

SUPREME COURT OF THE STATE OF NEW YORK
SARATOGA COUNTY

CLEAN AIR ACTION NETWORK OF
GLEN FALLS, INC.

Petitioner,

-v-

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

Respondents.

VERIFIED PETITION

Index No.: _____

Date filed: _____

Petitioner, Clean Air Action Network of Glen Falls, Inc., by their undersigned attorneys, for their verified petition in this CPLR Article 78 Proceeding against the Respondents, respectfully allege and state:

PRELIMINARY STATEMENT

1. This Article 78 Special Proceeding under N.Y. C.P.L.R. § 7801 *et seq.* challenges the Town of Moreau Planning Board (“Planning Board”) regarding its approval of the Site Plan for Saratoga Biochar Solutions facility (“Facility”) to be located in Moreau Industrial Park (Parcels 50.-4-16 and 50.-4-22), Moreau, NY.
2. Acting as lead agency under SEQR, the Planning Board resolved to issue a Conditioned Negative Declaration (“CND”) on March 7, 2022 (Conditioned Negative Declaration, exhibit P, at 27). The Planning Board held a public hearing on May 12, 2022, in which

many residents expressed deep concerns regarding the potential impacts of this Facility to their community.

3. Planning Board Member Ann Purdue explicitly stated that she never received the public written statements that were submitted to the Planning Board at this May 12, 2022 public hearing (Ann Purdue Written Statements, exhibit V). Without responding to, or apparently ever reading, submitted comments, the Planning Board issued a resolution approving the Site Plan for Saratoga Biochar on August 25, 2022, in plain violation of SEQR (Draft Resolution Site Plan Approval, exhibit DD).
4. Despite the obvious environmental concerns regarding this biowaste processing facility, including, *inter alia*, noise and odor impacts, potential spills, PFAS (or “forever chemicals”) and other contaminants, and air emissions of nitrogen dioxides, the Planning Board relied on a CND to approve the Site Plan. This CND did not comply with SEQR. It failed to identify the pertinent areas of environmental concern, take a hard look at them, and advance a reasoned elaboration of the grounds for its determination.
5. This Facility is the first of its kind in New York, and Raymond Apy, the CEO of Saratoga Biochar Solutions, LLC, has never constructed or operated this type of facility. Yet, the Planning Board did not take necessary steps to adequately assess the effects of such a facility on the community and the environment.
6. Though the Planning Board initially resolved to retain one or more experts to examine potential environmental impacts, this action was never taken. Without any education on these issues outside of the applicant’s one-sided reports and communications with the Planning Board, the Planning Board failed to make an educated determination on the potential significant impacts.

7. Further, the Planning Board, in issuing the CND, arbitrarily identified some concerns as significant while ignoring other concerns entirely, all without prior experience and without the technical assistance from an independent consultant.
8. Additionally, per and polyfluorinated alkyl substances (“PFAS”), commonly termed “forever chemicals” are known to be present in biosolids (*see* June Air Facility Permit App., exhibit Y, at 23 [June 13, 2022]). Yet, PFAS emissions was not considered by the Planning Board in making its SEQR determination.
9. Other concerns such as air emissions and potential hazardous contaminants in sewage sludge were deemed not an issue because they would be examined by DEC in reviewing the Facility’s permit applications. This is contrary to SEQR and the DEC’s own guidance, which states that regulatory permitting conditions and normal administrative procedures cannot be considered mitigation and thereby affect the determination of significance.
10. Moreover, Part 3 of the EAF is woefully incomplete, despite that section requiring a thorough evaluation of all “moderate to large” impacts identified in Part 2. The Planning Board identified the following as potential moderate to large impacts in Part 2 of its EAF:
 - Emissions of more than 1000 tons per year of carbon dioxide,
 - The requirement of a state air registration in which the Facility may produce more than 5 lbs. per hour of total contaminants or may include a heat source capable of producing more than 10 million BTU’s per hour,
 - Combustion or thermal treatment of more than one ton of refuse per hour,
 - Routine odors for more than one hour per day.

(exhibit P, at 27). While the listed moderate to large impacts were underinclusive because of a lack of consideration of public comments and expert testimony, the Planning Board did not even fulfill the basic requirement of providing sufficient reasoning on why the impacts they themselves identified will not result in a significant adverse environmental impact.

