

**STATE OF NEW YORK
DEPARTMENT OF AGRICULTURE AND MARKETS**

**In the Matter of Compelling Compliance with the
provisions of §305-a, subdivision 1 of the
Agriculture and Markets Law by**

**The Town of Varick
4782 Route 96
Romulus, New York 14541**

**DETERMINATION
AND
ORDER**

PRELIMINARY STATEMENT

Upon receiving a complaint concerning the enactment and administration of certain moratoria by the Town of Varick, in Seneca County Agricultural District Numbers 1 and 8, the Department of Agriculture and Markets investigated to determine whether the Town's moratoria comply with the provisions of § 305-a, subd.1 of the Agriculture and Markets Law (AML).

Section 305-a, subd. 1 prohibits local governments from enacting or administering local laws that unreasonably restrict farm operations located within an agricultural district unless it can be shown that the public health or safety is threatened.

The Department attended public meetings concerning the moratoria; reviewed correspondence from the Varick Town Attorney and the Varick Town Planning Board; reviewed New York State Department of Environmental Conservation (DEC) Regulations concerning Concentrated Animal Feeding Operations (CAFOs); and discussed the issues with affected farm landowners, the Seneca County Agricultural and Farmland Protection Board and the Seneca County Farm Bureau. Based upon the relevant facts and information gathered, I hereby make the following findings and conclusions which support a Determination that the Town of Varick has violated AML § 305-a, subd.1 and an Order compelling compliance with such law.

FINDINGS

1. On August 27, 1998, the Commissioner of Agriculture and Markets received a letter, dated August 21, 1998, from the Town of Varick Planning Board Chairman, Gary Catt concerning the Town's moratorium on the construction of new confined animal feeding operations. Mr. Catt stated that "Across the nation, 17 states- virtually every state in which these operations are located- are in the process of developing regulations to offset the unhealthy impact of mega-farms. The reasons are many, but they all include health as well as environmental impacts." Mr. Catt noted generally that "Seneca County and the Town of Varick in particular are extremely vulnerable ecologically. *** [and] Health effects from drinking water contamination and odors have been documented in all areas where such farms operate." Neither Mr. Catt nor the Planning Board provided any specific information concerning the impact of confined animal feeding operations, nationally, or as they operate within the Town of Varick.
2. On September 4, 1998 Kim Blot, the Director of the Division of Agricultural Protection and Development Services, wrote to the Town of Varick concerning two moratoria passed by the Town Board on August 4, 1998. The first moratorium (Moratorium I) halted the construction of new structures used as confined animal feeding operations until the NYS DEC has implemented a SPDES permit system. The second moratorium (Moratorium II) directed the Town Building Inspector not to issue any building permits for the new construction of structures used as confined animal feeding operations until such time that the Town of Varick Planning Board has had an opportunity to review the health hazards associated with such facilities and report its findings to the Town Board for possible amendments to the Town's Zoning Ordinance. Mr. Blot noted that the effect of the moratoria is to prohibit the new construction of structures to be used as confined animal feeding operations, as well as expansion of existing ones. Thus, certain livestock farms are prevented from starting up and expanding their operations. Also, the moratoria do not allow for replacement of confined animal feeding operations, which may be necessary in cases of casualty loss. Mr. Blot also noted that the moratoria do not define "confined animal feeding operations" and expressed concern that the time limits associated with the moratoria were not specified. Mr. Blot concluded that the moratoria appeared to unreasonably restrict farm operations within the agricultural district in possible violation of the AML and requested the Town's views on the issues raised, including whether it believes that "confined animal feeding operations" present a threat to the public health or safety.
3. Town Attorney Patrick J. Morrell replied to Mr. Blot by letter, dated October 7, 1998. Mr. Morrell provided a copy of the Town Board's Resolution of October 6, 1998,

