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	Ruling on Department Staff's Motion for a Protective Order
Brian F. Conlon, and BCD Tire Chip Manufacturing, Inc.	DEC Case No.: CO4-20150520-119
Respondents.	December 19, 2016

Proceedings

With a cover letter dated July 15, 2016, staff from the New York State Department of Environmental Conservation (Department staff) commenced the captioned enforcement proceeding with service of a complaint dated July 6, 2016 upon Brian F. Conlon, individually, and as president of BCD Tire Chip Manufacturing, Inc. (respondents). Mr. Conlon filed an answer dated July 20, 2016, which included 19 numbered discovery requests. Subsequently, in an email dated July 27, 2016, Mr. Conlon identified four other items and requested additional information.

In a ruling dated September 8, 2016 (at 11), I scheduled a telephone conference call with the parties to discuss discovery and related topics. As scheduled, the telephone conference call convened on October 20, 2016 at 10:00 a.m. With a letter dated October 24, 2016, I issued a scheduling order for discovery dated October 21, 2016. Among other things, the October 21, 2016 scheduling order identified the due dates for filing discovery demands, as well as any motions and responses related to the discovery demands.

Department staff timely 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 of the same date.[1] For the reasons outlined in a memorandum dated November 29, 2016, I extended the time for respondents to respond to staff's November 23, 2016 motion from December 9, 2016 to December 15, 2016. With an email dated December 14, 2016, Mr. Conlon attached his response of the same date to staff's November 23, 2016 motion for protective order.

[1] With his November 23, 2016 appeal, Mr. Conlon filed a motion to dismiss the charges alleged in the July 6, 2016 complaint. I issued a memorandum and ruling dated December 12, 2016, concerning the motion to dismiss. Therefore, the scope of this ruling is limited to staff's November 23, 2016 cross motion for a protective order.

This ruling considers the following papers:

1. Respondents' July 20, 2016 answer, in general and, in particular, pages 12 - 14;[2]

2. Mr. Conlon's email dated July 27, 2016;

3. Department staff's notice of cross motion dated November 23, 2016, and cross motion for protective order of the same date; and

4. Mr. Conlon's December 14, 2016 response.[3]

Discussion

The rules applicable to the captioned enforcement proceeding authorize discovery. Its scope and the authorized devices are outlined in the regulations at Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) § 622.7. The scope of discovery in the Department's enforcement proceedings must be as broad as that provided under article 31 of the Civil Practice Law and Rules (CPLR) (*see* 6 NYCRR 622.7[a]).

Section 3101(a) of the CPLR mandates full disclosure by a party to an action of "all matter material and necessary in the prosecution of the action . . . regardless of the burden of proof." The New York State Court of Appeals has stated that the phrase "material and necessary" must be

> interpreted liberally to require disclosure upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason. (*Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403, 406 [1968].)

Therefore, the rule requires broad disclosure of all relevant evidence, as well as information reasonably calculated to lead to relevant evidence.

Motions for protective orders in general conformance with CPLR 3103 are authorized. A motion for protective order will be granted to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice (*see* 6 NYCRR 622.7[c][1]).

Finally, a response to staff's motion is authorized pursuant to 6 NYCRR 622.6(c)(3). As identified above, Mr. Conlon timely filed a response dated December 14, 2016.

[2] The pages of the July 20, 2016 answer are not numbered. To provide references in this ruling, I have numbered the pages of the July 20, 2016 answer sequentially from 1 to 15.

[3] The pages of the November 14, 2016 response are not numbered. To provide references in this ruling, I have numbered the pages of the November 14, 2016 response sequentially from 1 to 6.

Rulings

Beginning on page 12 of the July 20, 2016 answer, each discovery request is considered below. The individual requests from the July 20, 2016 answer (at 12-14), Department staff's arguments from the November 23, 2016 cross motion (at 3-8), and Mr. Conlon's arguments from the December 15, 2016 response (1-4) are incorporated by reference, and not repeated here.

