

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

In the Matter of Compelling Compliance with the Provisions of Agriculture and Markets Law §305-a, Subdivision 1 by	:	
	:	
	:	DETERMINATION
	:	AND
The Village of Lacona	:	ORDER
P.O. Box 217	:	
Lacona, New York	:	
	:	

PRELIMINARY STATEMENT

In August 2005, Timothy and Renee Alford requested that the Department of Agriculture and Markets ("Department") review the Village of Lacona's Local Law #3 of 2002 with respect to the operation of their dairy farm on land located within Oswego County Agricultural District Number 2. The Department investigated to determine whether the Village administered its Local Law in a manner consistent with the provisions of Agriculture and Markets Law (AML) §305-a, subd.1. AML §305-a, subd. 1.a. mandates that when exercising their powers to enact and administer comprehensive plans and local laws, ordinances, rules or regulations, local governments must do so in a manner as may realize the policy and goals of Agriculture and Markets Law Article 25-AA. The statute further provides that local governments "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."

The Department reviewed several drafts of Local Law #3 of 2002 prior to its adoption; as well as various documents and correspondence received from the Village's Attorney. The Department also interviewed the farm owner, conducted a site visit, met with Village representatives, the NYS Department of Health, and the NYS Department of Environmental Conservation and provided the Village with information regarding its responsibilities under AML §305-a. Based upon the relevant facts and information gathered, I hereby make the following findings and conclusions which support a Determination that the Village of Lacona has violated AML §305-a, subd.1 and an Order compelling compliance with such law.

FINDINGS

1. The Village of Lacona enacted Local Law #4 of 2000 which prohibited the landspreading of liquid manure in the Village. The Commissioner of Agriculture and Markets issued a Determination and Order to the Village on September 12,

2001, ordering that it comply with the provisions of AML §305-a, subd. 1 by allowing the land application of liquid manure on farm operations located within a State certified agricultural district. Among other things, the Determination and Order informed the Village that if it wished to regulate the land application of liquid manure, a requirement that a DEC regulated and permitted activity also be subject to a locally administered permit would not be unreasonably restrictive if the local permit requirements did not exceed the State standard, applications were timely considered and issued without substantial fees or costs. The Village was also informed that a local law requiring CAFO farms to submit copies of their permit application and permit to the locality, make permit information available for inspection, and to keep the locality updated on changes in the permit status would be reasonable and that, to the extent permitted by State and federal law, a local law could adopt the State standard and include an enforcement mechanism.

2. On October 15, 2001 Richard J. Brickwedde, Attorney for the Village of Lacona, submitted to the Department a copy of a USGS study, *Determination of the Contributing Area to Six Municipal Groundwater Supplies in the Tug Hill Glacier Aquifer of Northern New York, with Emphasis on the Lacona-Sandy Creek Well Field* (Water Resources Investigation Report 90-4145), which he argued supported the Village's position that the spreading of liquid manure in the recharge area would threaten the Village's water supply. The Department provided copies of the report to the New York State Department of Health (DOH) and the NYS Department of Environmental Conservation (DEC) and requested their views on it. In a letter to the Department dated November 9, 2001, Ronald Entringer, P.E., Chief, Program Implementation Section of the Bureau of Public Water Supply Protection at the DOH, concluded that properly managed manure application does not present an imminent threat to the Village's water supply. Mr. Entringer also concluded that the Village has not demonstrated that a farm operation applying nutrients according to the existing Concentrated Animal Feeding Operation (CAFO) regulations would result in contamination of the water supply and, therefore, a complete prohibition of liquid manure application is not necessary to protect the water supply. Mr. Entringer further stated that the estimated travel time for the ground water "exceeds the infective period of most bacteria and protozoa." The DEC did not provide comments concerning the report.
3. On November 28, 2001, Matthew Brower, Agricultural Resource Specialist in the Department's Division of Agricultural Protection and Development Services, and John Rusnica, Associate Attorney in the Department's Counsel's Office, met with representatives from the Village of Lacona and the DOH staff. Joe DiMura, DEC CAFO Permit Administrator, participated by telephone. Mr. Brickwedde reiterated his contention that the USGS study supported the need for a ban on the land application of liquid manure in the recharge area of the Village of Lacona wells. While agreeing that the study shows that the area is hydrologically sensitive, Department representatives explained the basis for

