STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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	Ruling on: (1) Respondent's 12th and 13th Affirmative Defenses, and (2) Respondent's Motion to Dismiss DEC Case No.: R1-20031030-257

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

Respondent.

September 30, 2004

Proceedings

Department Staff initiated the captioned enforcement matter by duly serving a notice of pre-hearing conference, hearing and verified complaint dated December 2, 2003[1] upon Robert Liere (Respondent) as owner and operator of Liere Farm, and Robert Liere doing business as Liere Farm. The complaint asserts that Respondent 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 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, including the operation of a construction and demolition (C&D) debris solid waste management facility without a permit from the Department. According to the complaint, Respondent accepts C&D debris primarily in the form of yard waste, which he composts and then spreads on land. The alleged violations occurred at the Liere Farm at various times from July 31 to October 16, 2003. Department Staff seeks an order from the Commissioner that directs Respondent to remove all C&D debris and yard waste from the Liere Farm, and assesses a civil penalty of $157,500.

By his former attorney, Robert J. Cava, Esq., Respondent filed a verified answer dated January 20, 2004 and appeared at the pre-hearing conference scheduled for January 28, 2004 at

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[1] The April 20, 2004 *Rulings on: (1) Respondent's motion to take depositions, and (2) Department Staff's motion for a protective order* erroneously state that the verified complaint is dated December 29, 2003. Department Staff's notice of hearing and verified complaint in this matter are dated December **2**, 2003. (*See* Tr. 199).

10:00 a.m. at the Department's Region 1 office on the SUNY Stony Brook Campus. In the answer, Respondent generally denies the allegations asserted in the complaint, and asserts 13 affirmative defenses. Of these, Respondent asserts as the 12th affirmative defense that the charges alleged in the December 2, 2003 complaint are barred by the doctrines of res judicata and collateral estoppel based on a memorandum decision issued by Judge Sgroi (District Court, Suffolk County [1st District]) on December 19, 2000. For the 13th affirmative defense, Respondent asserts that the charges alleged in the complaint are barred by the doctrines of res judicata and collateral estoppel based on a decision issued by Justice Jones (Supreme Court, Suffolk County) on January 6, 2000.

With a cover letter dated February 25, 2004, Department Staff filed a statement of readiness as required by 6 NYCRR 622.9. Subsequently, Respondent retained new legal counsel, Joan B. Scherb, Esq.

The hearing commenced on May 25, 2004 and continued on May 26 and 27, 2004. The hearing in this matter is scheduled to continue on October 19, 2004 at the Department's Region 1 office.

Background

As part of his defense, Respondent contends that Judge Sgroi's December 19, 2000 memorandum decision (*see* Exhibit C to Respondent's memorandum of law) and Justice Jones' January 6, 2000 short form order (see Exhibit D to Respondent's memorandum of law) are relevant to the captioned administrative proceeding. The determinations are summarized below. According to Respondent, no party appealed from these determinations.

1. Suffolk District Court (1st District)

In 1999, Environmental Conservation Officer (ECO) Rucker served several appearance tickets upon Respondent, and charged him 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). These tickets were returnable in 1st District Court of Suffolk County. Respondent pleaded not guilty to the charges.

Consistent with the court's direction, Respondent filed an affidavit sworn to January 5, 2000, and a memorandum of law and

stipulation from Respondent's counsel, Robert Cava, Esq.[2] Based on these papers, the court found that Respondent "accepts trees, shrubs, grass clippings and leaves from landscapers," and that Respondent "grinds those materials up and sells the wood chips or spreads them on his farm" (*People v Robert A. Liere*, Suffolk Dist Ct, 1st Dist, Dec. 19, 2000, Sgroi, J., Docket No. 27571/99). Based on these facts, the court concluded that Respondent "was not engaged in conduct regulated by the provisions under which he is charged. There is no evidence that the defendant [Mr. Liere] accepted solid waste as same is defined in 6 NYCRR §360-1.2(a)(1). This Court finds that the People have failed to set forth any factual basis for bringing the materials in question within such definition" (*id.*).

Referencing 6 NYCRR 360-16.1(b), which outlines the exemption criteria for C&D debris processing facilities, Judge Sgroi determined further that "should the People allege that the material in question constituted 'construction and demolition debris' consisting of 'land clearing debris' (*see* 6 NYCRR §360-1.2(38)), the within defendant [Mr. Liere] would be exempt from prosecution under Part 360 (*see* 6 NYCRR §360-16.1(b))" (*id.*). Judge Sgroi dismissed all charges alleged in ECO Rucker's appearance tickets.

