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 after a Preliminary Hearing held on January 10, 2017
Brian F. Conlon, and BCD Tire Chip Manufacturing, Inc.,	DEC Case No.: CO4-20150520-119
Respondents.	July 5, 2017

Proceedings

By notice dated December 23, 2016, I scheduled a preliminary hearing for 10:00 a.m. on January 10, 2017. As outlined in the December 23, 2016 notice, the purpose of the preliminary hearing was to develop a factual record about the following:

1. Whether and, to what extent, the terms and conditions of the November 1, 2010 order on consent limit site inspections of Brookhaven Farm.[1]

2. The circumstances related to when and how the Department sought and obtained the April 2016 administrative search warrant from Justice Reilly.

3. Whether Mr. Conlon was served with a copy of the April 2016 warrant and, if so, when and in what manner.

4. The circumstances related to the search of Mr. Conlon's farm including, but not limited to, the date and time of the search, any equipment brought to the site that was used by the Department or its contractor as part of the search, the locations on the site that were searched, whether any samples were collected and removed from the site, and whether Mr. Conlon was present during all or any part of the search.

The December 23, 2016 notice directed the parties to bring copies of the following documents to the January 10, 2017 preliminary hearing. Mr. Conlon was directed to bring his copy of the Order on Consent dated November 1, 2010 (File No. R4-2010-0902-90), as well as any copy of the April 2016 administrative search warrant that he received. Department staff was directed to bring a verified copy of the November 2010 consent order, as well as a copy of the April 2016 warrant.

[1] During the January 10, 2017 preliminary hearing, Mr. Conlon advised that the site of the alleged violations is not actually Brookhaven Farm. Rather, a more accurate description of the site is Mr. Conlon's farm located on 3887 Amsterdam Road, Town of Glenville, Schenectady County. (Transcript [Tr.] at 74-76.)

On January 6, 2017, Ann Lapinski, Director of the Department's Office of Internal Audit and Investigation, advised me that she served as the custodian for the original copy of the November 2010 consent order, and provided me with the original document for the preliminary hearing. (Transcript [Tr.] at 9-11.) I returned the original copy of the November 2010 consent order to Ms. Lapinski on January 10, 2017 shortly after the preliminary hearing adjourned.

In addition, I directed Department staff to bring at least one staff member to the preliminary hearing who was present at Mr. Conlon's farm when the site visit occurred. As explained in the December 23, 2016 notice, the parties were advised that I would examine this member of Department staff under oath (*see* Title 6 of the Official Compilation of Codes, Rules and Regulations [6 NYCRR] § 622.10[b][1][vi]) to develop a factual record limited to the circumstances surrounding the search of the farm as described above. During the preliminary hearing, the parties had the opportunity to ask follow-up questions.

With the December 23, 2016 notice, I further advised the parties that I took official notice (*see* 6 NYCRR 622.17[b]; *see also, e.g.* 6 NYCRR 624.9[a][6]) of Office of General Counsel (OGC) No. 7 guidance document entitled, *Staff Access to Property or Premises*, dated June 4, 2009 (*see* www.dec.ny.gov/regulations/58846.html). During the preliminary hearing, I provided the parties with the opportunity to argue whether the inspection of the farm, as authorized by the April 2016 warrant, was conducted in a manner consistent with the guidance outlined in OGC No. 7.

As scheduled, the preliminary hearing convened at the Department's offices located at 625 Broadway, Albany, New York, in conference room 1120. Brian Conlon appeared pro se. Kenson Jeffrey, Esq., Senior Attorney, represented Department staff. During the preliminary hearing, Captain William Bramlage, an Environmental Conservation Officer, and Kathleen Prather, an Environmental Engineer, testified. Captain Bramlage and Ms. Prather are members of Department staff, who participated in the site inspection of the farm on May 2, 2016. At the preliminary hearing, Mr. Conlon did not testify.

On February 14, 2017, the Office of Hearings and Mediation Services (OHMS) received the transcript from the January 10, 2017 preliminary hearing. Attached to this ruling is an exhibit chart listing the documents marked for identification during the preliminary hearing.

Background

Mr. Conlon owns property used as a riding ring located on 3887 Amsterdam Road in the Town of Glenville, Schenectady County. Mr. Conlon and his family keep and ride horses at the farm.

In March 2004, the Department issued Mr. Conlon a Beneficial Use Determination (BUD [No. 783-4-47]) that authorized him to use tire chips as part of the subbase for the construction of a 200 ft. by 200 ft. riding ring at the farm. The BUD limited the amount of tire chips that could be brought to the site, and outlined conditions for the construction of the riding ring. These

conditions included, for example, the depth of the tire chip subbase, its thickness, and the depth of the soil covering the tire chip subbase. The BUD required Mr. Conlon to prepare a report confirming that he used the tire chips in the manner prescribed in the BUD, and to file the report with the Department.

On August 24, 2010, Department staff inspected the farm to determine whether Mr. Conlon constructed the riding ring in the manner prescribed by the BUD. According to staff, more than 30 cubic yards of tire chips were stockpiled on the site and were not contained within a geotextile material. Based on these observations, Department staff concluded that Mr. Conlon had not fully complied with the terms and conditions of the BUD.

With a cover letter dated October 21, 2010, Karen S. Lavery, Esq., Assistant Regional Attorney, from the Department's Region 4 office, enclosed a proposed order on consent (File No. R4-2010-0902-90) for Mr. Conlon's consideration. The proposed order on consent included a schedule of compliance concerning the removal of all excess tire chips from the farm and confirmation that the riding ring was constructed in a manner consistent with BUD No. 783-4-47. In the cover letter, Ms. Lavery stated that if Mr. Conlon wanted to settle the alleged violations observed by staff during August 24, 2010 inspection, Mr. Conlon should sign the draft order on consent before a notary, and return the signed document with a check for the specified civil penalty to the Department's Region 4 office by November 1, 2010.

On November 1, 2010, Mr. Conlon signed the order on consent before a notary, and delivered it with payment of the civil penalty to the Department's Region 4 office. Later that day, then Regional Director, Eugene Kelly, signed the order on consent on behalf of the Commissioner. Subsequently, Department staff provided Mr. Conlon with a copy of the fully executed order on consent, which included Mr. Conlon's signature as well as Director Kelly's. As discussed further below, a copy of the November 1, 2010 order on consent was marked for identification during the preliminary hearing as Exhibit 1.

