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.	)	

CORRECTED INITIAL DECISION AND ORDER[1]

DATED: July 14, 2020

BEFORE: Chief Administrative Law Judge Susan L. Biro

APPEARANCES: For Complainant:

Christopher Saporita, Esquire
Jason P. Garelick, Esquire
U.S. Environmental Protection Agency, Region 2
290 Broadway, 16th Floor
New York, NY 10007

For Respondent:

Alicia McNally, Esquire
David Winans, Esquire
Division of Legal Affairs
New York State Department of Transportation
50 Wolf Road, 6th Floor
Albany, NY 12232

PROCEDURAL HISTORY

[1] On page 112 of the Initial Decision and Order issued on June 29, 2020, an incorrect docket number for this matter was provided. This Corrected Initial Decision and Order is being issued to rectify that error.

On June 16, 2016, Complainant, the Director of the Division of Enforcement and Compliance Assurance, Region 2, United States Environmental Protection Agency ("EPA" or "the Agency"), filed an Administrative Complaint, Findings of Violation, Notice of Proposed Assessment of an Administrative Penalty, and Notice of Opportunity to Request a Hearing ("Complaint") against Respondent, the New York State Department of Transportation. The Complaint charges Respondent with 16,218 days of violation of Section 301(a) of the Clean Water Act ("CWA" or "Act"), 33 U.S.C. § 1311(a), based upon its failure to comply with the New York State Pollutant Discharge Elimination System General Permit for Stormwater Discharges from Municipal Separate Storm Sewer Systems in effect at the time, issued pursuant to Section 402(b) of the CWA, 33 U.S.C. § 1342(b). As a consequence, Complainant proposed that a civil administrative penalty in the amount of $150,000 be assessed against Respondent.

Respondent filed an Answer to Administrative Complaint ("Answer") on February 3, 2017,[1] at which time the case was transferred by the Regional Hearing Clerk for Region 2 to this Tribunal for adjudication. The parties subsequently participated in an Alternative Dispute Resolution process offered by this Tribunal but were unable to resolve this matter. Litigation then commenced. Complainant 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, Complainant filed a Motion for Partial Accelerated Decision on Liability, which the parties proceeded to fully brief. The parties also filed Joint Stipulations identifying 18 stipulated facts, among other stipulations. *See* Joint Stipulations (Jan. 12, 2018). I subsequently issued an Order on Motion for Partial Accelerated Decision on January 29, 2018.

After being postponed on two occasions at the request of Respondent, an evidentiary hearing was conducted April 3-5, 2018, in Albany, New York. At the hearing, Complainant proffered the testimony of six witnesses during the presentation of its case-in-chief: Christy Arvizu, Kortney Kirkeby, Bobby Jacobsen, Anthony D'Angelo, and Jacob Albright. Respondent, in turn, proffered the testimony of four witnesses during the presentation of its case-in-chief: Ellen Kubek, Dan Hitt, Carl Kochersberger, and Jonathan Bass. Upon completion of Respondent's case, Complainant proffered the testimony of Ms. Arvizu and Justine Modigliani in rebuttal. In addition to this testimony, I admitted into evidence 62 exhibits proffered by Complainant (marked as CX 1-6, 8-11, 13-17, 22-27, 30-37, 39-42, 44, 45, 47-66, 69, and 72-77), 63 exhibits proffered by Respondent (marked as RX 1, 2, 3 (pages 1-4), 4, 5, 7-9, 11-29, 31-34, 36-43, 45-50, 52-57, 59-64, 66, 67, and 70-73), and the parties' Joint Stipulations (marked as JX 1).[2]

---

[1] While Respondent initially filed an answer on July 20, 2016, the Regional Judicial Officer of Region 2 subsequently granted Respondent's motion to withdraw it. *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). The Regional Judicial Officer also afforded Respondent additional time to file a new answer, which Respondent ultimately did on February 3, 2017.

[2] A number of Complainant and Respondent's exhibits were identical, such as CX 4 and RX 5; CX 30 and RX 8; CX 35 and RX 7; CX 40 and RX 12; CX 42 and RX 14; and CX 60 and RX 64. When relying upon any such exhibits in this Initial Decision, I cite to only one set of the given exhibits in the interest of efficiency.

After this Tribunal received the official transcript of testimony taken at the hearing, electronic copies were transmitted to counsel for the parties by email, and I issued an Order Scheduling Post-Hearing Submissions, which established deadlines for the parties to file any motions to conform the transcript to the actual testimony taken and post-hearing briefs. Those deadlines were extended on multiple occasions at the request of the parties, largely due to the exceptionally poor quality of the transcript, which required extensive corrections. The parties ultimately filed motions to conform the transcript to the actual testimony taken on June 22, 2018. I granted those motions in part, with the exception of Respondent's Motion to Conform Transcript, which I denied as moot.[3] *See* Order on the Parties' Motions to Conform the Hearing Transcript (July 31, 2018).

The parties then proceeded to file post-hearing briefs over an extended period. Specifically, Complainant filed its Post-Hearing Brief in Support of its Proposed Findings of Fact, Conclusions of Law, and Order Assessing Administrative Penalties ("Complainant's Initial Brief" or "Complainant's Br.") on August 17, 2018. Respondent filed its Initial Post-Hearing Brief in Opposition to Complainant's Proposed Findings of Fact, Conclusions of Law, and Proposed Order (Respondent's Initial Brief" or "Respondent's Br.") on October 5, 2018. Complainant filed a Post-Hearing Reply Brief in Opposition to Respondent's Initial Post-Hearing Brief and in Further Support of its Proposed Findings of Fact, Conclusions of Law, and Order Assessing Administrative Penalties ("Complainant's Reply") on November 2, 2018. Finally, Respondent filed its Post-Hearing Reply Brief in Opposition to Complainant's Reply Brief ("Respondent's Reply") on November 30, 2018.

LEGAL BACKGROUND

Codified at 33 U.S.C. §§ 1251-1388, the CWA was enacted by Congress to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). In furtherance of this objective, Section 301(a) of the CWA prohibits "the discharge of any pollutant by any person," except as in compliance with certain sections of the Act, including Section 402. 33 U.S.C. § 1311(a). Section 402 establishes the National Pollutant Discharge Elimination System ("NPDES") permit program, which authorizes EPA and states approved by EPA to issue permits allowing for the discharge of pollutants, notwithstanding the prohibition set forth in Section 301(a), subject to certain requirements and conditions. 33 U.S.C. § 1342(a)-(b). Thus, those sections of the Act operate to bar any person from discharging a pollutant "without obtaining a permit and complying with its terms." *EPA v. California*, 426 U.S. 200, 205 (1976).

For purposes of the relevant provisions of the CWA, the phrase "discharge of a pollutant" is defined to mean "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). The CWA proceeds to define the term "pollutant" as "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes,

[3] All references to the transcript in this Initial Decision and Order are to the transcript as corrected by my Order on the Parties' Motions to Conform the Hearing Transcript. Citations to this transcript will be in the following format: "Tr. at [page number]."

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). In turn, the term "navigable waters" is defined as "waters of the United States." 33 U.S.C. § 1362(7). The term "point source" is defined as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). The term "person" is defined to include any "State, municipality, commission, or political subdivision of a state." 33 U.S.C. § 1362(5). The term "municipality" is then defined to include "a city, town, borough, county, parish, district, association, or other 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). Finally, regulations promulgated to implement the CWA define the phrase "waters of the United States," in part, as "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," and tributaries of those waters. *See, e.g.*, 40 C.F.R. § 122.2 (2011).

Of particular relevance to this proceeding, Section 402(p) of the CWA subjects discharges of storm water, including discharges of storm water from municipal separate storm sewer systems ("MS4s"), to regulation under the NPDES permit program. 33 U.S.C. § 1342(p). According to Section 402(p), permits for discharges of storm water from MS4s "may be issued on a system- or jurisdiction-wide basis," "shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers," and "shall require 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).

In enacting regulations to implement this provision of the CWA, EPA observed:

> Stormwater 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. Furthermore, the increased volume and velocity of stormwater discharges that result from the creation of impervious cover can alter streams and rivers by causing scouring and erosion. These surface water impacts can threaten public health and safety due to the increased risk of flooding and increased level of pollutants; can lead to economic losses to property and fishing industries; can increase drinking water treatment costs; and can decrease opportunities for recreation, swimming, and wildlife uses.

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). The ensuing regulations define the term "storm water" as "storm water runoff, snow melt runoff, and surface runoff and drainage." 40 C.F.R. § 122.26(b)(13) (2011).

In addition, the regulations define an MS4 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) [o]wned 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 . . . that discharges to waters of the United States; (ii) [d]esigned or used for collecting or conveying storm water; (iii) [w]hich is not a combined sewer; and (iv) [w]hich is not part of a Publicly Owned Treatment Works . . . .

40 C.F.R. § 122.26(b)(8) (2011). The regulations distinguish between large, medium, and small MS4s based primarily on the population of the place where the system is located, with small MS4s consisting of systems that are located in incorporated places with populations of less than 100,000 and that are not defined as "large" or "medium" MS4s. *See* 40 C.F.R. § 122.26(b)(4), (b)(7), (b)(16), (b)(18) (2011). The term "includes 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) (2011). The regulations define the term "incorporated place" as "a city, town, township, or village that is incorporated under the laws of the State in which it is located." 40 C.F.R. § 122.26(b)(3) (2011). 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) (2011). Further, the "additions of pollutants into waters of the United States from: surface runoff which is collected or channeled 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 (2011).

The regulations proceed to expound upon the circumstances under which small MS4s require coverage under an NPDES permit, stating that small MS4s, including those operated by State departments of transportation, are regulated if located in an "urbanized area" as determined by the latest Decennial Census of the Bureau of the Census.[4] 40 C.F.R. § 122.32(a)(1) (2011). The operator of a regulated small MS4 is required to seek coverage under an NPDES permit through the applicable NPDES permitting authority, which is the state in which the MS4 is located when the state has been authorized by EPA to administer the NPDES permit program. 40 C.F.R. § 122.33(a) (2011). Where the NPDES permitting authority has issued a general permit applicable to discharges of storm water from small MS4s,[5] the operator is required to submit a Notice of Intent ("NOI") to the NPDES permitting authority in order to seek coverage under that general permit. 40 C.F.R. § 122.33(b)(1) (2011).

---

[4] The regulations also identify certain criteria that qualify a small MS4 for a waiver from permit coverage. *See* 40 C.F.R. § 122.32(c)-(e). Respondent has not argued that it was entitled to any such waiver.

[5] The regulations promulgated to implement the NPDES permit program authorize the issuance of general NPDES permits covering a category of discharges, as opposed to a specific individual discharge, where a number of point sources operating within a specific geographic area 1) involve the same or substantially similar types of operations; 2) discharge the same types of wastes; 3) require the same effluent limitations or operating conditions; 4) require the same or similar monitoring requirements; and 5) are deemed to be more appropriately controlled under a general NPDES permit than under individual NPDES permits. 40 C.F.R. § 122.28(a).

As for the obligations imposed on regulated small MS4s, the regulations direct that NPDES permits covering such systems require operators to develop, implement, and enforce a storm water management program ("SWMP") designed to reduce the discharge of pollutants from the regulated small MS4s to the maximum extent practicable in order to protect water quality and satisfy the appropriate water quality requirements of the Clean Water Act. 40 C.F.R. § 122.34(a) (2011). More specifically, the regulations direct SWMPs to include requirements for minimum control measures ("MCMs") addressing (1) public education and outreach on storm water impacts; (2) public involvement and 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 and good housekeeping for municipal operations. 40 C.F.R. § 122.34(a), (b) (2011).

When a person is found to have violated certain sections of the CWA or a condition of a permit issued pursuant to Section 402 of the CWA that implements such sections, EPA 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) (2011) ("The permittee must comply with all conditions of [an NPDES] permit. Any permit noncompliance constitutes a violation of the Clean Water Act and is grounds for enforcement action.").

FACTUAL BACKGROUND

I. RESPONDENT AND ITS COVERAGE UNDER NEW YORK'S GENERAL PERMIT FOR STORM WATER DISCHARGES FROM MS4S

In 1975, EPA authorized the State of New York to administer the federal NPDES program for discharges of pollutants into navigable waters within the state. *See* N.Y. ENVTL. CONSERV. LAW, art. 17, tit. 8; *Nat. Res. Def. Council, Inc. v. N.Y. State Dep't of Envtl. Conservation*, 34 N.E.3d 782, 785 (N.Y. 2015). New York's version of the federal NPDES program, known as the State Pollutant Discharge Elimination System ("SPDES") program, is administered by the New York State Department of Conservation ("NYSDEC" or "DEC"). *See* N.Y. ENVTL. CONSERV. LAW, art. 17, tit. 8; *Nat. Res. Def. Council, Inc.,* 34 N.E.3d at 785. On January 8, 2003, NYSDEC first issued a general permit applicable to discharges of storm water from small MS4s within the state, entitled SPDES General Permit for Stormwater Discharges from Municipal Separate Stormwater Sewer Systems (MS4s), Permit Number GP-02-02 ("2003 MS4 Permit"). CX 2.

Respondent is a public agency established under the laws of the State of New York for purposes of developing and maintaining various systems of transportation within the state. *See* JX 1 ¶ I.1; Compl. ¶ III.1; Answer ¶ III.1; N.Y. TRANSP. LAW, art. 2; ABOUT NEW YORK STATE DEPARTMENT OF TRANSPORTATION: RESPONSIBILITIES AND FUNCTIONS, https://www.dot.ny.gov/about-nysdot/responsibilities-and-functions (last visited Oct. 24, 2019). It employs approximately 8,000 individuals and operates through a number of offices and facilities, such as its Headquarters office in Albany, New York; 11 regional offices located throughout the state, including Western New York (Region 5), Hudson Valley (Region 8), and Southern Tier (Region 9); and dozens of fixed facilities, including approximately 60 maintenance facilities known as

residencies, throughout the state. Compl. ¶ III.7; Answer ¶ III.7; ABOUT NEW YORK STATE DEPARTMENT OF TRANSPORTATION: REGIONAL OFFICES, https://www.dot.ny.gov/regional-offices (last visited Oct. 24, 2019); Tr. at 210-11, 553-54, 558-59. As part of its responsibilities, Respondent operates and maintains a statewide network of small MS4s located in urbanized areas throughout New York, which contained approximately 16,800 storm water outfalls along state-owned highways as of 2015. JX 1 ¶¶ I.3, 4; Compl. ¶ III.3; Answer ¶ III.3; CX 59 at 273-74. The number of outfalls in Regions 5, 8, and 9 at that time were 2,368, 6,699, and 722, respectively. CX 59 at 274.

On March 10, 2003, Respondent submitted an NOI to NYSDEC to be covered under the 2003 MS4 Permit, and NYSDEC authorized coverage of Respondent's MS4s by letter dated April 2, 2003. JX 1 ¶ I.5; CX 1; Tr. at 33-35. Thereafter, the 2003 MS4 Permit expired in 2008 and was replaced by General Permit Number GP-0-08-002 ("2008 MS4 Permit"); the 2008 MS4 Permit expired in 2010 and was replaced by General Permit Number GP-0-10-002 ("2010 MS4 Permit"); the 2010 MS4 Permit expired in 2015 and was replaced by General Permit Number GP-0-15-003 ("2015 MS4 Permit"); and the 2015 MS4 Permit, which, on its face, expired in 2017, was administratively extended and remained in effect at the time of the hearing in this proceeding. JX 1 ¶¶ I.6-10; CX 2-CX 5. Coverage of Respondent's MS4s continued under each of these permits. JX 1 ¶¶ I.6-10.

Pursuant to the permits, Respondent developed an SWMP, as well as a Stormwater Management Program Plan ("SWMP Plan") to document elements of its SWMP, for use by its MS4s around the state. JX 1 ¶ I.11; CX 4 at 96 (defining the term Stormwater Management Program Plan). In particular, Respondent issued an SWMP Plan in May 2012 and June 2013. JX 1 ¶ I.12; CX 30 at 157-252; CX 39 at 174-268.

II. EPA'S AUDITS OF RESPONDENT

Beginning in 2012, EPA evaluated Respondent's compliance with the 2010 MS4 Permit[6] and associated SWMP Plan in effect at the time through information obtained during a series of audits.[7] Specifically, staff from EPA, with the assistance of contractors from PG Environmental, LLC ("PG Environmental"), and accompanied by a representative from NYSDEC, conducted audits in three of Respondent's operating regions: Region 9, on June 19-21, 2012; Region 8, on November 27-29, 2012; and Region 5, on June 25-27, 2013. JX 1 ¶¶ I.13-15; Compl. ¶ III.8; Answer ¶ III.8; CX 30; CX 35; CX 39; Tr. at 29-32. Christy Arvizu, the lead inspector of MS4s for EPA's Region 2, coordinated the audits on behalf of EPA. Tr. at 32; CX 77. The audits focused on Respondent's implementation of four of the six MCMs required by the 2010 MS4 Permit: MCM 3 (illicit discharge detection and elimination); MCM 4 (construction site storm water runoff control); MCM 5 (post-construction storm water management); and MCM 6 (pollution prevention and good housekeeping for municipal operations). Tr. at 38-39; CX 30 at 4; CX 35 at 4; CX 39 at 4. In order to obtain information related to Respondent's

[6] The 2010 MS4 Permit was in effect at the time of the audits and applies to the alleged violations in this proceeding. JX 1 ¶ I.8; Compl. ¶ III.9; Answer ¶ III.9.

[7] An audit was described at the hearing as "an in-depth look at the MS4," involving " a detailed overview of the MS4 program from start to finish [and] how the program is managed upfront." Tr. at 29.

implementation of those MCMs, the auditors interviewed Respondent's staff, reviewed records, and conducted site visits and field verification activities. CX 30 at 4; CX 35 at 4; CX 39 at 4. At the conclusion of each audit, the auditors held a closing conference with Respondent's staff, at which time Respondent's staff was given an overview of the auditors' preliminary observations. *See, e.g.*, Tr. at 294-95, 320.

A. Audit of Region 9

Respondent's Region 9 comprises Broome, Chenango, Delaware, Otsego, Schoharie, Sullivan, and Tioga counties, and its headquarters is in Binghampton, New York. CX 30 at 3-4. By letter dated May 18, 2012, EPA notified Respondent of its intent to evaluate Respondent's compliance with the 2010 MS4 Permit in Region 9 by conducting a "mini-audit" from June 19 through June 21, 2012. CX 8; Tr. at 39. EPA attached to the letter a document entitled "Pre Audit Questionnaire and Records Request" ("Records Request"), which identified information sought by EPA from Respondent to assist in its evaluation. CX 9; Tr. at 40-41. EPA requested that nine of the items identified be provided in advance of the audit, while the remainder be provided during the audit. CX 8 at 2. EPA also sent Respondent a tentative agenda for the audit. CX 10; Tr. at 42.

By letter dated May 30, 2012, Respondent confirmed receipt of the foregoing materials. CX 11; Tr. at 41. Respondent subsequently submitted its response to the Records Request on June 7, 2012. CX 13; Tr. at 42. Therein, Respondent chronicled the documents that it provided in response to EPA's request for records and those purported to be unavailable. CX 13.

Ms. Arvizu of EPA, Ellen Hahn in her capacity as a Stormwater Control Specialist for NYSDEC,[8] and three contractors from PG Environmental, including Kortney Kirkeby, proceeded to conduct the audit beginning on June 19, 2012. CX 30 at 5. The audit involved a review of the documents made available by Respondent; interviews of Respondent's Statewide Stormwater Program Coordinator, Dave Graves, and representatives of Respondent's Region 9; and site visits to five storm water outfalls, three active construction projects, three storm water management practices ("SMPs"), and three operations and maintenance facilities. CX 30 at 4, 11, 20-21, 28, 36. Ms. Arvizu and the contractors from PG Environmental subsequently generated a report, dated January 30, 2013, containing descriptions of their observations, as well as photographs of the conditions they observed and copies of such documents as the 2010 MS4 Permit and the SWMP Plan issued by Respondent in May 2012. CX 30; Tr. at 32, 42.

B. Audit of Region 8

Respondent's Region 8 comprises Columbia, Dutchess, Orange, Putnam, Rockland, Ulster, and Westchester counties, and its headquarters is in Poughkeepsie, New York. CX 35 at 3; *see* Tr. at 30. EPA notified Respondent by letter[9] of its intent to evaluate Respondent's compliance with the 2010 MS4 Permit in Region 8 through a "mini-audit" conducted from

[8] Ellen Hahn's surname is now Kubek, and since January 9, 2014, she has been an Environmental Specialist employed by Respondent. Tr. at 386, 430; RX 73.
[9] The copy of the letter admitted into the record is undated.

November 27 through November 29, 2012. CX 31. As it did for the audit of Region 9, EPA attached a Records Request to the letter. CX 33. EPA requested that 12 of the items identified be provided in advance of the audit, while the remainder be provided during the audit. CX 31 at 2. EPA also sent Respondent a tentative agenda for the audit. CX 32. Respondent subsequently submitted a response to the Records Request, identifying the documents that it provided in response to EPA's request for records and those purported to be unavailable. CX 34.

Ms. Arvizu and Chris Mecozzi of EPA, Natalie Browne of NYSDEC, and three contractors from PG Environmental, including Bobby Jacobsen and Anthony D'Angelo, proceeded to conduct the audit beginning on November 27, 2012. CX 35 at 5. The audit involved a review of the documents made available by Respondent; interviews of Mr. Graves and representatives of Respondent's Region 8; and site visits to four active construction projects, several post-construction sites to inspect best management practices ("BMPs"), and eight operations and maintenance facilities. CX 35 at 4, 18, 27, 31. Ms. Arvizu and the contractors from PG Environmental subsequently generated a report, dated January 29, 2013, containing descriptions of their observations, as well as photographs of the conditions they observed and copies of such documents as the 2010 MS4 Permit and the SWMP Plan issued by Respondent in May 2012. CX 35; Tr. at 32, 42-43.

C. Audit of Region 5

Respondent's Region 5 comprises Niagara, Erie, Cattaraugus, and Chautauqua counties, and its headquarters is in Buffalo, New York. CX 35 at 3; *see* Tr. at 30. By letter dated May 22, 2013, EPA notified Respondent of its intent to evaluate Respondent's compliance with the 2010 MS4 Permit in Region 5 through a "mini-audit" conducted from June 25 through June 27, 2013. CX 36. As it did for the audits of Regions 9 and 8, EPA attached a Records Request to the letter. CX 36 at 5-9. EPA requested that nine of the items identified be provided in advance of the audit, while the remainder be provided during the audit. CX 36 at 2. EPA also sent Respondent a tentative agenda for the audit. CX 36 at 3-4. Respondent subsequently submitted a response to the Records Request, identifying the documents that it provided in response to EPA's request for records and those purported to be unavailable. CX 37.

Ms. Arvizu of EPA, Bill Murray of NYSDEC, and three contractors from PG Environmental, including Anthony D'Angelo and Jacob Albright, proceeded to conduct the audit beginning on June 25, 2013. CX 39 at 5. The audit involved a review of the documents made available by Respondent; interviews of Mr. Graves and representatives of Respondent's Region 5; and site visits to three storm water outfalls, one active construction project, seven post-construction sites to inspect BMPs, and nine operations and maintenance facilities. CX 39 at 4, 11, 19, 23, 31. Ms. Arvizu and the contractors from PG Environmental subsequently generated a report, dated December 17, 2013, containing descriptions of their observations, as well as photographs of the conditions they observed and copies of such documents as the 2010 MS4 Permit and the SWMP Plan issued by Respondent in June 2013. CX 39; Tr. at 32, 42-43.

III. POST-AUDIT EVENTS

Following the audits, Complainant issued an Administrative Compliance Order ("ACO"), dated March 5, 2014, alleging that Respondent had violated the CWA by failing to comply with 19 provisions of the 2010 MS4 Permit, as determined by the audits. JX 1 ¶ I.16; CX 40 at 6-13; Tr. at 43-44. To remedy the violations, Complainant directed in the ACO that Respondent take certain corrective actions and set deadlines for their completion. CX 40 at 13-20.

On May 13, 2014, representatives of Respondent, EPA, and NYSDEC met and negotiated revisions to the timetable for Respondent to complete the corrective actions as described in the ACO and thereby come into compliance with the 2010 MS4 Permit. *See, e.g.*, Tr. at 45-46, 431-32, 434; RX 16 at 1, 4. Among others, Ms. Arvizu and Justine Modigliani from EPA, and Jonathan Bass, Dan Hitt, Carl Kochersberger, and Ms. Kubek from Respondent, participated in the meeting. RX 16 at 4. Complainant subsequently issued a revised ACO, dated June 5, 2014, to reflect the modified schedule agreed upon by the meeting participants. JX 1 ¶ I.16; CX 47 at 1-22; Tr. at 46-47.

Between April 15, 2014, and February 5, 2016, Respondent undertook numerous corrective actions and made numerous submissions to EPA to achieve compliance with the 2010 MS4 permit, pursuant to the provisions of the revised ACO. *See, e.g.*, JX 1 ¶ I.17; CX 47-59; Tr. at 47-48. At the direction of Mr. Hitt, who was then serving as the acting Director of Respondent's Office of Environment, Mr. Bass and Ms. Kubek coordinated those activities. Tr. at 574-75, 587-88, 667, 671-72. Complainant subsequently filed the Complaint that initiated this proceeding, alleging that Respondent had violated 15 requirements of the 2010 MS4 Permit a total of 17 times and was thus liable for 16,218 days of violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a). CX 60; Tr. at 48.

BURDEN OF PROOF

This matter is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Rules of Practice") set forth at 40 C.F.R. Part 22. Pursuant to Section 22.24(a) of the Rules of Practice:

> The complainant has the burdens of presentation and persuasion that the violation occurred as set forth in the complaint and that the relief sought is appropriate. Following complainant's establishment of a prima facie case, respondent shall have the burden of presenting any defense to the allegations set forth in the complaint and any response or evidence with respect to the appropriate relief. The respondent has the burdens of presentation and persuasion for any affirmative defenses.

40 C.F.R. § 22.24(a). In carrying their respective burdens of proof, the parties are subject to a preponderance of the evidence standard. 40 C.F.R. § 22.24(b). To prevail under this standard, a party must demonstrate that the facts the party seeks to establish are more likely than not to be true. *See, e.g., Smith Farm Enterprises, LLC*, 15 E.A.D. 222, 228-29 (EAB 2011) ("A factual determination meets the preponderance of the evidence standard if the fact finder concludes that it is more likely true than not.") (citing *Julie's Limousine & Coachworks, Inc.*, 11 E.A.D. 498,

507 n.20 (EAB 2004); *Lyon Cty. Landfill*, 10 E.A.D. 416, 427 n.10 (EAB 2002), *aff'd*, 2004 U.S. Dist. LEXIS 10651 (D. Minn. June 7, 2004), *aff'd*, 406 F.3d 981 (8th Cir. 2005); *Bullen Cos., Inc.*, 9 E.A.D. 620, 632 (EAB 2001)).

LIABILITY

I. COMPLAINANT'S PRIMA FACIE CASE

A. The Complaint

In the Complaint, Complainant cites Section 309(g)(1) of the CWA, 33 U.S.C. § 1319(g)(1), as the statutory authority under which the Complaint was issued. Compl. ¶ II.16. That provision provides, in pertinent part:

> Whenever on the basis of any information available –
> (A) the Administrator finds that any person has violated section 1311, 1312, 1316, 1317, 1318, 1322(p), 1328, or 1345 of this Act, or has violated any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State . . .
> the Administrator . . . may . . . assess . . . a class II civil penalty under this subsection.

33 U.S.C. § 1319(g)(1). Thus, in order for EPA to seek a civil administrative penalty under Section 309(g)(1), it must assert a violation of one of the statutory provisions listed therein *or* a violation of "any permit condition or limitation implementing any of such sections in a permit issued under section 1342."

Far from a model of clarity, the Complaint initiating this proceeding appears to conflate these two distinct bases for an enforcement action under Section 309(g)(1). The Complaint first identifies 15 requirements of the 2010 MS4 Permit that Respondent allegedly violated, as demonstrated by information obtained during EPA's audits of Regions 9, 8, and 5. Compl. ¶ III.10. It then alleges that based upon those purported violations of the 2010 MS4 Permit, Respondent is liable for 16,218 days of violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a). Compl. ¶¶ I.2, III.14. Considering the statutory and regulatory provisions set forth above, a violation of Section 301(a) can be divided into five critical elements of liability as follows: (1) any "person" (2) that "discharges a pollutant" (3) into "a water of the United States" (4) from a "point source" (5) without a permit issued pursuant to Section 402, or contrary to the terms and conditions of such a permit, is in violation of the CWA. It follows that liability would attach only to discharges of pollutants that occurred at the time the person in question lacked coverage for the discharges under a permit issued pursuant to Section 402 or was out of compliance with such a permit, which would render those discharges unlawful. Under either scenario, proof of a specific discharge of a pollutant would be required. *See Service Oil, Inc.*, 2006 WL 3406345, at *6 (EPA ALJ Mar. 7, 2006) (Order on Complainant's Motion for Accelerated Decision on Liability and Penalties) ("[T]o prove a violation of Section 301(a), there must be proof of an actual discharge of a pollutant.").