2. Supreme Court, Suffolk County

The Town of Brookhaven served an order to show cause dated May 19, 1999 upon Respondent and others to prevent them from storing and collecting solid waste at the Liere Farm until Respondent and the other defendants had obtained all necessary approvals from the Town of Brookhaven. The basis for the Town's claim cannot be determined from the papers filed by Respondent. It appears to be based on a nuisance claim.

After a hearing, the court found that in 1999, Respondent received trees, branches, leaves and stumps which were processed with a chipper to produce mulch that was subsequently tilled into the soil at the farm, or sold. Although some grass clippings were mixed into the mulch, the court determined that the Town failed to prove that the actual amount of grass clippings at the farm was as significant as alleged by the Town. In addition, the court found that any on-site odors "could not be detected from a

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[2] The copy of Mr. Cava's memorandum of law and stipulation attached to Respondent's memorandum of law as Exhibit B is not dated.

distance" (*Town of Brookhaven v. Robert Liere*, Sup Ct, Suffolk County, Jan. 6, 2000, Jones, J., Index No. 9456/1999). Based on these findings, Justice Jones denied the Town's petition for injunctive relief in a short form order dated January 6, 2000 because the Town failed to demonstrate any irreparable injury.

Requests for Clarification and Respondent's Motion to Dismiss

During the administrative hearing in May 2004, Department Staff requested clarification of the April 20, 2004 ruling on Respondent's request to depose members of Department Staff (*see* Tr. 372). In addition to denying Respondent's request for depositions, Department Staff understood that the April 20, 2004 ruling dismissed Respondent's 12th and 13th affirmative defenses (*see* Tr. 7-9). Also during the hearing, Respondent moved to dismiss the charges alleged in the complaint (*see* Tr. 275, 374). I directed Respondent to make this request in writing (*see* Tr. 276). In addition, I requested clarification from Respondent about his 12th and 13th affirmative defenses (*see* Tr. 382).

On behalf of Respondent, Attorney Scherb filed an undated memorandum of law, which I received on June 15, 2004. Three exhibits were attached to the memorandum of law. Exhibit A is a copy of an affidavit by Respondent sworn to January 5, 2000. Exhibit B is a copy of an undated memorandum of law and stipulation of facts by Attorney Cava. Exhibit C is a copy of Judge Sgroi's December 19, 2000 memorandum decision. Exhibits A, B and C relate to the Suffolk County District Court matter summarized above. Respondent moves to dismiss the charges alleged in the December 2, 2003 complaint on the ground that the captioned enforcement action is barred by the doctrines of res judicata and collateral estoppel.

With a cover letter dated July 21, 2004, I received Department Staff's reply of the same date. Attached to Department Staff's reply is a letter dated October 21, 1999 from Anthony J. Cava, P.E., Regional Solid and Hazardous Materials Engineer, Region 1 to Robert Liere. Department Staff opposes Respondent's motion to dismiss. Department Staff seeks a ruling that Respondent's 12th and 13th affirmative defenses are not applicable to the captioned enforcement action.

During a conference call with the parties on July 26, 2004 concerning the captioned matter, Respondent's counsel requested that I disregard Department Staff's reply because it was a week late. By letter dated July 26, 2004, I denied Respondent's request, and accepted Department Staff's July 21, 2004 reply. In

addition, the July 26, 2004 letter authorized Respondent to file a reply by August 13, 2004.

With a cover letter dated August 11, 2004, Respondent timely filed a reply memorandum of law. Respondent argues that Department Staff is inappropriately trying to reassert jurisdiction over Respondent's property. Respondent maintains that whether it was operating a regulated solid waste management facility was decided by Judge Sgroi in December 2000. Respondent concludes that the captioned administrative action is barred by the doctrines of res judicata and collateral estoppel. Respondent cites additional cases to support his position (*see Matter of Reilly v Reid*, 45 NY2d 24; *Matter of Gowan v Tully*, 45 NY2d 32).

1. Clarification of the April 20, 2004 ruling concerning depositions

By notice of motion and supporting papers dated March 30, 2004, Respondent requested leave to depose members of Department Staff. With a cover letter dated April 5, 2004, Department Staff replied with a notice of motion for protective order and supporting papers. I issued a ruling dated April 20, 2004 which denied Respondent's request to depose members of Department Staff, and granted Department Staff's motion for protective order. Respondent's motion was denied because Respondent failed to show how depositions would expedite the hearing (*see* 6 NYCRR 622.7[b][2]).