By the captioned enforcement action, Department staff does not seek to enforce the terms and conditions of the November 1, 2010 order on consent (Tr. at 55). Although the allegations asserted in the July 6, 2016 complaint concern Mr. Conlon's compliance with the implementation of the terms and conditions of the March 2004 BUD at the farm, the July 6, 2016 complaint does not reference any term or condition of the November 1, 2010 order on consent nor does the July 6, 2016 complaint rely on any of staff's observations made during the August 24, 2010 inspection as the basis for the violations alleged in the July 6, 2016 complaint. Rather, Department staff obtained an administrative search warrant from Supreme Court, Schenectady County (Reilly, J), in April 2016, and inspected the farm on May 2, 2016 (Tr. at 96). The information collected during the May 2, 2016 inspection serves as the basis for the allegations asserted in the July 6, 2016 complaint.

Mr. Conlon maintained, however, that the November 1, 2010 consent order is relevant to the captioned enforcement action. Mr. Conlon contended that the terms of the consent order control how Department staff may access the farm. Mr. Conlon contended further that the terms of the April 2016 warrant are inconsistent with the terms of the November 2010 consent order.

According to Mr. Conlon, any information that Department staff obtained during the May 2, 2016 inspection of the farm should be excluded from the evidentiary record when the hearing convenes to consider the violations alleged in the July 6, 2016 complaint.

Discussion

I. The November 1, 2010 Order on Consent

The November 2010 consent order (Exhibit 1) consists of seven unnumbered pages. Throughout the consent order, the paragraphs are generally numbered using a combination of Arabic and Roman numerals. The first page includes a caption that references Environmental Conservation Law of the State of New York (ECL) article 27 and 6 NYCRR part 360. The document is identified as an order on consent and the file number is R4-2010-0902-90. The terms and conditions of the consent order are outlined on pages one through four. The fifth page is the signature page for the Regional Director. The sixth page is the signature page for respondent. The seventh page is a compliance schedule that is referenced throughout the consent order.

After obtaining the original copy of the November 2010 consent order, I prepared three photocopies of the document and stamped each photocopy with the word "COPY" in blue ink. At the preliminary hearing, I advised the parties how I obtained the original copy of the November 2010 consent order, and provided each party with a photocopy of the document. I retained one photocopy, which is marked for identification as Exhibit 1. During the preliminary hearing, the parties had the opportunity to compare the photocopies to the original. (Tr. at 9-12.)

A. Revisions to the November 1, 2010 Order on Consent

Mr. Conlon offered the following narrative about the November 2010 consent order. After observing the original, Mr. Conlon noted that the staples along the top of the document had been pulled out and replaced numerous times. According to Mr. Conlon, these circumstances demonstrate that the document had been altered, and are "evidence of a felony crime" (Tr. at 12-13).

Specifically, with respect to the third page of the consent order, Mr. Conlon offered the following. Mr. Conlon received the consent order by mail with a cover letter dated October 21, 2010 from Ms. Lavery (Tr. at 16, 17). Mr. Conlon telephoned Ms. Lavery to discuss, among other things, the text of Paragraph VI on the third page of the draft consent order (Tr. at 17). As originally drafted (*see* Exhibits 1 and 2), the text of Paragraph VI on the third page of the consent order states in full that:

> VI. Respondent shall allow duly authorized representatives of the DEC access to the site without proper notice, at such times as may be desirable or necessary in order for the DEC to inspect and determine the status of Respondent's compliance with this Order, the ECL and regulations promulgated thereunder.

During his telephone conversation with Ms. Lavery, Mr. Conlon explained his concerns about giving Department staff unlimited access to the site as contemplated by the text of Paragraph VI (Tr. at 18). Mr. Conlon said that his adult daughter operates a horse riding academy for children at the farm. Children walk out of the barn leading the horses to the ring for their riding lessons. Mr. Conlon said that Department staff appeared at the site without advance notice on at least one occasion when his daughter was about to begin a riding session. Mr. Conlon stated further that unexpected visitors could startle the horses, which would create unsafe conditions. Mr. Conlon emphasized the importance of receiving advance notice from the Department whenever staff planned any visits to the farm. (Tr. at 18-19.)

To address this safety concern, Mr. Conlon proposed, during his telephone conversation with Ms. Lavery, to add the word "not" between the words "Respondent shall" and "allow" to the text of Paragraph VI on the third page of the consent order (Tr. at 21). Mr. Conlon said that Ms. Lavery accepted the proposed change, and agreed to notify Mr. Conlon in advance of Department staff's visits to the farm.[2] Before signing the consent order, Mr. Conlon removed the third page, and retyped the entire page changing only the text of Paragraph VI. As a result, the full text of the revised paragraph is:

> VI. Respondent shall *not* allow duly authorized representatives of the DEC access to the site without proper notice, at such times as may be desirable or necessary in order for the DEC to inspect and determine the status of Respondent's compliance with this Order, the ECL and regulations promulgated thereunder (emphasis added).

After he retyped the page, Mr. Conlon printed out the revised page in a font different from the original, inserted the revised page into the consent order, and re-stapled the document together along the top. Mr. Conlon signed and dated the sixth page of the consent order before a notary, and brought the consent order to the Region 4 office where he handed it to Ms. Lavery. Mr. Conlon retained the original third page of the consent order. (*See* Exhibits 2 and 3; Tr. at 23-27, 29-30.)

When Mr. Conlon went to the Region 4 office on November 1, 2010, he did not tell anyone that he had revised the third page of the consent order (Tr. at 36). Mr. Conlon reiterated that he had discussed the revision to the consent order with Ms. Lavery, who agreed that the

[2] Mr. Conlon acknowledged that Ms. Lavery provided advance notice at least once, which he considers the only valid site inspection (Tr. at 21-22). However, the Department did not provide Mr. Conlon with advance notice for subsequent site visits (Tr. at 23-24). According to Mr. Conlon, staff inspected the farm on five occasions between January 2011 and either October or November 2015. Mr. Conlon said that Department staff did not notify him in advance of these site visits. (Tr. at 43.) Because the Department did not notify Mr. Conlon in advance of these five site visits, he argued that these inspections were illegal (Tr. at 51-52).