During the course of this proceeding, however, Complainant has made clear that it is seeking to hold Respondent liable not for 16,218 days of unlawful discharges of pollutants from its system of MS4s but for Respondent's failure to comply with the particular terms and conditions of the 2010 MS4 Permit identified in the Complaint over periods of time amounting to a total of 16,218 days, irrespective of whether a discharge occurred on any of those days. *See, e.g.*, Complainant's Rebuttal Prehearing Exchange at 6 ("[N]one of the alleged violations was based on the existence of an illegal discharge. The Complaint alleges violations of the terms of the MS4 General Permit . . . ."). Respondent did not raise any challenge to the Complaint as written or to Complainant's approach to the allegations. It also did not seek reconsideration or interlocutory appeal of my Order on Motion for Partial Accelerated Decision, which ruled on Complainant's request for accelerated decision as to a subset of the alleged violations of the 2010 MS4 Permit. Underlying that Order was the understanding that the Complaint seeks to impose a civil administrative penalty pursuant to Section 309(g)(1) because of violations of the terms of the 2010 MS4 permit under Section 402(p) rather than unlawful discharges of pollutants constituting violations of Section 301(a). Both parties and this Tribunal proceeded to rely upon that reading of the Complaint at the hearing, where the parties focused their presentations of evidence on Respondent's alleged failure to comply with provisions of the 2010 MS4 Permit and Respondent did not raise any claim that it was surprised or disadvantaged by that approach to the charged violations.

Thus, the record reflects that although the alleged violations of the 2010 MS4 permit were not precisely pled as the basis for this enforcement action under Section 309(g)(1), Complainant has pursued a theory of liability based solely on those alleged violations with the implied consent of Respondent, and those alleged violations have been fairly litigated. In *H.E.L.P.E.R., Inc.*, the Environmental Appeals Board ("EAB" or "Board") considered circumstances where a complainant presented evidence at the hearing in support of arguments that the Board found had not been properly pled in the complaint but had been fairly litigated at the hearing, notwithstanding the objections of the respondent. *H.E.L.P.E.R., Inc.*, 8 E.A.D. 437, 448-51 (EAB 1999). The Board looked to its jurisprudence under Rule 22.14 of the Rules of Practice, which generally allows for amendments to a complaint, and case law developed under Rule 15(b) of the Federal Rules of Civil Procedure, which specifically allows for amendments to pleadings during and after trial,[10] and held that it was appropriate to treat the complaint as having

[10] The Federal Rules of Civil Procedure may serve as guidance for this Tribunal and the EAB. *See, e.g., Euclid of Va.,, Inc.*, 13 E.A.D. 616, 657 (EAB 2008) ("[I]t is appropriate for Administrative Law Judges and the EAB to consult the Federal Rules of Civil Procedure and Federal Rules of Evidence for guidance...."); *Carroll Oil Co.*, 10 E.A.D. 635, 649 (EAB 2002) ("In the absence of administrative rules on [a] subject, it is helpful to consult the Federal Rules of Civil Procedure as they apply in analogous situations."). The particular rule invoked by the Board in *H.E.L.P.E.R., Inc.*, provides:

> (b) Amendments During and After Trial.
>
> (1) Based on an Objection at Trial. If, at trial, a party objects that evidence is not within the issues raised in the pleadings, the court may permit the pleadings to be amended. The court should freely permit an amendment when doing so will aid in presenting the merits and the objecting party fails to satisfy the court that the evidence would prejudice that party's action or defense on the merits. The court may grant a continuance to enable the objecting party to meet the evidence.

been implicitly amended to conform to the evidence presented at the hearing. *See id.* In discussing such amendments in another matter, the EAB also pointed to the following:

> The purpose of an amendment to conform to proof is to bring the pleadings in line with the actual issues upon which the case is tried; therefore an amendment after judgment which brings in some entirely extrinsic issue or changes the theory on which the case was actually tried is not permissible, even though there is evidence in the record – introduced as relevant to some other issue – which would support the amendment. This principle is sound, since it cannot be fairly said that there is any implied consent to try an issue if the parties do not squarely recognize it as an issue in the trial. The test should be whether the defendant would be prejudiced by the implied amendment, i.e., whether he had a fair opportunity to defend and whether he could offer any additional evidence if the case were to be retried on a different theory.

J.V. Peters & Co., 2 E.A.D. 177, 182-83 fn.9 (EAB 1986) (quoting 3 MOORE'S FEDERAL PRACTICE, ¶ 15.130-.131 (2d ed. 1985)). The principles guiding the Board in those decisions clearly apply here. While Complainant has not formally sought to amend the Complaint, I find that it is appropriate to treat it as implicitly amended such that it asserts violations of the 2010 MS4 Permit as the basis for this enforcement action under Section 309(g)(1). Accordingly, it is unnecessary for Complainant to establish that Respondent unlawfully discharged pollutants from its system of MS4s in violation of Section 301(a) of the CWA in order to prevail in this proceeding.

B. Respondent's Violations of the 2010 MS4 Permit

As discussed above, the statute provides that a violation of "any permit condition or limitation implementing [Sections 1311, 1312, 1316, 1317, 1318, 1322(p), 1328, or 1345] in a permit issued under section 1342" is enforceable under Section 309(g)(1). The terms and conditions of the 2010 MS4 Permit that Respondent purportedly violated appear to implement Section 308(a) of the CWA, which states, in pertinent part:

> Whenever required to carry out the objective of this chapter . . . the Administrator shall require the owner or operator of any point source to (i) establish and maintain such records, (ii) make such reports, (iii) install, use, and maintain such monitoring equipment or methods (including where appropriate, biological monitoring methods), (iv) sample such effluents (in accordance with such methods, at such locations, at such intervals, and in such manner as the Administrator shall prescribe), and (v) provide such other information as he may reasonably require . . . .

> (2) For Issues Tried by Consent. When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move – at any time, even after judgment – to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. But failure to amend does not affect the result of the trial of that issue.

Fed. R. Civ. Pro. 15(b).

33 U.S.C. § 1318(a). Thus, the alleged violations of the 2010 MS4 Permit set forth in the Complaint are enforceable under Section 309(g)(1) of the Act.

Respondent, who first sought coverage under the 2003 MS4 Permit and has maintained coverage under each successive general permit issued by NYSDEC for storm water discharges from small MS4s, has not disputed its obligation to obtain and abide by a permit covering discharges from its MS4s. *See, e.g.*, Respondent's Br. at 5 ("Under the terms of the permit that [it] was required to obtain, DOT assumed certain obligations.") (referring to the 2003 MS4 Permit). The question remaining is whether Respondent failed to fulfill the terms of the 2010 MS4 Permit as alleged. In order for Complainant to prevail on the issue of liability, it must then establish by a preponderance of the evidence that Respondent violated the particular requirements of the 2010 MS4 Permit identified in the Complaint. Complainant endeavors to satisfy its burden with regard to liability by relying on the testimonial and documentary evidence presented by Christy Arvizu and four of the contractors from PG Environmental who participated in the audits, Kortney Kirkeby, Bobby Jacobsen, Anthony D'Angelo, and Jacob Albright. In its defense, Respondent relies primarily on the testimonial and documentary evidence presented by Ellen Kubek, who was qualified at the hearing as an expert in storm water management and erosion and sediment control. *See* Tr. at 387-88. Each part of the 2010 MS4 Permit that Respondent allegedly violated is addressed below and grouped by the particular MCM at issue.[11]

1. Illicit Discharge Detection and Elimination

The 2010 MS4 Permit defines a "discharge" as "any addition of any pollutant to waters of the State through an outlet or point source" and an "illicit discharge" as any discharge to a small MS4 that is "not entirely composed of stormwater," subject to certain exemptions.[12] CX 4 at 88, 90. As then explained by Respondent's 2012 and 2013 SWMP Plans, illicit discharges, which can include "sanitary sewage, septic system effluent, industrial process wastewater, laundry wastewater, commercial carwash wastewater, and auto and household toxics improperly dumped into storm drains," are thought of as "illicit" because "stormwater systems are not designed to accommodate or treat non-stormwater wastes." CX 30 at 178; CX 39 at 194. The SWMP Plans continue:

> Illicit discharges can enter the stormwater system through direct connections (such as wastewater pipes either mistakenly or deliberately connected to a storm drain or outletting into a ditch) or indirect connections (such as infiltration into the stormwater system through cracks in a sanitary sewer). The result is untreated discharges that release high levels of pollutants into receiving waterbodies.

[11] Thus, the alleged violations are not necessarily addressed in the order in which they appear in the Complaint.

[12] This definition of the term "illicit discharge" comports with the definition set forth in the regulations promulgated by EPA on this subject, which describe an "illicit discharge" as "any discharge to a municipal separate storm sewer that is not composed entirely of storm water except discharges pursuant to a NPDES permit (other than the NPDES permit for discharges from the municipal separate storm sewer) and discharges from fire fighting activities." 40 C.F.R. § 122.26(b)(2) (2011).

CX 30 at 178; CX 39 at 194. In the Complaint, Complainant alleges that Respondent failed to implement certain provisions of the 2010 MS4 Permit as they relate to illicit discharge detection and elimination ("IDDE").

a. Part VIII.A.3.f.ii

Complainant alleges in the Complaint that Respondent violated Part VIII.A.3.f.ii of the 2010 MS4 Permit. Compl. ¶ III.10.e. Among other provisions related to the requirement that owners and operators of non-traditional MS4s[13] prohibit illicit discharges into their MS4s and implement appropriate enforcement measures, Part VIII.A.3.f.ii requires such MS4s to possess a written directive from the person authorized to sign the NOI requiring the use of "updated mechanisms" for its IDDE program and identifying all positions responsible for ensuring compliance with and enforcing those mechanisms. CX 4 at 54, 55, 56. I concluded in the Order on Motion for Partial Accelerated Decision that Respondent failed to comply with this requirement from at least June 19, 2012, the day on which the first audit conducted by EPA began, to February 5, 2016, the day on which Respondent submitted the required written directive to EPA. Order on Motion for Partial Accelerated Decision (Jan. 29, 2018), at 13. Complainant proceeds to argue in its Initial Brief, however, that Respondent's failure to comply began as early as July 1, 2011, a date "chosen by the EPA in its discretion," as the record lacks evidence that the required written directive existed prior to the audits.[14] Complainant's Br. at 34-35. Respondent does not challenge Complainant's position on this point. *See* Respondent's Br. at 17. Given the circumstances, I can infer that Respondent did not possess the written directive prior to EPA's audits. Accordingly, I find that Respondent's failure to comply with Part VIII.A.3.f.ii began on or before July 1, 2011, and continued until February 5, 2016, for a total of 1,680 days, as alleged.

b. Part VIII.A.3.g

Complainant alleges in the Complaint that Respondent violated Part VIII.A.3.g of the 2010 MS4 Permit. Compl. ¶ III.10.f. That provision requires all covered entities[15] to develop and implement a program for detecting and addressing non-stormwater discharges to their small MS4s. CX 4 at 56. It further mandates that such programs include "procedures for identifying priority areas of concern (geographic, audiences, or otherwise) for IDDE program; description of priority areas of concern, available equipment, staff, funding, etc.; procedures for identifying and

[13] As reflected in the 2010 MS4 Permit, an MS4 is identified by a particular designation based upon the entity that owns or operates it and the type of land use control authority that that entity possesses. Specifically, the 2010 MS4 Permit defines the term "traditional land use control MS4" as "a city, town, or village with land use control authority" and the term "traditional non-land use control MS4" as "any county agency without land use control." CX 4 at 97. Meanwhile, it defines the term "non-traditional MS4" as including state transportation agencies. CX 4 at 92. For purposes of the 2010 MS4 Permit, Respondent is treated as operating a "non-traditional MS4" in that it is a state transportation agency that possesses legal authority, particularly with regard to land use control, differing from that of a "traditional" MS4 owner or operator, such as a city or county government.

[14] In its Initial Brief, Complainant erroneously refers to Part VIII.A.3.b.i as the section of the 2010 MS4 Permit that I found Respondent to have violated in the Order on Motion for Partial Accelerated Decision. *Compare* Complainant's Br. at 34 *with* Order on Motion for Partial Accelerated Decision (Jan. 29, 2018), at 13.

[15] The 2010 MS4 Permit defines the term "covered entity" as the "holder" of the Permit, an entity required to gain coverage under the Permit, and the owner or operator of a small MS4. CX 4 at 88.

locating illicit discharges (trackdown); procedures for eliminating illicit discharges; and procedures for documenting actions." *Id.*

i. Parties' Arguments

In support of its position that Respondent failed to develop and implement a program fulfilling the requirements of Part VIII.A.3.g, Complainant first argues that documents produced by Respondent that addressed the subject of IDDE were each lacking in some manner. Specifically, Complainant notes that EPA requested in each Records Request sent to Respondent prior to the audits that Respondent provide, among other information, "[w]ritten procedures for field screening outfalls and procedures for IDDE." Complainant's Br. at 35 (citing CX 13 at 2; CX 34 at 2; CX 37 at 2; Tr. at 55-56). As observed by Complainant, Respondent responded to those requests by providing EPA with documents related to the inspection of outfalls. *See* CX 13 at 2 (identifying the responsive document as "Instructions for Conducting Outfall Inspections"); CX 34 at 2 (identifying the responsive document as "Outfall Inspection training and procedures"); CX 37 at 2 (identifying the responsive documents as "Instructions for Conducting Outfall Inspections" and "Operations Stormwater Outfall Inventory Form"). Pointing to testimony from Ms. Arvizu concerning her determination that those documents were inadequate for purposes of satisfying the requirements of Part VIII.A.3.g, Complainant argues that instructions for conducting inspections of outfalls "merely describe field procedures for how to perform inspections," which is far from conveying a plan of action for locating and eliminating illicit discharges and documenting the measures it took to do so. Complainant's Br. at 36 (citing Tr. at 55-59); *see also* Complainant's Br. at 39-40 (arguing that the document identified as "Outfall Inspection training and procedures," which was provided during the audit of Region 8, consisted of a slide presentation that only vaguely touched upon procedures for eliminating illicit discharges).

Complainant proceeds to note that one of the documents provided by Respondent, entitled "Instructions for Conducting Outfall Inspections," refers to another document, entitled "Environmental Handbook for Transportation Operations" ("Environmental Handbook"), as describing "the protocol to eliminate suspected illicit discharges." Complainant's Br. at 36 (citing CX 30 at 527). Complainant points out that the version of the Environmental Handbook in effect at the time of the audits devotes fewer than two pages to the subject, much of which consists of a recitation of Respondent's obligations under the Permit. Complainant's Br. at 36 (citing CX 58 at 108-09). With respect to the detection of illicit discharges, Complainant maintains, the Environmental Handbook "takes a completely passive, almost incidental, approach . . . , instructing DOT staff to act only if they happen to discover an illegal connection or illicit discharge during the conduct of other duties." Complainant's Br. at 36 (citing CX 58 at 108-09). Noting that the Environmental Handbook directs staff to report any illicit discharges ultimately to the Resident Engineer, who bears the responsibility of documenting the finding and arranging for an investigation by the appropriate agency, Complainant argues that the Environmental Handbook "says nothing after that about illicit discharge detection and elimination," such as "which agency might be contacted, what the DOT's role would be thereafter, and how elimination of the illicit discharge would be confirmed and documented." Complainant's Br. at 37 (citing CX 58 at 109).

Complainant next looks to the SWMP Plan appended to the audit report for Region 9,[16] observing that it quotes the text of the Environmental Handbook concerning IDDE but adds a paragraph stating that the New York State Department of Health ("NYSDOH") is responsible for investigating any illicit discharges involving sanitary sewage and NYSDEC is responsible for investigating any other illicit discharges. Complainant's Br. at 37 (citing CX 30 at 180). Complainant notes that Respondent's representatives confirmed this practice during the audits and explained that Respondent did not have any written procedures for investigating and eliminating an illicit discharge beyond reporting it to the appropriate agency. Complainant's Br. at 37 (citing CX 35 at 14-15; CX 39 at 15; Tr. at 57). Denouncing these measures, Complainant argues that Respondent still lacked procedures for determining whether a discharge involved sanitary sewage, who to contact at NYSDOH or NYSDEC, how to follow up, and how to ensure and document the elimination of the illicit discharge. Complainant's Br. at 38. Complainant notes that the SWMP Plan also refers to Chapter 8 of a document entitled "Highway Design Manual," which purportedly articulates policy and direction as to the identification and elimination of illicit discharges. Complainant's Br. at 38 (citing CX 30 at 179). However, Complainant argues, the version in effect at the time of the audits provides only "vague guidance" lacking instructions for such matters as the detection and elimination of illicit discharges not involving sanitary sewage. Complainant's Br. at 39.[17]

Finally, Complainant points to statements made by Respondent's staff during the audits as demonstrating the absence of an adequate program for detecting and eliminating illicit discharges. Complainant's Br. at 40. For example, Complainant notes that several of Respondent's staff indicated during the audits that they were not aware of what an illicit discharge is or how to identify one and that Respondent's staff indicated during the audit of Region 9 in particular that formal procedures for identifying, locating, and eliminating discharges had not been implemented, aside from outfall inspection activities. Complainant's Br. at 40 (citing CX 30 at 15; CX 35 at 15; CX 39 at 15).

Complainant concludes that Respondent finally demonstrated its compliance with the requirements of Part VIII.A.3.g when it submitted "a complete program" on December 1, 2015. Complainant's Br. at 40 (citing CX 58 at 15-21; Tr. at 327). Complainant contends that this program implements a number of measures, documented in "six pages of new procedures," including:

> establish[ing] a Regional Illicit Discharge Point of Contact within each DOT region; clarify[ing] and detail[ing] the process for working with other agencies and/or municipalities to track down and eliminate illicit discharges; establish[ing] an "Investigation Team" containing all of the people responsible for tracking down and eliminating the discharge; expand[ing] the instructions for DOT staff who initially confirm the illicit discharges to include not only the previously provided

[16] Complainant erroneously cites the effective date of that SWMP Plan as June 2012, rather than May 2012. *See* Complainant's Br. at 37 (citing CX 30).

[17] After noting that the version of the Highway Design Manual in effect at the time of the audits is no longer available by way of the web links provided in the SWMP Plan, Complainant cites to "Att. A at 18" and "Att. at 19" for the pertinent text of that document. Complainant's Br. at 39. However, it is unclear from those citations where the text can be found in the record.

> instructions for outfall reconnaissance inventory, but also instructions on "indicator monitoring" to help determine the nature of the discharge; and incorporat[ing] a new database for tracking illicit discharges from detection through elimination.

Complainant's Br. at 41 (citing CX 58 at 15-21; Tr. at 327).

Respondent counters that Complainant effectively concedes the adequacy of Respondent's program by devoting three pages of its brief to detailing the procedures comprising the program. Respondent's Br. at 18. Respondent further argues that it did not modify any of the allegedly deficient procedures, such as its practice of referring an illicit discharge originating outside of Respondent's right-of-way to the appropriate agency, in the written description of the program that it submitted to EPA on December 1, 2015, and yet EPA accepted the program as satisfying the applicable provision of the revised ACO at that time, such that the program as described in the December 1, 2015 submission "is nearly identical to what had existed prior to the audits." Respondent's Br. at 19 (citing CX 58; Tr. at 445, 473). As an example, Respondent contends, notwithstanding Complainant's criticism in its brief that Respondent's approach to IDDE was impermissibly "passive," EPA did not require that Respondent play a more proactive role in investigating illicit discharges in order to come into compliance. Respondent's Br. at 19. Pointing to the testimony of Ms. Kubek, Respondent argues that it was simply required "to write down and elaborate on procedures already in place." Respondent's Br. at 19 (citing Tr. at 480-81). Respondent concedes only that the program "was not in writing to the extent the EPA demanded to satisfy the [revised ACO]." Respondent's Br. at 19 (citing Tr. at 473).

In response, Complainant disputes Respondent's characterization of its original and final submissions on this subject as being substantially similar. Complainant's Reply at 9. Complainant maintains that despite Respondent's claims that the only difference between its programs before and after the audits was its coordination with actors controlling adjoining sewer systems outside of its right-of-way, Complainant has demonstrated that "the differences – and improvements – are far more significant than that, resulting in a thoroughly connected framework for guiding interactions among systems to address illicit discharges where there once was none." Complainant's Reply at 9.

ii. Discussion

Upon review of the documentary and testimonial evidence in the record, I agree with Complainant that Respondent was not in compliance with Part VIII.A.3.g of the 2010 MS4 Permit at the time of the audits. As noted above, Part VIII.A.3.g identifies a number of components that a program for detecting and addressing illicit discharges is required to include, and while the record contains several documents produced by Respondent during the course of the audits that address IDDE to some degree, I find that those documents fail to encompass all of the required elements specified in Part VIII.A.3.g.

First, the documents identified by Respondent as being responsive to EPA's request prior to each audit for "[w]ritten procedures for field screening outfalls and procedures for IDDE" – namely, the documents entitled "Instructions for Conducting Outfall Inspections," "Outfall Inspection training and procedures," and "Operations Stormwater Outfall Inventory Form" – do

not fulfill the requirements of Part VIII.A.3.g given that those documents focus primarily on the detection of illicit discharges, with only limited references to the elimination of such discharges. For example, the document entitled "Instructions for Conducting Outfall Inspections," which Respondent provided in response to EPA's requests concerning at least Regions 9 and 5 and was appended to the audit report for each of the three audits,[18] explicitly states that the 2010 MS4 Permit "requires that regulated MS4s develop a stormwater management program that includes an Illicit Discharge Detection and Elimination Program" and that "[i]nspection of drainage outfalls is [only] one component of this program." CX 30 at 527; CX 35 at 509; CX 39 at 522. Specifically, the document states, inspections of outfalls are conducted for the purpose of locating discharges of pollutants from MS4s to waterbodies. CX 30 at 527; CX 35 at 509; CX 39 at 522. However, as noted by Complainant, the document merely describes procedures for conducting such inspections. And aside from directing Respondent to notify the appropriate regulatory agency of any illicit discharge found to originate from a source outside of Respondent's right-of-way to enable that agency to eliminate the discharge, the document acknowledges that procedures for eliminating illicit discharges are "beyond the scope of the [subject of the document]." CX 30 at 527; CX 35 at 509-10; CX 39 at 523.

While the document proceeds to refer readers to the Environmental Handbook for such procedures, I agree with Complainant that the version of that document in the record, dated June 2011, also lacks sufficient details concerning the elimination of illicit discharges. Additionally, it does not identify any specific procedures for documentation of actions taken to track and eliminate illicit discharges. For example, as noted by Complainant, the Environmental Handbook states that a Resident Engineer receiving a report of an illicit discharge "should document the finding and arrange for a site investigation by the appropriate agency," without providing any guidance as to the proper manner for documenting the illicit discharge or determining the agency to be contacted. RX 4 at 18. The 2012 and 2013 SWMP Plans elaborate on those procedures to the extent that they identify the appropriate agency to investigate a suspected illicit discharge based upon the type of illicit discharge at issue,[19] but as argued by Complainant, they still lack such information as how to ascertain the nature of the illicit discharge, who specifically to contact at the appropriate agency about the suspected illicit discharge, and how to coordinate with that agency to ensure that the illicit discharge is eliminated. The 2012 and 2013 SWMP Plans appear to recognize these shortcomings, stating that a Memorandum of Understanding between Respondent and NYSDOH concerning Respondent's policy of reporting illicit discharges consisting of sanitary sewage to NYSDOH may require updates "to better reflect Illicit Discharge Detection and Elimination requirements and to identify appropriate agency contact staff." CX 30 at 180; CX 35 at 178; CX 39 at 196. While the 2012 and 2013 SWMP Plans point readers to the "Highway Design Manual" for additional information, the extent to which that document fills any gaps is unclear given that, as I

[18] While a document entitled "Instructions for Conducting Outfall Inspections" was appended to each audit report, they appear to differ to some extent. For example, the date "June 2012" appears at the bottom of each page of the version of the document appended to the audit reports for the audits of Regions 9 and 8, while it does not appear on the version of the document appended to the audit report for the audit of Region 5. None of the observed differences affect my evaluation of whether Respondent complied with Part VIII.A.3.g, however.

[19] The 2012 and 2013 SWMP Plans purport to quote from the Environmental Handbook, but they include a paragraph in the quotation not appearing in the version of that document in the record. *Compare* CX 30 at 180 and CX 39 at 196 *with* CX 58 at 109 and RX 4 at 18.

noted above, the version of the Manual in effect at the time of the audits could not be located in the evidentiary record. The 2012 and 2013 SWMP Plans also note that "[t]o address the issue that [private connections to its system of MS4s] may result in illicit discharges entering the state drainage system, NYSDOT has developed a DRAFT Engineering Instruction to clarify and emphasize department policy regarding sanitary connections, stormwater connections, sanitary discharges, and illicit discharges." CX 30 at 179; CX 35 at 177; CX 39 at 195. However, that document also does not appear to be in the evidentiary record, and in any event, the 2012 and 2013 SWMP Plans acknowledge that it was not in effect during the relevant period. CX 30 at 179; CX 35 at 177; CX 39 at 195.

Accordingly, I find that, as argued by Complainant, the foregoing evidence reflects "scattered, uncoordinated, and reactive procedures" that fall short of a comprehensive program encompassing the required elements identified in Part VIII.A.3.g. Complainant's Reply at 9. A finding that Respondent lacked such a program is supported by the evidence in the record concerning the level of awareness among Respondent's staff of the procedures in place at the time of the audits. For example, Mr. Albright, a contractor from PG Environmental who participated in the audit of Region 5, testified that conversations with Respondent's staff during the audit reflected "a general unawareness of what an illicit discharge was and the proper steps to follow up to mitigate it." Tr. at 302. Similarly, the audit reports indicate that several of Respondent's staff were unaware of what an illicit discharge is or how to identify one. CX 30 at 18; CX 35 at 15; CX 39 at 15. Further, the audit report for Region 9 states that Respondent's staff explained to EPA "that formal procedures other than outfall reconnaissance activities had not been implemented for identifying, locating, and eliminating illicit discharges." CX 30 at 18. The audit report for Region 8 reflects a greater awareness among Respondent's staff of the procedures in place to the extent that "[t]he NYSDOT Acting Regional Environmental Manager explained that when an illicit discharge is reported to NYSDOT by its staff or the public, NYSDOT notifies NYSDEC, and conducts its own follow-up inspection to trace the flow upstream as far as feasible." CX 35 at 15. However, the audit report also notes that "NYSDOT does not have procedures to investigate illicit discharges other than sending information to NYSDEC for follow-up." *Id.* Additionally, the NYSDOT Acting Regional Environmental Manager seemingly was unaware of Respondent's policy of reporting illicit discharges of sanitary sewage to NYSDOH. *See id.*

Respondent's arguments to the contrary are unavailing. Specifically, Respondent contends that procedures nearly identical to those submitted on December 1, 2015, in satisfaction of the revised ACO were in place at the time of the audits and points to the testimony of Ms. Kubek in support. Ms. Kubek testified in particular about Respondent's practices related to tracking illicit discharges and referring discharges found to originate outside of Respondent's right-of-way to the appropriate outside entities. *See, e.g.*, Tr. at 440, 444-45, 449-50, 472-73. She also testified that Respondent simply expanded on its existing procedures in order to come into compliance. *See* Tr. at 448-49 ("We made changes to the established program, which basically amounted to adding more language to it, more words to describe our procedures."); Tr. at 473 ("It is the exact same procedures, and we were required to elaborate on that program."); Tr. at 481 ("[W]e lengthened that program by just elaborating on each of the procedures that we've already had in place."). I agree that some practices reflected in the documentation discussed above and described at the hearing appear to have been kept in the version of the

program submitted to EPA on December 1, 2015, including the referral of illicit discharges found by Respondent to originate outside of its right-of-way to other entities. *See* CX 58 at 8-21. However, that fact does not negate my finding that certain elements were otherwise lacking. Indeed, the December 1, 2015 submission reflects that Respondent added numerous details to the program in the wake of the audits – including the designation of a Regional Illicit Discharge Point-of-Contact within each region and a detailed description of that person's duties with regard to investigating, documenting, and following up on all illicit discharges until elimination had been confirmed and recorded in accordance with the procedures outlined in the final version of the program – such that its program satisfied the requirements of Part VIII.A.3.g. *See id*. Thus, Respondent may not have modified the substance of the underlying practices to a considerable degree, but it clearly fleshed out the procedures significantly, thereby establishing "a thoroughly connected framework for guiding interactions among systems to address illicit discharges where there once was none." Complainant's Reply at 9. Additionally, the need for a single, easily identified set of written formal procedures is evident from the lack of awareness among Respondent's staff of the practices in place, and Respondent conceded in its post-hearing brief that its existing practices were not sufficiently documented in writing. Respondent's Br. at 19; *see also* Tr. at 444-45 (testimony of Ms. Kubek that NYSDOT formally adopted and documented a procedure for referring illicit discharges found to originate in a municipal MS4 bounding Respondent's right of way to the municipality). Accordingly, Respondent's attempts to minimize the actions it took to come into compliance are not compelling.

