such time.

PLEASE TAKE FURTHER NOTICE, that the petitioners designate Albany County as the place of trial pursuant to CPLR 506(b)(2).

DATED: Buffalo, New York
June 20, 2017

BOND SCHOENECK & KING, PLLC

By:  _____

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Milleville Brothers Farms
2598 Saunders Settlement Road
Sanborn, New York 14132

Sustainable Bioelectric, LLC
50 Public Square #1410
Cleveland, Ohio 44113

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Petitioners/Plaintiffs the Town of Wheatfield and the Town of Wheatfield Town Board (hereinafter collectively referred to as the "Town"), by their undersigned attorneys, Bond, Schoeneck & King, PLLC, for its Verified Petition for judgment pursuant to Article 78 of the New York Civil Practice Law and Rules ("CPLR") and its Complaint seeking a declaratory judgment pursuant to CPLR § 3001 against Respondents/Defendants Richard A. Ball, as Commissioner of the New York State Department of Agriculture and Markets, and the New York State Department of Agriculture and Markets (collectively, "AGM"), Sustainable BioElectric, LLC ("Sustainable BioElectric"), and Milleville Brothers Farms ("Milleville") (all Respondents/Defendants, collectively, "Respondents"), allege as follows:

Nature of the Action

1. The Town seeks a judgment annulling a May 22, 2017 Amended Determination and Order issued to the Town by AGM pursuant to Agriculture and Markets Law ("AML") § 36 (the "Order") and declaring the rights and legal obligations of the parties herein with respect to the Town's Local Law No. 3-2014, adopted on July 28, 2014, and Local Law No. 4-2014, adopted on August 11, 2014, which collectively amended Chapter 161 of the Town Code to add a new Article III, termed the "Biosolids Management Law of the Town of Wheatfield" (hereinafter, "Biosolids Law"). A copy of the Order is annexed hereto as **Exhibit 1**.¹

2. The Biosolids Law provides, in pertinent part, that "no person shall ... apply to the land or dispose 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." Town Code § 161-21. The term "biosolids" is defined in Town Code § 160-20(B) as "[a]ny solid, semisolid or sludge-like organic material generated by the treatment of sewage or wastewater or otherwise derived from sewage or wastewater or their byproducts. 'Sewage sludge' shall be considered synonymous with biosolids."

3. In particular, the Town seeks a judgment annulling the Order that purports to find that the Biosolids Law violates AML § 305-a because it is more restrictive than New York State Department of Environmental Conservation ("DEC") regulations governing biosolids

¹ Town's claim for declaratory judgment is not limited to what AGM has identified in the Order as the "administrative record." In the interest of judicial economy, copies of such documents are not annexed hereto but are referenced herein as "AGM Doc. No. ___." On the other hand, copies of additional public records that are relevant to the Town's claims but not listed in the Order are annexed hereto as exhibits.

use, and directs the Town to permit Respondent Millville to land apply a biosolids material produced and branded by Sustainable BioElectric as "Equate" on land for which Sustainable BioElectric has received DEC permit approval. AML § 305-a(1)(a) provides, in pertinent part, that local laws "shall not unreasonably restrict or regulate farm operations within agricultural districts in contravention of the purposes of [AML Article 25-AA] unless it can be shown that the public health or safety is threatened."

4. More specifically, the Town seeks a judgment from this Court annulling the Order in its entirety, and a declaration from this Court that the Order was improper, *ultra vires*, and thus void and of no legal effect, as inconsistent with the purposes and intent of AML Article 25-AA and AML §305-a(1)(b), contrary to the fundamental and constitutionally-protected police powers of a municipality to regulate solid waste management and disposal and land use, and to protect the safety, health and well-being of persons or property within the Town, contrary to the express statutory authority of local municipalities under New York State Municipal Home Rule Law ("MHRL") § 10, the New York Town Law § 130 and New York State Environmental Conservation Law ("ECL") § 27-0711 to enact local restrictions that go beyond DEC regulatory requirements, and lacking any rational basis on which to conclude either that the Biosolids Law constitutes an "unreasonable restriction" on Millville's farming operations in the Town or that the Town has failed to demonstrate that public health or safety is threatened by the proposed land application of biosolids in the Town.

5. As set forth in greater detail below, the full record in this matter demonstrates that this case has little or nothing to do with farming or restrictions on legitimate farming activity. Rather, the full record reveals that, in enacting the Biosolids Law, the Town was acting under its constitutionally and statutorily authorized police power to protect public

health and safety and the environment from the efforts of an industrial, non-farming business (Sustainable BioElectric) to find a convenient method of disposal for the solid waste by-product of its energy production facility that contains numerous unregulated contaminants. The record further reveals that AGM, contrary to its statutory obligation, never independently investigated whether a prohibition of the use of this waste by-product as a "fertilizer" materially affected Milleville's farming operation or whether the land application of such material was appropriate given the unique soil and hydrological conditions within the Town and the persistent and mounting concerns within the scientific community regarding the safety of this practice. As such, the conclusions and findings made by AGM in the Order are clearly arbitrary and capricious, were made without legal authority, and must be annulled.

The Parties

6. The Town is a municipal corporation organized and existing under the laws of the State of New York, with its principal office at 2800 Church Road, Wheatfield, New York. The Town Board is a duly constituted municipal board, with its principal address at 2800 Church Road, Wheatfield, New York.

7. Upon Information and belief, Respondent Milleville is a privately held corporation or other business organization with a principal place of business at located at 2598 Saunders Settlement Road, Sanborn, New York, 14132. According to the Order, Milleville is "an 80-head dairy farm which grows field crops (corn, wheat, soybeans, oats and hay), consisting of approximately 1,500 acres of owned land and 2,500 acres of rented land, located within Niagara County Agricultural District Nos. 6, 7, and 8." *See* Order (Exhibit 1) at p. 3.

8. Upon information and belief, Respondent Sustainable Bioelectric is a Delaware limited liability company organized and existing under the laws of the State of Delaware, with its principal office at 7642 Riverview Road, Cleveland, Ohio, and is wholly owned by Quasar Energy Group, LLC.²

Background

9. Residents of Niagara County, including those who live, work and raise families in the Town, live in the shadow of the nearby Love Canal Emergency Declaration Area, one of the most appalling environmental tragedies in American history. Throughout the Love Canal ordeal, which continues to this day, the legitimate concerns of Niagara County residents were ignored and/or minimized both by the chemical companies involved and the regulatory agencies entrusted with protecting public health and safety. This matter involves an attempt by AGM to abrogate by administrative fiat a duly enacted local law, adopted after extensive scientific review by the Town and its professional environmental consultant, intended to ensure that its environment and the health and safety of its residents are protected from the very real risk of contamination posed by the disposal of solid waste containing unregulated pollutants on farmland within the Town.

10. In order to fully understand the Town's purpose and intent in enacting the Biosolids Law, it is important for the Court to view the law in the context of Sustainable

² Sustainable BioElectric does not own land within an Agricultural District within the Town and conducts no farming operations therein. Moreover, as explained below, the Supreme Court, Niagara County, has ruled that Sustainable BioElectric lacks standing to assert claims under AML § 305-a. See ¶ 70 and Ex. 16, *infra*. However, out of an abundance of caution, the Town has named Sustainable BioElectric as a respondent and defendant, since, as explained below, it possesses a permit to land apply biosolids on property owned by Milleville in the Town, and thus Sustainable BioElectric may arguably have an interest that could be impacted by the resolution of this matter and thus could conceivably be considered a necessary party within the meaning of CPLR § 1001(a). In so doing, the Town does not concede, and expressly reserves the right to contest, that Sustainable BioElectric has standing in this matter.

BioElectric's business model for privatizing the disposal of municipal sewage sludge, Sustainable BioElectric's less than transparent (if not misleading) approach to seeking local zoning approvals for construction of its industrial-scale biosolids processing facilities and related approvals from the New York State Department of Environmental Conservation ("DEC") to allow land application of the sewage sludge-laden biosolids material, the unfavorable soil and groundwater conditions in the Town which make such land application inappropriate, and the lack of comprehensive or adequate regulations and enforcement governing the use of biosolids.

11. As discussed more fully below, the full record in this matter reveals that AGM (as well as DEC and the New York State Department of Health ("DOH")), have failed to address a growing body of scientific evidence concerning the potential adverse environmental and public health risks associated with the handling, storage and land application of biosolids. These potential threats are exacerbated by: (a) existing Federal and New York State regulatory programs which are out of date; (b) inadequate enforcement of existing regulatory standards and best practices for land application of biosolids; and (c) hydrological conditions in the vast majority of farmable property in the Town which render them unsuitable for land application of biosolids. When viewed in this context, the Biosolids Law is fully consistent with the purposes and intent of AML Article 25-AA, New York State Town Law, New York Municipal Home Rule Law, New York Environmental Conservation Law and Article IX of the New York State Constitution.

12. By way of background, in early 2012, an entity known as "Forest City Land Group" approached the Town Building Department regarding a proposal to construct an anaerobic digester ("AD") facility referred to as a "biomass/energy facility" on Liberty Drive in the Town. Upon information and belief, Forest City Land Group is a real estate development

enterprise that was then working in cooperation with an entity known as the Quasar Energy Group (hereinafter referred to as "Quasar").

