NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of Alleged Violations of Article 27 of the Environmental Conservation Law of the State of New York and Part 360 of Title 6 of the Official Compilation of Codes, Rules, and Regulations of the State of New York, by	Rulings on various requests and motions filed from July 29, 2016 to August 30, 2016
Brian F. Conlon, and BCD Tire Chip Manufacturing, Inc.	DEC Case No.: CO4-20150520-119
Respondents.	September 8, 2016

Proceedings

With a cover letter dated June 29, 2016, Department staff served a notice of pre-hearing conference and notice of hearing dated June 29, 2016, upon Brian F. Conlon and BCD Tire Chip Manufacturing, Inc. (respondents). The June 29, 2016 notice of pre-hearing conference and notice of hearing set August 10, 2016 as the date for a pre-hearing conference at 10:00 a.m. at the Department's offices in Albany, New York.

Subsequently, with a cover letter dated July 15, 2016, Department staff served a complaint dated July 6, 2016, upon respondents. In two causes of action, the July 6, 2016 complaint alleges several separate violations of Article 27 of the Environmental Conservation Law of the State of New York (ECL), and implementing regulatory provisions outlined in Part 360 of Title 6 of the Official Compilation of the Codes, Rules, and Regulations of the State of New York (6 NYCRR). Also at issue is whether respondents complied with the terms and conditions of the beneficial use determination (BUD) No. 783-4-47. The site of the alleged violations is a parcel of real property located in the Town of Glenville, Schenectady County (Tax Map No. 20-4-16.311) (site or farm).

Brian Conlon, on behalf of respondents, filed an answer dated July 20, 2016. The July 20, 2016 answer responded to the July 6, 2016 complaint. In addition, the answer provided a timeline of notable events leading up to the complaint, a set of conclusions, and a set of discovery requests numbered 1 through 19, inclusive.

By letter dated July 27, 2016, Chief Administrative Law Judge James T. McClymonds assigned the matter to me.

Subsequently, I received copies of a series of email messages exchanged between the parties. The dates of the emails range from July 26, 2016 (3:11 PM) through July 27, 2016 (2:52 PM). In addition, by letter dated July 27, 2016, which was served via email, Department staff

requested an extension of time to file motions as provided for by 6 NYCRR 622.4 (Answer), and 622.7 (Discovery). I responded with a letter dated July 28, 2016.

As scheduled, the pre-hearing conference (*see* 6 NYCRR 622.8) convened on August 10, 2016. With the parties' consent, I attended a portion of the pre-hearing conference. My letter dated August 10, 2016, summarizes the discussion that I had with the parties during the pre-hearing conference.

Subsequent to the August 10, 2016 pre-hearing conference, I received numerous emails and attachments from the parties. The dates of the emails sent by Mr. Conlon range from July 29, 2016 (7:09 AM) through August 30, 2016 (1:32 AM). During this period, Department filed two emails. The first is dated August 16, 2016 (3:36 PM). The second is dated August 19, 2016 (10:54 AM). This ruling addresses the various requests and motions presented in these emails.

Requests and Motions

I. Motion Practice

Respondents request that service of motions be made by email. Respondents state that Mr. Conlon does not have the financial resources to pay for a lawyer, stamps, envelopes, paper, and printer ink cartridges. According to respondents, Mr. Conlon's house is in foreclosure. Respondents state that Mr. Conlon cannot deliver motions in person to the Office of Hearing and Mediation Services in the manner that Ms. Andaloro can. **August 01, 2016 (11:18 AM);**[1] **August 19 (12:41 PM); August 21, 2016 (8:47 PM)**

Respondents acknowledge the repetitive nature of the arguments presented in their various motions. Respondents state that the administrative law judge has not timely ruled on any motions. Therefore, respondents argue that they must reiterate their positions in subsequent motions. **August 21, 2016 (8:47 PM)**

With an email from Ms. Andaloro dated August 19, 2016 **(10:54AM)**, Department staff filed a letter of the same date. In the August 19, 2016 correspondence, Department staff referenced 6 NYCRR 622.10 and State Administrative Procedure Act (SAPA) § 304, and requested that the administrative law judge (ALJ) direct respondents to

> cease all purported "motion practice" by electronic mail and cease engaging in the submission of arguments and factual allegations against the Department that are unassociated with a specific motion….

