

**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 Wheatfield
2800 Church Road
Wheatfield, New York 14120**

**AMENDED
DETERMINATION
AND ORDER**

PRELIMINARY STATEMENT

In a letter dated September 24, 2014, David Milleville, owner of Milleville Brothers Farms ("Milleville Brothers"), requested that the Department of Agriculture and Markets ("Department") review the Town of Wheatfield's Local Law No. 3-2014 and Local Law No. 4-2014 for compliance with Agriculture and Markets Law ("AML") §305-a (1) with respect to Milleville Brothers' proposed land application of "*Equate*" on land used for field crop production.

Department staff visited the farm operation; obtained information from David Milleville; reviewed correspondence together with accompanying materials submitted by Steven J. Ricca, Esq., legal counsel for the Town of Wheatfield, and Robert B. Cliffe, Town Supervisor for the Town of Wheatfield; consulted Sally Rowland, Division of Materials Management Environmental Engineer for the New York State Department of Environmental Conservation ("DEC"); held a telephone conference call with Department representatives, Town officials and its technical experts, and representatives of the DEC; and considered the Town of Wheatfield's Biosolids Management Law.

Based upon the facts ascertained by the Department during the course of its investigation and upon its analysis set forth below, the Department determined that the administration of the Town of Wheatfield's Local Laws No. 3-2014 and No. 4-2014 unreasonably restricts the Milleville Brothers farm operation and that the Town failed to demonstrate that the public health or safety is threatened by the operation's land application of *Equate* on land used for crop production within Niagara County Agricultural District No. 7.

BACKGROUND

The Town of Wheatfield's Local Law No. 3-2014, adopted on July 28, 2014, amends Chapter 161 of the Town Code to add a new Article III, termed the "Biosolids Management Law of the Town of Wheatfield." The Biosolids Management Law prohibits, in pertinent part, "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." Local Law No. 4-2014, adopted on August 11, 2014, provides a penalty system for violations of the Biosolids Management Law and establishes a legal non-conforming use for those activities inconsistent with the Biosolids Management Law which have previously been approved or issued a permit by the Town, subject to regulation.

On October 7, 2014, the Department advised the Town Board that it had received a copy of the Town's "Determination of Non-Significance" completed pursuant to the State Environmental Quality Review Act in relation to Local Law No. 3-2014 and Local Law No. 4-2014, and that this local law may unreasonably regulate a farm operation within a county-adopted, State-certified Agricultural District.

On October 21, 2014, the Department sent a letter to Town of Wheatfield Supervisor Robert B. Cliffe, informing him that the Department had received a request from David Milleville for a review of Chapter 161 of the Town Code for compliance with AML §305-a(1) in connection with Milleville Brothers' proposed land application of *Equate* on land used for crop production within Niagara County Agricultural District No. 7. The Department requested any documentation that it would like to be considered in the review.

By letter dated November 19, 2014, the Town provided information from its environmental consultant, Matrix Environmental Technologies ("Matrix"), which concluded that over 99% of land in the Town of Wheatfield is "unsuitable and unsafe for land application of biosolids" and that DEC's existing Part 360 regulations are inadequate protection.

Matthew Brower, Department Environmental Analyst, visited Milleville Brothers farm operation on February 19, 2015. Mr. Brower observed the farm, the proposed land application site and the surrounding area. The Department also consulted with Sally Rowland and other DEC representatives for those matters for which DEC staff have technical expertise.

On May 1, 2015, the Department sent Mr. Cliffe a letter which determined that the farm meets the Department's standard for AML §305-a protection. The Department addressed Mr. Cliffe's concerns and advised that the Town Biosolids Management Law and its administration by the Town unreasonably restrict the farm operation in possible violation of AML §305-a(1). The Department suggested reasonable alternatives to the Town's current blanket prohibition of all biosolids. The Department invited the Town to provide any documentation and other evidence that the public health or safety is threatened by the farm operation's land application of biosolids.

By letter dated December 21, 2015, Steven J. Ricca, Esq. forwarded materials produced by Dr. Murray McBride. Mr. Ricca, referencing those materials, argued that applying sewage sludge to farm land poses an unacceptable risk to the public health and safety and the continued viability of farm land.

On June 9, 2016, the Department responded to the Town's concerns raised in all previous correspondence and notified Mr. Ricca that it had completed its review, finding that Local Laws No. 3-2014 and No. 4-2014 unreasonably restrict the Milleville Brothers farm operation in violation of AML §305-a (1), and that the Town had 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.

The Town provided additional information following the Department's June 9, 2016 letter, which the Department reviewed and found to provide no basis to alter its Findings.