Department should give notice prior to any site visit. By not telling Ms. Lavery about the revision to the third page, Mr. Conlon said that he was protecting himself. (Tr. at 36, 38.)

After Mr. Conlon brought the consent order with his notarized signature to Ms. Lavery, the Regional Director signed it on behalf of the Commissioner on November 1, 2010 (*see* Exhibit 1). Therefore, Mr. Conlon expected that the Regional Director would have signed the version of the consent order that included his revised third page, which changed Department staff's access to the farm (Tr. at 30-31). Mr. Conlon said that he could not find the fully executed copy of the November 1, 2010 consent order that the Department sent to him after the Regional Director signed it (Tr. at 27-29).

To the January 10, 2017 preliminary hearing, Mr. Conlon brought three copies of the original version of the third page from the consent order that he had retained. This page was marked for identification as Exhibit 2 (Tr. at 32-34). The lower right hand corner of the document includes the following note added by Mr. Conlon: "original removed before replacing with …"[3] (*see* Exhibit 2).

In addition, Mr. Conlon brought to the January 10, 2017 preliminary hearing, his copy of the consent order that included the revised third page. Because Mr. Conlon did not bring additional copies, I advised the parties that his version of the consent order would be marked for identification as Exhibit 3 (Tr. at 34). Subsequently, photocopies of Mr. Conlon's version of the consent order were made after the preliminary hearing, and I provided Mr. Jeffrey with a copy of Exhibit 3 (Tr. at 31, 163).

Mr. Conlon explained further that after staff visited the farm in either October or November 2015, he received a notice of violation from the Department in January 2016 (Tr. at 42-43). With the January 2016 notice of violation, the Department included a copy of the November 1, 2010 consent order. After reviewing these documents, Mr. Conlon observed that the third page of the consent order that he received with the January 2016 notice of violation was not the revised version that he had prepared. Via email, Mr. Conlon contacted Jennifer Andaloro, Esq., Senior Attorney, about the discrepancy, and provided Ms. Andaloro with a copy of the revised third page of the consent order that he had prepared in November 2010 (*i.e.*, Exhibit 3) (Tr. at 47-48.)

Mr. Conlon requested an opportunity to review the version of the November 1, 2010 consent order in the Department's file. When Mr. Conlon examined the document, he observed that the third page was less faded than the other pages of the document,[4] that the third page had fewer staple holes along the top edge than the other pages of the document, and that the font of the third page matched the rest of the document. Finally, Mr. Conlon observed that the text of Paragraph VI on the third page of the consent order did not include the word "not." Mr. Conlon

[3] The remaining portion of the note on Exhibit 2 is not legible.

[4] I concur with Mr. Conlon's observation (Tr. at 49, 53-54) that the third page of the document examined during the January 10, 2017 preliminary hearing was less faded than the other pages of the November 1, 2010 consent order.

asserted that the third page of the consent order that he revised had been substituted subsequent to the time he delivered the consent order with his notarized signature to Ms. Lavery on November 1, 2010. (Tr. at 13-14, 48-51, 53-54.) These circumstances are the bases for Mr. Conlon's demand for a forensic investigation of the November 1, 2010 consent order (Tr. at 51-52).[5]

B. Discussion

Mr. Conlon's attempt to "protect" himself (Tr. at 36, 38) by modifying the language of Paragraph VI on the third page of the November 1, 2010 consent order without expressly disclosing the modification when he delivered the document to Ms. Lavery was imprudent. This imprudence resulted a great deal of confusion. It generated significant antagonism between the parties, and it compromised safety. In addition, both parties have devoted inordinate resources to this matter.

All consequences from this imprudent conduct could have been avoided. As Mr. Conlon credibly explained during the preliminary hearing, he and Ms. Lavery discussed Mr. Conlon's concern about having notice of staff's site visits, and Ms. Lavery acknowledged that Department staff should provide such notice. Consequently, on at least one occasion, Ms. Lavery did notify Mr. Conlon before staff came to inspect the site (Tr. at 21). Therefore, the parties would have very likely developed acceptable language for the consent order to address Mr. Conlon's concern as acknowledged by staff. Rather, Mr. Conlon intentionally chose not to advise Department staff that he had modified the November 1, 2010 consent order (Tr. at 26).

Eventually, however, someone discovered Mr. Conlon's surreptitious modification. Based on the record developed at the January 10, 2017 preliminary hearing, I cannot precisely determine when staff realized that Mr. Conlon had modified the third page of the November 1, 2010 consent order (*see* Exhibit 2). Mr. Conlon was not able to locate the copy of the November 1, 2010 consent order that Department staff sent to him after the Regional Director signed it (Tr. at 27-29), despite my directive to bring it to the January 10, 2017 preliminary hearing.

A review of the document provided to Mr. Conlon with the Regional Director's signature would establish the following. First, it would corroborate Mr. Conlon's statement that he modified the third page of the November 1, 2010 consent order and replaced it in the document presented to the Regional Director for his signature. Second, to the extent that the fully executed November 1, 2010 consent order included Mr. Conlon's modified third page, the change back to the original language would have occurred after November 1, 2010. Staff's discovery of Mr. Conlon's modification may be linked to when staff stopped providing notice to Mr. Conlon prior to site inspections. According to Mr. Conlon, staff stopped providing advance notice after March 2011 (Tr. at 42-43).

[5] Department staff acknowledged that Mr. Conlon made a compelling case with respect to the alteration of the November 1, 2010 consent order, and agreed, "a hundred percent" about the need for an investigation (Tr. at 56).

Nevertheless, the decision by a member, or members, of Department staff to remove the third page from the November 1, 2010 consent order that Mr. Conlon had modified (*see* Exhibit 2), albeit without staff's knowledge in the first instance, and to replace it with one formatted like the original, without advising Mr. Conlon of the substitution, was inexcusable. Such behavior by a member, or members, of Department staff constitutes behavior that undermines the integrity of the agency, and compromises the public trust.[6] The authority to investigate and to identify the responsible person, or persons, however, does not lie with the Office of Hearings and Mediation Services.