According to Department staff, each email engages in inappropriate and repetitive argument that is unnecessary and unrelated to any pending or authorized motion or pleading. Department staff requests that the ALJ disregard respondents' emails from July 29, 2016 to August 15, 2016 to the extent that the content of these and other emails do not relate to a specific

[1] References to the date and time of the emails are in bold.

motion. According to staff, the email exchange jeopardizes the orderly and efficient conduct of the proceeding.

As noted above, respondents replied to Department staff's August 19, 2016 correspondence, with an email dated August 21, 2016 **(8:47 PM)**.

Discussion and Ruling: The uniform enforcement hearing procedures allow parties to make motions and requests. Motions are part of the hearing record. Prior to the commencement of the hearing, motions must be made in writing, and filed with the ALJ with a copy provided to the other party. (*See* 6 NYCRR 622.6[c].)

Every motion must clearly state its objective and the facts upon which it is based. A motion may present any supporting legal argument. (*See* 6 NYCRR 622.6[c][2].) All parties have five days after a motion is served to serve a response. Thereafter, no further responsive pleadings are allowed without permission of the ALJ. (*See* 6 NYCRR 622.6[c][3].) The ALJ should rule on a motion within five days after a response has been served or the time to serve a response has expired (*see* 6 NYCRR 622.6[c][4]).

The rules concerning motion practice do not expressly exclude the electronic filing of motions and requests. Respondents have offered a credible explanation of the hardship associated with filing all motions in hardcopy with service by the US Postal Service. Therefore, I will allow the parties to this proceeding to serve motions via email. As previously stated in my August 10, 2016 correspondence, however, motions served upon the Commissioner must be in hardcopy with service by regular mail through the US Postal Service.

Due to the more informal nature of electronic communications, a tendency exists for motions to fail to state a clear objective or make a specific request. As discussed further below, respondents have made several different requests in the email exchanged from July 29, 2016 **(7:09 AM)** through August 30, 2016 **(1:32 AM)**, some of which contradict prior requests. Also, as noted below, respondents complain that I have not timely decided various requests. It is quite difficult to make any determinations about requests when the moving party does not state its objectives clearly or make a specific request. In addition, if a party is not specific about the relief sought, or changes the relief, then I cannot decide any motion within the recommended period.

As outlined below, the email exchange from July 29, 2016 **(7:09 AM)** through August 30, 2016 **(1:32 AM)** is a jumble of unfocused requests, many of which are beyond the scope of my authority in this administrative proceeding. Nevertheless, I endeavor to identify the various requests and rule as appropriate.

II. The 2010 Order on Consent

According to respondents, Department staff has threatened enforcement action against Mr. Conlon with respect to his tire processing facility since 2001. Mr. Conlon signed an order on consent in 2010. Mr. Conlon contends that Department staff has altered the 2010 order on

consent; its form and content are not the same as when he executed it in 2010. **August 15, 2016 (11:03 AM)**

In January 2016, staff from the Department's Region 4 Office served a notice of hearing and complaint upon respondents. With the January 2016 complaint, Department staff enclosed a copy of the 2010 order on consent as noted above. Respondents contend that the 2010 order on consent had been altered. **July 29, 2016 (7:09 AM); August 19, 2016 (11:50 AM)**

According to Mr. Conlon, members of Department staff from Region 4 have made false statements about whether a tire fire occurred in 2006, and whether the 4" x 4" tire chips located at the BCD manufacturing site and at the farm are hazardous to the environment and a threat to public health. Also, he claims that Department staff has withheld engineering reports that do not support Department staff's position. **August 1, 2016 (10:18 PM)**

Respondents request that the State Police crime laboratory undertake a review of the allegedly altered 2010 order on consent. Respondents had previously asked Ann Lapinski to undertake an investigation of the 2010 order on consent, and request a status report about that investigation. **August 1, 2016 (11:18 AM); August 22, 2016 (7:07 AM)**

Discussion and Ruling: With respect to the requests associated with the 2010 order on consent, the threshold issue is how the 2010 order on consent is relevant to the charges alleged in the July 6, 2016 complaint. In the various emails referenced above, respondents did not explain how the 2010 order on consent relates, if at all, to the charges alleged in the July 6, 2016 complaint. Absent any showing of relevance to the captioned matter, I deny all requests that respondents have made with respect to the 2010 order on consent.

Moreover, I note the following additional circumstances that serve as further bases to deny all requests related to the 2010 order on consent. Respondents have not identified, nor could I find, any legal authority that would allow me to order the State Police to undertake a review of the allegedly altered 2010 order on consent. Also, respondents did not clearly state the role that Ms. Lapinski's office is playing, or has played, in the review of the allegedly altered document. To that end, respondents did not identify, nor could I find, any legal authority that would allow me to direct Ms. Lapinski's staff to undertake any kind of investigation. The role of the Office of Hearings and Mediation Services (OHMS) is to conduct administrative hearings, not to undertake or direct any investigations.