concluding that the Village had not demonstrated that the existing CAFO standards are not adequate to protect the water supply or that a ban on liquid manure application in the recharge area is necessary to protect public health or safety. Mr. Brower, who is a certified nutrient management planner, discussed with the group the Department's *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)*. Mr. Brower explained nutrient management planning in relation to the DEC CAFO permit process and the factors that the Department considers in determining whether a local law is unreasonably restrictive under AML §305-a, subd.1.

4. Mr. Brower provided the Village with suggestions for a local law that would address its concerns while complying with AML §305-a. Mr. Brower explained that a local law that mirrors DEC's requirements for CAFO permits would not be unreasonably restrictive. The local law could require all CAFOs to submit copies of their permit application and permit to the locality; make permit information available for inspection; and to keep the locality updated on changes in the permit status. To the extent permitted by State and federal law, a local law could adopt the State standard and include an enforcement mechanism including on-site inspection and review of the plan as the result of a complaint.
5. On December 10, 2001 the Village rescinded the prohibition on the land spreading of liquid manure and thereafter informed the Department that it decided to draft a local CAFO law. Department staff provided Mr. Brickwedde with information, including aerial photographs of the water supply well area and information on the CAFO General Permit and NRCS standards, to assist the Village with the drafting of a local law that would not conflict with AML §305-a, subd. 1.
6. On December 17, 2001, Kim Blot, the then Director of the Division of Agricultural Protection and Development Services, informed Mr. Brickwedde by letter that, "[b]ased on information provided by the Village and comments received from the New York State Department of Health, the Department believes that the thresholds and standards established for the CAFO permit are appropriate to protect the Village's water supply." Mr. Blot informed the Village that if it was able to demonstrate that the DEC General Permit requirements for CAFOs and the NRCS Waste Management System No. 312-NY standards that must be met by CAFOs are not adequate to protect the water supply, the Department would consider such information as part of the review.
7. By letter dated January 7, 2002, Mr. Blot outlined to Mr. Brickwedde the specific requirements of the CAFO General Permit including best management practices for manure application, implementation of necessary erosion control practices, determining the nitrate leaching potential for each field, regular soil testing, and nutrient balancing for specific crops.

8. On March 12, 2002, Mr. Brickwedde provided the Department with a copy of a proposed local law to protect the public and private drinking water sources for the Village of Lacona. The Department responded by letter on April 2, 2002. Mr. Blot restated that, while the Village could have a local law for CAFO farms that did not exceed the State standards for such operations, it could not require non-CAFOs to comply with standards and requirements applicable to CAFO farms. He explained that the proposed local law "exceeded current State standards because, unlike the DEC General Permit, it applies to all farms and it imposes standards that exceed the NRCS Waste Management System No. 312-NY standard and Cornell Cooperative Extension Guidelines." Mr. Blot also noted that the Village had not provided any information demonstrating that the existing DEC Permit requirements were not adequate to protect the Village's water supply.
9. The Department had concluded to be unreasonably restrictive a requirement that all people engaging in nutrient management activities submit to the Village a copy of a nutrient management plan specifying all nutrients to be applied; a requirement that the nutrient management plan be "developed by a qualified Planner who is also qualified or assisted by a person qualified in groundwater hydrogeology and soils"; and a requirement that the farmer pay a fee, in an unspecified amount, to the Village to obtain a permit. The Village was informed that the State standards do not require farmers to submit nutrient management plans to State agencies or municipalities, and that the State does not require nutrient management planners to be "qualified or assisted by a person qualified in groundwater hydrogeology and soils." It was also noted that the local law does not provide minimum groundwater hydrogeology qualifications that must be met and the Village had not demonstrated that the existing State requirements for nutrient management planners are not adequate. Mr. Blot indicated in his April 2, 2002 letter that since CAFO farmers pay a significant amount of money to have a nutrient management plan prepared, it would be unreasonably restrictive for them to have to also provide funds to the Village to hire a certified planner, an attorney, geologist, and other consultants to review the plan.
10. In a letter dated April 12, 2002, the New York State DOH provided comments to the Department concerning the Village's draft local law. Michael Burke, P.E., Director of the Bureau of Public Water Supply Protection, stated that the DEC CAFO permit requirements appear adequate to protect groundwater quality for the Village of Lacona water supply. Mr. Burke also indicated that "severely mismanaged" farm operations "within the contributory area of the District's wells" could result in nitrate contamination of the wells. To address this, Mr. Burke stated that a "local law could require nutrient management for Nitrogen as a best management practice." Mr. Burke also stated that "[p]esticide contamination is a more remote possibility, but could be covered by reference to Department of Environmental Conservation regulation."