13. Upon information and belief, Quasar is a Cleveland-based company which owns and operates, through a number of subsidiary companies, numerous AD facilities, most of which are located in the State of Ohio. According to a January 2014 promotional packet provided to the Town regarding similar Quasar AD operations in Cleveland, "[t]he biomass that is used as fuel for the production of electricity primarily comes from a variety of sources including food processing wastes, expired beverages (dairy, soda, beer), and other fats oils and greases." The materials also provide that during the AD process, microbes break down solid waste material into methane gas, which can be used to generate electricity or to make compressed natural gas. A copy of the January 2014 promotional packet is annexed hereto as **Exhibit 2.**

14. Significantly, however, as Town officials later came to understand, a substantial percentage of solid waste feedstock utilized by Quasar's AD operations (reportedly up to 50%) is *sewage sludge derived from the treatment of municipal wastewater containing, among other things, human wastes and a vast array of any chemicals that may be found in a municipal sewer system.*

15. Further, Town officials came to realize that Quasar's AD process does not eliminate the solid waste feedstock, and that vast quantities of liquid and solids, comprised of biosolids, require disposal. Quasar's business model involves treatment of the solid waste feedstock to reduce pathogens and marketing these biosolids as a fertilizer/soil amendment product called "Equate." The Equate is destined for land application on numerous off-site farms,

providing an inexpensive, if not profitable, method of disposing of byproducts of municipal sewage sludge.

16. On or about June 6, 2012, Quasar submitted an application to the Town Planning Board for site plan approval for the proposed AD on Liberty Drive. A copy of Quasar's Site Plan Application is annexed hereto as **Exhibit 3**.

17. The site plan included, among other things, a 230,000 gallon feedstock holding tank and a 750,000 dual purpose tank. Both the site plan application and accompanying Environmental Assessment Form ("EAF") provided by Quasar's consultant pursuant to the New York State Environmental Quality Review Act ("SEQRA") were devoid of any mention of biosolids and claimed that the project would not involve the generation or disposal of solid waste or surface liquid waste disposal. A copy of the EAF submitted by Quasar is annexed hereto as **Exhibit 4**.

18. Based on the site plan application materials submitted by Quasar, the Town Planning Board issued a SEQRA Negative Declaration on or about July 18, 2012, and later approved the site plan on or about August 15, 2012.

19. On or about June 13, 2012, a Quasar affiliate, Niagara BioEnergy, submitted an application to DEC for approval under its 6 N.Y.C.R.R. Part 360 solid waste regulations to construct and operate the proposed AD as a regulated a solid waste management facility. A copy of this permit application is annexed hereto as **Exhibit 5**.

20. The AD on Liberty Drive is owned by Respondent Sustainable BioElectric and is referred to as the "Niagara Bioenergy Anaerobic Digestion Facility." Sustainable BioElectric's Part 360 application describes the types of solid waste to be handled at the Niagara

Bioenergy AD as: "organic solids, food wastes, oil and grease, biosolids (sewage sludge)." Notably, "biosolids" appear as the last item on the list, with no explanation of the municipal sewage content.

21. By letter dated July 3, 2012 to the Town (a copy of which is annexed hereto as **Exhibit 6**), DEC consented to the Town Planning Board acting as SEQRA lead agency with respect to the Niagara Bioenergy AD facility site plan application. Significantly, however, this facility was closely related to, if not inseparable from, Sustainable BioElectric's contemporaneous Part 360 application for approval (which DEC subsequently granted) to spread the sewage sludge-laden Equate on various farm sites throughout the region including, but not limited to, the 37.6 acres of farmland owned or operated by Milleville in the Town. *See, e.g.*, Sustainable Bioelectric Permit No. 9-9909-00112/00001 (7/24/13-7/23/18) ("Milleville Land Application Permit"), a copy of which is annexed hereto as **Exhibit 7**.³

22. Unfortunately, as discussed below, DEC's Part 360 land application approval process was segmented from the local municipal AD facility approval process, and involved little to no meaningful public education or outreach in the affected communities, including the Town.

23. The Town issued a building permit for Sustainable BioElectric's AD facility on or about October 24, 2012. Unbeknownst to the Town, however, Sustainable BioElectric's AD facility had the ability to generate sewage sludge laden biosolids at rates and in quantities that exceeded not only the AD facility's storage capacity, but also Sustainable

³ Upon information and belief, the approximately 37.6 acres of Milleville property located within the Town of Wheatfield covered by this permit represents less than 1% of Milleville's total farmland in Niagara County.

BioElectric's ability to lawfully land-apply Equate on farms in the Town of Wheatfield and elsewhere.

24. In this regard, the Town Board obtained, via a Freedom of Information Law ("FOIL") request to the DEC, an email dated July 31, 2012 from Bruce Bailey, Quasar's Vice President of technical affairs, to DEC's Deputy Permit Administrator Lisa Porter, revealing that "[Sustainable BioElectric's Liberty Drive] site is one we are considering for a storage lagoon adjacent to the digester site." A copy of this email is annexed hereto as **Exhibit 8**.

25. Similarly, an August 16, 2012 letter from Bruce Bailey to Lisa Porter refers to Quasar's need to discuss "earthen lagoon siting" to accommodate the accumulation of waste during "digester upsets." A copy of Mr. Bailey's August 16, 2012 letter (without appendices) is annexed hereto as **Exhibit 9**,

26. In fact, shortly after obtaining Town approval for the Liberty Drive AD facility, Sustainable BioElectric sought approval from the Town Planning Board to construct a massive Equate storage facility. Specifically, on or about April 17, 2013, Sustainable BioElectric approached the Town Planning Board for approval to construct an "open organic liquid fertilizer storage facility" consisting of an approximately **5 acre lagoon**. In response to a host of public health and environmental concerns raised by Town officials and local residents, Sustainable BioElectric withdrew its lagoon proposal and instead proposed a **five (5) million gallon** cement biosolids storage tank adjacent to the Niagara Bioenergy AD. The proposed storage site is adjacent to federally protected wetlands.

27. In an attempt to promote the storage facility, Sustainable BioElectric again relied on Quasar's January 2014 promotional packet (annexed hereto as **Exhibit 2**), which

focuses heavily on the benefits of re-using "food waste," and contains only a passing reference to "wastewater treatment residuals." As noted above, however, information subsequently gathered by the Town Board from DEC and other sources suggests that biosolids derived from municipal sewage sludge constitute a significant percentage (*i.e.*, reportedly up to 50%) of Quasar's feedstock and is a critical part of Quasar's business plan in Western New York.

28. For example, documents obtained by the Town pursuant to FOIL also show that Quasar has received permits from the DEC to import sewage sludge to the Niagara BioEnergy AD in the Town from municipal treatment plants throughout New York State. This was not disclosed to the Town Board and, as discussed below, Quasar's business plan fails to address numerous public health and environmental threats associated with the use of biosolids in the Town.

29. In view of these serious concerns, on or about April 28, 2014, the Town enacted Local Law No 1-2014 to Amend Chapter 161, placing a six-month moratorium on the processing, recycling, storage, and disposal, and including field application, of sludge, sewage sludge, septage and any and all derivative products within the Town (the "Moratorium"). The purpose of the Moratorium was to enable the Town Board to consider amendments to Chapter 161 of the Town Code designed to mitigate the threat to public health, safety and the environment associated with the processing, recycling, storage, and disposal, including land application, of biosolids in the Town.

30. Following adoption of the Moratorium, the Town retained the services of Matrix Environmental Technologies Inc. ("Matrix"), a firm with significant experience in the area of agricultural waste management, wastewater treatment and groundwater remediation, to

provide technical support regarding the environmental and public health implications of biosolids handling and land application.

31. In consultation with Matrix, the Town examined various sources of information obtained from members of the general public, Matrix, Quasar, regulatory agencies and numerous other sources. Following careful consideration of this information, the Town Board issued an initial draft local law which was the subject of a well-attended public hearing conducted on May 12, 2014. At that public hearing, numerous residents voiced their concerns about potential threats to public health and safety and the environment associated with the generation and use of Equate in the Town as well as the proposed expansion of storage capacity at Sustainable BioElectric's AD facility.

32. Following the May 12, 2014 public hearing, the Town Board continued to receive and consider public input and to gather additional information and scientific evidence regarding the potential health threats posed by the land application of biosolids and related activities governed by the proposed local law. Those efforts included, among other things, the issuance of FOIL requests to DEC for various relevant public records.

33. As noted above, the DEC refused to identify the proposed land application sites that were the subject of Quasar's pending Part 360 land application permit, which did not serve to allay the Town Board's health and safety concerns about the unsuitability of local soil and groundwater conditions for land application of biosolids.

34. The DEC also declined to answer technical questions posed by Town representatives and Matrix during a meeting at the DEC on May 29, 2014 regarding Sustainable

BioElectric's noncompliance with the allowable soil texture and depth to groundwater measurements for the permitted land application sites, among other issues.

35. In addition, even DEC's July 11, 2014 Notice of Complete Application concerning Sustainable BioElectric's Land Application Permit, a copy of which is annexed hereto as **Exhibit 10**, which reportedly sought public comment on that application, failed to identify additional land application sites proposed by Sustainable BioElectric in the Town.

36. Likewise, DEC's SEQRA determination concerning Sustainable BioElectric's Land Application Permit, annexed hereto as **Exhibit 11**, fails to mention, much less address, the public health and environmental concerns brought to DEC's attention by the Town and Matrix, including the concern that the soils within the Town were deemed inappropriate for land application under DEC's own regulatory criteria.

37. Instead, on July 2, 2014, on the eve of the Town's consideration of its proposed Biosolids Law, DEC's Director of Materials Management issued a so-called "Memorandum of Clarification" (the "DEC Memo") purporting to retroactively "re-write" the Part 360-4 regulations to weaken the regulatory standards for land application of biosolids, in clear violation of both ECL § 27-0705 and the New York State Administrative Procedure Act. A copy of the DEC Memo is annexed hereto as **Exhibit 12**.

38. The DEC Memo notably fails to address the soil texture and other Part 360 noncompliance issues which Matrix brought to DEC's attention on May 29, 2014. Further, Matrix advised the Town that the DEC Memo is contrary to longstanding United States Environmental Protection Agency ("USEPA") guidelines and best practices for the land application of biosolids, and otherwise lacks any logical or valid technical basis.