11. On its face, the Planning Board's issuance of the CND was contrary to the requirements of SEQR.
12. The Planning Board's approval of the Site Plan based on this defective CND was arbitrary, capricious, and contrary to law and must be annulled.

JURISDICTION AND VENUE

13. This Court has jurisdiction pursuant to CPLR § 7601 which gives the Court authority to grant the relief sought by Petitioner. Therefore, jurisdiction is proper to review the arbitrary and capricious issuance of the CND and approval of the Site Plan for the Facility, which are contrary to law, without sound basis in reason and without regard to the facts.
14. This Court is the proper venue for the proceeding pursuant to CPLR § 506(b) as "proceeding[s] against a body or officer shall be commenced in any county within the judicial district where the respondent made the determination complained of." Respondent, Town of Moreau Planning Board, operates its offices within Saratoga County, New York, and made such determinations while operating in Saratoga County.

PARTIES

15. Petitioner, Clean Air Act Network of Glen Falls, Inc. (“CAAN”), has standing in its own right and on behalf of its members. CAAN is dedicated to protecting public health and reducing air pollution (*see* Frisch affirmation, exhibit A ¶ 4). As an organization that works to achieve a healthier environment through grassroots organizing, public education, and strategic action, it represents its members’ interests by challenging this petition (exhibit A, ¶ 6).
16. Respondent, Town of Moreau Planning Board, operates out of the Moreau Town Hall located at 351 Reynolds Rd in Moreau, NY. Here, the Planning Board conducted a review of the project as the lead agency under SEQR, issued a CND and approved the Site Plan that gave rise to this Article 78 Proceeding.
17. Respondent Raymond Apy, CEO of Saratoga Biochar Solutions, LLC, submitted the application to the Town of Moreau Planning Board for a proposed project located on Farnan Road within Moreau Industrial Park in Moreau, NY (*see* exhibit P, at 2). Mr. Apy sought the Planning Board’s approval of his company’s proposal to construct a facility that manufactures carbon fertilizer from biosolids and wood waste feedstock (*id.* at 1).
18. Respondent, Saratoga Biochar Solutions, LLC, is the company that has sought to construct and operate the proposed facility in Moreau, NY (*id.*).

PETITIONER’S STANDING

19. CAAN’s mission is to protect the environment and public health from air pollution in the greater Glen Falls area (exhibit A, ¶ 4). CAAN has been involved in this process regarding the Saratoga Biochar Facility since March 2022, after concerned Moreau residents brought their concerns to the organization (*id.* ¶ 5). Preventing the siting of

industrial facilities like the Saratoga Biochar Facility that are anticipated to pollute the air and create other environmental impacts is central to CAAN's mission and purpose (*id.* ¶ 6).

20. Mary Clear is a member of CAAN and resides on 35 Sisson Road, Fort Edward, NY 12828 (Clear affirmation, exhibit B ¶ 3). The proposed Saratoga Biochar Facility would be located approximately 700 feet from her property line and less than 1600 feet from her home of almost 40 years (*id.* ¶ 4). Mrs. Clear and her husband built their home in 1985 as their "forever home" but are now considering moving if this Facility is constructed (*id.* ¶ 8). Due to the longevity of the connection that Mrs. Clear holds with the area, the proposed facility will negatively affect her on an environmental, aesthetic and emotional level (*id.* ¶ 4, 5, 8). Her most prominent concern regarding this Facility is the potential emissions of toxic substances and pollutants (*id.* ¶ 5). She has experience researching biosolids and their potential to contain PFAS and heavy metals and is deeply concerned for her and her husband's health, as well as that of the surrounding community (*id.* ¶ 6).