11. During the Village's public hearing on L.L. #3 of 2002, Mr. Brickwedde explained with respect to the adoption of the L.L. that "Basically we're talking about a nitrate issue, the potential for nitrates contaminating the water supply in this area east of Route 22 is the concern that the public health people have and the village has with regard to the potential contamination of the village well field." (Page 7 of transcript of public hearing, dated April 8, 2002.)
12. By letter dated May 6, 2002, Mr. Blot provided Department comments on a revised proposed local law that was received from Mr. Brickwedde on April 24, 2002. Based on the information provided by the Village and the DOH, nitrate contamination of the wells due to leaching appeared to be the primary concern associated with the Village's water supply. In light of that, Mr. Blot indicated that a local law requiring "submission and review of some basic nutrient management information from the farm operation would be adequate to assure the Village that the nutrient management is consistent with the NRCS standards and Cornell Guidelines for nutrient management for nitrogen." He also noted that the revised proposal did not address many Department concerns and that requiring non-CAFO farms to pay the Village \$250 to develop a nutrient management plan for the property in question was unreasonably restrictive, because these services were available to farmers free through the Soil and Water Conservation District and Cornell Cooperative Extension. Mr. Blot advised the Village that the local law appeared to unreasonably restrict farm operations within an agricultural district and offered Department staff assistance in the drafting of amendments to meet the needs of the Village consistent with AML §305-a.
13. By letter of May 31, 2002, Mr. Brickwedde responded to Mr. Blot's May 6th letter and provided another revised draft of the proposed local law as well as several documents concerning nutrient and pathogen management. In his response, Mr. Brickwedde stated that in addition to concerns about nitrate contamination, the Village was also concerned about soil erosion and surface runoff. He also stated that the \$250 application fee would not cover the Village's expenses related to the nutrient management plan review. Mr. Brickwedde did not specify the type of contamination expected to occur as a result of soil erosion and surface runoff.
14. On June 12, 2002 Mr. Brower visited the property in question (land owned by Wanda Groff located on Oswego County Route 22) to observe the land use and evaluate surface runoff potential. Mr. Brower walked the fields being used for crop production and observed the small tributary adjacent to the crop fields.
15. On June 28, 2002 Department staff again met with Village representatives, DOH staff, and Todd Miller from the United States Geological Survey to discuss the proposed local law. Mr. Miller provided an explanation of the ground water flow paths and the contributing area for the Village water supply. Mr. Brower provided information on the leaching potential of the soils in the subject agricultural area and provided details of his on-site investigation including an explanation of the topography, surface flows and vegetative cover near the small tributary on the

edge of the fields. Mr. Brower explained that surface runoff and erosion were not an issue because of the minimal slopes and natural vegetative buffers along the tributary. The Department and the DOH concluded that the primary concern is nitrate contamination due to leaching. As a result, both agencies agreed that it was not objectionable for the Village to require both CAFOs and non-CAFOs to submit for review information concerning the source, method, and timing of nitrogen application to the agricultural fields within the Village limits that are within the contributing area to the municipal well fields.