Based on the foregoing discussion, I find that Respondent failed to fulfill the requirements of Part VIII.A.3.g of the 2010 MS4 Permit for a comprehensive program designed to detect and address non-storm water discharges to its system of MS4s. Complainant argues in its Initial Brief that Respondent's failure to comply began as early as July 1, 2011, a date "chosen by the EPA in its discretion," as the record lacks evidence that the required program existed prior to the audits, and continued until December 1, 2015, the date on which it submitted an adequate program. Complainant's Br. at 41. Respondent does not challenge the period alleged by Complainant. *See* Respondent's Br. at 18-20. Given the circumstances, I can infer that Respondent did not have a program fulfilling the requirements of Part VIII.A.3.g prior to the audits. Accordingly, I find that Respondent's failure to comply with that provision began on or before July 1, 2011, and continued until December 1, 2015, for a total of 1,614 days, as alleged.

c. Part VIII.A.3.b.i

Part IV.C.3.b of the 2003 MS4 Permit required permittees to develop and maintain a map depicting the location of all outfalls from their MS4s and the names and locations of all waters of the United States that receive discharges from those outfalls. CX 2 at 14. In turn, Part VIII.A.3.b.i of the 2010 MS4 Permit requires covered entities who began coverage under an earlier version of the permit to "maintain a map, at a minimum within the covered entity's

jurisdiction in the urbanized area[20] and additionally designated area,[21] showing . . . the location of all outfalls and the names and location of all surface waters of the State[22] that receive discharges from those outfalls." CX 4 at 55. Complainant alleges in the Complaint that Respondent violated Part VIII.A.3.b.i of the 2010 MS4 Permit by omitting from the map it maintained pursuant to that provision at least five outfalls located in Regions 9 and 5, as observed during the audits of those Regions. Compl. ¶ III.10.c.

---

[20] The 2010 MS4 Permit defines the term "urbanized area," or UA, as follows:

> Urbanized Area – is a land area comprising one or more places (central place(s)) and the adjacent densely settled surrounding area (urban fringe) that together have a residential population of at least 50,000 and an overall population density of at least 1,000 people per square mile, as defined by the US Bureau of Census. Outlines the extent of automatically regulated areas, often do not extend to the political boundaries of a city, town, or village. SWMPs are only required within the UA. However, [NYSDEC] encourages covered entities to voluntarily extend their SWMP programs at least to the extent of the storm sewershed that flows into the UA or extend further to their entire jurisdiction. For ease of creation and administration of local laws, ordinances or other regulatory mechanisms, these should be created to apply to the full jurisdictional boundary of municipalities.

CX 4 at 97.

[21] The 2010 MS4 Permit defines the term "additionally designated area" as follows:

> Additionally Designated Areas – EPA required the [NYSDEC] to develop a set of criteria for designating additional MS4 areas as subject to these regulations. The following criteria have been adopted to designate additional MS4s in New York State:
>
> Criteria 1: MS4s discharging to waters for which and EPA-approved TMDL required reduction of a pollutant associated with stormwater beyond what can be achieved with existing programs (and the area is not already covered under automatic designation as UA).
>
> Criteria 2: MS4s contiguous to automatically designated urbanized areas (town lines) that discharge to sensitive waters classified as AA Special (fresh surface waters), AA (fresh surface waters) with filtration avoidance determination or SA (saline surface waters).
>
> Criterion 3: Automatically designated MS4 areas are extended to Town, Village or City boundaries, but only for Town, Village or City implementation of Minimum Control Measures (4) Construction Site Stormwater Runoff Control and (5) Post Construction Stormwater Management in Development and Redevelopment. This additional designation may be waived, by written request to the Department, where the automatically designated area is a small portion of the total area of the Town, Village or City (less than 15 %) and where there is little or no construction activity in the area outside of the automatically designated area (less than 5 disturbed acres per year).

CX 4 at 87-88.

[22] The 2010 MS4 Permit defines the term "surface waters of the State" as follows:

> Surface Waters of the State – shall be construed to include lakes, bays, sounds, ponds, impounding reservoirs, springs, rivers, streams, creeks, estuaries, marshes, inlets, canals, the Atlantic ocean within the territorial seas of the state of New York and all other bodies of surface water, natural or artificial, inland or coastal, fresh or salt, public or private . . . , which are wholly or partially within or bordering the state or within its jurisdiction.

CX 4 at 96-97.

i. Parties' Arguments

In support of its position that Respondent failed to maintain a map as required by Part VIII.A.3.b.i, Complainant argues that EPA compared outfalls observed during the audits to the geographic information system ("GIS") map of Respondent's outfalls that Respondent maintained at the time and identified at least five outfalls in Regions 5 and 9 that were not represented on the map. Complainant's Br. at 42. In particular, Complainant notes that as documented in the audit report for the audit of Region 9, EPA observed an outfall from a wet pond near the intersection of Nanticoke Drive and Highway 26 in Endicott, New York, that collects storm water runoff from Highway 26 and ultimately discharges it to Nanticoke Creek, but EPA determined that the outfall was not shown on the GIS map. Complainant's Br. at 42 (citing CX 30 at 12, 678-79). Turning to Region 5, Complainant notes that as documented in the audit report for the audit of Region 5, EPA visited nine maintenance facilities during the audit and determined that outfalls for at least four of those facilities did not appear on the GIS map. Complainant's Br. at 42 (citing CX 39 at 13). Noting that the revised ACO directed Respondent to develop a map depicting the location of all outfalls, including the five identified during the audits as having been erroneously omitted, Complainant asserts that Respondent submitted such a map in satisfaction of the applicable provision of the revised ACO on April 30, 2015. Complainant's Br. at 42 (citing CX 47 at 19; CX 53 at 3, 7; Tr. at 328).

Respondent disputes that it violated Part VIII.A.3.b.i as alleged, arguing that contrary to Complainant's assertions, the map submitted to EPA on April 30, 2015, did not include the five outfalls at issue for the reasons described by Ms. Kubek at the hearing. Respondent's Br. at 20 (citing CX 53 at 3; Tr. at 478-79). Specifically, Respondent asserts, the four outfalls identified by EPA in Region 5 were owned not by Respondent but by the New York State Office of General Services and thus were outside of Respondent's jurisdiction. Respondent's Br. at 20 (citing Tr. at 478-79). With regard to the outfall identified by EPA in Region 9, Respondent maintains that, as explained by Ms. Kubek at the hearing, the pipe in question "was not an outfall at all" but an "outlet" pursuant to guidance from NYSDEC. Respondent's Br. at 20 (citing Tr. at 418-19, 478-79). Accordingly, Respondent asserts, the five outfalls are not represented on the map submitted to EPA on April 30, 2015, which reflects such other revisions as the addition of newly-constructed outfalls and the elimination of outfalls removed from the system during construction activities. Respondent's Br. at 20 (citing CX 53 at 3).

ii. Discussion

As described above, Complainant focuses its arguments related to Respondent's alleged failure to comply with Part VIII.A.3.b.i of the 2010 MS4 Permit on the omission of five outfalls from the database of outfalls maintained by Respondent at the time of the audits.[23] In its

[23] In its Initial Brief, Complainant mentions an instance where the auditors identified a discrepancy between an outfall's location as observed by the auditors and its location as depicted on the GIS map. *See* Complainant's Br. at 42 (citing CX 39 at 24-25, 50). Complainant appears to seek a finding of liability based on the unmapped outfalls alone, however, and I thus do not discuss the purported discrepancy further in this Initial Decision.

defense, Respondent first disputes that the unmapped pipe observed during the audit of Region 9 constituted an "outfall." The 2010 MS4 Permit defines that term as follows:

> Outfall – is defined as any point where a municipally owned and operated separate storm sewer system discharges to either surface waters of the State or to another MS4. Outfalls include discharges from pipes, ditches, swales, and other points of concentrated flow. However, areas of non-concentrated (sheet) flow which drain to surface waters of the State or to another MS4's system are not considered outfalls and should not be identified as such on the system map.

CX 4 at 93. Citing Ms. Kubek's testimony in support, Respondent maintains that the pipe in question is considered an "outlet," rather than an "outfall," pursuant to guidance from NYSDEC. Respondent's Br. at 20 (citing Tr. at 418-19, 478-79). This guidance does not appear to have been entered into the record. Nevertheless, Respondent's position is persuasive in that it is not sufficiently clear from the evidence that was proffered that the subject pipe can be considered to discharge to a surface water, such that it falls within the 2010 MS4 Permit's definition of "outfall." *See* CX 30 at 12, 679; Tr. at 418-419, 479. In particular, while the auditors documented in the audit report for the audit of Region 9 that discharges from the pipe "flow north and eventually enter Nanticoke Creek," extensive vegetation is visible to the north of the pipe in the photographs taken by the auditors, and it is difficult to discern any waterway beyond the vegetation. CX 30 at 12, 679. Ms. Kubek testified in this regard:

> A: [The pipe] is an outlet from the pond, and it discharges to vegetated area, and the creek that this is in the vicinity of is some distance from the pond.
>
> Q: And what is the point of discharging into a vegetating area?
>
> A: The vegetation, as it grows, takes up excess nutrients that may or may not occur in the water discharging to it. The vegetation also stabilizes the embankment to keep it from eroding.
>
> Q: Does the vegetation act as a filtration?
>
> A: The vegetation also filters sediments. It slows down the velocity of the sediment as it's going along the sloped area, and it then traps the sediment to keep it from further eroding down.

Tr. at 419. Based on this evidence, I am not convinced that the definition of "outfall" has been met, and in its Reply, Complainant did not point to any other evidence to shore up its position or otherwise challenge that of Respondent.

Turning to the four outfalls found by the auditors to have been unmapped in Region 5, Respondent again relies on Ms. Kubek's testimony and argues that the outfalls were omitted because they are owned by the New York State Office of General Services and thus outside of Respondent's jurisdiction. Respondent's Br. at 20 (citing Tr. at 478-79). The 2010 MS4 Permit addresses a covered entity's jurisdiction in the context of discussing the coverage area of the

covered entity's SWMP, providing that a covered entity is required to implement its SWMP in the automatically designated urbanized areas and additionally designated areas under its jurisdiction that drain into its small MS4 and subsequently discharge to surface waters of the State directly or through other small MS4s. CX 4 at 15. The 2010 MS4 Permit proceeds to state:

> For the purposes of this SPDES general permit, areas under the covered entity's jurisdiction shall mean areas where the legal authority exists for the subject covered entity to develop and implement an SWMP including the six MCMs. It is not a permit requirement for covered entities to implement and enforce any portion of their SWMP in any area that is under the jurisdiction of another covered entity. For example, if a portion of a town drains directly into a stormwater system owned and operated by the State DOT, and this area of the town is regulated, the DOT will not be required to implement and enforce any portion of a SWMP in the area lying outside of its right of way. In this case, the town would be required to implement the program in the subject area in accordance with this SPDES general permit, this despite the fact that the subject drainage does not directly enter the town's system.

CX 4 at 15 n.3. Based on the sparse evidence in the record concerning the unmapped outfalls in Region 5, it is not clear to me that the outfalls fall within Respondent's jurisdiction, as argued by Respondent. The only evidence identified by Complainant is the following excerpt from the audit report for the audit of Region 5: "[T]he EPA Audit Team observed that MS4 outfall locations for at least four of the nine maintenance facilities visited during the audit were not represented in the GIS. It should be noted that the EPA Audit Team only requested GIS information for four facilities." CX 39 at 13. The maintenance facility inspection reports appended to the audit report, in which the auditors documented their visits to the facilities, do not mention any such outfalls, however. *See* CX 39 at 616-77. Thus, the precise locations of the subject outfalls are unknown. While Respondent clearly conducted operations at the facilities, it does not appear based on the language of the 2010 MS4 Permit to have been required by virtue of those operations to map an outfall if it was outside the bounds of the facility and under the legal authority of another covered entity. It is unknown whether the New York State Office of General Services was a covered entity, and Respondent did not point to any evidence to substantiate Ms. Kubek's testimony concerning the ownership of the subject outfalls. Nevertheless, Complainant did not offer any evidence or argument in rebuttal, and I find that her testimony casts enough doubt to rule against Complainant on this allegation.

Aside from these findings, I also note that the 2010 MS4 Permit appears to contemplate that the mapping of outfalls is routinely subject to modification, and therefore may not be completely accurate at any given time, in that it directs covered entities at Part VIII.A.3.e to "[m]ap new outfalls *as they are constructed or discovered*." CX 4 at 54, 55 (emphasis added). Thus, a violation seemingly would occur only if the owner or operator of the MS4 failed to update the map with the location of an outfall upon its discovery by the owner or operator, or as the case may be, its discovery by regulators.

In accordance with the foregoing discussion, I find that Complainant has not met its burden of demonstrating by a preponderance of the evidence that Respondent violated Part VIII.A.3.b.i as alleged in the Complaint.

d. Part VIII.A.3.d

Part VIII.A.3.d of the 2010 MS4 Permit requires each covered entity to conduct an outfall reconnaissance inventory ("ORI"), as described in a publication from EPA entitled "Illicit Discharge Detection and Elimination: A Guidance Manual for Program Development and Technical Assessment," addressing every outfall "within the urbanized area and additionally designated area" of the covered entity's jurisdiction "at least once every five years, with reasonable progress each year." CX 4 at 55. Noting that this requirement also appears in the 2008 MS4 Permit, the effective date of which was May 1, 2008, Complainant alleges in the Complaint that Respondent violated Part VIII.A.3.d by failing to complete the required ORI or show reasonable progress towards completion at the time of the audits, such that it would have fulfilled the requirement by the five-year deadline of May 1, 2013. Compl. ¶ III.10.d.

i. Parties' Arguments

In its Initial Brief, Complainant first asserts that Part VIII.A of the 2010 MS4 Permit requires entities covered under the 2008 MS4 Permit to continue to implement the MCMs described in Part VIII.A of the latter permit, including the requirement that a covered entity complete an ORI by May 1, 2013. Complainant's Br. at 43. Citing the audit report for Region 8 and the testimony of Ms. Arvizu, among other evidence, Complainant then asserts that Respondent's staff informed EPA during the audit of Region 8 that the ORI for four of the seven counties comprising Region 8 may not be completed by the deadline. Complainant's Br. at 43-44 (citing CX 35 at 11; CX 53 at 7; Tr. at 54-55). Consistent with that statement, Complainant continues, Respondent had inventoried only 50 percent of the outfalls then mapped in Region 8 as of May 1, 2013, and did not complete the ORI until April 30, 2015, as demonstrated by its submission to EPA on that date. Complainant's Br. at 44 (citing CX 53 at 7; Tr. at 54-55, 329). Complainant argues that Respondent thus violated Part VIII.A of the 2010 MS4 Permit. Complainant's Br. at 44.

In response, Respondent does not dispute that it failed to complete the ORI by the deadline established in the 2008 MS4 Permit. *See* Respondent's Br. at 21-22. Rather, Respondent argues that the deadline was unreasonable given the magnitude of Respondent's system of MS4s and that NYSDEC, the entity primarily responsible for overseeing Respondent's compliance, was aware and seemingly approved of Respondent's progress towards completing the ORI at the time of the audits, upon which Respondent "rightfully relied." Respondent's Br. at 21-22 (citing CX 30 at 3; N.Y. TRANSP. LAW, art. 2; CX 4; CX 54; Tr. at 487-89, 511-12, 632-33, 640, 665-66).

Complainant counters that Respondent's argument concerning the reasonableness of the deadline is untimely to the extent that it is based "on a challenge to the EPA's action in 'making any determination as to a State permit program submitted under section [402(b)] of this title,' which must have been brought within 120 days of the promulgation of that permit, in the Second

Circuit." Complainant's Reply at 10 (citing 33 U.S.C. § 1369(b)(1)). Even if Respondent's argument was timely, Complainant argues, Respondent failed to cite any evidence in support, other than pointing to the number of outfalls existing in its network of MS4s. Complainant's Reply at 10. Complainant maintains that contrary to Respondent's claims, the record suggests that Respondent possessed sufficient resources to complete the ORI within a five-year period. Complainant's Reply at 10-11. In particular, Complainant points to the testimony of Mr. Hitt that Respondent might have spent more money to complete the tasks set forth in the revised ACO had it known it would face a penalty, which, according to Complainant, "demonstrates that Respondent is able to marshal resources when it deems a task important enough." Complainant's Reply at 10-11 (citing Tr. at 608-09). Regardless, Complainant contends, Respondent agreed to abide by the terms of the permits by maintaining coverage. Complainant's Reply at 11 (citing CX 1 at 1; CX 2 at 21; CX 3 at 16; CX 4 at 22).

As for Respondent's argument that NYSDEC acquiesced in its violation, Complainant argues that Respondent fails to identify either any authority for shifting liability to NYSDEC or any evidence that NYSDEC was aware of its progress prior to the audit or that it had rendered a determination that the progress was adequate. Complainant's Reply at 11. Moreover, Complainant argues, Ms. Kubek admitted at the hearing "that Respondent repeatedly listed a false number when reporting the number of outfalls it had inventoried in its 2012 and 2013 annual reports to the DEC."[24] Complainant's Reply at 11 (citing Tr. at 510-12).

In its Reply, Respondent urges that it is "not questioning the validity of the [2010 MS4 Permit] or its requirement [regarding an ORI]." Respondent's Reply at 3. Rather, Respondent argues, its position is that the deadline for the ORI was unreasonable as applied to Respondent. Respondent's Reply at 3. Respondent maintains that it is "dedicated to achieving ongoing environmental compliance through a cooperative relationship with the regulating agencies," including NYSDEC in its capacity as the "primary regulator and drafter of the [2010 MS4 Permit]," and "Complainant's heavy-handed arguments flouts [sic] that relationship and DEC's role" given the evidence in the record that "DEC acquiesced to an extended timeline [for Respondent to complete the ORI] by accepting the progress in NYSDOT's annual reports." Respondent's Reply at 2 (citing Tr. at 632-33, 640, 665-66). Respondent also challenges Complainant's arguments concerning the availability of resources to complete the ORI by the deadline as "highlight[ing] the ignorance of EPA's knowledge with regard to the monumental number of tasks performed by state transportation agencies to ensure the safety of the traveling public." Respondent's Reply at 3 n.1.

ii. Discussion

At the outset of this discussion, I note that inconsistencies exist between the violation as charged in the Complaint and the violation as described by Complainant at later stages in this proceeding. First, Complainant asserts in the Complaint that "Part VIII.A.3.d of the Permit" requires each covered entity to conduct an ORI as described therein. Compl. ¶ III.10.d. Complainant proceeds to assert that this requirement also appears in the 2008 MS4 Permit and

[24] The 2010 MS4 Permit requires covered entities to submit annual reports to NYSDEC containing certain information specified in the Permit, including information identified as reporting requirements for each MCM. CX 4 at 18-21; *see also* Tr. at 488.

that Respondent had not completed an ORI or shown reasonable progress towards completion at the time of the audits, such that it would have fulfilled the requirement by the May 1, 2013 deadline established by the 2008 MS4 Permit. *Id.* It then charges Respondent with a violation of "Part VIII.A.3.d of the Permit." *Id.* Complainant initially uses the term "Permit" in the Complaint to refer to the 2015 MS4 Permit. *See* Compl. ¶ II.15 ("NYSDEC issued a SPDES General Permit for Storm Water Discharges from MS4s (GP-0-15-003) ('Permit') on May 1, 2015 and it expires on April 30, 2017. The Permit supersedes the previous SPDES permit (GP-0-10-002) [2010 MS4 Permit] . . . ."). However, in subsequently describing the alleged violations, it uses the term to refer to the 2010 MS4 Permit. *See, e.g.*, Compl. ¶ III.10.a ("Part IV.D of the Permit states that covered entities authorized under the previous permit (GP-0-08-002) [2008 MS4 Permit] . . . ."). Thus, the Complaint can be understood as charging Respondent with failing to comply with Part VIII.A.3.d of the 2010 MS4 Permit.

In its Initial Prehearing Exchange, on the other hand, Complainant alleges that "Respondent violated Part VIII.A.3.d of General Permit GP-0-08-002 [the 2008 MS4 Permit],"[25] rather than the 2010 MS4 Permit. Complainant's Initial Prehearing Exchange at 12. Finally, in its Initial Brief, Complainant asserts that Part VIII.A of the 2010 MS4 Permit requires entities covered under the 2008 MS4 Permit to continue to implement the MCMs described in Part VIII.A of that permit, including the requirement that a covered entity complete an ORI at least once every five years, or by May 1, 2013. Complainant's Br. at 43. Because Respondent failed to fulfill that requirement, Complainant continues, Respondent violated Part VIII.A of the 2010 MS4 Permit. Complainant's Br. at 44. While Complainant does not point to the specific text of Part VIII.A that Respondent purportedly violated, Complainant appears to be referring to the following statement contained in Part VIII.A: "Under this SPDES general permit, the continuing covered entities are required to implement their SWMP, including the MCM requirements [set forth in Part VIII.A]." CX 4 at 49. The term "continuing covered entities" is used in the 2010 MS4 Permit to refer to entities previously covered under the 2008 MS4 Permit whose coverage then continued under the 2010 MS4 Permit. *See, e.g.*, CX 4 at 8, 15. As also stated in Part IV.D of the 2010 MS4 Permit, "[c]overed entities authorized under [the 2008 MS4 Permit] shall continue to fully implement their SWMP, unless otherwise stated in this SPDES general permit [the 2010 MS4 Permit]." CX 4 at 15.

Those inconsistencies aside, it is clear that Complainant is seeking to hold Respondent liable based on Respondent's alleged failure to conduct an ORI addressing every outfall "within the urbanized area and additionally designated area" of Respondent's jurisdiction at least once every five years, with reasonable progress each year, a requirement that was first imposed beginning on May 1, 2008, when the 2008 MS4 Permit took effect. Given that effective date, the deadline for completion of the ORI as mandated by the 2008 MS4 Permit was May 1, 2013. *See* CX 3 at 1, 28. While the 2010 MS4 Permit took effect in the interim, it contains requirements concerning an ORI identical to those appearing in the 2008 MS4 Permit, and it undoubtedly obligates covered entities who were previously covered under the 2008 MS4 Permit to continue to implement those requirements. *See, e.g.*, CX 4 at 8, 15, 49. Nothing in the text of the 2010 MS4 Permit suggests that the drafter of the Permit intended to reset the deadline for their

[25] In discussing the factual bases for the alleged violation of Part VIII.A.3.d of the 2008 MS4 Permit, Complainant erroneously identifies May 1, 2008, as the deadline for Respondent to complete the ORI. *See* Complainant's Initial Prehearing Exchange at 12.

completion. Thus, it appears that Respondent was bound by the deadline of May 1, 2013, as dictated by the 2008 MS4 Permit. Respondent clearly understood the allegations against it, and as reflected in the summary of the parties' arguments, the issue was fairly litigated. Therefore, consistent with the precedence previously discussed, this Initial Decision treats the Complaint as implicitly amended to charge Respondent with a violation of Part VIII.A of the 2010 MS4 Permit arising from Respondent's alleged failure to conduct an ORI by May 1, 2013, as propounded by Complainant in its Initial Brief.

The record contains testimonial and documentary evidence that supports a finding that Respondent failed to complete an ORI by that date. *See* Tr. at 54-55, 329-30; CX 35 at 11 (noting in the audit report for Region 8 that Respondent's staff informed EPA that the ORI for four of the seven counties comprising Region 8 may not be completed by the deadline[26]); CX 53 at 2, 3, 5 (noting in the April 30, 2015 submission from Respondent to EPA that "[t]he current round of outfall inspections has been completed in all NYSDOT Regions," and that Respondent "has completed outfall inspections in all of the initial ten regions," including Region 8, in satisfaction of the pertinent provisions of the revised ACO concerning performance of ORI activities[27]). Moreover, Respondent does not deny that it failed to complete the ORI by May 1, 2013.

In its defense, Respondent does not claim in this proceeding that it was unaware of the May 1, 2013 deadline. Rather, it argues that the deadline was unreasonable, at least as applied to Respondent, given the magnitude of its system of MS4s. This proceeding is the inappropriate forum to raise such an argument, however. As observed by the EAB, it is well established that where a permittee fails to challenge the terms of a state-issued permit under applicable state law, the permittee is barred from later raising objections to the permit in the context of an enforcement proceeding. *Gen. Motors Corp., CPC-Pontiac Fiero Plant*, 7 E.A.D. 465, 474 (EAB 1997) (citing *Pub. Interest Research Group of N.J., Inc. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 77-78) (3rd Cir. 1990); *Sierra Club v. Union Oil Co. of Cal.*, 813 F.2d 1480, 1486-87 (9th Cir. 1987); *Pub. Interest Research Group of N.J. v. Yates Indus.*, 757 F. Supp. 438, 445-46 (D.N.J. 1991); *United States v. CPS Chemical Co.*, 779 F. Supp. 437, 453-54 (E.D. Ark. 1991); *Conn. Fund for the Env't v. Job Plating Co.*, 623 F. Supp. 207, 216 (D. Conn. 1985)), *aff'd*, *Gen. Motors Corp. v. EPA*, 168 F.3d 1377, 1379, 1383 (D.C. Cir. 1999). The EAB explained with regard to the respondent in that matter, "If [the respondent] had objections to any

[26] As noted by Complainant in its Initial Brief, the audit report identifies April 30, 2015, as the deadline for Respondent to complete the ORI "under the current Permit." CX 35 at 11. However, as discussed above, the deadline for completion of the ORI was dictated not by the 2010 MS4 Permit but by the 2008 MS4 Permit.

[27] It is evident from the first page of CX 53, which consists of an email transmission from Jonathan Bass of Respondent's Office of Environment to Ms. Arvizu, among others, that Respondent sent both an electronic copy and hard copy of its April 30, 2015 submission to EPA and that the electronic copy was the version admitted into the record of this proceeding. *See* CX 53 at 1. Attachments A and F to this submission purportedly contain documentation of the ORI activities performed by Respondent. *See* CX 53 at 2, 5. However, as reflected in both Mr. Bass's email and the coversheets for Attachments A and F included in CX 53, Respondent did not provide the bodies of those attachments in its electronic submission to EPA but, rather, provided them in hard copy only. *See* CX 53 at 1, 7, 56. While Complainant cites to the coversheet for Attachment A as support for the alleged violation, it does not cite to any page of the body of that attachment, and I am unable to locate anything but the coversheets for Attachments A and F in the record. Therefore, I am unable to view those attachments to confirm their contents.

condition of its 1988 permit (or to the permit itself), it had the opportunity as well as the obligation to raise such objections at the time the permit was issued under existing State procedures." *Gen. Motors Corp., CPC-Pontiac Fiero Plant*, 7 E.A.D. at 474-75. While the EAB applied this principle in rejecting a challenge to a state-issued *individual* NPDES permit, the fact that Respondent is challenging a state-issued *general* NPDES permit in the present proceeding hardly seems to call for a different conclusion. If Respondent objected to a term or condition of the 2010 MS4 Permit or its predecessors, it had every opportunity to seek modification of the Permit by following the procedures established under New York law. *See* N.Y. ENVTL. CONSERV. LAW § 70-0115 (McKinney 2019); N.Y. COMP. CODES R. & REGS. tit. 6 §§ 621.13, 750-1.81 (2019). Alternatively, if Respondent believed that the size of its system of MS4s distinguished it from other owners and operators of small MS4s to such a degree that the terms of the general permits were unreasonable as applied to Respondent, it had every opportunity to seek coverage under an individual permit with terms that it considered to be better tailored to its particular circumstances. I have not seen anything in the record showing that Respondent availed itself of those opportunities.[28] Rather, Respondent maintained its coverage under the 2010 MS4 Permit without adaptation and thus bound itself to abide by the terms of that Permit. Accordingly, Respondent is now precluded from challenging the reasonableness of the requirement that it complete an ORI at least once every five years, or any other term of the 2010 MS4 Permit, to defend against liability in this proceeding.

Respondent also contends that NYSDEC acquiesced in the violation, but this argument also fails to absolve Respondent of liability for failing to complete the ORI by the prescribed deadline. First, as argued by Complainant, the record lacks sufficient evidence that NYSDEC was fully aware of Respondent's progress towards completion or the probability that Respondent would complete the ORI after the five-year deadline. The annual reports that Respondent submitted to NYSDEC for the reporting periods ending on March 9, 2012, and March 9, 2013, reflect that Respondent reported having inspected 999 outfalls as part of its ORI for each period. CX 30 at 405; CX 35 at 403; CX 39 at 420. At the hearing, however, counsel for Complainant elicited testimony from Ms. Kubek that Respondent had likely inspected a higher number of outfalls than reported. Tr. at 510-12. Ms. Kubek attributed the underestimation in the annual reports to the fact that the annual reports consist of a "fillable PDF form [that] only has three spaces" for responding to the inquiry about the number of outfalls inspected as part of an ORI. Tr. at 510. She further testified that while she did not complete the annual reports in question, she has completed them in subsequent years, and that when identifying the number of outfalls inspected, "we always fill out 999, because there are only three spaces, and that is our indication that there are actually more outfalls inspected." Tr. at 511. Finally, when asked whether Respondent could have provided further explanation to NYSDEC in order to report an accurate figure, she testified simply that NYSDEC "has never asked for us to provide any additional [information]." *Id.*

[28] Conversely, Respondent appears to have informally sought and been granted a modification of the terms of another permit, entitled SPDES General Permit for Stormwater Discharges from Construction Activity (MS4s), Permit Number GP-02-01, as reflected in a letter from Respondent to NYSDEC dated September 20, 2004, and a response from NYSDEC to Respondent dated December 23, 2004. CX 30 at 482-83, 485-86; CX 35 at 480-81, 483-84; CX 39 at 494-95, 497-98.

