UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 2
290 Broadway
New York, New York 10007

IN THE MATTER OF:

New York State Department of Transportation
50 Wolf Road
Albany, NY 12232
SPDES Permit No. NYR20A288

Respondent.

Proceeding pursuant to Section 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g)

Proceeding to Assess Class II Civil Penalty Pursuant to Section 309(g) of the Clean Water Act

Docket No. CWA-02-2016-3403

COMPLAINANT'S REPLY TO RESPONDENT'S OPPOSITION TO THE MOTION FOR PARTIAL ACCELERATED DECISION ON LIABILITY

I. PRELIMINARY STATEMENT

Pursuant to 40 C.F.R. §§ 22.20 and 22.16(b) Complainant, the Director of the Division of Enforcement and Compliance Assistance of the United States Environmental Protection Agency, Region 2 ("EPA" or "Complainant"), submits the following in reply to Respondent, New York State Department of Transportation's ("DOT" or "Respondent") Response to Complainant's Motion for Partial Accelerated Decision ("Response"). For the reasons described below, the DOT's Response fails to demonstrate any genuine issue of material fact regarding the DOT's liability for the four violations at issue in the EPA's Motion for a Partial Accelerated Decision ("Motion"), and therefore, this tribunal should grant the Motion and declare Respondent liable as a matter of law.

II. COMPLAINANT'S MOTION

In its Motion, the EPA demonstrated, through its memorandum of law, accompanying exhibits, and an affidavit, that the DOT is liable, as a matter of law, to the United States for four violations alleged in the June 15, 2016 Complaint that commenced this administrative proceeding ("the Complaint"). Specifically, the Motion sought an order from this tribunal establishing and declaring that, as a matter of law, Respondent is liable for violating Section 301(a) of the Clean Water Act ("CWA" or the "Act"), 33 U.S.C. § 1311(a), by failing to comply with certain terms of the New York State Department of Environmental Conservation ("DEC") State Pollutant Discharge Elimination System ("SPDES") General Permit for Stormwater Discharges from Municipal Separate Storm Sewer Systems (MS4s), issued pursuant to Section 402 of the Act, 33 U.S.C. § 1342. The four violations at issue in the Motion are: (1) failure to have a written directive for an illicit discharge detection and elimination ("IDDE") program, in violation of Part VIII.A.3.f.ii of the Permit; (2) failure to provide required information about illicit discharges to the public, in violation of Part VIII.A.3.h of the Permit; (3) failure to develop a public complaint system for construction site stormwater runoff, in violation of Part VIII.A.4.a.v of the Permit; and (4) failure to retain records of a Quality Control/Quality Assurance Construction Review Program, in violation of Part V.B of the Permit.

III. RESPONDENT'S RESPONSE

A. Waiver of Penalty in the Interest of Justice

In its Response, the DOT asks this tribunal to waive any penalty in the interest of justice, and attempts to dispute three of the four violations at issue in the Motion. As an initial matter, the EPA notes that, pursuant to this tribunal's scheduling order, the Motion seeks a limited ruling on liability; it does not address penalty. Therefore, the DOT's request for this tribunal to waive a penalty is neither responsive to the Motion nor appropriate at this time. In any event, the DOT offers no legal or factual

basis to support its allegation that the interest of justice requires waiver of the penalty. Therefore, the DOT's request to waive a penalty should be denied.

B. Uncontested Jurisdictional Elements

The Motion demonstrates that the DOT is subject to the CWA because it is (1) a "person," (2) who discharged pollutants, (3) from point sources, (4) to waters of the United States. Significantly, the DOT does not challenge these underlying jurisdictional elements in its Response. Therefore, because Respondent has failed to demonstrate that any genuine issue of material fact exists regarding the jurisdictional elements, this tribunal should find them established as a matter of law.

C. Expiration of 2015 MS4 General Permit

Respondent notes that the 2015 MS4 General Permit expired in 2017, but remains in effect. Complainant agrees, and notes that, since all of the violations at issue in the Complaint are premised on earlier permits, this observation has no bearing on Respondent's liability.

D. Alleged Implication of Delay

The DOT complains that the EPA's use of the words, "finally corrected all of its violations," in its Motion implies that the DOT was dilatory in correcting its violations. Response at 2. The EPA intended no such implication in its Motion. In that context, "finally" merely refers to the last in a series of compliance actions and submissions that occurred over the course of two years. In any event, any delay in compliance would be relevant to the penalty, not the liability, phase of this matter. Therefore, the EPA reserves its right to present evidence regarding the timeliness of the DOT's remedial actions in the context of any hearing or subsequent motion on penalty.

E. Offer of Settlement

The DOT notes that it made a monetary settlement offer to Complainant on November 27, 2017. Response at 2. What the DOT does not mention is that its offer was to settle the $150,000 proposed penalty, which arises from more than 16,000 days of violation, for just $500. The EPA reasonably

rejected that offer as insufficient to remedy the DOT's systemic and longstanding violations of the Permit. It is also noted that this offer was made well after the EPA filed and served the Motion. In any event, the parties' settlement discussions are irrelevant to the issue of the DOT's liability.

F. CWA Liability

The DOT first alleges, without reference to any particular violation and without any evidentiary support, that no illicit discharges were discovered during the audits. As an initial matter, this allegation is irrelevant to the Motion since none of the four violations upon which the EPA has moved are predicated upon an alleged illicit discharge. Therefore, this allegation fails to raise a genuine issue of material fact regarding the DOT's liability. In any event, the EPA disputes this allegation. During its audit of the DOT's Region 9, in June of 2012, the EPA discovered dry weather discharges from the DOT's system into the Susquehanna River that were likely caused by illicit discharges into the system. See, e.g., Exhibit 6: CX 30, Pages 673-74 (Photographs 1-4) and 678 (Photograph 11).