which amended the August 4, 1998 resolution by replacing the phrase "Confined Animal Feeding Operation" with "Concentrated Animal Feeding Operation," and designated a threshold of 250 animal units for Concentrated Animal Feeding Operations. Mr. Morrell indicated that the lower 250 animal unit threshold was adopted by the Town "...due to the proximity of the Town of Varick to Cayuga and Seneca Lakes and the great potential for discharge into them through man made ditches, flushing systems or field tiles..." He also stated that the lower threshold "...was done to reflect the inability of the Building Inspector to accurately calculate animal units, a measurement based on weight, at the planning stage of development. Also, it is unknown at this point how the DEC regulations will be written. Because state regulations do not exist at this time, this lower threshold is not inconsistent." With respect to the Department's concern about the lack of a termination date for the moratoria, Mr. Morrell stated that "The intention of these resolutions was to place a stopgap measure to fill the void until the New York State Department of Environmental Conservation (DEC) has its State Pollutant Discharge Elimination System (SPDES) general permit in effect." Mr. Morrell did not state that concentrated animal feeding operations present a threat to the public health or safety and did not provide any information about health or safety impacts from these operations.

4. By letter, dated January 20, 1999, the Department concluded that the Town of Varick's adoption of the two resolutions violated Agriculture and Markets Law (AML) §305-a, subdivision 1 by prohibiting new construction of structures to be used as concentrated animal feeding operations, as defined by the Town, and the expansion of existing structures or lagoons. The Department determined that the Town did not demonstrate that the construction or expansion of structures to be used as concentrated animal feeding operations threatens the public health or safety. The Department requested that the Town lift the moratoria as they may apply to farm operations within a county adopted, State certified agricultural district. Town Attorney Patrick J. Morrell replied to the Department on February 4, 1999. Mr. Morrell indicated that the DEC is in the process of enacting a general permit for Concentrated Animal Feeding Operations (CAFOs) and that the purpose of the moratoria was to prevent farmers from defeating the purpose of the DEC regulations "...by constructing or substantially adding to a CAFO without implementing the restrictions which will be required after they take effect." He stated that the Town Planning Board had resolved that CAFOs present a potential risk to health, safety and environmental concerns. No evidence or other information was provided to the Department showing that a threat to the public health or safety exists.
5. The Department did not take further action because the Seneca County Cornell Cooperative Extension, Farm Bureau, and one of the affected landowners

requested a local resolution to the situation where the Town would appoint a committee to develop recommendations on manure management for the Town Planning Board. In addition, Town Attorney Morrell stated in his February 4, 1999 letter to the Department that the Chairman of the Planning Board informed him that the degree of cooperation exhibited by the committee made him hopeful that a resolution to this matter would be reached. The Department also supported the Town's appointment of an agricultural subcommittee in its efforts to equitably resolve the situation.

6. On February 26, 2001, Kevin Swartley, a farmer within the Town of Varick, sent Robert Somers, Chief of the Department's Agricultural Protection Unit, a copy of the Varick Agricultural Subcommittee's Recommendations to the Town Planning Board. Mr. Swartley indicated that the Town Planning Board has not met to consider the Committee's recommendations and requested that the Department renew its review of the Town's moratoria pursuant to AML §305-a, subd.1. Mr. Swartley also requested that the Department examine the impact of the moratoria on his farm operation.
7. In a letter to the Department dated April 1, 2001, Kevin and Melody Swartley indicated that their farm consists of approximately 585 acres, which they own, and an additional 1,950 acres that are rented for crop production, mainly corn, wheat and soybeans. Mr. Swartley advised that approximately 75% of the owned land and 50% of the rented land is located in the Town of Varick. The farm operation also includes a 2,200-head hog nursery facility in the Town, which is managed by Melody Swartley. The Swartleys indicated that they have considered expanding their farm operation, yet cannot do so due to the moratorium prohibiting the new construction of structures to be used as concentrated animal feeding operations.
8. On April 3, 2001, the Department received a request from John and Christine Saeli to review the impact of the moratoria on their farm operation. The Saelis operate a 20-head cow, cow-calf beef operation in the Town and cash crop approximately 600 acres, of which they own 500 acres and rent 100 acres. The Saelis indicated that about 75% of their acreage has been converted to organic production and their operation is certified by the Northeast Organic Farming Association (NOFA). The Saelis purchase composted poultry manure for their organic production and would like to start up a hog confinement operation with a manure composter to have a ready source of composted manure for use in their organic production. The Saelis stated that they had discussions with various parties about starting up such an operation, including obtaining grant money for a composting facility, and even signed a letter of intent. However, when the parties heard about the Town's moratorium, the project ended.