STANDARD OF REVIEW

AML §305-a(1)(a) mandates that when local governments enact and administer comprehensive plans and local laws, ordinances, rules or regulations, they must 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. Milleville Brothers 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.
2. Milleville Brothers is a "farm operation" for purposes of AML §305-a(1).
3. Milleville Brothers proposes to apply *Equate* on one (owned) parcel consisting of approximately 37.6 acres of land located in the Town of Wheatfield, within Niagara County Agricultural District No. 7. The Department supports a farm operation's lawful use of biosolids as part of its farm operation and there is no minimum land application acreage threshold for AML §305-a protection.
4. *Equate* is the byproduct of anaerobic digestion of food waste and sewage sludge, which the Department has previously determined is a beneficial biological process that produces valuable soil amendments for crop production.
5. The Town of Wheatfield Local Law No. 3-2014 prohibits the land application of biosolids at any location within the Town of Wheatfield.
6. The federal regulation 40 CFR Part 503, *Standards for the Use or Disposal of Sewage Sludge*, establishes standards, which consist of general requirements, pollutant limits, management practices, and operational standards, for the final use or disposal of biosolids generated during the treatment of domestic sewage in a treatment works. Standards are included for biosolids applied to agricultural land as a fertilizer. Also included are pathogen and vector attraction reduction requirements for biosolids. The rule applies to any person who land applies biosolids. States can have regulations that are more stringent than the federal rules.
7. DEC's Part 360-4 regulations are more restrictive than federal regulations and minimize the potential for adverse impacts from land application of nutrients. Part 360 regulations contain protective measures to minimize public exposure to pathogens including larger separation buffers from surface water for application than the federal regulations and many more site management practices including, in part, slope restrictions, soil type restrictions, incorporation requirements and separation to groundwater and bedrock requirements.

8. DEC's Part 360-4 regulations minimize risks of groundwater contamination and DEC conducts site-specific reviews when issuing permits, including the review of the depth to groundwater for each field proposed for land application of *Equate* and other like biosolids.
9. The Department considers the standards and permitting requirements under the DEC's regulations in evaluating whether restrictions on agricultural land use and nutrient management practices are unreasonably restrictive in violation of AML §305-a.
10. Based upon the lack of evidence that the biosolids land application regulations are inadequate for the protection of public health, New York State Department of Health has concluded that additional health studies are not necessary.
11. EPA, which continually researches and assesses biosolids sources, has concluded that the risk potential associated with "unregulated contaminants" is low.
12. Although given the opportunity to do so, the Town of Wheatfield did not provide the Department with any correspondence, documentation or other information showing any public health or safety threat relating to the land application of biosolids by the farm operation. The Town submitted articles referencing studies evaluating impacts under dissimilar circumstances (e.g., impacts to animals grazing on land where biosolids were surface-applied).
13. Milleville Brothers proposes to inject biosolids for crop production in compliance with DEC and EPA requirements and will not apply the biosolids by disking into the soil. Injection reduces the potential for odor and runoff as well as minimizes the risk of bioaerosols leaving the application site. There will be no animals grazing on the land.
14. Local Law No. 3-2014 and Local Law 4-2014, as administered by the Town, unreasonably restrict Milleville Brothers' proposed application of *Equate* in violation of AML §305-a(1).
15. Exhibit A, attached hereto, is a list of relevant documents considered by the Department in connection with this Determination and Order.

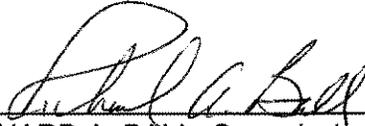
DETERMINATION AND ORDER

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

ORDERED, pursuant to the provisions of AML §36, that the Town of Wheatfield comply with the provisions of AML §305-a(1) by permitting Milleville Brothers to land apply *Equate* biosolids on land which has received DEC permit approval for land application of biosolids; and it is further

ORDERED that this Order shall take effect immediately upon service of a certified copy thereof on the Town of Wheatfield Supervisor, by mail to Hon. Robert B. Cliffe, Supervisor, Town of Wheatfield, 2800 Church Road, Wheatfield, New York 14120; and it is further

ORDERED that the Town of Wheatfield 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 22nd
Day of May, 2017 at, Albany, New York