While Respondent construes NYSDEC's silence on the matter as its tacit approval of the progress reported by Respondent and an "extended timeline" for compliance, this view is problematic from the standpoint that Respondent appears to have never disclosed an accurate tally of the number of outfalls that it inspected during the relevant reporting years. Additionally, in the annual reports at issue, Respondent represented to NYSDEC that "[o]utfall inspections were conducted in most NYSDOT regions," and it assented to a question asking whether it was "on schedule to meet the deadline set forth in the SWMPP."[29] CX 30 at 409; CX 35 at 407; CX 39 at 424. Those representations could easily be construed as indicating that Respondent was on course to complete the ORI by the May 1, 2013 deadline. Thus, it is not clear from the evidence before me that NYSDEC knew of Respondent's true progress in completing the inspections.

Moreover, as argued by Complainant, Respondent has not pointed to any legal authority or principle to support its argument that NYSDEC's inaction with regard to Respondent's progress excuses the violation. I also did find any such authority or principle. To the contrary, I note that the EAB has rejected the argument that a state regulatory agency's failure to cite a violation supports the conclusion that the agency approved of the violative conduct. Specifically, in *Euclid of Virginia, Inc.*, the EAB held:

> An agency decision regarding whether to enforce falls within the realm of discretionary authority. A decision to enforce involves consideration of numerous factors including resources and priorities; thus, agencies are not expected to pursue each and every potential violation. In light of the complicated balance of factors that come into play in deciding whether to initiate action against a violator, a decision not to act against a specific type of violation provides no indication that the regulating authority approves the violative conduct.

Euclid, 13 E.A.D. at 655 (citing *Heckler v. Chaney*, 470 U.S. 821, 831 (1985)). The EAB further held that EPA is not bound by a state regulatory authority's decision to refrain from acting against a violation because EPA holds independent discretionary authority to enforce. *Id.* at 618. This decision is consistent with federal case law on the matter. *See United States v. Lacks Indus.*, 1989 WL 120679, at *3 (W.D. Mich. May 1, 1989) (rejecting a claim that a state, through its acquiescence, authorized the continued discharge of hazardous waste after the expiration of the relevant permit, such that it excused a violation of the Resource Conservation and Recovery Act). Thus, to the extent that NYSDEC could be found to have 1) determined that Respondent was not making sufficient progress towards completion of the ORI and would not meet the five-year deadline and 2) elected not to act against Respondent, the argument that NYSDEC thereby approved of Respondent's conduct, and effectively excused the violation such that Respondent could not be held liable for it in this enforcement action by EPA, fails as a matter of law.

Based on the foregoing discussion, I find that Respondent failed to conduct an ORI at least once every five years, as first required by the 2008 MS4 Permit, in violation of Part VIII.A of the 2010 MS4 Permit. Complainant argues in its Initial Brief that the violation began on May 1, 2013, the date on which the ORI was due, and continued until the ORI was complete on April 30, 2015, as demonstrated by Respondent's submission to EPA on that date. Complainant's Br.

[29] This avowal is confusing to the extent that Respondent's 2012 and 2013 SWMP Plans do not appear to specify any deadline for the completion of outfall inspections. *See* CX 30 at 183; CX 35 at 181; CX 39 at 199.

at 44. As noted above, the record supports this period of alleged violation, and Respondent does not challenge it. *See* Respondent's Br. at 21-22. Accordingly, I find that Respondent's failure to comply with the requirement that it conduct an ORI at least once every five years began on May 1, 2013, and continued until April 30, 2015, for a total of 729 days.

e. Part IV.D

As noted above, Part IV.D of the 2010 MS4 Permit requires covered entities that were authorized under the 2008 MS4 Permit to continue to "fully implement" their SWMP, unless directed otherwise. CX 4 at 15. In turn, Section III.2.d of the SWMP Plans issued by Respondent in May 2012 and June 2013 describes Respondent's program for inspecting outfalls previously identified and mapped. CX 30 at 183; CX 35 at 181; CX 39 at 199. Complainant alleges in the Complaint that Respondent failed to implement this section in violation of Part IV.D of the 2010 MS4 Permit. Compl. ¶ III.10.a.ii.

i. Parties' Arguments

In support of its position that Respondent failed to implement Section III.2.d, Complainant first notes that that section incorporates by reference a publication by EPA entitled "Illicit Discharge Detection and Elimination: A Guidance Manual for Program Development and Technical Assessments" ("EPA IDDE Guidance"), and particularly Chapter 11 of that publication, entitled "The Outfall Reconnaissance Inventory." Complainant's Br. at 44-45 (citing CX 30 at 183, 524). Complainant then asserts that EPA observed during the audit of Region 9 that Respondent's staff was not conducting ORI activities in accordance with the EPA IDDE Guidance. Complainant's Br. at 45 (citing CX 30 at 14-15). Specifically, Complainant points to an observation documented in the audit report for Region 9 that a seasonal intern, among those trained to conduct ORI activities for Respondent using the EPA IDDE Guidance, demonstrated the standard procedure for those activities by placing his hand into the flow from an outfall in order to assess the water clarity and color. Complainant's Br. at 45 (citing CX 30 at 15). Complainant argues that this practice is contrary to the EPA IDDE Guidance, which instructs that sensory indicators such as odor and color are not always reliable for detecting illicit discharges, as the senses can be fooled, and that the best method for measuring color is to collect the discharge in a clear sample bottle and hold it up to the light. Complainant's Br. at 45 (citing CX 30 at 15). Thus, Complainant argues, Respondent failed to implement the procedures in Section III.2.d of the 2012 SWMP Plan and did not comply with this requirement until 804 days later on September 2, 2014, when it submitted a certification that ORI activities would be conducted in accordance with prescribed procedures. Complainant's Br. at 45-46 (citing CX 49 at 2, 6-7; Tr. at 330-31).

In response, Respondent objects to Complainant's reliance on "[o]ne isolated instance of an intern inadvertently neglecting [to adhere to] EPA's guidance" as insufficient to demonstrate a failure to fully implement the SWMP Plan as required by the 2010 MS4 Permit. *See* Respondent's Br. at 22-23. Noting that the term "implement" means to "carry out; accomplish" and the term "fully" means "in a full manner or degree; completely," Respondent argues that the requirement that it fully implement the SWMP Plan "does not, and cannot by any practical application, mean to carry out to perfection." Respondent's Br. at 23 (quoting

https://www.merriam-webster.com/dictionary/implement; https://www.merriam-webster.com/dictionary/fully). Respondent further objects to Complainant's position that the violation continued for 804 days, arguing that that view disregards the fact that EPA found Respondent to be in compliance after Respondent submitted a two-page certification of the existence of the outfall inspection instructions, of which EPA was aware at the time of the audit. Respondent's Br. at 23 (citing CX 49 at 6-7; CX 30 at 14-15, 183, 524). Respondent urges that "[t]here is no evidence or allegation that such instructions did not exist at the time of the audit, only that they were not followed by a seasonal intern on a single occasion," and that those facts do not support the alleged violation. Respondent's Br. at 23.

With regard to the isolated nature of the seasonal intern's violative conduct, Complainant counters that Respondent fails to point to any evidence that its staff was correctly performing the activities at issue before submission of the certification. Complainant's Reply at 11. To bolster its position, Complainant points to the testimony of Ms. Kubek that while proper procedures were generally followed, she did not personally implement, observe, or supervise the implementation of those procedures. Complainant's Reply at 11 (citing Tr. at 509). Complainant maintains that the seasonal intern's conduct reflected "both that the procedures were not being implemented properly and that Respondent had not done adequate training and oversight of its interns," which clearly demonstrates that Respondent was not fully carrying out the applicable procedures. Complainant's Reply at 11-12. Finally, Complainant argues that "[t]he fact that the procedures may have existed at the time of the audit does not prove that they were being followed" and the certification submitted by Respondent provided assurances to EPA that Respondent was committed to doing so. Complainant's Reply at 12.

In its Reply, Respondent reiterates that the documentation accepted by EPA as satisfying the revised ACO simply certifies the existence of the outfall inspection instructions without any mention of implementation. Respondent's Reply at 4-5.

ii. Discussion

In considering the arguments and evidence presented with respect to this alleged violation, I note that in the Complaint, Complainant based the allegation that Respondent violated Part IV.D of the 2010 MS4 Permit not on observations of a seasonal intern's actions in Region 9 but on observations of "Region 5 staff . . . not following the procedures identified as outlined in the Respondent's SWMP Plan." Compl. ¶ III.10.a.ii. Complainant maintained this posture in its Initial Prehearing Exchange, asserting that the allegation set forth in Paragraph III.10.a.ii of the Complaint "is supported by Respondent's SWMP and the observations of the auditors during the audit of Region 5, which are documented in the audit report for that audit." Complainant's Initial Prehearing Exchange at 11-12. Only in its post-hearing briefs does Complainant allege, seemingly for the first time, that the observations supporting the charged violation were made during the audit of Region 9, rather than Region 5.

The parties did not present any testimonial evidence regarding this alleged violation at the hearing, but a review of the audit reports reflects that the auditors observed a seasonal intern, Brent Perkins, performing ORI activities in a manner deviating from prescribed procedures during the audit of Region 9. *See* CX 30 at 4, 14-15, 554-55. While Complainant has neither

filed a motion to conform the Complaint to this evidence nor requested to do so in its post-hearing briefs, I find, once again, that the circumstances here warrant treating the Complaint as having been implicitly amended to allege that the purported violative conduct was observed during the audit of Region 9.

Respondent has not denied this allegation, and its arguments concerning the plain meaning of the phrase "fully implement" as used in the 2010 MS4 Permit, such that it allows a staff person to carry out procedures in contravention of Respondent's SWMP, are unpersuasive. While I agree with Respondent that the phrase is properly understood as requiring Respondent to carry out its SWMP completely or to its fullest extent, I do not agree with Respondent's view that that reading of the text is permissive, allowing for anything other than strict compliance or excusing a failure to implement the SWMP correctly. The 2010 MS4 Permit explains that "[e]ach covered entity is required to develop . . . and implement [an] SWMP that satisfies the requirements for each of six required program components, known as minimum control measures (MCMs)." CX 4 at 16. In order for an SWMP to serve that purpose, it is essential for the covered entity's staff to implement the SWMP in a manner that is consistent with the requirements as set forth in the 2010 MS4 Permit. One such requirement is that covered entities conduct an outfall reconnaissance inventory, as described in the EPA IDDE Guidance, CX 4 at 55, and the 2012 SWMP Plan refers to the EPA IDDE Guidance in describing Respondent's program for conducting outfall inspections, CX 30 at 183. Thus, a seasonal intern's failure to conduct ORI activities in accordance with the EPA IDDE Guidance can hardly be viewed as fulfilling the terms of the Permit or otherwise be excused for purposes of liability. Accordingly, I find that the preponderance of the evidence establishes that Respondent failed to fully implement its SWMP, in violation of Part IV.D of the 2010 MS4 Permit, by virtue of a staff person inspecting outfalls in a manner deviating from prescribed procedures.

Respondent's objections with respect to the period of violation are more persuasive. Respondent urges that the actions of a single seasonal intern on a single occasion fail to establish that the violation continued beyond that instance. As documented in the audit report, Mr. Perkins performed those actions in response to a request by the auditors that Respondent's staff demonstrate procedures for conducting ORI activities. CX 30 at 15. Specifically, the audit report states:

> During the audit, the EPA Audit Team requested that NYSDOT personnel demonstrate outfall reconnaissance field screening and documentation procedures. *NYSDOT personnel explained that outfall reconnaissance is conducted by seasonal interns, who demonstrated their standard procedures for the EPA Audit Team during the MS4 outfall site visits*. The NYSDOT Seasonal Intern [Brent Perkins] was observed checking for water clarity and color by placing his hand into the flow from an outfall to observe the water. Page 103 of the EPA IDDE Guidance states that sensory indicators (e.g., odor, color, turbidity, and floatables) do not always reliably predict illicit discharges, because the senses can be fooled, and this may result in a "false negative." Page 104 of the EPA IDDE Guidance states, "The best way to measure color is to collect the discharge in a clear sample bottle and hold it up to the light." The NYSDOT Seasonal Intern did not use a sample bottle as part of his physical indicator detection process.

CX 30 at 15 (emphasis added). The wording of the audit report suggests that multiple seasonal interns demonstrated the steps they took to conduct outfall reconnaissance, and only Mr. Perkins was identified by the auditors as having performed those procedures in contravention of the EPA IDDE Guidance. Given that other seasonal interns seem to have performed the ORI activities for the benefit of the auditors without any concerns raised in the audit report about their conduct, I am hard put to infer that the issue extended beyond Mr. Perkins to other staff for the lengthy period alleged by Complainant. As for Mr. Perkins, it is conceivable that he continued to conduct the ORI activities in contravention of the EPA IDDE Guidance for the duration of his employment as a seasonal intern. Seeing as the dates of his employment are unknown, however, I am compelled to find that the period of this particular violation was the single day on which it was observed by the auditors.

f. Part VIII.A.3.h

Complainant alleges in the Complaint that Respondent violated Part VIII.A.3.h of the 2010 MS4 Permit. Compl. ¶ III.10.g. That provision requires all covered entities to "[i]nform the public of the hazards associated with illegal discharges and the improper disposal of waste." CX 4 at 56.

i. Parties' Arguments

In support of its position that Respondent violated Part VIII.A.3.h, Complainant asserts that the SWMP Plan issued by Respondent in 2012 lacked any provisions addressing the issue of informing the public of the hazards associated with illegal discharges and improper disposal of wastes and that Respondent's staff advised EPA during each of the audits that Respondent had not provided formal outreach to the public on such matters. Complainant's Br. at 46 (citing CX 30 at 15, 178-84; CX 35 at 15-16; CX 39 at 16). While Respondent's staff did point EPA to a webpage it had developed concerning storm water management issues, Complainant continues, such a measure "passively rel[ies] on individuals to seek it out" and falls short of "any affirmative effort to reach [Respondent's] users or visitors." Complainant's Br. at 46-47 (citing CX 30 at 15).

Complainant further notes that Ms. Kubek admitted at the hearing that Respondent had endeavored to educate only its staff regarding the hazards of illicit discharges based on Respondent's interpretation of the term "public" as meaning its employees, which it considered to be its entire user population. Complainant's Br. at 47 (citing Tr. at 473). Complainant urges that such a limited view contradicts a number of publications, including the 2010 MS4 Permit, which directs in Part VIII.A that owners and operators of non-traditional MS4s such as Respondent consider "their public" to be the "employee/user population, visitors, or contractors/developers" and provides such examples as the "general public using or living along transportations systems." Complainant's Br. at 46-47. Complainant argues that it also contradicts earlier statements made by Respondent, such as a commitment in the SWMP it issued in 2003 to inform both its employees and the public of the hazards from illicit discharges and statements in the 2012 version of its SWMP Plan that Respondent considers the term "public" to include not only its staff but also the traveling public and property owners along the highways

owned and maintained by the state. Complainant's Br. at 46-47 (citing CX 1 at 4; CX 30 at 166, 174; CX 59 at 45, 53).

Citing the testimony of Ms. Kubek, Respondent confirms in its Initial Brief that it construed the term "public" as used in the 2010 MS4 Permit to mean its employees. Respondent's Br. at 24 (citing Tr. at 446). Respondent defends this stance, urging that the view adopted by EPA and the requirement in the revised ACO that Respondent extend its outreach beyond its own staff is "[i]nconsistent with the plain disjunctive language in the permit." Respondent's Br. at 24 (citing CX 52 at 7). In response to Complainant's observation that Respondent's SWMP Plans "contained language indicating that the traveling public was envisioned to be part of the DOT's education efforts," Respondent argues that "[t]hat fact does not support a violation . . . where the language of the permit itself does not require outreach beyond Respondent's employees." Respondent's Br. at 25 at n.8. Respondent argues that to the extent it "offered information beyond its own staff, it was available on the Respondent's website and included 'reports and websites about the sources of, and potential impacts on water bodies from, Phosphorus, Nitrogen, and Pathogens, and illicit discharges.'" Respondent's Br. at 24 (citing CX 30 at 16).

Complainant counters that Respondent's view of Part VIII.A of 2010 MS4 Permit as allowing a covered entity to choose any single category from those listed as the exclusive target of the information it was required to disseminate "would yield an absurd result . . . and thwart the evident intent of the permit requirement," which demonstrates that the text does not mean what Respondent has suggested. Complainant's Reply at 12-13 (citing *Litwin v. Am. Express Co*., 838 F.Supp. 855, 859 (S.D.N.Y. 1993); *BOKF, N.A. v. Caesars Entm't Corp.,* 162 F.Supp. 3d 243, 246 n.5 (S.D.N.Y. 2016)). Complainant proceeds to argue that Respondent's view directly conflicts with the text of the permit, urging that it "attempts to simply read out the presence of the words 'user population,' which are joined with the word 'employee' as one category in the permit definition ('employee/user population'), thus selectively ignoring the clear language of the permit." Complainant's Reply at 13. Further, Complainant contends, the permit directs that the term "public," as applied to Respondent's system of MS4s, be construed to include the "general public using or living along transportation systems." Complainant's Reply at 13. Complainant then argues that the CWA's broad purpose of reducing and ultimately eliminating discharges of pollutants to waters of the United States demonstrates that the requirement at issue is properly understood as targeting "all of the people who use Respondent's MS4," rather than simply Respondent's employees. Complainant's Reply at 13-14 (citing 33 U.S.C. §§ 1251(a), 1311(a), 1342(a)). Complainant concludes:

> Because the conjunctive use of 'or' [in the definition of the term 'public' as used in Part VIII.A of the 2010 MS4 Permit] is the only interpretation that gives effect to the intent of the Clean Water Act and the permit requirement at issue, the EPA's interpretation is the correct one, and the additional efforts to inform the public that Respondent developed in response to the [revised ACO] were warranted.

Complainant's Reply at 14.

ii. Discussion

In considering the allegation that Respondent failed to comply with Part VIII.A.3.h of the 2010 MS4 Permit, I must first resolve the parties' disagreement concerning the proper interpretation of the term "public" as used in the Permit. The subject of their dispute is the following text, which is set forth immediately preceding the six MCMs applying to traditional non-land use control MS4s and non-traditional MS4s, such as Respondent:

> To comply with the requirements of this SPDES general permit, the traditional non-land use control MS4s and non-traditional MS4s should consider their public to be the employee/user population, visitors, or contractors/developers. Examples of the public include, but are not limited to:
> - transportation covered entities – general public using or living along transportation systems, staff, contractors;
> - educational covered entities – faculty, other staff, students, visitors;
> - other government covered entities – staff, contractors, visitors.

CX 4 at 49.

In advancing its position on the charged violation, Respondent focuses on the term "or" used in the first sentence of the foregoing text. As noted by Respondent, the term "or" is ordinarily disjunctive.[30] However, for a number of reasons, including those advanced by Complainant, it would be untenable to adopt Respondent's construction of the text, such that it is read to allow a covered entity to select a single group from those listed in the first sentence to be the exclusive target of the information required to be disseminated. First, as argued by Complainant, "whether 'or' is conjunctive or disjunctive . . . may well depend on the context and usage in a particular [written instrument]." *BOKF, N.A. v. Caesars Entm't Corp.*, 162 F.Supp.3d 243, 246 n.5 (S.D.N.Y. 2016) (citing *Major Oldsmobile, Inc. v. Gen. Motors Corp.*, 1995 WL 326475, at *6 (S.D.N.Y. May 31, 1995) ("It is well established that '[t]he word "or" is frequently construed to mean "and" and vice versa, in order to carry out the evident intent of the parties.'") (quoting *Dumont v. United States*, 98 U.S. 142, 143 (1878)), *aff'd*, 101 F.3d 684 (2nd Cir. 1996)). The United States Supreme Court has also observed that "the word 'or' is often used as a careless substitute for the word 'and.'" *De Sylva v. Ballentine*, 351 U.S. 570, 573 (1956). Here, the 2010 MS4 Permit, after directing owners and operators of traditional non-land use control MS4s and non-traditional MS4s to "consider their public to be the employee/user population, visitors, or contractors/developers," goes on to identify examples of the "public" specific to certain types of covered entities, including "transportation covered entities" like Respondent. Respondent appears to have read the first sentence of the text in isolation and without regard for the second. However, the second sentence informs the construction of the term "or" as used in the first sentence. It suggests that the drafter of the 2010 MS4 Permit intended to identify in the first sentence general categories of individuals who could fall within the target audience of traditional non-land use control MS4s and non-traditional MS4s and then specify in the second sentence the particular categories deemed to fall within the target audience

[30] Consistent with guidance from the EAB, I looked to the dictionary for the plain and ordinary meaning of the term "or." *See, e.g.*, *Carbon Injection Sys., LLC*, 17 E.A.D. 1, 23 (EAB 2016). Among other meanings, the term can be "used as a function word to indicate an alternative." MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/or.

of each type of covered entity listed by virtue of their potential interactions with, and discharges into, each covered entity's MS4. Thus, when the passage is viewed in its entirety, it is evident that the term "or" should be read with a conjunctive connotation and that the text directs Respondent to consider its "public" as including not only its staff but also the general public using and living along the transportation systems operated by Respondent.

This interpretation of the text is supported by the principle that a literal reading of statutory language governs unless such a reading would yield an absurd or futile result, at which point one may look beyond the statutory language to the purpose of the statute. *See United States v. American Trucking Ass'ns*, 310 U.S. 534, 543 (1940). Even when a literal reading does not produce an absurd result "but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole,' [the Supreme] Court has followed that purpose, rather than the literal words." *Id.* (quoting *Takao Ozawa v. United States*, 260 U.S. 178, 194 (1922)). Indeed, courts have elected not to apply a disjunctive meaning to the term "or" where that "strict grammatical construction will frustrate legislative intent." *United States v. Moore*, 613 F.2d 1029, 1040 (D.C. Cir. 1979) (citing *De Sylva v. Ballentine*, 351 U.S. at 580; *Union Central Life Ins. Co. v. Skipper*, 115 F. 69, 72 (8th Cir. 1902); *United States v. Cumbee*, 84 F.Supp. 390, 391 (D. Minn. 1949); *Travelers Ins. Co. v. Norton*, 24 F.Supp. 243, 246 (S.D.N.Y. 1938); *United States v. Mullendore*, 30 F.Supp. 13, 15 (N.D. Okl. 1939), *app. dismissed*, 111 F.2d 898 (10th Cir. 1940)). Here, Respondent's construction of the permit language would yield the odd result of allowing it to disseminate information about the hazards associated with illegal discharges and the improper disposal of waste to just one set of individuals chosen at Respondent's discretion from the greater population of individuals having the potential to interact with its system of MS4s. Such a result is contrary to the broad, remedial objective of the CWA to reduce, and ultimately eliminate, the discharge of pollutants to navigable waters. *See* 33 U.S.C. § 1251(a)(1). It is also at odds with the statutory provisions written to achieve that goal, such as the requirement that permits for discharges from municipal storm sewers include measures designed "to reduce the discharge of pollutants to the *maximum extent practicable*." 33 U.S.C. § 1342(p)(3)(B) (emphasis added). Clearly, a reading of the text that requires Respondent to disseminate information about the hazards associated with illegal discharges and the improper disposal of waste to *all* individuals with the potential to illegally discharge or improperly dispose of waste in its system of MS4s, rather than just one subset of those individuals, best gives effect to those statutory provisions.

The applicable regulations are also instructive with regard to the proper interpretation of the term "public" for purposes of the 2010 MS4 Permit. Specifically, the regulations promulgated by the State of New York to implement its SPDES program provide:

> The provisions of each issued SPDES permit shall ensure compliance with all of the following, whenever applicable:
>
> * * * *
>
> (9) unless otherwise required or authorized by this Part, the provisions or requirements of . . . 40 C.F.R. parts 122.26, 122.30 to 122.37, and 122.42(c) and (d) – Storm water discharges . . . .

N.Y. COMP. CODES R. & REGS. tit. 6 § 750-1.11(a) (2019). Among the federal regulations cited in the foregoing excerpt, the regulations set forth at 40 C.F.R. § 122.34 require permits for regulated small MS4s to contain terms and conditions compelling permittees to "[i]nform public employees, businesses, and *the general public* of hazards associated with illegal discharges and improper disposal of waste." 40 C.F.R. § 122.34(b)(3)(i)(D) (emphasis added). Thus, any permit issued by NYSDEC for discharges of storm water from small MS4s within the state is required by law to contain provisions compelling permittees to inform the general public, among others, of the hazards associated with illegal discharges and improper disposal of waste. The 2003 MS4 Permit, in describing a permittee's obligation to disseminate information about the hazards associated with illegal discharges and improper disposal of waste, mirrored the language of 40 C.F.R. § 122.34 and identified the intended audience of this information to be "public employees, businesses, and the general public." *See* CX 2 at 15. While the drafter of the 2008 MS4 Permit proceeded to replace that language simply with the term "public," *see* CX 3 at 47, and the drafter of the 2010 MS4 Permit followed suit, *see* CX 4 at 56, the underlying regulations remained the same. It is difficult to fathom that the drafters of the 2008 and 2010 MS4 Permits intended for those documents to be at odds with the regulations, such that Respondent would not be required to extend its outreach to the public using and living along its transportation systems in contravention of the applicable law.

Interestingly, Respondent's own representations outside the context of this litigation demonstrate its recognition of the importance of adopting a more expansive view of the term "public" than it is currently proposing, which undermines its stance in this proceeding. Specifically, in its 2012 and 2013 SWMP Plans under the heading for the MCM related to public education and outreach, Respondent acknowledged:

> An integral component of any stormwater management program is an active effort to reach out to the public to educate as many stakeholders and interested parties as possible regarding the science and status of stormwater issues that are part of NYSDOT's operations. An informed and knowledgeable community is crucial to the success of a stormwater management program as it will ensure greater support and compliance as the public, and NYSDOT, become aware of expectations.

CX 30 at 166; CX 35 at 164; CX 39 at 182. Respondent proceeded to assert in its 2012 and 2013 SWMP Plans that it "directs its education and outreach to its staff, consultants and contractors, local Departments of Public Works, and the public that is affected by the transportation system, specifically the travelling public and property owners along the highways owned and maintained by the State." CX 30 at 166; CX 35 at 164; CX 39 at 182. It also asserted that it "defines 'public' to be its staff, consultants and contractors, local Departments of Public Works, and the public that is affected by the transportation system, specifically the travelling public and property owners along the highways owned and maintained by the State." CX 30 at 174; CX 35 at 172; CX 39 at 190. These pronouncements directly contradict Ms. Kubek's testimony that Respondent has "always" considered its "public" to consist of only its employees, a view that she attributed to Respondent's lack of interaction with the general public and the use of its facilities by no one other than its employees. Tr. at 446, 473. Respondent's position in this proceeding is also belied by a recitation in its Environmental Handbook of the requirements imposed by the

2010 MS4 Permit with regard to IDDE. Specifically, Respondent documented in its Environmental Handbook that it was required to "[i]nform *public employees, businesses, and the general public* of hazards associated with illegal discharges and improper disposal of waste." RX 4 at 18 (emphasis added). Thus, in the course of developing the Environmental Handbook, Respondent clearly understood its obligations under the 2010 MS4 Permit as including the duty to inform not only its employees but also the general public on the matters at hand. For Respondent to now claim in the context of this proceeding that it actually did not understand the 2010 MS4 Permit to impose such a duty is perplexing.

In accordance with the foregoing discussion, I find that Respondent's stance in this proceeding concerning the proper interpretation of the term "public" for purposes of the 2010 MS4 Permit must be rejected and that in order to fulfill Part VIII.A.3.h of the 2010 MS4 Permit, Respondent was required to inform not only its employees but also the general public using and living along its transportation systems of the hazards associated with illegal discharges and the improper disposal of waste. I turn now to the question of whether Respondent engaged in such efforts. As noted by both parties, the audit reports and attached SWMP Plans reflect that at the time of the audits, Respondent maintained a page on its website with materials related to storm water management issues, including sources of, and potential impacts on waterbodies from, illicit discharges. *See, e.g.*, CX 30 at 16, 171, 183; CX 35 at 16; 169, 181; CX 39 at 16, 187, 199. However, as argued by Complainant, this type of measure relies on Respondent's target audience to seek out the subject materials, which does not appear to comport with the guidance offered in EPA's regulations about the types of activities a covered entity can perform to fulfill the requirements for public education and outreach. Specifically, the regulations list the following activities: "distributing brochures or fact sheets, sponsoring speaking engagements before community groups, providing public service announcements, implementing educational programs targeted at school age children, and conducting community-based projects such as storm drain stenciling, and watershed and beach cleanups." 40 C.F.R. § 122.34(b)(1). These examples suggest that EPA contemplated that a covered entity would engage in affirmative efforts to distribute educational materials to the public or conduct equivalent outreach activities, rather than the passive exercise of maintaining a website.

