UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
New York State	)	**Docket No. CWA-02-2016-3403**
Department of Transportation,	)	
	)	
Respondent.	)	

ORDER ON MOTION FOR PARTIAL ACCELERATED DECISION

On June 16, 2016, Complainant, the Director of the Division of Enforcement and Compliance Assurance, United States Environmental Protection Agency, Region 2 ("EPA" or "the Agency"), filed a Complaint against Respondent New York State Department of Transportation. The Complaint alleges that Respondent violated Section 301(a) of the Clean Water Act ("CWA" or "Act"), 33 U.S.C. § 1311(a), for 16,218 days that Respondent was out of compliance with its General Permit for Storm Water Discharges from Municipal Separate Storm Sewer Systems ("MS4 Permit"). Specifically, the Agency claims that audits of three of Respondent's regional offices in 2012 and 2013 revealed that Respondent was not abiding by 15 different provisions of its MS4 Permit.

Respondent filed an Answer to the Complaint on February 3, 2017.[1] The parties subsequently participated in an Alternative Dispute Resolution process offered by this Tribunal but were unable to resolve this matter. Litigation then commenced. The Agency filed its Initial Prehearing Exchange and its Rebuttal Prehearing Exchange on August 3, 2017, and September 7, 2017, respectively. Respondent filed its Prehearing Exchange on August 25, 2017.

On November 8, 2017, the Agency filed a Motion for Partial Accelerated Decision on Liability ("Motion"). The Agency asserts that there is no genuine dispute of material fact as to whether Respondent violated four of the MS4 Permit provisions outlined in the Complaint. Respondent filed a response to the Motion on December 11, 2017 ("Response").[2] The Agency

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[1] Respondent initially filed its Answer on July 20, 2016. The Regional Judicial Officer in Region 2 subsequently granted Respondent's motion to withdraw its Answer. *See* Order Granting Respondent's Motion to Withdraw Answer and Granting an Extension of Time to File an Answer to the Complaint (July 27, 2016). Respondent then obtained additional time to file a new Answer before the case was transferred to this Tribunal.

[2] Respondent was granted an extension of time to file its Response. *See* Order on Respondent's Motions for Extension of Time (Nov. 22, 2017); Supplemental Order on Respondent's Motions for Extension of Time (Nov. 24, 2017).

filed a reply brief on December 21, 2017 ("Reply").[3] Later, pursuant to this Tribunal's Order on Respondent's Motions for Extension of Time, the parties also filed jointly stipulated facts. *See* Joint Stipulations (Jan. 12, 2018) ("Jt. Stip.").

For the reasons set forth below, the Motion is **GRANTED in part** and **DENIED in part**.

I. Accelerated Decision Standard

Under the Rules of Practice[4] that govern this proceeding, Administrative Law Judges are authorized to:

> render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law.

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[3] Throughout this proceeding, the parties have been advised to not include specific settlement terms in filings reporting the status of settlement negotiations between them. *See, e.g.*, Prehearing Order at 1 (June 13, 2017) ("Without mentioning any specific terms of settlement, Complainant shall file a Status Report regarding . . . the status of settlement . . . ."); Superseding Hearing Notice and Order (Sept. 14, 2017) ("Complainant is directed to file Status Reports as to the status of any settlement negotiations between the parties, *which shall not include any specific terms of settlement* . . . ."). The reason for this is that until a fully-executed Consent Agreement and Final Order is filed, the presiding Administrative Law Judge may need to rule on liability and/or penalty. If the record contains evidence relating to the terms of an incomplete settlement – such as draft, proposed, or partially executed settlement agreements; tentatively agreed upon settlement terms; settlement offers; or even statements made by parties in negotiations related to a potential settlement – it could create the appearance of bias. Thus, such settlement terms should *never* be presented to the presiding Administrative Law Judge.

Despite the notice to not disclose settlement terms, the Agency identifies in its Reply a specific settlement offer made by Respondent. Respondent subsequently filed a letter seeking "to clarify the record" in which Respondent acknowledges that the parties have been advised that disclosure of settlement terms is inappropriate – but Respondent then proceeds to describe additional terms anyway.

To be clear: The settlement terms disclosed by the parties were not material to the outcome of this Order, and I did not consider them in my ruling. At most, the parties' settlement-related statements appear to be a personal squabble about whether settlement negotiations were conducted in good faith. But as a measure of caution, these settlement statements are hereby stricken from the record. And because it apparently bears repeating: The parties shall file no further documents containing terms of settlement in this action.

[4] The Rules of Practice that govern this proceeding are found at 40 C.F.R. Part 22.

40 C.F.R. § 22.20(a). This standard is analogous to the summary judgment standard prescribed by Rule 56 of the Federal Rules of Civil Procedure. Although the Federal Rules do not directly apply here, the Environmental Appeals Board ("EAB") has consistently looked to Rule 56 and its jurisprudence when adjudicating motions for accelerated decision under Part 22. *See, e.g.*, *Consumers Scrap Recycling, Inc.*, 11 E.A.D. 269, 285 (EAB 2004); *BWX Techs., Inc.*, 9 E.A.D. 61, 74-75 (EAB 2000); *Clarksburg Casket Co.*, 8 E.A.D. 496, 501-02 (EAB 1999).[5]

Under the Federal Rules, summary judgment shall be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is material where, under the governing substantive law, it might affect the outcome of the proceeding. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1985). In turn, a dispute is genuine if a fact finder could reasonably resolve the dispute in favor of the non-moving party under the evidentiary standards applicable to the particular proceeding. *Id.* at 248, 250-52.

