Clean Air Action Network of Glens Falls, Inc. v Town of Moreau Planning Board
2023 NY Slip Op 32100(U)
June 27, 2023
Supreme Court, Saratoga County
Docket Number: Index No. EF20222135
Judge: Richard A. Kupferman
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STATE OF NEW YORK
SUPREME COURT COUNTY OF SARATOGA

CLEAN AIR ACTION NETWORK OF GLENS FALLS, INC.,

Petitioner,

-against-

TOWN OF MOREAU PLANNING BOARD, RAYMOND APY and SARATOGA BIOCHAR SOLUTIONS, LLC,

Respondents,

DECISION, ORDER & JUDGMENT

Index No.: EF20222135

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KUPFERMAN, J.,

In this CPLR Article 78 proceeding, Petitioner, Clean Air Action Network of Glens Falls, Inc. ("Petitioner") challenges the site plan approval for a solid waste management facility ("SWMF") in the Town of Moreau ("Town"). The issue is whether Respondent, Town of Moreau Planning Board ("Planning Board") violated the State Environmental Quality Review Act ("SEQRA") during its review and approval of the site plan.

Respondent, Saratoga Biochar Solutions, LLC ("SBS") seeks to construct the facility on 5.89 acres (Tax Parcels 50.-4-16 and 50.-4-22), in the Moreau Industrial Park. The land is currently undeveloped in an area zoned as M-1 General Manufacturing and Industrial. The building will be constructed in three phases and will be approximately 49,465 square feet (originally 34,100 square feet). Most of the development will be completed during the first phase. The second and third phases will include two building expansions.

The facility will process biosolids and manufacture carbon fertilizer using biosolids and wood waste as the feedstock. The handling of biosolids will require a Part 360 SWMF permit from the Department of Environmental Conservation ("DEC"). In addition, the manufacturing process will generate air emissions, which will also require a Part 201 air state facility permit from the DEC.

Biosolids are the accumulated semi-solids and solids resulting from treatment of wastewaters from sewage treatment plants (see 6 NYCRR 360.2 [b][31]). The facility is expected to receive up to 235,200 wet tons of biosolids and 35,280 tons of wood waste each year for use in the manufacturing process. The biosolids will be sourced from only wastewater treatment plants, which are subject to State and federal regulation, and will have already been treated and tested by the source prior to receipt at the facility. The biosolids are anticipated to be approximately 25%

anaerobically digested and 75% aerobically digested and otherwise destined for landfill disposal, which must meet the criteria contained in 6 NYCRR 363-7.1 (j). In addition, SBS will not accept or use in its production process municipal solid waste, construction and demolition debris, friable asbestos-containing material, mercury-added consumer products, radioactive waste, infectious and regulated medical waste, or hazardous waste.

SBS has contracted with Casella Organics ("Casella") to transport the biosolids to the facility. The trucks used will be regulated and inspected by the Department of Transportation ("DOT") and further subject to Part 364 waste transporter permits from the DEC. Deliveries will be restricted to the hours of 6:00 a.m. to 6:00 p.m. Monday through Saturday. The travel route will be the truck route established in the Generic Environmental Impact Statement ("GEIS") for the Moreau Industrial Park in 1991. The trucks will not travel through residential neighborhoods or on Town roads that are not part of the identified, pre-approved truck route for the Industrial Park. Trucks delivering biosolids are treated for odors prior to leaving the source wastewater treatment plant to minimize odors during transport. In addition, trucks hauling biosolids are covered with tight fitting, heavy grade tarps to minimize odors and prevent spillage.

The facility will require the trucks to enter the enclosed building prior to unloading the biosolids. Once off-loaded behind closed doors, the facility will use state-of-the art technology to minimize odors, including negative air pressure and an air treatment system. While at the facility, the biosolids will be dried and then subjected to high temperatures using pyrolysis, a form of thermal treatment, which has been used for a variety of other applications. This process does not involve incineration. Rather, it occurs in an oxygen-starved kiln that heats the material without direct exposure to flame.

The heated kiln will turn the volatile organic compounds, including per and polyfluoroalkyl substances ("PFAS") present in the biosolids, into syngas. The syngas is piped to and combusted in a thermal oxidizer at a temperature that generates sufficient heat to destroy odor compounds, prevents the formation of sulfur and nitrogen oxide emissions (i.e., SOx and NOx), and breaks down the PFAS compounds. The air treatment system will include particulate removal cyclones and contaminant scrubbers to remove dust particulates, sulfur oxides, ammonia odors, and other odors prior to releasing emissions through the facility's three, 115-foot-tall stacks (originally 75 feet). Process water from the air treatment system that is not recycled will be discharged through the Town's sewer system for treatment at the City of Glens Falls Wastewater Treatment Plant.

The facility plans to maintain air emissions below the major source thresholds for nitrogen dioxide (100 tons per year) and carbon dioxide (100,000 tons per year). To ensure compliance, the facility will operate on three process lines. The process lines will be built sequentially. Once the first process line is operational, stack tests will be performed to verify the actual emission factors to refine the emission estimates prior to increasing production with the second and third lines. If emissions are higher than expected, the facility will employ additional measures to reduce emissions or, alternatively, decrease production.

The Planning Board's SEQRA Review

In May 2021, the CEO of SBS contacted the Town's Zoning Administrator to discuss preliminary plans to construct the facility. The CEO emailed details concerning the project, attaching copies of the facility's preliminary design concept and a project information worksheet. The CEO asserted that this would be the first or second plant of its kind to open in North America, and that the facility would utilize state-of-the-art technology and equipment to minimize nuisance odors and air emissions. The Zoning Administrator forwarded the subject email and attachments

to the Planning Board members and informed them that the use was a permitted use in the Town, subject to site plan approval.

In July 2021, SBS submitted its application for site plan review, thereby triggering the SEQRA review process. The application included, among other things, a completed Full Environmental Assessment Form ("EAF") Part 1. The EAF described the proposed action, its location, and its purpose and indicated an increase in traffic from the trucks entering and leaving the facility (up to 50 trucks per day), odors from the receipt and handling of biosolids, and noise from the operation of the facility. The EAF further identified the on-site storage of sulfuric acid, the generation of air emissions (carbon dioxide (CO_2), nitrous oxide (N_20), and hazardous air pollutants (HAPs)), the emission and use of methane gas, and estimates for water consumption and sewer discharge.[1]

After reviewing the application, the Zoning Administrator prepared and distributed Staff Notes (dated July 21, 2021) to the Planning Board.[2] The Staff Notes outlined the requirements necessary for SBS to complete the application process and provided several questions for the Planning Board to consider regarding traffic, transportation, safety, feedstock composition, odors, spills, facility design, operations, sewer discharges, and air emissions, among other things.

In August 2021, SBS first appeared before the Planning Board and presented its proposed facility and site plan. SBS' presentation team comprised of its officers, an environmental engineering consultant, a civil engineering consultant, and Casella Organics (the transportation supplier). During the meeting, the Planning Board actively engaged in discussions with SBS. The

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[1] The estimates in the July 2021 EAF were updated in February 2022.

[2] The Zoning Administrator is employed as a Senior Planner and Economic Development Specialist at Landscape Architecture and Engineering, P.C., which is a contractual consultant to the Town.

presentation and discussions included issues relating to, among other things, the number of trucks visiting the facility, the use of a mesh liner system for the trucks to prevent spillage, the regulation of the trucks, the nature and source of the feedstock, the potential for the biosolids to contain PFAS, the manufacturing process, the manufactured product, wastewater, the DEC permits, noise control, parking, truck washing, water and sewer connections, and the other agencies involved. The Planning Board further declared itself as the lead agency for the coordinated review.

After the August meeting, the Zoning Administrator provided notice of its request for lead agency status to the Saratoga County Planning Board, the DEC, the Saratoga County Industrial Development Agency, the DOT, and the City of Glens Falls. The notice further identified the project's classification as an "unlisted action" under SEQRA (see 6 NYCRR 617.2 [al]; 6 NYCRR 617.6). Of the agencies that responded, none of them challenged the Planning Board's decision to serve as the lead agency.

Between the time of the August meeting and the next meeting held in November 2021, SBS submitted additional information and updated materials in support of the site plan application. These materials included updated plans, an updated presentation, a stormwater pollution prevention plan ("SWPPP"), and the DEC permit applications filed by SBS in November 2021. The permit applications include an engineering report, facility manual, and other documents that specifically address, among other things, traffic, the truck route, spills, odor controls, noise assessments, chemicals stored on-site, the air treatment system, air emissions and calculations, dispersion modeling for nitrogen oxides and other pollutants for comparison to ambient air quality standards, the potential risks of explosions and fires, the fire suppression system, and issues related to emergency services and facility training, including a waste control plan, an operations and maintenance plan, a training plan, and an emergency response plan. The permit application

materials further discuss the phased construction/operation process and a plan to limit production, if necessary, to maintain emissions of nitrogen dioxide and carbon dioxide below their corresponding major source thresholds of 100 tons per year and 100,000 tons per year, respectively.

During the meeting in November 2021, SBS provided addition details regarding, among other things, the stormwater prevention plan, emergency access, fire protection, its plans to meet with the fire department and contact the sewer district, the location of the sulfuric acid tank, the height of the building and the stacks, the DEC permitting process, the status of the DEC permit applications, the DEC's oversight after the permits are issued, and the reason for the three process lines and building them sequentially. At the conclusion of the meeting, the Planning Board scheduled a public hearing.