16. The Department's conclusions from the June 28th meeting and comments on the Village's May 31, 2002 draft of a proposed local law were summarized by Mr. Blot in a July 3, 2002 letter to Mr. Brickwedde. Mr. Blot expressed the Department's positions that (1) the local law should not contain any provisions regulating pesticides as the Environmental Conservation Law (ECL) pre-empts municipalities from doing so; (2) any regulations relative to runoff and erosion control should be removed as the risk of runoff and erosion is minimal for the subject land (based on Mr. Brower's site visit) and surface water pollution isn't an issue; (3) the requirement concerning plans being developed by planners "qualified or assisted by a person qualified in hydrogeology and soils" should be removed for reasons provided in prior Department letters to the Village; and (4) while a minimal fee for the Village planner to review a plan prepared by another planner or consultant is not unreasonably restrictive, the annual fee of \$250 is excessive since the Village's planner has limited work in such cases. In conclusion, Mr. Blot stated that the proposed local law still appeared to unreasonably restrict farm operations within an agricultural district.
17. In a letter dated July 3, 2002, Department Associate Attorney John Rusnica informed Mr. Brickwedde that the Village is pre-empted from regulating pesticides by ECL §33-0303(1), which states that "Jurisdiction in all matters pertaining to the distribution, sale, use and transportation of pesticides, is by this article vested exclusively in the commissioner" of DEC. Mr. Brickwedde was given citations to an Attorney General Opinion as well as case law on this issue.
18. On July 23, 2002 Mr. Brickwedde provided the Department with a newly revised draft of the proposed local law and advised that a public hearing on the proposed law was scheduled for August 12, 2002. In a letter to Mr. Brickwedde dated August 6, 2002, Mr. Blot reiterated the Department's concerns mentioned above and noted that references to "nutrients" in the proposed law should be changed to "nitrogen" as the Village had not shown a need to regulate other nutrients (e.g., phosphorous and potassium).
19. On August 9, 2002 Mr. Brickwedde provided the Department with another revised draft of the proposed local law which he indicated would be the subject of a public hearing on August 12, 2002. While this version only regulated nitrogen application, none of the other previously expressed Department concerns were addressed. On August 12, 2002, Mr. Brickwedde requested any comments that

the Department might have with respect to the changes made. On that same day, comments were provided concerning the land area regulated by the proposed law, pesticide pre-emption and notice requirements under the proposed law.

20. On October 25, 2002 Mr. Brickwedde provided the Department with a copy of Local Law #3 of 2002 which was filed with the New York Department of State on September 19, 2002. The law regulated all nutrient application, and not just nitrogen as set forth in the draft provided to the Department on August 9, 2002, and did not address the other concerns identified by the Department in previous letters and meetings with the Village.
21. By letter dated October 30, 2002, Mr. Brickwedde was informed of the Department's conclusion that Local Law #3 of 2002 appeared, on its face, to unreasonably restrict farm operations within an agricultural district. Mr. Brickwedde was advised that if the Village "administers the previously identified provisions of concern in Local Law #3 of 2002 with respect to farm operations within an agricultural district, the Village may be in violation of AML §305-a. In that event, appropriate action to enforce the provisions of AML §305-a will be taken."
22. In a letter dated November 5, 2002, Mr. Brickwedde requested that the Department identify the provisions of the local law that were still a concern. He contended that the Village could review pesticide application records maintained by the farmer because such activity was not a regulation of the "distribution, sale, use and transportation of pesticides."
23. By letter dated December 16, 2002, Mr. Blot responded that the provision allowing the Village the right to review pesticide records conflicted with the Environmental Conservation Law. Mr. Blot also indicated that the regulation should apply to "nitrogen" only in light of DOH information that nitrogen, not other nutrients (e.g., phosphorous and potassium), is the nutrient of concern for the Village's water supply. Mr. Brickwedde was also told that a provision requiring field specific assessments of the potential for runoff should be eliminated, since the risk of runoff and erosion is minimal for the subject lands. Mr. Blot also stated that the requirement concerning plans being developed by planners "qualified or assisted by a person qualified in hydrogeology and soils" should be removed for reasons indicated in prior letters and meetings with the Village. Mr. Blot further noted that the Village's imposition of a \$250 fee for field application is excessive for farmers who have their own planner/consultant, resulting in limited work for the Village's planner in such cases.
24. By letter dated July 25, 2005, Peggy Manchester, Mayor for the Village of Lacona, informed Timothy Alford of the requirements of Local Law #3 of 2002, since he would be conducting "agricultural activities" on land within the Village of