39. Meanwhile, the Town diligently considered the environmental and public health impacts of a proposed local law governing biosolids in accordance with SEQRA. The Town's extensive review included, among other things, preparation and consideration of a SEQRA Full EAF (a copy of which is annexed hereto as **Exhibit 13**) and issuance of the detailed and comprehensive Notice of Determination of Non-Significance on or about July 28, 2014 (hereinafter "SEQRA Determination") (AGM Doc. No. 7.a).

40. As detailed in the Town's SEQRA Determination, Matrix determined that the vast majority (*i.e.*, over 99%) of land in the Town is unsuitable and unsafe for land application of biosolids based upon its review of the hydrological and soil conditions in the Town, relevant studies and literature, recent soil sampling and other field observations conducted by Matrix, and its review of applicable documents from the USEPA, DEC, the United States Army Corps of Engineers and local zoning criteria.

41. For example, Matrix determined that the predominant hydrogeological conditions in the Town of Wheatfield include:

- Shallow perched groundwater that is at or near the ground surface (whereas DEC Part 360 standards mandate that groundwater be deeper than 2 feet at the time of application). The Milleville permit application prepared by Sustainable BioElectric used water levels from residential drinking water wells on the Tuscarora Nation, none of which are located in Wheatfield. These wells are located in the deeper bedrock aquifer and are not representative of depth to groundwater at the Wheatfield land application site. The difference in water elevations between the overburden and bedrock aquifer has been documented in the Town at NYSDEC Spill #99-75017. This data was not used in the Milleville permit application.

- Low permeability soils that are predominantly silty clay loam, silty clay and clay. These soil textures are not allowable for land application of Class B biosolids in New York and USEPA guidance ranks sites with these soil types as low for land application.

- Poorly drained agricultural fields where saturated conditions prevail and ponding is common. The combination of low permeability soils and poor drainage in Wheatfield resulted in the chronic failure of septic tank leach fields. As a result, municipal sewer lines have been installed throughout most of the Town.

- Federal and/or state-regulated wetlands and flood zones are located throughout the Town and, in fact, are within or contiguous to the field covered by the Milleville Land Application Permit.

42. According to Matrix, given these unfavorable conditions throughout the Town, the storage and/or land application of biosolids poses an unacceptable risk to human health and the environment, particularly given the outdated nature of existing biosolids regulations, as discussed below.

43. Further, Matrix advised that localized conditions at virtually all farmable land in the Town create the potential for adverse impacts to groundwater and surface water from nutrients, pathogens, heavy metals and a vast array of unregulated (*i.e.*, "emerging") contaminants, as well as the potential for exposure to humans from contaminant migration from treatment, storage and land application sites.

44. In addition, a pathway of contaminant migration from overburden soils to the bedrock aquifer, and further migration through water bearing bedrock fractures to potable wells, has been documented in the Town (DEC Spill Site # 99-75017).

45. This important data was not included in Sustainable BioElectric's application for DEC approval to land apply Equate; nor was it considered by the DEC, even when the Town and Matrix brought these issues to its attention.

46. Matrix also advised that, despite the prevalence of conditions in the Town that are unsuitable and unsafe for land application of biosolids, DEC did not:

- undertake a detailed review of the soil or hydrology in the Town
- require any site-specific baseline soil or groundwater data for proposed Part 360 land application sites in the Town, other than soil samples for analysis of pH and 10 metals;
- require any sample collection or groundwater monitoring plans for existing or proposed Part 360 land application sites in the Town;
- exercise its discretion under existing Part 360 regulations to require expanded testing of the feedstock supplied to the Niagara BioEnergy AD (both with respect to parameters of concern and required frequency of sample collection); or
- engage in meaningful public outreach concerning Part 360 applications involving biosolids storage, handling or land application in the Town, or with respect to potential adverse health effects associated with unregulated pollutants known to be present in biosolids.

47. The Town's SEQRA Determination also concluded that the potential threats presented by the existence of unsuitable hydrologic conditions in the vast majority of farmable property in the Town are exacerbated by an existing federal and New York State regulatory program which is out-of-date. As noted in the SEQRA Determination, the solid waste feedstock utilized by Quasar's AD operations, and the resulting Equate destined for local land application, contain sewage sludge derived from the treatment of municipal wastewater which *can contain not only human feces but a vast array of chemicals dumped into the municipal sewer system that are currently unregulated by Federal or New York State solid waste regulations.*

48. Current DEC regulations governing biosolids at 6 N.Y.C.R.R. Part 360-4 largely are based on federal rules first promulgated in 1993 at 40 C.F.R. Part 503 ("EPA 503 Rule"), which in turn regulate the loading of only a small list of heavy metals and nutrients on agricultural soils. Unfortunately, as Matrix explained to the Town, the risk assessment on which current rules are based is significantly incomplete and outdated.

49. The Town's SEQRA Determination concluded that the more than two decades since the EPA Part 503 Rule was promulgated, scientists from Cornell University, the National Research Council, the United States Geological Survey and other reputable scientific institutions around the world have reported findings regarding a host of alarming adverse potential environmental and health effects associated with the land application of biosolids.

50. For example, the Town's SEQRA Determination incorporated by reference scientific studies showing that such potentially adverse consequences include, among other things, endocrine disruption, adverse impacts on livestock, movement to groundwater through facilitated transport, human health risks presented by aerosols, persistent organic pollutants, bacterial regrowth and antibiotic resistance in sludge bacteria.

51. Despite the existence of substantial scientific evidence regarding potentially serious environmental and health impacts associated with biosolids, to date neither the Federal nor the New York State governments have taken steps to strengthen or reexamine the existing regulations to ensure that they are protective of public health and the environment.

52. In fact, DEC not only is actively promoting AD operations in New York State generally, but the operations of Quasar in particular. *See, e.g.,* <http://www.dec.ny.gov/chemical/94368.html> (a copy of a printout from this page is annexed hereto as **Exhibit 14**). DEC's promotion of private interests such as Quasar is inappropriate and seriously undermines DEC's regulatory objectivity.

53. As noted in the SEQRA Determination, *USEPA itself* recently documented the prevalence of a wide array of pharmaceuticals, steroids and hormones in biosolids in a "Targeted National Sewage Sludge Survey ("TNSSS") Sampling and Analysis

Technical Report." EPA-822-R-08-016. The prevalence of a wide array of pharmaceuticals, steroids and hormones, as summarized in the USEPA report, demonstrates that the sewage treatment process does not degrade these contaminants effectively.

54. Based upon the above, the Town concluded, among other things, that the proposed land application of biosolids posed a threat to public health and the environment within the Town. In this regard, the Town found that such potential contamination associated with biosolids would threaten not only fields where land application of biosolids occurs, but also on adjoining farmland due to runoff, particularly given the unfavorable soil and drainage conditions found to be prevalent in the Town.

55. The Town also concluded that the Biosolids Law will not unreasonably restrict existing farming operations and, in fact, will benefit them by providing significant environmental and health protection to consumers of agricultural products grown in the Town, and by reducing occupational exposure to biosolids among farm workers themselves.

56. In this regard, it is important to note that land application of sewage sludge historically has not been a typical farming practice in the Town nor in Western New York. *See, e.g.,* DEC's June 2011 Report entitled "Biosolids Management in New York State," a copy of which is annexed hereto as **Exhibit 15**.

57. In addition, the Town found that the Biosolids Law will help facilitate and protect the growing market for certified organic wine, fruit and other produce in Niagara County, which is threatened by the proposed land application of biosolids on adjacent or nearby lands.

58. Accordingly, the Town duly exercised its police powers under Municipal Home Rule Law, Town Law § 130(6), and ECL § 27-0711 to adopt the Biosolids Law in order to

protect the public health, safety and welfare of the residents of the Town. In enacting the Biosolids Law, the Town Board found that the land application and/or disposal of biosolids poses "a significant health risk to the residents of the Town and may adversely impact the surrounding environment. The potential contamination of groundwater, surface water and soil, as well as the potential for air pollution, resulting from such activities poses an unreasonable risk to town residents, public health and the environment." Town Code § 161-19(A).

59. Similarly, the stated purposes of the Biosolids Law included, in pertinent part, to "[r]educe the risk of pollution and other harmful effects, to the maximum extent possible, from ... Land Application Facilities..." and to "[p]rotect the residents of the Town from the harmful effects of Biosolids, including: a. Hazardous and nuisance conditions, including contamination of groundwater, surface water and air, odors, excessive traffic, dust and noise." Town Code § 161-19(B).

60. In furtherance of these important objectives, §161-21 of the Biosolids Law prohibits, among other things, the land application or disposal of biosolids at any location within the Town.

61. By letter of September 23, 2014, Milleville submitted to AGM a request for review of the impact of the Biosolids Law on Milleville's farming operations pursuant to AML §305-a and an "opinion to clarify that [the land application of biosolids] is allowed in Agricultural District 6, 7, 8, Niagara County." AGM Doc. No. 1.

62. In this letter, David Milleville claims "we will save Milleville Bros. Farms between \$150 to \$200/acre by using equate™ as a substitute for commercial fertilizer." As noted above, however, Milleville is authorized by DEC to land apply Equate on a single site in

the Town, namely, a 37.6 acre site designated as "NIQ-01-11" on Nash Road. See **Exhibit 7** at p.3.

63. By letter of October 7, 2014 to the Town (AGM Doc. No. 2), AGM advised that it had received Milleville's request to review the Biosolids Law, and enclosed an April 2, 2015 guidance document entitled "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)" (hereinafter "AGM Land Application Guidance").

64. AGM's October 7, 2014 letter asserts, without elaboration, that "[a] town wide prohibition, as included in the Town's local law, may unreasonably regulate a farm operation located within a county adopted, State certified agricultural district," and that "any local regulation of [biosolids] should be consistent with the DEC 6 NYCRR Part 360 and 364 regulations."