In December 2021, the Planning Board conducted further inquiries and held a public hearing. During the meeting, the Planning Board reviewed Part 2 of the EAF, evaluating the potential environmental impacts and their magnitude. The Planning Board discussed the impact on traffic (50 truck per day) and SBS' reliance on the GEIS prepared for the formation of the Industrial Park. In addition, SBS' environmental engineering consultant was questioned about the potential noise levels at night and his reliance on the dense forest around the Industrial Park to mitigate noise given that SBS did not own the forested area. He explained the anticipated noise would be lower at night and that he considered the daytime and nighttime noise as within acceptable limits, even without considering the surrounding vegetation. Nonetheless, he further explained that the facility design could further mitigate any noise issues, if needed, such as by modifying the insulation, the thickness of the walls, or the type of roof.

Regarding odors, SBS explained that the odor will be remediated through the building design and equipment. The facility will filter the air and contain the odors using negative pressure. The facility will use an advanced odor and emission treatment system. The environmental engineering consultant further explained that the DEC oversight would include regulation over the facility's odor, noise, and emissions. The Planning Board also discussed the potential carbon dioxide (CO_2) emissions and its potential impact on the environment. SBS clarified that the total projected emissions were between 90,000 to 100,000 tons per year (rather than the much smaller amount initially reported on the EAF from July 2021). SBS further explained that the facility would result in negative global carbon emissions overall by, among other things, reducing the emissions that would otherwise be generated from using landfills to dispose of the biosolids. SBS further explained that CO_2 emissions did not pose a direct threat to human health unless someone were to physically climb up the stack and stick one's head into it.

Ultimately, the Planning Board felt that it lacked sufficient understanding of the environmental concerns at the time to finalize the SEQRA process. During the meeting, the Planning Board passed a motion by unanimous vote to retain an independent consultant to assist the Planning Board with evaluating the moderate to large impacts and, if possible, suggest mitigations. As a result, the Planning Board chose to table its SEQRA determination until it had the ability to obtain additional information.

After this discussion, the Planning Board opened the public hearing. There was only one member of the public who spoke. This person asked questions and was provided with answers directly from SBS and its agents regarding the manufacturing process, the trucks used to transport the biosolids, the equipment (air treatment system, the dryer, the oxidizer, and the scrubbers), the extent of the testing performed, the use of sulfuric acid, the level of moisture in the biosolids, the

potential for spills/leakage and odors from trucks during transportation, the use of chemicals to reduce odors during transport, the additional traffic generated by the trucks, the annual noise studies required by the DEC, and the facility's operating hours.

Thereafter, the Planning Board scheduled a special meeting with the DEC to discuss several concerns. Prior to the meeting, the Planning Board members prepared specific questions for the DEC concerning, among other things, the impact of the anticipated carbon dioxide output; the existence of other similar facilities in the State and their impact on air quality, noise, odor, and traffic; the effectiveness of the proposed treatments in limiting ammonia, sulfur dioxide, nitrous oxide, and odor; the DEC permitting process, including the types of conditions imposed; and the ability of a municipality to receive notices and provide input to the DEC on permitting issues.

The special meeting with the DEC staff members occurred in January 2022 by way of Zoom. At the beginning of the meeting, the acting chairperson explained that the Planning Board desired to gain information and details from the DEC specialists to assist them in making its SEQRA determination. During the meeting, the Planning Board members were able to ask questions and engage in discussions to obtain additional information for their deliberation and decision. Mike Sundberg (DEC Air Division), Kevin Wood (DEC Solid Waste Program Region 5), and Beth McGee (DEC Permitting) made themselves available to answer the questions.

During the meeting, the DEC staff explained generally the permit application process, the DEC compliance process, and the anticipated degree of testing and monitoring. They also explained that although other biosolid processing facilities existed in the State, they did not believe that any other facilities of this particular nature existed in the State. The DEC staff clarified, however, that it had specific regulations (Subpart 362-1) applicable to thermal treatment facilities such as this facility. Other facilities in Schenectady and New Jersey were discussed. The DEC

further explained that it requires permit holders to meet its emission standards and that if the emissions are greater than anticipated, the DEC could require less production or more controls to mitigate emissions.

With respect to the issue of carbon dioxide, Mr. Sundberg of the DEC confirmed that carbon dioxide generally did not create any toxic impact on the local community and that the issue concerns greenhouse gases and involves a global issue. Concerning other emissions, the DEC confirmed that the scrubbers and oxidizers being proposed were well-known technologies and would be effective in mitigating impacts on air. On the issue of nitrogen oxides, the DEC confirmed that they would only require mitigation measures to be imposed if necessary to control emissions. SBS confirmed that if that were the case, measures such as catalytic injections could be employed to modify the exhaust gas.

Shortly thereafter, SBS submitted a letter to the Planning Board, which summarized the special meeting with the DEC and provided additional information regarding the proposed manufacturing process, the facility design, and an evaluation of the greenhouse gas emissions. In February 2022, SBS submitted additional materials for the Planning Board to review, including, among other things, a completed site plan application, an updated EAF (dated February 22, 2022), updated drawings, a letter from the Glens Falls Wastewater Treatment Plant dated February 18, 2022, and additional information regarding the manufacturing process, traffic, and the measures employed by the facility design to mitigate against potential odors and noise.[3] SBS included a SEQRA assessment discussing the Planning Board's identification of "moderate to large impacts"

[3] The updated EAF includes, among other things, changes in following: the total acreage to be physically disturbed (from 2.35 to 4.64 acres), projected carbon dioxide emissions (from 34,164 to 96,232 tons per year); projected nitrous oxide emissions (from 0.18 to 0 tons per year); projected hazardous air pollutants (HAPs) (from less than 25 tons per year to 12.7 tons per year); water usage (from 10,584 to 30,079 gallons per day); and sewer usage (from 1,512 to 29,456 gallons per day).

and the mitigation available through the project's design and the DEC permits. SBS also provided responses to both the Zoning Administrator's Staff Notes from July 2021 and the Planning Board's questions to the DEC. In March 2022, SBS also submitted site plan review drawings dated February 18, 2022, and responses to the comments of the Town's consulting engineer regarding the SWPPP.

In March 2022, the Planning Board held a four-hour special meeting with the sole item on the agenda being SBS' application. During the meeting, the Planning Board listened to SBS' representatives discuss, at length, the entire project. The presentation included a review of the final site plan design, site plan development, and the environmental concerns. SBS focused on the moderate to large impacts the Planning Board identified during its December meeting with respect to Part 2 of the EAF, explaining how it proposed to implement mitigation to avoid a significant adverse impact on the environment. The Planning Board engaged in a thorough discussion with SBS regarding the entire project, specifically reviewing in detail the revised EAF. The Planning Board discussed the changes on the revised EAF and considered how the changes affected the project and the environmental concerns. The Planning Board further discussed, among other things, chemical storage, emergency services, truck counts, air emissions, water, wastewater, noise, and stormwater management.

During the March meeting, the Planning Board again reviewed Part 2 of the EAF and reassessed the potential impacts and their magnitude. On the issue of odors, the Planning Board asked SBS to explain the proposed mitigations offered to address this potential issue. The members were informed about the facility design and its air treatment system. SBS explained that the facility would only be receiving the biosolids while the trucks were inside the enclosed, negative pressure building. The members were further advised that in addition to the negative

pressure system design to obviate odor from the biosolids, the facility will also be equipped with three scrubbers to mitigate odor. SBS also advised that odors, similar to noise, are a permit condition based on DEC regulation and any violations are enforceable. The Planning Board members were polled as to whether they believed sufficient mitigation was offered to offset the potential impacts from odors. The members agreed (5-1) that sufficient mitigation existed.

Similarly, the Planning Board discussed mitigation for the potential impacts on air. After the discussion, the Planning Board members were polled in a similar manner. They agreed (5-1) that sufficient mitigation existed regarding the potential impacts on air based on the DEC permits and the regulatory standards, among other things.

Thereafter, during the March meeting, the Planning Board went through Part 3 of the EAF. Ultimately, a motion was made for the Planning Board to declare a negative declaration. By a roll call vote (5-1), the motion passed, adopting a negative declaration under SEQRA. Although the Planning Board adopted a negative declaration during the March 2022 meeting, the Zoning Administrator marked the box for a conditional negative declaration ("CND") when he completed Part 3 of the EAF on behalf of the Planning Board. Under "conditions" for the CND, the Zoning Administrator further listed the DEC permits and the facility design as mitigating measures. In an affidavit submitted to this Court, the Zoning Administrator (who completed Part 3 of the EAF and signed the form) avers that this was a "scrivener's error," and that once he realized the error, the Chairman at the time had passed away, which prevented him from creating a new document.

March 2022 to August 2022 - Post-SEQR Determination

Over the next several months, SBS continued to finalize its submission for the site plan application, adding information based on the concerns raised by the Planning Board, the consulting engineers, and the public comments. In April 2022, SBS provided the Zoning Administrator with

updated information regarding the SWPPP. SBS also provided a Water Engineer's Report dated March 30, 2022, which concluded that the Town's water system had adequate capacity to accommodate the facility's demand (30,079 gallons per day). SBS further provided a Wastewater Engineering Report dated March 30, 2022, which concluded that the City of Glens Falls Wastewater Treatment Plant had adequate capacity to manage the subject discharge (29,456 gallons per day).

