STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 BROADWAY
ALBANY, NEW YORK 12233-1010

In the Matter

- of -

the Alleged Violations of Articles 27 and 71
of the Environmental Conservation Law ("ECL")
and Part 360 of Title 6 of the Official
Compilation of Codes, Rules and Regulations
of the State of New York ("6 NYCRR"),

- by -

ROBERT LIERE, as owner and operator of LIERE FARM, and ROBERT LIERE d/b/a LIERE FARM,

Respondent.

DEC Case No. R1-20031030-257

DECISION AND ORDER OF THE COMMISSIONER

April 17, 2006

DECISION AND ORDER OF THE COMMISSIONER

Respondent Robert Liere owns and operates the Liere Farm located on the North Service Road of the Long Island Expressway at Exit 66 in Yaphank (Town of Brookhaven, Suffolk County). The farm is 110 acres and has been in operation since the 1950's. In a verified complaint dated December 2, 2003, staff of the New York State Department of Environmental Conservation ("Department") alleged that respondent violated various provisions of Environmental Conservation Law ("ECL") article 27 and title 6 of the Official Compilation of Codes, Rules and Regulations ("6 NYCRR") part 360 and its subparts.

Pursuant to 6 NYCRR part 622, Administrative Law Judge ("ALJ") Daniel P. O'Connell convened a hearing on May 25, 26 and 27, 2004 and on October 19 and 20, 2004 at the Department's Region 1 office in Stony Brook, New York. ALJ O'Connell prepared the attached hearing report. The ALJ concludes that respondent violated 11 of the 13 violations alleged in the December 2, 2003 complaint, and recommends a total civil penalty of $142,500. The ALJ also recommends that respondent be directed either to close the solid waste management facility at the farm by removing all solid waste, or to apply for a permit to operate a solid waste management facility at the farm. I concur with and adopt the

ALJ's hearing report as my decision in this matter, subject to the comments in this order.

The record demonstrates that respondent accepted and processed large amounts of land clearing debris and yard waste, which are regulated solid wastes, without any approvals from the Department. As a result, respondent violated the general provisions outlined in 6 NYCRR subpart 360-1, as well as regulatory requirements related to the operation of land application facilities (6 NYCRR subpart 360-4), composting facilities (6 NYCRR subpart 360-5), and construction and demolition ("C&D") debris processing facilities (6 NYCRR subpart 360-16). Due to this lack of regulatory compliance, respondent realized a significant economic benefit, as well as created a nuisance with potential adverse human health impacts.

Throughout this administrative enforcement proceeding, respondent has sought to rely upon a decision of District Court, Suffolk County, in the criminal matter, People v Liere (December 19, 2000, Sgroi, J., Docket Nos. 27571/99, et al.), as a defense to the complaint. Respondent's reliance on the District Court's decision is unavailing. The dismissal of a criminal charge or an acquittal in a prior criminal proceeding against a defendant is not proof of innocence and does not bar, and has no collateral

estoppel effect in, a subsequent civil proceeding against the same defendant arising out of the same incident (see Reed v State of New York, 78 NY2d 1, 7-8 [1991]; Kalra v Kalra, 149 AD2d 409, 410-411 [2d Dept 1989]). An acquittal in a prior criminal matter on issues upon which the People bore the burden of proof merely stands for the proposition that the People failed to meet the higher "beyond a reasonable doubt" standard applied in the criminal proceeding (see Reed v State, 78 NY2d at 8). Thus, the District Court's dismissal of the prior criminal proceeding against respondent does not bar this subsequent civil administrative enforcement proceeding, in which the lower "preponderance of evidence" standard is applied, even assuming this proceeding arises at least in part out of the same incidents as the criminal proceeding (see id.).

Moreover, as the ALJ correctly concluded in a prior ruling in this matter, because the present complaint is based upon operations at respondent's farm that post-date the District Court's decision, neither the doctrine of res judicata nor collateral estoppel bar the present proceeding (see ALJ Ruling on Respondent's Affirmative Defenses and Motion to Dismiss, Sept. 30, 2004, at 8-10, 11-13). In addition, Department staff did not participate in the prosecution of the criminal matter and no basis exists for deeming the Department and the District

Attorney's Office as the same party for collateral estoppel purposes (see id. at 11-12; see also Brown v City of New York, 60 NY2d 897, 898-899 [1983]).

Finally, nothing in the District Court's decision supports the conclusion that Judge Sgroi intended to issue a declaratory ruling or an order authorizing operations at respondent's farm as contemplated by 6 NYCRR 360-1.5(a)(2). The court simply determined that the People failed to prove its criminal case. In any event, even assuming that the court's decision was an order in the nature of a permit, at most the court would have authorized operations consistent with regulatory requirements. As the record in this case makes clear, respondent violated multiple operating requirements applicable to the farm. Thus, respondent has violated whatever approvals the court provided through its December 19, 2000 decision (see Hearing Report, at 11).

NOW, THEREFORE, having considered these matters and being duly advised, it is ORDERED that:

I. Respondent Robert Liere is adjudged to have committed the following violations:

A. Respondent Robert Liere violated ECL 27-0707(1) and 6 NYCRR 360-1.5(a) on October 16, 2003 by operating an unauthorized C&D debris disposal facility at the

farm. With respect to the requirements outlined in 6 NYCRR subpart 360-4 concerning land application facilities, respondent violated 6 NYCRR 360-4.2(a)(3) on October 16, 2003 by failing to adequately incorporate grass and leaf material into the soil at the farm.

B. With respect to operations related to composting facilities (6 NYCRR subpart 360-5), respondent violated 6 NYCRR 360-5.7(b)(5) on October 16, 2003 by failing to control ponding on the farm. Respondent violated 6 NYCRR 360-5.7(b)(6) on October 16, 2003 by neither establishing nor maintaining windrows at the farm. Respondent violated 6 NYCRR 360-5.7(c) on October 16, 2003 by not maintaining the required records. Respondent repeatedly violated 6 NYCRR 360-5.7(b)(11) on July 31, 2003, August 6, 11, 18, 22, 25 and 29, 2003, and September 3 and 4, 2003 by failing to control odors from the farm.

C. Concerning C&D processing facilities (6 NYCRR subpart 360-16), respondent violated 6 NYCRR 360-16.1(a) on October 16, 2003 by commingling land clearing debris and yard waste at the farm. Respondent violated 6 NYCRR 360-16.4(f)(3) on October 16, 2003 because individual piles of commingled solid waste occupy an area greater that 5,000 square feet. Respondent violated 6 NYCRR 360-16.4(i)(2) on October 16, 2003 because he failed to maintain records about the amount and nature of the C&D debris accepted and processed at the farm.

II. For the violations identified above, respondent is assessed a total civil penalty of $142,500. Within 30 days of service of this order upon respondent, respondent shall pay the full assessed penalty. Payment shall be in the form of a certified check, cashier’s check or money order payable to the order of the "New York State Department of Environmental Conservation" and delivered by certified mail, overnight delivery or hand delivery to the Department at the following address: Craig Elgut, Esq., Regional Attorney, Region 1, New York State Department of Environmental Conservation, SUNY Campus, Building 40, Stony Brook, New York 11790-2356.

III. Respondent shall comply with the following schedule of compliance:

A. Effective immediately, respondent shall not accept

any land clearing debris, yard waste, or any other solid waste at the Liere farm for any purpose.

B. Within 30 calendar days after service of this order upon respondent, respondent shall submit to the Department an approvable plan for the closure and removal of all existing construction and demolition debris, land clearing debris and yard waste to an approved facility. After Department staff notifies respondent of its approval of the closure plan, respondent shall immediately implement the approved closure plan.

IV. In the alternative to complying with the requirements outlined in III(B), respondent may file an application with the Department for a permit to operate a solid waste management facility. Respondent shall submit the application and all necessary supporting materials within 30 calendar days after service of this order upon respondent. Until any such permit application is approved by the Department, respondent shall not accept any land clearing debris, yard waste, or any other solid waste at the Liere farm for any purpose.

V. All communications from respondent to the Department concerning this decision and order shall be made to Craig Elgut, Esq., Regional Attorney, New York State Department of Environmental Conservation, Region 1, SUNY Campus, Building 40, Stony Brook, New York 11790-2356.

VI. The provisions, terms and conditions of this order shall bind respondent and his successors and assigns, in any and all capacities.

NEW YORK STATE DEPARTMENT
OF ENVIRONMENTAL CONSERVATION

By: _________/s/_______________
Denise M. Sheehan
Commissioner

Dated: Albany, New York
April 17, 2006

To: Robert Liere (via Certified Mail)
100 Long Island Avenue
Yaphank, New York 11980

Joan B. Scherb, Esq. (via Certified Mail)
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STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 Broadway
Albany, New York 12233-1550

In the Matter of Alleged Violations of New York State Environmental Conservation Law (ECL) articles 27 and 71, and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) part 360 by Robert Liere as owner and operator of Liere Farm,
and
Robert Liere doing business as Liere Farm,
Respondent.

DEC Case No.:
R1-20031030-257

Hearing Report

by

_______________/s/_______________
Daniel P. O'Connell
Administrative Law Judge

Proceedings

Staff from the New York State Department of Environmental Conservation (Department staff) initiated the captioned enforcement matter by duly serving a notice of pre-hearing conference, hearing and verified complaint dated December 2, 2003 upon Robert Liere (Respondent) as owner and operator of Liere Farm, and Robert Liere doing business as Liere Farm. The complaint asserts that Mr. Liere owns and operates the Liere Farm, which is located on the North Service Road of the Long Island Expressway at Exit 66 in Yaphank (Town of Brookhaven, Suffolk County), New York. In 13 separate causes of action, the complaint alleges various violations of ECL article 27, as well as provisions of 6 NYCRR part 360 and its subparts. According to the complaint, the alleged violations occurred at the Liere Farm at various times from July 31 to October 16, 2003. Department staff requests an order from the Commissioner that directs Mr. Liere to remove all construction and demolition (C&D) debris, and yard waste from the Liere Farm, and assesses a total civil penalty of $157,500. Attached as Appendix A to this report is a copy of the December 2, 2003 complaint.

Mr. Liere's former attorney, Robert J. Cava, Esq., filed a verified answer dated January 20, 2004 and appeared at the pre-hearing conference scheduled for January 28, 2004 at 10:00 a.m. at the Department's Region 1 office on the SUNY Stony Brook Campus. In the answer, Mr. Liere generally denied the charges alleged in the complaint, and asserted 13 affirmative defenses.