65. By letter of October 21, 2014 (AGM Doc. No. 6), AGM advised the Town, among other things, that "[p]ursuant to AML §305-a, subdivision 1, local governments are prohibited from enacting and administering laws that would unreasonably restrict farm operations located within an agricultural district unless it can be shown that the public health or safety is threatened." AGM's October 21, 2014 letter further asserts:

The Department performs all reviews *on a case-by-case basis, based on the specific facts of a situation*. In examining whether a local law is unreasonably restrictive, the Department considers several factors, including, but not limited to: the cost of compliance for the farm operation affected; whether the requirements will cause a lengthy delay in the construction of a farm building or implementation of a practice; whether the requirements adversely affect the farm operator's ability to manage the farm operation effectively and efficiently; whether the requirements restrict production options which could affect the

economic viability of the farm; and the availability of less onerous means to achieve the locality's objective. The Department also considers whether a State law, regulation or standard applies to the regulated activity.

The Department evaluates whether an unreasonable restriction exists and, if it does, whether it can be shown that the public health or safety is threatened by the farm operation or activity which the Town seeks to regulate. Prior to making a decision as to whether a local law unreasonably restricts a farm operation within an agricultural district, *the Department considers all pertinent information submitted by the affected farm operator*, and the provisions of the local law involved. *We also take into account any facts or circumstances that the locality may wish to bring to our attention regarding the issue presented.*

Emphasis supplied.

66. AGM's October 21, 2014 letter also "encouraged" the Town to submit, within 30 days of its receipt of the AGM letter, any information or documentation which the Town wished AGM to consider prior to AGM making its determination as to whether an unreasonable restriction exists. According to AGM, in the event it deemed the Biosolids Law to constitute an unreasonable restriction, "we will ask the Town to provide any evidence it may have of a threat to the public health or safety."

67. By letter of November 19, 2014 (AGM Doc. No. 7), the Town submitted a detailed and comprehensive written response to AGM's October 21, 2014 request for information. The Town's November 19, 2014 letter included the Town's SEQRA Determination concerning the Biosolids Law, the detailed technical analysis of local soil and groundwater conditions prepared by Matrix, and the Town's August 5, 2014 response to DEC's July 11, 2014 Notice of Complete Application concerning Sustainable BioElectric's land application permit.

68. On or about November 26, 2014, Sustainable BioElectric commenced an Article 78 Special Proceeding seeking to annul the Biosolids Law on various grounds, including its claims that the Biosolids Law was preempted by the ECL and/or Sustainable BioElectric's

land application permit, that the Biosolids Law violated AML § 305-a, that it constituted an unconstitutional taking of Sustainable BioElectric's property interest in its land application permit and various alleged procedural flaws in the adoption of the law.

69. On or about May 6, 2016, Supreme Court, Niagara County, Justice Caruso presiding, dismissed Sustainable BioElectric's petition in its entirety, finding no procedural defects in the adopting of the Biosolids Law, rejecting Sustainable BioElectric's taking claim and affirming the Town's broad authority to regulate solid waste management and disposal activities within the Town. Specifically, the Court held: "Environmental Conservation Law §27-0711 makes it clear that 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 (see *Town of Concord v. Duwe*, 4 N.Y.3d 870 [2005]) and it is not required to allow an action simply because it has been approved by the DEC (see *Matter of Zagoreos v. Conklin*, 109 A.D.2d 281 [2nd Dept. 1985]). In fact the Town remains free to impose additional standards or prohibit the action altogether. *Id.* ***So the mere fact that permits were acquired by the petitioner does not prohibit the Town from imposing other restrictions, or even a complete ban***" (emphasis supplied). A copy of the Court's decision and order is annexed hereto as **Exhibit 16**.

70. With respect to Sustainable BioElectric's argument that the Biosolids Law violated AML § 305-a, the Court held that Sustainable BioElectric lacked standing to assert such a claim, since it is not a landowner within an agricultural district nor does it operate a farm within one. See **Ex. 16** at pp. 6-7.

71. Meanwhile, by letter of May 1, 2015 (AGM Doc. No. 12), after a delay of nearly six months, AGM submitted a follow-up to the Town's November 19, 2014 detailed response to AGM's request for information regarding the Biosolids Law. The AGM letter purports to rebut the Town's significant documented concerns about unfavorable local hydrological and soil conditions in the Town based on, among other things, reported visits by DEC staff to "proposed biosolids application locations (four parcels, one owned and one rented) operated by Millville Farms and located in the Town," without specifying critical information such as the location of the site in question nor providing any pertinent DEC permit application materials or information concerning the soil, groundwater or other conditions at those sites.

72. In addition, AGM's May 1, 2015 letter indicates that AGM "consulted with Sally Rowland, DEC Division of Materials Management Environmental Engineer, to address factual information concerning the Milleville application as well as to address matters with which DEC staff has technical expertise."

73. Significantly, however, AGM made no effort to reach out to the Town's technical consultant, Sean R. Carter, PE, of Matrix, to obtain his information and views on the threats posed by biosolids.

74. By letter dated May 11, 2015 from Steven J. Ricca, Esq., counsel to the Town, to AGM (AGM Doc. No. 13), the Town advised that, in order for it and its consultants to fully and adequately respond to the AGM's letter, the Town required all relevant information concerning the four parcels mentioned in AGM's May 1, 2015 letter and any related Milleville DEC permit applications and/or modifications that may have been submitted, processed and/or granted subsequent to the adoption of the Biosolids Law. The Town further advised that, upon

its receipt the requested information, and once the Town and Matrix had an opportunity to review AGM's letter, the Town would contact AGM to request an opportunity for a conference call with AGM, Matrix and other Town representatives for the purpose of sharing the Town's perspective on the technical issues as they relate to the proposed land application sites.

75. By letter of July 14, 2015 (AGM Doc. No. 19), Mr. Ricca responded to the assertion in AGM's May 1, 2015 letter that the Biosolids Law unreasonably restricts the Milleville's farm operation "in possible violation of AML §305-a(1)" and AGM's opinion that the Town's authority to regulate biosolids is limited to local regulations that "mirror" those of the DEC. Specifically, Mr. Ricca advised that AGM's position lacked any definitive scientific basis, failed to meaningfully address the public health and environmental threats posed by biosolids as detailed in the Town's extensive SEQRA Determination, and was otherwise at odds with the extensive public record supporting the Biosolids Law. Mr. Ricca also reiterated the Town's request the information described in the Town's May 11, 2015 letter.

76. In addition, Mr. Ricca's July 14, 2015 letter to AGM observes that AGM failed to conduct its own independent examination of the technical issues presented by the land application of biosolids in the Town, and merely adopted wholesale the self-serving, conclusory and unsupported opinions of a DEC employee that DEC's current biosolids regulations and DEC's enforcement of them are sufficient to address the myriad concerns detailed in the Town's SEQRA Determination. For example, AGM's prior correspondence acknowledges, but does not address, Matrix' observation that found that soils in the Town, including those at Milleville's application site in the Town, are poorly drained, low permeability soils that are predominantly silty clay loam, silty clay and clay, which USEPA and DEC regulations disfavors for land application of biosolids.

77. Mr. Ricca's July 14, 2015 letter includes a letter, also dated July 14, 2015, from Matrix which addresses the unfavorable soil conditions in the Town in greater detail, as well as the problem of innumerable unregulated contaminants known to be present in municipal wastewater treatment sludge. As explained more fully in Mr. Ricca's July 14, 2015 letter and accompanying exhibits, the Town's findings are supported by studies conducted by scientists from numerous reputable scientific institutions around the world, and well as recent studies conducted by EPA itself. AGM's assertion that "EPA and DEC continue to research this topic but have determined that additional regulations are not necessary at this time, and that the risk potential associated with such 'unregulated contaminants' is low" is unsupported by any conclusive epidemiological or other scientific study, and merely confirms the fact that health threats associated with biosolids do exist.

78. Mr. Ricca's July 14, 2015 letter to AGM further advised that AGM's position that the Town's authority to regulate biosolids is limited to local regulations that "mirror" those of the DEC is also contrary to State and Federal law. Specifically, Mr. Ricca explained the Town's fundamental and constitutionally-protected police powers cannot be abrogated by AGM for the economic benefit of Milleville, and certainly not for an agricultural business located outside of an agricultural district such as Sustainable BioElectric, given that:

- the very New York State statute which governs DEC and which authorizes the regulation of Biosolids under 6 N.Y.C.R.R. Part 360-4, specifically authorizes municipalities to go beyond state regulations to protect its citizens and the environment pursuant to E.C.L. § 27-0711;
- the federal Clean Water Act and its implementing regulations, 33 U.S.C.A. § 1345(e) and 40 C.F.R. § 503.5(b), likewise specifically authorize local municipalities to regulate the disposal of sewage sludge in a manner that is more stringent than the EPA's Part 503 biosolids regulations, the regulations on which DEC's Part 360-4 biosolids regulations are largely based;

- AGM's position also runs afoul of the Town's fundamental and constitutionally-protected police power of a municipality strong home rule powers afforded by N.Y. Const. Art. IX, MHRL § 10 and New York State Town Law § 130 to enact local laws to protect the "safety, health and well-being of persons or property."

79. Finally, Mr. Ricca's July 14, 2015 letter advises that, under the circumstances outlined above, AGM's opposition to the Biosolids Law actually subverts the purpose of AML Title 25-AA, namely, to protect farming activities within such agricultural districts from the encroachment of "nonagricultural development ... into farm areas." AML § 300. Specifically, by promoting the private sector disposal of contaminated municipal waste in farm areas, at the expense of the Town's legitimate overriding interest in minimizing threats to public health and safety and the growing organic farming industry in New York State, AGM's position harms, rather than supports, the long term viability of the existing agricultural district property in the Town. Based on the foregoing, the Town urged AGM to rescind its tentative conclusion that the Biosolids Law is an unreasonable restriction on farming operations in the Town.