21. Rojana Padron is a member of CAAN and resides on 19-21 Sisson Road, Moreau, NY 12828 (Padron affirmation, exhibit C, ¶ 3). Her home would be approximately 965 feet away from the proposed Saratoga Biochar Facility (*id.* ¶ 5). In fact, she recalls that her residence appeared on Saratoga Biochar's plans filed with the Planning Board (*id.* ¶ 3, 5). Her family moved to Moreau in large part due to their desire to live amongst the trees and wildlife that exist in what is now their approximately 13 acres of land. She enjoys the peace and serenity of clean, fresh air living (*id.* ¶ 4). Her most prominent concern is that this Facility would be the first of its kind in New York and that the Planning Board's

failure to properly consider its impacts could impact her and her family's quality of life (*id.* ¶ 6, 7, 8).

22. Being in such close proximity to the proposed Facility, Ms. Padron is deeply concerned that the odors, traffic, noise, and air emissions will impact her and her family's health and their enjoyment of their property (*id.* ¶ 8, 9, 12). Additionally, she is deeply troubled by potential PFAS emissions and fire and explosion risks from this Facility due to her and her family's proximity to the site (*id.* ¶ 9, 11). She also fears that this Facility threatens to harm the wildlife she holds dear in her area (*id.* ¶ 13). She is frustrated that the Planning Board approved this Facility without properly studying its impacts on the community's health and the environment. She feels the Planning Board has put her and her family in jeopardy (*id.* ¶ 15).

STATEMENT OF FACTS

23. In August of 2021, Mr. Apy, as CEO of Saratoga Biochar Solutions, LLC, submitted an initial Site Plan Application, including an Environmental Assessment Form (EAF), to the Town of Moreau Planning Board (*see* exhibit P, at 2). The proposed Facility, as described by Respondent, would manufacture carbon fertilizer from biosolids and wood waste feedstock with an annual throughput up to 235,200 wet tons of received biosolids and up to 35,280 tons of wood waste (March 2022 Engineering Report, exhibit D, at 1). The Facility would be constructed in three phases with each phase constructing a process line capable of processing up to 10 wet tons per hour of biosolids and up to 1.5 tons per hour of wood waste (*id.*).

24. During the Planning Board's meeting on August 2, 2021, the Planning Board voted unanimously to be Lead Agency under SEQR (August Meeting Minutes, exhibit E, at 2465 [Aug. 2, 2021]).
25. DEC formally recognized the Planning Board's Lead Agency Status on August 23, 2021 (*see* Lead Agency Approval, exhibit F, at 1).
26. Saratoga Biochar submitted applications for both an Air Facility Permit and a Solid Waste Management Facility Permit to DEC dated October 29, 2021 (*see* October 2021 Air Facility Permit App., exhibit G; Solid Waste Permit App., exhibit H).
27. Subsequently on November 16, 2021, representatives from Saratoga Biochar, including Mr. Apy and his counsel, had a private meeting with representatives from DEC to discuss the project (*see* email correspondence *RE: Saratoga Biochar Solutions, LLC – NYSDEC Permit Applications – STERLING Project 2020-20*, exhibit I [Nov. 16, 2021]).
28. Soon after, on November 22, the Planning Board held a meeting in which Mr. Apy and other representatives of Saratoga Biochar were present (November Meeting Minutes, exhibit J, at 2513, [Nov. 22, 2021]). There, Saratoga Biochar presented the Planning Board with an updated Site Plan and the Planning Board Members began asking questions (*id.*).
29. When asked about the status of the permit applications sent to DEC, Mr. Apy recalled the meeting with DEC on November 16 as "productive" and that the DEC's review of their application seemed "very favorable" (exhibit J, at 2516). Informing the Planning Board that they received a notice of incomplete application from DEC, Mr. Apy stated that "the only thing requested was that they will need the Town's SEQR determination, and it sounds like of course I can't speak for them, that's all they need" (*id.*).