III. Commissioner's March 26, 2013 Decision and Order

Respondents assert that Mr. Conlon did not receive a "fair trial on appeal." **July 29, 2016 (7:09 AM)**

Ruling and Discussion: This comment fails to state a clear objective and does not state the facts upon which it is based. Given this vague assertion, I deny any motion with respect to the Commissioner's March 26, 2013 decision and order.

I note that subsequent to the issuance of the Commissioner's March 26, 2013 decision and order, respondent BCD Tire Chip Manufacturing filed a petition pursuant to Civil Practice Law and Rules (CPLR) article 78 and commenced an action for declaratory judgment pursuant to CPLR § 3001. Upon review of the Commissioner's March 26, 2013 decision and order, Supreme Court, Fulton County (Giardino, J), issued a decision dated June 26, 2013 finding a rational basis for the Commissioner's determination, and holding that the determination was not arbitrary or capricious (Index No. 2013-01354). The court later issued a judgment dated July 11, 2013 denying respondent's petition and dismissing the proceeding.

IV. Department Staff's actions since March 2013

Respondents argue that Department staff has not complied with the findings outlined in the Commissioner's March 2013 decision and order. **August 1, 2016 (10:18 PM)** Respondents request sanctions against Department staff because members of staff did not comply with the terms of the administrative search warrant during the investigation. **August 14 (8:55 PM)** Respondents assert that Jennifer Andaloro is conducting a personal attack against Mr. Conlon. **August 19, 2015 (12:41)**

Ruling and Discussion: These comments fail to state a clear objective and do not state the facts upon which the objective is based. Given these vague assertions, I deny the motion with respect to respondents' comments about Department staff's actions since March 2013. As I previously noted the role of OHMS is to conduct administrative hearings, rather than to undertake any investigations.

V. Motion for Reconsideration (August 15, 2016)

Based on respondents' presumption that Department staff's engineering reports, developed after the search of the site, will show that the tire chips do not adversely impact public health and the environment, respondents request a full refund of all the civil penalties paid by respondents that are associated with the BCD manufacturing facility and the farm. As an additional basis for the refund, respondents argue that the previously paid civil penalties should be refunded due to Department staff's illegal activities. **August 15, 2016 (11:03 AM)**

Respondents note that Department staff inspected the site in March 2011, and did not identify any violations. Respondents contend that the round pen on the site was a test site and not intended for permanent use. According to respondents, Departments staff has been aware of the test site since 2004. After 10 years of use and another three years at rest, respondents argue that it is not necessary to dig up the tire chips, and destroy the site. In his August 24, 2016 email, Mr. Conlon outlines the other authorized uses for tire chips that do not require permits or any other type of approval from the Department. **August 24, 2016 (1:57 PM)**

Ruling and Discussion: I have no authority to order refunds of previously paid civil penalties. Respondents' request is denied. I note further that respondents sought judicial review of the Commissioner's March 26, 2013 decision and order, and did not prevail.

One of the purposes of the adjudicatory hearing will be to determine what remediation, if any, would be necessary to ameliorate any adverse environmental impacts associated with the 4" x 4" tires chips at the farm. During the hearing, respondents may endeavor to show that the 4" x 4" tires chips at the farm would not result in any environmental harm or adversely impact public health.

Respondents' discovery requests concerning the engineering reports are addressed below.

VI. Freedom of Information Law (FOIL)

According to Respondents, the Department has yet to respond to a pending FOIL request from 2014 concerning the July 2014 site inspection conducted with the helicopter flyover. **July 29, 2016 (7:09 AM)**

With an email dated August 30, 2016 **(1:32 AM)** to OHMS, respondents filed a request for documents pursuant to FOIL. From 1970 to the present, respondents request "the number of times that either a [sic] Administrative Law Judge and or Commissioner has ruled against NYSDEC." Respondents assert that the number of times is zero, but "want verification and total number of cases handled." Respondents request that OHMS respond to the FOIL request before the September 9, 2016 return date for respondents' motion to recuse the Commissioner.

Ruling and Discussion: I can grant no relief with respect to respondents' pending FOIL request concerning the July 2014 site inspection. This administrative proceeding is not the appropriate forum.