In his March 30, 2004 motion for leave for depositions, Respondent explained that Department Staff previously sought criminal sanctions against him in Suffolk County District Court. Judge Sgroi's decision is discussed above. According to Respondent, the criminal charges considered by Judge Sgroi are similar to those alleged in the December 2, 2003 complaint. Respondent contended that "Judge Sgroi's decision ... is the law of this case" (Attorney Scherb's March 30, 2004 affirmation, paragraph 8).

Respondent argued further that Department Staff must show there is a "material difference" between the charges considered in the criminal matter before Judge Sgroi, and those alleged in the complaint (Attorney Scherb's March 30, 2004 affirmation, paragraph 7). Otherwise, Department Staff is inappropriately attempting to retry the allegations previously dismissed in the criminal proceeding, according to Respondent. Respondent contended that depositions would show whether there is a material

difference between the criminal charges and those alleged in the December 2, 2003 complaint.

In the April 20, 2004 ruling, I found that Judge Sgroi's December 19, 2000 decision relates to events that occurred in 1999, and that the charges alleged in the December 2, 2003 complaint relate to alleged violations that occurred between July 31 and October 16, 2003. I stated further that I did not agree with Respondent's contention that Judge Sgroi's December 19, 2000 decision is the law of this case. Rather, I said that "the captioned administrative matter is a new case that is different from the previous criminal matter" (April 20, 2004 ruling at 3).

As noted above, Department Staff seeks clarification of the above quoted portion of the April 20, 2004 ruling. At the hearing on May 25, 2004, Attorney Rail inquired whether the ruling dismissed Respondent's 12th and 13th affirmative defenses, in addition to denying Respondent's request to depose members of Department Staff (*see* Tr. 7-9, 372).

At the May 25, 2004 hearing, I said that the April 20, 2004 ruling was not intended to dismiss any of Respondent's affirmative defenses. I noted that Department Staff had not moved to dismiss any affirmative defenses, and that the issue before me was whether the requested depositions would expedite the proceeding (*see* Tr. 16-18). Upon review of the parties' papers, I determined that Respondent failed to show how depositions would expedite the proceeding, and accordingly denied Respondent's motion for leave to depose members of Department Staff.

Respondent contends, among other things, that Judge Sgroi's December 19, 2000 decision is the law of the case in this administrative matter (Attorney Scherb's March 30, 2004 affirmation, paragraph 8). I disagree. The doctrine of the law of the case applies to various states of the same action or proceeding (*see Matter of McGrath v Gold*, 36 NY2d 406). Its purpose is to avoid the retrial of issues already determined within it (*see Fadden v Cambridge Mut. Fire Ins.*, 51 Misc 2d 858 [Sup Ct, Albany County, 1966], *affd* 27 AD2d 487). Once a point is decided within a case, the doctrine of the law of the case makes it binding not only on the parties, but on the court as well. No other judge of coordinate jurisdiction may undo the decision (*see State of New York Higher Educ. Serv. Corp. v Starr*, 158 AD2d 771).

The action decided by Judge Sgroi considered charges alleged in the appearance tickets issued by ECO Rucker in 1999. However, Department Staff commenced the captioned administrative matter with service of a notice of pre-hearing conference, hearing and verified complaint dated December 2, 2003 upon Respondent. The charges alleged in the December 2, 2003 complaint relate to violations that allegedly occurred between July 31 and October 16, 2003. Therefore, I conclude that the doctrine of the law of the case does not apply here because the matter considered in Judge Sgroi's December 19, 2000 decision, and the matter before me are not the same action or proceeding.

Similarly, I conclude that Justice Jones' January 6, 2000 order is not the law of the case with respect to the captioned administrative matter. It appears that the Town of Brookhaven initiated the matter against Mr. Liere as a nuisance claim. The January 6, 2000 order does not explicitly identify any statute or regulation that Mr. Liere had allegedly violated. I conclude that the action commenced by the Town of Brookhaven with service of its order to show cause dated May 19, 1999 is different from the matter before me, which Department Staff initiated with service of a notice of pre-hearing conference, hearing and verified complaint dated December 2, 2003. Consequently, the doctrine of the law of the case does not apply here because the matter considered by Justice Jones in his January 6, 2000 decision, and the captioned administrative matter before me are not the same action or proceeding.

