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 Respondents' Motion to Dismiss, Staff's Cross-Motion to Dismiss Affirmative Defenses, Staff's Motion to Exclude, and Respondents' Motion to Adjourn.
Brian F. Conlon, and BCD Tire Chip Manufacturing, Inc., Respondents.	DEC Case No.: CO4-20150520-119 November 8, 2021

Proceedings

With an email dated August 26, 2021, Mr. Conlon moved to dismiss all claims alleged in the July 6, 2016, complaint with prejudice. With an email from Mr. Jeffrey dated September 21, 2021, Department staff filed a memorandum of law opposing the motion to dismiss.

In an email dated September 29, 2021, Department staff inquired whether Mr. Conlon would be responding to staff's discovery demands. Staff noted that the revised scheduling order dated August 27, 2021, set September 20, 2021, as the due date for Mr. Conlon's responses to the discovery demands. Mr. Conlon responded to staff's inquiry with an email also dated September 29, 2021. Mr. Conlon advised that he had already responded, and would not be providing any other information. With his September 29, 2021 email, Mr. Conlon also responded to staff's September 21, 2021, memorandum of law opposing the motion to dismiss.

Subsequently, Department staff moved, with papers dated October 1, 2021, to exclude the materials or information requested by the discovery demands from the evidentiary record of the upcoming hearing because Mr. Conlon did not produce any responsive documents. With emails dated October 1 and 21, 2021, Mr. Conlon replied to staff's motion to exclude.

With an email dated October 30, 2021, Mr. Conlon moved to adjourn the hearing. Mr. Conlon offered additional arguments in an email dated October 31, 2021. Attached to an email from Mr. Jeffrey dated November 4, 2021, Department staff responded with a memorandum of law dated November 1, 2021. Mr. Conlon replied with an email dated November 4, 2021.

With a cover letter dated November 2, 2021, the Office of Hearings and Mediation Services issued the Second Interim Decision and Rulings of the Commissioner on Motions to Recuse the Commissioner and the Administrative Law Judge, and Related Appeals and Motions, dated November 1, 2021 (November 1, 2021, Second Interim Decision).

I. Respondents' Motion to Dismiss and Staff's Cross-Motion to Dismiss Affirmative Defenses

By email dated August 26, 2021, Mr. Conlon moved to dismiss all claims alleged in the July 6, 2016, complaint with prejudice. Mr. Conlon asserted that he complied with the terms and conditions of the schedule of compliance attached to the 2010 Order on Consent. He notes that pursuant to Item 5 of the compliance schedule, the Beneficial Use Determination (BUD) #783-4-47 (2004) "terminates" when he complied with the requirements outlined in the schedule. Mr. Conlon asserted further that neither the terms and conditions of the BUD, nor the compliance schedule from the consent order provided directives about how to close the riding arena at his farm. Referring to "NYS Environmental Conservation Law NY-15," Mr. Conlon also contended that the disposal of solid waste on his farm is exempt from permitting requirements.[1] Mr. Conlon contended further that the BUD states that the tire chips are not solid waste. Mr. Conlon concluded that no violations have occurred because he complied with the consent order, the compliance schedule, and the BUD. In addition, the arena at the farm is closed.

Department staff opposed Mr. Conlon's motion to dismiss for the reasons outlined in the September 20, 2021 memorandum of law. Staff characterized Mr. Conlon's motion to be in the nature of affirmative defenses not previously asserted. According to staff, Mr. Conlon's arguments do not meet the criteria at 6 NYCRR 622.4(d), which preclude him from asserting any affirmative defenses, unless certain conditions are met. Staff argued that Mr. Conlon did not claim in his July 20, 2016 answer that the 2010 Order on Consent terminated the BUD. Accordingly, staff concluded that such a claim is barred now. (*See* Staff's September 20, 2021 memorandum at 4).

Staff argued further that Mr. Conlon did not show that his newly raised affirmative defenses are likely to be meritorious. Staff noted that Item 5 of the compliance schedule of the 2010 Order on Consent states that "[u]pon completion of the Schedule of Compliance, Respondents' BUD (#783-4-47), shall terminate." Staff explained that the schedule of compliance appended to the 2010 Order on Consent required Mr. Conlon to complete four additional tasks in order to terminate the BUD. To show that the newly proposed affirmative defenses have merit, staff contended that Mr. Conlon must demonstrate that he completed the other four tasks. However, Mr. Conlon failed to offer any proof that he completed these tasks, according to staff. As a result, staff concluded that Mr. Conlon failed to show that his newly pleaded affirmative defenses would have merit. Finally, staff noted that the Commissioner observed that the 2010 Order on Consent is not at issue in this proceeding, and determined that the 2010 Order on Consent is not relevant to this proceeding (*see* Interim Decision and Rulings of the Commissioner, dated June 1, 2018 [June 1, 2018, Interim Decision], at 7), which would include Item 5 of the schedule of compliance. (*See* Staff's September 20, 2021 memorandum at 5-7).