30. The Planning Board resolved to schedule a Public Hearing for the Saratoga Biochar project on December 13, 2021. There, the Planning Board reviewed Saratoga Biochar's EAF and determined a number of moderate to large impacts (December Meeting Minutes, exhibit K, at 2560-61 [Dec. 13, 2021]). Admitting that they did not have the expertise to assess these impacts, the Planning Board passed a motion by unanimous vote to retain an independent consultant to assist the Board (*id.*). A consultant was never retained.
31. On January 12, 2022, the Planning Board held a meeting in which the Planning Board requested that Saratoga Biochar submit additional information regarding the Facility's potential environmental impacts (January Meeting Minutes, exhibit L, at 2630-33 [Jan. 12, 2022]).
32. According to Board Member Ann Purdue, Saratoga Biochar provided additional documentation to the Planning Board, including an updated EAF and Site Plan during February of 2022 (Ann Purdue Statement of Concern, exhibit M, at 1).
33. The Planning Board held a special meeting on March 7, 2022, where numerous changes were observed in the information contained in the updated EAF (*see* March Meeting Minutes, exhibit N, at 2 [March 7, 2022]; exhibit M, at 1). In particular, the updated EAF, as compared to the previous EAF, noted an increase in disturbed acreage and an increase in wastewater produced by the Facility. Board Member Ann Purdue voiced her concerns during this meeting about the potential impacts of the project on the surrounding community (exhibit M, at 1). However, the majority of the Planning Board determined that they would deem the moderate to large impacts mitigated by the eventual issuance of the DEC Air Facility and Solid Waste Management Facility Permits (exhibit N, at 4-6).

34. Such reasoning is in direct conflict with DEC's SEQR Handbook. There, DEC specifically states that "requiring that the applicant obtain the approval of another agency, when that approval is already legally required, is not a mitigation measure" (DEC SEQR Handbook Excerpt, exhibit O). As lead agency, the Planning Board's responsibility is to assess whether the permitted levels of pollution through the DEC permits and the other activities associated with the Facility will negatively impact the environment and the surrounding community.

35. The Planning Board determined that this was an Unlisted Action under SEQR and issued a Conditioned Negative Declaration on March 7, 2022 (Conditioned Negative Declaration exhibit P, at 27). However, the conditions listed in Part 3 are wholly inadequate to justify overlooking the significant adverse impacts identified. The conditions set by the Planning Board were as follows:

- "Impacts on air mitigated by NYSDEC issuance of air emissions permit and periodic 3rd party monitoring."
- "Impact on noise, odor and light mitigated by building enclosure, scrubbing, and being under negative air pressure and bio filters."
- "Human health – hazardous waste not received nor processed at site in accord with solid waste permit."

(*id.* at 27).

36. The first and third conditions are merely relying on the NYDEC permitting process to take care of any significant adverse environmental impacts. Such permits cannot be considered a mitigating factor during the SEQR process. As to the impact on noise, odor and light, the Planning Board did not take a hard look into whether such impacts could in

fact be mitigated by the actions the applicant proposed. Rather, it chose to forgo retaining an independent consultant to ensure that they made an informed decision and instead relied on the biased reports of the applicant.

37. At a subsequent Planning Board meeting on June 20, 2022, the Town Attorney incorrectly advised the Planning Board that Saratoga Biochar's Site Plan had been deemed approved due to the board's failure to act on the plan in February and that independent third-party consultant review was unnecessary for this project. The majority of the Planning Board on June 20th was persuaded that retaining an independent consultant was unnecessary, despite previously passing a motion to retain one (June Meeting Minutes, exhibit Q, at 11 [June 20, 2022]).
38. In attempting to justify this change, the Planning Board reasoned that there was no way to objectively measure or monitor odor impacts (*id.* at 11). Not only was this assumption false, but it also ignored the multiple other environmental impacts that required review by an expert. Moreover, the Planning Board, in abandoning its prior resolutions to retain an independent consultant, purposefully withheld from itself the necessary technical assistance to make an accurate assessment of all the potential impacts from this Facility.
39. Before issuing a negative declaration, the Planning Board was required to find either that there *will not* be any significant adverse environmental impacts or that the identified adverse environmental impacts will not be significant (6 NYCRR 617.7(a)(2)). Not knowing the extent of odors or other environmental impacts is precisely the reason to conduct an Environmental Impact Statement ("EIS") – to make those determinations. The Planning Board's concession that it could not determine the impacts alone should have resulted in a positive declaration and required an EIS.

40. On July 18, 2022, Planning Board Member Ann Purdue made a motion to rescind the prior SEQR determination because of the new environmental concerns raised after the March 7, 2022 meeting (Ann Purdue Resolution to Rescind, exhibit R). That motion failed (July Meeting Minutes, exhibit S, at 15-24 [July 18, 2022]). Ann Purdue also made a motion to retain an independent expert to assist the Planning Board in its consideration of this project and its impacts (*id.*). That motion also failed according to the meeting minutes (*id.*).