Item 1	Staff's cross motion for a protective order is granted. I addressed the requested document in the September 8, 2016 ruling (at 3-4). The December 14, 2016 response offers nothing new about this document. The request does not seek relevant evidence and would not lead to any relevant evidence.
Item 2	Staff's cross motion for a protective order is granted. The request does not seek any relevant evidence, and would not lead to any relevant evidence.
Items 3 and 4	Staff's cross motion for a protective order is granted, in part. As written, this request is overly broad. If Department staff has not already done so, staff shall provide Mr. Conlon with a copy of the document described in ¶ 16 of the cross motion for protective order (at 4).
Items 5 and 6	Staff's cross motion for a protective order is granted. The request does not seek any relevant evidence, and would not lead to any relevant evidence.
Item 7	Staff's cross motion for a protective order is granted. As written, this request is overly broad. Furthermore, the request does not seek any relevant evidence, and would not lead to any relevant evidence.
Item 8	Staff's cross motion for a protective order is granted. This request was also the subject of FOIL request made to the Office of Hearing and Mediation Services (OHMS). The Chief ALJ provided a response by email dated September 7, 2016, which is incorporated into this ruling by reference. No responsive documents exist.
Item 9	Staff's cross motion for a protective order is granted. As written, this request is overly broad and vague.
Item 13	Staff's cross motion for a protective order is granted. The request does not seek any relevant evidence, and would not lead to any relevant evidence. The response (at 3-4) relates to issues addressed the Commissioner's March 26, 2013 Decision and Order and, therefore, is beyond the scope of this proceeding. (*See also* September 8, 2016 ruling at 4-5.)

Items 14-18	With respect to Item 14, staff's cross motion for a protective order is granted, in part, and denied, in part. As written, this request is overly broad. With respect to Item 14, Department staff shall provide Mr. Conlon with copies of any Beneficial Use Determination issued by the Department since January 1, 2004, concerning the use of tire chips as a subbase for a horse riding area. Department staff is not required to provide a copy of BUD #783-4-47 dated March 16, 2004, which has already been provided to Mr. Conlon and the ALJ. With respect to Items 15-18, Staff's cross motion for a protective order is granted. As written, these requests are overly broad. In addition, the requests do not seek any relevant evidence and would not lead to any relevant evidence.

Department staff did not seek a protective order with respect to Items 10, 11, 12, and 19, as identified in the July 20, 2016 answer. In his December 14, 2016 response, Mr. Conlon acknowledged receipt of responsive documents related to Items 10, 11, and 12 from Department staff. Staff's response to Item 19 is not known.

With respect to the additional discovery requests outlined in Mr. Conlon's July 27, 2016 email, each discovery request is considered below. The individual requests from the July 27, 2016 email, staff's arguments from the November 23, 2016 motion (at 8-9), and Mr. Conlon's arguments from the December 15, 2016 response (at 4) are incorporated by reference, and not repeated here.

Item 1	Staff's cross motion for a protective order is granted. As written, this request is overly broad. In addition, the request does not seek any relevant evidence, and would not lead to any relevant evidence. Finally, this request appears to be redundant of the information requested in Item 14 from the July 20, 2016 answer (at 13).
Item 2	Staff's cross motion for a protective order is granted. As written, this request is overly broad. In addition, the request does not seek any relevant evidence, and would not lead to any relevant evidence.
Item 3	Staff's cross motion for a protective order is granted. As written, this request is overly broad. In addition, the request does not seek any relevant evidence, and would not lead to any relevant evidence.

Item 4	Staff's cross motion for a protective order is granted. The request does not seek any relevant evidence, and would not lead to any relevant evidence. Challenging the terms and conditions of BUD #783-4-47 dated March 16, 2004 is beyond the scope of this enforcement proceeding.

I call Department staff's attention to the rulings concerning Items 3 and 4, as well as Item 14 from the July 20, 2016 answer, which require the disclosure of additional documents.

Appeals

Pursuant to 6 NYCRR 622.10(d)(2), the parties must obtain permission from the Commissioner **before** filing any appeal from these rulings, as set forth above, concerning Department staff's cross motion for a protective order. To obtain permission to file an appeal, the parties should send a letter to Commissioner Basil Seggos, Attn: Louis A. Alexander, Assistant Commissioner for Hearings and Mediation Services, 625 Broadway, 14th Floor, Albany, New York 12233-1010. In the letter, the parties will need to explain why not filing an appeal at this point in the proceeding would be unduly prejudicial, or would result in significant inefficiency in the hearing process (*see* 6 NYCRR 622.10[d][2][ii]).

Because this is a communication with the Commissioner, the letter must be in writing, and it must be received by January 4, 2017. If a party files a letter seeking permission to file an appeal, the other party may respond, and any response must be received by January 11, 2017. Subsequently, the Commissioner will advise the parties whether he will grant permission to consider an appeal. If granted, the Commissioner will provide a schedule for filing the appeal and response.

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

Dated: Albany, New York
December 19, 2016