On September 7, 2016, OHMS responded to Mr. Conlon's August 30, 2016 FOIL request. The response states that OHMS does not maintain any responsive records, but offered to release lists of decisions from 1984 to the present. Respondents have requested that those records be released.

VII. Site Inspections

According to respondents, Department staff has performed six illegal inspections of Mr. Conlon's farm. The purpose of the inspections was to look for tire chips. **July 29, 2016 (7:09 AM); August 1, 2016 (10:18 PM)**

A. The July 2014 Inspection

Respondents state that one of the illegal inspections included a helicopter flyover in July 2014. **July 29, 2016 (7:09 AM)** Mr. Conlon states that the lives of his children were put at risk during the helicopter flyover. **August 1, 2016 (10:18 PM)**

Discussion: Respondents' pending FOIL request concerning the July 2014 inspection is addressed above in Section VI.

B. Administrative Search Warrant

With an email dated August 12, 2016 **(11:34AM)**, Mr. Conlon provided a copy of his memorandum dated August 12, 2016 to Justice Vincent J. Reilly, Jr., Supreme Court, Schenectady County. Mr. Conlon's August 12, 2016 memorandum discusses the administrative search warrant issued by Justice Reilly. Mr. Conlon asserts that the search authorized by Justice Reilly was not undertaken in a manner consistent with the terms and conditions of the administrative search warrant. Mr. Conlon seeks to have the warrant quashed, and all evidence obtained by the search excluded from the forthcoming hearing record. **August 12, 2016 (11:34 AM); August 19, 2016 (11:50 AM**)

Respondents advise that Mr. Conlon asked Justice Reilly to withdraw the administrative search warrant issued by the court. Respondents contend that the search did not comply with the conditions of the warrant. Therefore, respondents argue that any evidence gathered during the search should be excluded. **August 14, 2016 (8:55 PM)**

With an email dated August 24, 2016, respondents provided a copy of Justice Reilly's response to Mr. Conlon's August 12, 2016 memorandum. In his August 16, 2016 response, Justice Reilly states that he has no authority to entertain challenges to the previously issued administrative search warrant. **August 24, 2016 (1:57 PM)**

Respondents object to the introduction of any evidence at the administrative hearing that was obtained by the site inspection pursuant to the warrant that Justice Reilly issued. Mr. Conlon states that he was not present during the inspection, and claims that he was authorized to be on the site during Department staff's inspection. Respondents argue that Department staff could not meet its burden of proof if all this evidence is excluded. **August 24, 2016 (1:57 PM)**

With an email dated August 16, 2016 **(3:36 PM)**, Department staff provided a copy of Ms. Andaloro's letter of the same date to Justice Reilly. Staff's August 16, 2016 letter responds to Mr. Conlon's August 12, 2016 memorandum to Justice Reilly concerning the administrative search warrant. Department staff opposed Mr. Conlon's request that Justice Reilly withdraw the administrative search warrant.

Discussion and Ruling: Department staff may obtain an administrative search warrant from the court without leave from an ALJ before an administrative enforcement proceeding is commenced. After the court has issued the administrative search warrant, the ALJ subsequently assigned to the case has no authority to quash, or otherwise modify, the warrant issued by the court.

To date, no party has provided me with a copy of the document issued by the court. I do not know when the search took place, or what property was searched. I note further that the administrative hearing has not commenced. Consequently, no evidence about the alleged

violations has been offered, and none has been received into the record of the administrative hearing. Respondents' lack of factual details to support their objections is sufficient for me to deny any motion related to the administrative search warrant.

Respondents have served discovery requests, and have advised that additional discovery requests will be forthcoming. The applicable regulations permit discovery (*see* 6 NYCRR 622.7). As outlined in my August 10, 2016 correspondence, a schedule for filing additional discovery requests will be developed after respondents file further preliminary motions. After discovery is complete and upon receipt of a statement of readiness (*see* 6 NYCRR 622.9), the hearing will be scheduled.

At the hearing, respondents will have the opportunity to examine all the evidence offered by Department staff. The scope of the examination may include an inquiry into when the evidence was obtained, how it was obtained, and by what legal authority. Respondents will have the opportunity to state any objections about the evidence offered by Department staff, and provide the bases for their objections. After a complete record has been developed at the hearing, I will evaluate all the evidence offered and address any objections made about the proffered evidence in my hearing report.

Therefore, the parties will have the opportunity to develop a record about any issues related to the administrative search warrant during the adjudicatory hearing. Accordingly, respondents' motion about the administrative search warrant is denied as premature. At the appropriate time, respondents may renew the motion about the administrative search warrant.