With a cover letter dated February 25, 2004, Department staff filed a statement of readiness as required by 6 NYCRR 622.9. Subsequently, Mr. Liere retained new legal counsel, Joan B. Scherb, Esq., from Commack, New York In a ruling dated September 30, 2004, Administrative Law Judge (ALJ) Daniel P. O'Connell denied Mr. Liere's motion to dismiss the December 2, 2003 complaint, and dismissed Mr. Liere's 12th and 13th affirmative defenses.

The hearing commenced on May 25, 2004, continued on May 26 and 27, and reconvened on October 19 and 20, 2004 at the Department's Region 1 office. During the May hearing sessions, Department staff was represented by Vernon Rail, Esq., Assistant Regional Attorney. Subsequently, Craig L. Elgut, Esq., Assistant Regional Attorney, represented Department staff at the October hearing sessions. Mr. Rail prepared Department staff's closing statement and brief. Mr. Liere was represented by Joan B. Scherb, Esq., from Commack, New York.

Four witnesses testified on behalf of Department staff: (1) Anit Patel, P.E., Environmental Engineer II; (2) John E. Conover, Jr., P.E., Regional Enforcement Coordinator; (3) Merlange Genece, P.E, Environmental Engineer; and (4) Frank Lapinski, Investigative Lieutenant. Mr. Liere testified on his behalf.

After the hearing, a briefing schedule was established. With a cover letter dated February 15, 2005, Department staff filed its closing statement and brief. Mr. Liere's memorandum of law was received on February 17, 2005. With the closing statement and brief, Department staff enclosed a document dated June 1990 entitled, *Yard Waste Management: A Planning Guide for New York State*. I returned the referenced document to Department staff under cover of a memorandum to the parties dated February 18, 2005. In the February 18, 2005 memorandum I explained that the document included additional evidentiary material that had not been offered during the hearing. In addition, I suspended the return date for reply briefs.

Nevertheless, Mr. Liere filed a reply to Department's closing statement and brief on March 16, 2005. Mr. Liere objected to Department staff's attempt to introduce the planning guide with its closing statement and brief.

In a letter dated February 24, 2005, Department staff requested that I reconsider my determination to return the planning guide. In a memorandum dated March 3, 2005, I explained that I considered the document to include evidentiary material, and that Department staff should move to reopen the record of the hearing. With a cover letter dated March 8, 2005, Department staff requested leave from the Commissioner to appeal from my decision in the February 18, 2005 memorandum to return the guidance document. By letter dated June 6, 2005, the Assistant Commissioner for Hearings and Mediation Services informed the parties that the Commissioner denied Department staff's motion for leave to appeal.

As directed by the Commissioner, I convened a telephone conference call on June 21, 2005 to inquire whether the parties wanted to amend or supplement their closing briefs and to schedule a date for filing reply briefs. I issued a memorandum of the conference call on June 21, 2005. In a letter dated July 12, 2005, I set August 12, 2005 as the return date for reply briefs after receiving additional information from the parties. The July 12, 2005 letter authorized Mr. Liere to supplement his March 16, 2005 reply. I received nothing more from the parties. In a letter dated September 26, 2005, I noted that I did not

receive any additional filings from the parties, and stated that the hearing record was closed.

Findings of Fact

The Liere Farm

1. The Liere farm is 110 acres, and has been in operation since the 1950's. It is located on the north side of the North Service Road of the Long Island Expressway (Exit 66) in Yaphank (Town of Brookhaven, Suffolk County), New York. Robert Liere has worked on the farm for about 40 years, and took over operations from his father and uncle in 1996.

2. Each year, Mr. Liere cultivates and sells pumpkins, beans, rye and horticulture specialties. He planted a crop for the 2004 growing season. Since 1996, Mr. Liere has processed land clearing debris and yard waste into what he characterizes as mulch and top soil.

3. Mr. Liere collects $60-$80 from landscapers who bring land clearing debris and yard waste in a six wheeler, and $20-$30 for materials brought in a pickup truck. For these materials, Mr. Liere accepts only cash. Mr. Liere does not keep any records concerning the amount and nature of the materials he accepts at the Liere farm, the total revenue he earns from accepting these materials, the amount of mulch and top soil he sells, or the total revenue he earns from the sale of these products.

Operations

4. Mr. Liere accepts land clearing debris and yard waste at the Liere farm, and processes these materials. The Liere farm is open Monday through Saturday from 7:00 a.m to 4:30 p.m. Landscapers enter the farm through a gate, and proceed to an open area. There, Mr. Liere visually inspects each load of land clearing debris and yard waste by climbing into every truck. If the load includes anything other than acceptable materials, Mr. Liere rejects the load, and directs the landscaper to leave his farm.

5. After Mr. Liere inspects each load of yard waste, the landscapers bring their loads to an area of the farm where the loads are dumped onto the ground. Mr. Liere uses a payloader to "roll," or turn over, the loads to determine whether any unacceptable materials were hidden in the bottom

of the loads. Any unacceptable materials found after the loads are turned over are collected and placed in roll-off containers or dumpsters. It can take up to 6 months to fill the dumpsters with unacceptable materials.

6. Mr. Liere makes what he refers to as mulch from loads of large branches, trunks and tree stumps, which are broken up with a "shear." The shear cuts and splits the large material into smaller pieces. During the shearing process, dirt surrounding the roots of tree stumps is knocked off. The sheared pieces of wood are then placed on an intake conveyor belt that leads to the pre-disc screener.

7. During the pre-disc screening process, bits of material that are 4 inches or less in diameter are separated from larger pieces of land clearing debris and yard waste. These smaller pieces of material are called "4-inch minus." Four-inch minus includes dirt, sticks, wood chips, and stones that are less than 4 inches in diameter. Even though some material such as sticks and twigs may be less than 4 inches in diameter, they may not be part of the 4-inch minus if they are longer than 4 inches.

8. The pre-disc screener has 4 belts. The sheared wood pieces are loaded onto belt #1, which is called the feed belt or intake conveyor. From belt #1, the yard waste passes over a series of discs, which shake the material. The 4-inch minus falls down through the discs and onto belt #2.

9. Belt #2 moves in the opposite direction of belt #1 and the discs. Belt #2 leads to belt #3, which is referred to as a stacking conveyor. The stacking conveyor (belt #3) is perpendicular to belt #2. In addition, the stacking conveyor is angled up so that heavier materials, such as stones and small rocks, roll back down the stacking conveyor. The heavy items that roll back down the stacking conveyor fall off the stacking conveyor into a pile underneath the pre-disc screener where they can be scooped up with a payloader. Small, flat materials such as dirt and wood chips (*i.e.*, the 4-inch minus) travel up the stacking conveyor. The 4-inch minus is collected from the end of belt #3 of the pre-disc screener, and added to one of three

large piles on the Liere farm identified as E, F and G in Department staff's Exhibits (Dept. Exh.) 18 and 19.[1]

10. The sheared pieces of wood that are greater than 4 inches pass over the discs onto belt #4. Along belt #4, there is a picking station where any remaining rocks or other unacceptable materials, such as pieces of metal, that are bigger than 4-inch minus are removed. At the end of belt #4, there is a magnet to catch any iron.

11. From belt #4, the sheared pieces of wood are fed into the grinding machine. After the sheared pieces of wood are processed in the grinder, the material is called the "first-grind mulch" because it has passed through the grinding machine once. For the first-grind mulch, Mr. Liere uses three inch by five inch grates in the grinder. The resulting pieces of mulch are about ½ inch in diameter and up to four inches long. The first-grind mulch is stored at what has been identified as the wood chip pile on the farm. The wood chip pile is located near what has been identified as pile G. The dimensions of the wood chip pile are unknown.

12. Depending on the landscape product needed, the first-grind mulch may be ground again. The size of the second-grind mulch is about ¼ inch by 1 ¼ to 1 ½ inches. Occasionally, the second-grind mulch is ground a third time to create a finer product called the "third-grind mulch." These mulch variations are sold to landscapers.

13. Although the procedure described above could apply to mixed loads of wood, grass and leaves, mixed loads are very rare. Generally, Mr. Liere does not process loads of yard waste consisting of either grass, or a combination of grass and leaves into mulch. Rather, he processes them into top soil.

14. The piles identified as E, F and G on the Liere farm are the sites of what Mr. Liere describes as top soil production. The 4-inch minus is collected and added to these piles. In addition, loads of grass and leaves are incorporated into the face of piles E, F, and G. Mr. Liere does not turn

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[1] Appendix B to this Hearing Report is a copy of the schematic from Dept. Exh. 18, which served as the basis for Dept. Exh. 19.

these piles. The grass and leaves in piles E, F, and G "rot away."

15. Mr. Liere adds grass to these piles to maintain moisture, and leaves to keep the top soil "looser" so that when water is added, the material does not "lock up."

16. Material is taken from older areas of piles E, F, and G, and screened. Screening takes place in the trommel. Mr. Liere markets the screened product as top soil.

DEC Oversight

17. In 1996, operations at the Liere farm complied with the exemption criteria for a land clearing debris processing facility and, therefore, did not need a permit from the Department. Mr. Liere accepted land clearing debris, which consisted of trees, stumps, branches and wood. These materials were chipped and sold.

18. Subsequent to an inspection by Department staff in 1996, Mr. Liere applied for and obtained a registration from the Department. The registration allowed Mr. Liere to accept wood and uncontaminated materials in addition to land clearing debris for processing.

19. In 1999, Ms. Genece of the Department staff inspected the Liere farm in June, July, August, September and October. During these inspections, Ms. Genece observed problems with dust. Also Ms. Genece observed that the separation distance between the piles of processed materials was not sufficient, and created a potential fire hazard.

20. Some time before October 16, 2003, the Department revoked Mr. Liere's registration. There is no dispute that as of October 16, 2003, Mr. Liere had neither a registration nor a permit to operate any kind of solid waste management facility regulated pursuant to 6 NYCRR part 360 at the Liere farm.

21. Since 2001, Mr. Liere has operated his farm based on his understanding that Judge Sgroi's December 19, 2000 memorandum decision (*see People v Robert A. Liere*, Suffolk Dist Ct, 1st Dist, Dec. 19, 2000, Sgroi, J., Docket No. 27571/99 et al.) was a valid order (*see* 6 NYCRR 360-1.5[a][2]).

Department staff's October 16, 2003 Inspection

22. During the summer of 2003, residents living in the vicinity of the Liere farm complained to Department staff about noxious odors. To follow up on these complaints, Department staff attempted to inspect the Liere farm on June 30 and July 9, 2003 to determine whether the odors originated from the farm. On both occasions, Mr. Liere refused to allow Department staff to inspect his farm.

23. Subsequently, Department staff obtained an administrative search warrant, and inspected the Liere farm on October 16, 2003. During the October 16, 2003 inspection, Department staff determined that the origin of the materials stored in piles E, F and G, and the wood chip pile was from offsite sources due to the amount and nature of the materials at the site.