[1] Mr. Conlon's first reference to NY-15 is in an email dated October 24, 2016. Attached to an email dated July 20, 2021, Mr. Conlon subsequently provided two pages numbered NY-15 and NY-16. The title of Section IV on page NY-15 is *Solid Waste and Hazardous Waste*. Exempt facilities are listed on page NY-16, and include: "[d]isposal areas located within the property boundaries of a single family residence or farm for solid waste generated from that residence or farm…." The actual regulatory reference is 6 NYCRR 360-1.7(b)(1-4), effective March 10, 2003 (*see also* 6 NYCRR 363-2.1(b), effective September 5, 2017).

As an additional basis to deny Mr. Conlon's motion to dismiss, Department staff asserted that Mr. Conlon did not demonstrate how the regulatory exemptions at 6 NYCRR 360-1.7(b)(1-4) apply to the site. Staff maintained that the tire chips at the site are solid waste and, thereby, regulated pursuant to 6 NYCRR part 360. (*See* Staff's September 20, 2021 memorandum at 7-10.)

In his September 29, 2021 email, Mr. Conlon stated that operations at the riding ring have been abandoned. He restated his claim that neither the BUD, nor the 2010 Order on Consent provides any conditions for terminating the BUD. According to Mr. Conlon, the tire chips brought to the site as part of the BUD to construct the riding ring were not considered solid waste, and were not piled on the site. Rather, the tire chips were immediately put in place as part of the riding ring. Given the immediate placement of the tire chips into the riding ring, Mr. Conlon concluded that the terms and conditions of the BUD did not need to account for the possibility of having excess tire chips piled on the site.

Discussion and Rulings: My December 12, 2016 memorandum and ruling (at 3) addressed a previous motion by Mr. Conlon to dismiss the charges alleged in the July 6, 2016, complaint. At that time, I noted that a fair reading of the complaint contains all of the elements required by State Administrative Procedure Act § 301(2) and 6 NYCRR 622.3(a). For example, the allegations are sufficiently specific to apprise respondents of the charges alleged against them. I noted further that the complaint states the relevant regulatory provisions alleged to have been violated, and describes the allegations with sufficient particularity to allow respondents to prepare defenses. To support this ruling, I referenced *Matter of Grout*, Ruling of the Chief Administrative Law Judge on Motions, dated December 12, 2014, at 6-7.

In the June 1, 2018, Interim Decision (at 9), the Commissioner denied leave to appeal from the December 12, 2016, memorandum and ruling. The Commissioner noted further, however, that Mr. Conlon would have the opportunity to contest the violations alleged in the July 6, 2016, complaint at the administrative hearing (*see* June 1, 2018, Interim Decision at 9). In addition, for purposes of administrative efficiency, the Commissioner also addressed Mr. Conlon's motion to dismiss in the November 1, 2021, Second Interim Decision, and denied it (*see* November 1, 2021, Second Interim Decision at 3-4). Because the Commissioner has already addressed the motion to dismiss, a separate ruling from me is not necessary.

However, the Commissioner's November 1, 2021 Second Interim Decision is silent about staff's cross-motion to dismiss affirmative defenses. A discussion and ruling about staff's September 20, 2021 motion follows.

Department staff's opposition to Mr. Conlon's August 26, 2021, motion to dismiss is in the nature of a cross-motion to dismiss affirmative defenses. With papers dated October 3, 2016, staff previously moved to clarify or strike affirmative defenses, which I addressed in rulings dated October 19, 2016. In the October 19, 2016, ruling (at 7), I noted that Mr. Conlon is representing himself, and he is not an attorney. I noted further that Mr. Conlon filed a document titled, *Answer to NYSDEC Complaint DEC Case No. CO4-204150520-119 by Brian Conlon*, dated July 20, 2016.

Mr. Conlon did not expressly identify any affirmative defenses in the July 20, 2016, answer, as required by 6 NYCRR 622.4(c). However, as required by 6 NYCRR 622.4(b), Mr. Conlon responded to each allegation stated in the July 6, 2016, complaint.