41. A public hearing was scheduled for May 12, 2022. At this public hearing, many residents of Moreau voiced their concerns and opposition to the Facility and its potential environmental impacts, including noise, odor, truck traffic and air pollution (May Meeting Minutes, exhibit T, at 2-4 [May 12, 2022]). Many of these residents expressed concern that the Planning Board had not retained an expert to assess the impacts of the Facility (*id.*).

42. At this public hearing, Planning Board Member Ann Purdue made another motion for independent review to be done for the project (exhibit T, at 5). According to the meeting minutes, that motion was not seconded (*Id.* at 5). However, an article published in the Glen Falls Post Star newspaper states otherwise, confirming that the “Moreau Planning Board voted in favor of an independent review of Saratoga Biochar Solutions” (Post Star Article, exhibit U). Thus, it appears that the Planning Board did not even report accurate meeting minutes of the public hearing.

43. Additionally, there was no recording of the public hearing that day, leaving no record of what was said to the Planning Board, beyond the brief descriptions contained in the draft meeting minutes. The Interim Planning Board Chair claimed at several subsequent

Planning Board meetings that an electrical cord was inadvertently unplugged, resulting in no recording of the meeting. Tracy Frisch, founder of CAAN, attended this public hearing and stated that she did not witness anyone trip on the electrical cord of the tape recorder (exhibit A, ¶ 16-18).

44. Moreover, Tracy Frisch stated that, at this public hearing, she witnessed those who spoke to the Planning Board place their written statements and any supporting documents on the table where the Town Attorney and Town Zoning Administrator were sitting (*id.* ¶ 19). Planning Board Member Ann Purdue confirms, however, that the Planning Board never received these written statements or supporting documents (exhibit V). Moreover, despite submitting a FOIL request with the Planning Board on July 2, 2022, the Planning Board has not produced any of the written statements submitted. One business day prior to the filing of this Petition, Petitioner received a letter stating that it would be provided documents in response to the FOIL request (FOIL Letter, exhibit W [Sept. 23, 2022]). As of this filing, those documents have not been received.

45. Reconstructed public comments reveal that the public had strong concerns regarding the potential adverse impacts of the Facility and the inadequate review of these concerns by the Planning Board (Public Comments, exhibit X).

46. It is plainly evident from comments sent and presented to the Planning Board that the Facility may cause significant adverse impacts to the environment and surrounding community, and the brief and inadequate discussion in the CND does not address these issues (*id.*). Concerns identified by Petitioner and the public include:

- Traffic and truck route noise and odor impacts,
- Potential spills on route to the Facility,

- Issues related to emergency services, including ingress and egress restrictions and proper equipment and training related to activities at the Facility,
- Impacts of 30,000 gallons of potentially contaminated wastewater per day on the sewer system and the Hudson River,
- Odors,
- Noise,
- Hazardous chemicals stored on-site,
- PFAS and other contaminants in sewage sludge and potentially in wastewater and air emissions,
- Air emissions of Nitrogen Oxides and other pollutants,
- Potential explosions and fire risks

(*id.*).

47. Despite all of these potential impacts, the Planning Board only noted the following on

Part 2 of its CND:

- Small impacts on land due to construction.
- Small impacts on plants and animals.
- Small impacts on energy.
- Small impacts on human health.
- Moderate to large impact on air due to more than 1000 tons/year of carbon dioxide, the requirement of a state air registration, and combustion or thermal treatment of more than 1 ton of refuse per hour.
- Moderate to large impact on odor due to routine odors for more than one hour per day.

(exhibit P, at 27). This underinclusive determination of both small and moderate to large impacts was made without the guidance of an independent consultant despite the fact that the Planning Board lacks any expertise or experience with such a facility.