Lacona recharge area for the municipal water system. She also requested that an application fee of \$250.00 be submitted to the Village.

25. On August 8, 2005 the Department received a request from Mr. Alford to review the Village of Lacona's Local Law #3 of 2002 for compliance with AML §305-a. Mr. Alford indicated that the local law was problematic because he has already paid to have a nutrient management plan prepared and he is operating according to the requirements in the CAFO General Permit. Mr. Alford also indicated that compliance with the provisions in the local law would be time consuming and would result in a "financial burden" for his operation.
26. In a letter dated August 9, 2005 William Kimball, who has succeeded Mr. Blot as the Director of the Department's Division of Agricultural Protection and Development Services, advised Mayor Manchester that the Department had received a request from Mr. Alford to review the local law. Mr. Kimball requested that the Village submit any information that they would like the Department to consider, "including any evidence it may have of a threat to the public health or safety presented by the Alford operation," as part of the review.
27. On October 31, 2005 the Department received a letter from Mr. Brickwedde responding to the Department's August 9 2005 letter to the Village. Mr. Brickwedde referenced the USGS Report 90-4145 which identifies the recharge area for the Village well field and indicated that Larry Rinaldi, a representative with the United States Environmental Protection Agency (EPA), informed him that the Tug Hill Glacial Aquifer would soon be designated as a Sole Source Aquifer. Mr. Brickwedde stated that the Village's nutrient management consultant "charges between \$55.00 and \$275.00 per hour to develop and/or review a nutrient management plan." He indicated that the Village had reviewed one plan since the law was enacted at a cost of \$962.50. Mr. Brickwedde also reiterated his argument that reviewing the farm's pesticide records should not be considered a regulation of the "distribution, sale, use or transportation of pesticides." Mr. Brickwedde did not indicate the significance of the pending Sole Source Aquifer designation nor provide any information relative to the purpose or need for the Village to regulate the application of all nutrients, as opposed to nitrogen only. He also did not offer any justification for the requirement that Mr. Alford's plan be developed by a planner "qualified or assisted by a person qualified in hydrogeology and soils."
28. By letter dated December 5, 2005, Department Attorney Rusnica informed Mr. Brickwedde that Mr. Rinaldi indicated to the Department that the Sole Source Aquifer designation means that EPA must assess the potential impacts to the water supply from any project receiving federal funds, including agricultural activities, located in the aquifer. (There is no federal funding involved with Mr. Alford's land application of manure and fertilizer. Thus, there would be no EPA review if there were such a designation, which as of March 8, 2006 Mr. Rinaldi confirmed there has not been in this case. However, as noted in paragraphs "2,"

"10," and "15" above, the DOH considered the impacts of land application of manure in the subject area and concluded that nitrogen is the nutrient of concern for the Village's water supply and that this could be addressed by requiring nutrient management for nitrogen as a best management practice.) Mr. Rusnica explained that since Mr. Alford needs to have a nutrient management plan for all of his fields, including those within the Village of Lacona, that the consultant hired by the Village would not have to prepare the plan. Rather, the consultant would only have to review the proposed nitrogen application rate, timing and method and such review could generally be accomplished in an hour.