The party moving for summary judgment bears the burden of showing an absence of genuine dispute as to any material fact. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970). This includes an initial burden of production, which shifts to the non-moving party once it is satisfied by the moving party, and the ultimate burden of persuasion, which always remains with the moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986) (Brennan, J., dissenting) (citing 10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2727 (2d ed. 1983)). A party must support its assertion that a material fact cannot be or is genuinely disputed by "citing to particular parts of materials in the record," such as documents, affidavits or declarations, and admissions, or by "showing that the materials cited do not establish the . . . presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1). Once the moving party satisfies its initial burden of production, the burden shifts to the non-moving party to show that a genuine dispute exists by similarly "citing to particular parts of materials in the record" or by "showing that the materials cited do not establish the absence . . . of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." *Id.*

Evidentiary material and reasonable inferences drawn therefrom must be construed in a light most favorable to the non-moving party. *See Anderson*, 477 U.S. at 255 ("The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor."); *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) ("On summary judgment the inferences to be drawn from the underlying facts contained in [the moving party's] materials must be viewed in the light most favorable to the party opposing the motion."). The court is then required to consider whether a fact finder could reasonably find in favor of the non-moving party

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[5] Federal courts also endorse this approach, describing Rule 56 as "the prototype for administrative summary judgment procedures" and its associated jurisprudence as "the most fertile source of information about administrative summary judgment." *Puerto Rico Aqueduct & Sewer Auth. v. EPA*, 35 F.3d 600, 607 (1st Cir. 1994), *cert. denied*, 513 U.S. 1148 (1995) (rejecting the argument that federal court rulings on motions for summary judgment are "inapposite" to administrative proceedings).

under the applicable evidentiary standards. *Anderson*, 477 U.S. at 252-55. Where the evidence viewed in the light most favorable to the non-moving party is such that the fact finder could not reasonably find in favor of the non-moving party, summary judgment is appropriate. *See Adickes*, 398 U.S. at 158-59. Conversely, where conflicting inferences may be drawn from the evidence and a choice among those inferences would amount to fact-finding, summary judgment is inappropriate. *Rogers Corp. v. EPA*, 275 F.3d 1096, 1105 (D.C. Cir. 2002). Even where summary judgment appears technically proper, sound judicial policy and the exercise of judicial discretion permit denial of the motion in order for the case to be more fully developed at hearing. *Roberts v. Browning*, 610 F.2d 528, 536 (8th Cir. 1979).

In applying these principles to motions for accelerated decision under Section 22.20(a) of the Rules of Practice, the moving party "assumes the initial burden of production on a claim, and must make out a case for presumptive entitlement to summary judgment in his favor." *BWX*, 9 E.A.D. at 76. Where the moving party bears the burden of persuasion on an issue, it is entitled to an accelerated decision only if it presents "evidence that is so strong and persuasive that no reasonable [fact finder] is free to disregard it." *Id.* As noted by the EAB, "neither party can meet its burden of production by resting on mere allegations, assertions, or conclusions of evidence." *BWX*, 9 E.A.D. at 75. Likewise, a party opposing a properly supported motion for accelerated decision is required to "provide more than a *scintilla* of evidence on a disputed factual issue to show their entitlement to a[n] . . . evidentiary hearing: the evidence must be substantial and probative in light of the appropriate evidentiary standard of the case." *Id.* at 76.

Consistent with the jurisprudence of Rule 56, a tribunal adjudicating a motion for accelerated decision is required to consider whether the parties have met their respective burdens in the context of the applicable evidentiary standard. *BWX*, 9 E.A.D. at 75. The evidentiary standard that applies here is proof by a preponderance of the evidence. 40 C.F.R. § 22.24(b). The Agency bears the burdens of presentation and persuasion that a violation occurred as set forth in the Complaint, and Respondent bears the burdens of presentation and persuasion for any affirmative defenses. 40 C.F.R. § 22.24(a).

II. Legal Background

Congress enacted the law commonly known as the Clean Water Act a little more than 45 years ago. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified, as amended, at 33 U.S.C. §§ 1251-1388). The declared objective was "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To achieve this objective, the CWA prohibits "the discharge of any pollutant by any person" from "any point source" into "the waters of the United States," except under certain provisions outlined in the Act. 33 U.S.C. §§ 1311(a), 1362(7), 1362(12).

The "discharge of a pollutant" means "any addition of any pollutant" to U.S. waters. 33 U.S.C. § 1362(12). A "pollutant" includes "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6). The term "person"

includes, among other entities, any "State, municipality, commission, or political subdivision of a state, or any interstate body." 33 U.S.C. § 1362(5). A "municipality" may be any "public body created by or pursuant to State law and having jurisdiction over disposal of sewage, industrial wastes, or other wastes." 33 U.S.C. § 1362(4). A "point source" is "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, [or] rolling stock . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). "Waters of the United States" are defined by Agency regulations to include:

> (i) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
> (ii) All interstate waters, including interstate wetlands;
> (iii) The territorial seas;
> (iv) All impoundments of waters otherwise identified as waters of the United States under this section;
> (v) All tributaries, as defined in paragraph (3)(iii) of this section, of waters identified in paragraphs (1)(i) through (iii) of this section;
> (vi) All waters adjacent to a water identified in paragraphs (1)(i) through (v) of this definition, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;
> (vii) All waters in paragraphs (1)(vii)(A) through (E) of this definition where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. The waters identified in each of paragraphs (1)(vii)(A) through (E) of this definition are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