Throughout the July 6, 2016, complaint, Department staff alleges, in general, that Mr. Conlon violated the terms and conditions of the BUD (*see e.g.* July 6, 2010, Complaint ¶¶ 9, 15, 42, 44, 46, 47, 48, 54-58). In particular, the first cause of action alleges that Mr. Conlon did not comply with the terms and conditions of the BUD (*see* July 6, 2010 Complaint ¶¶ 52-58). To each of these allegations, Mr. Conlon responds in the July 20, 2016 answer. In addition to denying the allegations, Mr. Conlon asserted in the July 20, 2016, answer that he complied with the terms and conditions of the BUD, that the tire chips brought to the site were not considered solid waste, as defined in the regulations, and that no solid waste was present at his farm. (*See* July 20, 2016, Answer ¶¶ 9, 15, 42, 44, 52-58.)

Contrary to staff's cross-motion, Mr. Conlon did not assert any new affirmative defenses in an untimely manner as part of his August 26, 2021, motion to dismiss. Rather, the July 16, 2016, answer identifies factual and legal disputes for the forthcoming adjudicatory enforcement hearing. Mr. Conlon's disputes, which he reiterates on his present motion, are more in the nature of denials, not affirmative defenses, and therefore are not subject dismissal (*see Matter of Truisi*, Ruling of the Chief Administrative Law Judge on Motion to Strike or Clarify Affirmative Defenses, dated April 1, 2010, at 11). Department staff has been on notice since July 2016, that Mr. Conlon denies the charges alleged in the July 6, 2016, complaint, and asserts that he has complied with the terms and conditions of the BUD based on notifications filed with staff in 2005, and inspections conducted by staff in March 2011 (*see* July 20, 2016, Answer ¶¶ 9, 42, 44, and 57). In addition, the only potential affirmative defense Mr. Conlon has asserted is a potential agricultural exemption from the regulations in an email dated October 24, 2016. However, staff has not raised a basis for dismissing such a defense at this time.

Therefore, I deny Department staff's cross-motion, as outlined in staff's September 20, 2021, memorandum of law, to dismiss Mr. Conlon's affirmative defenses. Since filing the July 16, 2016, answer, Mr. Conlon has been remarkably consistent with respect to the bases for his denials of liability. At the forthcoming hearing, Mr. Conlon will have the opportunity to offer the documentation referenced in the July 16, 2016, answer to demonstrate how he has complied with the terms and conditions of the BUD. In addition, Mr. Conlon may offer any evidence (documents or testimony), as well as any argument to show how the riding ring located at the site is exempt from permitting requirements, as provided for by 6 NYCRR 360-1.7(b)(1-4), effective March 10, 2003. (*See also* November 1, 2021 Second Interim Decision at 4.)

II. Department Staff's Motion to Exclude

In addition, Department staff moved to exclude the materials or information requested by the discovery demands from the evidentiary record of the upcoming hearing because Mr. Conlon did not produce any responsive documents. Staff's October 1, 2021, motion consists of the following: (1) a notice of motion; (2) a motion to exclude; (3) an attorney affirmation; and (4)

Exhibits 1 through 7, inclusive.[2] Department staff explained that during the course of the proceedings, staff served document demands upon Mr. Conlon. However, Mr. Conlon did not provide any documents, and generally refused to respond. The July 20, 2021, scheduling order authorized staff to re-serve the discovery demands, and directed Mr. Conlon to advise whether he would respond by August 4, 2021. In addition, responses were due by August 20, 2021. Subsequently, the due dates were extended to September 3, 2021 and September 20, 2021 pursuant to the revised scheduling order dated August 27, 2021. (*See* Exhibits 1- 4; ¶¶ 2-5, 7 Jeffrey affirmation dated October 1, 2021.)

During the July 20, 2021, conference, Mr. Conlon said that he no longer had any documents responsive to staff's demands due to the passage of time. After staff inquired about the status of his responses in an email dated September 29, 2021, Mr. Conlon stated in an email of the same date that he had previously responded, and would not provide anything further. As of the date of staff's motion, Mr. Conlon has not responded to the document demands. (*See* Exhibit 7; ¶¶ 8-10 Jeffrey affirmation dated October 1, 2021.)

Staff's motion papers included a description of the document demands (*see* ¶¶ 11-29 Jeffrey affirmation dated October 1, 2021). Staff requested the sanctions authorized by 6 NYCRR 622.7(c)(3) and Civil Practice Rules and Regulations (CPLR) § 3216 to exclude the demanded information from the evidentiary record of the hearing, as well as adverse inferences. (*See* ¶¶ I – XI Jeffrey affirmation dated October 1, 2021.)