80. By letter of December 21, 2015 from Steven Ricca (AGM Doc. No. 15), the Town again wrote to AGM to provide additional information concerning the numerous unregulated pollutants known to be present in wastewater treatment sludge. In particular, Mr. Ricca's December 21, 2015 letter included a December 20, 2015 letter from Matrix as well as a detailed presentation by Dr. Murray B. McBride, Professor of Soil and Crop Sciences at Cornell University, at the Genesee/Finger Lakes Regional Planning Council Fall 2015 Regional Local Government Workshop held on November 13, 2015 in Batavia, New York.

81. Dr. McBride's presentation discussed the environmental and health concerns of using sewage sludge as a crop fertilizer and the failure of current USEPA and DEC regulations to protect natural resources, livestock and humans from exposure to unregulated and emerging contaminants. The presentation also includes data on pathogens, metals, pharmaceuticals, polycyclic aromatic hydrocarbons, plasticizers and polybrominated fire retardants detected in sewage sludge. In addition, Dr. McBride's presentation discusses a critical appraisal of EPA Part 503 regulations first published by Cornell University in 1997.

82. By letter dated June 9, 2016 (AGM Doc. No. 20), AGM responded to the Town's July 14, 2015 and December 21, 2015 letters, in which AGM continued to dismiss or otherwise downplay the scientific materials submitted by the Town and concluding that the Biosolids Law "unreasonably restrict[s] the Milleville Farms, [sic] farm operation in violation of AML § 305-a(1) and that the Town has 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."

83. Significantly, AGM's June 9, 2016 letter provides no basis for its conclusion that the Biosolids Law unreasonably restricts Milleville's farm operation. Despite AGM's insistence that its reviews of local laws are conducted on a case-by-case basis, its letter is devoid of any analysis of the Biosolids Law's impact on Milleville's farm operation within the Town. While apparently recognizing that the Biosolids Law affects only a small fraction of Milleville's total acreage within Niagara County, AGM concludes, in a wholly conclusory and speculative fashion, that the Biosolids Law could have "greater economic impact" on other, future Milleville operations, failing to acknowledge that many of Milleville's acres are outside of the Town and thus could not be impacted by the Biosolids Law.

84. AGM's June 9, 2016 letter is equally flawed regarding its conclusions with respect to environmental and public health and safety threats posed by the land application of biosolids within the Town. AGM attempted to reject the scientific studies relied upon by the Town by asserting that those studies are not applicable to Milleville's proposed land application to biosolids, since those studies involved surface application, while Milleville/Sustainable BioElectric proposes to inject the biosolids. This critique ignores one of the key elements of the Town's concerns about land application of biosolids – namely, the unique soil types and high groundwater table that prevail within the Town, and thus the risk of *groundwater contamination*, which is *likely to be exacerbated by injection*.

85. AGM's June 9, 2016 letter also includes a March 14, 2016 letter from Sally Rowland at DEC, which generally reiterates DEC's previous statements and position that it believes existing Federal and State regulations are adequate and that no conclusive evidence exists that the land application of biosolids poses a significant risk to human health or the environment, "so long as the specific farm operation that is utilizing biosolids for land application complies with the Part 360 biosolids regulations."

86. Significantly, however, DEC's "Technical Review" of the Town's submissions makes clear that DEC undertook no independent analysis of the suitability of the soils on the Milleville property for biosolids land application, but rather based its conclusion on its "review of the permit application" (which, of course, was prepared by Sustainable BioElectric).

87. AGM's June 9, 2016 letter also includes a two page letter from DOH, dated June 25, 2015, addressed to New York State Assembly member John Ceretto. In this

letter, DOH declined to conduct a health study regarding biosolids land application, since it was unaware of any published studies that provide "clear evidence of significant human exposures or unusual adverse health effects caused by biosolids land application."

88. It is important to note, however, that DOH's letter was not based in any way on its consideration of the specific conditions in the Town nor a review of any of the extensive scientific materials submitted by the Town to AGM. Thus, AGM's reliance on what amounts to a general statement regarding biosolids land application by DOH contradicts AGM's statutory obligation (and its own policy) to make case-by-case determinations.

89. By letter dated July 11, 2016 (AGM Doc. No. 18), the Town responded to AGM's June 9, 2016 letter by pointing out AGM's continued failure to document or otherwise substantiate its conclusion that the Biosolids Law imposed any sort of "unreasonable" restriction on Milleville's farm operation. As stated in the letter, it is patently illogical to conclude that the restriction on one type of "fertilizer" could amount to an "unreasonable restriction" on farming operations, particularly given that such "fertilizer" has no history of use within the Town and the ready availability of alternative, less risky fertilizers. Given the lack of evidence establishing that the Biosolids Law unreasonably restricts Milleville's farm operations, the Town disputed that it has any obligation to demonstrate a public health and safety threat.

90. Nevertheless, the Town again pointed to the extensive, credible scientific evidence, including, among other things, site specific analysis by Matrix 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, that demonstrate that existing sewage treatment works fail 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.

91. The Town's July 11, 2016 letter also reiterated that Federal and State regulations governing the land application of biosolids, developed in the 1990s, simply have not kept up with this science, and 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.

92. The Town's July 11, 2016 letter also points out that, even in the absence of conclusive scientific evidence regarding the threats posed by the land application of biosolids *in general*, neither the Department, nor the agencies upon which it relies (DEC and DOH), 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 in the Town.

93. The Town's July 11, 2016 letter also pointed out that the agencies' insistence that a lack of "conclusive evidence" of public health and environmental risks associated with the land application of biosolids was at odds with the State's more prudent and protective position with respect to high volume hydraulic fracturing, where the existence of scientific uncertainty concerning the safety of that practice led the State to ban such activity.

94. Similarly, the Town's July 11, 2016 letter points out that the recent discovery of perfluorooctanoic acid (PFOA) or perfluorooctanesulfonic acid (PFOS), *previously unregulated chemicals*, in drinking water supplies in Hoosick Falls and Newburgh, and the

tragic consequences resulting therefrom, should caution AGM against relying on "scientific uncertainty" as a basis for actively combating enhanced public health and safety measures by local governments concerning biosolids.

95. Lastly, the Town's July 11, 2106 letter enclosed a July 6, 2016 letter from Matrix that pointed out numerous flaws in DEC's March 14, 2016 letter, the most significant of which continues to be the fact that DEC has never substantively addressed the specific soil and hydrologic conditions prevailing within the Town that render virtually all land within the Town inappropriate for land application *based upon DEC's own criteria*.

96. By letter dated September 30, 2016 (AGM Doc. No. 21), the Town supplemented its July 11, 2016 response to AGM's June 9, 2016 letter by forwarding a copy of the testimony of Dr. Howard Freed, the former director of DOH's Center for Environmental Health, given before the New York State Legislature's Joint Public Hearing on Water Quality on September 7, 2016. Dr. Freed's testimony, while dealing specifically with DOH's failures with respect to the regulation of PFOA and PFOS, supports the Town's position that a passive approach to regulating emerging contaminants such as those known to exist in biosolids was nothing less than reckless. In forcefully criticizing DOH's history of passive, reactive approaches to assessing public health threats posed by chemical contamination, Dr. Freed concluded that DOH's institutionalized practice of "always minimizing the risk of ingesting toxins in drinking water is a *pattern of behavior doomed to fail the people of New York*" (emphasis supplied).

97. To combat this dangerous regulatory practice, Dr. Freed recommended that DOH (and, by logical extension, DEC and those agencies that rely upon their expertise such

as AGM) adopt a "precautionary approach to protecting public health, such that they act to protect the public where 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" (emphasis in the original).

98. The Town thus urged AGM to adopt this "precautionary principle" in evaluating the risk posed by the land application of biosolids, so that the Town should not be forced to bear the risk of yet another environmental tragedy.

99. AGM never substantively responded to either the Town's July 11, 2016 or its September 30, 2016 letters, but rather issued its Order on May 22, 2017, which essentially reiterated its prior positions that the Biosolids Law somehow "unreasonably restricts" Milleville's farm operation and that, despite all of the evidence cited above, the Town failed to demonstrate the existence of a public health and safety threat.

AS AND FOR A FIRST CAUSE OF ACTION:

The Commissioner Is Not Authorized To Enforce AML § 305-a Pursuant to an AML § 36 Administrative Order and Thus the Order Was Issued In Excess of AGM's Jurisdiction and in Violation of Lawful Procedure

100. The Order was improperly issued pursuant to AML § 36 (*see Ex. 1* at p. 4). Originally enacted in 1922, AML § 36 generally authorizes the Commissioner to issue an order compelling compliance with the provisions of the AML: "If it be ascertained after an investigation or hearing conducted as herein provided, that any person, association or corporation has failed to comply with or is guilty of a violation of the provisions of this chapter or of a rule of the department, or of any other general or special law relative to any matter within the

jurisdiction of the department, an order may be made by the commissioner, under the seal of the department, compelling a compliance with such law or rule."

101. However, since the alleged violations sought to be restrained arise under AML § 305-a(1) (*see Ex. 1* at p.4), AGM was required to commence an action to enforce compliance with § 305-a(1), which it has failed to do.

102. AML § 305-a(1)(c) provides only one means of enforcement related to allegedly unreasonable restrictions upon agriculture within an agricultural district: "The commissioner, upon his or her own initiative or upon the receipt of a complaint from a person within an agricultural district, may bring an action to enforce the provisions of this subdivision."

103. The Third Department has observed that this provision is mandatory. *See In re Town of Butternuts v. Davidsen*, 259 A.D.2d 886, 888, 686 N.Y.S.2d 239 (3d Dept. 1999) (holding that Commissioner had authority to issue an order under AML § 36 prior to the amendment of the statute in 1997, "since AML § 305-a(1) did not [at the time the order was issued] contain a provision **mandating the manner by which [the Commissioner] was to seek enforcement** of local government's compliance with its laws and rules regarding the regulation of farm operations") (emphasis supplied).