40 C.F.R. § 122.2.

"The principal [CWA] provision under which . . . a discharge may be allowed is Section 402, which establishes the 'National Pollutant Discharge Elimination System' ('NPDES') permitting program." *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 846 F.3d 492, 502 (2d Cir. 2017) (citing 33 U.S.C. § 1342). Outside of narrow exceptions, "a party must acquire an NPDES permit in order to discharge a specified amount of a specified pollutant . . . . [W]ithout an NPDES permit, it is unlawful for a party to discharge a pollutant into the nation's navigable waters." *Id.* Additionally, "[n]oncompliance with an NPDES permit's conditions is a violation of the Clean Water Act." *Id.* (citing 33 U.S.C. § 1342(h)). States may adopt and enforce their own standards and limitations concerning discharges of pollutants as long as they

are at least as stringent as those adopted by the Agency, and with the Agency's approval, states may administer the NPDES permit program within their borders. 33 U.S.C. §§ 1342(b), 1370. New York enacted a state version of the NPDES permitting law in 1973, and the Agency approved its program in 1975. *See* N.Y. ENVTL. CONSERV. LAW, art. 17, tit. 8; *Nat. Res. Def. Council, Inc. v. N.Y. State Dep't of Envtl. Conservation*, 25 N.Y.3d 373, 381 (2015).

In 1987, Congress amended the CWA to add Section 402(p), which explicitly requires NPDES permitting for discharges of storm water from municipal separate storm sewer systems ("MS4s"). Water Quality Act, Pub. L. No. 100-4, 101 Stat. 7 (codified, as amended, at 33 U.S.C. § 1342(p)). MS4 permits are to "be issued on a system- or jurisdiction-wide basis," have to "include a requirement to effectively prohibit non-stormwater discharges into the storm sewers," and are required to mandate "controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions" deemed appropriate to control pollutants. 33 U.S.C. § 1342(p)(3)(B). Congress further tasked the Agency with developing a program to regulate storm water discharges. *Id.* at § 1342(p). The Agency began to implement the amended CWA storm water provisions in 1990 before expanding the program in 1999. *See* National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges, 55 Fed. Reg. 47,990 (Nov. 16, 1990) (Final Rule); National Pollutant Discharge Elimination System – Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges, 64 Fed. Reg. 68,722 (Dec. 8, 1999) (Final Rule).

In enacting its stormwater regulations, the Agency has observed that "[s]tormwater discharges are a significant cause of water quality impairment because they can contain a variety of pollutants such as sediment, nutrients, chlorides, pathogens, metals, and trash that are mobilized and ultimately discharged to storm sewers or directly to water bodies." National Pollutant Discharge Elimination System (NPDES) Municipal Separate Storm Sewer System General Permit Remand Rule, 81 Fed. Reg. 89,320, 89,322 (Dec. 9, 2016) (Final Rule). When designing a permitting system, the Agency determined "that pollutants from wet weather discharges are most appropriately controlled through management measures rather than end-of-pipe numeric effluent limitations." 64 Fed. Reg. at 68,753. Consequently, the Agency required "all regulated small MS4s to develop and implement" a Stormwater Management Program Plan ("SWMP Plan") that included six Minimum Control Measures ("MCMs"). The MCMs address "public education and outreach; public involvement; illicit discharge detection and elimination; construction site runoff control; post-construction storm water management in new development and redevelopment; and pollution prevention and good housekeeping of municipal operations." 64 Fed. Reg. at 68,736, 68,754-68,762. According to the Agency's determination, properly implementing these MCMs is the mechanism that would "reduce pollutants to the maximum extent practicable" as required under the statute. 64 Fed. Reg. at 68,752.

Among those subject to the Agency's stormwater discharge regulations, found at 40 C.F.R. Part 122, Subpart B, are small MS4s. An MS4 is described by the regulations as:

> a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains):

> (i) Owned or operated by a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of the CWA that discharges to waters of the United States;
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> (ii) Designed or used for collecting or conveying storm water;
>
> (iii) Which is not a combined sewer; and
>
> (iv) Which is not part of a Publicly Owned Treatment Works (POTW) as defined at 40 CFR 122.2.

40 C.F.R. § 122.26(b)(8). *Small* MS4s are MS4s that generally are located in incorporated places with populations of less than 100,000 and that are "[n]ot defined as 'large' or 'medium' municipal separate storm sewer systems."[6] 40 C.F.R. § 122.26(b)(16)(i)-(ii). Small MS4s also "include[ ] systems similar to separate storm sewer systems in municipalities, such as systems at . . . highways and other thoroughfares." 40 C.F.R. § 122.26(b)(16)(iii). Agency regulations define storm water to mean "storm water runoff, snow melt runoff, and surface runoff and drainage." 40 C.F.R. § 122.26(b)(13). The points at which an MS4 "discharges to waters of the United States" are referred to as "outfalls" and are treated as "point sources" under the regulations. 40 C.F.R. §§ 122.2, 122.26(b)(9). Further, the "additions of pollutants into waters of the United States from: surface runoff which is collected or channelled by man; discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works" are "discharge[s] of a pollutant" under the CWA. 40 C.F.R. § 122.2.