SBS further submitted updated SWMF permit application documents to the DEC in early April 2022, including the engineering report and facility manual, with copies provided to the Planning Board. These documents were updated to respond to technical comments from the DEC. The updated documents address potential explosion and fire risks, with additional details to mitigate combustible dust, including dust management systems, a nitrogen purging system, and an emergency sprinkler system.

In April 2022, SBS further participated in a meeting by Zoom with Petitioner and others to discuss the project and address their concerns. One of the participants included a college professor of Earth and Environmental Sciences. During the call, the participants were provided the opportunity to ask questions regarding, among other things, the manufacturing process, the potential destruction of PFAS, and the potential for fluorine molecules to recombine. SBS responded to the questions and further explained that the process should destroy most, but not all, of the PFAS in the biosolids, and that the machines and process is set up to avoid the recombination of fluorine molecules.[4]

[4] A copy of the recording is contained in the record. In a letter dated June 2022, SBS referenced the recording and urged the Planning Board review it.

In addition to SBS' submissions, in April 2022, the Planning Board also received an email from Ann Purdue, the Planning Board member who voted against the negative declaration. She urged the Planning Board to reconsider its SEQRA decision and to retain an independent consultant to consider whether an environmental impact statement ("EIS") would be appropriate. Among other things, Member Purdue raised concerns regarding potential impacts from odors, emissions, PFAS, the uncertainty regarding whether the facility could destroy the PFAS or cause further dispersal in air and water, the facility's use of large quantities of public water (more than 30,000 gallons per day), and its discharge of large amounts of public wastewater (more than 29,000 gallons per day). Shortly thereafter, SBS provided written responses to Ms. Purdue's statements, addressing each of her concerns in detail. In addition to these comments, the Planning Board also received numerous public comments before and after the public hearing, mostly in opposition to the project.

The second public hearing was held in May 2022. Several members of the public actively expressed their concerns regarding traffic, air emissions, PFAS, wastewater capacity, noise, odor, and emergency services. After the public hearing was closed, Member Purdue made a motion to rescind the Planning Board's negative declaration based on "new information." The documents associated with the motion (attached to the meeting minutes) discussed the amount of biosolids processed at the facility; the presence of PFAS, heavy metals, and dioxins in the biosolids; the uncertainties associated with PFAS remediation, including the unknown extent to which the PFAS may be destroyed and the potential risks of emissions/discharges of PFAS into the air and water; the potential for odors; the facility's allocation of wastewater and water capacity in excess of the GEIS thresholds established for the Industrial Park; the fire risks associated with the storage of biosolids; the use and storage of liquid nitrogen; and the potential emission of 100 tons per year of

nitrogen dioxide. The motion to rescind was seconded, however, the motion failed by a vote of two in favor and four opposed.

At the May meeting, Member Purdue then made a motion to retain an independent consultant to assist with a review of project, which was again seconded. This motion was approved by the members, with a successful follow-up motion by Member Purdue to have the Zoning Administrator submit a scope of work to the Planning Board. Member Purdue shortly thereafter drafted a proposed scope of work, which was later reviewed and commented on by the Planning Board members, the Zoning Administrator, the Town's counsel, and SBS.

In June 2022, the Zoning Administrator consulted with the Town's Water Superintendent concerning the facility's water and sewer demands. In addition, SBS submitted various additional materials to the Planning Board, including (1) SBS' good neighbor policy (agreeing to operate the facility in strict compliance with regulatory authorities and to avoid unreasonable odors); (2) SBS' responses to the public hearing statements; (3) a spill control plan applicable to the trucks; (4) a noise review letter; (5) technical information regarding PFAS remediation; (6) a fire and emergency preparedness planning summary; (7) site plan drawings with updated and final stack heights, proposed yard fire hydrant locations, and fire/emergency facility access; (8) a letter from SBS' environmental engineering consultant explaining the final stack height (115 feet); (9) another copy of the facility operating manual; and (10) a project review letter offered in support of SBS' position that the water and sewer concerns had already been addressed.

SBS also submitted updated air permit application documents to the DEC around the middle of June 2022, with copies provided to the Planning Board. The updated permit application materials include a discussion of potential PFAS emissions and control methods, if needed, to meet the Annual Guideline Concentration for Perfluorooctanoic Acid ("PFOA") contained in DEC

DAR-1. The updates further explain that PFOA is the only PFAS compound with an established air standard; discuss air emissions of nitrogen oxides and other pollutants to clarify the potential for emissions of different forms of nitrogen oxides; discuss the potential decrease in global greenhouse gas emissions; and provide air emission dispersion modeling for stack heights of 75 feet, 100, feet, and 115 feet with the objective of selecting a final stack height for facility construction.

At the public meeting in June 2022, the Planning Board discussed a draft scope of work for an independent third-party review of the SBS project submittals. Member Purdue made a motion for the Zoning Administrator to issue a request for proposal ("RFP") to qualified consultants to perform the independent review. After members expressed concern over the proposed scope of work, the Zoning Administrator offered to refine the scope. As a result, Member Purdue withdrew her motion.

At a subsequent meeting, also held in June 2022, the Planning Board considered whether they should proceed with retaining an independent consultant. The Planning Board's counsel expressed her opinion that a third-party review was unnecessary. Member Purdue disagreed and made another motion to proceed with the RFP. The motion did not receive a second and, as a result, failed. The Planning Board then passed a motion for its counsel to draft for consideration a site plan approval resolution with conditions incorporating all the features that had been discussed, including the agency regulations and the Town's codes and policies.

In June 2022, the Zoning Administrator updated his Staff Notes to incorporate the information supplied by SBS since the inception of the application. The Zoning Administrator advised the Planning Board that in his opinion the conditions and requirements for site plan approval had been met.

During the next meeting in July 2022, Member Purdue read a prepared statement regarding the project. Member Purdue expressed concerns regarding, among other things, the amount of biosolids being transported into the community; their origins (including New York City); the PFAS in the biosolids; the potential for contamination from PFAS emissions; and the uncertainties regarding PFAS remediation. After reading the statement, Member Purdue made a motion to rescind the negative declaration and to retain an independent expert to assist the Planning Board in considering the project and its impacts. In support of the motion, Member Purdue expressed concerns to the Planning Board regarding, among other things, the presence of PFAS and metals in the biosolids; the potential risks that the process may not destroy PFAS or may result in other unknown derivative compounds; the potential that PFAS may enter the air and water; the potential for odor; the substantial water usage and sewer discharge; the fire risks associated with the fertilizer; the potential emission of up to 100 tons per year of nitrogen dioxide; and the storage of liquid nitrogen. There was no second to the motion and, as a result, it failed.

At the July meeting, the Planning Board determined that additional time was required to review the draft approval resolution. The Planning Board notified SBS that an additional 45 days would be taken to draft acceptable language for the approval resolution.

In August 2022, the Planning Board conducted its final meeting on the application. Member Purdue read a draft resolution to rescind the SEQRA determination. The draft resolution referenced, among other things, the same concerns regarding PFAS emissions, the potential for odor, the water usage, the sewer discharges, the fire risks, the potential nitrogen dioxide emissions, and the storage of liquid nitrogen. The motion was seconded for discussion purposes. The Planning Board then discussed the motion. After the discussion, the Planning Board voted and, by a vote of two in favor and four opposed, the motion failed.

After this motion, the Planning Board then went through the draft resolution prepared in favor of the site plan approval, discussing the conditions it wanted placed on the approval, going back and forth among themselves and SBS, and ultimately finalizing a resolution approving the site plan with conditions. A motion was passed (4-2) to approve the final site plan with the conditions discussed and approved. Thereafter, on August 30, 2022, the Zoning Administrator filed notice of the decision with the Town Clerk. Less than 30 days later, on September 26, 2022, Petitioner commenced this CPLR Article 78 proceeding challenging the site plan approval and the SEQRA determination.

Analysis

I.
Statute of Limitations

The Planning Board initially sought to dismiss this proceeding as untimely because the proceeding was not commenced within four months of the SEQRA determination. At oral argument, however, the Planning Board withdrew this objection. The Court therefore dismisses this objection as withdrawn and, in any event, would have otherwise dismissed it from the bench as meritless based on the applicable case law (see Matter of Eadie v Town Bd. of Town of N. Greenbush, 7 NY3d 306, 316-318 [2006]; Matter of North Country Citizens for Responsible Growth, Inc. v Town of Potsdam Planning Bd., 39 AD3d 1098, 1103 [3d Dept 2007] ["insofar as it was the same agency that made the SEQRA determination and the site plan approval--both steps in an integrated process, we agree with the individual petitioners that they did not suffer the concrete injury until the site plan was approved"]).

II.
Misjoinder

During the proceedings, the CEO of SBS (a named respondent) made a motion to dismiss the claims against him. The CEO asserted that he was not a proper party to this proceeding. While he applied for the site plan approval on behalf of SBS, he signed the forms only in his official capacity (rather than in his individual capacity). On Petitioner's consent, this Court issued an Order in April 2023, granting such relief and dismissing the proceeding as against the CEO.

