

STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the 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

Rulings on:

- (1) Respondents' Motion to Take Depositions, and
- 2) Department Staff's Motion for a Protective Order

DEC Case No. R1-20031030-257

Robert Liere as owner and operator of Liere Farm and Robert Liere doing business as Liere Farm,
RESPONDENTS.

Proceedings

The Department Staff initiated the captioned enforcement matter by duly serving a notice of pre-hearing conference, hearing and verified complaint dated December 29, 2003 upon respondents Robert Liere, as owner and operator of Liere Farm and Robert Liere, doing business as Liere Farm. The complaint asserts that Robert 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 (Suffolk County), New York. In 13 causes of action, the complaint alleges various violations of ECL article 27, as well as provisions of 6 NYCRR part 360 and its subparts, including the operation of a C&D debris solid waste management facility without a permit from the Department. According to the complaint, respondents accept C&D debris primarily in the form of yard waste, which respondents compost and then spread on land. The alleged violations occurred at the Liere Farm at various times from July 31, 2003 to October 16, 2003. After a hearing, the Department Staff seeks an order from the Commissioner that directs respondents to remove all C&D debris and yard waste from the Liere Farm. The Department Staff also seeks a civil penalty of \$157,500.

By their attorney, Robert J. Cava, Esq., respondents 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 Offices on the SUNY Stony Brook Campus. In their answer, respondents generally denied the allegations asserted 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, respondents retained new legal counsel, Joan B. Scherb, Esq.

Motion for Leave to Depose Department Staff

By notice of motion and an affirmation in support of motion to take a deposition by Attorney Scherb, both dated March 30, 2004, respondents request leave to depose Merlange Gerece, John Conover, and Anit Patel of Department Staff. Referring to 6 NYCRR 622.7(b)(2), respondents argue that the ALJ should grant leave to depose these members of Department Staff because the depositions will expedite the proceeding.

Respondents explain that Department Staff sought criminal sanctions against them in Suffolk County District Court (1st District) in an action begun in 1999. The Honorable Sandra L. Sgroi issued a memorandum decision on December 19, 2000 and dismissed the criminal charges alleged against respondents (*see* Exhibit A to Attorney Scherb's Affirmation). According to respondents, the criminal charges considered by Judge Sgroi are similar to those alleged in the December 29, 2003 complaint. Respondents contend that Judge Sgroi's decision is the law of this case.

Respondents argue that Department Staff must show there is a "material difference" between the charges considered in the criminal matter and those alleged in the complaint (Attorney Scherb's Affirmation, Paragraph 7). Otherwise, Department Staff is inappropriately attempting to retry the allegations previously dismissed in the criminal proceeding, according to respondents. Respondents contend that depositions would show whether there is a material difference between the criminal charges and those alleged in the December 29, 2003 complaint.

Respondents anticipate that the deposition will show there is no material difference between the previously decided criminal matter and the charges alleged in the December 29, 2003 complaint. If there is no difference between the two sets of charges, then respondents state they will move to dismiss the charges alleged in the December 29, 2003 complaint.

Motion for Protective Order

With a cover letter dated April 5, 2004, Department Staff replied with a notice of motion for protective order, and an affirmation by Vernon Rail, Esq., Assistant Regional Attorney. Department Staff opposes respondents' motion for leave to take depositions. According to Attorney Rail's affirmation, Department Staff produced documents in response to a discovery demand made by respondents' prior counsel. During the March 24, 2004 conference call, Attorney Scherb acknowledged receipt of the file from respondents' prior counsel, Attorney Cava. Department Staff contends that respondents' motion should explain what additional information would be obtained from depositions that was not already provided to respondents in the form of documentary information.

Department Staff disagrees with respondents' assertion that Judge Sgroi's December 1999 memorandum decision is the law of the case. According to Department Staff, the court's December 1999 memorandum decision is irrelevant. Department Staff explains that the captioned enforcement matter relates to violations that allegedly occurred on respondents' property in October 2003. In order to inspect Respondent's property in October 2003, Department Staff notes that Staff obtained an administrative search warrant. Department Staff argues that respondents failed to show how depositions would expedite the proceeding.

Discussion and Ruling

Depositions will be allowed with permission of the ALJ upon a finding that they are likely to expedite the proceeding (*see* 6 NYCRR 622.7[b][2]). Respondents request the depositions to determine whether the charges considered in the criminal proceeding are materially different from the charges alleged in the December 29, 2003 complaint.

The criminal charges are identified in the first sentence of the first paragraph of Judge Sgroi's December 19, 2000 decision. Based on Attorney Scherb's affirmation, the criminal proceeding was brought before the court in 1999. At that time, the defendant, Robert Liere, was charged with violating ECL 71-0907(7), and 6 NYCRR 360-1.4(a)(1)(iv); 360-1.7(a)(1)(ii); 360-1.14(i) and 360-16.4(f)(3). As noted above, these criminal charges were dismissed in 2000.

The court's memorandum decision dated December 19, 2000 relates to events that occurred in 1999. However, the December 29, 2003 complaint relates to alleged violations that occurred between July 31, 2003 and October 16, 2003, which is about three years after Judge Sgroi issued her memorandum decision. Accordingly, I disagree with respondents' claim that Judge Sgroi's December 19, 2000 memorandum decision is the law of the case. Rather, the captioned administrative matter is a new case that is different from the previous criminal matter.

Based on these circumstances, respondents failed to explain how depositions are necessary to expedite this proceeding. Accordingly, respondents' request for leave to depose members of Department Staff is denied, and Department Staff's motion for a protective order is granted.

Department Staff's First Notice to Produce Documents dated February 18, 2004

In the April 5, 2004 cover letter, Department Staff requests that I direct respondents' counsel to review Department Staff's February 18, 2004 discovery demand and confirm whether all applicable documents have been provided to Department Staff. Department Staff explains that Attorney Cava had responded to the discovery demand, but wants respondents' current counsel to confirm there are no remaining documents responsive to the request that have yet to be turned over to Department Staff.

During the March 24, 2004 conference call, Attorney Scherb agreed to review Department Staff's February 18, 2004 discovery demand and the documents provided to Department Staff, and to confirm whether any additional documents exist that are responsive to Department Staff's discovery demand.

Pursuant to 6 NYCRR 622.7(c)(3), the ALJ may preclude material from the hearing that was previously demanded. Accordingly, if respondents' counsel intends to offer information that is responsive to Department Staff's February 18, 2004 discovery demand, and has not yet provided the information to Department Staff, respondents' counsel shall do so immediately.

Allegations

Upon review of the allegations made in the complaint, I have discovered some erroneous regulatory citations. Department Staff shall review the following citations and provide respondents and me with corrections. The following citations are:

1. 6 NYCRR 360-5.7(b)(5)(c) in the fifth cause of action where the allegation relates to windrow construction and frequency of turning;
2. 6 NYCRR 360-1.17(m) in the twelfth cause of action where the allegation relates to odor control; and
3. 6 NYCRR 360-1.14(a)(2) in the thirteenth cause of action.

To the extent that the corrected citations provided by Department Staff require respondents to amend their answer with respect to the fifth, twelfth and thirteenth causes of action, respondents may do so within the period prescribed by 6 NYCRR 622.4(a).

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

Dated: Albany, New York
April 20, 2004

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