

**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(1) by**

**Town of Ellenburg
P.O. Box 22
Ellenburg Center, New York 12934**

**DETERMINATION
AND ORDER**

PRELIMINARY STATEMENT

In a letter dated July 30, 2015, 3L Farm requested that the Department of Agriculture and Markets ("Department") review the Town of Ellenburg's (the "Town") Zoning Law for compliance with Agriculture and Markets Law ("AML") §305-a(1) with respect to 3L Farm's proposed land application of *Fertilimer* on land used for crop production.

Department staff visited the farm, obtained information from 3L Farm, reviewed correspondence and accompanying materials submitted by the Town, and considered the Town's Zoning Law.

Based upon the facts ascertained by the Department during the course of its investigation and its analysis set forth below, the Department determined that the administration of the Town's Zoning Law unreasonably restricts the 3L Farm operation and that the Town failed to demonstrate that the public health or safety is threatened by 3L Farm's proposed land application of *Fertilimer* on land used for crop production within Clinton County Agricultural District No. 10.

BACKGROUND

On September 17, 2015, the Department advised the Town a request had been received from 3L Farm for a review of the Zoning Law for compliance with AML §305-a(1) in connection with 3L Farm's proposed land application of *Fertilimer* on land used for crop production within Clinton County Agricultural District No. 10.

Article 3 of the Town's Zoning Law prohibits "septage" in any zone, which is defined in Article 7 as "sludge (or derivatives of) biosolids." The land application of *Fertilimer* is banned by the Zoning Law as it falls within the Zoning Law's definition of septage.

On November 2, 2015, the Department visited 3L Farm's operation. Matthew Brower, Department Environmental Analyst, observed the farm, the proposed land application sites, and the surrounding area.

On or about October 2015, the Town sent a letter supporting the Zoning Law ban, referencing studies related to land application of biosolids, and contended that there has been inadequate testing to determine the risks associated with organic chemicals in biosolids.

In a letter dated March 9, 2016, the Department advised the Town that 3L Farm met the Department's standard for a farm operation under AML §305-a, evaluated the Town's stated

concerns and advised that the Zoning Law and its administration by the Town unreasonably restricts 3L Farm in possible violation of AML §305-a(1). The Department invited the Town to provide any documentation and other evidence that the public health or safety would be threatened by 3L Farm's land application of biosolids.

On July 5, 2016, in response to the Department's March 9, 2016 letter, the Town advised the Department of its belief that *Fertilimer* is insufficiently tested and that each load of sludge should be tested and a report created.

STANDARD OF REVIEW

AML §305-a(1)(a) mandates that when exercising their powers to enact and administer comprehensive plans and local laws, ordinances, rules or regulations, local governments do so in a manner as may realize the policy and goals of AML 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."

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. 3L Farm is a 525-cow dairy farm, with an additional 500 heifers, which grows corn and hay on 900 acres owned and approximately 500 acres of rented land.
2. 3L Farm is a "farm operation" for purposes of AML §305-a(1).
3. 3L Farm proposes to apply *Fertilimer* to three parcels consisting of approximately 154 acres of land located in the Town of Ellenburg, within Clinton County Agricultural District No. 10.
4. Article 3 of the Zoning Law prohibits septage in any zone. Zoning Law Article 7 defines "septage" as "[t]he contents of a septic tank, cesspool, dry well or other individual sewage treatment facility which received wastes, sewage, sludge (or derivatives of) biosolids, etc...."
5. Zoning Law Article 3 bars the application of *Fertilimer* as proposed by 3L Farm.
6. The Environmental Protection Agency (EPA) and Department of Environmental Conservation (DEC) regulations recognize two levels of pathogen reduction, Class A and Class B. Class A processes have been shown to reduce pathogens to below detectable levels.
7. *Fertilimer* is a Class A biosolid.
8. The DEC does not require a permit for land application of Class A biosolids.
9. The Town's prohibition on land application of *Fertilimer* by farm operations located within an agricultural district, including 3L Farm, is more restrictive than the DEC standards and regulations.

10. The Town raised only general concerns about the risk to public health and safety and inadequate testing of biosolids. Although given the opportunity to do so, the Town did not provide the Department with any correspondence, documentation or other information showing any public health or safety threat relating to the proposed land application of *Fertilimer* by 3L Farm.
11. The EPA reviews sewage sludge regulations every two years and has not identified additional toxic pollutants in biosolids for regulation under the Clean Water Act.
12. EPA continually researches and assesses biosolids sources and has concluded that the risk potential associated with "unregulated contaminants" is low.
13. Zoning Law Article 3, as administered by the Town, unreasonably restricts 3L Farm's proposed application of *Fertilimer* in violation of AML §305-a(1).
14. Exhibit A, attached hereto, is a list of relevant documents considered by the Department in connection with this Determination and Order.

DETERMINATION AND ORDER

Now, therefore, in consideration of the above-stated findings, it is hereby determined that the Town of Ellenburg violated AML §305-a(1), and it is hereby

ORDERED, pursuant to the provisions of AML §36 that the Town of Ellenburg comply with the provisions of AML §305-a(1) by permitting 3L Farm to land apply *Fertilimer* biosolids; and it is further

ORDERED that this Order shall take effect immediately upon service of a certified copy thereof on the Town of Ellenburg Supervisor, by mail to Hon. Jason Dezan, Supervisor, Town of Ellenburg, P.O. Box 22, Ellenburg Center, NY, 12934; and it is further

ORDERED that Town of Ellenburg shall notify the Department within ten business days of the service of this Determination and Order whether the Order is accepted and will be obeyed.



RICHARD A. BALL, Commissioner of Agriculture
and Markets of the State of New York

Dated and Sealed this 14th
Day of December, 2016 at
Colonie, New York

Town of Ellenburg Order

List of Relevant Documents Considered by the Department

1. July 30, 2015 letter from Thomas M. Murnane, Attorney for Gary Lashway and 3L Farm, to the Department of Agriculture and Markets (1 page);
2. New York State Department of Agriculture and Markets Law (AML) Section 305-a Review Application submitted by Gary Lashway, dated July 30, 2015 (2 pages);
3. September 17, 2016 letter from Michael Latham, Department Director of the Division of Land and Water Resources (1 Page);
4. Town of Ellenburg Zoning Law (43 pages);
5. Letter received October 16, 2015 from David Leonard, former Supervisor for the Town of Ellenburg (6 pages);
6. September 21, 2015 letter from Jeffrey C. Brinck, Division Manager – New York Casella Organics, to David Leonard (2 pages);
7. September 23, 2015 letter from David Leonard to Jeffrey Brinck (1 page);
8. Biosolids Applied to Land Advancing Standards and Practices, Cornell Waste Management Institute (20 pages);
9. March 9, 2016 letter from Michael Latham to David Leonard (4 pages);
10. March 21, 2016 email from Jason Dezan, Supervisor for the Town of Ellenburg, to Matthew Brower, Associate Environmental Analyst for the Department of Agriculture and Markets (1 page);
11. July 5, 2016 email from Jason Dezan to Matthew Brower (2 pages);
12. August 17, 2016 letter from Michael Latham to Jason Dezan (2 page);
13. NYS DEC Part 360-4 regulations (27 pages);
14. Department's Guidelines entitled Review of Local Laws Affecting Nutrient Management Practices (i.e. Land Application of Animal Waste, Recognizable and Non-recognizable Food Waste, Sewage Sludge, Animal Waste Storage/Management), dated 4-2-15 (4 pages).
15. NYSDOH letter from Commissioner Zucker, dated June 25, 2015 (2 pages).
16. Fertilimer product information Casella Organics website.