III.
Standing

The Planning Board further challenges Petitioner's standing to maintain this proceeding. Unlike the first two issues discussed above in this analysis, this issue has not yet been decided in this case. To establish standing under SEQRA, a petitioner must demonstrate that at least one of

its members suffers an injury-in-fact; that the asserted injury falls within the zone of interests sought to be protected by SEQRA; and that the direct harm suffered differs from that suffered by the public at large (see Matter of Creda, LLC v City of Kingston Planning Bd., 212 AD3d 1043, 1045 [3d Dept 2023]). A petitioner must show "more than generalized environmental concerns to satisfy that burden and, unlike in cases involving zoning issues, there is no presumption of standing to raise a SEQRA or other environmental challenge based on ... close proximity alone" (id. at 1045-1046 [internal quotation marks and citations omitted]). Further, for an organization to bring a claim on behalf of its members, it must show that "at least one of its members would have standing to sue, that it is representative of the organizational purposes it asserts and that the case would not require the participation of individual members" (Matter of Spence v New York State Off. of Mental Health, 211 AD3d 1430, 1431-1432 [3d Dept 2022] [internal quotation marks and citations omitted]; see Society of Plastics Indus. v County of Suffolk, 77 NY2d 761, 775 [1991]).

While proximity alone is not necessarily enough to demonstrate standing in cases not involving zoning issues, it is nonetheless an important factor to consider (see Matter of Creda, LLC, 212 AD3d at 1046). Here, the distance between the facility and the residential property line for one of Petitioner's members is only 700 feet. Another member asserts that the facility will be located only 965 feet away from her home. In addition, these two members have raised concerns regarding risks of exposure to toxic substances and pollutants from the facility, as well as potential adverse impacts on surrounding wildlife, odor, traffic, and noise that will allegedly result from operation of the facility. Their proximity to the facility could result in their suffering such exposure and harm to a greater degree than the public at large. Plainly, there does not appear to be any resident more qualified to pursue these claims than these two members, who live in direct proximity to the increased truck traffic, potential PFAS emissions, noise, odor, and other potential

impacts (see e.g. Basha Kill Area Ass'n v Planning Bd. of Town of Mamakating, 46 AD3d 1309, 1311 [3d Dept 2007] [standing demonstrated where petitioner resided 941 feet from proposed factory and identified an environmental concern that arose from such proximity]; Saratoga Lake Prot. v Dep't of Pub. Works, 46 AD3d 979, 982-983 [3d Dept 2007] [organizational standing existed where the proximity of a member's property to the proposed development, within 1,000 feet, resulted in her suffering harm to a greater degree than the general public]; Ziemba v City of Troy, 37 AD3d 68, 71 [3d Dept 2006]).

Further, while the Planning Board contends that such injuries are too speculative, it found that moderate to large impacts existed regarding the quality of the air and the potential for odors, and the negative declaration was based on the effectiveness of the mitigation proposed and identified by SBS. Petitioner should be entitled to challenge whether the proposed mitigation rendered the potential adverse impacts insignificant and whether the Planning Board's reliance on such mitigation was legally permitted. The Court also disagrees with the Planning Board's assertion that traffic and noise are not environmental. SEQRA specifically lists substantial adverse changes in traffic and noise levels as indicators of significant adverse environmental impacts (see 6 NYCRR 617.7[c][1][i]).

The remaining two elements for organizational standing are not disputed and, in any event, are readily satisfied. Petitioner was formed to reduce air pollution and protect public health and the environment in the greater Glens Falls area. This proceeding and the members' interests in the outcome are therefore directly relevant to Petitioner's purpose. In addition, Petitioner requests that the Court annul the site plan approval. This requires consideration of the administrative record and a thorough legal analysis and review of SEQRA, the regulations, and the case law. This does not require the participation of the individual members.

IV.
SEQRA

Turning to the merits, Petitioner contends that the Planning Board violated SEQRA. "Judicial review of an agency determination under SEQRA is limited to whether the lead agency identified the relevant areas of environmental concern, took a hard look at them, and made a reasoned elaboration of the basis for its determination" (Matter of Brunner v Town of Schodack Planning Bd., 178 AD3d 1181, 1183 [3d Dept 2019] [internal quotation marks and citations omitted]; see Matter of Save the Pine Bush, Inc. v Town of Guilderland, 205 AD3d 1120, 1123 [3d Dept 2022]; 6 NYCRR 617.7[b]). The sole function of the courts "is to assure that the agency has satisfied SEQRA, procedurally and substantively," and a court neither can, nor will, "evaluate data de novo, weigh the desirability of any particular action, choose among alternatives or otherwise substitute [its] judgment for that of the agency" (Matter of Save the Pine Bush, Inc., 205 AD3d at 1123 [internal quotation marks and citations omitted]; see Akpan v Koch, 75 NY2d 561, 573 [1990]).

As discussed below, Petitioner raises numerous legal challenges based on SEQRA. The Court will begin its analysis in this section by first addressing whether the Planning Board issued a negative declaration or a CND (a matter in dispute between the parties) and, similarly, the collateral issues arising from such dispute. The Court will then address Petitioner's remaining challenges concerning the Planning Board's alleged failure to take a hard look, make a reasoned elaboration, reconsider its determination, and engage the public.

A.
The SEQRA Determination

This case involves an unusual situation in which the parties dispute whether the Planning Board issued a CND or a negative declaration.[5] Petitioner, in support of its position that a CND was issued, relies on the formal written determination issued by the Planning Board (specifically, in this case, Part 3 of the EAF). That determination clearly identifies itself as a CND and further lists (in the area specifically designated for a CND) the DEC permits and facility design as "conditions" required by the lead agency to mitigate against the potential environmental impacts. In contrast, Respondents, in support of their position that a negative declaration was issued, rely on the discussions and resolutions from the March 2022 meeting. Respondents further rely on an affidavit from the Zoning Administrator, who avers that he improperly completed the form by marking the wrong box and mistakenly listing the DEC permits and facility design in the space designated for listing the "conditions" for a CND.

Upon reviewing the meeting minutes, the transcript, and the audio recording of the March 2022 meeting, the Court agrees with Respondents' interpretation of these materials. The minutes, transcript, and recording all clearly reflect that a motion was made and passed (5-1) to declare a negative declaration. The record further demonstrates that the Planning Board did not engage in any substantive discussion during the meeting about issuing a CND. SBS, in its presentation materials and during the meeting, also requested a negative declaration and, in support, asserted

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[5] A "negative declaration" is "a written determination by a lead agency that the implementation of the action as proposed will not result in any significant adverse environmental impacts" (6 NYCRR 617.2 [z]). In contrast, a "conditional negative declaration" is "a negative declaration … in which the action as initially proposed may result in one or more significant adverse environmental impacts; however, mitigation measures identified and required by the lead agency … will modify the proposed action so that no significant adverse environmental impacts will result" (6 NYCRR 617.2[h]; see also 6 NYCRR 617.3 [b]; 617.7 [d][1][iii]).

that the potential impacts were not significant because the DEC permits and the facility's design mitigated against the moderate to large impacts regarding air, odor, and human health. The Planning Board was further polled and voted on whether the mitigation was sufficient. In contrast, there is simply nothing in the minutes or transcript/recording to conclude that the Planning Board voted on a CND or otherwise passed a resolution issuing a CND.

When these circumstances are combined with the Zoning Administrator's affidavit confirming that he checked the wrong box, it would seem unjust to allow a mistake in the form of the written determination to prevail over the substantive discussions that occurred during the meeting/deliberations. As such, the results of the vote held at the March 2022 meeting should prevail over the error in the written determination (cf. Schwartzbard v Cogan, 192 AD3d 523, 524 [1st Dept 2021]; Spier v Horowitz, 16 AD3d 400, 401 [2d Dept 2005] ["A written order or judgment must conform strictly to the court's decision, and in the event of an inconsistency between a judgment and a decision or order upon which it is based, the decision or order controls" [internal quotation marks, citations, and brackets omitted]).

Accordingly, the Court finds that the Planning Board issued a negative declaration even though Part 3 of the EAF identifies the determination as a CND.

a. *Was the Issuance of a Negative Declaration Per Se Illegal?*

Petitioner nevertheless contends that the Planning Board could not have legally issued a negative declaration because such a determination (according to Petitioner) is only permissible for projects that do not have any potential moderate to large impacts. This argument, however, has already been addressed by the Court of Appeals and rejected by the Third Department (see Matter of Merson v McNally, 90 NY2d 742, 751 [1997]; Hare v Molyneaux, 182 AD2d 908, 909 [3d Dept 1992]; Nicklin-McKay v Town of Marlborough Planning Bd., 14 AD3d 858, 861-862 [3d

Dept 2005]). As explained by the Court of Appeals, "Part 2 of the EAF allows the lead agency to identify the range of possible impacts and whether an impact can be mitigated or reduced" (Merson, 90 NY2d at 751 [internal quotation marks and citation omitted]). Merely identifying an impact as potentially large does not mean that it is also significant; rather, any large impact must be evaluated in Part 3 to determine significance (see id.; see also 6 NYCRR § 617.20, Appendices).

Accordingly, the Planning Board's finding of potential moderate to large impacts during its review of Part 2 of the EAF did not preclude it from issuing a negative declaration.

b. *Was the Issuance of a Negative Declaration the Functional Equivalent of a Conditional Negative Declaration?*

Similarly unavailing is Petitioner's contention that the Planning Board's reliance on the facility design and DEC permits as mitigation rendered the negative declaration as conditional (compare Kahn v Pasnik, 231 AD2d 568, 570 [2d Dept 1996], affd 90 NY2d 569 [1997]; Shawangunk Mountain Environmental Ass'n v Planning Bd. of Gardiner, 157 AD2d 273, 276-277 [3d Dept 1990]).