C. Ruling on Relevance

According to Department staff, the November 1, 2010 consent order is not relevant to the captioned enforcement matter (Tr. at 35). Mr. Jeffrey argued on behalf of the Department that the scope of the consent order is limited to staff's observations during a site visit on August 24, 2010. Referencing Paragraph 6 on the first page of the consent order, Mr. Jeffrey said that staff observed more than 30 cubic yards of tire chips stockpiled on the site, and that the stockpiled tire chips were not contained within a geotextile material (*see* Exhibits 1 and 3). Mr. Jeffrey argued further that the consent order does not impact any legal rights outside the violation alleged in the consent order. To support this argument, Mr. Jeffrey cited Paragraph X(A) on the fourth page of the November 1, 2010 consent order. (Tr. at 56-57.) Mr. Jeffrey observed there is no dispute between the Department and Mr. Conlon about the content of Paragraphs 6 and X(A), regardless of any other alterations to the consent order (Tr. at 57). Mr. Jeffrey contended that the violation resolved by the November 1, 2010 consent order is different from the violations alleged in the July 6, 2016 complaint. (Tr. at 57-58.)

Mr. Conlon maintained, however, that the November 1, 2010 consent order is relevant to the captioned matter. According to Mr. Conlon, BUD No. 783-4-47 terminated when the terms of the schedule of compliance were completed (*see* Exhibits 1 and 3, Paragraph 5 of the Compliance Schedule). Inasmuch as he could afford, Mr. Conlon contended that he completed all the requirements outlined in the compliance schedule. After Department staff inspected the farm in either March or April 2011, Mr. Conlon said that no one from the Department contacted him further. Therefore, Mr. Conlon concluded that he had satisfactorily complied with the consent order and the incorporated compliance schedule. The next time that Department staff visited the site was in January 2016, according to Mr. Conlon. (Tr. at 39-43.)

In a ruling dated September 8, 2016, I previously considered Mr. Conlon's claim about whether the November 1, 2010 order on consent was relevant to the captioned matter. In the September 8, 2016 ruling (at 3-4), I determined that the November 1, 2010 consent order was not relevant.

[6] Although offering nothing in support, Mr. Conlon contended that the Commissioner may have altered the consent order at the January 10, 2017 preliminary hearing (Tr. at 63).

The forgoing circumstances concerning the changes to the November 1, 2010 consent order, first by respondent, and then by Department staff, are not relevant to the captioned matter. Moreover, the violations alleged in the July 6, 2016 complaint are different from those resolved by the November 1, 2010 consent order. Department staff does not seek to enforce *any* of the terms and conditions outlined in the November 1, 2010 consent order and associated compliance schedule as part of this administrative enforcement matter. Again, I conclude, therefore, that the November 1, 2010 consent order is not relevant to the captioned matter.

II. The April 28, 2016 Administrative Inspection Warrant

To the January 10, 2017 preliminary hearing, the parties brought their respective copies of the administrative inspection warrant that Justice Vincent J. Reilly, Jr., Supreme Court, Schenectady County, issued on April 28, 2016. I marked the copy brought by Mr. Conlon as Exhibit 4. Mr. Conlon said that Ms. Andaloro provided him with a copy of the April 2016 warrant as an attachment to an email (Tr. at 67-68). After the preliminary hearing, I made additional photocopies of Mr. Conlon's copy of the April 2016 warrant, and provided Mr. Jeffrey with a photocopy of the document, as marked for identification, for the Department's file. In addition, I marked the copy brought by Mr. Jeffrey as Exhibit 5. (Tr. at 67-71.)

The April 2016 warrant (*see* Exhibits 4 and 5) consists of five unnumbered pages, plus a back page. Throughout the warrant, the paragraphs are generally numbered with Arabic numerals. The document is identified as an administrative inspection warrant. The terms and conditions of the warrant are outlined throughout. The fifth page is the signature page, which Justice Reilly signed on April 28, 2016. Justice Reilly modified and made annotations to the warrant on the third, fourth, and fifth pages. (Tr. at 78.) The court's modifications and annotations are discussed below.

Ms. Andaloro made the application to the court for the warrant on behalf of Department staff (*see* Exhibits 4 and 5; Tr. at 71-72). With reference to Criminal Procedure Law (CPL) § 690.50, Mr. Jeffrey explained at the January 10, 2017 preliminary hearing that Department staff was not required to serve Mr. Conlon with a copy of the warrant prior to the search, which occurred on May 2, 2016. Because no one was at the farm located on Amsterdam Road in Glenville, during the search, Department staff left a copy of the warrant tacked to a bulletin board in a tack room. (Tr. at 72-74.) Mr. Conlon said that he would not have seen the warrant in the tack room. According to Mr. Conlon, a bobcat had taken up residence in that area of the barn. Therefore, Mr. Conlon avoided that area so as not to disturb the bobcat. (Tr. at 67-68.)

At the January 10, 2017 preliminary hearing, Mr. Conlon observed that the court modified Paragraph (6) on the third page of the April 2016 warrant. The paragraph initially stated in full that:

> (6) Conlon shall not be permitted to access the Property during the execution of the warrant.

The court struck out this paragraph. Justice Reilly's initials (VJR, Jr.) are next to the strikeout. (*See* Exhibits 4 and 5; Tr. at 79-80.)

Mr. Conlon contended that the intent of the court's modification was to require him to be present during staff's inspection because staff used an excavator to collect evidence as part of the site visit. According to Mr. Conlon, staff did not notify him about the inspection. Mr. Conlon explained that he drove by the site after he finished work and observed tire tracks from heavy equipment. Once at home, Mr. Conlon emailed Department staff to complain that his property had been illegally searched again. Mr. Conlon received a response the next day from Ms. Andaloro who said that Department staff had a warrant. With the email response, Ms. Andaloro included a copy of the April 2016 warrant. (Tr. at 82-84, 91-92.)

The court made an annotation on the fourth page of the warrant (*see* Exhibits 4 and 5) after the sentence, which states that the inspection must take place between the hours of 6:00 am and 9:00 pm. The court's annotation states, in full, that "[a]ny area excavated shall be restored to its pre-inspection condition. VJR, Jr."

Mr. Conlon asserted that staff did not comply with this requirement because Department staff damaged his property during the inspection. Mr. Conlon said that he took pictures which show that staff did not fully restore the site after the inspection. (Tr. at 86, 91-92.)