The First Cause of Action (6 NYCRR subpart 360-1)

24. During the October 16, 2003 inspection, Department staff observed two piles of concrete, asphalt, brick and wood on the Liere farm. In the record, the two piles are identified as piles B and C (*see* Appendix B). Pile B is between 40 and 50 feet (ft) wide and about 8 to 10 ft high. In addition to concrete, asphalt, brick and wood, pile C also included some plastic debris. The size of pile C is unknown.

25. Piles B and C were heavily overgrown with weeds and other vegetation, which reasonably suggests that the material had been on the Liere farm for an extended period of time.

26. During the construction of the Long Island Expressway in the late 1960s, the New York State Department of Transportation (NYS DOT) took 13 acres of the Liere farm by eminent domain. NYS DOT disposed of the material identified as piles B and C on the Liere farm during the construction of the expressway.

27. Mr. Liere removed all the material in piles B and C from his property after Department staff's October 16, 2003 inspection. Mr. Liere disposed of the material, which totaled 76.26 tons, at Global Land Materials, Inc.

The Second Cause of Action (6 NYCRR subpart 360-8)

28. There is no information in the hearing record about whether the Liere farm, in general, and any of the piles observed on

the site by Department staff during the October 16, 2003 inspection, in particular, are located over the deep flow recharge area on Long Island.

The Seventh and Eighth Causes of Action (6 NYCRR subpart 360-4)

29. During the October 16, 2003 inspection, Department staff observed a half acre area in the northwest area of the Liere farm where grass and leaves were being applied to the surface of the soil. In some areas, grass and leaves were two feet or more deep on the soil surface. In other areas, grass and leaves had been turned into the soil.

The Third, Fourth, Fifth, Sixth and Twelfth Causes of Action (6 NYCRR subpart 360-5)

30. The material in pile E consists of a mixture of grass, leaves, chipped wood, and small branches. The volume of pile E is more than 3,000 yd^3.

31. The material in Pile F consists of the same kind of materials as pile E, which is a mixture of grass, leaves, chipped wood, and small branches. Different areas of pile F are different colors, from which it can be reasonably inferred that materials have been gradually added to pile F over time. Older material looks grayer and darker compared to newer material, which is greener. The material in pile E is older than the material in pile F.

32. The material in pile G is similar to the material in piles E and F. On October 16, 2003, Department staff observed areas of standing water in the vicinity of pile G, and throughout the Liere farm.

33. The general shape of pile F is a right triangle. During the October 16, 2003 inspection, Department staff measured the dimensions of pile F. The lengths of the sides are 150 ft and 750 ft, and the overall height of the pile is 10 ft. Therefore, the total calculated volume of material in pile F was about 526,500 cubic feet (ft^3), which converts to about 20,800 yd^3.

34. If it is assumed that Mr. Liere had less than 3,000 yd^3 of yard waste on his farm in 1999, and continued to accept less than 3,000 yd^3 of yard waste per year, then it can be reasonably inferred that the maximum amount of yard waste that Mr. Liere could have on his farm on October 16, 2003,

and still be exempt from the requirements outlined in 6 NYCRR subpart 360-5, was 12,000 yd^3 (4 years x 3,000 yd^3 per year). Given that the estimated total volume of yard waste in the various piles on the Liere farm exceeds 25,000 yd^3, it can be reasonably inferred that Mr. Liere has accepted more than 3,000 yd^3 of yard waste annually at his farm since 1999.

35. Mr. Liere does not arrange the processed land clearing debris and yard waste into windrows, and he does not turn the material in the piles identified as E, F and G.

36. As noted above, neighbors living near the Liere farm complained to Department staff during the summer of 2003 about odors. When Department staff attempted to inspect the Liere farm to determine whether the source of the odors was the farm, Mr. Liere did not allow Department staff onto his property.

37. Department staff investigated the odor complaints by driving around the neighborhood in the vicinity of the Liere farm. At various times from June to October 2003, staff drove down Hilldown Road, Lincoln Road, Middle Line Avenue, and Milldown Road to determine the nature and potential origin of the odors.

38. Department staff detected a rancid odor while driving along the roads in the vicinity of the Liere farm on July 31, 2003, August 6, 11, 18, 22, 25 and 29, 2003, and September 3 and 4, 2003.

<u>The Ninth, Tenth and Eleventh Causes of Action (6 NYCRR subpart 360-16)</u>

39. The materials in piles E and F includes land clearing debris, such as tree trunks and bigger branches, which has been processed in the manner described above in Findings of Fact Nos. 4 through 16, inclusive, and yard waste, such as grass and leaves.

40. As noted above, the general shape of pile F is a right triangle. The lengths of the sides are 150 ft and 750 ft From this information the approximate area of the pile can be calculated. Pile F occupies an approximate area of 56,250 ft^2.

Discussion

I. Respondent's Exhibit 9

During the hearing, Mr. Liere offered a list of composting facilities in New York dated July 19, 2001. The exhibit was marked for identification as Respondent's Exhibit 9. During the hearing Mr. Liere's counsel stated that the list came from the Department's website, and offered Respondent's Exhibit 9 as evidence. I reserved decision on receiving the document into evidence until Mr. Liere provided me with the URL, or web address, for the document. (Tr. 619-622.)

With a fax received on October 22, 2004, Mr. Liere's counsel provided me with the web address. Respondent's Exhibit 9 is a document entitled, List of Composting Facilities in New York State (compweb.pdf-15.9 Kb) listed on http://www.dec.state.ny.us/website/dshm/redrecy/compost.htm [dated 07/19/01].

Respondent's Exhibit (Res. Exh.) 9 is received into evidence.

II. The Liere Farm

During his testimony, Mr. Liere described the size and location of the Liere farm, and how long his family and he have operated his farm. Mr. Liere also explained his farming experience, and the crops typically raised on his farm. In great detail, Mr. Liere outlined the steps associated with accepting land clearing debris and yard waste at the Liere farm and how he processed these materials. A summary of Mr. Liere's testimony with appropriate references to the transcript and hearing exhibits is attached to this Hearing Report as Appendix C.

Department staff offered nothing to refute Mr. Liere's testimony concerning these topics. Accordingly, I assigned substantial weight to Mr. Liere's testimony, and Mr. Liere's unrefuted testimony serves as the evidentiary basis for Findings of Facts Nos. 1 through 16, inclusive.

III. DEC Oversight

During her testimony, Ms. Genece described the Department's oversight of the Liere farm from 1996 until Department staff's inspection on October 16, 2003. Mr. Liere offered nothing to refute Ms. Genece's testimony. Accordingly, I assigned

substantial weight to the testimony offered by Ms. Genece concerning the Department's oversight of the Liere farm during this period, and it serves as the basis for Findings of Facts Nos. 17 through 20, inclusive. A summary of Ms. Genece's testimony concerning this topic, with appropriate references to the transcript and hearing exhibits, is attached to this Hearing Report as Appendix C.

IV. Mr. Liere's Affirmative Defense Concerning Judge Sgroi's December 19, 2000 Memorandum Decision

Since 2000, Mr. Liere has continued to operate the Liere farm based on his understanding that Judge Sgroi's December 19, 2000 memorandum decision (*see People v Robert A. Liere*, Suffolk Dist Ct, 1st Dist, Dec. 19, 2000, Sgroi, J., Docket No. 27571/99 et al.) was a valid order, which authorized all activities at the Liere farm (*see* 6 NYCRR 360-1.5[a][2]) (Tr. 629-930). According to Mr. Liere, operations at his farm have not changed since Judge Sgroi's decision: "Not at all. Not one bit." (Tr. 630.) Mr. Liere reiterated these points in his memorandum of law and in his reply to Department's closing statement and brief.

Department staff argued in its closing statement and brief, however, that circumstances at the Liere farm have changed significantly since 2000, and that Mr. Liere has violated regulatory provisions outlined in 6 NYCRR part 360, which served as the basis for Judge Sgroi's December 19, 2000 decision. As a result, Department staff argued that Mr. Liere can not rely on Judge Sgroi's December 19, 2000 decision as an affirmative defense to the charges alleged in the December 2, 2003 complaint.

For the reasons that follow, activities at the Liere farm related to processing land clearing debris and yard waste have resulted in violations of the regulations identified in the Department staff's December 2, 2003 complaint. Department staff has shown that the current activities on the Liere farm exceed the regulatory exemption criteria, which served, in part, as the basis for Judge Sgroi's December 19, 2000 decision. Therefore, Mr. Liere can no longer rely on Judge Sgroi's decision, pursuant to 6 NYCRR 360-1.5(a)(2) and 360-1.7(a)(3)(ii), as authority to operate the Liere farm, as a solid waste management facility without a permit from the Department.

V. Department Staff's October 16, 2003 Inspection

During the summer of 2003, residents living in the vicinity of the Liere farm complained to Department staff about odors from

the farm (Tr. 206). Department staff attempted to follow up on these complaints and tried to inspect the Liere farm on June 30 and July 9, 2003. On both occasions, Mr. Liere refused to allow Department staff to inspect his farm. According to Ms. Genece, Mr. Liere said that he had a court order (*i.e.*, Judge Sgroi's December 19, 2000 memorandum decision), which stated that operations at the Liere farm were not regulated pursuant to the Environmental Conservation Law. Mr. Liere stated further to Ms. Genece that the Department had no right to inspect his farm. (Tr. 207.)

Subsequently, the Department obtained an administrative search warrant (Res. Exh. 2), and inspected the Liere farm on October 16, 2003 (Tr. 145). During the October 16, 2003 inspection, Department staff determined that the origin of the materials stored in the piles identified as E, F and G, and the wood chip pile was from offsite sources and not from the Liere farm (Tr. 261). The basis for Department staff's opinion is the amount and nature of the materials at the site (Tr. 262).

VI. Liability

Part 360 is divided into 17 subparts. The charges alleged in the December 2, 2003 complaint relate to five of the 17 subparts. The first and thirteenth causes of action allege violations of the general provisions (*see* ECL 27-0707[1] and 6 NYCRR subpart 360-1). The second cause of action alleges a violation of requirements applicable to Long Island landfills (*see* 6 NYCRR subpart 360-8). The remaining allegations relate to provisions applicable to land application facilities (*see* 6 NYCRR subpart 360-4), composting facilities (*see* 6 NYCRR subpart 360-5), and construction and demolition debris processing facilities (*see* 6 NYCRR subpart 360-16).

In addition to his reliance on Judge Sgroi's December 19, 2000 decision as a court issued order that authorizes operations at the Liere farm without a permit from the Department (*see* 6 NYCRR 360-1.5[a][2]), Mr. Liere asserted, as affirmative defenses, that he does not accept any solid waste at the Liere farm, and that he is exempt from the regulatory requirements outlined in 6 NYCRR part 360.