A negative declaration, rather than a CND, may be appropriate where the applicant incorporates mitigation measures into a project to avoid potential adverse impacts (see Merson, 90 NY2d at 747-756; Matter of Coalition for Cobbs Hill v City of Rochester, 194 AD3d 1428, 1433-1434 [4th Dept 2021]; Wilkinson v Planning Bd., 255 AD2d 738, 740-741 [3d Dept 1998]; The SEQR Handbook at 90 [4th ed 2020]; see also Inc. Vill. of Poquott v Cahill, 11 AD3d 536, 541-542 [2d Dept 2004] ["the EAF properly took account of the anticipated effect of various measures intended to mitigate the environmental impact of the Energy Center, including yearly limits on the number of hours of operation of the combustion turbines, use of water injection and selective catalytic reduction systems to reduce nitrogen oxides, adoption of good combustion practices to minimize emissions of carbon monoxide and volatile organic compounds, and voluntary caps

designed to keep emissions of certain airborne contaminants below federal and state thresholds for new source review and prevention of serious deterioration regulatory programs"]).

Specifically, where the applicant proceeds on the initial application (rather than resubmitting a revised application), a negative declaration may be issued based on "adjustments incorporated by the project sponsor to mitigate the concerns identified by the public and the reviewing agencies," provided that such mitigation is incorporated as part of an "open and deliberative process" and not as "conditions unilaterally imposed by the lead agency" (Matter of Merson, 90 NY2d at 753-755; Cathedral Church of St. John the Divine v Dormitory Auth., 224 AD2d 95, 102-103 [3d Dept 1996]; Hare, 182 AD2d at 909; see also Inc. Vill. of Poquott, 11 AD3d at 541-542).[6]

Here, the subject mitigations were not unilaterally imposed on SBS by the Planning Board. To the contrary, SBS proposed the mitigations in its initial application. Moreover, to the extent SBS revised its plans to incorporate additional mitigations, this too was voluntary and part of the open and deliberate process. These adjustments were provided to the Planning Board in writing for public filing. They were openly discussed during the public meetings, and the public was afforded ample opportunity to comment on them. As such, the mitigations were incorporated as part of an open and deliberative process and did not render the resulting negative declaration procedurally defective.

Further, contrary to Petitioner's contention, a lead agency may not only rely on legally required permits, but it may also impose such a requirement and consider such as part of a negative

[6] Alternatively, if the mitigation measures are implemented during the review process (rather than included in the initial application), the applicant also has the option to withdraw the application, incorporate the additional mitigation measures, and resubmit the application to receive a negative declaration rather than a CND (The SEQR Handbook at 90, 94).

declaration. In fact, The SEQR Handbook (published by the DEC) expressly provides that a lead agency may issue a negative declaration with conditions that include compliance with "explicitly articulated standards (either numerical or narrative) within that lead agency's underlying jurisdiction, or conditions that an applicant is otherwise legally obligated to meet in order to obtain a permit or approval" (The SEQR Handbook, at page 92; see also ECL 8-0103[6]; 6 NYCRR 617.3[b]). One of the examples provided in the Handbook is a condition that the applicant satisfy "emission or discharge standards as required by law" (The SEQR Handbook at 92). Under such circumstances, the Handbook explains that a lead agency may "issue a negative declaration, not a CND, if the effects of the action will not be significant when such conditions are imposed" (id.).

Accordingly, the Planning Board's reliance on the DEC permits and facility design as mitigation did not render the negative declaration as the functional equivalent of a CND.

B.
The Hard Look and Reasoned Elaboration Requirements

Petitioner further contends that the Planning Board failed to take a hard look at the relevant areas of environmental concern and to make a reasoned elaboration of the basis for its decision. To comply with SEQRA, a lead agency must "thoroughly analyze the identified relevant areas of environmental concern to determine if the action may have a significant adverse impact on the environment" (6 NYCRR 617.7[b][3]; see H.O.M.E.S. v New York State Urban Dev. Corp., 69 AD2d 222, 232 [4th Dept 1979]). In addition, a lead agency must "set forth its determination of significance in a written form containing a reasoned elaboration and providing reference to any supporting documentation" (6 NYCRR § 617.7[b][4]).

These standards are "viewed in light of a rule of reason, realizing that not every conceivable environmental impact, mitigating measure or alternative must be identified and addressed before the substantive dictates of SEQRA are satisfied" (Matter of Gabrielli v Town of New Paltz, 116

AD3d 1315, 1318 [3d Dept 2014] [internal quotation marks and citations omitted]; see Neville v Koch, 79 NY2d 416, 425 [1992]). "The degree of detail - the reasonableness of an agency's action - will depend largely on the circumstances surrounding the proposed action" (Neville v Koch, 79 NY2d at 425).

Further, in considering whether a lead agency conducted a hard look and made a reasoned elaboration, the Court must consider the determination of significance and its reasonableness. SEQRA requires a positive declaration and an EIS "when an agency action may have a significant effect on the environment" (Matter of Village of Ballston Spa v City of Saratoga Springs, 163 AD3d 1220, 1222-1223 [3d Dept 2018] [internal quotation marks and citations omitted]). "To determine that an EIS will not be required for an action, the lead agency must determine either that there will be no adverse environmental impacts or that the identified adverse environmental impacts will not be significant" (6 NYCRR 617.7[a][2]; see also Matter of Village of Ballston Spa, 163 AD3d at 1223). "Although the threshold triggering an EIS is relatively low, a negative declaration is properly issued when the agency has made a thorough investigation of the problems involved and reasonably exercised its discretion" (Matter of Chinese Staff & Workers' Assn. v Burden, 19 NY3d 922, 924 [2012] [internal quotation marks and citation omitted]).

a. Did the Planning Board Conduct a Thorough Investigation of the Problems Involved?

Upon reviewing the record, the Court finds that the Planning Board conducted a thorough investigation of the problems involved. As set forth at length above, the Planning Board spent significant time analyzing the potential environmental impacts associated with this project, as reflected throughout the record in the Staff Notes prepared by the Zoning Administrator; the demands for additional information and documents; the numerous submissions, revisions, and updates from SBS; the presentations made by SBS; the Planning Board's consultation with the

DEC and the Town's Water Superintendent; the Planning Board's use of an engineering consultant (LaBerge); the questions asked by the Planning Board at the numerous public meetings; the public comments received; and the scheduling of two public hearings. The Planning Board, in fact, reviewed and discussed Part 2 of the EAF twice. During the first review, in December 2021, the Planning Board acknowledged that it lacked enough information to render a decision and therefore elected to obtain additional information prior to finalizing its review. In March 2022, after having consulted with the DEC and having received additional updates and revisions from SBS, the Planning Board then spent four hours discussing the environmental concerns and reviewing Part 2 and 3 of the EAF before issuing the negative declaration.

After making this determination, the Planning Board continued to consider new information, modifications, and changes over the next five months while it continued its site plan review process, as required under SEQRA (see 6 NYCRR 617.7 [e], [f]; Matter of Town of Mamakating v Village of Bloomingburg, 174 AD3d 1175, 1178 [3d Dept 2019] [holding that the lead agency had "a continuing duty to evaluate the new evidence presented"]; see also Matter of Eadie, 7 NY3d at 316 [reaffirming that the time period to challenge a SEQRA violation does not begin to run until the petitioner has "suffered a concrete injury not amenable to further administrative review and corrective action"]; Har Enterprises v Brookhaven, 74 NY2d 524, 530-531 [1989] [recognizing that SEQRA requires a lead agency to complete its environmental review before it approves a proposed action]; Matter of Coalition for Cobbs Hill v City of Rochester, 194 AD3d 1428, 1434 [4th Dept 2021] [incorporating mitigating measures into the project after the negative declaration was issued]). During such time, the Planning Board received numerous public comments and additional submissions from SBS, conducted a second public hearing, engaged in several additional public meetings, reviewed and discussed detailed motions to rescind made by

Member Purdue, and thoroughly prepared a resolution approving the site plan with detailed conditions reflective of the stipulations made by SBS during the SEQRA review process.

b. Did the Planning Board Reasonably Exercise Its Discretion?

In addition to conducting a thorough investigation, the Planning Board also reasonably exercised its discretion. In assessing the health risks, the Planning Board considered that the biosolids will come from only wastewater treatment plants. SBS represented that the biosolids will already have been treated and tested by the source prior to receipt at the facility. SBS cited statutory authority in support of this assertion and provided a copy of its feedstock supply agreement. In addition, SBS will not accept or use in its production process municipal solid waste, construction and demolition debris, friable asbestos-containing material, mercury-added consumer products, radioactive waste, infectious and regulated medical waste, or hazardous waste.

SBS will further arrange for the delivery of the biosolids by using approved trucks and routes. SBS explained in detail the precautions employed by the trucks to minimize and eliminate odors and spills during transit. SBS further provided the Planning Board with a copy of Casella's safety plan regarding spills. Again, the trucks used will be regulated and inspected by the DOT and further subject to waste transporter permits required by the DEC.

Prior to unloading, the trucks will be required to enter the enclosed building at the facility rather than idling outside. The facility will use negative air pressure and state-of-the-art equipment to reduce the possibility of odors from emanating to the surrounding properties. The manufacturing process will further use high temperature heat, a thermal oxidizer, scrubbers, and stacks to help reduce and minimize harmful emissions and odors. SBS further explained during its presentations and in its DEC permit application materials that process wastewater from the air

treatment system that is not recycled will be discharged and treated by the City of Glens Falls Wastewater Treatment Plant.