In addition to the regulations (*see* 6 NYCRR 622.7[c][3]) and CPLR 3216, staff referenced *Richards v RP Stellar Riverton, LLC* (136 AD3d 1011 [2016]), and other cases, to support its request for relief. Staff asserted that Mr. Conlon's failure to respond has been willful, deliberate, and contumacious. According to staff, there is no choice but to grant the motion. (*See* ¶¶ 32, 35 Jeffrey affirmation dated October 1, 2021.)

With an email dated October 1, 2021, Mr. Conlon responded. Mr. Conlon stated that he is not a lawyer and is not represented by counsel. Mr. Conlon is not sure about the meaning of staff's motion to exclude, and expressed concern that it is an attempt to remove all evidence from the record. Referring to himself in the third person, Mr. Conlon will rely on:

> the 5th amendment in regards to ALL requests for discovery and answering any questions based on a complaint alleging violations of a terminated BUD. Staff has come to a dead end in their attempts to personally attack my client and are now using a bogus complaint to try to force discovery.

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[2] Exhibit 1 is a copy of staff's email dated January 12, 2017, and a request for leave to serve discovery demands. Exhibit 2 is a copy of staff's email dated July 14, 2018, with two attachments. The first is a request for leave to serve discovery demands. The second attachment is a copy of the discovery demands. Exhibit 3 is a copy of respondents' request for a protective order dated August 3, 2018, as well as various discovery demands. Exhibit 4 is a copy of a letter dated August 17, 2018, from Department staff opposing respondents' motion for a protective order. Exhibit 5 is a copy of Mr. Conlon's email dated August 4, 2021, in which he moves to recuse the ALJ and the Commissioner. Exhibit 6 is a copy of Mr. Conlon's email dated June 13, 2018, in which he acknowledged receipt of the June 1, 2018, Interim Decision, and offered additional comments. Exhibit 7 is a copy of Mr. Conlon's September 29, 2021, email stating that he had previously responded to staff's discovery demands, and that he would not be providing any additional information.

With his October 1, 2021, email, Mr. Conlon renewed his motion to dismiss, as well as his request for an FBI investigation of the 2010 Order on Consent. Mr. Conlon stated further in the email that he wants:

> the NYS Police to take over the criminal investigation into the forgery and tampering of the order on consent before I advise my client to seek other alternative options, including a citizen's arrest of any and all NYSDEC employees that have become accessory to a felony crime by their actions or inactions.

Discussion and ruling: Staff itemized its relief in Mr. Jeffrey's affirmation, as well as in the motion to exclude (*see* Motion to Exclude at 2-4 [¶¶ II-XI]). Although Mr. Conlon has not provided any information responsive to staff's document demands, the relief sought by staff would preclude Mr. Conlon from presenting a direct case, and essentially limit his participation at the adjudicatory enforcement hearing to cross-examining staff's witnesses. The relief sought by staff is excessive.

As noted above, Mr. Conlon's July 16, 2016, answer provided staff with notice of his denial of the charges alleged in the complaint, and a potential exemption from permitting requirements. Oddly, despite his several motions to dismiss, Mr. Conlon has yet to provide any documentary evidence to substantiate his claims. Nevertheless, to the extent that Mr. Conlon actually filed the information required by the terms and conditions of the BUD, Department staff will have copies of those documents.

Accordingly, I deny, in part, and grant, in part, staff's request for relief, as outlined in the motion to exclude. Each request is addressed below.

Sanction Request Item[3]	**Sanction Request from Motion**	**Ruling**
II.	Excluding from admission into the evidentiary record by respondents, any material and information related to the actual use of the site from 2004 to present.	Deny.
III.	Excluding from admission into the evidentiary record by respondents, any material and information related to number or weight of tire chips/tire derived aggregate used at the Site.	Deny.
IV.	Excluding from admission into the evidentiary record by respondents, any material and information related to the beneficial use determination ("BUD") issued by the NYSDEC on March 16, 2004 (BUD # 783-4-47).	Deny.

[3] S*ee* Motion to Exclude at 2-4 (¶¶ II-XI).

V.	Excluding from admission into the evidentiary record by respondents, any material and information related to the use of tire chips or tire derived aggregate at the Site.	Deny.
VI.	Excluding from admission into the evidentiary record by respondents, any material and information produced by witnesses, expert witnesses [sic] called at a hearing.	Mr. Conlon may testify.
VII.	Excluding from admission into the evidentiary record by respondents, any material or information from alleged eyewitnesses to the events specified in the Complaint.	Granted.
VIII.	Excluding from admission into the evidentiary record by respondents, any material and information to support any of respondents' defenses to the allegations in the Complaint.	Deny.
IX.	Excluding from admission into the evidentiary record by respondents, any material and information regarding respondents' finances, debts, creditors, or incomes or government assistance received by respondents.	Deny.
X.	Excluding from admission into the evidentiary record by respondents, any and all statements made by or related to the allegations set forth in the Complaint by any person not made available for cross examination at a hearing.	Granted.
XI.	Drawing draw [sic] an adverse inference regarding respondents with respect to any material or information they attempt to enter into evidence at the hearing that they did not produce in response to Department Staff's discovery demands.	Reserve.