A small MS4 is regulated when it is operated by a state or local government, including state departments of transportation, and the MS4 is located in an urbanized area. 40 C.F.R. § 122.32(a)(1). "The operator of any regulated small MS4 . . . must seek coverage under an NPDES permit issued by the applicable NPDES permitting authority. If the small MS4 is located in an NPDES authorized State, Tribe, or Territory, then that State, Tribe, or Territory is the NPDES permitting authority." 40 C.F.R. § 122.33(a). New York is an NPDES authorized state, and the New York State Department of Environmental Conservation ("DEC") is the NPDES permitting authority. *See, e.g.*, CX 1; N.Y. ENVTL. CONSERV. LAW, art. 17, tit. 8. The DEC is authorized to "issue a general permit . . . to cover a category of point sources of one or more discharges within a stated geographical area," including permits for discharges from "separate storm sewers or stormwater conveyance systems." *Nat. Res. Def. Council, Inc.*, 25 N.Y.3d at 384 (quoting N.Y. ENVTL. CONSERV. LAW § 70-0117). Small MS4 operators "seeking

[6] The regulations distinguish between large, medium, and small MS4s, primarily by the population of the places where the system is located. 40 C.F.R. §§ 122.26(b)(4), (b)(7), (b)(16).

coverage under a general permit . . . must submit a Notice of Intent (NOI) to the NPDES permitting authority . . . ." 40 C.F.R. § 122.33(b)(1). Permits issued to small MS4s "must include requirements that ensure the permittee implements, or continues to implement, the minimum control measures" outlined in the regulations. 40 C.F.R. § 122.34(b). Permits must also require a written SWMP Plan "that, at a minimum, describes in detail how the permittee intends to comply with the permit's requirements for each minimum control measure." *Id.* As mentioned above, the MCMs that a permittee must implement address "(1) public education and outreach on storm water impacts"; "(2) public involvement/participation"; "(3) illicit discharge detection and elimination"; "(4) construction site storm water runoff control"; "(5) post-construction storm water management in new development and redevelopment"; and "(6) pollution prevention/good housekeeping for municipal operations." 40 C.F.R. § 122.34(b).

When a person violates any condition of a permit that a state issues pursuant to 33 U.S.C. § 1342, the Agency may assess a civil administrative penalty. 33 U.S.C. § 1319(g)(1)(A), (g)(2)(B). *See also* 40 C.F.R. § 122.41(a) ("Any permit noncompliance constitutes a violation of the Clean Water Act and is grounds for enforcement action.").

III. Factual Background[7]

Respondent is a public agency established under the laws of the State of New York that coordinates and assists in the development and operation of transportation facilities and services for highways, railroads, mass transit systems, ports, waterways, and aviation facilities in the state. *See* Jt. Stip. ¶ I.1; Compl. ¶ III.1; Answer ¶ III.1; N.Y. TRANSP. LAW, art. 2; https://www.dot.ny.gov/about-nysdot/responsibilities-and-functions (last visited Jan. 23, 2018). It operates through its Headquarters office in Albany, New York, and 11 regional offices located throughout New York, including Western New York (Region 5), Hudson Valley (Region 8), and Southern Tier (Region 9). Compl. ¶ III.7; Answer ¶ III.7. In addition to its transportation responsibilities, Respondent "operates and maintains a statewide network" of small MS4s that include some 16,800 storm water outfalls along state-owned highways in urbanized areas. Jt. Stip. ¶¶ I.3, 4; Compl. ¶ III.3; Answer ¶ III.3; CX 59 at 273-74. Many of these outfalls discharge storm water into the waters of the United States. CX 1; CX 30; CX 59; CX 73; Mot. at 20 & Exs. 9, 14, 15, 21.

On April 2, 2003, following Respondent's submission of a Notice of Intent ("NOI") to be covered under State Pollutant Discharge Elimination Systems General Permit No. GP-02-02 ("2003 MS4 Permit"), the New York State Department of Environmental Conservation authorized general permit coverage of Respondent's MS4. Jt. Stip. ¶ I.5; CX 1. The 2003 MS4 Permit expired in 2008 and was replaced by General Permit No. GP-0-08-002 ("2008 MS4 Permit"); the 2008 MS4 Permit expired in 2010 and was replaced by General Permit No. GP-0-10-002 ("2010 MS4 Permit"); the 2010 MS4 Permit expired in 2015 and was replaced by General Permit No. GP-0-15-003 ("2015 MS4 Permit"); the 2015 MS4 Permit expired in 2017.

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[7] This factual background is drawn from the Complaint, Answer, documents in the record, and facts stipulated by the parties.

Jt. Stip. ¶¶ I.6-10; CX 2-CX 5. Coverage of Respondent's MS4 continued under each of these MS4 Permits. Jt. Stip. ¶¶ I.6-10.

Pursuant to the MS4 Permits, Respondent published an SWMP Plan in May 2012 to specify in writing how it was maintaining its MS4 and otherwise meeting permit requirements.[8] Jt. Stip. ¶ I.12; CX 30 at 157-252. Therein, Respondent recognized that "[s]tormwater runoff from State-owned highways, roadsides, rest areas, and maintenance yards constitutes a potential source of pollutants to the surface and ground waters" of New York. CX 30 at 161.