104. Thus, the general power to issue administrative orders under AML § 36 no longer applies to the more specific authority to regulate allegedly unreasonable restrictions on agricultural practices occurring with certified agricultural districts through the institution of an action, as it is a "well-established rule of statutory construction ... that a 'prior general statute yields to a later specific or special statute'." *In re Dutchess County Department of Social Services v. Day*, 96 N.Y.2d 149, 153, 726 N.Y.S.2d 54 (2001) (quoting *Erie County Water Auth.*

v. Kramer, 4 A.D.2d 545, 550 (4th Dept. 1957), *aff'd* 5 N.Y.2d 954); *Dandomar Co., LLC v. Town of Pleasant Valley Town Bd.*, 86 A.D.3d 83, 92, 924 N.Y.S.2d 499 (2d Dept. 2011).

105. Therefore, the Order must be annulled pursuant to CPLR 7803(2)-(3).

AS AND FOR A SECOND CAUSE OF ACTION:

The Order Was Improperly Based on the Rigid Application of AGM Land Application Guidelines Adopted and Applied in Violation of the New York State Constitution and the State Administrative Procedure Act

106. Even if the Order were deemed a lawful measure to enforce alleged violations of AML § 305-a(1) (which it is not), the Order still must be annulled, and the Biosolids Law upheld, because AGM's conclusion therein that the Biosolids Law "unreasonably restricts" Millville's farm operation was impermissibly based upon "guidance" documents adopted and rigidly applied in violation of Article IV § 8 of the New York State Constitution and the State Administrative Procedure Act ("SAPA").

107. AML § 305-a(1), titled "Coordination of local planning and land use decision-making with the agricultural districts program," provides that: "Local governments, when exercising their powers to enact and administer comprehensive plans and local laws, ordinances, rules or regulations, shall exercise these powers in such manner as may realize the policy and goals set forth in this article, and shall not unreasonably restrict or regulate farm operations within agricultural districts in contravention of the purposes of this article unless it can be shown that the public health or safety is threatened."

108. AGM's conclusion that the Town's Biosolids Law is an unreasonably restriction on Millville's farming operation, as reflected in both the Order and its prior

correspondence, relies primarily on AGM's own unspecified "prior reviews" and its informal AGM Land Application Guidelines.

109. AGM, however, has never attempted to explain how the facts of the instant case are similar to or different than those "prior determinations." Nor has AGM ever attempted to apply the AML Land Application Guidelines to the unique facts and circumstances in the Town including, among other things, the unfavorable soil and groundwater conditions there.

110. Rather, it is evident that AGM adopts the blanket position that any restriction on the land application of Biosolids beyond those set forth in the AML Land Application Guidelines are, by definition, unreasonable restrictions on farming operations.

111. Neither the Order nor the AML Land Application Guidelines contain any factual basis for this conclusion, let alone with respect to the application of biosolids in a municipality where local soil and groundwater conditions have been determined by a qualified environmental consultant to be unsafe, and the AML Land Application Guidelines makes no attempt to differentiate what AGM deems to be acceptable restrictions based on local soil and hydrogeologic conditions.

112. Moreover, as reflected in similar recent orders issued by AGM to other municipalities, copies of which are annexed hereto as **Exhibits 17** and **18**, AGM routinely and inflexibly concludes that any local regulations that go beyond the requirements of DEC unreasonably restrict farming operations. Such a pattern belies AGM's contention that it considers each local law on the unique circumstances in that community, but rather demonstrates that AGM treats the standards outlined in the Land Application Guidelines (specifically

including the requirement that local regulation mirror DEC permitting requirements) as *de facto* rules.

113. Such rigid application of an informal guidance document, which has never been subject to public review and comment, violates both Article IV § 8 of the New York State Constitution and SAPA, since the AGM Land Application Guidelines were never formally promulgated as rules of regulations.

114. AML § 307 expressly authorizes AGM to "promulgate such rules and regulations ... as [he or she] shall deem necessary to effectuate the purposes of [Article 25-AA]...", but it has never formally promulgated regulations related to the purposes of AML § 305-a (*i.e.*, "Coordination of local planning and land use decision-making with the agricultural districts program"). Rather, AGM has informally prepared and used a series of "guidelines" intended to define acceptable levels of local regulation over farming activities occurring within agricultural districts, including the AML Land Application Guidelines.

115. Article IV § 8 of the New York State Constitution provides that "[n]o rule or regulation made by any state department [or] officer ... shall be effective until it is filed in the office of the department of state."

116. Upon information and belief, the AML Land Application Guidelines have never been filed in the office of the Department of State.

117. In addition, SAPA § 202(a)(1) provides that prior to the adoption of any rule, an agency shall submit a notice of the proposed rulemaking to the secretary of state and shall afford the public an opportunity to submit comments on the proposed rule. The notice of proposed rulemaking must appear in the state register at least 45 days prior to the first public

hearing on the proposed rule. *Id.* The notice shall cite the statutory authority under which the rule is proposed for adoption; give the date, time, and place of any public hearing(s) which are scheduled; state whether or not the place of any public hearing(s) shall be reasonably accessible to persons with a mobility impairment; include a statement that an interpreter shall be made available to deaf persons; contain the complete text of the proposed rule; include a regulatory impact statement; include a regulatory flexibility analysis and a rural area flexibility analysis; give the name, public office address and telephone number of any agency representative; and include any additional matter required by statute. *Id.*

118. Upon information and belief, the AML Land Application Guidelines were never subject to any of the requirements of SAPA.

119. Nevertheless, the Commissioner has inflexibly applied the AGM Land Application Guidelines in such a manner that any deviations therefrom are deemed to establish that a local regulation constitutes an unreasonable restriction on farm operations.

120. It is well established that such rigid use of "guidelines" and "policies" as *de facto* rules or regulations is impermissible and any action taken pursuant to such documents void as a matter of law. *See In re Schwartzfigure v. Hartnett*, 83 N.Y.2d 296, 301-302, 610 N.Y.S.2d 125 (1994); *In re Cordero v. Corbisiero*, 80 N.Y.2d 771, 772-773, 587 N.Y.S.2d 266 (1992); *In re Morningside House Nursing Home Co., Inc. v. Commissioner of New York State Dept. of Health*, 206 A.D.2d 617, 619, 614 N.Y.S.2d 589 (3d Dept. 1994).

121. Thus, the AGM's conclusion that the Town's restrictions on biosolids in excess of or inconsistent with the regulatory programs referenced in the AML Land Application Guidelines must be annulled pursuant to CPLR 7803(2)-(3).

AS AND FOR A THIRD CAUSE OF ACTION:

**The Order Impermissibly Interferes with the Town's Constitutionally
and Statutorily Protected Powers to Regulate Solid Waste Disposal and Land Use**

122. AGM's position that the Town must allow the land application, storage and related uses of biosolids in the Town and to impose no restrictions beyond existing DEC regulatory requirements also runs afoul of the constitutionally and statutorily protected rights of the Town to enact and enforce local laws regulating solid waste and land use pursuant to its police power.

123. The New York State Constitution expressly authorizes local governments to "adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to ... [t]he government, protection, order, conduct, safety, health and well-being of persons or property therein." Constitution Art. IX § 2(c)(10).

124. The Municipal Home Rule Law similarly provides that "every local government, as provided in this chapter, shall have power to adopt and amend local laws not inconsistent with the provisions of the constitution or not inconsistent with any general law, relating to ... [t]he protection and enhancement of its physical and visual environment... [and] [t]he government, protection, order, conduct, safety, health and well-being of persons or property therein." MHRL § 10(1)(ii)(a)(11)-(12).

125. The Legislature has declared that the local laws enacted "for the purpose of protecting the public health, safety and general welfare of its citizens" to be "[a]mong the most important powers and duties ... to a town government," Town Law § 272-a(1)(b), and the Court of Appeals has also found that the local regulation of land use to be "one of the core powers of local governance" that must be respected so as to "provide for the development of a balanced,

cohesive community' in consideration of 'regional needs and requirements.'" *In re Wallach v. Town of Dryden*, 23 N.Y.3d 728, 743, 992 N.Y.S.2d 710 (2014) (quoting *In re Gernatt Asphalt Prods. v. Town of Sardinia*, 87 N.Y.2d 668, 683, 642 N.Y.S.2d 164 (1996)).

126. Moreover, while a municipality's police power is not without limits and can be preempted by other statutory provisions, the Court of Appeals has strongly instructed that courts shall not "lightly presume preemption where the preeminent power of a locality to regulate land use is at stake," but should only find that the local police power is preempted where the State Legislature has clearly expressed its intent to completely override local authority to regulate land uses in a given context. *Id.* at 743-744 (finding that supersession clause in the State Oil, Gas and Solution Mining Law did not preempt the authority of local governments to prohibit oil and gas drilling within their borders, despite strong Legislative intent to encourage the development of the States oil and gas resources).

127. Further, legislative enactments like the Biosolids Law are afforded "a strong presumption of constitutionality, imposing a heavy burden on the party trying to overcome that presumption by proof beyond a reasonable doubt." *Murtaugh v. New York State Dept. of Environmental Conservation*, 42 A.D.3d 986, 841 N.Y.S.2d 189 (4th Dept. 2007). It is therefore AGM's burden to establish that the Biosolids Law unreasonably restricts Milleville's farm operations and the land application of biosolids presents no threat to public health and safety, and any suggestion that the Town bears this burden is legally invalid and fundamentally unfair.

128. While AML § 305-a is a general law that imposes some limits on a municipality's constitutionally and statutorily protected rights to regulate land use, AGM's

categorical and blanket determination that any restriction on land application of solid wastes that do not precisely mirror DEC regulations are unreasonable, regardless of context, is inconsistent with its obligation to "coordinate" local land use regulation with the overall purposes of Article 25-AA (AML § 305-a) and the Town's strong interest in enacting and enforcing sound solid waste disposal regulations that protect all of its citizens, and is thus arbitrary and capricious.