The record contains conflicting evidence as to whether Respondent performed any such activities. As Complainant notes, the audit reports reflect that Respondent's staff advised the auditors during each audit that Respondent had not engaged in formal outreach concerning the hazards associated with illegal discharges and the improper disposal of waste aside from the maintenance of a page on its website and that Respondent did not provide any documentation demonstrating that the public had been informed on these matters. *See* CX 30 at 15; CX 35 at 15-16; CX 39 at 16. This evidence clearly supports finding against Respondent on this issue.

On the other hand, in its 2012 and 2013 SWMP Plans, Respondent described activities targeted to the public that arguably would communicate information concerning the hazards associated with illegal discharges and the improper disposal of waste. For example, under a heading entitled "Public Presentations," Respondent described a poster developed as part of its public education and outreach program that "illustrates sources of phosphorus, the impacts of high phosphorus concentrations on [the Onondaga Lake Watershed], and actions that the public can take to reduce phosphorus in the watershed," which it made available at such public events

as the New York State Fair. CX 30 at 168; CX 35 at 166; CX 39 at 184. Respondent also explained that its staff frequently offers presentations on a variety of topics, including "General Stormwater Management Information," "Household Hazardous Waste Disposal," "Illicit discharge Detection and Elimination," "Pesticide and Fertilizer Application," and "Trash Management." CX 30 at 168; CX 35 at 166; CX 39 at 184. Respondent asserted that these presentations are given at public meetings, tradeshows, and conferences to audiences comprised of the general public, contractors, and employees. CX 30 at 168; CX 35 at 166; CX 39 at 184. Respondent confirmed in its annual reports to NYSDEC for the reporting periods ending on March 9, 2012, and March 9, 2013, that its public education and outreach activities covered some of those pertinent topics and that the general public was among the specific audiences targeted. CX 30 at 391; CX 35 at 389; CX 39 at 407. Respondent further reported that out of the list of education and outreach activities that it could have performed to target the public, it held "Public Events/Presentations," which were attended by 30 and 40 people during the respective reporting periods. CX 30 at 392; CX 35 at 390; CX 39 at 408. Additionally, Respondent's 2012 and 2013 SWMP Plans reflect that Respondent developed a number of programs involving public participation that aimed to "eliminate trash, debris, and chemicals from the roadside and within communities that otherwise would find its way to the state's water resources." CX 30 at 168-71, 177; CX 35 at 166-69, 175; CX 39 at 184-86, 192-93. Respondent reported on those programs in its annual reports for the relevant reporting periods, noting that, among other opportunities for public participation, it held 9,600 cleanup events during each reporting period. CX 30 at 395-98; CX 35 at 393-96; CX 39 at 411-13. Such presentations and events fall squarely within the types of activities described in 40 C.F.R. § 122.34(b)(1) as fulfilling the requirements for public education and outreach, and the particular activities performed by Respondent seemingly address the hazards associated with illegal discharges and the improper disposal of waste.

Weighing the foregoing evidence, I am struck by the level of discussion in Respondent's 2012 and 2013 SWMP Plans concerning public education and outreach and the statements in Respondent's annual reports to NYSDEC confirming that it implemented those activities. These items suggest to me that Respondent did, in fact, engage in some affirmative efforts to inform the public of the hazards associated with illegal discharges and the improper disposal of waste, such that it fulfilled the requirements of Part VIII.A.3.h, and they cast just enough doubt on the evidence adduced by Complainant that I am compelled to find against Complainant on this issue. Accordingly, I find that Complainant has not carried its burden of demonstrating by a preponderance of the evidence that Respondent violated that provision of the 2010 MS4 Permit, as alleged.

2. Construction Site Storm Water Runoff Control

With respect to this MCM, the 2010 MS4 Permit requires all covered entities to develop, implement, and enforce a program that provides protection at least as stringent as that of the New York State SPDES General Permit for Stormwater Discharges from Construction Activities ("Construction Permit")[31] and addresses storm water runoff to the covered entity's MS4 from construction activities that result in a land disturbance of greater than or equal to one acre, as

[31] A copy of the Construction Permit in effect at the time of the audits was not entered into evidence at the hearing.

well as any disturbance less than one acre if the construction activity at issue is part of a larger common plan of development or if controlling such activities in a particular watershed is required by NYSDEC. CX 4 at 58. In the Complaint, Complainant alleges that Respondent failed to implement a number of provisions of the 2010 MS4 Permit as they relate to construction site storm water runoff controls.

a. Part IV.D

As noted above, Part IV.D of the 2010 MS4 Permit requires covered entities that were authorized under the 2008 MS4 Permit to continue to "fully implement" their SWMP, unless directed otherwise. CX 4 at 15. With respect to construction site storm water runoff controls, Section IV.C.2.c of Respondent's 2012 and 2013 SWMP Plans, entitled "Quality Control/Quality Assurance Construction Reviews," 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; CX 35 at 191; CX 39 at 209. That Section further states that Respondent "has established goals and procedures, a rating system, and a checklist for conducting these project reviews." CX 30 at 193; CX 35 at 191; CX 39 at 209. Complainant alleges in the Complaint that at the time of the audit in Region 9, no evidence of these purported goals and procedures, rating system, and checklist could be found, such that Respondent was not implementing the SWMP Plan in violation of Part IV.D of the 2010 MS4 Permit. Compl. ¶ III.10.a.i.

To prove this alleged violation, Complainant points to a violation found to have been established on accelerated decision. Specifically, the heading used by Complainant in its Initial Brief cites Paragraph III.10.a.i of the Complaint and the violation of Part IV.D of the 2010 MS4 Permit alleged therein.[32] Complainant's Br. at 48. However, under that heading, Complainant proceeds to refer to Part V.B of the 2010 MS4 Permit, a violation of which was alleged in an altogether different paragraph of the Complaint. *Id.* at 48-49. That provision of the Permit directs covered entities, in relevant part, to maintain certain records required by the Permit and make copies available upon request by regulators such as EPA. CX 4 at 18. In its Motion for Partial Accelerated Decision, Complainant sought an accelerated decision that Respondent violated Part V.B of the 2010 MS4 Permit by failing to retain certain records – namely, documentation of the goals and procedures, rating system, and checklist for conducting reviews of active construction sites referenced in Section IV.C.2.c of the SWMP Plans – and I granted accelerated decision on that basis. *See* Order on Motion for Partial Accelerated Decision (Jan. 29, 2018), at 15-16.

Respondent's inability to produce that documentation during the audit certainly lends support to a finding that Respondent failed to develop those items. Additionally, the audit report for Region 9 reflects that Respondent not only failed to produce the requested records during the audit but also failed to implement a program including the components outlined in Section IV.C.2.c of the applicable SWMP Plan, at least in that Region. Specifically, the audit report states:

[32] In particular, Complainant uses the following heading in its Initial Brief: "Respondent Failed to Implement its SWMP Plan by Failing to Establish Goals and Procedures, a Rating System, or a Checklist for Conducting Construction Project Reviews (III.10.a.i)."

> The EPA Audit Team requested an inspection form or checklist that the NYSDOT CEC [Construction Environmental Coordinator] uses to conduct site inspections as a component of NYSDOT's Quality Control Program. The NYSDOT CEC stated that he does not document his site inspections or site visits, and does not have formal procedures that he follows for oversight of construction site stormwater inspections. The CEC further stated that he primarily visits the sites when requested by the NYSDOT EIC [Engineer-in-Charge] to help address specific questions, concerns, or issues regarding erosion and sediment control. Further, as noted above, the NYSDOT CEC explained that he will occasionally review the on-site stormwater inspection forms, but has no set schedule for review or oversight of the completion or adequacy of the forms. The EPA Audit Team found no evidence of established goals and procedures, a rating system, or a checklist for conducting construction project reviews as a component of NYSDOT's Quality Control Program to improve its erosion and sediment control program.

CX 30 at 25; *see also* CX 30 at 8. While Ms. Kubek testified at the hearing that Respondent "had a program in place," Tr. at 476, Respondent did not address this alleged violation in its Initial Brief, let alone point to any evidence to substantiate Ms. Kubek's testimony. Accordingly, the preponderance of the evidence shows that Respondent failed to establish goals and procedures, a rating system, and a checklist for conducting reviews of active construction sites, as described in Section IV.C.2.c of the applicable SWMP Plan, such that Respondent failed to fully implement its SWMP in violation of Section IV.D of the 2010 MS4 Permit.

As for the period of violation, EPA directed Respondent in paragraph C.2.g of the revised ACO to:

> Implement the NYSDOT "Quality Control Program to improve its Erosion and Sediment Control" program as identified in Section IV.2.c of the NYSDOT SWMP Plan as required by Part IV.D of the Permit. The program should include identification of established goals and procedures, a rating system, or a checklist for conduction [sic] construction project reviews. Submit the updated program and proof of implementation to EPA and NYSDEC.

CX 47 at 17. While Ms. Arvizu testified at the hearing that Respondent submitted documentation to EPA in satisfaction of the requirements of paragraph C.2.g on September 2, 2014, which she then took as the date of compliance, *see* Tr. at 332-33, Complainant maintains in its Initial Brief under the heading citing Paragraph III.10.a.i of the Complaint and the violation of Part IV.D alleged therein that the violation ended on November 3, 2014, Complainant's Br. at 49. The latter date is consistent with my conclusion in the Order on the Motion for Partial Accelerated Decision that Respondent's violation of Part V.B of the 2010 MS4 Permit continued until November 3, 2014, which I based on the affidavit of Ms. Arvizu attached to Complainant's Motion for Partial Accelerated Decision and documentation submitted by Respondent to EPA on that date. *See* Order on Motion for Partial Accelerated Decision (Jan. 29, 2018), at 15-16. That documentation reflects that EPA considered the requirements set forth in paragraph C.2.g of the revised ACO to have been fulfilled upon final verification that certain activities had been

completed, which Respondent provided in the documentation at issue. CX 50 at 5-6. Thus, notwithstanding Ms. Arvizu's testimony on the matter, I find that the Respondent came into compliance on November 3, 2014.

In turn, Complainant argues that Respondent's failure to comply began as early as July 1, 2011, a date "chosen by the EPA in its discretion," as the record lacks evidence that Respondent had ever implemented the program described in Section IV.C.2.c of its SWMP Plan prior to the audits. Complainant's Br. at 49. Respondent does not challenge the period of violation alleged by Complainant in its post-hearing briefs. Given the circumstances, I can infer that Respondent had not implemented Section IV.C.2.c of its SWMP Plan prior to the audits. Accordingly, I find that Respondent's failure to comply with Part IV.D of the 2010 MS4 Permit by virtue of failing to implement Section IV.C.2.c of its SWMP Plan began on or before July 1, 2011, and continued until November 3, 2014, for a total of 1,221 days, as alleged.

b. Part IV.D

As previously discussed, Part IV.D of the 2010 MS4 Permit requires covered entities that were authorized under the 2008 MS4 Permit to continue to "fully implement" their SWMPs, unless directed otherwise. CX 4 at 15. According to its SWMP Plan issued in May 2012, Respondent implements certain management practices, deemed by Respondent to provide protection equivalent to that provided by the Construction Permit, in an effort to prevent erosion and control sediment at its construction and maintenance sites. *See* CX 30 at 186; CX 35 at 184. Specifically, Section IV.1.b of the 2012 SWMP Plan[33] identifies certain requirements applying to contractors, including that all temporary controls be inspected at certain intervals – namely, every seven calendar days and after each rainfall of one half inch or more within a 24-hour period – in order to determine if the given measure is functioning as intended. CX 30 at 188; CX 35 at 186. Complainant alleges in the Complaint that Respondent failed to implement this section of the 2012 SWMP Plan in violation of Part IV.D of the 2010 MS4 Permit. Compl. ¶ III.10.a.iii.

i. Parties' Arguments

In support of its position that Respondent failed to implement the requirement at issue, Complainant notes that EPA reviewed construction storm water runoff control inspection records for the three months preceding the audit of Region 9 and determined that inspections had not been conducted in accordance with the requirement. Complainant's Br. at 49-50 (citing CX 30 at 23, 636-37). Specifically, Complainant asserts, inspections of the Route 201/434 construction project were conducted 14 days apart from April 25 to May 9, 2012, and from May 9 to May 23, 2012. Complainant's Br. at 50 (citing CX 30 at 23, 636-37). Complainant further asserts that each inspection of the I-81/86 bridge replacement project conducted between March 20 and June 18, 2012, was identified as a "Standard 7 calendar day inspection" in the records, notwithstanding meteorological data reflecting that rainfall events producing one half inch or

[33] Throughout the proceedings, the parties erroneously refer to this section of the SWMP Plan as Section IV.i.b, rather than Section IV.1.b. I consider this to be harmless error.

more of precipitation within a 24-hour period occurred in Binghampton, New York, on six dates in April, May, and June 2012.[34] Complainant's Br. at 50 (citing CX 30 at 23, 636-37).

In its defense, Respondent argues first that the SWMP Plan incorporated the requirements of the Construction Permit and that that permit no longer required rainfall-related inspections at the time of the audit. Respondent's Br. at 25-26 (citing Tr. at 477-78; CX 30 at 22, 188). Respondent urges, "Although failing to update the SWMP was an oversight on [its] part, the regulatory requirement for the inspections no longer existed." Respondent's Br. at 26. As for the inspections of the Route 201/434 construction project identified as having been performed 14 days apart, Respondent maintains that these deficiencies were "isolated" and that "full implementation [of the SWMP Plan] cannot mean perfection." Respondent's Br. at 26.

Complainant counters that the requirement for rainfall-related inspections in Respondent's SWMP was not "suddenly nullified" by the removal of that requirement from the Construction Permit. Complainant's Reply at 14. Citing the 2010 MS4 Permit, Complainant argues that a covered entity is required to notify NYSDEC of any proposed modifications to its SWMP and that Respondent did not present evidence of having submitted any such notification to NYSDEC. Complainant's Reply at 14-15 (citing CX 4 at 15-16). Thus, Complainant argues, "Respondent remained obligated to implement its SWMP as written at the time of the EPA audits." Complainant's Reply at 15. Complainant then argues that Respondent's presentation of testimony as to the contents of the Construction Permit, without offering that permit into evidence, "runs afoul of the so-called 'best evidence rule,' codified in the Federal Rules of Evidence," and the testimony is therefore inadmissible. Complainant's Reply at 15 (citing FED. R. EVID. 1002). Finally, Complainant challenges Respondent's characterization of the deficiencies as "isolated," arguing that EPA actually found "17 instances where Respondent failed to inspect with the required frequency, indicating a more systemic problem." Complainant's Reply at 15 (citing CX 35 at 20-21, 641, 650, 661).

In its Reply, Respondent responds to Complainant's objection to the admission of Ms. Kubek's testimony concerning the contents of the Construction Permit as violative of the Federal Rules of Evidence, arguing that this Tribunal is not bound by the Federal Rules of Evidence. Respondent's Reply at 5-6 (citing various authorities). Even if the Federal Rules of Evidence applied in this proceeding, Respondent continues, Complainant's objection is untimely and therefore should be deemed to have been waived. Respondent's Reply at 6 (citing various authorities).

ii. Discussion

As a preliminary matter, I note that in describing Respondent's purported failure to implement Section IV.1.b of its SWMP Plan in violation of Part IV.D of the 2010 MS4 Permit, Complainant alleges in the Complaint only that Respondent failed to conduct rainfall-related inspections at the Interstate 81/86 Bridge Replacement Project located in Region 9, without any allegation that Respondent also failed to conduct inspections every seven calendar days at the

[34] In its Initial Brief, Complainant erroneously cites these dates as having occurred in 2010, rather than 2012. *See* Complainant's Br. at 50. The audit report for the audit conducted in Region 9 confirms that the rainfall events in question occurred in 2012. CX 30 at 23.

New York State Route 201/434 construction site in that Region. Compl. ¶ III.10.a.iii. Complainant maintained this posture in its Initial Prehearing Exchange, asserting that "Respondent violated Part IV.D of the Permit by failing to conduct construction site stormwater inspections after rainfall events producing greater than [one half inch] of precipitation within a 24-hour period between April and June of 2012 for Respondent's I-81/I-86 Bridge Replacement project." Complainant's Initial Prehearing Exchange at 12. At the hearing, however, Complainant presented testimonial and documentary evidence concerning Respondent's failure to conduct inspections every seven calendar days at the New York State Route 201/434 construction site. Complainant then alleges in its post-hearing briefs that Respondent failed to implement Section IV.1.b of its SWMP Plan in that manner.

While Complainant has neither filed a motion to conform the Complaint to the foregoing evidence nor requested to do so in its post-hearing briefs, I find, yet again, that the circumstances here warrant treating the Complaint as having been implicitly amended to allege that Respondent failed to implement Section IV.1.b of its SWMP Plan not only by failing to conduct inspections of the Interstate 81/86 Bridge Replacement Project after rainfalls of at least one half inch within a 24-hour period but also by failing to conduct inspections of the New York State Route 201/434 construction site on a weekly basis.[35] The evidentiary record supports the latter allegation. Specifically, the auditors documented in the construction site visit report for the New York State Route 201/434 construction site and the audit report for Region 9 that they reviewed records of storm water inspections performed by Respondent at that site from April 15, 2012, through June 20, 2012, and observed that 14 days had elapsed between inspections from April 25 to May 9, 2012, and from May 9 to May 23, 2012. CX 30 at 23, 636-37; *see also* Tr. at 138-39. The auditors noted that Respondent's personnel were aware of the requirement concerning frequencies of inspections and were unsure why that requirement was not met during the periods in question. CX 30 at 23, 637. In its defense, Respondent argues only that these incidents were "isolated" and that the requirement that it "fully implement" its SWMP cannot be construed to mean that it was expected to implement the 2012 SWMP Plan to "perfection." As previously discussed, such arguments are unavailing for purposes of absolving Respondent of liability. Thus, I find that Respondent failed to properly implement Section IV.1.b of the 2012 SWMP Plan with regard to the requirement that inspections be performed every seven calendar days, in violation of Part IV.D of the 2010 MS4 Permit, at the New York State Route 201/434 construction site between April 25, 2012, and May 23, 2012. Respondent's failure to satisfy the requirement first began on May 2, when it failed to conduct an inspection seven days from the inspection performed on April 25, and ended with the inspection performed on May 9. The violation began again on May 16, when Respondent failed to conduct an inspection seven days from the inspection performed on May 9, and ended with the inspection performed on May 23, for a total of 14 days.

Conversely, the evidentiary record does not bear out Complainant's contention that Respondent failed to perform inspections after each rainfall of one half inch or more within a 24-hour period, a requirement also set forth in Section IV.1.b of the 2012 SWMP Plan, at the

[35] In its Initial Brief, Complainant mentions other instances where Respondent failed to perform inspections of construction sites at that frequency, as reflected in the audit report for Region 8. *See* Complainant's Br. at 50 n.16 (citing CX 35 at 20-21, 641, 650, 661). As Complainant is not pursuing a finding of liability based on those alleged offenses, however, they do not merit further discussion in this Initial Decision.

Interstate 81/86 Bridge Replacement Project located in Region 9. The construction site visit report for that site lacks any reference to such a transgression. *See* CX 30 at 631-32. Meanwhile, the audit report for Region 9 describes it as follows:

> During a review of inspection records of the I-81/86 Bridge Replacement Project, the EPA Audit Team noted that inspections were only conducted at seven day increments, and *may not have been conducted within 24 hours of rainfall events as required by the Construction General Permit*. Specifically, the inspections conducted between March 20, 2012 and June 18, 2012 were identified as "Standard 7 calendar day inspections" on the inspection report forms. The inspection records did not identify any of the inspections as post-rainfall event inspections. The EPA Audit Team further noted that meteorological history reports indicate that over 0.5 inch of rain fell in Binghamton, NY on the following dates during April 2012 through June 2012: April 22 (0.77 inch); April 23 (0.72 inch); May 8 (0.61 inch); May 14 (0.76 inch); May 15 (0.56 inch); June 1 (0.61 inch). *Although these precipitation totals were not collected at the construction sites, it indicates that NYSDOT may not have been conducting inspections after rainfall events of 0.5 inch or more as required by the Construction General Permit*.

CX 30 at 23 (emphasis added) (footnote omitted). Finally, in testifying about the auditors' visit to this particular construction site, Mr. Kirkeby, the contractor from PG Environmental who participated in the audit of Region 9, did not mention any observations concerning rainfall-related inspections. *See* Tr. at 152-57. Considering the absence of any notations in the construction site visit report about a failure to perform rainfall-related inspections, the equivocal language used by the auditors in the audit report to describe their misgivings about the performance of such inspections, and the absence of any testimony on the issue, I find that the evidence simply is insufficient to establish that Respondent failed to implement Section IV.1.b of the 2012 SWMP Plan in this manner. Accordingly, the parties' arguments about the applicability of the requirement that rainfall-related inspections be conducted are deemed moot.

c. Part VIII.A.4.a.v

Complainant alleges in the Complaint that Respondent violated Part VIII.A.4.a.v of the 2010 MS4 Permit. Compl. ¶ III.10.i. That provision requires covered entities 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." CX 4 at 58, 59.

i. Parties' Arguments

In support of its position that Respondent violated Part VIII.A.4.a.v, Complainant first notes that Respondent failed to identify procedures for receipt and follow up on complaints or other information submitted by the public regarding construction site storm water runoff in response to EPA's request in each Records Request sent to Respondent prior to the audits. Complainant's Br. at 50-51 (citing CX 13 at 4; CX 34 at 5; CX 37 at 4; Tr. at 60-63). Citing the audit reports, Complainant then notes that Respondent's staff also did not provide such

procedures during the audits themselves. Complainant's Br. at 51 (citing CX 30 at 25-26; CX 35 at 23; CX 39 at 20). Complainant acknowledges that Respondent did identify some information related to the requirement at issue during each audit. Complainant's Br. at 51 (citing CX 30 at 26 (an email address posted on Respondent's webpage for submitting public complaints about issues related to storm water); CX 35 at 23 (same); CX 35 at 23-24, 627-28 (a document entitled "Informal Procedures for Receipt and Follow-up on Complaints from the Public Regarding Construction Sites"); CX 39 at 20 (emails exchanged between Respondent and NYSDEC about complaints received from the public about a particular construction project)). Complainant argues against the sufficiency of that information, however, maintaining that "none of these submissions contained procedures regarding how Respondent would follow up on public complaints it receives about construction stormwater runoff." Complainant's Br. at 51.

Complainant proceeds to argue that while Respondent submitted a progress report to EPA on July 1, 2014, describing some procedures related to the requirements of Part VIII.A.4.a.v, Respondent acknowledged in that submission that procedures for responding to public inquiries were still being formulated, and it did not fully develop all of the required procedures and demonstrate compliance until September 30, 2015. Complainant's Br. at 52 (citing CX 48 at 147; CX 57 at 1-2; Tr. at 335-36, 522). Complainant then challenges the testimony of Ms. Kubek that Respondent had an unwritten program for receiving and responding to complaints about construction site storm water runoff prior to the audits and was thus in compliance with Part VIII.A.4.a.v at that time. Complainant's Br. at 53 (citing Tr. at 520, 522). Noting that the 2010 MS4 Permit requires a program that "describes procedures," Complainant urges, "Clearly, for a program to describe procedures, it must be written." Complainant's Br. at 53. Complainant also disputes that the procedure identified in the progress report of July 1, 2014, existed at the time of the audits, given that it refers to Ms. Kubek, who was not employed by Respondent at that time. Complainant's Br. at 53. Moreover, Complainant contends, "even a quick comparison of that submission with the final one shows that they are significantly different, and that the latter one is more complete." Complainant's Br. at 53. Finally, Complainant points to the testimony of Ms. Kubek conceding that she "could not adequately explain why it took Respondent over 18 months to submit a procedure that purportedly already existed." Complainant's Br. at 53 (citing Tr. at 522-23).

Respondent challenges Complainant's position by first pointing to the email address it had in place for the submission of complaints by the public at the time of the audits and then asserting that "the individual responsible for fielding those complaints in the regions was not consulted [during the audits]" and the employees participating in the audits were not familiar with the process as it was not part of their job duties. Respondent's Br. at 27 (citing CX 30 at 26; CX 35 at 23-24; Tr. at 482-83). In response to Complainant's contention that the naming of Ms. Kubek in the procedure identified in the progress report of July 1, 2014, demonstrates that the procedure did not exist at the time of the audits, Respondent argues that "it is reasonable to assume that after Ms. Kubek was hired, the contact information in that process was updated to reflect her involvement, as it was one of her job duties," and that because "this information was not handed over until after the audits, an updated process was submitted." Respondent's Br. at 27. Finally, with regard to the statement in the July 1, 2014 submission that Respondent was in the process of promulgating procedures for responding to complaints, Respondent contends that those procedures were thoroughly articulated in its final submission to EPA, which referred to a

"Construction Administration Manual" containing a procedure that already existed and was in writing prior to the audits. Respondent's Br. at 27 (citing Tr. at 482-83).

Complainant counters that in arguing that the individual responsible for processing complaints from the public was absent during the audits, Respondent ignores the fact that its Statewide Stormwater Program Coordinator was present. Complainant's Reply at 15-16 (citing CX 30 at 4; CX 35 at 4; CX 39 at 4, 462; Tr. at 621). Complainant urges, "Presumably, if the required program existed [at the time of the audits], Respondent's Statewide Stormwater Program Coordinator would know about it." Complainant's Reply at 16. Complainant also construes Respondent's arguments as claims that its submission to EPA on July 1, 2014, consisted of "merely an update of the pre-existing process" and that the final submission was "merely a 'thorough articulation' of the original version that was not substantially different." Complainant's Reply at 16. In response, Complainant maintains:

> The procedures initially submitted likely did not exist at the time of the first audit, because they refer to Ms. Kubek, who did not work for Respondent at the time. Therefore, that submission does not prove that Respondent had ANY public complaint process in place at the time of the audits. In any event, a comparison of the initial and final submissions clearly demonstrates that the latter are [sic] far more comprehensive . . . .

Complainant's Reply at 16 (internal citation omitted).

ii. Discussion

As previously stated, Part VIII.A.4.a.v of the 2010 MS4 Permit requires covered entities 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." CX 4 at 58, 59. Complainant alleges in the Complaint that Respondent violated that provision by failing to have written procedures for receipt and follow up on complaints by the public regarding construction site storm water runoff. Compl. ¶ III.10.i.

I am inclined to agree. The plain meaning of the term "describe" is "to represent or give an account of in words." MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/describe. As argued by Complainant, the use of that term in Part VIII.A.4.a.v supports the view that covered entities were required not only to develop but also to document their procedures for receiving and responding to complaints in order for their programs to satisfy that provision. The record shows that during the relevant period, Respondent received comments and inquiries from the public through multiple avenues but that it failed to have written procedures in place for each such avenue. For example, as reflected in the audit reports for each of the audits, Respondent's Statewide Stormwater Program Coordinator, Dave Graves, informed the auditors of an email address provided on Respondent's webpage at which Respondent could receive complaints from the public about storm water-related issues. CX 30 at 4, 26; CX 35 at 4, 23; CX 39 at 4, 20. That email address is also referenced by other items in the record, including Respondent's 2012 and 2013 SWMP Plans, *see* CX 30 at 171, 176; CX 35 at 169, 174; CX 39 at 187, 192, and Respondent's initial response to the ACO, dated April 15,

2014, *see* RX 15 at 6. Respondent indicated in its 2012 and 2013 SWMP Plans that the email address was monitored on a daily basis. CX 30 at 171; CX 35 at 169; CX 39 at 187. Beyond that, however, I do not see any evidence in the record of written procedures followed by Respondent at the time to process and respond to complaints sent to the email address. Indeed, Respondent asserted in its April 15, 2014 response to the ACO that while it "[did] have [a program for receiving and responding to complaints] in place, including an email link on the public website," it "did not have procedures specific to complaints about construction site runoff *documented in writing*." RX 15 at 6 (emphasis added). Later, in its submission to EPA on July 1, 2014, Respondent also referenced that email address as one of a number of avenues by which the public could submit comments and inquiries, but it admitted that its various offices were still working "to develop procedures for responding to public inquiries that are in accordance with official Department protocol." CX 48 at 147.