Nearly six years ago, the Agency tested Respondent's MS4 Permit compliance through a series of audits.[9] Specifically, the Agency audited Respondent's MS4 program in three different regions: Region 9, from June 19-21, 2012; Region 8, from November 27-29, 2012; and Region 5, from June 25-27, 2013. Jt. Stip. ¶¶ I.13-15; Compl. ¶ III.8; Answer ¶ III.8; Arvizu Aff., ¶¶ 8-11; CX 30; CX 35; CX 39a. Before each audit, the Agency requested records related to Respondent's MS4 operation and implementation of related CWA requirements. Arvizu Aff., ¶ 12; CX 9; CX 33; CX 37. The audits began at each regional headquarters office, where the audit team reviewed Respondent's documents, interviewed Respondent's storm water program coordinator, and interviewed regional representatives. Arvizu Aff., ¶ 13; CX 13; CX 34; CX 37. The audit team then made site visits to several of Respondent's outfalls, construction sites, and maintenance facilities. Arvizu Aff., ¶ 13. The records requests and audits focused on four of the six MCMs required by the MS4 Permits. Arvizu Aff., ¶ 14. The four permit provisions at issue in the Agency's Motion relate to two of those MCMs.

Part VIII.A.3.f.ii of the 2010 MS4 Permit requires Respondent "to have a written directive from the person authorized to sign the Notice of Intent ("NOI") stating that updated mechanisms must be used, and who is responsible for ensuring compliance with and enforcement of the mechanisms for the [Illicit Discharge Detection and Elimination] program." Arvizu Aff., ¶ 16; CX 4 at 56. Respondent was unable to provide this written directive when the Agency sought it through a records request and during audit interviews. Respondent eventually submitted a written directive to the Agency on February 5, 2016. Arvizu Aff., ¶ 16; CX 30 at 7, 12; CX 35 at 7, 10; CX 39 at 7, 11; CX 59.

Part VIII.A.3.h of the 2010 MS4 Permit requires Respondent "to inform the public of the hazards associated with illegal discharges and the improper disposal of waste." Arvizu Aff., ¶ 17; CX 4 at 56. The 2010 MS4 Permit states that Respondent "should consider their public to be the employee/user population, visitors, or contractors/developers, and provides examples which include, but are not limited to the general public using or living along transportation systems." Arvizu Aff., ¶ 17; CX 4 at 49. The Agency requested documentation of Respondent's public information activities during the audits of the regions, but Respondent was unable to provide this documentation and said it "had not provided formal outreach to the public regarding these

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[8] Respondent updated its SWMP Plan in January 2016. *See* CX 59 at 37-137.

[9] The 2010 MS4 Permit was in effect at the time of the audits and applies to the alleged violations in this proceeding. Jt. Stip. ¶ I.8; Compl. ¶ III.9; Answer ¶ III.9.

issues." Arvizu Aff., ¶ 17; CX 30 at 7, 15-16; CX 35 at 7, 15-16; CX 39 at 7, 16. Respondent eventually submitted documentation of its public information program on April 1, 2015. Arvizu Aff., ¶ 17; CX 52.

Part VIII.A.4.a.v of the 2010 MS4 Permit requires Respondent "to develop, implement and enforce a program that describes procedures for receipt and follow up on complaints or other information submitted by the public regarding construction site stormwater runoff." Arvizu Aff., ¶ 18; CX 4 at 59. However, Respondent could not provide written procedures for such a program when the Agency sought it through a records request and during audit interviews, "and Respondent's representatives told the EPA that no such procedures existed." Arvizu Aff., ¶ 18; CX 30 at 8, 25-26; CX 35 at 8, 23-24; CX 39 at 8, 20. Respondent eventually submitted the procedures to the Agency on September 30, 2015. Arvizu Aff., ¶ 18; CX 57.

Part V.B of the 2003 MS4 Permit requires Respondent "to retain records required by the permit, including records that document the SWMP, records included in the SWMP Plan, and records of reporting required by the permit, for at least five (5) years after they are generated, and to submit them to the DEC or the EPA upon request." Arvizu Aff., ¶ 19. Parts V.B of the 2008 and 2010 MS4 Permits continue this requirement. Arvizu Aff., ¶ 19; CX 4 at 18. According to Section IV.2.c of Respondent's 2012 SWMP Plan, Respondent "developed a program of quality control/quality assurance ('QC/QA') construction reviews to improve its erosion and sediment control program, whereby reviews of active construction sites are conducted by Main Office and regional staff, and [Respondent] established goals and procedures, a rating system, and a checklist for conducting these project reviews." Arvizu Aff., ¶ 19; CX 30 at 193. During the audit of Respondent's Region 9, the Agency requested a copy of those procedures, rating system, and checklist, and Respondent's representative "stated that Respondent had no formal procedure for oversight of construction site stormwater inspections, and was unable to provide the goals and procedures, a rating system, or checklist." Arvizu Aff., ¶ 19; CX 30 at 8, 25. Respondent eventually certified on November 3, 2014, that it was implementing the required program. Arvizu Aff., ¶ 19; CX 50.

In light of the audit findings, the Agency issued an Administrative Compliance Order ("Compliance Order") to Respondent on March 5, 2014. CX 40. The Compliance Order alleged that Respondent violated 19 provisions of its MS4 Permit. CX 40. Further, the Compliance Order instructed Respondent to take 24 different corrective actions and set deadlines for their completion. CX 40 at 13-20. Subsequently, representatives of Respondent and the Agency met and negotiated a timeline for Respondent to complete the corrective actions described in the Compliance Order and thereby come into compliance with its MS4 Permit. The Agency issued a revised Compliance Order on June 5, 2014, to reflect the agreed-upon schedule. CX 47. Respondent spent the next two years correcting its violations, fulfilling its requirements on February 5, 2016. CX 47-CX 59.