Based on the changes that the court made on the third and fourth pages of the April 2016 warrant, Mr. Conlon argued that he should have been allowed to oversee the inspection and restoration of the site. Given that he was not present during the inspection and because staff failed to restore the site fully, Mr. Conlon argued further that staff did not comply with the terms and conditions of the April 2016 warrant. As a result, Mr. Conlon concluded that the search was invalid, any evidence collected during the search is tainted, and all tainted evidence should be excluded from the evidentiary record whenever the hearing may convene. (Tr. at 91-92.)

Department staff offered no argument about how to interpret the changes that the court made to the third and fourth pages of the April 2016 warrant (Tr. at 92-93).

Finally, from the bottom of the fourth page to the top of the fifth page, the April 2016 warrant (*see* Exhibits 4 and 5) required the Department to make a return to the court showing that the inspection had been completed (Tr. at 107). The court added the following:

> The return shall be made within 72 hours of the completion of the inspection and should include copies of all photos taken and a detailed summary of all findings from the inspection.

A. <u>The May 2, 2016 Site Inspection</u>

During the January 10, 2017 preliminary hearing, Captain Bramlage and Ms. Prather testified as a panel of witnesses. Both members of staff participated in the May 2, 2016

inspection (Tr. at 94-95). Based on the panel's testimony, I have determined that Department staff conducted the May 2, 2016 inspection in the following manner:

1. Captain Bramlage reviewed the April 2016 warrant prior to the May 2, 2016 inspection (Tr. at 101-102).

2. Department staff inspected Mr. Conlon's farm located at 3887 Amsterdam Road in Glenville (Schenectady County) on May 2, 2016. The inspection began between 8:30 AM and 8:45 AM. (Tr. at 96.)

3. The site is approximately 64 acres. The property is not fenced or gated. Department staff searched the entire site in a cursory fashion, and focused attention on an area about 1½ acres adjacent to a horse barn. (Tr. at 97.) The vegetation on the site was wild grown (Tr. at 119).

4. For the inspection, the Department retained a contractor to operate heavy equipment on the site. The equipment included a mid-sized excavator, a dump truck, and a trailer to transport the excavator to and from the site. The contractor provided personnel to operate the excavator and to drive the truck. In addition, the contractor provided a person to supervise the operator of the excavator and the truck driver. (Tr. at 96-97.)

5. Mr. Conlon was not at the site during the May 2, 2016 inspection (Tr. at 97). Before inspecting the site, staff did not notify Mr. Conlon (Tr. at 116). If Mr. Conlon had been present at the farm, staff would have adapted the inspection accordingly (Tr. at 114).

6. Prior to the inspection, staff developed a work plan for digging the test pits based on standard engineering practices (Tr. at 109). During the inspection, the excavator dug six test pits. Staff photographed each test pit during its excavation. (Tr. at 98.)

7. As the test pits were dug, the topsoil and vegetation were scraped away and reserved to the side of the test pit location (*see* Exhibit 6A and B). During the excavation of the test pit, each layer was observed. The process was reversed to fill in the test pits. The reserved topsoil was replaced last. (Tr. at 118-119, 122-124, 143.)

8. Department staff did not collect any samples from the test pits during the site inspection (Tr. at 99).

9. Staff acknowledged that those areas of the site where the test pits were dug were not returned exactly to their pre-inspection condition (*see* Exhibit 8A and D; Tr. at 109, 129).

10. Captain Bramlage is familiar with OGC No. 7: *Staff Access to Property or Premises*, issued June 4, 2009 (Tr. at 100). Ms. Prather is aware of the guidance document, but has not read it (Tr. at 101).

11. As required by the April 2016 warrant, Ms. Andaloro prepared the return, and filed it with the court within 72 hours of the May 2, 2016 inspection (*see* Exhibits 4 and 5 at 4-5; Tr. at 102).

B. Compliance with the April 2016 Warrant

In a memorandum dated August 12, 2016 to Justice Reilly, Mr. Conlon inquired whether the court would withdraw the April 28, 2016 warrant. According to Mr. Conlon, staff did not advise him of the inspection of his farm before it occurred, and staff did not return the site to its pre-inspection condition. As of August 12, 2016, Mr. Conlon also observed that staff had not yet provided him with copies of any reports developed as a result of the inspection, or photographs taken during the inspection.

With a letter dated August 16, 2016, Department staff opposed Mr. Conlon's request. Staff argued that Mr. Conlon's request to have the court withdraw the April 2016 warrant was procedurally improper.

By letter dated August 16, 2016, Justice Reilly stated that the matter was no longer before the court. Justice Reilly noted that the court initially found probable cause to issue the warrant. According to Justice Reilly, the objections made by Mr. Conlon and the relief sought "must be made in the current administrative proceeding." The court reiterated its lack of authority to consider challenges to the previously issued warrant.

It is not clear from Mr. Conlon's objections that he challenges the April 2016 warrant on its face. However, based on Justice Reilly's August 16, 2016 correspondence, the court initially found probable cause to issue the warrant. Therefore, for purposes of discussion here, I conclude that the April 2016 warrant was valid on its face.

The April 2016 warrant (*see* Exhibits 4 and 5) served three functions. It identified ECL 3-0301(2)(g) and case law as authorities for the May 2, 2016 site inspection. It prescribed the limits of the inspection (*see* Exhibits 4 and 5 at 3-4), and assured Mr. Conlon that Department staff was authorized to undertake the inspection. (*See Marshall v Barlow's, Inc.*, 436 US 307, 332 [1978], citing *Camara v Municipal Court*, 387 US 523, 532 [1967].)[7] Mr. Conlon's objections focus on the limits of the inspection as outlined in the April 2016 warrant. These objections relate to whether the April 2016 warrant required staff to give Mr. Conlon notice of the inspection, and whether staff complied with the restoration requirement added by the court. Based on these objections, Mr. Conlon seeks suppression of the evidence collected by Department staff during the May 2, 2016 site inspection.

[7] In addition, the April 2016 warrant also cited the following: *See v Seattle*, 387 US 541 (1967), and *Sokolov v Village of Freeport*, 52 NY2d 341 (1981) (*see* Exhibits 4 and 5).