A definition of the term "solid waste" is provided in the regulations at 6 NYCRR 360-1.2(a). Solid waste means, among other things, any garbage, refuse or other discarded materials. A material is discarded if it is abandoned by being disposed of, or accumulated, stored or physically, chemically or biologically

treated instead of or before being disposed of. The definition also identifies what would not constitute solid waste, none of which are relevant here. Subcategories of solid waste relevant to this proceeding are construction and demolition debris (C&D debris) (defined at 6 NYCRR 360-1.2[b][38]), land clearing debris (defined at 6 NYCRR 360-1.2[b][94]), and yard waste (defined at 6 NYCRR 360-1.2[b][185]).

At his farm, Mr. Liere accepts vegetative matter consisting of trees, wood, grass and leaves for physical and biological treatment. The vegetative matter brought to the Liere farm has been discarded by the property owners on whose property these materials accumulated. Subsequently, landscapers collect and transport the discarded vegetative matter to the Liere farm for physical and biological treatment. At the farm, the materials are treated physically by sorting, shredding and grinding. After physical treatment, the materials are placed in piles, as described in the Findings of Fact, and allowed to "rot" according to Mr. Liere (Tr. 683), which is a form of biological treatment. In addition grass and leaves are spread on the land, which is another example of physical and biological treatment. Additional physical treatment occurs when the materials are subsequently screened. Therefore, the vegetative matter brought to the Liere farm is solid waste as that term is defined at 6 NYCRR 360-1.2(a). (*See* Tr. 476.)

Various exemptions are provided in 6 NYCRR part 360 and its subparts. Whether operations qualify for exemptions depends on the nature of the waste stream, the scale of operations, as well as the nature of other activities being conducted at a particular site. The various exemption criteria and their applicability to operations at the Liere farm are discussed below.

Mr. Liere testified that he does not make compost (Tr. 596). Rather, Mr. Liere stated that he makes mulch and top soil through an anaerobic process (Tr. 603), which he argues is not regulated pursuant to 6 NYCRR part 360. In their respective closing submissions, the parties provided extensive argument about whether there is a difference between compost, and mulch and top soil.

The regulations do not define the term "compost." The regulations, however, define the term "composting facility," which is:

> "a solid waste management facility used to provide aerobic, thermophilic decomposition of solid organic

> constituents of solid waste to produce a stable, humus-like material" (6 NYCRR 360-1.2[b][34]).

Composting facilities are regulated pursuant to 6 NYCRR subpart 360-5 (effective March 10, 2003).

Although Mr. Liere testified that he does not turn the piles (Tr. 575), he does incorporate grass, leaves and 4-inch minus into the piles with a payloader (Tr. 678-679, 702) to retain moisture (Tr. 681), and to prevent the materials in the pile from locking up (Tr. 682). The piles of processed vegetative matter are outside and exposed to the elements. Though perhaps a more passive approach than contemplated by the regulations, the process of mixing in new vegetative matter, even on an occasional basis, introduces air into the piles of wood, grass and leaves as these materials decompose.

Moreover, at the hearing, Mr. Conover, of Department staff, testified that Mr. Liere told him during the October 16, 2003 inspection that the internal temperature of the material in pile F was 130 degrees Fahrenheit (Tr. 125, Dept Exh 18), which is substantially higher than the ambient temperature. Mr. Conover testified further that during the October 16, 2003 inspection Mr. Liere also said that he "was composting" the materials on the site (Tr. 157). Though given the opportunity, Mr. Liere did not cross-examine Mr. Conover about these statements, and Mr. Liere did not offer any information during his testimony to refute Mr. Conover's testimony. Therefore, I consider Mr. Conover's testimony about what Mr. Liere told him during the October 16, 2003 inspection to be reliable.

Accordingly, Mr. Liere's attempt to distinguish the production of mulch and top soil by anaerobic methods at the Liere farm from the production of compost by an aerobic, thermophilic process fails. Based on the foregoing discussion concerning the nature of the activities undertaken at the Liere farm (*see* DEC Declaratory Ruling 27-33, *Matter of Ronald G. Hull, Esq.*, May 2, 2002, at 4), I conclude that what Mr. Liere characterizes as mulch and top soil is actually compost produced from the aerobic, thermophilic decomposition of solid organic constituents of solid waste. As noted above, the vegetative matter processed at the Liere farm is solid waste. Furthermore, the record of this proceeding shows that the processing of solid waste materials at the Liere farm includes activities regulated pursuant to the requirements outlined in 6 NYCRR part 360.

A. General Provisions (6 NYCRR subpart 360-1)

In the first cause of action, Department staff alleged that Mr. Liere is operating a solid waste management facility without a permit in violation of ECL 27-0707(1) and 6 NYCRR 360-1.5(a) by disposing of construction and demolition (C&D) debris at the farm. The regulations broadly define C&D debris as uncontaminated solid waste, which may include, among other things, bricks, concrete and other masonry materials, as well as land clearing debris. Any unrecognizable components, however, are expressly excluded from the regulatory definition of C&D debris. (*See* 6 NYCRR 360-1.2[b][38].)

During the October 16, 2003 inspection of the Liere farm, Department staff (who included Messrs. Patel and Conover, and Ms. Genece) observed two piles of concrete, asphalt, brick and wood (Tr. 40-42, 119, 146-148, 250, 435 and Dept. Exhs. 2, 3, 4), which are considered C&D debris. The first pile of C&D debris on the Liere farm is identified as pile B on Dept. Exh. 18 and 19 (*see* Appendix B), and the second pile is identified as pile C on the same exhibit. Pile B is between 40 and 50 ft wide and about 8 to 10 ft high (Tr. 64). Pile C also included some plastic debris (Tr. 148; Dept. Exh. 18). The dimensions of pile C are not known. Ms. Genece testified that she did not know when the C&D debris in piles B and C was deposited on the Liere farm (Tr. 438).

Mr. Liere testified convincingly that the New York State Department of Transportation (NYS DOT) took 13 acres of the Liere farm by eminent domain when it constructed the Long Island Expressway during the late 1960s. According to Mr. Liere, NYS DOT disposed of the C&D debris material in the piles identified as B and C on the Liere farm during the construction of the expressway. (Tr. 618-619.)

Mr. Liere testified further that he removed all the material in piles B and C from his property after Staff's October 16, 2003 inspection (Tr. 619). He provided copies of invoice tickets, which show that a total of 76.26 tons of material were brought to Global Land Materials, Inc. from November 6, 2003 to November 19, 2003 for disposal. In addition, the invoice tickets show that the material brought to the Global Land Materials facility was a mixture of concrete, asphalt and dirt. (Court's Exh. 10.)

In addition to the materials in the piles identified as B and C, there are three big piles of processed land clearing

debris and yard waste on the Liere farm. Department staff identifies them as piles E, F and G (*see* Dept. Exh. 10-14, 18, and 19; Appendix B). During the October 16, 2003 inspection, Department staff observed that what is identified as pile E consists of a mixture of grass, leaves, chipped wood, and small branches (Tr. 439). Like pile E, the material in pile F consists of a mixture of grass, leaves, chipped wood, and small branches (Tr. 459). The material in pile G is similar to that in the piles identified as E and F (Tr. 462). Pursuant to the definition provided at 6 NYCRR 360-1.2(b)(38), the vegetative material brought to the Liere farm and which, after being processed, is subsequently placed in the piles identified as E, F, and G, is C&D debris – a form of solid waste.

ECL 27-0707(1) prohibits anyone from constructing and operating any solid waste management facility without a permit from the Department. This statutory prohibition is echoed in the regulations at 6 NYCRR 360-1.7(a)(1)(i). In addition, 6 NYCRR 360-1.5(a) prohibits any person from disposing of solid waste except at either exempt facilities or authorized facilities. The permitting requirement at ECL 27-0707(1) and 6 NYCRR 360-1.7(a)(1)(i) assures compliance with the prohibition at 6 NYCRR 360-1.5(a). Department staff has shown that Mr. Liere is operating an unauthorized solid waste management facility for C&D debris in violation of ECL 27-0707(1), and deposited, or allowed someone to deposit, C&D debris on the Liere farm in violation of 6 NYCRR 360-1.5(a).

In the thirteenth cause of action, Department staff alleged that on November 13, 2003, Mr. Liere violated ECL 27-0707(1) and 6 NYCRR 360-1.5 when he accepted solid waste at his farm without having a permit from the Department for a solid waste management facility, or without qualifying for an exemption from 6 NYCRR part 360. In the December 2, 2003 complaint, Department staff based this allegation on a set of interviews conducted by an Environmental Conservation Officer with waste haulers who stated that they delivered solid waste to the Liere farm.

Department staff offered no evidence during the hearing to prove the allegation asserted in the thirteenth cause of action. Consequently, the Commissioner should dismiss the charge in the thirteenth cause of action.

B. Long Island Landfills (6 NYCRR subpart 360-8)

As the second cause of action, Department staff alleged that Mr. Liere violated ECL 27-0707(1), 6 NYCRR 360-1.7(a)(1)(i) and

360-8.4(b) by not obtaining authorization from the Department prior to using the farm as a disposal facility for C&D debris. Department staff based this allegation on observations made during the October 16, 2003 inspection.

As noted above, ECL 27-0707(1) prohibits anyone from constructing and operating any new solid waste management facility without a permit from the Department. This statutory prohibition is repeated in the regulations at 6 NYCRR 360-1.7(a)(1)(i). Additional requirements apply to landfills located in Nassau and Suffolk Counties, and are outlined at 6 NYCRR subpart 360-8. Pursuant to 6 NYCRR 360-8.4(b), no one may construct or operate a new landfill in Nassau or Suffolk Counties that would be located over the deep flow recharge area.

With respect to the first cause of action, I concluded that Department staff proved that Mr. Liere was operating an unauthorized solid waste management facility for C&D debris in violation of ECL 27-0707(1) and 6 NYCRR 360-1.7(a)(1)(i). With respect to the alleged violation of 6 NYCRR 360-8.4(b), however, there is no information in the hearing record about whether the Liere farm, either in whole or in part, is located over the deep flow recharge area. Department staff had the burden to show that the Liere farm is located over the deep flow recharge area, and did not meet it. Therefore, the Commissioner should dismiss the charge in the second cause of action that Mr. Liere allegedly violated 6 NYCRR 360-8.4(b).