Further, SBS explained that the facility will be constructed and operated using a three-phased approach, which will allow it to obtain enough data to better project and refine the emission calculations, if needed, before constructing the additional lines. The facility will also be subject to DEC permits, which will limit the potential emissions to the levels permitted by the DEC and require testing and monitoring. These details regarding the manufacturing process, the facility design, and the DEC permits were explained extensively to the Planning Board during the lengthy review process. SBS further submitted numerous reports and correspondence, detailing its numerous safety and operational plans. After considering all these aspects of the proposed facility, the Planning Board then focused on the potential impacts based on the questions presented in Part 2 of the EAF. Ultimately, the Planning Board determined that the facility had the potential for moderate to large impacts upon air quality, odors, and human health. The Planning Board then discussed the mitigations proposed by SBS for these issues and voted on whether the mitigations were sufficient.

Contrary to Petitioner's contention, the Planning Board reasonably relied on the mitigations offered by SBS to alleviate the significance of these potential moderate to large impacts. The potential impacts from odor, for example, were rendered insignificant based on the DOT and DEC regulations of the trucks used to transport the biosolids, the chemicals generally used to reduce odors during transport, and the project design, including state-of-the-art technology and equipment to reduce odors (see Inc. Vill. of Poquott, 11 AD3d at 541-542 [considering as proper mitigation the use of water injection and selective catalytic reduction systems to reduce nitrogen oxides]). While the public raised several concerns over potential odors, the comments

consisted of generalized objections and did not provide any reasonable basis to conclude that the proposed mitigation for potential odors was inadequate (see Matter of Heights of Lansing, LLC v Village of Lansing, 160 AD3d 1165, 1167 [3d Dept 2018] ["generalized community objections or speculative environmental consequences are not sufficient to establish a SEQRA violation" (internal quotation marks and citation omitted)]).

Further, the potential impacts from air pollution and human health were similarly offset by the DEC regulatory standards, permits, and compliance requirements (see The SEQR Handbook at 92 [providing that a lead agency may rely on an applicant "meeting emission or discharge standards as required by law"]; see also Spitzer v Farrell, 100 NY2d 186, 191 [2003] ["it was rational for the agency, which is not an expert on air quality, to use such standards in its analysis"]; Inc. Vill. of Poquott, 11 AD3d at 541 [holding that it was proper to consider "the anticipated effect of various measures intended to mitigate the environmental impact" including the "adoption of good combustion practices to minimize emissions" and "voluntary caps designed to keep emissions of certain airborne contaminants below federal and state thresholds for new source review and prevention of serious deterioration regulatory programs"]; Matter of Viserta v Town of Wawayanda Planning Bd., 156 AD3d 797, 799 [2d Dept 2017] ["In approving the original site plan application, the Planning Board rationally relied on modeling that showed that the anticipated level emissions of fine particulates from the Energy Center would fall below federal limits"]).[7]

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[7] While perhaps not directly considered by the Planning Board, the Court takes judicial notice of 6 NYCRR 211.1, which prohibits air pollution and provides as follows:

> "No person shall cause or allow emissions of air contaminants to the outdoor atmosphere of such quantity, characteristic or duration which are injurious to human, plant or animal life or to property, or which unreasonably interfere with the comfortable enjoyment of life or property. Notwithstanding the existence of specific air quality standards or emission limits, this prohibition applies, but is not

On these issues, the data collected by SBS (namely, the testing and modeling performed for the air emission projections) supports its position that the process can break down unwanted PFAS and limit air emissions of pollutants harmful to human health and the environment. SBS further stipulated that it would limit its air emissions to the levels allowed in its permits and comply with State and federal standards. As the Planning Board was not an expert on air quality, its reliance on the limits permitted by the DEC standards and permits was rational (see Spitzer, 100 NY2d at 191; Matter of Viserta, 156 AD3d at 799; The SEQR Handbook at 92).

To the extent that Petitioner contends that the current regulatory standards for PFAS are insufficient to protect human health and the environment, this is an issue that has not been demonstrated on this record. Nor would it be appropriate for the Court to require a local agency to resolve this issue during a SEQRA review (see e.g. Spitzer, 100 NY2d at 191 [holding that the agency rationally conducted a study of particulate matter emissions based on the EPA standards and the scientific information available at the time]). Rather, the issue of whether the standards need to be stricter on PFAS emissions/discharges is an issue more appropriately left for the DEC and the Legislature or, if consistent with State law, the local governing body (e.g., a Town Board) (see ECL § 27-0711 [allowing a municipality to adopt local laws, ordinances, and regulations for solid waste management and resource recovery facilities if consistent with State law]; Monroe-Livingston Sanitary Landfill, Inc. v Caledonia, 51 NY2d 679, 682-684 [1980] [holding that a municipality may adopt stricter requirements for waste management if consistent with the applicable State law and regulations]; see also ECL § 19-0709 [allowing municipalities to adopt stricter air pollution controls if consistent with State law]).

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limited to, any particulate, fume, gas, mist, odor, smoke, vapor, pollen, toxic or deleterious emission, either alone or in combination with others" (see also 6 NYCRR 200.6).

The Court further disagrees with Petitioner's contention that the Planning Board lacked the ability to understand and analyze the impacts without the assistance of an independent consultant. Although the Planning Board originally sought to engage an independent consultant, it nevertheless followed up with the DEC, conducted additional inquiries, and received numerous additional submissions from SBS and the public. Ultimately, the Planning Board determined that it had sufficient information to proceed without an independent consultant. Given the extent of the record developed after December 2021, this decision was rational (see 6 NYCRR 617.20, Appendices ["It is ... understood that those who determine significance may have little or no formal knowledge of the environment or may not be technically expert in environmental analysis"]; see also Spitzer, 100 NY2d at 191; Inc. Vill. of Poquott, 11 AD3d at 541-542; Matter of Viserta, 156 AD3d at 799).

Further, contrary to Petitioner's contention, the Planning Board did not improperly delegate its SEQRA responsibilities by consulting with the DEC and relying on the DEC permits. "A lead agency improperly defers its duties when it abdicates its SEQRA responsibilities to another agency or insulates itself from environmental decision making" (Matter of Riverkeeper, Inc. v Planning Bd. of Town of Southeast, 9 NY3d 219, 234 [2007]; see Matter of Coca-Cola Bottling Co. of N.Y. v Board of Estimate of City of N.Y., 72 NY2d 674, 682-683 [1988]). Although a lead agency is encouraged to consult experts and other agencies, "it must exercise its own judgment in determining whether a particular circumstance adversely impacts the environment" (Matter of Riverkeeper, Inc., 9 NY3d at 234). Where a permit from another agency is required for the same project under consideration, the lead agency must sufficiently consider the environmental concerns

addressed by the permit, however, it need not wait for another agency's permitting decision before exercising its own independent judgment on that issue (see id.).[8]

Here, the Planning Board consulted with the DEC for the stated purpose of gaining information and details from the DEC specialists to assist them in making its SEQRA determination. The inquisitive nature of the meeting, including the advance preparation of questions, reflects that the Planning Board was seeking to obtain information to continue its own independent review of Parts 2 and 3 of the EAF. Further, the DEC consultation was only one part of the entire SEQRA review. The Planning Board further obtained copies of the permit applications and supporting reports, conducted numerous meetings to discuss the environmental issues, scheduled two public hearings to understand the public concerns, and received numerous submissions from SBS addressing the environmental issues.

The Planning Board, moreover, did not blindly rely on the protections of the permits. To the contrary, the Planning Board discussed the project scope in detail and considered a variety of other mitigations, including SBS' representations that it would not exceed the regulatory exceedances; that it would use state-of-the-art technology to reduce emissions and destroy PFAS; that it had conducted modeling and testing that produced positive results for PFAS destruction and limited air emissions; and that its process of pyrolysis was distinct from and environmentally superior to other methods of thermal treatment such as incineration and gasification.

According, the Court finds that the Planning Board conducted a thorough investigation and reasonably determined that no significant adverse impacts existed, especially considering the scientific information available at this time and the current regulatory standards.

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[8] Notably, the DEC regulations provide that, if a project is subject to SEQRA, the DEC will not consider a permit application complete unless, among other things, a negative declaration or CND has been filed or a draft EIS has been accepted by the lead agency (see 6 NYCRR 621.3[a][7]).

c. Did the Planning Board Overlook Any Potential Impacts Requiring Further Analysis or Rescission of the Negative Declaration?

Petitioner further asserts that the Planning Board overlooked several impacts during its environmental review, specifically the potential for spills on route to the facility, the potential for explosions and fires from fertilizer and liquid nitrogen, the noises from trucks, the increased stack height (75 feet to 115 feet), the problems associated with remediating PFAS and other contaminants from the biosolids, the impacts form nitrogen dioxide and nitrous oxide emissions, and the impacts of 30,000 gallons of potentially contaminated wastewater per day on the sewer system and the Hudson River.

The record, however, reflects that the Planning Board properly considered and evaluated all these potential issues. These issues were not only raised in the public comments and during the various public meetings, but Member Purdue repeatedly highlighted them for the Planning Board to consider. She wrote a detailed email in April 2022 discussing several of these issues and made three motions between May 2022 and August 2022, seeking to rescind on these same grounds. Far from overlooking them, the Planning Board was directly confronted with them.