1. New York State Department of Agriculture and Markets ("Department") Section 305-a Review Application submitted by David Milleville on behalf of Milleville Farms, dated September 23, 2014 with cover letter (3 pages);
2. Letter dated October 7, 2014 from Michael Latham, Department Director of the Division of Land and Water Resources, to the Wheatfield Town Board (1 page) with attachment entitled "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);
3. Town of Wheatfield Local Law 3-2014 (5 pages) and Local Law 4-2014 (2 pages);
4. Quasar Energy Group ("Quasar") Brochure entitled "Equate, Naturally Balanced NPK" (12 pages);
5. Quasar Presentation entitled "Progressive Agriculture, Energy Options for Ohio Agriculture" Dec-10-2013 (23 pages);
6. Letter dated October 21, 2014 from Michael Latham to Robert B. Cliffe, Town of Wheatfield Supervisor (3 pages);
7. Letter dated November 19, 2014 from Robert B. Cliffe to Michael Latham (5 pages) with the following attachments:
 - a. Enclosure 1: Notice of SEQRA Determination of Non-Significance issued in relation to Local Law Regulating Biosolids in the Town of Wheatfield (21 pages) with the Proposed Local Laws Nos. 3-2014 and 4-2014 (7 pages) and Matrix Environmental Technologies ("Matrix") presentation on Biosolid Application in the Town of Wheatfield (41 pages);
 - b. Enclosure 2: Town of Wheatfield August 5, 2014 response to New York State Department of Environmental Conservation's ("DEC") July 11, 2014 Notice of Complete Application concerning Niagara / Buffalo Bioenergy Land Application Sites at Various Unidentified Farm Fields NYS DEC Application ID: 9-9909-0112/00001 (71 pages);
8. Letter dated December 3, 2014 from Robert B. Cliffe to Michael Latham (2 pages);
 - a. Enclosure 1: October 16, 2014 DEC Notice of Violation of State Air Facility Permit issued to Niagara BioEnergy Anaerobic Digestion Facility (3 pages);
 - b. Enclosure 2: November 17, 2014 DEC Letter Notification to Robert B. Cliffe concerning Niagara Bioenergy Anaerobic Digestion Facility (1 page);
9. Letter dated January 30, 2015 from Steven J. Ricca, Esq., legal counsel for the Town of Wheatfield to Matthew Brower, Department Environmental Analyst (3 pages) with the following attachments:
 - a. Enclosure 1: Memorandum dated July 2, 2014 issued by Salvatore Ervolina, P.E., Director of Division of Material Management at DEC (3 pages);
 - b. Enclosure 2: October 16, 2014 DEC Notice of Violation of State Air Facility Permit issued to Niagara BioEnergy Anaerobic Digestion Facility (3 pages);
 - c. Enclosure 3: November 17, 2014 DEC Letter Notification to Robert B. Cliffe concerning Niagara Bioenergy Anaerobic Digestion Facility (1 page);

10. Letter dated May 29, 2014 from DEC Commissioner Joseph Martens to NYS Assembly & Senate representatives (2 pages);
11. DEC Summary entitled "Anaerobic Digesters, Digestate Storage and Land Application" (8 pages);
12. Letter dated May 1, 2015 from Michael Latham to Robert B. Cliffe (6 pages);
 - a. 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);
 - b. AML 308(4) Agriculture in Nature Opinion dated May 7, 2014 concerning Trav-Co Farms land application of *equate* (2 pages);
13. Letter dated May 11, 2015 from Steven J. Ricca, Esq. to Michael Latham (2 pages);
14. Documents received on May 14, 2015 concerning the DEC Permit and application sites in Wheatfield from Quasar Energies (5 pages);
15. Letter dated December 21, 2015 from Steven Ricca, Esq. to Michael Latham (2 pages) with the following attachments:
 - a. Letter dated December 20, 2015 from Matrix to Steven Ricca, Esq. (1 page);
 - b. Presentation by Murray B. McBride entitled "Concerns with Application of Sewage Sludge Products on Farmland" (24 pages);
16. DEC Part 360-4 regulations (26 pages);
17. New York State Department of Health ("DOH") letter from Commissioner Zucker, dated June 25, 2015 (2 pages);
18. Letter dated July 11, 2015 from Robert B. Cliffe to Michael Latham (7 pages) with Letter dated July 6, 2015 from Matrix to Robert B. Cliffe (4 pages);
19. Letter dated July 14, 2015 from Steven J. Ricca to Michael Latham (7 pages) with the following attachments:
 - a. Exhibit A: Matrix Letter to Robert Cliffe dated July 14, 2015 and accompanying exhibits (72 pages);
 - b. Exhibit B: Oswego County Farm Bureau Newsletter, March 2015 (2 pages);
20. Letter dated June 9, 2016 from Michael Latham to Steven Ricca, Esq. (6 pages) with Letter dated March 14, 2016 from Division of Materials Management Environmental Engineer for DEC, Sally Rowland, Ph.D., P.E., with appendices (12 pages);
21. Letter dated September 30, 2016 from Robert B. Cliffe to Michael Latham (3 pages) with Transcript of testimony given by Dr. Howard Freed before the Assembly and Senate Standing Committees on Health and Environmental Conservations dated September 7, 2016 (10 pages);
22. United States Environmental Protection Agency 2011 Biosolids Biennial Review (2 pages).