2. Clarification of the 12th and 13th Affirmative Defenses

Respondent asserts as the 12th and 13th affirmative defenses that the charges alleged in the December 2, 2003 complaint are barred by the doctrines of res judicata and collateral estoppel based on Judge Sgroi's December 19, 2000 memorandum decision and Justice Jones's January 6, 2000 short form order, respectively. Respondent argues in the memorandum of law that every allegation in the December 2, 2003 complaint is predicated on the fact that Respondent operates a solid waste management facility. According to Respondent, the Department Staff is attempting to relitigate the issue of jurisdiction, which is barred by these doctrines.

Respondent notes that the regulatory definitions applied by the court in the previous determinations have not changed since December 2000 when Judge Sgroi and Justice Jones determined that the Liere Farm was not a solid waste management facility, and that Respondent needs neither a permit nor a registration from the Department.

Department Staff contends, however, that Mr. Liere's January 5, 2000 affidavit and Attorney Cava's memorandum of law and stipulation of facts show that the claims and issues decided in the 1999 criminal proceeding are different from the claims and issues raised in the December 2, 2003 complaint. According to Department Staff, the captioned administrative proceeding is not related to the matters decided by Judge Sgroi and Justice Jones. Department Staff contends that the captioned enforcement matter was commenced after investigating citizens' complaints about operations at the Liere Farm, and that the violations alleged in the December 2, 2003 complaint are based on an on-site inspection, which occurred in October 2003. Department Staff argues that the causes of action and the underlying factual issues related to the captioned administrative proceeding arise from "a completely different time, origin and motivation" (Department Staff's Reply at 6).

The December 2, 2003 complaint alleges thirteen causes of action. With the exception of the violations asserted in the twelfth cause of action, all other violations are alleged to have occurred on or after October 16, 2003. According to the twelfth cause of action, Respondent violated 6 NYCRR 360-1.14(m) and 360-5.7(b)(11), which relate to controlling odors, on July 31, August 6, 11, 18, 22, 25, 29, and September 3 and 4, 2003. All but one of the causes of action in the December 2, 2003 complaint identify provisions of 6 NYCRR part 360 that are different from the regulatory provisions identified in ECO Rucker's appearance tickets. On October 16, 2003, Respondent is alleged to have violated 6 NYCRR 360-16.4(f)(3) which relates to the amount of processed and unprocessed C&D debris that may be stored at a site. A violation of 6 NYCRR 360-16.4(f)(3) was also considered and decided by Judge Sgroi in the criminal proceeding.

A. Res judicata

After a matter has been duly decided, the doctrine of res judicata puts an end to it. If a litigant is dissatisfied with the result of an adjudication, the proper course is to appeal the unsatisfactory result rather than ignore it and attempt to relitigate it in a separate action. The doctrine of res judicata applies not only to the matter litigated but also to what might have been litigated (*see Schuylkill Fuel Corp. v B&C Nieberg Realty Corp.*, 250 NY 304). From this principle, the concept of "claim preclusion" has developed. (*See* Siegel, New York Practice § 442, at 714 [3d ed]).

The doctrine of res judicata requires a final judgment on the merits and a determination that the second action involves the same "cause of action." Causes of action are considered the same if they arise out of the same transaction or series of connected transactions. Relevant factors include the time, place and origin of the causes of action (*see* Siegel, New York Practice § 447, at 721 [3d ed]).

Whether the doctrine of res judicata precludes Department Staff from pursuing the causes of action alleged in the December 2, 2003 complaint depends on whether these allegations are the same as the charges considered and decided by Judge Sgroi and Justice Jones. The violations asserted in the December 2, 2003 complaint are alleged to have occurred from July through October 2003, four years after Judge Sgroi decided the charges alleged in the appearance tickets issued in 1999 by ECO Rucker. Consequently, the causes of action alleged in the December 2, 2003 complaint are not the same as the charges decided by Judge Sgroi given the difference in time.

In addition to the difference in time, the activities associated with the criminal proceeding and those associated with the captioned administrative enforcement action are different. The causes of action in the captioned administrative enforcement action did not arise from the same transaction or series of connected transactions that gave rise to the causes of action decided in the criminal matter by Judge Sgroi. Moreover, Department Staff could not have anticipated during the summer and fall of 1999 that additional violations of the requirements outlined in 6 NYCRR part 360 at the Liere Farm might occur in 2003. Consequently, the charges alleged in the December 2, 2003 complaint could not have been litigated before Judge Sgroi in the 1999 criminal proceeding.