9. The DEC's General Permit for CAFOs became effective on July 1, 1999. All existing CAFOs within the State were required to file a Notice of Intent with the DEC by January 1, 2000. The State's CAFO General Permit establishes three basic tiers for compliance. All Animal Feeding Operations (AFOs) with 1,000 animal units or more are CAFOs. AFOs with greater than 300 animal units and less than 1,000 animal units that discharge to surface waters either through a man-made ditch, flushing system, or other similar man made device or directly into surface waters are CAFOs. An AFO may also be designated as a CAFO if it is found to be a significant contributor of pollution to surface waters. AFOs of less than 300 animal units are not CAFOs unless DEC conducts an on site inspection and determines that they are to be regulated under the permit program. The Town's definition of CAFO differs from the State standard insofar as it applies to operations with only 250 animal units, regardless of the potential to discharge.
10. CAFO farms are required to have a plan prepared according to the NRCS Conservation Practice "Waste Management System No. 312-NY" for the proper management of liquid and solid waste as a condition of the DEC CAFO General Permit. The plan will include other NRCS practice standards needed to address resource concerns, such as "Waste Storage Facility NY313" and "Nutrient Management (Supplement) NY590."
11. The DEC's permitting process for CAFOs addresses public health and safety issues related to water pollution. The Department believes that the thresholds and standards established by DEC for the CAFO permit are appropriate.
12. On April 5, 2001, Kim Blot sent a letter to Town Supervisor Hayssen and advised him that the Town's first moratorium, which prohibited the construction of concentrated animal feeding operations until the NYS DEC had implemented a SPDES permit, appeared to have ended by operation of law. Mr. Blot also informed Mr. Hayssen that the Department had determined that the Town's second moratorium unreasonably restricts farm operations within Seneca County Agricultural District Nos. 1 and 8, including the Swartley Farm and the Saeli Farm, by prohibiting the new construction of structures to be used as concentrated animal feeding operations. The second moratorium directed the Town Building Inspector not to issue any building permits for the new construction of structures used as confined animal feeding operations until such time that the Town of Varick Planning Board has had an opportunity to review the health hazards associated with such facilities and report its findings to the Town Board for possible amendments to the Town's Zoning Ordinance. Mr. Blot explained that the moratorium prevents start-up farms from establishing operations and prevents existing farms from expanding their

operations. The Swartley Farm is prohibited from constructing the structures necessary to expand its hog nursery operation. The Saeli Farm is prevented from starting up a hog confinement operation to expand their farm operation and obtain a ready source of composted manure for their organic farming operation. Thus, each of these farms' ability to manage the farm operation effectively and efficiently is adversely affected and their production options are restricted, which could affect the economic viability of the farms.

13. By Mr. Blot's April 5, 2001 letter, the Department renewed its request that the Town repeal the second moratorium to allow building permits to be issued for the construction of new structures used as concentrated animal feeding operations (CAFOs) within a county adopted, State certified, agricultural district. The Department requested that corrective action be taken within the next 30 days and that it be informed as to how the Town intends to proceed and the approximate time frame required for doing so.
14. On May 18, 2001, Mr. Blot received a letter from Town Attorney Patrick Morrell. Mr. Morrell stated that "it appears that the first moratorium that prohibited construction until the NYS DEC had implemented a SPDES permit has terminated by operation of law." He indicated that the second moratorium is currently in effect. Mr. Morrell stated that the 250 animal unit threshold, as specified by the moratorium, was chosen to protect the Town against a situation where building plans showing a capacity under the stated threshold could actually house animals in excess of that capacity. He stated that the lower threshold was used because of the close proximity of two lakes and the large number of Varick residents that rely upon them for both recreation and consumption. He concluded that the "...moratorium that remains in effect is reasonable." Mr. Morrell stated that the Agricultural Committee has submitted its findings to the Varick Planning Board, yet the Varick Planning Board has not submitted a report to the Town Board on the potential health risks associated with CAFOs. While Mr. Morrell indicated a general concern with water quality based upon the proximity of the Town to two lakes, he did not provide any evidence to the Department showing that a threat to the public health or safety exists.
15. The Town's Moratorium II, as amended in 1998, directs the Town Building Inspector not to issue any building permits for new construction of structures to be used as concentrated animal feeding operations "...until the Town of Varick Planning Board has had *the opportunity* to review the health hazards which may be associated with them and to report their findings to the Town Board relative to any possible amendments of the Town Zoning Ordinance." (Emphasis added) The Town Planning Board has had almost three years to review the health hazards which may

be associated with concentrated animal feeding operations, yet it has not reported its findings, if any, to the Town Board. The purpose for the moratoria, as expressed by the Town's Attorney, was to "fill the void" until the NYS DEC's SPDES General Permit for CAFOs was in effect. The DEC CAFO General Permit went into effect in July 1999.