Regarding the EPA's allegation that the DOT failed to have a written directive for an IDDE program, the DOT first misstates the EPA's allegation, stating that it is for failure to produce a written directive "for ensuring compliance with and enforcement of mechanisms for the IDDE program." Response at 2. As stated in the Motion, Part VIII.A.3.f.ii of the 2010 MS4 General Permit requires permittees, as part of their IDDE program, to have "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." (Italics added). This is the third of four separate requirements under Part VIII.A.3.f.ii of the 2010 MS4 General Permit. In arguing that "connection permits … and contract provisions are accepted mechanisms for ensuring compliance," the DOT appears to be referring to one or more of the other requirement(s) in that permit section. Because those requirements are independent of the one cited by the EPA, compliance with those requirements, even if established, does not demonstrate compliance

with the provision that the EPA has found the DOT to have violated. Moreover, the DOT provides no evidence to contest the EPA's evidence that the DOT had no such written directive from at least June 18, 2012 until February 5, 2016. The DOT also, inexplicably, and without evidentiary support, states that it "has no jurisdiction to enforce the IDDE Program outside of its limited right-of-way." Response at 2. While the EPA disagrees with this statement, it notes that this allegation, even if true, is irrelevant to whether the DOT had the required written directive. Therefore, because the EPA established this violation in its Motion, and Respondent has failed to demonstrate that any genuine issue of material fact exists regarding this claim, this tribunal should find the DOT liable as a matter of law.

Regarding the EPA's allegation that the DOT failed to provide required information about illicit discharges to the public, the DOT admits that it chose not to do so, instead doing so only for its employees, but argues that the permit does not require it to provide the information to the public. Response at 2. Respondent is mistaken. As described the Motion, Part VIII.A.3.h of the 2010 MS4 General Permit requires permittees to "inform the public of the hazards associated with illegal discharges and the improper disposal of waste," and Part VIII.A of the Permit states that "traditional non-land use control MS4s and non-traditional MS4s should consider their public to be the employee/user population, visitors, or contractors/developers." The Permit then states that, "[e]xamples of the public include, but are not limited to: [for] transportation covered entities: the general public using or living along transportation systems ..." Id. In addition to admitting its failure to comply with this requirement, the DOT provides no evidence to contest the showing in the EPA's Motion that the DOT violated this provision from at least June 18, 2012 until April 30, 2015. Having failed to demonstrate that any genuine issue of material fact exists regarding this claim, this tribunal should find the DOT liable as a matter of law.

Regarding the EPA's allegation that the DOT failed to develop a public complaint system, the DOT appears to argue that an email address on a web page, that its staff in DOT Region 9 were unaware

of and for which there is no documented procedure for response or follow up, constitutes a public complaint system. The DOT is incorrect. As described in the Motion, Part VIII.A.4.a.v of the 2010 MS4 General Permit requires permittees 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." As demonstrated in the Motion, the DOT had no such system from at least June 18, 2012 until September 30, 2015. The DOT also contends that the EPA "notes ... that there was a non-written procedure for directing ... complaints to the appropriate entities with jurisdiction over the construction sites." Response at 2-3. This is incorrect. The EPA merely noted that DOT representatives described having communicated with the DEC about one complaint in DOT Region 5 in 2011. One isolated instance does not constitute a public complaint system or program. In an attempt to justify this failure, the DOT argues, without evidence or legal authority, that its "jurisdiction is limited to its right-of-way." Response at 3. Presumably the DOT is attempting to argue that it lacks the ability to influence the conduct of its contractors in areas beyond its rights-of-way. The EPA disputes the DOT's limited view of its authority, since it is the public agency responsible for contracting for construction related to its transportation system. In any event, such a view is irrelevant to the claim at issue; the DOT's ability to directly remedy a problem on a particular site is independent of its ability to comply with the Permit requirement to establish a public complaint system. Therefore, because the EPA established this violation in its Motion, and the DOT has failed to demonstrate that any genuine issue of material fact exists regarding this claim, this tribunal should find Respondent liable for violating the CWA as a matter of law.

Finally, the DOT completely fails to respond to the fourth claim in the Motion, that the DOT failed to retain records of a quality control/quality assurance construction review program. The Motion amply supports a finding of this violation and the DOT has failed to demonstrate that any genuine issue

of material fact exists regarding this claim. Accordingly, this tribunal should find the DOT liable for violating the CWA as matter of law.

CONCLUSION

Based on the foregoing, the EPA submits that the DOT's Response to the Motion fails to demonstrate that any genuine issue of material fact exists regarding the four violations at issue. Therefore, the EPA is entitled to judgment as a matter of law, and respectfully requests that the Court find that the DOT is liable for the four violations of Section 301(a) the CWA, 33 U.S.C. § 1311(a), at issue in its Motion. Complainant asks this tribunal to: (1) render a judgment as a matter of law declaring that Respondent is liable for those violations; (2) issue an order granting Complainant partial accelerated decision on the corresponding findings of fact and conclusions of law in its Complaint; and (3) grant Complainant such other and further relief as this tribunal deems lawful and proper.

Dated: December 21, 2017
New York, New York

Respectfully submitted,

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

CERTIFICATION OF SERVICE

I hereby certify that the foregoing Complainant's Reply to Respondent's Opposition to the Motion for Partial Accelerated Decision on Liability, dated December 21, 2017, was sent this day to the following parties in the manner indicated below.

Yolanda Majette, Secretary

Original and One Copy by OALJ E-Filing System to:
Headquarters Hearing Clerk
Office of Administrative Law Judges
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Copy by Certified Mail to:
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For Respondent

Dated: December 21, 2017
New York, NY