After Respondent satisfied the Agency's directives to become compliant, the Agency in June 2016 filed the Complaint that initiated this proceeding. In the Complaint, the Agency alleges that Respondent "violated 15 separate permit requirements a total of 17 times, and that those violations lasted for a total of 16,218 days." Mot. at 16. For these violations, the Agency seeks a $150,000 penalty.

IV. Discussion

The record shows that Respondent is a public agency established under the laws of the State of New York and is therefore a "person" subject to the prohibitions of the CWA. *See* 33 U.S.C. § 1362(5); N.Y. TRANSP. LAW, art. 2. *See also* Jt. Stip. ¶ I.1; Compl. ¶ III.1; Answer ¶ III.1. The evidence further establishes that Respondent operates and maintains a network of small MS4s in urbanized areas that includes some 16,800 outfalls. Jt. Stip. ¶¶ I.3, 4; Compl. ¶ III.3; Answer ¶ III.3; CX 59 at 273-74. Therefore, Respondent's MS4s are "point sources" that "discharge . . . pollutant[s]" into "the waters of the United States." *See* 33 U.S.C. § 1362(14) (defining a point source as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, [or] conduit . . . from which pollutants are or may be discharged"); 40 C.F.R. § 122.26(b)(8) (describing MS4s as "a conveyance or system of conveyances . . . that discharge[ ] to waters of the United States"); 40 C.F.R. § 122.2 (defining "discharge of a pollutant" to include "additions of pollutants into waters of the United States from: surface runoff which is collected or channelled by man; discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person"); 40 C.F.R. § 122.26(b)(9) (defining "outfall" to mean "a point source as defined by 40 CFR 122.2 at the point where a municipal separate storm sewer discharges to waters of the United States"). *See also* CX 1; CX 30; CX 59; CX 73; Mot. at 20 & Attachs. 9, 14, 15, 21.

Thus, as a matter of law, it is clear that Respondent is obligated to obtain and abide by an MS4 permit issued by the applicable NPDES permitting authority.[10] *See* 40 C.F.R. § 122.33(a). And Respondent obtained coverage under successive general permits issued by the New York DEC. Jt. Stip. ¶¶ I.5-I.10; CX 1-CX 5. But at issue is the extent to which Respondent complied with those permits. The Complaint alleges that Respondent violated 15 different provisions of the 2010 MS4 Permit, which was in effect at the time of the 2012 and 2013 audits. In its Motion, the Agency seeks accelerated decision as to Respondent's liability for violating four of those provisions. The four provisions relate to two of the permit's MCMs – illicit discharge detection and elimination ("IDDE") and construction site storm water runoff control. CX 4 at 56, 58.

Part VIII.A.3.f.ii.

The Agency alleges Respondent violated Part VIII.A.3.f.ii. of the 2010 MS4 Permit. Compl. ¶ III.10.e. That permit provision states, in regard to development of a program to detect and eliminate illicit discharges, that all covered entities must: "[p]rohibit *illicit discharges* into the *small MS4* and *implement* appropriate enforcement procedures and actions below, as applicable:

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[10] Respondent does not dispute that it is subject to the CWA and associated small MS4 permitting requirements. *See, e.g.*, Jt. Stip. ¶¶ I.5-12; Response at 1-2.

> for *non-traditional MS4s*:[11]
> - prohibit and enforce against *illicit discharges* through available mechanisms (ie. tenant lease agreements, bid specifications, requests for proposals, standard contract provisions, connection permits, maintenance directives / BMPS, access permits, consultant agreements, internal policies);
> - procedures or policies must be developed for implementation and enforcement of the mechanisms;
> - a written directive from the person authorized to sign the NOI stating that updated mechanisms must be used and who (position(s)) is responsible for ensuring compliance with and enforcing the mechanisms for the *covered entity's IDDE* program; and
> - the mechanisms and directive must be equivalent to the *State*'s model illicit discharge local law[.]

CX 4 at 55, 56.

Of particular relevance to this proceeding is the requirement that covered entities have "a written directive from the person authorized to sign the NOI stating that updated mechanisms [for prohibiting and enforcing against illicit discharges] must be used and who (position(s)) is responsible for ensuring compliance with and enforcing the mechanisms for the covered entity's IDDE program." CX 4 at 56. According to an affidavit signed by Christy M. Arvizu, an environmental scientist at the Agency who participated in the audits of Respondent's MS4 program, "[i]n response to the EPA's records request and audit interviews seeking, among other things, this written directive, Respondent was unable to provide one." Arvizu Aff., ¶ 16; *see also* CX 30 at 7, 12; CX 35 at 7, 10; CX 39 at 7, 11. Ms. Arvizu further states that Respondent did not correct the violation until it submitted the required directive to the Agency on February 5, 2016. Arvizu Aff., ¶ 16; CX 59.

In response, Respondent admits that it failed to produce a written directive "because the [2010 MS4 Permit] states that connection permits (e.g., highway work permits and use and occupancy permits) and contract provisions are accepted mechanisms for ensuring compliance." Response at 2. Respondent adds that it "has no jurisdiction to enforce the IDDE Program outside of its limited right-of-way, and thus, had no written directive for such." Response at 2.