Notwithstanding these admissions, Respondent now maintains that written procedures actually existed at the time of the audits. Its arguments in this regard are unavailing, however. With respect to Respondent's contention that the auditors failed to consult the appropriate staff on this issue, I agree with Complainant that it seems implausible that Respondent had written procedures in place for handling complaints received by way of each avenue available but that Mr. Graves was ignorant of those procedures, aside from the existence of the email address that he identified to the auditors, despite his role as Respondent's Statewide Stormwater Program Coordinator, which was described in uncontroverted testimony as "the glue of the MS4 program" and "the person who is responsible for ensuring that the MS4 program is being implemented on behalf of the regulated entity." Tr. at 694. Ms. Kubek's testimony on the subject, upon which Respondent relies to support its position, also is not particularly compelling. Not only is it at odds with Respondent's admission prior to this litigation that the procedures at issue were still being developed as of July 1, 2014, but it also is short on key details in that she only briefly discussed Respondent's receipt of complaints by telephone or email, *see* Tr. at 519-20; she did not describe any procedures for responding to such complaints aside from baldly stating that the procedures identified by Respondent in its September 30, 2015 submission to EPA were in existence at the time of the audits and simply needed to be verified, *see* Tr. at 522; and she acknowledged that she was unaware of whether the procedures she referenced were memorialized in writing at the time of the audits as she was not yet employed by Respondent,[36] Tr. at 520. As for Respondent's claim that the procedures described in its submission to EPA on September 30, 2015, already existed and had been documented at the time of the audits, it seems to be referring in particular to instructions, set forth in a document entitled "Construction Administration Manual," for maintaining copies of correspondence related to construction sites using a certain software tool, which purportedly was "a documented procedure . . . already in existence and in writing prior to the audit." Respondent's Br. at 27. An excerpt from the Construction Administration Manual appears in Respondent's submission to EPA on September 30, 2015. *See* CX 57 at 2. However, Respondent fails to point to any evidence to substantiate its claim, such as a copy of the Construction Administration Manual predating the audits, aside from Ms. Kubek's assertion about the procedures existing at the time.

[36] That particular testimony about not being employed by Respondent at the time of the audits begs the question of how Ms. Kubek knew that Respondent's processes for handling comments and inquiries from the public existed at that time.

Based on the foregoing discussion, I find that a preponderance of the evidence demonstrates that Respondent did not have written procedures for handling comments or inquiries submitted by the public regarding construction site storm water runoff, such that it failed to fulfill the requirements of Part VIII.A.4.a.v of the 2010 MS4 Permit as alleged. Complainant argues that Respondent's failure to comply began as early as July 1, 2011, a date "chosen by EPA in its discretion," and that it demonstrated compliance on September 30, 2015, when it submitted the required procedures to EPA. Complainant's Br. at 52-54 (citing CX 57 at 1-2; Tr. at 335-36, 522). Given the circumstances, I can infer that Respondent did not have the written procedures required by Part VIII.A.4.a.v prior to the audits, and the record supports Complainant's position that Respondent achieved compliance with its September 30, 2015 submission. Accordingly, I find that Respondent's failure to comply with Part VIII.A.4.a.v of the 2010 MS4 Permit began on or before July 1, 2011, and continued until September 30, 2015, for a total of 1,552 days, as alleged.

d. Part VIII.A.4.a.vii

Complainant alleges in the Complaint that Respondent violated Part VIII.A.4.a.vii of the 2010 MS4 Permit. Compl. ¶ III.10.j. That provision requires covered entities to develop, implement, and enforce a program that ensures that construction site contractors, including "trained contractors" as that term is defined in the Construction Permit, have received erosion and sediment control training before performing work within the given covered entity's jurisdiction. CX 4 at 58, 59.

i. Parties' Arguments

In support of its position that Respondent failed to develop and implement a program fulfilling the requirements of Part VIII.A.4.a.vii, Complainant first asserts that Respondent responded to each Records Request sent to Respondent prior to the audits with a number of documents, each of which focuses on the training of Respondent's staff without any regard for the training of contractors. Complainant's Br. at 54-55 (citing CX 13 at 5; CX 34 at 6; CX 37 at 4). Citing the audit reports for the audits of Regions 9 and 8, Complainant notes that in response to requests from EPA during those audits, Respondent was unable to provide any written procedures for ensuring that contractors had received the required training. Complainant's Br. at 55 (citing CX 30 at 24; CX 35 at 21-23). Indeed, Complainant maintains, EPA observed during a visit to a construction site in Region 9 that Respondent was unable to produce the erosion and sediment control credentials of a subcontractor hired to perform weekly inspections. Complainant's Br. at 55 (citing CX 30 at 24).

Complainant then challenges the testimony of Ms. Kubek that Respondent was in compliance with Part VIII.A.4.a.vii at the time of the audits because of its use of a form referenced in Respondent's 2012 SWMP Plan, known as the "CONR-5 form," which requires contractors and subcontractors to have staff on site that are certified trained contractors in accordance with the Construction Permit. Complainant's Br. at 54 (citing CX 30 at 192), 55 (citing Tr. at 482-83, 568-69). Complainant urges, "[W]hile the form may be a tool in ensuring that contractors receive the necessary training, the fact that Respondent was unable to produce any completed forms when asked (repeatedly) indicates that Respondent was not using the form,

and, therefore, not ensuring compliance with this requirement." Complainant's Br. at 55. Respondent did not demonstrate compliance, Complainant continues, until July 1, 2014, when it submitted "complete procedures designed to ensure that the form is properly used, submitted, reviewed, and maintained." Complainant's Br. at 55 (citing CX 48 at 135-36; Tr. at 336-37).

Respondent counters that the 2010 MS4 Permit does not require it to conduct and document training of its contractors, "a fact that was conceded by the EPA when they accepted the CONR-5 form in satisfaction of the [revised ACO]," and that in response to EPA's request in the Records Requests for documentation of education or training of individuals to whom the construction stormwater requirements apply, Respondent simply submitted documentation of the training it was required to conduct. Respondent's Br. at 28-29 (citing CX 30 at 5; CX 34 at 6; CX 37 at 4). Respondent further asserts that during the incident in Region 9 cited by Complainant in support of its position, EPA requested not the CONR-5 form but the credentials of the subcontractor. Respondent's Br. at 28-29 (citing CX 30 at 24). Pointing to the testimony of Ms. Kubek, Respondent proceeds to argue that it "has ensured contractor training with the use of its CONR-5 form and pursuant to Part 100 of the Standard Specifications" since before the audits were conducted. Respondent's Reply at 28 (citing Tr. at 469, 482). Respondent maintains that the CONR-5 form and the procedures governing its use existed at the time of the audits and were submitted in satisfaction of the revised ACO on July 1, 2014. Respondent's Reply at 28 (citing CX 48 at 135-36). Respondent then disputes as unsupported Complainant's assertions that it repeatedly requested completed versions of the form and that the forms were not being used. Respondent's Br. at 28.

ii. Discussion

As observed by Respondent, the 2010 MS4 Permit does not require a covered entity to train construction site contractors with respect to erosion and sediment controls prior to the contractors performing work within its jurisdiction. *See* CX 4 at 59. Rather, it requires only that a covered entity ensure that the construction site contractors have received such training. *See id.* In arguing about whether Respondent complied with this requirement, the parties focus on the document identified in the record as the "CONR-5 form." In its 2012 and 2013 SWMP Plans, Respondent references this document in the context of management practices and procedures comprising Respondent's construction site stormwater runoff control program, stating that the Contractor/Subcontractor SPDES Permit Certification Form, or CONR-5 form, "requires that contractors and subcontractors have staff on site that are Certified Trained Contractors in accordance with the SPDES General Permit for Stormwater Discharges from Construction Activity." CX 30 at 192; CX 35 at 190; CX 39 at 208. Ms. Kubek explained at the hearing that the CONR-5 form is signed and dated by a contractor to certify that the contractor has received erosion and sediment control training. Tr. at 482-83. She also testified that the form was in existence at the time of the audits. *Id.*

Complainant appears to concede these points in its Initial Brief. It argues, however, that Respondent was not actually using the CONR-5 form during the relevant period, as evidenced by Respondent's failure to produce any completed forms in response to each Records Request sent to Respondent prior to the audits, which requested "[d]ocumentation of education/training for construction site owner/operators, design engineers, DOT staff, and other individuals to whom

the construction storm water requirements apply." *See* CX 13 at 5; CX 34 at 6; CX 37 at 4. I find Respondent's rebuttal to this argument, and others raised by Complainant on this issue, to be plausible, however. Particularly compelling is Respondent's point that documentation submitted to EPA a month after the revised ACO was issued – namely, a document entitled "Site Log Book Guidance for § 209 and SPDES General Permit (GP-0-10-001)," which outlined procedures for using, submitting, and maintaining completed CONR-5 forms[37] – was marked with the words "January 2014 version." *See* CX 48 at 134-38. As Respondent contends, such a notation seemingly would not have been necessary had prior versions not already existed, and it signifies that the document predated Respondent's receipt of the ACO, suggesting that "it was not produced or modified in response to receiving the [ACO]." Respondent's Br. at 28 n.10. Notably, Complainant did not seek to counter Respondent's position in its Reply. Based on these considerations, the documentary and testimonial evidence weighs in favor of finding that Respondent was, in fact, using CONR-5 forms at the time of the audits to ensure that construction site contractors had received the required training in advance of performing work. Accordingly, I find that Complainant has not carried its burden of demonstrating by a preponderance of the evidence that Respondent violated Part VIII.A.4.a.vii of the 2010 MS4 Permit as alleged in the Complaint.

e. Part VIII.A.4.a.i

Part VIII.A.4.a.i of the 2010 MS4 Permit requires covered entities to develop, implement, and enforce a program that provides protection at least as stringent as that of the Construction Permit. CX 4 at 58. Complainant alleges in the Complaint that Part IV.A.1 of the Construction Permit "requires owners or operators to ensure that all erosion and sediment control practices identified in the Stormwater Pollution Prevention Plan ('SWPPP') are maintained in effective operating condition at all times" and that Respondent violated Part VIII.A.4.a.i of the 2010 MS4 Permit by virtue of "erosion and sediment control deficiencies" observed at six sites owned and operated by Respondent. Compl. ¶ III.10.h.

Complainant presented testimonial and documentary evidence of the auditors' observations at six construction sites visited during the audits of Regions 9 and 8, Tr. at 139-57, 180-210; CX 30 at 20-22, 631-47; CX 35 at 18-20, 640-46, and it refers to the documentary evidence in particular in arguing that Respondent committed "numerous erosion and sediment control violations" at those sites, such as improperly installing and maintaining silt fences, Complainant's Br. at 56 (citing CX 30 at 20-22, 631-47; CX 35 at 18-20, 640-46). In disputing the alleged violation, Respondent questions the reliability of the evidence presented by the auditors, first asserting that "[t]he record shows that all but one consultant, including Ms. Arvizu herself, had never audited a state transportation agency." Respondent's Br. at 32-33 (citing Tr. at 79, 173, 223, 315). Respondent further asserts that the contractors "played a supportive role to lead auditor, Max Kuker, who did not testify at the hearing," and that "Mr. D'Angelo and Mr. Kirkeby went so far as to describe their roles in the audits as on-the-job training." Respondent's Br. at 33 (citing Tr. at 133, 167, 180, 249, 315). Finally, Respondent notes that none of these witnesses were qualified as experts, Respondent's Br. at 32, and that their role during the audits was merely to document their observations, rather than identify violations of the 2010 MS4 Permit, Respondent's Br. at 33 (citing Tr. at 25, 137-38, 142, 146-48, 150-65, 181-227, 232, 252,

[37] Respondent also submitted to EPA a copy of the CONR-5 form. *See* CX 48 at 147.

256-320). To demonstrate the auditors' purported lack of expertise, Respondent points to the testimony of Mr. Kirkeby that kitty litter may be used to remove a petroleum stain, which, Respondent urges, was refuted by the expert testimony of Ms. Kubek that kitty litter is effective only at cleaning a liquid spill and that petroleum discolors asphalt surfaces because it is absorbed and sequestered within the asphalt. Respondent's Br. at 32 (citing Tr. at 171, 427-28).

In its Reply, Complainant counters Respondent's characterization of the auditors as inexperienced, arguing that at the time of the audits, each auditor possessed "extensive and relevant experience in conducting audits of MS4 systems and stormwater pollution controls in multiple contexts." Complainant's Reply at 6. For support, Complainant points to Ms. Arvizu's curriculum vitae and testimony as demonstrating that she had conducted over 27 audits of MS4s, and been involved in 15 enforcement actions arising from those audits, as part of her decades of relevant experience. Complainant's Reply at 6 (citing CX 77 at 1; Tr. at 26). Turning to the contractors from PG Environmental, Complainant points to testimony concerning each contractor's experience in conducting inspections of MS4s, including those associated with highway systems in other states, and/or other storm water pollution control measures. Complainant's Reply at 6-7 (citing Tr. at 133-34, 178-79, 246-47, 298-300).

Complainant next challenges the notion that Respondent's system of MS4s differs from others to such an extent that specialized experience was required, beyond the extensive experience that the auditors possessed, in order for the auditors' observations to be reliable, arguing that such a claim is unsubstantiated and conflicts with the uncontested testimony of Mr. Albright that the types of stormwater pollution controls applicable in other contexts are similar to those applicable in the context of MS4s. Complainant's Reply at 7 (citing Tr. at 298-99). As for Respondent's point that the auditors were not qualified as experts at the hearing, Complainant contends that Respondent conflates expertise with reliability, Complainant's Reply at 6, and that a witness's qualification as an expert allows the witness to provide opinion testimony within his or her area of expertise, which does not ensure reliability or credibility, *id.* at 8 (citing Fed. R. Evid. 702). Acknowledging that the auditors were tasked simply with recounting their personal observations, Complainant argues that "their level of qualification was essentially irrelevant to whether their testimony was reliable." Complainant's Reply at 19.

Finally, Complainant argues that Ms. Arvizu and the contractors each "described the consistent and thorough process by which they observed, recorded, confirmed, and reported the findings of their audits," and that "Respondent does not point to any instances in the hearing transcript where the auditors' observations, documentation, or credibility were seriously called into question." Complainant's Reply at 7 (citing Tr. at 32, 42-43, 136-38, 181-83, 309). To the contrary, Complainant continues, "the auditors all testified with precision, professionalism, and objectivity about their personal observations, which were enhanced by their extensive experience and substantiated by extensive documentary and photographic evidence." Complainant's Reply at 7 (citing Tr. 132-75, 177-236, 245-96, 297-31).

I agree with Complainant on this point. The evidentiary record reflects that at the time of the audits, Ms. Arvizu and the contractors from PG Environmental each possessed ample training and experience with regard to inspections of storm water pollution control measures in a variety of contexts. *See, e.g.*, CX 77 at 1; Tr. at 27-28, 133-34, 166, 178-79, 246-48, 282-83,

298-300. While Respondent suggests that the auditors were unqualified to observe and document Respondent's implementation of its SWMP due to a lack of experience with the type of MS4 operated by Respondent, the record contains testimonial evidence to the contrary. In particular, Mr. Kirkeby testified that while he had never inspected an MS4 prior to his involvement in the audits of Respondent's system of MS4s, he had participated in trainings focused on non-traditional MS4s such as Respondent's. Tr. at 134, 165-66. Meanwhile, Mr. Jacobsen testified that he had participated in audits of MS4s associated with highway systems in three other states prior to the audits of Respondent's system of MS4s and that for each of those audits, "the approach was the same" and the "minimum control measures . . . looked at were the same." Tr. at 179, 223. Mr. D'Angelo also testified that he had inspected an MS4 associated with a highway system in another state prior to his involvement in the audits of Respondent's system of MS4s. Tr. at 282-83.

Even if the auditors had lacked training or experience pertaining to non-traditional MS4s, as argued by Complainant, Respondent fails to point to any evidence demonstrating that the storm water pollution control measures applicable to its network of MS4s differ in a meaningful way from those applicable in other contexts. To the contrary, when asked to compare the storm water pollution control measures used in various contexts and the steps taken during inspections of such measures, Mr. Kirkeby, Mr. Jacobsen, and Mr. Albright each attested to the similarities. Tr. at 174-75 (testimony of Mr. Kirkeby that inspections of storm water pollution controls used in the context of industrial activities and in the context of MS4s involve "looking at the exact same things"); Tr. at 224-25 (testimony of Mr. Jacobsen that "the permit requirements are fairly similar [for] traditional and non-traditional [MS4s]."); Tr. at 298-99 (testimony of Mr. Albright that storm water pollution controls used in the context of industrial and construction activities are "[o]ftentimes" analogous to those used for MS4s and that the procedures followed for inspections in those various contexts are similar). Thus, the auditors' training and experience pertaining to storm water pollution control measures used in contexts other than non-traditional MS4s is not immaterial.

In accordance with the foregoing discussion, I find that Ms. Arvizu and the contractors from PG Environmental were well qualified to observe and document Respondent's implementation of its SWMP. As argued by Complainant, these witnesses also "described the consistent and thorough process by which they observed, recorded, confirmed, and reported the findings of their audits of Respondent's MS4," and testified about their firsthand personal observations related to the audits, with "precision, professionalism, and objectivity." *See, e.g.*, Tr. at 32, 39-43, 136-38, 181-83, 250-52, 300-01, 304, 309, 319-20. Based on these considerations, I find the evidence presented with regard to the auditors' personal observations during the audits to be reliable and credible. This determination is not undercut by the fact that the auditors were not qualified as experts at the hearing. As acknowledged by both parties, the contractors from PG Environmental clearly identified their role during the audits as observing and documenting Respondent's implementation of its SWMP, rather than determining whether the conditions and practices that they observed amounted to violations of the 2010 MS4 Permit. *See, e.g.,* CX 30 at 11, 20-21, 28, 36; CX 35 at 18, 31; CX 39 at 11, 19, 31; Tr. at 167-68, 172, 194, 223, 296, 317. It was hardly necessary for the auditors to be qualified as experts at the hearing in order for them to testify about their firsthand personal observations and for that testimony to be deemed reliable and credible. While I am inclined to agree with Respondent that

Ms. Kubek's testimony concerning the use of kitty litter for purposes of removing a petroleum stain from pavement refutes the testimony of Mr. Kirkeby on that particular subject,[38] I do not consider that finding to discredit his entire testimony concerning his personal observations at Respondent's constructions sites and fixed facilities. Additionally, while the contractors for PG Environmental may have served in a supportive role to PG Environmental's lead investigator, Max Kuker, it is clear from the evidentiary record that they possessed ample training and experience in their own right. Moreover, Mr. Jacobsen testified that in the course of participating in the audit of Region 8, he led one of the two field teams conducing inspections. Tr. at 180. Meanwhile, Mr. D'Angelo described his role during the audits as "on-the-job learning" and "shadowing" of Mr. Kuker, Tr. at 249, but he also identified several parts of the audit of Region 5 that he performed independently. Tr. at 283. Accordingly, Respondent's attempts to cast doubt on the reliability and credibility of these witnesses' observations is unpersuasive.

That being said, I still see a flaw in Complainant's position with regard to this alleged violation, namely, that Complainant fails to point to sufficient evidence establishing the erosion and sediment control practices that Respondent was actually required to employ and maintain for four out of the six construction sites at issue. As previously noted, neither party to this proceeding offered into evidence a copy of the Construction Permit in effect at the time of the audits. Nevertheless, the audit reports for the audits of Regions 9 and 8 recite that Part IV.A.1 of the Construction Permit "requires the owner or operator to ensure that all erosion and sediment control practices . . . *identified in the stormwater pollution prevention plan (SWPPP)* are maintained in effective operating condition at all times." CX 30 at 22; CX 35 at 20 (emphasis added). Based on this language, a document known as the SWPPP was controlling in terms of the erosion and sediment control practices that Respondent was required to maintain in effective operating condition at all times. However, neither party entered into evidence copies of SWPPPs for the subject construction sites. Without the benefit of those documents or other evidence of their contents, I am unable to determine whether the physical conditions observed by the auditors at the construction sites amounted to violations.

---

[38] Complainant contends that Mr. Kirkeby never testified about the use of kitty litter for that purpose. Complainant's Reply at 8 n.2. The following exchange at the hearing indicates otherwise, however:

> Q: And you indicated that the proper measure when there is a petroleum stain is to clean it up; is that correct?
>
> A: Yes.
>
> Q: Are you aware of some type of cleaning product that does not create a hazardous discharge into the waterway?
>
> A: I don't design them, but there are mechanisms to clean up petroleum stains that don't cause petroleum to discharge to --
>
> Q: I'm talking about the detergent itself, which is considered an illicit discharge, is it not?
>
> A: There are other things than detergent. There is kitty litter, for example, things we will see at locations like this for cleaning up of petroleum stain.

Tr. at 170-71.

Put another way, the evidence presented with regard to the auditors' observations is not enough on its own to establish that a violation occurred. The audit reports document that the auditors observed certain erosion and sediment control practices being employed at the construction sites that the auditors visited and physical conditions related to those practices, *see, e.g.*, CX 30 at 21, 636-42, and at the hearing, Mr. Kirkeby and Mr. Jacobsen credibly described their observations in that regard, *see, e.g.*, Tr. at 140-47. However, this evidence is not dispositive of what erosion and sediment control practices were specified in the SWPPP, which is necessary to establish what practices Respondent was required by the relevant Construction Permit, and in turn, the 2010 MS4 Permit, to maintain in effective operating condition at all times. Indeed, when Mr. Kirkeby was asked at the hearing whether a type of structural control that he observed to be absent at one of the construction sites in Region 9, and that Complainant cited as a violation, was "in the . . . erosion and sediment control plan for this,"[39] he responded that he could not recall. Tr. at 145. Thus, it is unclear whether that particular structural control was actually required by the SWPPP. As previously discussed, the auditors also clearly identified their role as documenting the physical conditions at the construction sites that they visited, rather than determining whether violations had been committed as a result of those conditions. *See, e.g.*, CX 30 at 20-21; CX 35 at 18; Tr. at 167-68, 194.

The record contains evidence concerning the contents of SWPPPs, or more specifically, the erosion and sediments control plans, for only two of the construction sites for which Complainant seeks findings of liability, the Sprain Brook Parkway over Route 119 Construction Project ("Sprain Brook Project") and the Interstate 287 Interchange 8 Construction Project ("Interstate 287 Project"), both located in Region 8. In the construction site visit report for the Sprain Brook Project, which comprised both a staging area and an active construction area, the auditors documented that Respondent provided the auditors "with a copy of the updated erosion and sediment control document, but due to size limitation it was not able to be included in [the audit report]." CX 35 at 649. However, the auditors proceeded to describe the erosion and sediment control practices for the active construction area identified in that document, with references to relevant portions of the document,[40] and the physical conditions that they observed at that location, with accompanying photographs of those conditions. CX 35 at 649-50, 653-56. Mr. Jacobsen, who led the field team conducting the inspection of the sites, also clearly referred to the erosion and sediment control plan for the active construction area of the Sprain Brook Project in his testimony.[41] Tr. at 180, 187-90, 192-94. It is evident from the descriptions in the

[39] The referenced "erosion and sediment control plan" seems to be a document associated with the SWPPP. *See* CX 30 at 606 (identifying components of the SWMPP as including an "Erosion and Sediment Control Plan"). According to the audit reports for the audits of Regions 9 and 8, Respondent or its design consultant is responsible for preparing an initial erosion and sediment control plan for each construction project. CX 30 at 20; CX 35 at 17. Respondent then "requires the contractor to provide an updated plan to address specific on-site items such as construction entrances and staging areas." CX 35 at 17.

[40] Conversely, in describing their observations of the site's staging area, the auditors referred simply to a drawing that the contractor had purportedly provided to Respondent in a letter dated August 3, 2012. The relationship of this drawing to the SWPPP or erosion and sediment control plan is unclear.

[41] When testifying about the conditions he observed in the staging area of the Sprain Brook Project, Mr. Jacobsen referred to the "contractor's plan." Tr. at 186. The construction site visit report makes clear that the document to which Mr. Jacobsen referred was the previously described drawing.

audit report, the accompanying photographs, and Mr. Jacobsen's testimony that the conditions observed by the auditors deviated from the practices identified in the erosion and sediment control plan in three ways: 1) a stablized construction entrance called for by the erosion and sediment control plan failed to encompass the entire area identified in the plan; 2) a silt fence was installed around a particular storm drain inlet when the erosion and sediment control plan identified concrete block as the appropriate means of protecting that inlet; and 3) inlet protection had not been installed for a different storm drain inlet identified in the erosion and sediment control plan as requiring such protection through the use of concrete block. *See* CX 35 at 649-50, 653-54, 656; Tr. at 187-90, 192-94. Respondent does not point to any evidence in rebuttal.

Turning to the Interstate 287 Project, the auditors addressed the erosion and sediment control plan for the site in the construction site visit report as follows:

> The NYSDOT EIC [Engineer-in-Charge] explained that the contractor provided NYSDOT with a revised erosion control plan in August 2010 which identifies specific controls to be implemented at the site. The revised plan was transmitted to NYSDOT with an accompanying letter dated August 26, 2010. The actual revised erosion control plan included hand written notes for specific erosion and sediment control measures. The notes were written on a set of drawings for "Maintenance and Protection of Traffic" (ESD-012) dated August 5, 2010, and are referenced in the observations below, as applicable.

CX 35 at 660. The auditors then cited the erosion and sediment control practices identified in the revised erosion and sediment control plan in describing the physical conditions that they observed, which were also documented in accompanying photographs. CX 35 at 660-61, 664, 668. Mr. Jacobsen also referred to the erosion and sediment control plan for this site in his testimony. Tr. at 200. Based on this evidence, it is clear that the conditions observed by the auditors deviated from the practices identified in the erosion and sediment control plan in at least two ways[42]: 1) inlet protection had not been installed for a storm drain drop inlet identified in the revised erosion and sediment control plan as requiring such protection through the use of "silt fence inlet protection 209.1701"; and 2) perimeter controls had not been installed in an area that the revised erosion and sediment control plan identified as requiring "vegetation fence 615.0402." CX 35 at 660-61, 664, 668; Tr. at 200. Again, Respondent does not point to any evidence in rebuttal.

In accordance with the foregoing discussion, I find that Complainant presented sufficient evidence to establish Respondent's failure to maintain in effective operating condition at all

[42] The auditors explained in the second and fifth sets of observations listed in the construction site visit report that stabilized construction entrances had not been installed in two areas of active construction and that while such measures were not identified in the revised erosion and sediment control plan for those areas, "General Note No. 6 of the revised erosion control plan transmittal letter states 'stabilized construction entrances shown on the erosion plans are a minimum. Entrances can be adjusted in the field *if necessary* by the project superintendent or EIC.'" CX 35 at 660-61 (emphasis added). The auditors further noted that sediment from vehicle tracking was observed in the areas in question, suggesting that installation of stabilized construction entrances was, in fact, necessary. CX 35 at 660. The auditors also noted in the fifth set of observations listed in the construction site visit report that a storm drain inlet not identified in the revised erosion and sediment control plan was present in a disturbed area and was lacking any inlet protection. CX 35 at 661.

times certain erosion and sediment control practices identified in components of the SWPPPs for two construction sites located in Region 8, in contravention of Part IV.A.1 of the Construction Permit and Part VIII.A.4.a.i of the 2010 MS4 Permit. While Respondent argues that the auditors failed to investigate the length of time that the observed conditions had existed and that a violation "cannot be established without [such] appropriate context," Respondent's Br. at 33-34, this argument is not persuasive, as the violative conditions found at the Sprain Brook and Interstate 287 Projects consisted of failures to install certain measures called for by the relevant erosion and sediment control plans, which clearly were long-standing in nature.

Turning to the length of time that the conditions persisted, the construction site visit reports reflect that the sites in question were visited by the auditors on November 28, 2012, CX 35 at 648, 659, and Complainant asserts in its Initial Brief that it took that date as the start date for the violations, Complainant's Br. at 63. As for end date of the violations, Complainant cites a progress report submitted by Respondent on July 1, 2014, and argues that "Respondent demonstrated that it had corrected the violations on July 1, 2014, when it submitted a description and photographs of the corrections it had made." Complainant's Br. at 63 (citing CX 48 at 102-33). Respondent counters that construction at the sites located in Region 8 had been completed, and that the alleged violations no longer existed, prior to that date, as described by Ms. Kubek at the hearing. Respondent's Br. at 34 (citing Tr. at 461). In addition to Ms. Kubek's testimony, some documentary evidence in the record also supports this position. For example, in the progress report that Respondent submitted to EPA on July 1, 2014, Respondent describes construction at the Interstate 287 Project as having been completed, and the accompanying photographs are marked as having been taken on March 17, 2014. CX 48 at 102, 114-15. Based on this evidence, it appears that the violations at the Interstate 287 Project had been remedied at least as of that date. Turning to the Sprain Brook Project, the photographs that Respondent submitted as part of the July 1, 2014 progress report are undated. CX 48 at 108-113. However, Respondent's description of the conditions at that site in its July 1, 2014 progress report, which EPA accepted as remedying the transgressions found there, match a description that Respondent provided to EPA months earlier in its initial written response to the ACO, dated April 15, 2014. *Compare* RX 15 at 5-6 *with* CX 48 at 102. This evidence is persuasive that the violations at the Sprain Brook Project had been remedied at least as of April 15, 2014. Complainant asserts in its Initial Brief that it counted the instances of Respondent's failure to comply with Part VIII.A.4.a.i of the 2010 MS4 Permit as a single violation. Complainant's Br. at 63 n. 18. This approach appears to be reasonable. Therefore, while Respondent may have remedied the deficiencies at the Interstate 287 Project earlier than it had remedied the deficiencies at the Sprain Brook Project, I too am treating its violations of Part VIII.A.4.a.i at the sites in question as a single offense that began on November 28, 2012, and was ultimately resolved on April 15, 2014, for a total of 503 days.