C. <u>Land Application and Associated Storage Facilities (6 NYCRR subpart 360-4)</u>

A land application facility is a solid waste management facility where solid waste is applied to the soil surface to improve soil quality or to provide plant nutrients (*see* 6 NYCRR 360-1.2[b][93]). Subpart 360-4 (Land Application and Associated Storage Facilities, effective March 10, 2003) outlines the relevant requirements that pertain to land application facilities. If certain criteria are met, land application facilities may be exempt from permitting requirements (*see* 6 NYCRR 360-4.2[a][3]). Alternatively, operators of land application facilities may need either to register their facilities with the Department, or obtain permits from the Department to construct and operate them.

The seventh and eighth causes of action relate to alleged violations of 6 NYCRR subpart 360-4. According to the seventh cause of action, Mr. Liere allegedly violated 6 NYCRR 360-

4.2(a)(3) and the Department's Beneficial Use Determination (BUD) #303-0-00 by failing to adequately incorporate grass and leaf material into the soil at the Liere farm. According to the eighth cause of action, Mr. Liere allegedly violated 6 NYCRR 360-4.2(a)(3) and BUD #303-0-00 by failing to comply with the operational conditions necessary to be exempt from the requirements outlined in 6 NYCRR part 360.

The permit exemption criteria related to land application and storage facilities for grass and leaves are outlined at 6 NYCRR 360-4.2(a)(3). Of relevant concern here are the criteria at 6 NYCRR 360-4.2(a)(3)(iv-vi). All grass and leaves must be incorporated into the soil, and after incorporation, only minimal grass or leaf material may be apparent on the soil surface (*see* 6 NYCRR 360-4.2[a][3][iv]). Grass must be incorporated into the soil on the same day as it is land applied (*see* 6 NYCRR 360-4.2[a][3][v]). Leaves must be incorporated into the soil within seven days after application to the soil (*see* 6 NYCRR 360-4.2[a][3][vi]).

BUDs are authorized by 6 NYCRR 360-1.15. The purpose of these determinations is to use certain solid waste materials in a beneficial manner. A predetermined list of beneficial uses are identified in the regulations (*see* 6 NYCRR 360-1.15[b]). In addition to those expressly listed in the regulations, the Department may consider petitions for additional beneficial uses, and will issue determinations on a case by case basis (*see* 6 NYCRR 360-1.15[d]). After the Department determines that certain solid waste materials have a beneficial use, those materials are no longer considered solid wastes (*see* 6 NYCRR 360-1.15[b] and 360-1.15[d][3]).

As noted above, BUD #303-0-00 is identified in the complaint. However, Department staff offered no information for the hearing record about BUD #303-0-00. Accordingly, no determinations can be made about whether Mr. Liere violated the terms or conditions of BUD #303-0-00.

The Department maintains a list of BUDs on its web site (*see* http://www.dec.state.ny.us/website/dshm/redrecy/budnum.pdf [accessed on November 9, 2005]). BUD #303-0-00 does not appear on the list. It is possible that the intended identification number is BUD #030-0-00, which recognizes that the land application of leaves is a beneficial use. According to the web site, the Department issued BUD #030-0-00 to the Monroe County Cornell Cooperative Extension. Because the Department issues BUDs on a case by case basis, except for those expressly

identified in the regulations at 6 NYCRR 360-1.15(b), BUD #030-0-00 does not appear to be relevant to the captioned matter (*see* 6 NYCRR 360-1.15[d]). During the hearing, Ms. Genece testified that a BUD had been incorporated into the regulations (Tr. 280). Ms. Genece, however, did not state whether BUD #303-0-00 had been added to the list at 6 NYCRR 360-1.15(b).

During the October 16, 2003 inspection, Department staff observed a half acre area in the northwest area of the Liere farm where grass and leaves were being applied to the surface of the soil (Tr. 42-43, 279, 489). The area of land application at the Liere farm is shown on the schematic attached to Dept. Exh. 18, and on Dept. Exh. 19 (*see* Appendix B).

Department Exhibits 5, 6, and 7 are photographs of the land application area, and the grass and leaves that Department staff saw during the inspection. In some areas, grass and leaves were two feet or more deep on the soil surface (Tr. 424, 489). In other areas, grass and leaves had been turned into the soil (Tr. 488). According to Department staff, grass and leaves had been placed in this area over a prolonged period. The basis for this conclusion was that newer grass and leaves would be greener than older grass and leaves, which would be brown (Tr. 71, 281-283, 418, 424). In this area of the Liere farm, Ms. Genece smelled a foul odor during the October 16, 2003 inspection (Tr. 282-283; *see* Dept. Exh. 23).

Mr. Liere offered nothing to contradict Department staff's evidence concerning the land application of grass and leaves at his farm. Although Mr. Liere testified that he uses a manure spreader to distribute a thin layer of grass and leaves over the soil (Tr. 545), this testimony does not refute Department staff's observations and the photographic evidence concerning the amount of material and whether it had been properly incorporated into the soil. In particular, during the October 16, 2003 inspection, Department staff saw a landscaper dump a truck load of grass and leaves in the vicinity of the land spreading area (Tr. 417-418, Res. Exh. 8) without using the spreader. Accordingly, I assign significant weight to Department staff's testimony and the photographic evidence identified as Dept. Exh. 5, 6, and 7.

Therefore, with respect to the seventh cause of action (*see* December 2, 2003 complaint, ¶ 41-43), I conclude that Mr. Liere violated 6 NYCRR 360-4.2(a)(3)(iv) because more than minimal grass and leaf material was apparent on the soil surface based on the depth of the unincorporated material on the soil surface.

Concerning the eighth cause of action (*see* December 2, 2003 complaint, ¶ 44-46), I conclude further that Mr. Liere violated 6 NYCRR 360-4.2(a)(3)(v) when he failed to incorporate grass into the soil on the same day as it was land applied. Finally, I conclude that Mr. Liere violated 6 NYCRR 360-4.2(a)(3)(vi) when he failed to incorporate leaves into the soil within seven days.

Mr. Liere failed to demonstrate his affirmative defense with respect to the seventh and eighth causes of action that land spreading operations at the Liere farm are exempt from the requirements outlined in 6 NYCRR subpart 360-4. Department staff's observations at the Liere farm on October 16, 2003 and the related photographic evidence prove that Mr. Liere was not complying with the exemption criteria listed at 6 NYCRR 360-4.2(a)(3)(iv-vi). In places, grass and leaves were up to two feet deep, and had not been incorporated into the soil at all, much less within the time frames specified in the regulations. To be exempt from the requirements of this subpart, Mr. Liere's operations must comply with the exemption criteria at 6 NYCRR 360-4.2(a)(3), and they do not. Therefore, no permit exemption from the requirements in 6 NYCRR subpart 360-4 applies to operations at the Liere farm.

Moreover, if it is assumed that Judge Sgroi's December 19, 2000 memorandum decision is an order contemplated by 6 NYCRR 360-1.5(a)(2) and 360-1.7(a)(3)(ii) that could authorize operations at the Liere farm, the activities described above, which are in violation of the requirements outlined at 6 NYCRR subpart 360-4, go beyond the scope of the activities authorized by Judge Sgroi's December 19, 2000 decision. As a result, the land application activities at the Liere farm do not comply with Judge Sgroi's December 19, 2000 decision, and Mr. Liere cannot rely on it as authorization to conduct these activities on his farm without a permit from the Department.

D. Composting Facilities (6 NYCRR subpart 360-5)

The third, fourth, fifth, sixth, and twelfth causes of action in the December 2, 2003 complaint allege violations of 6 NYCRR subpart 360-5. This subpart regulates the construction and operation of composting and other organic waste processing facilities for mixed solid waste, source separated organic waste, biosolids, septage, yard waste and other solid waste.

In the third cause of action, Department staff alleged that Mr. Liere violated ECL 27-0707(1), and 6 NYCRR 360-1.7(a)(1)(i) and 360-5.3(b)(1) by accepting more than 10,000 cubic yards (yd^3)

of yard waste during 2003 without a permit from the Department. Based on the October 16, 2003 inspection, Department staff alleged, in the fourth cause of action, that Mr. Liere violated 6 NYCRR 360-5.7(b)(5) because he failed to control ponding at the Liere farm. In the fifth cause of action, Department staff alleged that Mr. Liere violated 6 NYCRR 360-5.7(b)(6) by failing to establish and maintain windrows to better promote aerobic conditions in order to produce a compost product. Department staff alleged in the sixth cause of action that Mr. Liere violated 6 NYCRR 360-5.7(c) because he did not maintain daily operating records for the composting facility. In the twelfth cause of action, Department staff alleged that Mr. Liere violated 6 NYCRR 360-1.14(m) and 360-5.7(b)(11) on July 31, 2003, August 6, 11, 18, 22, 25 and 29, 2003, and September 3 and 4, 2003 by failing to control odors from the Liere farm.

As noted above, the three very large piles of processed land clearing debris and yard waste on the Liere farm are identified as piles E, F and G (*see* Dept. Exh. 10-14, 18, 19). During the October 16, 2003 inspection, Department staff observed that the three piles consisted of a mixture of grass, leaves, chipped wood, and small branches (Tr. 439, 459, 462). According to Ms. Genece, pile E included more than 3,000 yd^3 of material (Tr. 469). Department staff observed areas of standing water in the vicinity of pile E (Tr. 152, Dept. Exh. 18, 19) and pile G. (Tr. 190-191, Dept. Exh. 19). Dept. Exh. 10 and 14 are photographs that show areas of standing water on the Liere farm.

During the October 16, 2003 inspection, Department staff measured the dimensions of pile F. The general shape of pile F was a right triangle. The lengths of the sides were 150 ft and 750 ft; the overall height of the pile was 10 ft. Therefore, the total calculated volume of material in pile F was about 526,500 ft^3, which converts to about 20,800 yd^3. (Tr. 123-124.) Ms. Genece testified that different areas of pile F are different colors, from which it can be reasonably inferred that materials had been gradually added to pile F. Older material looks grayer and darker compared to the newer material, which is greener. (Tr. 501-502, 517-518.) According to Ms. Genece, the material in pile E is older than the material in pile F (Tr. 459, 461) based on the color variations between the two piles.

1. <u>Third Cause of Action</u>

To be exempt from the requirements outlined at 6 NYCRR subpart 360-5, the operator of a composting facility cannot accept more than 3,000 yd^3 of yard waste per year (*see* 6 NYCRR

360-5.3[a][2], effective March 10, 2003). The regulations provide for a registration if an operator accepts between 3,000 yd^3 and 10,000 yd^3 of yard waste per year (*see* 6 NYCRR 360-5.3[b][1][i]). If an operator accepts more that 10,000 yd^3 of yard waste annually, then the facility must obtain a permit from the Department in order to operate (*see* 6 NYCRR 360-5.3[b][1]). As previously noted, ECL 27-0707(1) and 6 NYCRR 360-1.7(a)(1)(i) prohibit anyone from constructing and operating any solid waste management facility without a permit from the Department.