VIII. Hearing Venue

Respondents request a change of the administrative hearing venue to a federal court. Respondents argue that the ALJs from OHMS serve as legal secretaries, and act as prosecutors, to develop a legal decision for the Commissioner. According to respondents, the Commissioner "has never" overturned an ALJ's recommendation. **July 29, 2016 (7:09 AM); August 1, 2016 (10:18 PM)** Reference is also made to Mr. Conlon's FOIL request dated August 30, 2016 **(1:23 AM)**, as discussed above.

Ruling: Respondents did not identify, nor could I find, any legal authority that would allow me to move this State administrative proceeding to any federal venue. Respondents' motion is denied. I previously denied this request in my August 10, 2016 letter.

IX. Motion to Appoint a Special Prosecutor (August 15, 2016)

Respondents move to have a special prosecutor appointed to review the Commissioner's March 26, 2013 decision and order. The scope of the investigation should include all civil and criminal actions from 2010 to the present. According to Mr. Conlon, a complete investigation is necessary before the hearing concerning the July 6, 2016 complaint begins. **August 15, 2016 (11:03 AM)**

Respondents contend that the potential adverse environmental impacts associated with tire chips have changed. As a result, Respondents argue that the past decisions and the actions of Department staff and staff members from the New York State Attorney General's Office, as they relate to the BCD manufacturing facility and the farm, need to be investigated by a special prosecutor. **August 15, 2016 (11:03 AM)**

Respondents maintain that any review of Department staff's actions related to the BCD manufacturing facility and the farm must be undertaken by an outside prosecuting agency. Respondents assert that the activities allegedly were of a criminal nature, and that as a result, the Department cannot undertake a proper investigation. **August 15, 2016 (11:03 AM)**

Respondents request that the motion to assign a special prosecutor be decided before the return date for respondents' motion to recuse the Commissioner. **August 15, 2016 (11:03 AM)**

In the event that the administrative law judge cannot decide respondents' motion to appoint a special prosecutor, respondents request that the administrative law judge forward the motion to the appropriate State office. **August 15, 2016 (11:03 AM)**

Respondents request that the altered 2010 order on consent be turned over to the FBI for "safe keeping and investigation" **August 22, 2016 (7:07 AM)**. Respondents are concerned about the integrity of the document. Finally, respondents argue that the State Police or FBI need to take over the investigation. **August 22, 2016 (7:07 AM)**

Ruling and Discussion: Respondents did not identify, nor could I find, any legal authority that would allow me to appoint a special prosecutor. Respondents' motion is denied.

In addition, respondents do not state a clear objective. First, respondents seek the appointment of a special prosecutor, and then request that the State Police or FBI initiate an investigation. The lack of clarity is an additional basis on which to deny the motion. As noted above, respondents did not identify, nor could I find, any legal authority that would allow me to request the State Police or FBI to undertake an investigation of the circumstances related to this captioned matter.

As noted above, respondents sought judicial review of the Commissioner's March 26, 2013 decision and order, and did not prevail. The opportunity to seek reconsideration of the Commissioner's March 26, 2013 decision and order has passed.

X. Motion Seeking the Commissioner's Review of this Matter (August 19, 2016)

Respondents move to have the Commissioner review the July 6, 2016 complaint and the events associated with the development of the complaint including the allegedly illegal searches of the site. Respondents contend that Department staff did not conduct the search properly. In addition, respondents seek to have Department staff's attorney, Jennifer Andaloro, removed from the case. Respondents assert that Ms. Andaloro has lied about altering the 2010 order on

consent. Respondents argue that this motion must be decided before respondents file their motion to recuse the Commissioner, which is due on September 9, 2016. **August 19, 2016 (11:50 AM)**

Discussion and Ruling: During the August 10, 2016 pre-hearing conference, the parties and I discussed the procedures for filing a motion to recuse the Commissioner from deciding this matter. My August 10, 2016 letter outlined the schedule for filing the recusal motion.

However, with the August 19, 2016 email, respondents now want the Commissioner to review the July 6, 2016 complaint and related circumstances. If respondents maintain that the Commissioner cannot objectively decide the charges alleged in the July 6, 2016 complaint and will seek his recusal, how can respondents now ask the Commissioner to intervene and review the July 6, 2016 complaint and related circumstances? These requests are contradictory, and I deny the motion based on the lack of clarity.