Further, the Planning Board reasonably determined that these issues did not require any further analysis or raise a significant adverse impact requiring rescission (see 6 NYCRR 617.7[f] [requiring a lead agency to rescind a negative declaration when presented with significant new information, a project modification, or other changes in circumstances that cause it to conclude that the action may result in one or more significant adverse environmental impacts]; see also Matter of Village of Ballston Spa, 163 AD3d at 1225-1226; The SEQR Handbook at 87).

Regarding spills from trucks, SBS explained that the trucks used to transport the biosolids are regulated and designed not to spill or leak materials onto the roadway. SBS further provided the Planning Board with a copy of the subject safety plan in place by the truck supplier to avoid

spills and remedy any accidents. To mitigate truck noise, the hours for deliveries are limited. The deliveries are also scheduled to occur throughout the day rather than all at the same time. In addition, the potential for explosion and fire risks discussed in SBS' submissions concern the same safety risks present in many industrial and manufacturing facilities. As in other cases, SBS prepared a safety plan and met with the fire department to address these issues. SBS further provided the Planning Board with copies of its facility manual and safety plan. Again, the mitigations proposed by SBS were sufficient. No EIS was required to address these routine safety issues.

Regarding the stack height, the Planning Board was notified in June 2022 that the stack height would be raised from 75 feet to 115 feet. SBS explained that this change was made after discussions with the DEC and to address concerns regarding emissions and dispersion. The Planning Board was fully aware of this change and properly exercised its discretion by concluding that the additional increase in height in the three stacks was insignificant, especially considering that the area is zoned for manufacturing and industrial use.

Further, while the Court agrees with Petitioner that during the early phases of this project little attention on the potential for PFAS emissions was discussed by SBS, the Planning Board, and the public, this potential impact was nevertheless raised extensively in April 2022, at the public hearing in May 2022, and again at the public meetings in July and August 2022, as significant public comment focused on this issue. During this time, the Planning Board continued to consider these concerns over the course of several months, as Member Purdue made motions to rescind based on this issue. Ultimately, the Planning Board decided to rely upon the DEC standards, permits, and compliance procedures as mitigation sufficient to render the potential impact as insignificant.

Likewise, while the Planning Board did not discuss the potential emissions of nitrogen oxides in any significant detail, it was nonetheless aware of the amount of the potential emissions and that they would comply with the DEC permits and regulatory standards. SBS explained this issue in detail in its DEC submissions, which were forwarded to the Planning Board for its review. The submissions provided modeling data to compare dispersion with ambient air quality. For the reasons discussed above, the Planning Board's reliance on the DEC standards and permits and SBS' modeling data was reasonable.

Further, the record does not support Petitioner's conclusion that the facility poses any risks to the Hudson River from wastewater. The facility will remain fully enclosed. This design will prevent the biosolids from being exposed to stormwater runoff. In addition, all drainage in the building will go into the sewer system, not the stormwater system. This issue was considered and addressed by the Town's engineering consultant (LaBerge) during the stormwater review analysis.

The Planning Board also reasonably relied on SBS' submissions (including engineering reports and a letter from the wastewater treatment plant), as well as the discussions during the public meetings and its consultation with the Town's Water Superintendent, to reasonably conclude that sufficient capacity existed to support the facility's water usage and wastewater demands. Regarding water usage, the Town's Water Superintendent opined in an email that sufficient capacity existed and that such use would not impact the Town's future needs. Regarding wastewater discharge, the Town's Water Superintendent also felt comfortable with the project proceeding. While the volume of wastewater discharge will be relatively high, the Planning Board reasonably concluded that sufficient capacity currently exists to adequately provide for both the Town's current and future needs. In fact, the record indicates that the Town was discharging

around only 75,000 gallons per day to the treatment plant, whereas the Town's purchased capacity was much higher, namely, 190,000 gallons per day.

The Court nonetheless is troubled based on the undeveloped record before it, with the conclusions reached by SBS' environmental engineering consultant that the City of Glens Falls Wastewater Treatment Plant can adequately treat the content of the wastewater and that no pre-treatment by SBS will be required. On this issue, SBS's consultant relied on a letter from the treatment plant, dated February 18, 2022, which reads: "Per our discussion on December 14, 2021, the City of Glens Falls Wastewater Treatment Plant can receive the profile and volume of wastewater as stated in said meeting." The letter further states that the facility "will be required to meet the Glens Falls City Code 177 Article VII, Discharge Requirements [and that] Pretreatment will not be necessary unless the profile of your wastewater does not meet the Glens Falls Local Limits or causes pass through or interference with the wastewater treatment plant process." The consultant did not adequately address the necessity for pretreatment. Moreover, the Town's Water Superintendent in an email dated June 6, 2022, further commented that SBS "never submitted a sewer profile for consideration to the City or the County [and that] if either party has an issue with the sewer profile onsite pretreatment would be required."[9]

Notwithstanding, SBS' submissions do not provide any indication that the wastewater will be problematic, that it will cause any adverse impact on the environment, or that it cannot be successfully treated. At the March 2022 meeting, SBS represented that the PFAS from the

[9] The Zoning Administrator's updated Staff Notes assert generally that a profile was provided. In addition, Mr. Apy avers (without any record citations) that he sent an email on March 15, 2022 to the Zoning Administrator, attaching a copy of a document entitled "Saratoga Biochar Wastewater Profile 31 Jan2022." The record, however, does not appear to contain the email or the document. Nor does the record appear to contain any other documents to support a finding that a profile was provided.

biosolids would not contaminate the wastewater. The City of Glens Falls Wastewater Treatment Plant further did not have any issues with the wastewater when it was discussed with SBS. Further, even assuming any pre-treatment will be required, the Planning Board was permitted to rely on "conditions that an applicant is otherwise legally obligated to meet in order to obtain a permit or approval" such as "emission or discharge standards as required by law" (see The SEQR Handbook at 92; see also ECL § 8-0103[6]; 6 NYCRR 617.3[b]). In this case, the Planning Board reasonably relied on the treatment plant's preliminary approval and SBS' stipulations that it would obtain the required discharge permits/approvals and comply with the law regarding discharges. Indeed, the Glens Falls City Code provides adequate protections to avoid a potential adverse impact from the wastewater discharges, thereby rendering the potential impact as insignificant when such conditions are imposed.

The Glens Falls City Code, for example, prohibits the discharge of "any pollutant, wastewater or other material which will inhibit ... performance of the [treatment plant] ... or pass through the [treatment plant] without adequate treatment in violation of any applicable federal, state or local environmental regulation into the receiving waters of the Hudson River or into the sludge by-product of the [treatment plant]" (Glens Falls City Code § 177-50). In addition, the Code further prohibits, among other things, discharges of substances capable of causing fires or explosions, causing a hazard to humans or animals, creating a public nuisance, creating a toxic effect, causing the treatment plant to violate its permit, exceeding the limitations set forth in the national pretreatment standards or any other applicable pollutant discharge regulation, or containing materials in excess of certain concentration levels (*e.g.*, the maximum concentration of mercury discharge allowed into the treatment plant is 0.001 mg/l) (see id.).

In addition to these legal requirements, SBS must obtain approval from the Town to connect to the sewer district prior to engaging in any discharges. As a final protective measure, the site plan conditions further require SBS to comply with all the requirements set forth in a letter dated June 6, 2022, from the Town's Water Superintendent before the Zoning Administrator may issue a building permit. These were all proper conditions for the Planning Board to consider during its review process (see The SEQR Handbook at 92).

d. Did the Planning Board Properly Consider the Novelty of the Facility and the Lack of Available Data?

As discussed above, this case presents a novel facility/process. The facility will seek to remove PFAS from biosolids to create carbon fertilizer. The record indicates that the science behind such PFAS remediation is still evolving and requires further testing to fully understand. SBS, moreover, did not provide any data from comparable facilities and admittedly relied on small-scale testing to estimate the air emission levels. SBS further explained that production would have to commence (phases 1 and 2) to reliably verify the emission projections to a reasonable degree of certainty. The record also lacks data and analysis regarding the contents of the wastewater discharges.

Nonetheless, the Court is not troubled by the lack of data available to the Planning Board during its review process. The Planning Board reasonably concluded that such impacts were insignificant based on the record, e.g., the modeling and testing performed by SBS for the air emissions, the regulatory standards, the letter from the treatment plant, the applicable provisions of the Glens Falls City Code, the DEC oversight, and the project design. The record in fact indicates that SBS conducted material testing and syngas testing in a pilot scale kiln that its manufacturer typically uses for testing materials for design purposes. SBS reports that it utilized verifiable third-party professional laboratories to conduct analyses and provide the results.

Further, the record indicates that the kilns and thermal oxidizes incorporated in the processing system design are used broadly in industrial applications and have a track record for reliably performing pyrolysis on numerous materials and combusting the syngas generated from the process. The record further indicates that the dryers, material handling systems, and air treatment systems are also already employed on biosolids in many metropolitan areas nationally. The major equipment manufacturer selected by SBS, which reportedly has been designing and implementing thermal treatment systems for over 140 years, further required testing to supply a performance guarantee. In addition, the DEC has already implemented regulations specifically applicable to the process (see 6 NYCRR Subpart 362-1). As discussed during the January 2022 meeting, and again in SBS' submission from April 2022, the DEC recently issued a permit for a similar facility in Schenectady, New York (Permit ID: 4-4215-00026/00005).