129. Moreover, consistent with the New York State Constitution's broad grant of authority to local governments to enact laws to protect public health and safety, and the MHRL's equally broad grant of authority to enact local laws related to "[t]he protection and enhancement of its physical and visual environment... [and] [t]he government, protection, order, conduct, safety, health and well-being of persons or property therein," State law expressly authorizes local governments to enact local laws and regulations governing solid waste management and disposal that is more stringent than DEC regulations.

130. Specifically, Town Law Sections 130(6) authorizes towns to prohibit and/or regulate the "use of any lands within the town as a dump or dumping ground."

131. Section 27-0711 of the ECL, meanwhile, provides, in relevant part: "Any local laws, ordinances or regulations of any governing body of a county, city, town or village which are not inconsistent with this title or with any rule or regulation promulgated pursuant to this title shall not be superseded by it, and nothing in this title shall preclude the right of any governing body of a county, city, town or village to adopt local laws, ordinances or regulations which are not inconsistent with this title or with any rule or regulation promulgated pursuant to this title *Any local laws, ordinances or regulations of a county, city, town or village which comply with at least the minimum applicable requirements set forth in any rule or regulation*

promulgated pursuant to this title shall be deemed consistent with this title or any such rule or regulation" (emphasis supplied).

132. It is well established that "local laws governing municipal solid waste management and recycling *that are stricter than the state legislation*, but not inconsistent with it, are explicitly permitted" (emphasis supplied). *In re Syracuse Haulers Waste Removal, Inc. v. Madison County Dept. of Solid Waste and Sanitation*, 122 A.D.3d 969, 970, 995 N.Y.S.2d 820, 822 (3d Dept. 2014). A local law is not inconsistent with the ECL merely because it " 'prohibit[s] something which the State law would consider acceptable.' " *Town of LaGrange v. Giovenetti Enterprises, Inc.*, 123 A.D.2d 688, 689, 507 N.Y.S.2d 54, 55 (2d Dept. 1986) (holding that exclusion of solid waste transfer stations from schedule of permitted uses within town was not preempted by, or inconsistent with, State Solid Waste Management Law and associated permitting regulations); *see also Town of Concord v. Duwe*, 4 N.Y.3d 870, 799 N.Y.S.2d 167 (2005) (upholding local law prohibiting siting of commercial composting facility on property zoned residential-agricultural); *Jancyn Mfg. Corp. v. County of Suffolk*, 71 N.Y.2d 91, 524 N.Y.S.2d 8 (1987) (holding that county law prohibiting sale of cesspool additives without county approval was not preempted by Solid Waste Management Law); *Monroe-Livingston Sanitary Landfill v. Town of Caledonia*, 51 N.Y.2d 679, 435 N.Y.S.2d 966 (1980) (upholding local law prohibiting importation of refuse into town); *Moran v. Village of Philmont*, 147 A.D.2d 230, 542 N.Y.S.2d 873 (3d Dept. 1986) (holding that town-wide ban on private landfills was valid health and safety measure within scope of village's police power).

133. In fact, as noted above, in an unsuccessful action by Sustainable BioElectric to annul the Biosolids Law, the Court specifically held, among other things, that the Biosolids Law is not pre-empted by land application permits issued by DEC. *See Ex. 16* at p. 7

("Environmental Conservation Law §27-0711 makes it clear that 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 (see *Town of Concord v. Duwe*, 4 N.Y.3d 870 [2005]) and it is not required to allow an action simply because it has been approved by the DEC (see *Matter of Zagoreos v. Conklin*, 109 A.D.2d 281 [2nd Dept. 1985]). In fact the Town remains free to impose additional standards or prohibit the action altogether. *Id.* ***So the mere fact that permits were acquired by the petitioner does not prohibit the Town from imposing other restrictions, or even a complete ban***" (emphasis supplied)).

134. Federal law also recognizes local authority to regulate solid waste disposal. The federal Clean Water Act specifically authorizes local control over the use and disposal of sewage sludge so long as federal regulatory standards are met: "The ***determination of the manner of disposal or use of sludge is a local determination***, except that it shall be unlawful for any person to dispose of sludge from a publicly owned treatment works or any other treatment works treating domestic sewage for any use for which regulations have been established pursuant to subsection (d) of this section, except in accordance with such regulations." 33 U.S.C.A. § 1345(e) (emphasis supplied).

135. EPA's 40 C.F.R. Part 503 biosolids regulations, on which DEC's Part 360-4 biosolids regulations are largely based, reiterate this local municipal authority: "Nothing in this part precludes a State or political subdivision thereof ... from imposing requirements for the use or disposal of sewage sludge more stringent than the requirements in this part or from imposing additional requirements for the use or disposal of sewage sludge." 40 C.F.R. § 503.5(b).

136. Thus, because the Order purports to abrogate the Town's constitutionally and statutorily protected authority to regulate solid waste disposal to protect public health and safety and the environment, it is unconstitutional and *ultra vires*, and must be annulled.

AS AND FOR A FOURTH CAUSE OF ACTION:

AGM's Conclusion that the Biosolids Law Constitutes An Unreasonable Restriction on Milleville's Farming Operations Lacks A Rational Basis and is Arbitrary and Capricious

137. 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. *In re Murphy v. New York State Div. of Housing and Comm. Renewal*, 21 N.Y.3d 649, 652, 977 N.Y.S.2d 161 (2013). "An action is arbitrary and capricious when it is taken without a sound basis or regard to the facts." *Id.* Courts "must scrutinize administrative rules for genuine reasonableness and rationality in the specific context presented by a case." *Id.*

The Biosolids Law Does Not Unreasonably Restrict Milleville's Farm Operation

138. AGM's conclusion that the Biosolids Law, as applied to Millville's farming operations, constitutes an unreasonable restriction on those operations utterly fails to satisfy the standards for genuine reasonableness supported by the prevailing facts in this matter.

139. Specifically, there is no evidence cited in the Order or existing in the record in this matter to support AGM's conclusory finding that the Biosolids Law unreasonably restricts Milleville's farm operation, a threshold issue pursuant to AML § 305-a.

140. Neither the Order nor, upon information and belief, the record in this matter contains any evidence concerning Milleville's need to utilize biosolids as a "fertilizer," the prevalence of that practice in Western New York in general or Niagara County in particular, or

the impact – fiscally or operationally – on Milleville's farm operation if it is prevented from using biosolids on its Wheatfield property.

141. The record is devoid of any credible evidence establishing that the Biosolids Law will threaten the viability of any existing farm operation within the Town, including Milleville's. 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.

142. 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.

143. Moreover, the Town adduced evidence, ignored by AGM, that the use of biosolids has not been a customary farming practice in Niagara County. *See Ex. 15* (DEC report) at p. 13.

144. AGM also failed to consider the fact that Milleville could obtain comparable nutrient value from traditional sources, which failure was arbitrary and capricious, particularly in light of its own policy governing its issuance of opinions as to whether a practice qualifies as a "sound agricultural practice" pursuant to AML § 308(1)(a), which mandates that AGM consider the "availability of alternatives that may be equal or superior in their efficacy that would reduce or avoid off-farm side effects associated with the practice in question without causing undue costs or disruptions to orderly farm operations..." This policy is available on AGM's website at <https://www.agriculture.ny.gov/ap/agservices/sapreview.html>

145. Indeed, AGM's own Land Application Guidelines acknowledge that there are numerous nutrient management practices available to farmers that do not involve the use of human waste or contaminated sewage sludge and septage, and, in fact, as noted above, farmers in Western New York and in the Town in particular have utilized nutrient management practices for decades without resorting to the use of municipal sewage sludge, and the Biosolids Law does nothing to change this.

146. Upon information and belief, the only information considered by AGM was Milleville's bald assertion that it would save "between \$150 to \$200/acre by using equateTM as a substitute for commercial fertilizer." AGM Doc. No. 1. However, there is no evidence that AGM attempted to confirm this figure or to quantify that alleged cost as compared to Milleville's overall operations, given the undisputed fact that the Biosolids Law impacts only a miniscule percentage of Milleville's overall acreage (*i.e.*, 36.7 acres out of approximately 4000 total acres).

147. Rather, the Order indicates that AGM's "investigation" regarding Milleville's Wheatfield property consisted merely of an AGM employee visiting the site on one occasion, "observ[ing] the farm, the proposed land application site and the surrounding area." *See Ex. 1* at p. 2.⁴ There is no indication that AGM ever conducted soil testing or meaningfully evaluated the need to utilize biosolids as a "fertilizer."

148. The Order also notes that AGM consulted with DEC for its technical expertise (*Ex. 1* at p. 2), but the record, in fact, demonstrates that DEC's review of Milleville's land application permit and the Town's concerns were equally conclusory. It is clear that DEC never independently confirmed the soil types and hydrological conditions on Milleville's

⁴ This language is virtually identical to the recitation of similar "investigations" in other similar orders (*see Exs. 17 and 18*), providing further evidence that AGM routinely fails to conduct any meaningful individualized evaluation of the impact of local laws on farming operations as required by the plain language of AML § 305-a.

property, but rather relied solely on Sustainable BioElectric's permit application, even after the Town pointed out inaccurate information in that permit application (*see* AGM Doc. No. 20, Appendix B, concluding that "[b]ased on DEC *review of the permit application*, the soils on the land application site meet Part 360 regulations" (emphasis supplied)), and when confronted with the fact that the predominant soil types in the Town were not, in fact, consistent with those regulations, DEC arbitrarily – and improperly -- purported to "clarify" those regulations (*see* ¶¶ 36-36 *supra* and **Ex. 12**).

149. In addition, AGM failed to consider that the Biosolids Law would actually benefit and protect the larger agricultural community in the Town (and beyond) by protecting against potential soil and groundwater contamination that could devastate the Town and Niagara County's important agricultural economy. *See* ¶¶ 55-57 above.