With respect to the matter decided by Justice Jones on January 6, 2000, Respondent has offered nothing to show that the civil action brought by the Town of Brookhaven in 1999 was based on any alleged violations of the Environmental Conservation Law or its implementing regulations. Therefore, I conclude that the Town's cause, or causes, of action considered by Justice Jones and resolved in his short form order dated January 6, 2000 are not the same as the causes of action alleged by Department Staff in the December 2, 2003 complaint.

Based on the foregoing discussion, I find that the causes of action considered by Judge Sgroi and decided in her December 19, 2000 memorandum decision and those considered by Justice Jones

and decided in his short form order dated January 6, 2000 are different from the causes of action asserted in the December 2, 2003 complaint. Therefore, the doctrine of res judicata does not bar consideration of the causes of action asserted in the December 2, 2003 complaint in this administrative enforcement proceeding.

B. Declaratory Judgment

Respondent argues further that Judge Sgroi's December 19, 2000 decision is essentially a declaratory judgment because it is based on stipulated facts (*see* Exhibits A and B to Respondent's memorandum of law). Respondent concludes that whether Respondent is operating, or has operated, a solid waste management facility without a permit has been decided as a matter of law.

According to Department Staff, Respondent's January 5, 2000 affidavit and Attorney Cava's memorandum of law and stipulation are not a stipulation of the facts. Citing CPLR 2104, Department Staff argues that a stipulation is a written agreement accepted by the parties, or an oral agreement made between counsel in open court. Department Staff contends that Respondent offered nothing to show there was a stipulation consistent with the requirements outlined in CPLR 2104. Referring to Judge Sgroi's December 19, 2000 decision, Department Staff notes that the defendant (*i.e.*, Mr. Liere) "sought to stipulate to certain facts," but the court's determination does not expressly state that the parties actually did. Absent a stipulation consistent with the requirements outlined in CPLR 2104, Department Staff argues that it cannot be determined whether Judge Sgroi's December 19, 2000 decision is controlling over the captioned administrative proceeding.

In Respondent's reply memorandum of law, he argues that his January 5, 2000 affidavit (*see* Exhibit A), and Attorney Cava's memorandum of law and stipulation of facts (*see* Exhibit B), which Respondent included with his initial memorandum of law, constitute the stipulation of facts in the criminal case that Judge Sgroi relied upon in reaching her December 19, 2000 decision.

I reject Respondent's characterization of Judge Sgroi's December 19, 2000 decision as a declaratory judgment. Respondent offered nothing to demonstrate that any party to the criminal proceeding before Judge Sgroi requested a declaratory judgment from the court as part of the disposition of the case. Furthermore, the court did not convert the proceeding into an

action for a declaratory judgment. As noted below, whether Respondent operated the Liere Farm in October 2003 in the same manner as he did in 1999 is a fact question not considered in Judge Sgroi's December 2000 memorandum decision.

C. Collateral estoppel

The doctrine of collateral estoppel is related to the doctrine of res judicata. Where res judicata applies to a whole case (claim preclusion), collateral estoppel precludes the relitigation of issues (issue preclusion). The doctrine of collateral estoppel applies to questions of law and fact (*see* Siegel, New York Practice § 443, at 715 - 716; § 463 at 744 [3d ed]). It may not be used against one who was not a party to the first action (*see id*. § 458, at 736). In addition, a court must have passed upon the issue in question. Where, as here, collateral estoppel is asserted, the burden of showing that the alleged, estopped issue is the same as one disposed of in an earlier action rests with the proponent (*see id*. § 462, at 742 - 743).

As noted above, collateral estoppel may not be used against one who was not a party to the first action. Although ECO Rucker issued the appearance tickets for alleged violations of 6 NYCRR part 360, Department Staff was not a party to the criminal matter decided by Judge Sgroi. Rather, the local district attorney prosecuted the case. With respect to criminal matters concerning alleged violations of the ECL, the Suffolk County district attorney does not have a relationship with the New York State Department of Environmental Conservation (the Department) such that the district attorney could be considered the same as the Department. In *Matter of New York Site Dev. Corp. v. New York State Dept. of Envtl. Conservation* (217 AD2d 699), the court held that the New York City Department of Sanitation (DOS) and the Department were separate agencies of the government, and that the Department had not been a party to a prior CPLR article 78 proceeding involving the DOS and New York Site Development Corporation concerning the terms and conditions of a permit issued by the Department.

