

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

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-

**BRIAN F. CONLON and BCD TIRE CHIP MANUFACTURING, INC.,**

Respondents.

DEC Case No.: CO4-20150520-119

SECOND INTERIM DECISION AND RULINGS OF THE COMMISSIONER  
ON MOTIONS TO RECUSE THE COMMISSIONER AND THE  
ADMINISTRATIVE LAW JUDGE, AND RELATED APPEALS AND MOTIONS

November 1, 2021

SECOND INTERIM DECISION AND RULINGS OF THE COMMISSIONER  
ON MOTIONS TO RECUSE THE COMMISSIONER AND THE  
ADMINISTRATIVE LAW JUDGE, AND RELATED APPEALS AND MOTIONS

Staff of the New York State Department of Environmental Conservation (Department or DEC) commenced this enforcement proceeding with the service of a complaint dated July 6, 2016 (2016 Complaint), against Brian F. Conlon and BCD Tire Chip Manufacturing, Inc. (respondents). Department staff alleged that respondents violated the terms and conditions of a beneficial use determination (BUD) that the Department had issued to them on March 16, 2004 (BUD #783-4-47). The matter was referred to the DEC's Office of Hearings and Mediation Services and assigned to DEC Administrative Law Judge (ALJ) Daniel P. O'Connell.

Respondents subsequently filed motions, among other things, to recuse ALJ Daniel P. O'Connell and me in this proceeding. These motions were denied (*see* [First] Interim Decision and Rulings of the Commissioner on Motions to Recuse the Commissioner and the Administrative Law Judge, and Related Motions, June 1, 2018 [First Interim Decision], at 2-4). Respondents also raised issues regarding the authenticity of an order on consent dated November 1, 2010, that respondent Conlon had executed with the Department (November 2010 consent order). Upon review, I held that the order was not relevant to this proceeding (*see* First Interim Decision at 7). Respondents' request for a transfer of venue was also denied by the First Interim Decision (*see id.* at 5).

By email dated August 4, 2021, to ALJ O'Connell, respondent Conlon again moved, on behalf of BCD Tire Chip Manufacturing, Inc., and himself, to recuse both ALJ O'Connell and me from making any rulings and determinations in this proceeding. Respondents further demanded a forensic investigation into the authenticity of the November 2010 consent order and again requested a change of venue.

The ALJ, upon consideration of the e-mailed motion, denied the motion for his recusal, but deferred that part of the motion relating to the request for the Commissioner's recusal to me (*see* ALJ's Rulings on Respondents' Second Motion to Recuse the ALJ and additional requests dated August 16, 2021 [ALJ August 2021 Rulings], at 2-4). The ALJ also denied respondents' renewed request for a change of venue as well as the request to submit the November 2010 consent order for a forensic review of its authenticity (*see id.* at 4).

The governing regulations at 6 NYCRR part 622 (Uniform Enforcement Hearing Procedures) provide that, during the course of a proceeding, certain rulings may be appealed to the Commissioner on an expedited basis, including:

- "(i) any ruling in which the ALJ has denied a motion for recusal; [and]
- (ii) any other ruling of the ALJ by seeking permission to file an expedited appeal, upon a demonstration that the failure to decide such an appeal on an expedited basis would be unduly prejudicial to one of the parties, or would result in significant inefficiency in the

hearing process. In all such causes, the commissioner's determination to entertain the appeal on an expedited basis is discretionary."

(6 NYCRR 622.10[d][2]). The ALJ provided a schedule for any appeal of his ruling (*see* ALJ August 2021 Rulings at 5), which dates were subsequently extended to October 13, 2021, for any appeal and October 20, 2021, for any reply.

By letter received on October 13, 2021, respondents filed an appeal (Respondents' Appeal), together with various motions. At the outset of the Appeal, respondent lists two appeals and three motions:

- “1. Appeal from Judge O’Connell’s August 16, 2021 Rulings [.]
2. Appeal from Commissioner [Seggos’] June 1, 2016 Rulings [.]
3. Motion to submit [November] 2010 Order on Consent to forensic review and testing.
4. Motion to dismiss DEC Case No. CO4-20150520-119.
5. Motion to recuse Commissioner Seggos from DEC Case No. CO4-20150520-119 and to move to a different venue.”

Appeal at 1. Attached to Respondents’ Appeal are Exhibits (labelled Items) numbered 1 through 12.<sup>1</sup>

Department staff submitted a reply (entitled Memorandum of Law in Opposition to Respondents’ Various Appeals and Motions) dated October 20, 2021 (Staff Reply). Department staff contends that no basis exists for the recusal of ALJ O’Connell (Staff Reply at 2-4) or the Commissioner (*see id.* at 12-13). Staff further contends that the November 2010 consent order is not relevant to this matter (*see id.* at 5-6). Department staff also disputes respondents’ contention that the tire chips on respondent Conlon’s property are not regulated by 6 NYCRR part 360 (*see id.* at 6-12). Department staff further states that respondents have failed to cite any authority that permits a change of venue with respect to this proceeding (*see id.* at 13).