CONCLUSIONS

Based upon the above findings, I conclude the following:

1. The Town of Varick's moratoria unreasonably restrict farm operations, including the Swartley Farm and the Saeli Farm, within Seneca County Agricultural District Numbers 1 and 8 by prohibiting the new construction of structures to be used as concentrated animal feeding operations, as defined by the Town, within a county adopted, State certified agricultural district. The moratorium on the construction of new structures used as concentrated animal feeding operations until the DEC has implemented a State Pollution Discharge Elimination System (SPDES) permit system (Moratorium I) terminated by operation of law, effective July 1999, because the NYS DEC permitting system is in effect. Town Attorney Patrick Morrell acknowledges that the moratorium has terminated by operation of law.
2. The moratorium remaining in effect unreasonably restricts farm operations within a county adopted, State certified, agricultural district because it applies to operations with only 250 animal units, regardless of the potential to discharge into surface waters.
3. The Town's moratoria have been in effect since August 4, 1998. The Town has not taken any action since the adoption of these moratoria to address the concerns which it alleges justified the adoption of the moratoria. The Town has expressed general concerns about the potential impact of concentrated animal feeding operations on water quality within the Town as well as the potential impact on Seneca and Cayuga Lakes. The Town Planning Board also resolved that concentrated animal feeding operations present a potential risk to health, safety and environmental concerns. However, the Town has not provided the Department with any documentation or other evidence which substantiates those concerns or which shows that the construction or expansion of structures to be used as concentrated animal feeding operations threatens the public health or safety.
4. If the Town wishes to regulate DEC CAFO farms, a requirement that a DEC regulated and permitted activity also obtain a locally administered permit would not appear unreasonable if the local permit requirements did not exceed the State

standard, applications were timely considered and without substantial fees or costs. A local law which required CAFO farms to submit copies of their permit application and permit to the locality; make the permit information available for inspection; and to keep the locality updated on changes in permit status, would be reasonable. Also, to the extent permitted by State and federal law, a local law could adopt the State standard and include a local enforcement mechanism. However, the State does not generally require CAFO permits for smaller farms which have less than 300 animal units.

DETERMINATION AND ORDER

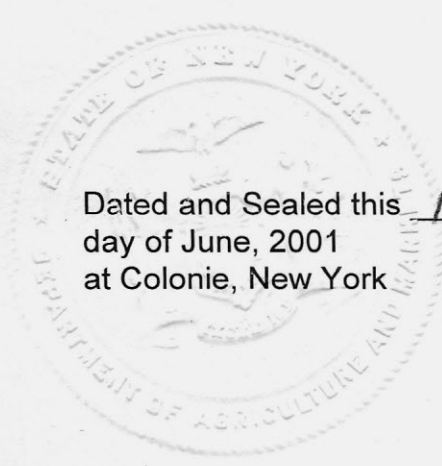
Now, therefore, in consideration of the above-stated findings and conclusions, it is hereby determined that the Town of Varick has violated § 305-a, subd. 1 of the AML, and it is hereby

ORDERED, pursuant to the provisions of § 36 of the AML, that the Town of Varick comply with the provisions of AML § 305-a, subd. 1 by processing any applications for building permits for new construction of structures to be used as concentrated animal feeding operations within a State certified agricultural district and by allowing the Town Building Inspector to issue building permits for such structures which meet applicable permit criteria.

This Order shall take effect immediately upon service of a certified copy thereof on the Town of Varick, by mail to Robert Hayssen, Supervisor, Town of Varick, 4782 Route 96, Romulus, New York, 14541.



Nathan L. Rudgers
Commissioner of
Agriculture and Markets



Dated and Sealed this 19th
day of June, 2001
at Colonie, New York