Because Department Staff was not a party to either the criminal matter decided by Judge Sgroi or the civil matter before Justice Jones, Department Staff did not have a full and fair opportunity to litigate the issues decided in those actions. Therefore, the doctrine of collateral estoppel does not bar Department Staff from litigating the issues underlying the

charges alleged in the December 2, 2003 complaint in this proceeding.

In addition to Department Staff not being a party to the criminal matter decided by Judge Sgroi, the facts that Judge Sgroi based her December 2000 decision upon are different from the facts alleged by Department Staff in the December 2, 2003 complaint. As noted above, Judge Sgroi found that Respondent "accepts trees, shrubs, grass clippings and leaves from landscapers," and that Respondent "grinds those materials up and sells the wood chips or spreads them on his farm." These findings were the basis for Judge Sgroi's conclusion that operations at the Liere Farm in 1999 were exempt from the requirements outlined in 6 NYCRR part 360.

The facts alleged in the December 2, 2003 complaint, however, are based on information that Department Staff obtained during an October 16, 2003 inspection of the Liere Farm, almost three years after Judge Sgoi's December 19, 2000 decision. Based on the October 16, 2003 inspection, Department Staff alleges, among other things, that Respondent has been "commingling land clearing debris and yard waste," and composting "yard waste in excess of three thousand yards" on an annual basis. Given these alleged facts, Department Staff contends in the December 2, 2003 complaint that Respondent no longer qualifies for an exemption from the requirements outlined in 6 NYCRR part 360. Therefore, the issues underlying the charges alleged in the December 2, 2003 complaint concerning the captioned administrative enforcement proceeding are different from the issues decided by Judge Sgroi in December 2000. Accordingly, the doctrine of collateral estoppel does not bar from consideration the issues underlying the charges alleged in the December 2, 2003 complaint.

As noted above, Judge Sgroi determined whether Respondent violated 6 NYCRR 360-16.4(f)(3) in 1999. The tenth cause of action in the December 2, 2003 complaint also alleges a violation of 6 NYCRR 360-16.4(f)(3), which limits the amount of C&D debris that may be stored on a site. When the hearing last convened, I determined that Respondent would have the opportunity during the proceedings to demonstrate whether the doctrines of res judicata and collateral estoppel apply to this cause of action (*see* Tr. 366). Upon review of the parties' papers, I reverse this ruling, however. I find that the facts underlying the cause of action decided by Judge Sgroi in 1999 concerning an alleged violation of 6 NYCRR 360-16.4(f)(3) is different from the facts underlying the violation alleged as the tenth cause of action in the December 2, 2003 complaint. Judge Sgroi decided the first allegation in

2000. The factual basis for the tenth cause of action, however, is Department Staff's observations during the October 16, 2003 inspection. As noted above, Department Staff alleges that circumstances at the Liere Farm have changed since 1999 based on the October 16, 2003 inspection.

In summary, I conclude, therefore, that contrary to Respondent's contention, the doctrine of res judicata does not bar from consideration in this administrative enforcement hearing the claims alleged in the December 2, 2003 complaint. Furthermore, the doctrine of collateral estoppel does not bar the issues underlying the charges alleged in the complaint. Therefore, I dismiss, as inapplicable, Respondent's twelfth and thirteenth affirmative defenses.

3. Respondent's Motion to Dismiss

As part of the conclusion to the memorandum of law, Respondent moves to dismiss the charges alleged in the December 2, 2003 complaint. The bases for Respondent's motion are the arguments presented concerning the doctrines of res judicata and collateral estoppel.

As outlined above, however, I concluded that the doctrines of res judicata and collateral estoppel do not bar from consideration in this administrative enforcement hearing the causes of action and the issues underlying them as alleged in the December 2, 2003 complaint. Therefore, I deny Respondent's motion to dismiss.

Further Proceedings

As stated in my letter to the parties dated August 4, 2004, the captioned administrative hearing will reconvene on Tuesday, October 19, 2004 at 10:00 a.m. at the Department's Region 1 office on the SUNY Stony Brook campus, and will continue as necessary on October 20 and 21. Department Staff should reserve a room for the hearing and make arrangements to retain a stenographer.

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

Dated: Albany, New York
September 30, 2004

To: Joan B. Scherb, Esq.
Law Offices
1 Rural Place
Commack, New York 11725

Craig L. Elgut, Esq.
Assistant Regional Attorney
Division of Legal Affairs
NYS DEC - Region 1
Building 40 - SUNY
Stony Brook, New York 11790-2356