Respondents’ appeal from the ALJ ruling denying the recusal motion is one of right that is required to be addressed here. Even though I am not required to consider respondents’ remaining appeals at this time, because such appeals would require a grant of leave to appeal before they would technically be before me, I have decided to address respondents’ remaining appeals, as well as respondents’ remaining motions, for the purpose of administrative efficiency in this hearing process.

Based upon my review of the submissions of the parties, the ALJ's ruling denying respondents' motion for recusal of the ALJ (*see* ALJ August 2021 Rulings at 4) is affirmed on appeal. Respondents have reiterated the arguments that they previously raised, and I addressed

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<sup>1</sup> Exhibit 6 consists of Items 6, 6A and 6B.

them in the First Interim Decision. Respondents have not advanced any new basis that would warrant the ALJ's recusal in this proceeding. The analysis set forth in the First Interim Decision, as well as the ALJ's analysis in his recent rulings, fully support the determination to deny this motion (*see* First Interim Decision at 3-4; ALJ August 2021 Rulings at 2-4).

Respondents have presented no new basis that would warrant my recusal. For the reasons set forth in my First Interim Decision (*see* First Interim Decision at 3-4), respondents' motion for the recusal of the Commissioner is denied.

In both the First Interim Decision and the ALJ August 2021 Rulings, respondents' request for a change of venue was denied (*see* First Interim Decision at 5; ALJ August 2021 Rulings at 4). Respondents have not presented any argument that would alter the previous determination (*see* CPLR 2221). I hereby affirm the ALJ's denial of respondents' motion in the ALJ August 2021 Rulings for a change of venue.

As for the November 2010 consent order, I previously determined that it is not relevant to this proceeding, and that respondents' accusations of staff wrongdoing are unsupported and rejected (*see* First Interim Decision, at 5-7). Accordingly, the ALJ's ruling rejecting respondents' request for a forensic investigation (*see* ALJ August 2021 Rulings at 4) is affirmed.

It is not clear what respondents are referring to when they reference an appeal from my June 1, 2016 Rulings, as I did not issue any order or rulings on that date. If respondents are referencing my First Interim Order issued on June 1, 2018, no appeal is in order at this stage of the proceeding. However, I will entertain this "appeal" as a motion by respondents for reargument of the First Interim Order (*see* CPLR 2221[d]). Upon my review of the record, it is clear that respondents have advanced no argument that warrants reargument of the First Interim Order and respondents' motion is denied.

With respect to respondents' motion before me to dismiss this proceeding, respondents have filed such dismissal motions previously. The ALJ, in a memorandum and ruling dated December 12, 2016, denied respondents' motion to dismiss the complaint as set forth in a November 9, 2016, letter. Respondent Conlon then filed a motion dated December 19, 2016, for leave to appeal from the ALJ's ruling denying the motion to dismiss. I denied the motion for leave but noted that respondents "will have the opportunity to contest Department staff's allegations contained in the [Complaint] in the administrative hearing" (First Interim Decision at 9).

Respondents have again filed a motion to dismiss all claims in the Complaint which is now pending before the ALJ. To raise a motion to dismiss in the first instance before the Commissioner in the context of an appeal is not the proper course. However, I am addressing the motion here for purposes of administrative efficiency in the hearing process. I have reviewed the Complaint, and the arguments that respondents and Department staff have advanced in the papers that they have filed. It is clear that the Complaint includes all of the elements that the

applicable statutes and regulations require (*see e.g.* 6 NYCRR 622.3[a]), and is drafted in a manner that is sufficient to apprise respondents of the charges alleged. I see no argument or defense that supports dismissing the Complaint before the hearing is held and, accordingly, respondents' motion to dismiss is denied (*see* CPLR 3211).

During the course of this proceeding, respondents have been consistent in their arguments by which they oppose the allegations set forth in the Complaint. The administrative hearing is the proper forum for these arguments. In this proceeding, I do not see where further motion practice seeking dismissal of the Complaint would serve any beneficial purpose. If no settlement between the parties can be reached, this matter should advance to the administrative hearing.

To the extent that respondents have raised any other issues on their appeals or motions, these have been considered and rejected.

For the New York State Department  
of Environmental Conservation

By                    /s/  
Basil Seggos  
Commissioner

Dated: November 1, 2021  
Albany, New York