3. Post-Construction Storm Water Management

Complainant alleges in the Complaint that Respondent failed to implement certain provisions of the 2010 MS4 Permit as they relate to post-construction storm water management practices.

a. Part V.B[43]

In the Complaint, Complainant alleges that Respondent failed to comply with Part V.B of the 2010 MS4 Permit. Compl. ¶ III.10.b. As previously discussed, that provision directs covered entities to keep records required by the Permit – namely, "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 [NYSDEC], etc." – for at least five years after being generated. CX 4 at 18. Specifically, a covered entity is required to maintain duplicate copies of those records, with one copy available for public observation at reasonable times during regular business hours and "a separate working copy where the covered entity's staff, other individuals responsible for the SWMP[,] and regulators, such as [NYSDEC] and EPA staff[,] can access them." *Id.*

i. Parties' Arguments

As support for the allegation that Respondent failed to comply with Part V.B, Complainant first notes in its Initial Brief that Respondent indicated in response to EPA's request in the Records Request sent to Respondent prior to the audit of Region 9 that it did not have records of inspections of post-construction storm water management practices for the most recent reporting year or records of maintenance for post-construction storm water management practices for the most recent reporting year. Complainant's Br. at 64 (citing CX 13 at 16; Tr. at 72-73). Citing the audit reports for the audits of Regions 9 and 5, Complainant further asserts that Respondent was unable to provide documentation of maintenance for post-construction storm water management practices during the audits themselves. Complainant's Br. at 64 (citing CX 30 at 31; CX 39 at 27). In fact, Complainant maintains, the Regional Maintenance Environmental Coordinator stated during the audit of Region 5 that such records were not kept. Complainant's Br. at 64 (citing CX 39 at 27). Complainant contends that Respondent thus violated Part V.B of the 2010 MS4 Permit and did not demonstrate compliance until November 3, 2014, when it submitted procedures for documenting inspections and maintenance of post-construction storm water management practices and maintaining those records. Complainant's Br. at 64 (citing CX 50 at 7).

Respondent counters that Complainant fails to point to any section of the 2010 MS4 Permit that requires "tracking of post-construction inspections." Respondent's Br. at 35. "Without a more fully developed rationale for this violation," Respondent urges, "Complainant has not carried its burden of proof" with respect to this alleged violation. Respondent's Br. at 35.

[43] As noted above, Complainant sought and was granted accelerated decision that Respondent violated Part V.B of the 2010 MS4 Permit. Specifically, I found that no genuine issue of material fact existed that Respondent failed, in contravention of that provision, to retain documentation of the goals and procedures, rating system, and checklist for conducting reviews of active construction sites referenced in Section IV.C.2.c of the 2012 and 2013 SWMP Plans and that this failure continued from at least June 19, 2012, until November 3, 2014. *See* Order on Motion for Partial Accelerated Decision (Jan. 29, 2018), at 15-16. In its Initial Brief, Complainant addresses that finding only in the context of its discussion of how Respondent violated Part IV.D of the 2010 MS4 Permit by virtue of failing to implement its SWMP Plan with regard to reviews of active construction sites. Without any mention of the documentation dealt with on accelerated decision, Complainant then argues that Respondent violated Part V.B of the 2010 MS4 Permit by failing to maintain other records independent from that documentation. That argument is considered in this Initial Decision.

ii. Discussion

In the Complaint, Complainant alleges that Respondent failed to comply with Part V.B of the 2010 MS4 Permit by virtue of being unable to provide EPA "with adequate SWMP implementation documentation, including but not limited to, required procedures and training records." Compl. ¶ III.10.b. Complainant reiterated this broad allegation in its Initial Prehearing Exchange, asserting that it "is supported by a review of documents by the auditors during the three audits, and is documented in the audit reports." Complainant's Initial Prehearing Exchange at 12. As described above, however, Complainant later significantly narrowed the basis for the alleged violation, first in seeking accelerated decision and again in its Initial Brief. In its Initial Brief, Complainant focuses on Respondent's purported failure to maintain records related to post-construction storm water management practices and argues that Respondent demonstrated compliance with Part V.B by submitting new procedures for documenting and maintaining records of inspections and maintenance of post-construction stormwater management practices. Complainant's Br. at 64 (citing CX 50 at 7).

As noted by Respondent, Complainant does not point to a specific provision of the 2010 MS4 Permit requiring Respondent to document inspections or maintenance of post-construction storm water management practices. Surprisingly, Complainant did not respond to this assertion in its Reply. Upon reviewing the 2010 MS4 Permit, however, I came upon the section outlining the reporting requirements for continuing covered entities with regard to post-construction storm water management controls. This section of the Permit states:

> Program implementation reporting for continuing covered entities (MS4s covered for 3 or more years on the reporting date). At a minimum, the covered entity shall report on the items below:
>
> i. number and type of sanctions;
> ii. number and type of post-construction stormwater management practices;
> iii. number and type of post-construction stormwater management practices inspected;
> iv. number and type of post-construction stormwater management practices maintained;
> v. status of regulatory mechanism, equivalent mechanism, that regulatory mechanism is equivalent; and
> vi. report on effectiveness of program, BMP and measurable goal assessment, and implementation of a banking and credit system, if applicable.

CX 4 at 63. Thus, in its annual report to NYSDEC during the relevant periods, Respondent was required to provide information pertaining to inspections and maintenance of its post-construction storm water management practices. As previously described, among the records that Respondent was required to maintain pursuant to Part V.B of the 2010 MS4 Permit were "other records that verify reporting required by the permit." CX 4 at 18. In other words, Respondent was required to keep records demonstrating the accuracy of Respondent's reports concerning its inspection and maintenance of its post-construction storm water management

practices, thus necessitating documentation of those activities. Additionally, Part VIII.A.5.a.v of the 2010 MS4 Permit requires covered entities to "establish and maintain an inventory of post-construction stormwater management practices . . . discharging to the small MS4," which "shall include, at a minimum[,] . . . dates and type of maintenance performed." CX 4 at 62. Based on the foregoing verbiage, it is clear that Respondent had a duty under the Permit to document inspections and maintenance of post-construction storm water management practices.

As for whether Respondent was fulfilling that duty at the time of the audits, Respondent referred in its 2012 and 2013 SWMP Plans to a tool called the "Stormwater Management Practice Database," which it described as having been created in response to the requirement, first imposed in the 2008 MS4 Permit, that it establish and maintain an inventory of post-construction storm water management practices. CX 30 at 202-03; CX 35 at 200-01; CX 39 at 218-19. Specifically, the 2008 MS4 Permit set a deadline of May 1, 2009, for permittees to establish such an inventory. CX 3 at 51. While Respondent provided in its annual reports to NYSDEC during the relevant periods a tally of the number of post-construction storm water management practices it had "inventoried, inspected and maintained" and affirmed that it utilized "an electronic tool (e.g., GIS, database, spreadsheet) to track post-construction BMPs, inspections, and maintenance," CX 30 at 417; CX 35 at 415; CX 39 at 431, certain items in the record support a finding that Respondent was not consistently keeping such records across its regional offices.

In particular, Respondent stated in its 2012 and 2013 SWMP Plans that its Stormwater Management Practice Database was modeled after one previously developed in Region 8 and that it "*can be used statewide* to document and track the maintenance history of stormwater management practices that have been constructed." CX 30 at 202; CX 35 at 200; CX 39 at 218 (emphasis added). Respondent further stated that "[i]ssuance of an [Engineering Instruction] regarding the use of the database [was] listed as a measurable goal," first for the reporting period beginning March 10, 2012, and ending on March 9, 2013, and later extended to the reporting period beginning March 10, 2013, and ending on March 9, 2014. CX 30 at 203, 221; CX 35 at 201, 219; CX 39 at 219, 238. Respondent proceeded to explain in its annual reports to NYSDEC during the relevant periods that while the Stormwater Management Practice Database was "available for use by NYSDOT staff," they had yet to "[i]ssue an Engineering Instruction to roll out the Stormwater Management Practice Database." CX 30 at 420; CX 35 at 418; CX 39 at 434. These assertions suggest that the Stormwater Management Practice Database, while in existence at the time of the audits, was not being utilized uniformly by each of Respondent's regions. Meanwhile, Respondent admitted to EPA in its April 15, 2014 written response to the ACO that it was "continuing to work to complete the Stormwater Management Practices database and keep it current with respect to maintenance." RX 15 at 7. The evidence adduced by Complainant confirms that records of inspections and maintenance of post-construction storm water management practices were not being kept by all regions or, at the very least, not being made available to regulators during each audit, as required. CX 13 at 6; CX 30 at 31; CX 39 at 27; Tr. at 72-73. Respondent did not point to any evidence in rebuttal.

Accordingly, I find that Respondent failed to fulfill the requirements of Part V.B of the 2010 MS4 Permit as alleged. Complainant argues in its Initial Brief that Respondent's failure to comply began as early as July 1, 2011, a date "chosen by the EPA in its discretion," as the record

lacks evidence that Respondent had fulfilled the recordkeeping requirement prior to developing procedures for documenting and maintaining records of inspections and maintenance of post-construction storm water management practices as ordered by the revised ACO,[44] and ended on November 3, 2014, when Respondent submitted those procedures to EPA. Complainant's Br. at 64 (citing CX 50 at 7). In that submission, Respondent informed EPA that the Stormwater Management Practices Database was being "used by all regions to identify the locations of permanent stormwater management practices constructed by NYSDOT [and] to record the inspection and maintenance history of these practices." CX 50 at 7. Respondent does not challenge the period of violation alleged by Complainant. *See* Respondent's Br. at 35-36. Given the circumstances, I can infer that Respondent did not consistently maintain records related to inspections and maintenance of post-construction storm water management practices across its regional offices prior to EPA's audits. Thus, I find that Respondent's violation of Part V.B of the 2010 MS4 Permit by virtue of failing to maintain and provide access to records related to inspections and maintenance of post-construction storm water management practices began on or before July 1, 2011, and continued until November 3, 2014, for a total of 1,221 days, as alleged.[45]

b. Part VIII.A.5.a.vi

Complainant alleges in the Complaint that Respondent failed to comply with Part VIII.A.5.a.vi of the 2010 MS4 Permit. Compl. ¶ III.10.k. That provision directs covered entities to develop, implement, and enforce a program that ensures adequate long-term operation and maintenance of post-construction storm water management practices by trained staff, including assessments to ensure that the practices are performing properly. CX 4 at 62.

i. Parties' Arguments

In support of its allegation that Respondent violated Part VIII.A.5.a.vi, Complainant first argues that, as documented in the audit reports and described at the hearing, the auditors observed conditions reflecting failures in Respondent's maintenance of post-construction storm water management practices during the audits of Regions 9 and 5. Complainant's Br. at 65 (citing CX 30 at 680-87; CX 39 at 41-55; Tr. at 308, 309-11, 313-14). For example, Complainant points to observations of "inadequately maintained vegetative cover and/or rip rap [storm water management practices] on the side slope of two wet ponds that allowed the edges of the ponds to erode, likely causing sediment to enter the ponds and limiting their effectiveness in retaining water." Complainant's Br. at 65 (citing CX 39 at 44 (photograph 5), 51 (photograph

[44] Specifically, the revised ACO directs Respondent in paragraph C.2.h to "[d]evelop, implement and submit to EPA and NYSDEC written procedures for documenting and maintaining records as required by Part V.B of the Permit, including, but not limited to SWMP implementation documentation, post-construction maintenance records, and good housekeeping/pollution prevention training records." CX 47 at 18.

[45] As previously discussed, I found on accelerated decision that Respondent violated Part V.B of the 2010 MS4 Permit by failing to retain documentation of the goals and procedures, rating system, and checklist for conducting reviews of active construction sites referenced in Section IV.C.2.c of the 2012 and 2013 SWMP Plans and that this failure continued from at least June 19, 2012, until November 3, 2014. *See* Order on Motion for Partial Accelerated Decision (Jan. 29, 2018), at 15-16. Consistent with the approach utilized for violations of other requirements of the 2010 MS4 Permit, I am treating Respondent's violations of Part V.B as a single offense.

19); Tr. at 308, 313-14). In addition to those observations, Complainant points to statements by Respondent's staff, as documented in the audit report for Region 9, that procedures for the operation, maintenance, and inspection of post-construction storm water management practices were in development but had not yet been implemented at that time. Complainant's Br. at 65-66 (citing CX 30 at 31). Complainant concludes that Respondent demonstrated its compliance with Part VIII.A.5.a.vi when it submitted such procedures to EPA on November 3, 2014. Complainant's Br. at 66 (citing CX 50 at 7, 8; CX 48 at 46-52; Tr. at 337-38).

Respondent acknowledges in its Initial Brief that it was still developing a program for the long-term operation and maintenance of post-construction storm water management practices at the time of the audits. Respondent's Br. at 36 (citing CX 30 at 31). Respondent argues, however, that "it is not surprising that some items [from the 2010 MS4 Permit] remained outstanding," despite its "good faith efforts to fully develop and implement every requirement of the permit upon issuance," given that it is "by far the largest MS4 governed by the terms of this permit" and that "the breadth of the MS4 permit grew considerably" in the seven years since it first took effect in 2003. Respondent's Br. at 36 (citing CX 2; CX 3; CX 4; Tr. at 511-12).

In its Reply, Complainant counters that "the complexity of the permit is no excuse for the violations and, to the extent that Respondent now challenges the permit, such an argument in untimely, and thus precluded." Complainant's Reply at 20.

ii. Discussion

I find in favor of Complainant on this issue. As noted above, Respondent cites the auditors' documentation of statements made by Respondent's staff about the ongoing development of procedures for ensuring the proper operation and maintenance of post-construction storm water management practices, *see* CX 30 at 31, and concedes that at the time of the audits, it had not yet finished developing a program in fulfillment of Part VIII.A.5.a.vi of the 2010 MS4 Permit, Respondent's Br. at 36. Consistent with my earlier discussion concerning Respondent's failure to challenge the terms of the 2010 MS4 Permit under applicable state law, its arguments related to the magnitude of its system of MS4s and scope of the requirements imposed by the 2010 MS4 Permit do not absolve it from liability for its failure to comply.[46] Thus, I find that Respondent failed to develop and implement a program ensuring adequate long-term operation, maintenance, and inspection of post-construction storm water management practices by trained staff in violation of Part VIII.A.5.a.vi. Complainant argues in its Initial Brief that EPA took the start date of the violation as June 20, 2012, the date on which it was first discovered during the audit of Region 9, and that it continued until November 3, 2014, when Respondent demonstrated compliance by submitting procedures for maintaining and inspecting post-construction storm water management practices across all regions. Complainant's Br. at 66 (citing CX 50 at 7, 8; Tr. at 337-38). Again, Respondent does not contest the alleged period of violation. *See* Respondent's Br. at 36-37. Accordingly, I find that Respondent failed to comply

[46] Also, those arguments ring hollow given that permit holders were first obligated to develop and implement a program ensuring adequate long-term operation and maintenance of post-construction storm water management practices not by the 2010 MS4 Permit but by the 2003 MS4 Permit, which took effect nearly 10 years prior to the first audit that EPA conducted. CX 2 at 17.

with Part VIII.A.5.a.vi of the 2010 MS4 Permit from June 20, 2012, until November 3, 2014, for a total of 866 days of violation.

4. Pollution Prevention and Good Housekeeping for Municipal Operations

In the Complaint, Complainant alleges that Respondent failed to implement certain provisions of the 2010 MS4 Permit as they relate to pollution prevention and good housekeeping for municipal operations.

a. Parts VIII.A.6.a.i and VIII.A.6.a.iii

Part VIII.A.6.a of the 2010 MS4 Permit directs covered entities to develop and implement a pollution prevention and good housekeeping program for municipal operations and facilities that fulfills certain requirements. CX 4 at 64. Complainant alleges in the Complaint that Respondent failed to comply with the particular requirements set forth at Parts VIII.A.6.a.i and VIII.A.6.a.iii. Compl. ¶ III.10.l. Part VIII.A.6.a.i requires the program to "address[] municipal operations and facilities that contribute or potentially contribute [pollutants of concern]" to the covered entity's MS4s, which "may include, but are not limited to: street and bridge maintenance; winter road maintenance; stormwater system maintenance; vehicle and fleet maintenance; park and open space maintenance; municipal building maintenance; solid waste management; new construction and land disturbances; right-of-way maintenance; marine operations; hydrologic habitat modification, or other." *Id.* In turn, Part VIII.A.6.a.iii requires the program to "determine[] management practices, policies, procedures, etc. that will be developed and implemented to reduce or prevent the discharge of (potential) pollutants." *Id.* at 64-65. As used in the 2010 MS4 Permit, the term "management practice" is synonymous with the term "best management practice," or BMP, which is defined by the 2010 MS4 Permit as meaning:

> Schedules activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of waters of the state. BMPs also include treatment requirements (if determined necessary by the covered entity), operating procedures, and practices to control runoff, spillage and leaks, sludge or waste disposal, or drainage from areas that could contribute pollutants to stormwater discharges.

Id. at 88, 91. The term "pollutants of concern," or POCs, is defined by the 2010 MS4 Permit to encompass two categories of pollutants, as follows:

> There are POCs that are primary (comprise the majority) sources of stormwater pollutants and others that are secondary (less likely).
>
> - The POCs that are primarily of concern are: nitrogen, phosphorus, silt and sediment, pathogens, flow, and floatables impacting impaired waterbodies listed on the Priority Waterbody List known to come in contact with stormwater that could be discharged to that water body.

- The POCs that are secondarily of concern include but are not limited to petroleum hydrocarbons, heavy metals, and polycyclic aromatic hydrocarbons (PAHs), where stormwater or runoff is listed as the source of this impairment.

- The primary and secondary POCs can also impair waters not on the 303(d) list. Thus, it is important for the covered entity to assess known and potential POCs within the area served by their small MS4. This will allow the covered entity to address POCs appropriate to their MS4.

CX 4 at 93.

i. Parties' Arguments

In support of the alleged violation, Complainant points to the Records Requests, which requested certain information related to this MCM, and argues that Respondent's responses demonstrate that it failed to develop and implement a comprehensive pollution prevention and good housekeeping program. *See* Complainant's Br. at 67-68. For example, Complainant notes, EPA requested "[o]perational BMPs developed to reduce stormwater pollution from DOT facilities and activities." Complainant's Br. at 67 (citing CX 13 at 3; CX 34 at 3; CX 37 at 2). Noting that Respondent identified a number of documents in response to that particular request, Complainant argues that those documents fail to "contain all of the management practices, policies, and procedures required to reduce or prevent the discharge of POCs from its municipal operations." Complainant's Br. at 67. In particular, Complainant contends, the first document identified by Respondent, namely, Chapter 4 of its Environmental Handbook, describes some management practices applicable to municipal operations but fails to include "any practices, policies, or procedures for preventing the discharge of pollutants from stockpiles or from the storage of scrap metal and other waste piles," such as those observed during the audits. Complainant's Br. at 67-68 (citing CX 30 at 35-36; CX 35 at 30; CX 39 at 30). As for the other documents identified by Respondent, Complainant urges that each document addresses "a single practice, and [does] not (alone or in combination) constitute a complete program." Complainant's Br. at 68 (citing CX 13 at 3; CX 34 at 3; CX 37 at 2; Tr. at 64-66). Complainant also notes that Respondent stated "[n]o" in response to EPA's request for records of DOT facility inspections conducted for stormwater purposes in the most recent reporting year. Complainant's Br. at 68 (citing CX 13 at 3; CX 34 at 3; CX 37 at 3). Complainant concludes that Respondent developed the required program as of December 1, 2015, when it submitted to EPA updated management practices, policies, and procedures based on an assessment of its facilities and identification of POCs. Complainant's Br. at 68 (citing CX 58 at 2-3, 68-73; Tr. at 338; CX 48 at 53, 56-57, 73-74).

In its Initial Brief, Respondent argues that "[t]he plain language of the [2010 MS4 Permit] simply requires a pollution prevention/good housekeeping program for municipal operation [sic] and facilities and goes on to list examples of operations and facilities." Respondent's Br. at 29. Respondent maintains that it submitted numerous documents to EPA during the audits that evince such a program, such as the documents entitled "Spill Prevention Control and Countermeasure Plans Template," "Petroleum Bulk Storage Inspection and Reporting Checklist," and Chapter 4 of the Environmental Handbook, albeit without addressing

site-specific pollution prevention plans for its facilities or the discharge of pollutants from stockpiles and scrap metal storage. Respondent's Br. at 29-30 (citing CX 13; CX 34; CX 37; CX 30). Urging that the 2010 MS4 Permit did not require its program to contain those elements, Respondent's Br. at 30 (citing CX 4 at 64), Respondent argues that it nevertheless developed site-specific pollution prevention plans, as well as procedures for preventing the discharge of pollutants from stockpiles and scrap metal storage in fulfillment of the revised ACO, Respondent's Br. at 30 (citing Tr. at 526; CX 52 at 26-27; CX 58 at 3, 68).

Paying no heed to Respondent's contention that the 2010 MS4 Permit did not require its pollution prevention and good housekeeping program to include measures for preventing the discharge of pollutants from stockpiles and scrap metal storage, Complainant argues in its Reply that Respondent conceded liability by acknowledging the absence of those measures in the documents it submitted to EPA as its program. Complainant's Reply at 17. Complainant then characterizes Respondent's assertions concerning site-specific pollution prevention plans as "red herrings" because EPA never required Respondent to develop such plans, although it did require Respondent to perform self-assessments of its facilities in compliance with another part of the 2010 MS4 Permit. Complainant's Reply at 17 (citing CX 54 at 3, 506-965).

Respondent counters in its Reply that "Complainant's repeated contention that it did not require site-specific pollution prevention plans is refuted by testimony from Ms. Arvizu, Mr. Jacobsen, Mr. D'Angelo, and Ms. Kubek – all of which confirm that the EPA required the Respondent to promulgate site-specific pollution prevention plans to satisfy the [revised ACO]." Respondent's Reply at 7 (citing Tr. at 65-66, 212, 288, 475, 484; CX 58 at 3).

ii. Discussion

As noted above, Part VIII.A.6.a.i of the 2010 MS4 Permit requires covered entities to develop and implement a pollution prevention and good housekeeping program that "addresses municipal operations and facilities that contribute or potentially contribute POCs" to their MS4s. CX 4 at 64. It then identifies examples of such operations and facilities, stating that "[t]he operations and facilities may include, but are not limited to: street and bridge maintenance; winter road maintenance; stormwater system maintenance; vehicle and fleet maintenance; park and open space maintenance; municipal building maintenance; solid waste management; new construction and land disturbances; right-of-way maintenance; marine operations; hydrologic habitat modification, or other." *Id.* In turn, Part VIII.A.6.a.iii requires the program to "determine[] management practices, policies, procedures, etc. that will be developed and implemented to reduce or prevent the discharge of (potential) pollutants." *Id.* at 64-65. This text does not identify the level of specificity with which a covered entity is required to "address" its municipal operations and facilities or develop and implement practices to reduce or prevent the discharge of potential pollutants. In particular, the provisions do not indicate whether a covered entity is required to develop and implement a plan specific to each individual operation and facility or whether it is sufficient for the covered entity to develop and implement more general plans covering categories of operations and facilities existing state-wide.

I need not resolve that question in this proceeding, as it appears that Complainant is not seeking to hold Respondent liable for violating Part VIII.A.6.a.i or Part VIII.A.6.a.iii by virtue of

failing to have site-specific pollution preventions plans at the time of the audits.[47] Even without considering whether Respondent lacked site-specific pollution prevention plans at that time, I find that the evidentiary record before me reflects that Respondent described its policies, practices, and procedures for reducing or preventing the discharge of POCs from its fixed facilities and operations in numerous documents, *see, e.g.*, CX 30 at 234-36, 238-39; CX 35 at 232-34, 236-37; CX 39 at 250-52, 254-55, but that at least in the one document that is part of the record,[48] it did not address certain activities at its facilities, namely, the stockpiling and storage of certain materials, like scrap metal and materials collected as part of street sweeping activities, *see* RX 4. Respondent admits as much in its Initial Brief. *See* Respondent's Br. at 30. Based on the observations of the auditors during the audits, these activities undoubtedly served as a potential source of pollutants. *See, e.g.*, CX 35 at 675-77 (documentation of an uncovered and uncontained pile of scrap metal at Respondent's Fairview Residency, with "[v]isible petroleum sheen . . . observed on standing water on the ground surface underneath and around the scrap metal pile"); CX 35 at 719, 721-22 (documentation of uncovered and uncontained stockpiles of sand at Respondent's Carmel Residency, with accumulated sediment observed in a storm water conveyance ditch located just downgradient from one stockpile and accumulated sediment observed around an unprotected storm drain inlet located directly adjacent to another stockpile); Tr. at 267-68 (testimony of Mr. D'Angelo concerning evidence of erosion from one of the stockpiles of sand at Respondent's Carmel Residency, namely, that the conveyance below the stockpile "appeared to be inundated with sediment," creating "the potential for sand that had

[47] Complainant maintains in its post-hearing briefs that EPA never expected Respondent to develop site-specific pollution prevention plans for its municipal facilities. However, as argued by Respondent, this claim is belied by multiple items in the record. *See, e.g.*, CX 13 at 2 (requesting that Respondent produce "Example Facility Stormwater Pollution Prevention Plan (SWPPP) document – EPA Audit Team may select additional sites at the time of the audit"); CX 34 at 3 (same); CX 37 at 2 (same); Compl. ¶ III.10.l (alleging in support of the charged violation that "NYSDOT facilities do not have site specific BMP Plans that addresses [sic] potential pollutant sources from multiple NYSDOT facilities"); Tr. at 65-66 (testimony of Ms. Arvizu that the documents provided by Respondent in response to EPA's request for "[o]perational BMPs developed to reduce stormwater pollution from DOT facilities and activities" were "[n]ot wholly responsive" because the documents contained only "general guidance" or "state-wide procedures," whereas Respondent "needed site-specific BMPs to [address] site-specific concerns and failures at their maintenance facilities"). To the extent that Complainant once relied on allegations that Respondent had failed to develop site-specific pollution prevention plans for its facilities in order to support the charged violation, Complainant does not seem to be pursuing that theory any longer.

[48] In the relevant section of its 2012 and 2013 SWMP Plans, Respondent identified relevant documents as including a template for Spill Prevention, Control, and Countermeasures ("SPCC") Plans and related guidance, which it described as addressing "[o]perating procedures that prevent oil spills," "[c]ontrol measures installed to prevent a spill from reaching waters of the [United States]," and "[c]ountermeasures to contain, clean up, and mitigate the effects of an oil spill"; a Road-Kill Deer Carcass Composting Operation and Maintenance Manual; Operation of Oil/Water Separators ("OWS")/Wastewater Controls from Vehicle Washing and Storage Instructions, which it described as addressing, among other things, "appropriate wastewater controls from vehicle washing operations at NYSDOT facilities"; and its Environmental Handbook, which it described as addressing a variety of operations that involve pollution prevention and good housekeeping, including vehicle washing, storage and handling of certain products and wastes, spills containment and cleanup, and disposal of animal carcasses. CX 30 at 234-36, 238-39; CX 35 at 232-34, 236-37; CX 39 at 250-52, 254-55. Respondent identified those same documents in response to EPA's request in the Records Requests for "Operational BMPs developed to reduce stormwater pollution from DOT facilities and activities." *See* CX 13 at 3; CX 34 at 3; CX 37 at 2. Respondent noted in its SWMP Plans and responses to the Records Requests that the majority of those documents are not publicly accessible, and it appears that only the Environmental Handbook, out of the numerous documents identified, was entered into the record of this proceeding. *See* RX 4.

eroded off the pile [to be] mobilized via that conveyance into a culvert pipe inlet" leading to Stump Pond Creek); CX 39 at 623-25 (documentation of uncovered and uncontained stockpiles of sediment and aggregate at Respondent's Buffalo Sub Residency, with "[e]vidence of sediment mobilization [from the stockpiles] towards the two storm drain inlets located on the south and southwest sides of the Facility"); CX 39 at 636, 638 (documentation of an uncovered and uncontained pile of scrap metal at Respondent's Equipment Management Facility, with a greasy residue observed on one of the metal pieces in the stockpile).