1. Notice of the May 2, 2016 Inspection

Mr. Conlon claimed that the court's modification to Paragraph (6) of the April 2016 warrant required Department staff to provide him with notice of the inspection so that he could be at the farm during the inspection. As initially presented to the court, Paragraph (6) of the April 2016 warrant would have expressly prevented Mr. Conlon from accessing the farm during the site inspection. Upon review, the court removed this paragraph by striking a line through it. (*See* Exhibits 4 and 5.) During the preliminary hearing, Captain Bramlage said that it did not matter whether Mr. Conlon was at the site during the inspection; staff would adapt either way (Tr. at 114).

I conclude that Mr. Conlon's interpretation of the court's modification to the April 2016 warrant is overly broad, and I do not accept it. Rather, I interpret the modification to mean that Mr. Conlon could not be prevented from accessing the farm during the site inspection had he been present, or had he come to the site while the inspection was in progress. Therefore, I conclude that the terms and conditions of the April 2016 warrant, as modified by the court with respect to Paragraph (6), did not require staff to provide Mr. Conlon with notice of the May 2, 2016 inspection.

The April 2016 warrant authorized Department staff and contractors to enter the farm located on Amsterdam Road in Glenville, to use equipment to verify the location and depth of the waste tire chips, and to verify compliance with the terms and conditions of BUD No. 783-4-47. The terms of the April 28, 2016 warrant required staff to complete the inspection within forty-five days after obtaining the warrant. Staff conducted the site visit on May 2, 2016, which is within the forty-five day limit. In addition, the April 2016 warrant required staff to conduct the site inspection between the hours of 6:00 a.m. and 9:00 p.m. As noted above, staff began the inspection between 8:30 and 8:45 a.m., and completed it that day.

Finally, the April 2016 warrant required Department staff and the contractors to have appropriate credentials, and to bring a copy of the April 2016 warrant to the site. Staff was required to present these credentials and the April 2016 warrant to anyone who may have been at the site during the inspection. The purpose of this information was to demonstrate that Department staff was authorized to undertake the inspection.

Based on the foregoing, I conclude that Department staff complied with the essential requirements outlined in the April 2016 warrant. Contrary to Mr. Conlon's argument, the April 2016 warrant did not require Department staff to provide him with notice of the inspection prior to the site visit on May 2, 2016. No basis exists to grant Mr. Conlon's request to suppress the evidence collected by Department staff during the May 2, 2016 inspection. Accordingly, I deny Mr. Conlon's request.

2. Site Restoration

Mr. Conlon noted that Justice Reilly required the restoration of any excavated areas to their pre-inspection condition (*see* Exhibits 4 and 5). Based on staff's testimony at the January 10, 2017 preliminary hearing and photographs taken by staff during the May 2, 2016 inspection (*see e.g.*, Exhibits 8A and 8D), Mr. Conlon contended that his property was not restored in violation of the terms and conditions of the April 2016 warrant. As a result, Mr. Conlon seeks suppression of the evidence collected by Department staff during the May 2, 2016 site inspection.

In addition to the essential requirements outlined in any search warrant, the courts have identified ministerial requirements. These include providing receipts of evidence removed from the searched location, and preparing an inventory of the evidence collected, commonly referred to as "the return." When ministerial requirements, such as these, have not be met, the courts have determined that such errors do not taint otherwise valid searches. As a result, evidence would not be suppressed. (*See People v Dominique*, 229 AD2d 719, 720 [1996], *People v Morgan*, 162 AD2d 723, 724 [1990], *People v Nelson*, 144 AD2d 714, 716 [1988].)

Mr. Conlon did not assert any issue about these commonly identified ministerial requirements. Rather, Department staff's testimony shows that Department staff did not collect samples during the May 2, 2016 inspection. Consequently, staff did not need to provide any receipts. In addition, the return was prepared and timely provided to the court pursuant to the terms of the April 2016 warrant (Tr. at 102).

With respect to ministerial requirements, the courts have determined that warrants should not be read hypertechnically, and should be accorded all reasonable inferences (*see Town of East Hampton v Omabuild USA No. 1, Inc.*, 215 AD2d 745, 748 [1995], *People v Robinson*, 68 NY2d 541, 552 [1986]). The question with respect to the captioned matter, therefore, becomes whether site restoration should be considered an essential requirement or a ministerial requirement. Unlike the receipts and the return, site restoration is not mentioned in CPL 690.50(4) and (5). The case law, in general, and this agency's administrative decisions, in particular, are silent about the topic.

Despite his objection, Mr. Conlon did not offer any authority to support his contention that site restoration should be considered an essential requirement of the April 2016 warrant. In the absence of any authority, no basis exists to grant Mr. Conlon's request to suppress the evidence collected by Department staff during the May 2, 2016 inspection. Accordingly, I deny the request as it relates to site restoration.

III. OGC No. 7: Staff Access to Property or Premises

On June 4, 2009, the General Counsel issued Policy No. 7 entitled, *Staff Access to Property or Premises* (OGC No. 7). The policy provides guidance to program staff about how

and when to enter property to carry out their official duties. The policy recognizes that staff may need to conduct property inspections to complete the review of permit applications, to determine compliance with either permits or other regulatory requirements, and to undertake enforcement activities, among other things. Also, the policy acknowledges that staff may obtain search warrants.

At the January 10, 2017 preliminary hearing, the parties were provided with the opportunity to comment about whether staff's May 2, 2016 search of Mr. Conlon's farm located on Amsterdam Road in Glenville was conducted in a manner consistent with the guidance outlined in OGC No. 7 (Tr. at 103-104). With reference to § III(3), Mr. Conlon contended that staff did not comply with the guidance outlined in OGC No. 7. Mr. Conlon noted that when, as here, staff obtains a search warrant, the policy recommends that staff follow any restrictions and requirements outlined in the search warrant. As noted above, Mr. Conlon alleged that staff did not return his property to its pre-existing condition after the May 2, 2016 inspection, as required by the April 2016 search warrant. (Tr. at 104-105.)