150. To override the Town's thoroughly researched and carefully considered conclusion, based on the unique environmental and hydrological conditions prevailing in the Town, as supported by extensive competent scientific evidence, based on the lack of any truly independent consideration of the impact of the Biosolids Law on the ability of Milleville to continue to profitably operate its farms, was arbitrary and capricious.

151. Such "so-called findings" that are "pure *ipse dixit* and conclusions" are arbitrary and capricious as a matter of law and must be annulled. *In re Furey v. County of Suffolk*, 105 A.D.2d 41, 44-45, 482 N.Y.S.2d 788 (2d Dept. 1984).

152. Moreover, the failure of AGM (and DEC) to adequately consider the local soil and groundwater conditions in the Town and on property owned by Milleville in particular in analyzing the reasonableness of the Biosolids Law was also contrary to the well-established

principal that administrative determinations must be rational "in the specific context presented by a case." *Murphy*, 21 N.Y.3d at 652.

**The Order's Conclusions Ignore Material Facts and Are
Inconsistent With the Purposes of the Agricultural District Program**

153. AGM's categorical, non-contextual approach is also flatly inconsistent with the purpose and intent of the Agricultural District program it claims to be administering. As noted above, AML § 305-a(1) ("Coordination of local planning and land use decision-making with the agricultural districts program") provides: "Local governments, when exercising their powers to enact and administer comprehensive plans and local laws, ordinances, rules or regulations, *shall exercise these powers in such manner as may realize the policy and goals set forth in this article*, and shall not unreasonably restrict or regulate farm operations within agricultural districts *in contravention of the purposes of this article* unless it can be shown that the public health or safety is threatened" (emphasis supplied).

154. AML § 305-a was enacted as part of Article 25-AA of the AML creating the Agricultural District program. Title 25-AA of the AML authorizes the creation of Agricultural Districts as a "locally-initiated mechanism for the protection and enhancement of New York state's agricultural land as a viable segment of the local and state economies and as an economic *and environmental resource* of major importance" by protecting farming activities within such districts from the encroachment of "*nonagricultural development ... into farm areas*." AML § 300 (emphasis supplied).

155. The Town's Biosolids Law is fully consistent with these purposes. This is not an instance where the Town is attempting to regulate farm practices that may conflict with encroaching residential or commercial development into farm areas. Rather, it is exercising its

traditional, and constitutionally and statutorily protected, police powers to protect public health and safety and the environment throughout the Town, to the benefit of all of the residents of the Town – including its farmers – by ensuring that potentially harmful contaminants do not contaminate the soil and groundwater throughout the Town.

156. Nothing in the statutory language indicates that the intent of the Agricultural Districts Program is to maximize the profits of farm operations at the expense of environmental and health protections, and it certainly was not the intent of the legislation to maximize the profits of *non-farming industrial concerns* (such as Sustainable BioElectric) or to provide a cheap and convenient method of disposing of an industrial by-product, as is the case here.

157. The failure of AGM to take such factors into consideration in making its determination as to the reasonableness of the restrictions was plainly inconsistent with the purposes of the Agricultural District Program and thus arbitrary and capricious.

AS AND FOR A FIFTH CAUSE OF ACTION:

**Since the Town's Biosolids Law Does Not Unreasonably Restrict
Millville's Farming Operations, the Town Has No Obligation to
Demonstrate That Biosolids Threatens Public Health and Safety,
But the Record Clearly Establishes That Such a Threat Exists**

158. Due to the failure of AGM to demonstrate a rational basis for its determination that the Biosolids Law restrictions as applied to Millville's farming operations unreasonably restrict those operations in contravention of the purposes of AML Article 25-AA, the Order is arbitrary and capricious, void and must be annulled, without regard to whether the Town has demonstrated that the proposed land application, storage and other use of biosolids presents a threat to public health and safety within the meaning of AML § 305-a(1).

159. Nevertheless, in the event the Court finds that AGM's determination of an unreasonable restriction is supported by rational basis or is otherwise proper, the full record in this matter clearly establishes that such a threat is posed by the proposed land application, storage and other use of biosolids in the Town, and that the Town has more than adequately documented such public health threat.

160. Specifically, as set forth in great detail in the Town's SEQRA Determination (AGM Do. No. 7.a), and the correspondence from the Town, its attorneys and its professional environmental consultant, with enclosures, dated November 19, 2014 (AGM Doc. No. 7), July 14, 2015 (AGM Doc. No. 19), December 21, 2015 (AGM Doc. No. 15), July 11, 2106 (AGM Doc. No. 18) and September 30, 2016 (AGM Doc. No. 20), all of which is summarized above (*see generally* ¶¶ 40-54, 58-59, 75-77, 80-81, 89-98), the Town has demonstrated that the land application of biosolids within the Town poses an unacceptable risk to public health and the environment.

161. Without unnecessarily repeating those risks as outlined above in greater detail, such risks include: (a) the undisputed fact that biosolids contain literally hundreds of unregulated contaminants, the safety and potential exposure pathways of which has not been adequately studied; (b) the failure of Federal and State regulations to adequately address these "emerging" contaminants; (c) the unsuitability of virtually all of the soils within the Town for biosolids land application, due to the prevalence of silty clay loam soil overlying silty clay and clay soils and a shallow water table; (d) the failure of AGM and/or DEC to independently evaluate these soil and hydrologic conditions within the Town; and (e) clear evidence concerning the risks posed by other unregulated contaminants in analogous cases (*e.g.*, PFOA and PFOS contamination).

162. AGM has failed to rebut the Town's thorough and well-documented findings regarding the public health threat posed by the land application of biosolids within the Town. As noted above, AGM never undertook any scientific review of the Town's findings; nor did it conduct any independent analysis of the soil and hydrological conditions within the Town in general or on the Milleville property in particular. Thus, it had no reasonable basis to dismiss the Town's concerns or dispute its findings of an environmental and public health threat based upon those unique characteristics.

163. Significantly, neither did the agencies with whom AGM consulted, purportedly with greater technical expertise in the areas of environmental and public health protection, adequately address the Town's findings and concerns.

164. Rather, as noted above, DEC never independently confirmed the soil types on the Milleville property to ensure their suitability for land application, and it improperly sought to "clarify" regulations indicating to the contrary.

165. Perhaps most perplexingly – and arbitrarily – DEC attempted to downplay the numerous scientific studies raising serious concerns regarding the safety of biosolids land application and the adequacy of existing regulations by pointing out that many of those studies involved direct land application, while Milleville is proposing to inject the biosolids into its soils (*see* AGM Doc. No. 20 at p. 5), which completely ignores the Town's concerns regarding the potential for **groundwater contamination** based upon the unique soil and hydrologic conditions within the Town, including a very shallow groundwater table, and the fact that subsurface soils (where injection would occur) at the Milleville land application site are silty clay and clay, which are not allowable textures for land application in New York State.

166. For its part, DOH, without any investigation whatsoever of local conditions, issued a two page letter declining to undertake a public health assessment based on what it deemed to be the lack of any "clear evidence" of a public health threat posed by land application of biosolids in general. As noted above, this passive, reactive approach minimizing the risk of chemical contamination was forcefully criticized by the former director of DOH's Center for Environmental Health as a practice "doomed to fail the people of New York," and, in any event, DOH's failure to consider local conditions or make any case-specific finding with respect to risk renders AGM's reliance on DOH's opinion wholly arbitrary and unreasonable.

167. In this regard, the Town's unprecedented level of due diligence and scientific rigor engaged in throughout this process clearly distinguishes this matter from those previous instances where courts have found that AGM's findings of unreasonable restrictions unsupported by a showing of legitimate public health and safety concerns. The record in this matter clearly demonstrates that the Town's duly enacted Biosolids Law is intended to protect public health and the environment from the very real risks associated with the land application of biosolids and that the Town has gathered an exceptional level of evidence supporting its findings and conclusions.

168. Thus, the record in this matter contains more than ample evidence establishing that the Biosolids Law is reasonable and justified, and that AGM's rejection of the Town's carefully considered and well-supported exercise of its police power, as reflected in the Order, is arbitrary and capricious.

WHEREFORE, the Town respectfully requests the entry of judgment against Respondents/Defendants as follows:

- (a) Annuling the Order and Declaring it improper, *ultra vires*, void and without legal effect;
- (b) Declaring that the Order, as applied, violates the Town's constitutionally and statutorily protected authority to regulate the handling and disposal of solid waste and to otherwise enact local laws to protect public health and the environment;
- (c) Declaring that the Biosolids Law as applied to Milleville's farming operations does not constitute an unreasonable restriction on those operations;
- (d) Declaring, in the alternative, that the Biosolids Law as applied to Milleville's farming operations is proper due to the public health and safety threats posed by biosolids;
- (e) Awarding the Town all costs and reasonable attorneys' fees incurred in the prosecution of this proceeding; and
- (f) Any such other and further relief as the Court may deem just and proper.

**DATED: Buffalo, New York
June 20, 2017**

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VERIFICATION OF MUNICIPAL CORPORATION

STATE OF NEW YORK)
) SS.:
COUNTY OF NIAGARA)

Robert B. Cliffe, being duly sworn, deposes and says:

I am the Supervisor of the Town of Wheatfield, New York. I have read the foregoing Verified Petition and Complaint and know the contents thereof. The document is true to my own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters deponent believes it to be true.

I further say that the reason this verification is made by me and not by Petitioner the Town of Wheatfield, New York is that said party is a municipal corporation, and the grounds of my belief as to all matters in this action not stated upon my own knowledge are investigations which I have caused to be made concerning the subject matter of this litigation and information acquired by me in the course of my duties as Supervisor for the Town of Wheatfield and from the books and papers of said municipal



ROBERT B. CLIFFE

Sworn to before me this
16th day of June, 2017.



Notary Public

KATHLEEN HARRINGTON - McDONELL
NOTARY PUBLIC, STATE OF NEW YORK
QUALIFIED IN NIAGARA COUNTY
My Commission Expires July 21, 20 20