In order for Judge Sgroi to conclude that the Liere farm was an exempt composting facility, the amount of yard waste at the farm in 1999 must have been less than 3,000 yd^3 (*see* 6 NYCRR 360-5.1[b][1], effective September 29, 1997). To maintain an exemption from the regulatory requirements in 6 NYCRR subpart 360-5, Mr. Liere could not have accepted more than 3,000 yd^3 of yard waste per year since 1999. If it is assumed that Mr. Liere had less than 3,000 yd^3 of yard waste on his farm in 1999, and continued to accept less than 3,000 yd^3 of yard waste per year without selling any processed yard waste as compost, then it can be reasonably inferred that the maximum amount of yard waste, since January 2000, that Mr. Liere could have accepted on his farm by October 16, 2003, and still be exempt from the requirements outlined in 6 NYCRR subpart 360-5, would be 12,000 yd^3 (4 years x 3,000 yd^3 per year).

During the October 16, 2003 inspection, Department staff estimated that the amount of processed yard waste in what has been identified as pile F was 20,800 yd^3. In addition, Mr. Liere offered nothing to refute Ms. Genece's opinion that pile E included more than 3,000 yd^3 of material. Therefore, it can be reasonably inferred that for at least one year between 1999 and October 2003, Mr. Liere accepted more than 3,000 yd^3 of yard waste at his farm.

Mr. Liere has not complied with the exemption criterion at 6 NYCRR 360-5.3(a)(2). As a result, he must comply with either the registration requirements outlined in 6 NYCRR 360-5.3(b)(1), or obtain a permit. Mr. Liere has neither registered his operations nor obtained a permit from the Department to operate a composting facility. Therefore, Mr. Liere has violated 6 NYCRR 360-5.3(b)(1).

2. Fourth, Fifth and Sixth Causes of Action

Design criteria and operational requirements for yard waste composting facilities are outlined at 6 NYCRR 360-5.7(b).

Pursuant to 6 NYCRR 360-5.7(b)(5), facilities must be constructed to minimize any ponding. Areas of standing water were present throughout the Liere farm when Department staff inspected it on October 16, 2003 (Dept Exh 10). As a result, Mr. Liere violated 6 NYCRR 360-5.7(b)(5).

Pursuant to 6 NYCRR 360-5.7(b)(6), windrows at facilities that compost yard waste must be constructed and turned with sufficient frequency to maintain aerobic conditions for the production of a compost product. Based on observations made by Department staff during the October 16, 2003 inspection, and by his own admission, Mr. Liere does not arrange processed yard waste into windrows, and he does not turn the piles of processed yard waste. Therefore, Mr. Liere has violated the requirements at 6 NYCRR 360-5.7(b)(6).

The monitoring, record keeping, and reporting requirements for yard waste composting facilities are outlined at 6 NYCRR 360-5.7(c). Operators are required to keep daily operational records about the quantity and character of the material processed, the quantity of the product removed from the facility, and how the product(s) is/are used (*see* 6 NYCRR 360-5.7[c][1]). During his testimony, Mr. Liere admitted that he does not keep any records concerning the amount and nature of the materials that he accepts at his farm (Tr. 667). In addition, Mr. Liere testified that he does not keep records about the amount of processed materials that he sells (Tr. 667). Therefore, Mr. Liere violated 6 NYCRR 360-5.7(c) by failing to maintain the records required by this rule.

3. Twelfth Cause of Action

In June 2003, the Department received complaints about odors from the Liere farm. Department staff attempted to inspect the Liere farm to investigate these odor complaints, but Mr. Liere did not allow Department staff onto his property. (Tr. 206-207.) Although Department staff was not allowed to inspect the Liere farm, members of Department staff investigated the odor complaints by driving around the neighborhood that surrounds the Liere farm (Tr. 209). Staff traveled around Hilldown Road, Lincoln Road, Middle Line Avenue, and Milldown Road, in the vicinity of the Liere farm, to determine the nature and potential origin of the odors (Tr. 215-216.) During some of these inspections, Department staff detected odors. Dept. Exh. 22 is a list of the dates, locations and members of the Department staff who participated in these investigations, and their findings (Tr.

218 - 220).[2] The weather data recorded on Dept. Exh 22 came from the weather channel (Tr. 222-221).

Department staff conducts odor patrols in groups for two reasons. First, the same person may not always be available to conduct every patrol. Second, having more than one person on most inspections allows the inspectors to verify the presence and nature of the odors because whether a particular odor is considered objectionable may be somewhat subjective (Tr. 226-227).

On some of the days listed in Dept. Exh. 22, Ms. Genece detected odors; on other days she did not (Tr. 236). On the dates that she detected odors, Ms. Genece described the odor as "rancid." Ms. Genece explained that composing operations have a very distinct odor. (Tr. 237.) Odors are more noticeable during the summer because it is comparatively warmer in the summer than in the winter (Tr. 237-238).

Ms. Genece stated that large scale composting operations should be enclosed to minimize odors. Alternative methods include forced aeration to promote aerobic decomposition rather than anaerobic decomposition. Another composting alternative is to use windrows, which are elongated piles that are turned at frequent intervals. (Tr. 238-240).

According to Ms. Genece, determining the origin of the odors is an educated guess. In this case, the determinations were based on the distinctive nature of the odor. Ms. Genece detected the odors on the roadways in the vicinity of the Liere farm. The Liere farm is a big facility in this area, and it composts large amounts of grass and leaves. When the odor is detected, Ms. Genece stated that it is very offensive, and not easy to ignore. (Tr. 241-242.)

During the October 16, 2003 inspection, Department staff detected odors at the northwest corner of the Liere farm (Tr. 282). Department staff also smelled odors near the piles identified as E and F (Tr. 461). According to Ms. Genece, the odor on the Liere farm was the same type of odor detected offsite on August 6, 11 and 22, 2003 (Tr. 282, 289). On October 16, 2003, Department staff left the Liere farm to investigate whether

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[2] In Dept. Exh. 22, the initials stand for: Anit Patel [AP], Alex Moskie [AM], Deepak Ramrakhiani [DR], Papaachan Daniel [PD], Ernie Lampro [EL].

the odors detected on site could be detected offsite. Department staff did not detect any odors offsite on October 16, 2003. (Tr. 462, 467).

Operational requirements for all solid waste management facilities are outlined in 6 NYCRR 360-1.14. Odors must be effectively controlled so that they do not constitute nuisances or hazards to health, safety or property (*see* 6 NYCRR 360-1.14[m]). Pursuant to 6 NYCRR 360-5.7(b)(11), compost facilities must be operated in a manner to control the generation and migration of odors to a level that is to be expected from a well operated facility, as determined by the Department.

Although Mr. Liere's counsel argued, during the hearing and in his memorandum of law and reply to Staff's closing statement, that other potential odor causing facilities, such as a chicken farm, a pig farm, and a horse farm were in the area (Tr. 230, 287), Mr. Liere offered no evidence about these other potential odor sources. In his memorandum of law and reply, Mr. Liere argued further that the Commissioner should dismiss the charges related to odors because Department staff offered no evidence to verify the origin of the odors.

I assign significant weight to the information presented in Dept. Exh. 22 and Department staff's testimony concerning offsite odors and their likely origin. Department staff's evidence demonstrates by a preponderance of the evidence that Mr. Liere did not effectively control odors on the Liere farm and that, as a result, these odors created an offsite nuisance. Therefore, I conclude that Mr. Liere violated 6 NYCRR 360-1.14(m) and 360-5.7(b)(11) on July 31, 2003, August 6, 11, 18, 22, 25 and 29, 2003, and September 3 and 4, 2003.

E. Construction and Demolition Debris Processing Facilities (6 NYCRR subpart 360-16)

A construction and demolition debris processing facility is a solid waste management facility where C&D debris is received and processed (*see* 6 NYCRR 360-1.2[b][39]). The regulations broadly define C&D debris as uncontaminated solid waste resulting from, among other things, land clearing (*see* 6 NYCRR 360-1.2[b][38]). Subpart 360-16 outlines the relevant requirements that pertain to the construction and operation of C&D debris processing facilities. If certain criteria are met, C&D debris processing facilities may be exempt (*see* 6 NYCRR 360-16.1[b]). Mixed solid waste may not be accepted at C&D debris processing facilities unless additional regulatory requirements are met (*see*

6 NYCRR 360-16.1[a]). Operational requirements for C&D processing facilities permitted by the Department are outlined at 6 NYCRR 360-16.4.

1. Applicability of 6 NYCRR subpart 360-16

In his answer and throughout the hearing, Mr. Liere argued that operations at his farm were exempt from the requirements outlined in 6 NYCRR subpart 360-16 (Respondent's tenth affirmative defense), and denied that he commingled land clearing debris with yard waste (Respondent's eleventh affirmative defense). Whether operations at the Liere farm are exempt depends on the meaning of the terms, "land clearing debris" and "yard waste."

The parties offered arguments, in their respective closing statements, about the meaning of these terms, which are defined in the regulations. "Land clearing debris" means vegetative matter, soil and rock resulting from activities such as land clearing and grubbing, utility line maintenance or seasonal or storm-related cleanup such as trees, stumps, brush and leaves including wood chips generated from these materials. Land clearing debris does not include yard waste which has been collected at the curbside.[3] (*See* 6 NYCRR 360-1.2[b][94].) "Yard waste" means leaves, grass clippings, garden debris, tree branches, limbs and other similar materials (*see* 6 NYCRR 360-1.2[b][185]).

Because some constituent elements of land clearing debris and yard waste are the same, yard waste could be considered a subcategory of land clearing debris. In this context, yard waste would be considered a form of C&D debris. As noted above, solid waste management facilities that process only land clearing debris are exempt from the requirements outlined in 6 NYCRR subpart 360-16 (*see* 6 NYCRR 360-16.1[b]). Such an interpretation of the meaning of the terms "land clearing debris" and "yard waste," however, would result in a distinction without any regulatory significance.

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[3] Mr. Liere testified that he does not accept any materials that have been collected at the curbside (Tr. 540). For the reasons outlined below, however, I conclude that land clearing debris and yard waste are distinct forms of solid waste, by operation of the regulations. Therefore, Mr. Liere's testimony concerning the origin of the yard waste accepted at his farm is immaterial.

I conclude that, as a matter of regulatory interpretation, yard waste is not a subcategory of land clearing debris. On the one hand, land clearing debris results from construction activities, or seasonal and storm-related cleanup. On the other hand, yard waste results from routine maintenance such as mowing lawns and raking leaves. I note further that by definition, yard waste collected at the curbside is expressly excluded from land clearing debris. This express exclusion makes clear that leaves and grass clippings collected from the curbside in the fall do not become a form of seasonal cleanup contemplated by the regulatory definition of the term, "land clearing debris." Therefore, yard waste, because it is distinct from land clearing debris, would not be considered a form of C&D debris as that term is defined in 6 NYCRR part 360.