In addition, Mr. Conlon referred to § V(1)(d) of OGC No. 7. He noted that the guidance recommends that when no one is present, staff should contact the owner or operator of the facility before entering any facility. According to Mr. Conlon, the court's modification to the April 2016 warrant required him to be at the site during the May 2, 2016 inspection. Because staff did not advise him of the inspection, staff did not comply with its terms and conditions, based on Mr. Conlon's interpretation of the April 2016 warrant. Mr. Conlon contended, therefore, that staff did not follow the guidance outlined in OGC No. 7. (Tr. at 110-112.)

To support his contentions, Mr. Conlon offered pictures from the site visit (*see* Exhibits 6, 7, 8, and 9 [Tr. at 134]). Mr. Conlon said that he obtained the pictures in response to his discovery demands. During the January 10, 2017 preliminary hearing, I reminded Mr. Conlon that he wanted all evidence collected during the May 2, 2016 site visit excluded from the hearing record because staff did not comply with the terms and conditions of the 2010 consent order, and the April 2016 warrant. Mr. Conlon acknowledged the contradiction, and said that he wanted to offer the pictures for the limited purpose of showing that staff did not lay down a piece of plastic before removing the vegetation and top soil from the areas where the test pits were dug. (Tr. at 120-123.)

Mr. Conlon argued further that it would have been nearly impossible and very costly to return the site to the pre-inspection condition. Exhibit 8 is a set of photographs taken after a test pit was filled in. The photographs show that a portion of the geotextile fabric, which initially covered the tire chips when originally constructed, is on the surface and mixed with top soil. (Tr. at 125-127.)

Staff noted that § V(1)(d) of OGC No. 7 permits staff to conduct a site visit without advising the owner or operator when, as here, staff obtained a search warrant that did not require staff to notify the owner or operator before undertaking the inspection (Tr. at 117). The Department argued that staff complied with the guidance outlined in OGC No. 7 during the May 2, 2016 site inspection (Tr. at 148-149).

Discussion and Ruling

As determined above, the April 2016 warrant did not require staff to provide Mr. Conlon with notice of the May 2, 2016 inspection. Mr. Conlon's reference to OGC No. 7 § V(1)(d) is not complete. The recommendation concerning routine inspections under the terms of a permit, order, such as a warrant, or consent form states, in full, that:

> At the facility entry point staff should present their identification and describe their purpose for entering. If no one is present, in the absence of an emergency staff should contact the facility owner or operator before entering, unless a permit, *court order or warrant*, or prior written consent authorizes the inspection without the necessity of having facility staff present (emphasis added).

On May 2, 2016, staff entered Mr. Conlon's farm pursuant to the authority provided by the April 2016 warrant. Because the April 2016 warrant did not require Department staff to provide Mr. Conlon with notice about the May 2, 2016 inspection, staff complied with the terms and conditions of the April 2016 warrant. Therefore, staff followed the recommendation in OGC No. 7 § V(1)(d).

Where, as here, staff has obtained a warrant, OGC No. 7 § III(3) notes that search warrants are limited in time, duration and scope. Mr. Conlon noted that this section states further that, "DEC staff must adhere to all restrictions and requirements set forth in the warrant." Based on Exhibits 8A and 8D, Mr. Conlon contended that staff did not restore the excavated areas on his farm as required by the April 2016 warrant, and as recommended by OGC No. 7 § III(3).

As noted above, Department staff complied with the essential requirements of the April 2016 warrant. The guidance in OGC No. 7 § III(3) neither adds any additional legal obligations, nor provides a separate basis to suppress the evidence obtained by staff during the May 2, 2017 site inspection.

IV. Discovery

The October 21, 2016 scheduling order for discovery required Department staff to serve discovery demands upon Mr. Conlon by November 10, 2016. In addition, the scheduling order directed the party propounding discovery demands to file a copy of the demands with me. With a memorandum dated November 29, 2016, certain due dates outlined in the October 21, 2016 scheduling order, not relevant here, were amended.

During an exchange of emails on December 28, 2016, Department staff inquired about the status of Mr. Conlon's responses to discovery demands purportedly served upon him on November 10, 2016. In an email to the parties dated December 29, 2016, I noted that I had not received any copies of discovery demands concerning this matter in either hard copy or electronic form from Department staff.

1. Staff's Request for Leave to Serve Discovery Demands

At the January 10, 2017 preliminary hearing, staff requested leave to serve discovery demands upon Mr. Conlon. I directed staff to file its request in writing, and advised Mr. Conlon that he would have an opportunity to respond to staff's request for leave. (Tr. at 151-153.)

With an email from Mr. Jeffrey dated January 12, 2017, Department staff included a request for leave and a copy of the discovery demands. The attached discovery demands were prepared by Ms. Andaloro and were dated November 10, 2016, which was consistent with the deadlines established in the October 21, 2016 scheduling order. According to Mr. Jeffrey's request for leave, Department staff had initially served the demands by first class mail on November 10, 2016.

By email dated January 12, 2017, Mr. Conlon objected to service of any additional discovery demands. According to Mr. Conlon, the information sought by Department staff would be used to bring additional claims not previously alleged. Mr. Conlon noted that Department staff had visited the farm on numerous occasions without notice and, therefore, without his consent. Mr. Conlon argued that staff falsely accused him of denying receipt of the November 10, 2016 discovery demands, and should not be rewarded by being granted leave. Rather, Mr. Conlon argued further that staff should be sanctioned.

I deny without prejudice staff's January 12, 2017 request for leave to serve any additional discovery demands upon Mr. Conlon. The basis for the denial is the outstanding number of requests for leave to file expedited appeals, and the appeals now pending before the Commissioner, which are outlined below. After the Commissioner provides direction about how to proceed, I will confer with the parties about completing discovery before the hearing convenes, consistent with the Commissioner's directives.

2. Reconsideration of Staff's Motion for Protective Order

Consistent with the deadlines established in the October 21, 2016 scheduling order, Department staff timely filed a motion for protective order dated November 23, 2016. By the motion, staff sought relief from the discovery demands made with Mr. Conlon's July 20, 2016 answer and outlined in an email dated July 27, 2016. With a ruling dated December 19, 2016, I granted, in part, and denied, in part, staff's November 23, 2016 motion.

At the January 10, 2017 preliminary hearing, Mr. Conlon requested that I reconsider the December 19, 2016 ruling related to staff's motion for a protective order (Tr. at 157-160). I deny the request to reconsider the December 19, 2016 ruling.