48. Moreover, following the March 7th meeting, new concerning information regarding the potential impacts of the Facility came to the Planning Board's attention. Specifically, Saratoga Biochar's updated Air Facility Permit Application, revealed that the Facility could emit not only Nitrogen Dioxide, but also Nitrous Oxide, another greenhouse gas. (June Air Facility Permit App., exhibit Y, at 14 [June 13, 2022]). Additionally, the updated Air Facility Permit Application discusses potential PFAS air emissions and control methods that were not discussed in the October 2021 application the Planning Board reviewed, nor in the March 2022 application (*see* exhibit Y at 23; *see also* March Air Facility Permit App., exhibit Z [Mar. 31, 2022]). Saratoga Biochar's updated Engineering Report revealed through its site drawings that it would store liquid nitrogen on site (March Engineering Report Site Drawings, exhibit AA [Mar. 31, 2022]). Saratoga Biochar's updated Facility Manual identifies potential fire risks associated with the storage of biochar on site (March Facility Manual, exhibit BB, at 16 [Mar. 31, 2022]). Lastly, the Planning Board learned after the March 7th meeting that DEC would require the Facility to use higher smokestacks in order to better disperse air contaminants (Stack Height Change, exhibit CC).

49. These issues were never addressed in the EAF despite SEQR requiring a lead agency to "rescind the [conditioned negative declaration] and issue a positive declaration requiring the preparation of a draft EIS if it receives substantive comments that identify: (i)

potentially significant adverse environmental impacts that were not previously identified and assessed or were inadequately assessed in the review” (6 NYCRR 617(d)(2)).

50. Notwithstanding the glaring uncertainties regarding this Facility and its potential adverse environmental impacts as the first of its kind in New York, the Planning Board issued a resolution approving the Site Plan for Saratoga Biochar on August 25, 2022 (Draft Resolution Site Plan Approval, exhibit DD).

51. The Site Plan Approval states that on March 7, 2022, the Planning Board “adopted a resolution finding no significant environmental impact and issued a negative declaration under SEQRA” (*id.* at 4).

52. Further, the Site Plan Approval reiterated conditions that were insufficient to comply with SEQR which requires a lead agency in issuing a conditioned negative declaration for unlisted actions to impose “SEQR conditions pursuant to section 617.3(b) of this Part that have mitigated all significant environmental impacts and are supported by the full EAF and any other documentation” (*id.* at 7). The Planning Board in listing the DEC permits as mitigating conditions for significant air and hazardous waste impacts did not satisfy this requirement (6 NYCRR 617.7(d)(1)(iii)).

53. Further, the Site Plan Approval contained additional conditions that were not included in the Conditioned Negative Declaration issued on March 7, 2022, including:

- Continuous noise testing and noise reports
- A much more 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,
 - Use of woodchipper limited to specific times of day,
 - Environmental liability policy to be maintained by applicant
- (exhibit DD, at 7-13).

54. These detailed conditions were not laid out in Part 3 of the CND that was subject to public comment. Therefore, the Planning Board failed to put the public on notice of all the conditions that would be imposed and allow for public comments on all such conditions in violation of SEQR (6 NYCRR 617.7(d)(1)(iv)).

55. Despite this discrepancy, the Planning Board never sought to modify or rescind the CND.

56. Further, even if the Court were to look at these additional measures contained in the Site Plan Approval, there is no evidence that these conditions would mitigate the potential significant environmental impacts identified. These conditions were not set with the knowledge or guidance from an independent consultant. Rather, the Planning Board relied on the applicant's own studies and reports, despite acknowledging that they do not understand the science or technical aspects of this facility and its potential impacts.

57. Moreover, the Site Plan only addressed a few areas of moderate concern, including the emission of 1000 tons/year of carbon dioxide, emissions of contaminants requiring a state air registration, the combustion or thermal treatment of more than one ton of refuse per hour, and routine odors (exhibit DD, at 3). This underinclusive list fails to address

concerns regarding PFAS emissions, fire risks, truck traffic, nitrogen oxide emissions, and many other concerns raised by the community.