Because land clearing debris and yard waste are different forms of solid waste, different regulatory schemes apply to how they can be processed. During the hearing, Ms. Genece explained that different types of waste processing may take place at one site, as long as the processes are distinct from each other. Ms. Genece stated that when, as here, different waste streams are commingled, a permit from the Department would be required given the putrescible nature of the grass and leaves in yard waste. (Tr. 264-265, 435-436.) Pursuant to 6 NYCRR 360-1.2(b)(125), "putrescible" is defined as the tendency of organic matter to decompose with the formation of malodorous by-products.

During the October 16, 2003 inspection, Department staff observed that the materials in the piles identified as E and F consisted of commingled materials. According to Department staff, these piles included not only land clearing debris, but yard waste, as well. During her testimony, Ms. Genece characterized the land clearing debris present in piles E and F to be tree trunks and bigger branches, and the yard waste present in piles E and F as grass clippings and loose leaves. (*See* Tr. 273.) As previously noted, Mr. Liere incorporates the 4-inch minus associated with the processing of land clearing debris, as well as grass and leaves into piles E and F (Tr. 559, 570, 572-573, 666, 670-671, 675, 678). Operations at the Liere farm do not comply with the exemption criteria outlined at 6 NYCRR 360-16.1(b) because Mr. Liere commingles processed land clearing debris with yard waste. Consequently, the regulatory requirements outlined in subpart 360-16 apply.

2. The Ninth Cause of Action

According to the ninth cause of action, Mr. Liere allegedly violated 6 NYCRR 360-1.7(a)(1)(i) and 360-16.1(b) because he commingled land clearing debris and yard waste at the Liere farm. Based on the foregoing discussion, operations at the Liere farm do not comply with the exemption criteria outlined at 6 NYCRR 360-16.1(b). The prohibited activity, however, is mixing putrescible material (*i.e.*, yard waste) with C&D debris, which requires either compliance with additional regulatory conditions, or disposal of the mixed solid waste material at an authorized solid waste management facility (*see* 6 NYCRR 360-16.1[a]). Consequently, Mr. Liere has violated 6 NYCRR 360-16.1(a) rather than 6 NYCRR 360-16.1(b), as alleged in the December 2, 2003 complaint (*see* ¶ 59).

Pleadings may be amended to conform to the evidence pursuant to Civil Practice Law and Rules (CPLR) 3025(c). In addition, the court may conform pleadings to the proof *sua sponte* (*see e.g.*, *Tinkess v Burns*, 24 AD2d 545, 546; *Dampskibsselskabet v P.L. Thomas Paper Co., Inc.*, 26 AD2d 347,352; and *Harbor Associates, Inc. v Asheroff*, 35 AD2d, 667, 668).

The hearing record clearly shows that the violation alleged in the ninth cause of action related to the commingling of land clearing debris and yard waste in the piles identified on the Liere farm as E and F. As a result, Mr. Liere had been provided with adequate notice of the factual basis for, and the actual nature of, the charge alleged in the ninth cause of action. Accordingly, I recommend that the Commissioner amend the ninth cause of action, and conclude that Mr. Liere violated 6 NYCRR 360-16.1(a) rather than 6 NYCRR 360-16.1(b).

3. Tenth and Eleventh Causes of Action

The tenth and eleventh causes of action relate to the operational requirements for permitted C&D processing facilities, which are outlined at 6 NYCRR 360-16.4. The tenth cause of action alleges that Mr. Liere violated 6 NYCRR 360-16.4(f)(3) because the commingled solid waste forms being processed on the Liere farm are in piles that occupy an area greater than 5,000 ft^2 at the base.

During the October 16, 2003 inspection, Department staff measured the dimensions of pile F. The general shape of pile F is a right triangle. The lengths of the sides were 150 ft and

750 ft. (Tr. 123-124.) From this information the approximate area of the pile can be calculated.[4] Pile F occupies an area of 56,250 ft^2, which exceeds the 5,000 ft^2 limitation at 6 NYCRR 360-16.4(f)(3). Therefore, Mr. Liere violated 6 NYCRR 360-16.4(f)(3).

The eleventh cause of action alleges that Mr. Liere violated 6 NYCRR 360-16.4(i)(2) because he did not keep records about the amount and nature of the C&D debris (*i.e.*, land clearing debris) accepted and processed at the Liere farm. Pursuant to 6 NYCRR 360-16.4(i)(2), operators are required to keep daily logs about the quantity, description and origin of the C&D debris received, among other things. The records must account for all the materials handled at the facility. Mr. Liere admitted that he does not keep or maintain this information (Tr. 667). Therefore, Mr. Liere violated 6 NYCRR 360-16.4(i)(2) by failing to maintain the necessary records.

Finally, if it is assumed that Judge Sgroi's December 19, 2000 memorandum decision is an order contemplated by 6 NYCRR 360-1.5(a)(2) that could authorize operations at the Liere farm in the absence of a permit from the Department, the violations described above concerning the ninth, tenth and eleventh causes of action from the December 2, 2003 complaint show that the current activities on the Liere farm far exceed what was authorized by the regulations in effect at the time, and which served as the basis for Judge Sgroi's December 19, 2000 decision. Therefore, Mr. Liere could no longer rely on the authority provided at 6 NYCRR 360-1.5(a)(2) and 360-1.7(a)(3)(ii) to operate the Liere farm, as a solid waste management facility, without a permit from the Department.

VII. Relief

Department staff requests an order from the Commissioner which directs Mr. Liere to cease and desist from undertaking any further solid waste activities at the farm, and to remove all C&D debris and any other solid waste from the farm to an approved facility. Department staff also requests that the Commissioner assess a total civil penalty of $157,500 for the violations.

Mr. Liere requests that the Commissioner dismiss the charges alleged in the December 2, 2003 complaint.

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[4] The area of a right triangle is ½ the product of the two sides that form the right angle.

A. Civil Penalty

Department staff relied on the guidance outlined in the Commissioner's Civil Penalty Policy (DEE-1, June 20, 1990) to calculate its civil penalty request. Staff argues that the violations alleged in the December 2, 2003 complaint are of a continuous nature. Referring to ECL 71-2703(1), Staff states that the maximum civil penalty for each violation is $7,500 and that an additional civil penalty of $1,500 may be assessed for each day that the violations continued.

Staff argues that Mr. Liere realized a substantial economic benefit by avoiding the regulatory requirements outlined in 6 NYCRR part 360. Staff argues further that the noncompliant solid waste management facility has became a nuisance and threatens human health for the following reasons. First, Staff contends that the record demonstrates there are nine separate instances where off-site odors, originating from the Liere farm, were a nuisance. Second, Staff argues that ponded water on the site, in violation of the regulations, could provide suitable conditions for mosquito breeding, which is a human health hazard. Third, the large, static piles of decaying vegetative matter could harbor rodents, which may serve as vectors for some diseases.

According to Department staff, Mr. Liere failed to cooperate by refusing Department staff's requests to inspect his farm. Staff asserts that this lack of cooperation required Staff to obtain an administrative search warrant, which further delayed the initiation of the captioned enforcement action.

For each alleged violation associated with the causes of action not related to the odor violations, Department staff requests the maximum civil penalty of $7,500, which totals $90,000 (12 x $7,500 = $90,000). With respect to the odor violations, Staff contends that each occurrence should be considered a separate violation, and that the maximum civil penalty should be assessed. For the nine odor violations, the civil penalty would, therefore, be $67,500 (9 x $7,500 = $67,500). As a result, the total requested civil penalty would be $157,500.

In his reply to Staff's closing statement, Mr. Liere did not respond to Department staff's civil penalty calculation.

I conclude that Department staff has offered a rational basis for the requested civil penalty. The total amount, however, should be adjusted because Staff did not demonstrate all

the violations alleged in the December 2, 2003 complaint. Department staff did not demonstrate the violations alleged in the second and thirteenth causes of action. As a result, the total requested civil penalty should be reduced by $15,000 (2 x $7,500 = $15,000).

The revised total civil penalty would be $142,500. The revised total is based on $7,500 for causes of action 1, and 3 through 11, inclusive (10 x $7,500 = $75,000); and $7,500 for each of the 9 nuisance odor incidents alleged in the twelfth cause of action (9 x $7,500 = 67,500). The revised total civil penalty also assumes that the Commissioner will accept the recommendation to amend the ninth cause of action, as discussed above.

B. Remediation

In addition to the requested civil penalty, Department staff seeks an order from the Commissioner prohibiting Mr. Liere from accepting any more solid waste at his farm. In addition, Mr. Liere should be required to file a closure plan within 45 days for Department staff's review and approval. An element of the closure plan should include the removal of all solid waste materials from the farm to an approved facility. Staff recommends that the Commissioner should require Mr. Liere to implement the closure plan after Staff's review and approval. To demonstrate that the solid waste has been removed from the farm to an approved facility, Department staff wants Mr. Liere to provide receipts. Finally, Department staff should be provided access to the site to determine whether all solid waste has been removed from the farm. As an alternative to closure, Department staff requests that Mr. Liere be directed to file an application with supporting materials for a permit consistent with the applicable requirements outlined in 6 NYCRR part 360.

In his reply to Staff's closing statement, Mr. Liere does not respond to Department staff's request for remediation. Mr. Liere, however, maintains that the activities at his farm are exempt from the requirements outlined in 6 NYCRR part 360.

The record of this proceeding demonstrates that the activities at the Liere farm are regulated pursuant to the requirements outlined in 6 NYCRR part 360 and its subparts, and that several violations have occurred. The Commissioner should prohibit Mr. Liere from accepting any more solid waste at his farm until Mr. Liere files either an approvable closure plan, or an application for a permit to construct and operate a solid

waste management facility pursuant to the applicable requirements outlined in 6 NYCRR part 360.

Conclusions

1. A definition of the term "solid waste" is provided in the regulations at 6 NYCRR 360-1.2(a). Solid waste means, among other things, any garbage, refuse or other discarded materials. A material is discarded if it is abandoned by being disposed of, or accumulated, stored or physically, chemically or biologically treated instead of or before being disposed of. The definition also identifies what would not constitute solid waste, none of which are relevant here. Subcategories of solid waste relevant to this proceeding are construction and demolition debris (C&D debris) (defined at 6 NYCRR 360-1.2[b][38]), land clearing debris (defined at 6 NYCRR 360-1.2[b][94]), and yard waste (defined at 6 NYCRR 360-1.2[b][185]). The vegetative material that Mr. Liere accepts at his farm has been discarded. At the Liere farm, the discarded vegetative material undergoes physical and biological treatment before it is disposed of. Therefore, the vegetative matter brought to the Liere farm is solid waste as that term is defined at 6 NYCRR 360-1.2(a).