With respect to sanction request Item VI, Mr. Conlon may testify. If he does, Department staff will have to opportunity to cross-examine him (*see* 6 NYCRR 622.10[a][3]).

With respect to sanction request Item VII, Mr. Conlon has not identified any potential expert witnesses, and states in an email dated September 29, 2021, that he does not "need" any witnesses.

With respect to sanction request Item IX, Mr. Conlon has stated, in numerous emails, that he filed for bankruptcy protection. At the hearing, Mr. Conlon may provide copies of any court orders related to his bankruptcy.

With respect to sanction request Item X, each party will have the opportunity to cross-examine the other parties' witnesses (*see* 6 NYCRR 622.10[a][3]).

III. November 1, 2010, Order on Consent

With this set of motions, Mr. Conlon renewed his request for a forensic investigation of the 2010 Order on Consent by either the New York State Police or the FBI (*see* Mr. Conlon's emails dated August 26, 2021, September 29, 2021, October 1, 2021, October 21, 2021, October 30, 2021 [*see* Motion to Adjourn below], and October 31, 2021).

I have previously addressed this request. The most recent was as part of the rulings on Mr. Conlon's second motion to recuse the ALJ dated August 16, 2021. In the August 16, 2021 ruling (at 4), I noted that the Commissioner addressed Mr. Conlon's concerns about the 2010 Order on Consent in the June 1, 2018, Interim Decision (at 3-7), and noted that the Commissioner determined, among other things, that the 2010 Order on Consent is not relevant to the captioned matter, and that his claims were unsubstantiated. Because the Commissioner has previously addressed Mr. Conlon's concerns related to the 2010 Order on Consent, I deny all his renewed requests.

In the November 1, 2021 Second Interim Decision (at 3), the Commissioner also addressed Mr. Conlon's renewed requests for a forensic investigation of the 2010 Order on Consent, and denied the requests.

IV. Motion to Adjourn

By email dated October 30, 2021, Mr. Conlon requested that the hearing be delayed until "a PROPER INVESTIGATION is made into the physical alteration" of the 2010 Order on Consent. According to Mr. Conlon, he cannot receive a fair hearing until a forensic investigation of the 2010 Order on Consent has been completed. Mr. Conlon argues that he did not participate in any review that the Department's Office of Employee Relations may have conducted with respect to the 2010 Order on Consent.

In his email dated October 31, 2021, Mr. Conlon requested an immediate response to his motion for an adjournment, and renewed his request for a forensic investigation of the 2010 Order on Consent. Mr. Conlon contended that the 2010 Order on Consent is relevant to the captioned enforcement matter because it is part of the history of events leading to the charges alleged in the July 6, 2016, complaint.

Department staff opposes the motion to adjourn. According to staff, the 2010 Order on Consent is not relevant to this captioned matter. To support this position, staff referenced the Commissioner's November 1, 2021, Second Interim Decision, as well as the June 1, 2018, Interim Decision. Staff argued that the results of any investigation related to the 2010 Order on Consent have no bearing on the charges alleged in the July 6, 2016 complaint.

Ruling: Adjournments are authorized by the ALJ for good cause (*see* 6 NYCRR 622.10[g]). I deny Mr. Conlon's motion to adjourn the hearing. Mr. Conlon's arguments about the 2010 Order on Consent do not demonstrate the required good cause to support his request. As previously noted, the Commissioner has determined that the 2010 Order on Consent is not relevant to the captioned administrative enforcement matter (*see* November 1, 2021, Second Interim Decision at 3).

V. Witness Lists

As revised, the August 27, 2021, scheduling order required the parties to identify their respective witnesses by October 4, 2021. With a letter from Mr. Jeffrey dated September 30, 2021, Department staff identified Kathleen Prather, Captain Ben Bramlage, NYS ENCON Police, and Lieutenant Neil Stevens, NYS ENCON Police, as witnesses.

In an email dated September 29, 2021, Mr. Conlon stated that he does not need any witnesses. As noted above, Mr. Conlon may testify at the proceeding and, if he does, he will be subject to cross-examination (*see* 6 NYCRR 622.10[a][3]).

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

Dated: Albany, New York
November 8, 2021