[11] The 2010 MS4 Permit defines "non-traditional MS4s" to include "state and federal prisons, office complexes, hospitals; state transportation agencies; university campuses, public housing authorities, schools, [and] other special districts." CX 4 at 92. Respondent is a "non-traditional" MS4 because it is a state department of transportation that possesses different legal authority than might a "traditional" MS4 operator such as a city or county government, particularly in regard to land use control. However, the Agency has determined that the MCMs are sufficiently flexible that they can still be implemented by state DOTs and other non-traditional MS4 operators. *See, e.g.*, CX 4 at 14 n.2, 97; CX 30 at 62, 89, 160, 162, 166; 64 Fed. Reg. at 68,749; 40 C.F.R. § 122.32(a).

In addition to admitting in its Response that it "failed to produce a written directive," Respondent does not offer or point to any specific materials in the record as evidence that it complied with the requirement to produce a written directive. Rather, Respondent appears to make a legal argument that its failure is excused by its compliance with the requirement that it sought to prohibit and enforce against illicit discharges through its "connection permits" and "contract provisions." However, aside from not citing to evidence in the record of such connection permits and contract provisions, the permit on its face is clear that the four requirements quoted above are not interchangeable or alternatives to one another. Specifically, the four requirements are joined by the term "and," not "or." Additionally, they are substantively distinctive. In particular, the requirement to which Respondent refers is that an entity use connection permits, contract provisions, and other available mechanisms to "prohibit and enforce against illicit discharges." Meanwhile, the requirement that Respondent is alleged to have violated is that a specific person – the person authorized to sign the NOI on the entity's behalf – issue a directive that (a) states that updated mechanisms must be used and (b) names another person or position responsible for overseeing compliance with and enforcement of the mechanisms in the IDDE program. If an entity complied with the first requirement but not the second, it would have completed only a portion of the actions directed by Part VIII.A.3.f.ii. of the 2010 MS4 Permit.

Consequently, there is no genuine factual dispute as to whether Respondent produced a written directive as required by Part VIII.A.3.f.ii. of the 2010 MS4 Permit. It did not. Therefore, Respondent is liable for not complying with this requirement of the 2010 MS4 Permit from at least June 19, 2012, until February 5, 2016. On this point, accelerated decision is **GRANTED**.

Part VIII.A.3.h.

Also in connection with the requirement to develop a program to detect and eliminate illicit discharges, the Agency alleges Respondent violated Part VIII.A.3.f.ii. of the 2010 MS4 Permit. Compl. ¶ III.10.g. That provision states that all covered entities must "[i]nform the public of the hazards associated with illegal *discharges* and the improper disposal of waste." CX 4 at 56.

According to Ms. Arvizu, the Agency during its three audits asked Respondent for documentation of its public information activities. Arvizu Aff., ¶ 17. "In response, Respondent's representatives were unable to provide the requested documentation, and said that Respondent had not provided formal outreach to the public regarding these issues," Ms. Arvizu stated. Arvizu Aff., ¶ 17; *see also* CX 30 at 7, 15-16; CX 35 at 7, 15-16; CX 39 at 7, 16. The Agency concludes that Respondent did not correct this violation until it submitted documentation of the required public information program on April 1, 2015. Arvizu Aff., ¶ 17; CX 52.

However, Respondent now asserts that its public information efforts had been focused on its employees and that during the audits it "directed the Complainant to a webpage that contained

stormwater management information."[12] Response at 2. Respondent contends that the 2010 MS4 Permit "does not specifically require outreach to the general public." Response at 2.

Respondent does not offer or point to any specific materials in the record as evidence that it complied with the requirements of Part VIII.A.3.h. Instead, it largely relies on legal argument that the 2010 MS4 Permit does not require what the Agency says it requires. However, the Agency's evidence indicates that Respondent did in fact maintain a website that "contains multiple links to documents and information about the stormwater program." *See, e.g.*, CX 30 at 16. Although the Agency describes the website as "not appear[ing] to provide targeted information . . . about the hazards associated with illegal discharges and the improper disposal of waste," the existence of the website is sufficient to create a factual dispute as to whether Respondent satisfied Part VIII.A.3.h. of the 2010 MS4 Permit. CX 30 at 16.

Consequently, there is enough of a factual dispute to permit Respondent to contest at hearing the allegation that it violated Part VIII.A.3.h. of the 2010 MS4 Permit. On this point, accelerated decision is **DENIED**.

Part VIII.A.4.a.v.

The Agency further accuses Respondent of violating Part VIII.A.4.a.v. of the 2010 MS4 Permit. Compl. ¶ III.10.i. With respect to construction site stormwater runoff control, that permit provision states that all covered entities must "[d]evelop . . . , implement, and enforce a program that . . . describes procedures for receipt and follow up on complaints or other information submitted by the public regarding construction site stormwater runoff." CX 4 at 59.

According to Ms. Arvizu, "[i]n response to the EPA's records request, and requests during the audits, Respondent could not provide written procedures for receipt and follow up on complaints by the public regarding construction site stormwater runoff, and Respondent's representatives told the EPA that no such procedures existed." Arvizu Aff., ¶ 18; *see also* CX 30 at 8, 25-26; CX 35 at 8, 23-24; CX 39 at 8, 20. Ms. Arvizu further declares that Respondent's representatives in Regions 5 and 8 told the Agency "that there was an email address for complaints on Respondent's stormwater webpage, and gave an example of having communicated with the DEC about a 2011 complaint in Region 5." Arvizu Aff., ¶ 18. But, she states, "Respondent had no procedures for receiving and following up on such complaints." Arvizu Aff., ¶ 18. The Agency contends that Respondent resolved this violation on September 30, 2015, when it "submitted the required procedures to the EPA." Arvizu Aff., ¶ 18; CX 57.