After the hearing, the Commissioner will review the hearing record associated with the July 6, 2016 complaint, and my hearing report. Upon review of the hearing record, the Commissioner will make a final determination, unless respondents prevail on their recusal motion.

Motions related to the 2010 order on consent have been addressed above.

XI. Recusal of Commissioner

Respondents assert that the Commissioner cannot control Department staff and, therefore, cannot make an impartial decision related to this matter. **July 29, 2016 (7:09 AM); August 21, 2016 (8:47 PM)** Respondents also argue that this case cannot be heard in the administrative context. **August 2, 2016 (11:59AM)**

Discussion: Respondents should clarify whether they will move to have the Commissioner recused given the request made via email on August 19, 2016 **(11:50 AM)**, which seeks alternative relief. I direct respondents to advise Department staff and me whether they will need additional time to prepare the motion to recuse the Commissioner, in light of all these other requests. As outlined in my August 10, 2016 correspondence, respondents' motion must be postmarked by September 9, 2016.

XII. Discovery

Respondents request discovery and state that they will seek extensive discovery to prove their case. According to Respondents, Department staff has withheld evidence in order to prevail in prior DEC administrative proceedings. **July 29, 2016 (7:09 AM)**

Respondents assert that the forthcoming hearing will be lengthy. To support their affirmative defenses at hearing, respondents intend to call past Commissioners and the current

Commissioner, as well as judges as witnesses. According to respondents, these potential witnesses have committed civil and criminal violations. **August 1, 2016 (10:18 PM)**

A. Scope of Discovery

Respondents argue that Department staff's actions and inactions are a significant part of their affirmative defenses. Respondents maintain that any attempt to block or deny any discovery requests would violate their civil rights as they relate to obtaining a fair trial. Respondents contend that the captioned matter is a personal attack on Mr. Conlon. **July 29, 2016 (7:09 AM**)

According to respondents, Department staff prepared engineering reports subsequent to the search of the site. Respondents contend that the reports would demonstrate that the tire chips at the BCD manufacturing site and at his farm pose no environmental hazard and would not adversely impact public health. **August 15, 2016 (11:03 AM)**

B. Procedures for Discovery

If a change in venue is not granted, respondents request the following: (1) a restraining order against Captain Bramlage, (2) a State Police escort while in any NYSDEC building, (3) an order excluding any member of Department staff, who carry side arms, from the area where Mr. Conlon will be reviewing discovery materials. **July 29, 2016 (7:09 AM)**

Discussion: With their July 20, 2016 answer, respondents listed 19 discovery demands. Subsequently in an email dated July 27, 2016 (**8:08: 43 AM**), respondents requested additional information. During the August 10, 2016 pre-hearing conference, the parties said that they would be serving additional discovery demands.

As already discussed above, discovery is authorized. Its scope and the authorized devices are outlined in the regulations. (*See* 6 NYCRR 622.7). At the August 10, 2016 pre-hearing conference, the parties agreed to participate in a telephone conference at 10:00 AM on October 20, 2016 to discuss discovery and to develop a schedule for the exchange of any additional discovery requests. In addition, the parties will have the opportunity during the conference call to discuss the scope of the discovery, and the procedures for disclosing documents.

To participate in the telephone conference call at 10:00 AM on October 20, 2016, the toll free number will be **1-518-549-0500**. When prompted, enter the following ID **642 664 064**.

* * * * * * *

Based on the statements made in respondents' emails, it appears that Mr. Conlon recorded the August 10, 2016 pre-hearing conference. Recording the pre-hearing conference is expressly prohibited (*see* 6 NYCRR 622.8[d]), and at no time did Mr. Conlon advise me that he was recording the pre-hearing conference.

Recording conversations without advising the other parties is unlawful and discourteous. Such behavior undermines the veracity of respondents' statements. I will consider the adverse inferences associated with this unacceptable behavior when I review future submissions by the respondents.

Mediation Referral

Prior to excusing myself from the August 10, 2016 pre-hearing conference, Mr. Conlon said that he would be making a settlement offer to Department staff. Discussions of this nature are one of the express purposes of the pre-hearing conference (*see* 6 NYCRR 622.8[b]). To date, the parties have not advised me that that matter has settled. However, OHMS does offer mediation services to assist in this process.

In an effort to resolve this matter without a hearing, the parties will be receiving a letter from Chief Administrative Law Judge McClymonds about participating in a mediation session with ALJ Richard Wissler prior to the commencement of the adjudicatory hearing.

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

Dated: Albany, New York
September 8, 2016