29. Mr. Rusnica informed Mr. Brickwedde that the Department had concluded that the Village of Lacona's administration of Local Law #3 of 2002 to require the Alford farm operation to comply with provisions of the Local Law unreasonably restricts the Alford farm operation in violation of AML §305-a, subd. 1. He further noted that the Department had concluded that the Village had not demonstrated that the public health or safety is threatened by the Alford farm operation's application of liquid manure.
30. By the December 5, 2005 letter, Mr. Brickwedde was informed that, "[t]o comply with AML §305-a, subd. 1, the Village must not impose any such unreasonably restrictive requirements of L.L. #3 of 2002 on the Alford farm operation within Oswego County Agricultural District Number 2." The Village was asked to confirm within 20 days that it would not impose such requirements. While Mr. Brickwedde requested and received an extension of time to January 19, 2006 to respond, the Village has not replied to the Department's letter.
31. In a December 16, 2005 letter, Village of Lacona Mayor Manchester reiterated several issues that were previously raised by the Village's attorney and responded to by the Department. A response was sent to the Mayor accordingly, on January 20, 2006.

CONCLUSION

Based upon the above findings, I conclude the following:

1. The Village of Lacona's enactment and administration of Local Law #3 of 2002 unreasonably restricts farm operations, including the Alford farm operation, in Oswego County Agricultural District Number 2 to the extent that the Local Law: contains an inadequate definition of "Zone II-G"; fails to define the terms "aquifer contributing area" and "hydrologically sensitive areas"; requires information concerning harvested yields; regulates nutrients other than nitrogen; authorizes the Village to review pesticide records for land subject to the Local Law; requires field specific assessments of the potential for runoff; requires that manure and liquid manure be managed to minimize preferential flow paths; requires testing of phosphorous and potassium content; requires that commercial nitrogen fertilizers be applied within three days of planting of spring annual crops; provides that the Village

has sixty days from submission to act upon an application for field application of materials; requires that a plan for an applicant who is subject to state or federal CAFO regulation be developed by a planner who is also qualified or assisted by a person qualified in hydrogeology and soils; requires that persons with farmsteads or who propose to construct or operate a farmstead in Zone II-G pay for the Village's costs to hire an attorney, geologist, certified CAFO planner and other professional consultants in connection with the Village's review, consideration and approval or rejection of an application for a farmstead; and requires an annual application fee of \$250.00 for field application of materials.

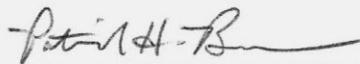
2. While expressing health and safety concerns generally, the Village has not shown that the public health or safety is threatened by the agricultural practices conducted by the Alford farm operation within the agricultural district.
3. A local law which regulates agricultural activities by requiring CAFOs and non-CAFOs to submit to the Village information concerning their nitrogen application practices within the recharge area would not be unreasonably restrictive.

DETERMINATION AND ORDER

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

ORDERED, pursuant to the provisions of §36 of the AML, that the Village of Lacona comply with the provisions of AML §305-a, subd. 1 by not applying Local Law #3 of 2002 to farm operations, including the Alford Farm, located within a State certified agricultural district, insofar as such law has been found to be unreasonably restrictive as set forth in the Findings and Conclusions herein.

This Order shall take effect immediately upon service of a certified copy thereof on the Village of Lacona, by first class mail to Hon. Peggy Manchester, Mayor, Village of Lacona, at P.O. Box 217, Lacona, New York 13083-0217.



Patrick H. Brennan
Commissioner of
Agriculture and Markets

Dated and Sealed this 21st
day of March, 2006
at Colonie, New York

