

STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of Alleged
Violations of New York State Ruling concerning Hearing
Environmental Conservation Law Record and Briefing Schedule
(ECL) articles 27 and 71, and
Title 6 of the Official
Compilation of Codes, Rules and DEC Case No.:
Regulations of the State of New R1-20031030-257
York (6 NYCRR) part 360 by

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

Respondent.

March 3, 2005

Background

With a memorandum to the parties dated February 18, 2005, I returned a document dated June 1990 entitled, *Yard Waste Management: A Planning Guide for New York State* (June 1990 document) to Department staff. Department staff had enclosed the June 1990 document with its closing statement and brief. In the February 18, 2005 memorandum, I explained that I considered the June 1990 document to be evidentiary material, and that it is inappropriate to submit evidentiary material for the hearing record with a party's closing statement.

Department staff responded to my February 18, 2005 memorandum with a letter dated February 24, 2005. According to Department staff, the June 1990 document was enclosed "as a source of authority in support of legal argument, and not as an evidentiary document." Staff argues further that "[p]roviding such an enclosure is no different than providing a copy of a court decision, which has been cited as legal authority in a brief."

Upon receipt of Department staff's February 24, 2005 letter, Respondent's counsel left a telephone message for me on February 24, 2005. In her telephone message, Mrs. Scherb stated that she would be out of her office from March 2, 2005 until March 16, 2005. Mrs. Scherb requested that if I grant Department staff's request to file another brief, that I set the return date for Respondent's reply after March 16, 2005.

In a letter dated March 1, 2005, Department staff requested, among other things, that I extend the briefing schedule outlined in the February 18, 2005 memorandum.

Discussion and Ruling

The first reference to the June 1990 document in Department staff's closing statement and brief is on page 7. Department staff explains that in 1990, Cornell University and the Department collaborated on the development and publication of the June 1990 document to provide municipalities and private operators with "key information" about designing economical and environmentally acceptable composting facilities.

Department staff's brief continues with specific references to Chapter V of the June 1990 document. According to the June 1990 document, microbes convert organic waste into a stable, soil enriching humus. In addition, staff states that "[t]he guide further explains that '[a]ir can be supplied by either passive or active means...fresh air can passively diffuse in from the outside of the pile, accelerated by forces of natural convection caused by high temperatures....'" Department staff's brief also quotes from page 16 of the June 1990 document where it states that, "'[a]s organisms decompose waste, they generate heat. Decomposition is most rapid when the temperature is between 90 degrees F and 140 degrees F.'"

I do not accept Department staff's contention that the June 1990 document is "a source of authority in support of a legal argument." Contrary to the Department staff's contention, the quotations from the June 1990 document offer a scientific explanation as evidence that large piles of organic material, such as those found on the Liere farm, may decompose via an aerobic, thermophilic process. Department staff's closing brief reports this scientific information, for the first time in this proceeding, and proffers it to rebut Mr. Liere's testimony that he relies on an anaerobic process to convert the large piles of organic material at the Liere farm into mulch and top soil (Tr. 704).

I note further that the June 1990 document is not a determination by the Commissioner or a court. Moreover, the June 1990 document is not a duly promulgated regulation. Therefore, I conclude that the June 1990 document is not a legally binding precedent. Rather, I find that the document offers guidance about how to construct and operate large scale composting facilities based on scientific principles accepted by the Department. Before these scientific principles may be considered in the context of this administrative enforcement action, respondent must be given the opportunity to test the reliability of these scientific principles, and if he desires, rebut them.

Before I can consider whether to accept the evidentiary material presented in the June 1990 document into the hearing record, the hearing record must be reopened. In order to reopen the hearing record, however, Department staff must explain how the information in the June 1990 document is new and significant (see 6 NYCRR 622.18[d]). If Department staff provides an explanation, respondent will have an opportunity to reply. Whereupon, I will rule whether to reopen the hearing record after considering the arguments presented by the parties.

I will consider Department staff's explanation about how the information in the June 1990 document is new and significant as a motion to reopen the hearing record, which is authorized pursuant to 6 NYCRR 622.18(d). Staff's explanation must be postmarked by March 14, 2005. Respondent's reply must be postmarked by March 24, 2005.

/s/

Daniel P. O'Connell
Administrative Law Judge

Dated: March 3, 2005
Albany, New York

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