Pending Requests for Leave to Appeal and Appeals

The following is a list of rulings issued to date. For each ruling, Mr. Conlon has filed either a request for leave to appeal or, with respect to the October 19, 2016 ruling concerning the motion to recuse the ALJs, an appeal as of right. Each request for leave, and the appeal are pending before the Commissioner. Also pending before the Commissioner is Mr. Conlon's September 9, 2016 motion for the Commissioner's recusal.

1. September 8, 2016 Rulings

In a series of emails filed from July 29, 2016 to August 30, 2016, Mr. Conlon made various requests and motions related to the captioned matter. In a ruling dated September 8, 2016, I considered these requests and motions. In a filing dated November 9, 2016, Mr. Conlon requested leave to appeal from these rulings, which is pending before the Commissioner.

2. Recusal Motions

In a letter dated September 9, 2016, Mr. Conlon moved to: (1) recuse the Commissioner as the final decision maker in this matter; (2) recuse all New York State administrative law judges (ALJs) from presiding over the captioned matter; and (3) change the venue of the captioned State administrative matter to a federal venue.

The arguments outlined in Mr. Conlon's September 9, 2016 motions reference Items 1 through 20A. However, Mr. Conlon did not include these items with his September 9, 2016 motions. Subsequently, Mr. Conlon supplemented his September 9, 2016 motions with a letter dated September 25, 2016, and enclosed Items 1 through 36, inclusive. Items 1 through 20A relate to the arguments outlined in the papers dated September 9, 2016. The remaining items (Items 21 through 36) relate to the arguments outlined in Mr. Conlon's September 25, 2016 supplement.

With a cover letter dated September 30, 2016, Department staff filed a memorandum of law of the same date in opposition to the motions for recusal and change of venue. Then, Department staff filed a notice of motion for clarification or to strike affirmative defenses with a cover letter dated October 3, 2016. By email dated October 5, 2016, I suspended Mr. Conlon's time to respond to staff's October 3, 2016 motion because Mr. Conlon's recusal motion was pending.

On October 19, 2016, I ruled on Mr. Conlon's motion to recuse all ALJs and to change the hearing venue. In addition, I denied staff's motion to clarify or strike affirmative defenses, without prejudice, pending the completion of discovery.

With respect to the recusal motion, the October 19, 2016 ruling set November 10, 2016 as the return date for appeals and November 23, 2016 for replies. Pursuant to 6 NYCRR 622.10(d)(2), the moving party may appeal a ruling that denies a motion to recuse the ALJ on an expedited basis. The ruling noted, however, that staff must obtain leave to appeal from my ruling on the motion to clarify affirmative defenses.

Mr. Conlon timely filed his appeal dated November 9, 2016. With a cover letter dated November 23, 2016, staff timely replied with a memorandum of law. The appeal from the ruling denying Mr. Conlon's motion to recuse the ALJs is pending before the Commissioner.

In addition, the Commissioner has not ruled on Mr. Conlon's September 9, 2016 motion seeking the Commissioner's recusal.

3. Motion to Dismiss

With his November 9, 2016 appeal, Mr. Conlon moved to dismiss the charges alleged in the July 6, 2016 complaint. By this motion, Mr. Conlon also asked me to reverse the Commissioner's Decision and Order dated March 26, 2013 concerning a related matter. I previously addressed Mr. Conlon's motion concerning the Commissioner's Decision and Order dated March 26, 2013 in the September 8, 2016 ruling (at 4-5, 6-8).

Staff's November 23, 2016 memorandum of law replied to both Mr. Conlon's appeal from the October 19, 2016 ruling, and Mr. Conlon's motion to dismiss.

In a memorandum and ruling dated December 12, 2016, I denied Mr. Conlon's motion to dismiss the charges alleged in the July 6, 2016 complaint. The December 12, 2016 memorandum and ruling advised the parties that they must obtain permission from the Commissioner before filing any appeals from this ruling. Mr. Conlon timely filed a request for leave to appeal dated December 19, 2016, which is pending before the Commissioner.

4. Motion for Protective Order

Department staff filed a notice of motion for a protective order dated November 23, 2016 with a cross motion for protective order and opposition to respondents' motion to dismiss.[8] With an email dated December 15, 2016, Mr. Conlon responded to staff's motion for protective order.

I issued a ruling dated December 19, 2016, which granted staff's motion for a protective order, in part, and denied the motion, in part. As noted above, Mr. Conlon asked me to reconsider the December 19, 2016 ruling during the January 10, 2017 preliminary hearing (Tr. at 157-160), which I deny, as stated above.

[8] I ruled on Mr. Conlon's motion to dismiss in a memorandum and ruling dated December 12, 2016.

Further Proceedings

Given the circumstances and events associated with the November 1, 2010 order on consent, as well as the numerous motions and pending requests for leave to appeal from the rulings related to them, as outlined above, all further proceedings related to the captioned matter are suspended pending written guidance from the Commissioner, or his designee, about how to proceed.

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

Dated Albany, New York
July 5, 2017

Attachment: Exhibit Chart

Exhibit Chart
Matter of Brian F. Conlon and BCD Tire Chip Manufacturing, Inc.

Preliminary Hearing Date: January 10, 2017

Exhibit No.	Description
1	Copy of Order on Consent Dated November 1, 2010 File No. R4-2010-0902-90
2	Copy of third page of the November 1, 2010 Order on Consent (File No. R4-2010-0902-90) Retained by Mr. Conlon as part of his review of the draft.
3	Cover letter dated October 21, 2010 from Karen S. Lavery, Esq., Assistant Regional Attorney to Brian F. Conlon with draft Order on Consent.
4	Mr. Conlon's copy of the Administrative Inspection Warrant issued by Justice Vincent J. Reilly, Jr., on April 28, 2016.
5	Department's copy of the Administrative Inspection Warrant issued by Justice Vincent J. Reilly, Jr., on April 28, 2016.
6	Photographs of the May 2, 2016 inspection (A-H, inclusive).
7	Photographs of the May 2, 2016 inspection (A-H, inclusive).
8	Photographs of the May 2, 2016 inspection (A-H, inclusive).
9	Photographs of the May 2, 2016 inspection (A-H, inclusive).