Nonetheless, considering the novelty of the facility and the limited data available at the time of the review, the Court finds that SEQRA imposed the additional duty on the Planning Board to later re-confirm the reasonableness of its evaluation of the impacts and their significance once the data becomes available and prior to the increased production in the facility from lines 2 and 3. In this case, the Planning Board complied with this obligation by imposing site plan conditions, as permitted under Town Law § 274-a (4), specifically those requiring an ambient air quality analysis, a monitoring plan for ambient air quality, the recording of water use and wastewater discharge, and a meeting with the Planning Board prior to proceeding with phases 2 and 3, and the condition allowing for the Planning Board to halt further construction/operations (phases 2 or 3) if phases 1 and/or 2 result in negative impacts on the community.

The Planning Board, however, should also obtain, review, and analyze the testing and monitoring data regarding the actual emissions and wastewater discharges from the facility, when

such data becomes available and, more specifically, immediately or soon after the first phase (before the operations double in size) and again immediately or soon after the second phase (before the operations triple in size). Based on the record presented, the Court finds that such measures are in fact necessary in this case to ensure compliance with SEQRA.

Accordingly, to the extent such measures are not already impliedly part of the site plan conditions, the Planning Board is hereby directed, prior to meeting with SBS in advance of the construction of phases 2 and 3 (as required under condition number 15 of the site plan approval), to obtain, review, and analyze the readily available data, test results, and monitoring data regarding air emissions and wastewater discharges from the facility. The Planning Board should also inquire into the extent and nature of the monitoring and testing performed. The Planning Board is further directed to provide Petitioner with copies of this information, together with reasonable advance notice of the subject meetings with SBS.

e. Did the Planning Board Ignore the Public Comments?

The Court disagrees with Petitioner's assertion that Planning Board ignored the public comments. This assertion is based solely on a one-sentence email allegedly sent by Member Purdue to Petitioner's representative in September 2022, which reads: "I did not receive copies of the written statements that the public submitted to the planning board at the Saratoga Biochar public hearing on May 12th."[10] Even assuming for the sake of argument the truth of this assertion, the record demonstrates that the Planning Board conducted two public hearings and received a significant number of additional public comments before and after the public hearing on May 12, 2022.

[10] The Planning Board, in contrast, denies this allegation and affirmatively states in its answer that "the Planning Board was provided with all public comments."

Critically, Petitioner fails to explain how, if at all, the written statements submitted on May 12, 2022 were materially different than any of the other public comments or oral statements received and considered by the Planning Board. In addition, Petitioner fails to articulate any examples regarding what written comments the public may have provided on May 12, 2022 that would change the result in this case. The Petitioner itself in fact has not identified any new environmental concerns or mitigations other than that which is already contained in the record. Indeed, Petitioner's arguments are taken directly from Member Purdue's prior statements and the public comments contained in the record. Moreover, the Court has reviewed the May 12, 2022 statements contained in the record (attached to the meeting minutes). The statements are similar to the other public comments addressed above and do not provide sufficient grounds to invalidate the SEQRA determination.

f. Did the Planning Board Make a Reasoned Elaboration?

Petitioner further contends that the Planning Board did not make a reasoned elaboration of the basis for its determination. As explained above, a lead agency must "set forth its determination of significance in a written form containing a reasoned elaboration and providing reference to any supporting documentation" (6 NYCRR § 617.7[b][4]). In reviewing the written determination (in this case, Parts 2 and 3 of the EAF), several defects become readily apparent. In particular, the form identifies the wrong determination, fails to adequately explain the basis for the determination, and does not reference any supporting documents.

Nonetheless, the Court finds that the documentation contained in the record, including the transcript of the four-hour public meeting involving the Planning Board's consideration of the EAF, sufficiently demonstrates the reasons for Planning Board's SEQRA determination (see Matter of Town of Mamakating v Village of Bloomingburg, 174 AD3d 1175, 1179 [3d Dept 2019];

Matter of Ellsworth v Town of Malta, 16 AD3d 948, 950 [3d Dept 2005]; see also Matter of Coursen v Planning Bd. of Town of Pompey, 37 AD3d 1159, 1160 [4th Dept 2007]). As explained above, the environmental concerns were identified and discussed throughout the extensive review process conducted from May 2021 to August 2022. They are set forth in the record and evidenced by, among other things, the meeting minutes and audio recordings; the lengthy transcript of the March 2022 meeting; the Staff Notes; the numerous submissions and public comments; the Planning Board's consultation with the DEC, the Town's Water Superintendent, and LaBerge (its engineering consultant); and the Planning Board's consideration of the motions made by Member Purdue during the proceedings.

Prior to issuing its negative declaration, the Planning Board in fact spent four hours discussing and evaluating the EAF in March 2022. During the meeting, the Planning Board evaluated and assessed the potential impacts. The Planning Board further considered the proposed mitigations for each of the potential moderate to large impacts and voted on whether the proposed mitigation was sufficient. In addition, Member Purdue raised several challenges to the negative declaration after it was issued. She emailed her concerns in April 2022 and later made three formal motions to rescind based on these concerns.

Based on the Court's review of the record, the Court finds that the Planning Board was fully aware of the manufacturing process and the potential environmental risks associated with the facility, but nonetheless considered those risks as insignificant based on the circumstances presented. Accordingly, the Court finds that the Planning Board provided a reasoned elaboration of the basis of its determination.

The Court, however, recognizes that the written determination is inaccurate and, as such, it technically fails to comply with the regulation requiring a "written" form setting forth the

determination. The Court therefore directs the Planning Board to correct the error by preparing a new EAF containing the correct determination of significance rendered at the March 2022 meeting, to be placed on file with the Town Clerk's Office or by such other means that will notify the public that a negative declaration was issued (see Matter of Village of Ballston Spa, 163 AD3d at 1226 [holding that a lead agency may make changes to a negative declaration to correct a mistake]).

C.

Did the Conditions Imposed on the Site Plan Approval Require Public Comment?

Petitioner further contends that the Planning Board's approval of the site plan through its resolution on August 25, 2022, contained additional conditions that were not included in the SEQRA declaration. Specifically, according to Petitioner, the site plan conditions included continuous noise testing and noise reports; a detailed account of odor mitigation, including details regarding "odor quality monitoring equipment that will continuously monitor emissions," how biosolid materials are to be handled under negative pressure, and how odor complaints are to be handled; monitoring of biosolid feed stock composition; truck traffic limitations; pre-construction meetings with attendees as determined by the Zoning Administrator and Building Department; the use of woodchipper limited to specific times of day; and an environmental liability policy to be maintained by the applicant.

Petitioner contends that because of these additional conditions, the Planning Board was required, but failed, to put the public on notice of the conditions and allow for public comments on them for at least 30 days, resulting in a violation of SEQRA (see 6 NYCRR 617.7[d][1][iv]). The Court disagrees. The bulk, if not all, of the conditions reflect the terms and specifications of the site plans themselves, as proposed by SBS and discussed openly during the review process. SBS, for example, specifically informed the Planning Board that it would comply with the noise

regulations of the Town and the DEC; that the odors would be mitigated by its special equipment; that the feedstock will generally contain a specific composition; that they would not use biosolids from prohibited sources; that they would comply with DEC permitting requirements and the Town Code; and that they would avoid using the wood-chipper during the night. This is reflected in the application materials, including the EAF and the good neighbor policy (signed by SBS' officers), as well as SBS' responses to comments from the Planning Board and the public. As with the DEC permits and facility design mitigations, these too were simply adjustments made by SBS to mitigate potential impacts, and they were discussed openly and as part of the public review process.

To the extent that the site plan conditions imposed any additional monitoring and compliance requirements on SBS, this was done to ensure that SBS operated the facility in the environmentally friendly manner it specifically promised during the SEQRA review process. Such conditions, moreover, concern matters for which either the Town and/or the DEC had jurisdiction to require, regardless of SEQRA (see Town Law § 274-a [4] ["The authorized board shall have the authority to impose such reasonable conditions and restrictions as are directly related to and incidental to a proposed site plan."]; Town of Moreau Noise Control Local Law). These conditions were therefore proper conditions for a negative declaration, as discussed above. In addition, while the issue of liability insurance appears to be a new proposed term, the Planning Board passed a motion to strike it from the draft on advice of counsel. The language therefore does not appear in the final resolution and, as such, this was not made a condition to the site plan approval.

It is therefore,

ORDERED, ADJUDGED, and DECREED, that the Planning Board is directed to correct the scrivener's error in its determination of significance from March 7, 2022, within 30 days from the date of this decision; and it is further

ORDERED, ADJUDGED, and DECREED, that the Planning Board is hereby directed, prior to meeting with SBS in advance of the construction of phases 2 and 3 (as required under condition number 15 of the site plan approval), to obtain, review, and analyze the readily available data, test results, and monitoring data regarding air emissions and wastewater discharges from the facility. The Planning Board should also inquire into the extent and nature of the monitoring and testing performed. The Planning Board is further directed to provide copies of this information to Petitioner, together with reasonable advance notice of the meetings with SBS; and it is further

ORDERED, ADJUDGED, and DECREED, that the petition is **DENIED** in all other respects.

Dated: June 27, 2023
at Ballston Spa, New York

HON. RICHARD A. KUPFERMAN
Supreme Court Justice

Enter.