In response, Respondent again notes that it "did have an email address for public complaints regarding construction site stormwater run-off." Response at 2. Respondent also

[12] The Agency concedes that Respondent's representatives referred the audit teams to a webpage "that generally described Respondent's stormwater management issues, but that webpage failed to inform the public of the hazards associated with illegal discharges and improper disposal of waste as required . . . ." Mot. at 22.

asserts that its representatives in Regions 5 and 8 "indicated there was a non-written procedure for directing those complaints to the appropriate entities with jurisdiction over the construction sites." Response at 2-3. According to Respondent, it did not create procedures "beyond referral to appropriate entities" because "Respondent's jurisdiction is limited to its right-of-way." Response at 3.

Respondent again does not cite evidence in the record to support its position. However, the Agency's evidence indicates that a factual dispute exists. That is, it is apparent that *some* manner of receiving and following up on complaints about construction site stormwater runoff existed. Whether such a system suffices as the "program" required under Part VIII.A.4.a.v. of the 2010 MS4 Permit is a matter that must be proven or disproven at hearing.

Consequently, there is enough of a factual dispute to permit Respondent to contest at hearing the allegation that it violated Part VIII.A.4.a.v. of the 2010 MS4 Permit. On this point, accelerated decision is **DENIED**.

Part V.B.

The Agency alleges Respondent did not adhere to Part V.B. requirements of the 2010 MS4 Permit. Compl. ¶ III.10.b. That permit provision mandates that permittees comply with certain record-keeping requirements. Specifically,

> the *covered entity* must keep records required by this *SPDES general permit* (records that document *SWMP*, records included in *SWMP plan*, other records that verify reporting required by the permit, NOI, past annual reports, and comments from the public and the *Department*, etc.) for at least five (5) years after they are generated. Records must be submitted to the *Department* within 5 business days of receipt of a *Department* request for such information. The *covered entity* shall keep duplicate records (either hard copy or electronic), to have one copy for public observation and a separate working copy where the *covered entity's* staff, other individuals responsible for the *SWMP* and regulators, such as *Department* and EPA staff can access them. Records, including the NOI and the *SWMP plan*, must be available to the public at reasonable times during regular business hours.

CX 4 at 18. With respect to construction site stormwater runoff control, Respondent's SWMP Plan states that Respondent "has developed a Quality Control Program to improve its Erosion and Sediment Control Program whereby reviews of active construction sites are conducted by Main Office and regional staff." CX 30 at 193. The SWMP Plan further indicates that Respondent "has established goals and procedures, a rating system, and a checklist for conducting these project reviews." CX 30 at 193.

According to Ms. Arvizu, during the Agency's audit of Respondent's Region 9, the Agency asked for "a copy of those procedures, the rating system, and the checklist, but Respondent's representative stated that Respondent had no formal procedure for oversight of construction site stormwater inspections, and was unable to provide the goals and procedures, a rating system, or checklist." Arvizu Aff., ¶ 19; *see also* CX 30 at 8, 25. Respondent did not correct this violation until November 3, 2014, when it certified it was implementing the required program, Ms. Arvizu asserts. Arvizu Aff., ¶ 19; CX 50.

Unlike the three other alleged violations for which the Agency seeks accelerated decision, Respondent did not in any way respond to this alleged violation. *See* Response at 1-3. That is, Respondent does not even argue, let alone cite to evidence, that it did not violate the 2010 MS4 Permit's record-keeping provision by retaining documentation of its purported Quality Control Program to improve its Erosion and Sediment Control Program.

Consequently, there is no genuine factual dispute as to whether Respondent maintained the records required by Part V.B. of the 2010 MS4 Permit – namely, certain records that document and would be included in its own SWMP Plan. It did not. Therefore, Respondent is liable for not complying with this requirement of the 2010 MS4 Permit from at least June 19, 2012, until November 3, 2014. On this point, accelerated decision is **GRANTED**.

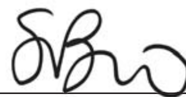
Respondent's Affirmative Defense

In its Answer, Respondent asserts as an affirmative defense "that it has expended in excess of $500,000 . . . in its effort to resolve the alleged violations relevant to the events, transactions and occurrences cited in the allegations of the Administrative Complaint." Answer at 4. This may be true, but such conduct relates to the issue of penalty and not to liability. Therefore, Respondent's compliance efforts will be considered at hearing to the extent they are relevant to the proposed penalty amount.

V. Conclusion

For the foregoing reasons, the Agency's Motion for Partial Accelerated Decision on Liability for violating the permit provisions discussed above is **GRANTED in part** and **DENIED in part**.

SO ORDERED.



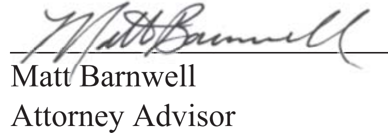
Susan L. Biro
Chief Administrative Law Judge

Dated: January 29, 2018
Washington, D.C.

In the Matter of *New York State Department of Transportation*, Respondent. Docket No. CWA-02-2016-3403

CERTIFICATE OF SERVICE

I certify that the foregoing **Order on Motion for Partial Accelerated Decision**, dated January 29, 2018, and issued by Chief Administrative Law Judge Susan L. Biro, was sent this day to the following parties in the manner indicated below.



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Dated: January 29, 2018
Washington, D.C.