2. What Mr. Liere characterizes as mulch and top soil is actually compost produced from the aerobic, thermophilic decomposition of solid organic constituents of solid waste.

<u>General Provisions (6 NYCRR subpart 360-1)</u>

3. Pursuant to the definition provided at 6 NYCRR 360-1.2(b)(38), construction and demolition (C&D) debris includes, among other things, bricks, concrete and other masonry materials, soil and rocks, as well as land clearing debris. C&D debris is a form of solid waste (*see* 6 NYCRR 360-1.2[a]). The materials that Department staff observed in the piles identified as B and C on the Liere farm (*see* Appendix B), which consisted of concrete, asphalt, brick and wood, are construction and demolition debris (C&D debris), as that term is defined in the regulations. In addition, the record shows that the material in the piles identified as E, F and G (*see* Appendix B) also includes C&D debris.

4. ECL 27-0707(1) prohibits anyone from constructing and operating any solid waste management facility without a permit from the Department. This statutory prohibition is

echoed in the regulations at 6 NYCRR 360-1.7(a)(1)(i). In addition, 6 NYCRR 360-1.5(a) prohibits any person from disposing solid waste except at either exempt facilities or authorized facilities. Department staff has shown by a preponderance of the evidence that Mr. Liere operated an unauthorized solid waste management facility at his farm for C&D debris in violation of ECL 27-0707(1), and deposited, or allowed someone to deposit, the C&D debris at his farm in violation of 6 NYCRR 360-1.5(a).

5. It is not known whether Mr. Liere accepted any solid waste at his farm on November 13, 2003. Therefore, Department staff failed to demonstrate that Mr. Liere violated ECL 27-0707(1) and 6 NYCRR 360-1.5 on that date when he allegedly accepted solid waste at the farm without having a permit from the Department for a solid waste management facility, or without qualifying for an exemption from 6 NYCRR part 360.

Long Island Landfills (6 NYCRR subpart 360-8)

6. Department staff failed to prove that Mr. Liere is operating a solid waste management facility over the deep flow recharge area in Suffolk County in violation of 6 NYCRR 360-8.4(b).

Land Application and Associated Storage Facilities (6 NYCRR subpart 360-4)

7. Although Department staff alleged that Mr. Liere violated the terms and conditions of BUD #303-0-00, Staff offered no information for the hearing record about it. Accordingly, no determinations can be made about whether Mr. Liere violated the terms or conditions of BUD #303-0-00.

8. Department staff's observations at the Liere farm on October 16, 2003 and the photographic evidence prove that Mr. Liere was not complying with the exemption criteria listed at 6 NYCRR 360-4.2(a)(3) concerning land application and associated storage facilities. Grass and leaves were piled up to two feet deep in places, and had not been incorporated into the soil at all, much less within the time frames specified in the regulations (*see* 6 NYCRR 360-4.2[a][3][v and vi]). Therefore, with respect to the seventh cause of action, Mr. Liere violated 6 NYCRR 360-4.2(a)(3)(iv) because more than minimal grass and leaf material was apparent on the soil surface.

9. With respect to the eighth cause of action, Mr. Liere violated 6 NYCRR 360-4.2(a)(3)(v) when he failed to incorporate grass into the soil on the same day it was applied. In addition, Mr. Liere violated 6 NYCRR 360-4.2(a)(3)(vi) when he failed to incorporate leaves into the soil within seven days.

10. Mr. Liere failed to establish his affirmative defense with respect to the seventh and eighth causes of action that land spreading operations at the Liere farm are exempt from the requirements outlined in 6 NYCRR subpart 360-4. The record demonstrates that operations at the Liere farm do not comply with the exemption criteria listed at 6 NYCRR 360-4.2(a)(3)(iv-vi).

11. Department staff has shown that the current activities on the Liere farm do not comply with the requirements outlined in 6 NYCRR subpart 360-4, which served, in part, as the basis for Judge Sgroi's December 19, 2000 decision. Therefore, Mr. Liere can no longer rely on Judge Sgroi's decision, pursuant to 6 NYCRR 360-1.5(a)(2) and 360-1.7(a)(3)(ii), as authority to operate the Liere farm, as a solid waste management facility without a permit from the Department.

Composting Facilities (6 NYCRR subpart 360-5)

12. Mr. Liere has not complied with the exemption criterion at 6 NYCRR 360-5.3(a)(2). As a result, he must comply with either the registration requirements outlined in 6 NYCRR 360-5.3(b)(1), or obtain a permit. Mr. Liere has neither registered his farm as a composting facility nor obtained a permit from the Department to operate a composting facility. Therefore, Mr. Liere has violated 6 NYCRR 360-5.3(b)(1).

13. Pursuant to 6 NYCRR 360-5.7(b)(5), composting facilities must be constructed to minimize ponding. Areas of standing water were present throughout the Liere farm when Department staff inspected it on October 16, 2003. Therefore, Mr. Liere violated 6 NYCRR 360-5.7(b)(5).

14. Pursuant to 6 NYCRR 360-5.7(b)(6), windrows at facilities that compost yard waste must be constructed and turned with sufficient frequency to maintain aerobic conditions for the production of a compost product. The processed yard waste in the piles identified as E, F and G is not arranged into windrows, and Mr. Liere does not turn the piles of processed

yard waste on a regular basis. Therefore, Mr. Liere has violated the requirements at 6 NYCRR 360-5.7(b)(6).

15. Pursuant to 6 NYCRR 360-5.7(c), composting facility operators are required to keep daily operational records about the quantity and character of the material processed, the quantity of the product removed from the facility, and how the products are used. Mr. Liere admitted that he does not keep any operational records. Therefore, he violated 6 NYCRR 360-5.7(c) for failing to do so.

16. Operational requirements for all solid waste management facilities are outlined in 6 NYCRR 360-1.14. Among them, odors must be effectively controlled so that they do not constitute nuisances or hazards to health, safety or property (*see* 6 NYCRR 360-1.14[m]). Pursuant to 6 NYCRR 360-5.7(b)(11), compost facilities must be operated in a manner to control the generation and migration of odors to a level that is to be expected from a well operated facility, as determined by the Department. Department staff's evidence demonstrates that Mr. Liere did not effectively control odors, and that as a result, these odors created a nuisance offsite. Therefore, Mr. Liere violated 6 NYCRR 360-1.14(m) and 360-5.7(b)(11) on July 31, 2003, August 6, 11, 18, 22, 25 and 29, 2003, and September 3 and 4, 2003 by failing to control odors from the Liere farm.

Construction and Demolition Debris Processing Facilities (6 NYCRR subpart 360-16)

17. Land clearing debris (6 NYCRR 360-1.2[b][94])and yard waste (*see* 6 NYCRR 360-1.2[b][185]) are separate and distinct forms of solid waste. Different regulatory schemes apply to the processing of land clearing debris and to the processing of yard waste. C&D debris includes land clearing debris (*see* 6 NYCRR 360-1.2[b][38]), and operations at solid waste management facilities that commingle land clearing debris with yard waste are regulated pursuant to 6 NYCRR subpart 360-16.

    Department staff's observations on October 16, 2003 and Mr. Liere's testimony concerning operations at the Liere farm show that the yard waste and land clearing debris are processed together in the piles identified as E and F. Because Mr. Liere commingles land clearing debris and yard waste on his farm, the processing method is not exempt. Therefore, the requirements outlined in 6 NYCRR subpart 360-

16 apply. Absent a permit from the Department, Mr. Liere has violated 6 NYCRR 360-1.7(a)(1)(i) and 360-16.1(a).

18. The material in the pile identified as F occupies an area of 56,250 ft^2, which exceeds the 5,000 ft^2 limitation at 6 NYCRR 360-16.4(f)(3). Therefore, Mr. Liere violated 6 NYCRR 360-16.4(f)(3).

19. Pursuant to 6 NYCRR 360-16.4(i)(2), operators of C&D debris processing facilities are required, among other things, to keep daily logs about the quantity, description and origin of the C&D debris received. The records must account for all the materials handled at the facility. Mr. Liere does not keep or maintain this information, which is a violation of 6 NYCRR 360-16.4(i)(2).

20. Current operations at the Liere farm do not comply with the exemption criteria outlined in 6 NYCRR 360-16.1(b), which served, in part, as the basis for Judge Sgroi's December 19, 2000 decisions. Therefore, Mr. Liere can no longer rely on Judge Sgroi's decision, pursuant to 6 NYCRR 360-1.5(a)(2) and 360-1.7(a)(3)(ii), as authority to operate the Liere farm, as a solid waste management facility without a permit from the Department.

Recommendations

1. The Commissioner should dismiss the charge alleged in the second cause of action because Department staff did not present any proof to demonstrate that the C&D debris on the Liere farm was located over a deep flow recharge area in Suffolk County (*see* 6 NYCRR 360-8.4[b]).

2. The Commissioner should dismiss the charge in the thirteenth cause of action because Department staff did not present any proof to demonstrate that Mr. Liere violated ECL 27-0707(1) and 6 NYCRR 360-1.5 on November 13, 2003.

3. The Commissioner should amend the charge in the ninth cause of action from a violation of 360-16.4(b) to a violation of 360-16.4(a) for the reasons discussed in the hearing report.

4. With respect to the remaining causes of action (1, and 3 through 12, inclusive) in the verified complaint dated December 2, 2003, the Commissioner should conclude that Mr. Liere violated various provisions of 6 NYCRR subpart 360-1 with respect to the general provisions, subpart 360-4

concerning the land application of solid waste materials, subpart 360-5 related to composting facilities, and subpart 360-16 concerning C&D debris processing facilities.

5. For the demonstrated violations, the Commissioner should assess a total civil penalty of $142,500. In addition, the Commissioner should enjoin Mr. Liere from accepting any additional yard waste such as grass, leaves, as well as land clearing debris at the Liere farm.

6. The Commissioner should direct Mr. Liere to develop a closure plan that would result in the removal of all yard waste such as grass, leaves, as well as land clearing debris from his farm to an approved solid waste management facility. Alternatively, the Commissioner may allow Mr. Liere to file an application with the Department for a permit consistent with the requirements outlined in 6 NYCRR part 360 and its subparts. In the meantime, Mr. Liere should be enjoined from accepting any land clearing debris and yard waste at his farm.

Attachments:	Appendix A	Complaint dated December 2, 2003
	Appendix B	Schematic from Dept. Exh. 18
	Appendix C	Summaries of Mr. Liere’s testimony and Ms. Genece’s testimony