AS AND FOR A FIRST CAUSE OF ACTION

58. The preceding paragraphs of this Petition are incorporated in this Count by reference as if fully set forth herein.
59. Article 78 of New York's Civil Practice Law and Rules provides a device for challenging the actions of New York State or political subdivisions thereof, including the Planning Board (N.Y. C.P.L.R. § 7801).
60. The Planning Board's issuance of a CND for the Facility in light of the above reasons was arbitrary, capricious, and contrary to law.
61. The Planning Board's admitted inexperience and lack of knowledge regarding the potential significant environmental impacts associated with this Facility required it to, at the very least, retain an independent consultant as it originally agreed to do. In failing to do so, the Planning Board improperly relied solely on biased reports submitted by the applicant and thus failed to take a hard look at the environmental impacts as required by SEQR.
62. Further, the Planning Board failed to properly consider public comments when making its determination of significance in violation of SEQR which requires consideration of issues raised by the public throughout the review process (6 NYCRR 617.3(d)). Upon information and belief, the Planning Board did not even receive or read public written statements (*see* exhibit V). Thus, the Planning Board could not have taken a "hard look" or properly considered public comments when making its determination.

63. Lastly, the Planning Board improperly relied on the separate DEC permitting process as a mitigating factor for potential air and hazardous waste impacts (*see* exhibit O).
64. Because the Planning Board failed to take a hard look at all potential adverse environmental impacts identified by the public, failed to consult an independent consultant to adequately assess these impacts, and impermissibly cited the DEC permitting process as a mitigating factor for moderate to large impacts, the Planning Board's issuance of a Conditioned Negative Declaration was arbitrary, capricious, and contrary to law.

AS AND FOR A SECOND CAUSE OF ACTION

65. The preceding paragraphs of this Petition, other than those identified in the First Cause of Action, are incorporated in this Count by reference as if fully set forth herein.
66. Article 78 of New York's Civil Practice Law and Rules provides a devise for challenging the actions of New York State or political subdivisions thereof, including the Planning Board (N.Y. C.P.L.R. § 7801).
67. The Planning Board's approval of the Site Plan was arbitrary, capricious, and contrary to law because it inaccurately relied on a CND that did not comply with SEQR.
68. The Planning Board failed to rescind the CND and issue a positive declaration when it received substantive comments that identified potentially significant adverse environmental impacts that were not previously identified and assessed, in violation of SEQR (6 NYCRR 617.7(d)(2)).
69. Further, when new information was discovered regarding potential significant environmental impacts, including the emission of Nitrous Oxide (exhibit Y, at 14),

storage of liquid nitrogen on site (exhibit AA), an increase in stack height (exhibit CC), emission of PFAS (exhibit Y at 23), as well as potential fire risks associated with storage of biochar on site (exhibit BB, at 16), the Planning Board was required to rescind the CND under SEQR (6 NYCRR 617.7(f)(1)).

70. Lastly, Planning Board's approval of the Site Plan through its Resolution on August 25, 2022, contained additional conditions that were not included in the CND (exhibit DD, at 7-13). Therefore, the Planning Board failed to put the public on notice of all the conditions that would be imposed and allow for public comments on all such conditions in violation of SEQR (6 NYCRR 617.7(d)(1)(iv)).

PRAAYER FOR RELIEF

WHEREFORE, Petitioner respectfully demands judgment and injunctive relief as follows:

- A) A judgment that the Planning Board's Conditional Negative Declaration was arbitrary, capricious, and contrary to law.
- B) A judgment that the Planning Board's approval of the Site Plan was arbitrary, capricious, and contrary to law.
- C) A judgment that enjoins Respondent Raymond Apy and his company Saratoga Biochar Solutions, LLC from commencing construction of the facility until the application is properly considered by the Planning Board in accordance with SEQR.
- D) Granting Petitioner such further relief as the Court may deem proper.

Dated: September 26, 2022

Respectfully submitted,



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VERIFICATION

STATE OF NEW YORK)
Washington) ss.:
COUNTY OF SARATOGA)
TR

TRACY FRISCH, being duly sworn, deposes and says:

1. I am PETITIONER, Clean Air Action Network of Glen Falls, Inc., Founder.
2. I have read the foregoing petition and its factual contents are true to my personal knowledge, except as to those matters alleged therein to be upon information and belief and as to those matters, I believe them to be true.



TRACY FRISCH

Sworn to before me this

9/26/2022



Notary Public

JANE R. LEVEY DOWLING
Notary Public, State of New York
Washington County #01LE6371776
Commission Expires March 5, 2024