The lack of procedures to address this potential source of pollutants supports a finding that Respondent failed to develop and implement a program fulfilling the requirements of Parts VIII.A.6.a.i and VIII.A.6.a.iii of the 2010 MS4 Permit. Respondent's argument that the 2010 MS4 Permit did not require procedures covering those sources is unpersuasive. In particular, Part VIII.A.6.a.i directs covered entities to address municipal operations and facilities that contribute or potentially contribute POCs to their MS4s and then states that such operations and facilities "may include, but are not limited to," certain examples listed therein. Clearly, that list is not exhaustive, and the Permit need not identify the storage of materials specifically in order to require Respondent to address them as potential sources of pollutants at its facilities.

In accordance with the foregoing discussion, I find that at the time of the audits, Respondent had failed to develop and implement a pollution prevention and good housekeeping program for municipal operations and facilities that fulfilled the requirements of Parts VIII.A.6.a.i and VIII.A.6.a.iii of the 2010 MS4 Permit. With regard to the period of violation, Respondent submitted a progress report to EPA on April 1, 2015, reflecting that it had "developed a statewide strategy for controlling runoff and sediment from scrap metal piles and other material stockpiles." CX 52 at 6, 26-49. However, as shown by documentation later submitted by Respondent to EPA on December 1, 2015, Respondent's efforts to refine and finalize those practices, among others, based on self-assessments performed at its fixed facilities appear to have been ongoing at the time, CX 58 at 2-3, 68-73, and EPA took December 1, 2015, as the date on which Respondent demonstrated that it had fulfilled the terms of the revised ACO associated with this particular violation, *see* RX 61 at 3. Complainant argues in its Initial Brief that Respondent's failure to comply began as early as July 1, 2011, a date "chosen by the EPA in its discretion," as the record lacks evidence that the required program existed prior to the audits. Complainant's Br. at 69. Respondent does not challenge the dates identified by Complainant. *See* Respondent's Br. at 29-30. Given the circumstances, I can infer that Respondent did not have a program fulfilling the requirements of Parts VIII.A.6.a.i and VIII.A.6.a.iii prior to the audits. Accordingly, I find that Respondent's failure to comply with those provisions began on or before July 1, 2011, and continued until December 1, 2015, for a total of 1,614 days.

b. Part VIII.A.6.a.ii

With regard to a pollution prevention and good housekeeping program for municipal operations and facilities, Complainant also alleges in the Complaint that Respondent failed to comply with the requirement set forth at Part VIII.A.6.a.ii of the 2010 MS4 Permit. Compl. ¶ III.10.m. That provision requires a covered entity's pollution prevention and good housekeeping program to include the performance and documentation of a self-assessment of all municipal operations to "determine the sources of pollutants potentially generated by the covered entity's

operations and facilities" and "identify the municipal operations and facilities that will be addressed by the pollution prevention and good housekeeping program, if it is not done already." CX 4 at 64.

i. Parties' Arguments

In order to demonstrate that Respondent failed to perform and document a self-assessment of all municipal operations in satisfaction of Part VIII.A.6.a.ii of the 2010 MS4 Permit, Complainant first points to two requests set forth in each Records Request sent to Respondent prior to the audits and Respondent's responses to those requests. *See* Complainant's Br. at 69-70. In particular, Complainant notes that EPA requested documentation of self-assessments performed for all of Respondent's operations and facilities for the "current permit term." Complainant's Br. at 69 (citing CX 13 at 3; CX 34 at 3; CX 37 at 3). While Respondent produced a number of documents in response to that request, Complainant contends that "[n]one of these documents was a self-assessment of any facility, much less of all facilities." Complainant's Br. at 69-70 (citing CX 13 at 3; CX 34 at 3; CX 37 at 3; Tr. at 66-69). Complainant also notes that EPA requested records of facility inspections conducted for stormwater purposes in the most recent reporting year, to which Respondent stated "[n]o" with regard to documentation provided in response. Complainant's Br. at 70 (citing CX 13 at 3; CX 34 at 3; CX 37 at 3; Tr. at 69-70). In addition to relying on Respondent's responses to the Records Requests for support, Complainant also notes that the audit reports for each audit reflect that Respondent's staff informed EPA of its failure to perform any self-assessments or even to develop a program for performing and documenting self-assessments. Complainant's Br. at 70 (citing CX 30 at 33; CX 35 at 28; CX 39 at 28). Complainant asserts that Respondent demonstrated its compliance with Part VIII.A.6.a.ii on June 30, 2015, when it submitted documentation of self-assessments for all of its municipal operations and facilities. Complainant's Br. at 70 (citing CX 54 at 3, 506-965).

In its Initial Brief, Respondent acknowledges that it "had not yet performed a self-assessment" at the time of the audits. Respondent's Br. at 36 (citing CX 30 at 31, 33). Respondent argues, however, that because the 2010 MS4 Permit is silent as to the frequency of the self-assessments required by Part VIII.A.6.a.ii, its failure to perform one by the time of the audits is not a violation. Respondent's Br. at 36. As it did with regard to the charged violation of Part VIII.a.5.a.vi, Respondent also argues that "it is not surprising that some items [from the 2010 MS4 Permit] remained outstanding," despite its "good faith efforts to fully develop and implement every requirement of the permit upon issuance," given that it is "by far the largest MS4 governed by the terms of this permit" and that "the breadth of the MS4 permit grew considerably" in the seven years since it first took effect in 2003. Respondent's Br. at 36 (citing CX 2; CX 3; CX 4; Tr. at 511-12).

As it argued previously, Complainant maintains that "the complexity of the permit is no excuse for the violations and, to the extent that Respondent now challenges the permit, such an argument is untimely, and thus precluded." Complainant's Reply at 20. Complainant also balks at Respondent's argument concerning the absence of language in the 2010 MS4 Permit with respect to a specific frequency for performing the self-assessments required by Part VIII.A.6.a.ii. *See* Complainant's Reply at 20. While Respondent may have construed the Permit's silence on

the issue as meaning that "it can simply wait as long as it wants to perform [a self-assessment]," Complainant maintains:

> Respondent ignores the fact that the permit requires the assessments in order for Respondent to "determine the sources of pollutants potentially generated by the permittee's operations and facilities and identify the municipal operations and facilities that will be addressed by the pollution prevention and good housekeeping program . . . ." Thus, without completing the assessments, Respondent would be (and was) unable to develop a proper pollution prevention and good housekeeping program, as required by the permit.

Complainant's Br. at 20-21 (citing CX 4 at 64). Complainant further argues that the alleged violation "is based on the fact that Respondent had never done ANY self-assessments of its fixed facilities, as clearly required by the permit." Complainant's Reply at 20.

ii. Discussion

The record contains ample evidence that Respondent had not formally performed and documented a self-assessment of all municipal operations in Regions 9, 8, and 5 by the time of the audits. *See, e.g.*, CX 13 at 3; CX 34 at 3; CX 37 at 3; CX 30 at 33; CX 35 at 28; CX 39 at 28; Tr. at 66-69, 71-72, 254-55. I find that this evidence outweighs the opposing evidence – namely, Respondent's assertions in its annual reports to NYSDEC for the reporting periods ending on March 9, 2012, and March 9, 2013, that it had performed a self-assessment of its operations, activities, and facilities within the past three years, CX 30 at 428; CX 35 at 426; CX 39 at 441, and Ms. Kubek's vague and unsubstantiated testimony at the hearing that Respondent had performed self-assessments in the past "but not the exact type of self-assessment or style that EPA was asking for," Tr. at 453 – particularly given Respondent's admission in its Initial Brief that it had failed to perform and document self-assessments as required by the Permit.

As for Respondent's arguments in defense of liability, consistent with the discussions above, the size of Respondent's network of MS4s and the scope of the requirements imposed by the 2010 MS4 Permit do not absolve it from liability for its failure to fulfill the requirements of the Permit. Turning to its contention concerning the date by which it was required to comply with the particular requirement at hand, Respondent is correct that Part VIII.A.6.a.ii directs covered entities to perform and document a self-assessment of all municipal operations without any reference to the frequency at which the self-assessment must be performed or a date by which the self-assessment must be completed during the term of the Permit. Respondent advances the view that this silence entitles it to perform a self-assessment at any time within its discretion. According to the Permit, however, the purpose of the self-assessment is to ensure that a covered entity has determined the sources of pollutants potentially generated by its operations and facilities and identified the operations and facilities that will be addressed by its pollution prevention and good housekeeping program. Thus, as argued by Complainant, a failure to perform a self-assessment would undermine a covered entity's ability to develop and implement a pollution prevention and good housekeeping program in fulfillment of the other terms of the Permit. To the extent that Respondent's reading of Part VIII.A.6.a.ii would have a dilatory effect on a covered entity's performance and documentation of a self-assessment, and subsequent

development and implementation of a pollution prevention and good housekeeping program consistent with the requirements of the Permit, it seems to be patently unreasonable.

The question then is precisely how often or by what date covered entities such as Respondent were expected by NYSDEC, as the drafter of the 2010 MS4 Permit, to perform self-assessments in order to satisfy Part VIII.A.6.a.ii. The evidentiary record offers a few clues. Specifically, the counterpart of Part VIII.A.6.a.ii that applies to traditional land use control MS4s directs those covered entities to perform and document a self-assessment of all municipal operations "at a minimum frequency of once every three years." CX 4 at 45. This contrast existed in the 2008 MS4 Permit as well. *See* CX 3 at 35, 52-53. Principles of statutory construction direct that "where Congress includes particular language in one section of a statute but omits it in another . . ., it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)). Consistent with that principle, I have reservations about reading the same requirement into Part VIII.A.6.a.ii that exists in its counterpart, such that the covered entities to which Part VIII.A.6.a.ii applies, like Respondent, would be required to perform and document a self-assessment of all municipal operations at least once every three years as well. However, I note that the form that Respondent was required to complete and submit to NYSDEC as its annual report during the relevant period lists examples of operations, activities, and facilities that contribute or potentially contribute POCs to a covered entity's MS4 and then asks the covered entity to indicate whether it performed a self-assessment of those operations, activities, and facilities within the past three years, regardless of whether the covered entity was a traditional land use control MS4, traditional non-land use control MS4, or non-traditional MS4 such as Respondent. *See* CX 30 at 428; CX 35 at 426; CX 39 at 441. This suggests that NYSDEC expected Respondent, and that Respondent was aware of the expected obligation, to perform a self-assessment at least every three years, notwithstanding the absence of express language to that effect in Part VIII.A.6.a.ii. Based on this consideration, the date by which Respondent was first required to perform a self-assessment in accordance with Part VIII.A.6.a.ii was May 1, 2011, three years from the effective date of the 2008 MS4 Permit, which first imposed the requirement that covered entities perform a self-assessment as part of their pollution prevention and good housekeeping programs.

Complainant argues in its Initial Brief that Respondent's failure to comply with Part VIII.A.6.a.ii began as early as July 1, 2011, a date "chosen by the EPA in its discretion," as the record lacks evidence that Respondent had performed any self-assessments in accordance with that provision prior to being ordered to do so by EPA. Complainant's Br. at 70. As for the date on which Respondent demonstrated compliance, Complainant cites June 30, 2015, the date on which Respondent submitted documentation evincing the self-assessments it had performed for its operations and facilities.[49] Complainant's Br. at 70 (citing CX 54 at 3, 506-965). Respondent did not offer any evidence in rebuttal. Accordingly, I find that Respondent's failure to comply

[49] Notably, Respondent represented to EPA in that documentation that it had "completed self assessments of each of the active operations and facilities in its MS4, *except for those within Jefferson County urbanized area, which will be completed by March 9, 2016*." CX 54 at 3 (emphasis added). Notwithstanding this assertion, Complainant took June 30, 2015, as the date on which Respondent achieved compliance. That date is consistent with other evidence in the record. *See, e.g.*, CX 58 at 70 ("Self-Audits of Maintenance Facilities were performed in the Spring of 2015."), 74-90.

with Part VIII.A.6.a.ii began on at least July 1, 2011, and continued until June 30, 2015, for a total of 1,460 days.

c. Part VIII.A.6.a.vi

With regard to a pollution prevention and good housekeeping program for municipal operations and facilities, Complainant alleges in the Complaint that Respondent failed to comply with the particular requirement set forth at Part VIII.A.6.a.vi of the 2010 MS4 Permit. Compl. ¶ III.10.n. That provision requires a covered entity's pollution prevention and good housekeeping program to "include[] an employee pollution prevention and good housekeeping training program and ensure that staff receive and utilize training." CX 4 at 65.

i. Parties' Arguments

In support of its position that Respondent failed to comply with Part VIII.A.6.a.vi of the 2010 MS4 Permit, Complainant points to numerous items in the record as demonstrating the absence of a pollution prevention and good housekeeping training program for Respondent's employees and a failure to ensure that staff received and utilized such training across Respondent's regional offices. *See* Complainant's Br. at 71-72. With respect to Region 9, Complainant first points to the Records Request, in which EPA requested training records pertaining to pollution prevention and good housekeeping for the most recent reporting year and Respondent answered that such records were not available. Complainant's Br. at 71 (citing CX 13 at 3). Looking next to the audit report for the audit of Region 9, Complainant argues that while Respondent's staff spoke of various training activities during the audit, not only were the employees unable to provide documentation of those activities but they also stated that training pertaining to pollution prevention and good housekeeping was not provided to staff working at Respondent's fixed facilities. Complainant's Br. at 71 (citing CX 30 at 34). Respondent subsequently provided documentation of a training, Complainant contends, but it reflected that the training was not provided to all staff and that it was focused on matters other than pollution prevention and good housekeeping. Complainant's Br. at 71-72 (citing CX 30 at 34).

Turning to Region 8, Complainant notes that Respondent provided a document entitled "Employee Maintenance Personnel Training" in response to EPA's request in the Records Request for training records pertaining to pollution prevention and good housekeeping for the most recent reporting year. Complainant's Br. at 71 (citing CX 34 at 4). This document, Complainant contends, describes two stormwater pollution prevention trainings purportedly provided to Region 8 staff but fails to "specify which facilities or staff received either training, although the Region 8 Environmental Specialist I/Acting MEC [Maintenance Environmental Coordinator] explained that only DOT Region 8 residency employees attended the training." Complainant's Br. at 72 (citing CX 35 at 29).

Finally, with regard to Region 5, Complainant first notes that Respondent did not produce any documents in response to EPA's request in the Records Request for training records pertaining to pollution prevention and good housekeeping for the most recent reporting year. Complainant's Br. at 71 (citing CX 37 at 3). Citing the audit report for the audit of Region 5, Complainant then notes that the Maintenance Environmental Coordinator described periodic

meetings and informal discussions touching on the subject of good housekeeping but that "the EPA observed a widely varying level of stormwater awareness amongst DOT staff." Complainant's Br. at 72 (citing CX 39 at 29). Further, Complainant asserts, "while it was reported that multiple DOT employees from different facilities had attended an SPDES stormwater webinar class on June 19, 2013, there was nothing to indicate that the class had been offered to, or attended by, all DOT municipal operations personnel." *Id.*

Complainant concludes that Respondent demonstrated its compliance with Part VIII.A.6.a.vi on November 3, 2014, when it submitted training materials, procedures, and documentation. Complainant's Br. at 73 (citing CX 50 at 7-8, 28-38; Tr. at 340-41).

In its Initial Brief, Respondent challenges the allegation that it failed to develop and implement a training program in accordance with Part VIII.A.6.a.vi. Respondent's Br. at 30-31. In support of its position, Respondent first points to the audit reports for Regions 8 and 9 and Complainant's Initial Brief as demonstrating that "[i]t is undisputed that [it] did have employee training programs in place prior to the audits" and that the trainings covered topics ranging from inspections of outfalls to stormwater pollution prevention. Respondent's Br. at 30 (citing CX 30 at 24, 34; CX 35 at 29; Complainant's Br. at 71-72). Citing the testimony of Ms. Kubek, Respondent next argues that "all regional facilities performed semi-annual training covering pollution prevention and control measures," and that "[t]hese training programs were submitted to [NYSDEC]" as part of its annual report, which NYSDEC seemingly accepted in satisfaction of Part VIII.A.6.a.vi. Respondent's Br. at 30-31 (citing Tr. at 488-89, 492-93). Finally, Respondent challenges Complainant's reliance on the auditors' observations of varying levels of awareness among Respondent's staff concerning stormwater issues as proof that Respondent lacked the required training program, arguing that "Complainant tries to elevate a training requirement into a complete knowledge requirement." Respondent's Br. at 31. Respondent maintains that the audit reports neglect to state whether the auditors investigated the matter further, such as by inquiring "how long those staff members had been employed by [Respondent], or what their duties were." Respondent's Br. at 31. Moreover, Respondent contends, "the permit does not require a consistent level of stormwater awareness amongst staff." Respondent's Br. at 31.

In response, Complainant argues that contrary to Respondent's assertions, its staff described to the auditors "various training activities," rather than a "training program," and that those activities were lacking for purposes of satisfying Part VIII.A.6.a.vi because of the contents of the training materials and/or the particular staff to whom the trainings were offered. Complainant's Reply at 17-18 (citing CX 30 at 34; CX 35 at 29). Complainant also objects to Ms. Kubek's testimony on the matter, arguing that Ms. Kubek was not employed by Respondent at the time of the audits; that the witnesses who were employed by Respondent before and during the audits were unable to describe or provide documentation of the purported trainings; that Respondent produced only "scattered and unresponsive examples in response to the EPA's request for any training plan, syllabus, or records"; and that, as confirmed by the testimony of the auditors, Respondent was unable to produce any evidence of a pollution prevention and good housekeeping training program for its employees. Complainant's Reply at 18 (citing Tr. at 255-56, 288-89). Finally, Complainant disputes Respondent's assertion that NYSDEC accepted the trainings it submitted in its annual reports as fulfilling the requirements of Part VIII.A.6.a.vi,

arguing that the testimony cited by Respondent in support fails to substantiate those claims. Complainant's Reply at 18 (citing Tr. at 489, 492-93).

ii. Discussion

Upon consideration, I agree with Complainant that the documentary and testimonial evidence in the record weighs in favor of finding that at the time of the audits, Respondent had not developed and implemented a pollution prevention and good housekeeping training program for its employees, and ensured that its staff received and utilized training, in accordance with Part VIII.A.6.a.vi of the 2010 MS4 Permit. First, I note that the audit reports reflect variations across Respondent's regions with regard to the contents of trainings offered, if any were offered at all, and the staff who participated. As documented in the audit report for the audit of Region 9, Respondent's staff informed the auditors of various training activities that had been conducted on a number of topics but then provided documentation of only one training, which had been offered to only a subset of employees and focused primarily on erosion and sediment control, rather than pollution prevention and good housekeeping. CX 30 at 34. Respondent's staff also informed the auditors that training specific to pollution prevention and good housekeeping had not been developed for staff employed at Respondent's residencies or other fixed facilities. *Id.*

Turning to the audit of Region 8, Respondent produced during that audit a document entitled "Employee Maintenance Personnel Training." CX 35 at 29. Appended to the audit report for the audit of Region 8, this document simply lists, without any explanation, two trainings related to pollution prevention and good housekeeping: "Municipal Storm Water Pollution Prevention Video presented to staff at Various Maintenance Facilities (Video is available for viewing at Audit)" and "Dutchess Co. SWCD Trainings attended by Residency Employees (2008 and 2010)." CX 35 at 630. According to the audit report, the auditors determined that these trainings were presented to staff only at Region 8's residencies and no other fixed facilities. CX 35 at 29. The maintenance facility inspection reports appended to the audit report offer additional details. For example, in the maintenance facility inspection reports documenting the auditors' visits to three of Respondent's residencies in Region 8, the auditors indicated that representatives for those facilities reported that "besides SPCC [spill prevention control and countermeasures] training, stormwater training had not been provided for the Facility staff." CX 35 at 675, 689, 701. The auditors proceeded to refer to a video shown to staff at those facilities in 2010 that "partially addressed stormwater pollution prevention practices," but records of attendance were not able to be provided. CX 35 at 675, 689-90, 701-02. Meanwhile, in a maintenance facility inspection report documenting the auditors' visit to Respondent's Katonah Residency in Region 8, the auditors relayed that a representative for that facility described semi-annual safety meetings conducted each spring and fall at which environmental issues had at one time been addressed by "an environmental staff member" but that those issues had not been a component of the meetings "since that staff member left a couple years prior." CX 35 at 726; *see also* Tr. at 213-14.

Finally, the audit report for the audit of Region 5 reflects that Respondent's Maintenance Environmental Coordinator ("MEC") informed the auditors of semi-annual safety meetings conducted each spring and fall for all of Respondent's maintenance personnel for at least the previous 10 years, which would "sometimes touch on the subject of good housekeeping in

regards to employee safety and work hazards." CX 39 at 29. Additionally, the MEC advised that he regularly visited each facility to "discuss facility operations and answer any environmental questions that staff may have." *Id.* The auditors also observed during their visits to Respondent's facilities in Region 5 that some of the staff had recently attended a "SPDES stormwater webinar class" conducted by a private entity but that it did not appear to have been offered to all personnel. CX 39 at 29. Once again, the maintenance facility inspection reports appended to the audit report offer additional details. In particular, in the maintenance facility inspection reports documenting the auditors' visits to four of Respondent's residencies in Region 5, the auditors noted that representatives from those facilities advised that "NYSDOT Health and Safety staff . . . hold safety meetings two times per year (fall and spring)" and that "[h]ousekeeping practices are generally not discussed unless they present safety hazards for personnel." CX 39 at 623, 630, 656, 671.

Respondent maintains that the audit reports demonstrate the existence of training programs addressing pollution prevention and good housekeeping at its fixed facilities. However, I consider the representations of Respondent's staff to the auditors and the scant documentation produced in support as more aptly demonstrating that Respondent may have engaged in some training activities addressing pollution prevention and good housekeeping but that the subject was either discussed only sporadically, as described by multiple personnel during the audit of Region 5, or taught to only a fraction of the staff employed at Respondent's fixed facilities, as shown by the auditors' observations of the trainings identified by Respondent's staff during the audit of Region 8. Given the varying information provided during each audit, the activities also seem to have lacked consistency and coordination across Respondent's regions. These features are hardly indicative of a structured training program. Dan Hitt, who was Director of Respondent's Office of Environment by the time of the hearing, seemed to confirm the lack of structure for those activities during his testimony on the subject, in which he explained that his office provides monthly trainings on "environmental matters," approximately one hour in length, to "whoever is interested" and that on a regional level training is provided to maintenance staff on an "as-needed" basis, as determined by the Resident Engineer. Tr. at 551, 561-63, 575-76. When questioned about it further, he testified as follows:

> Q: Tell us, generally, whether before 2012, the maintenance employees received training on their responsibilities with regard to hazardous substances and the pollution issues?
>
> A: All I can say is the training has been offered, and who took it depends on who signed up for the classes or who coordinated the training within their particular region with the Resident Engineer . . . .

Tr. at 564-65.

To bolster its stance that it had a conforming program in place at the time of the audits, Respondent points to the testimony of Ms. Kubek. During her testimony, Ms. Kubek described trainings covering a multitude of topics, including pollution prevention, as being provided to all staff at Respondent's maintenance facilities during semi-annual meetings occurring each spring and fall. *See* Tr. at 460-61, 470, 492-93. This testimony comports with the information provided

by the representative from Respondent's Katonah Residency during the audit of Region 8 and by various personnel during the audit of Region 5 to the extent that she identifies the semi-annual meetings as the vehicle by which pollution prevention and good housekeeping training was provided to staff, but it deviates from their representations in that she suggests that the subject of pollution prevention was consistently presented at each semi-annual meeting. When questioned about the discrepancy between her depiction of the trainings and those reflected elsewhere in the record, Ms. Kubek testified as follows:

> I think the -- during the audits, some of the staff that were questioned may have perceived that there were no agendas for their training, but the training staff there, which would be their resident engineers or the maintenance environmental coordinators, whoever is conducting the training, they do have an agenda. The folks attending the training tend to be our highway maintenance workers, and they try to have a more relaxed atmosphere, so they don't feel pressure into a -- thinking of it as a school-like setting, but trying to keep it so that they are approaching it more like a carrot situation than a stick, because you get more response from people if you say it would be really good for the environment if you did these things, and we encourage all of our staff to do everything the right way. So they may perceive it as being more informal, but they have a set agenda, and there are items that must be covered under those trainings every year.

Tr. at 547-48.

Testimony was elicited from two other witnesses at the hearing that corroborates her account. First, Carl Kochersberger, who had been employed by Respondent for six years and was working under the supervision of Respondent's Statewide Stormwater Program Coordinator, Dave Graves, at the time of the audits, testified that each year maintenance staff attended a "spring safety meeting," where "[a] lot [of] housekeeping," among other topics, was covered, as it is "a very important part of storm water pollution prevention." Tr. at 615-16, 621. He further testified that while documentation of employees' attendance at these trainings was not consistently kept at the time of the audits, participation was required of all staff at Respondent's maintenance facilities. Tr. at 648-49. Finally, he testified that "tailgate trainings" were held "quite frequently" and that resources were available to employees in the event that any questions arose. Tr. at 617-18. Meanwhile, Jonathan Bass, who had been employed by Respondent for 18 years at the time of the audits, testified that he "wasn't directly involved in [the trainings of staff on environmental issues]" during the relevant period but that he was aware of certain topics addressed during these "informal" trainings. Tr. at 656-57. Specifically, he testified:

> A: The ones that I'm aware of, there would be asbestos training for certain folks, I believe there was a lot of stuff associated with fuel, and the, you know, fuel that is stored on-site on our residencies, and the maintenance of fuel tanks, and that kind of thing; a lot to do with fuel, and also transfer of waste from the sites, clean-up and maintaining the facilities so that things weren't polluted, that kind of stuff.
>
> Q: What about the proper disposal of petroleum products?

A: Absolutely. That would be part of it, yes.

Tr. at 657-58. Consistent with Mr. Kochersberger, Mr. Bass testified that records of attendance were not kept. Tr. at 659. He also testified about the resources available to employees to answer any questions they may have. Tr. at 658.

While the foregoing testimonial evidence supports a finding that the topic of pollution prevention and good housekeeping was not an insignificant or irregular component of the trainings provided to staff at Respondent's fixed facilities each year, I am still skeptical of Respondent's position given certain considerations that detract from the reliability of its witnesses' testimony on this subject. For example, as noted by Complainant, Ms. Kubek was not employed by Respondent at the time of the audits, and I question the amount of weight to afford her testimony, as well as that of Mr. Kochersberger and Mr. Bass even though they were employed by Respondent at the time, over the representations of numerous staff contemporaneous with the audits concerning the regularity with which pollution prevention and good housekeeping was discussed during the semi-annual meetings in question. Ms. Kubek's attempt to explain away the discrepancy – namely, by suggesting that the staff questioned by the auditors may have characterized the trainings as casual in nature because of their particular positions at the fixed facilities and that higher level staff, such as the Resident Engineer and Maintenance Environmental Coordinator, would have known and advised the auditors that the trainings were, in fact, more structured – is not particularly compelling given that the audit report for the audit of Region 5 reflects that a Resident Engineer and Maintenance Environmental Coordinator were consulted during that audit and that they both alluded to the variability in how pollution prevention and good housekeeping matters were presented during those meetings. *See* CX 39 at 623 ("The NYSDOT RE [Resident Engineer] stated that NYSDOT Health and Safety staff . . . hold safety meetings two times per year (fall and spring). Typical safety meetings cover topics regarding work hazards and basic first aid. *Housekeeping practices are generally not discussed unless they present safety hazards for personnel*.") (emphasis added); CX 39 at 29 ("The NYSDOT MEC [Maintenance Environmental Coordinator] stated that a semi-annual safety meeting is conducted each spring and fall for all NYSDOT maintenance personnel and that the training *will sometimes touch on the subject of good housekeeping in regards to employee safety and work hazards*.") (emphasis added). Moreover, the auditors met with Resident Engineers during the audit of Region 8 who never referred to the semi-annual meetings at all but rather informed the auditors that "besides SPCC [spill prevention control and countermeasures] training, stormwater training had not been provided for the Facility staff." CX 35 at 689, 701. In the context of testifying about this requirement, Ms. Kubek also conceded that she is "not aware of every activity in every region," and while she maintained that a training video provided by Respondent to EPA in order to fulfill the directives of the revised ACO on this issue existed prior to the ACO, she testified that she was uncertain when a Power Point presentation developed to supplement the video was prepared. Tr. at 531-34.

Even if it was deemed to be reliable on this subject, the testimony of Mr. Kochersberger and Mr. Bass points to a practice of not maintaining records of employees' participation in the trainings provided to staff at Respondent's fixed facilities each year, which raises questions about the degree to which Respondent was able to ensure that staff received training as required by Part VIII.A.6.a.vi. Their testimony in this regard comports with the inability of Respondent's

staff to provide records of attendance during the audits, as documented by the auditors. I note that the annual reports submitted by Respondent to NYSDEC paint a slightly different picture by identifying the number of staff who received "stormwater management trainings" during the relevant period. Specifically, in its annual report for the reporting period ending on March 9, 2012, Respondent indicated in the section covering MCM 6 that it had offered 21 storm water management trainings to "municipal employees" and that 493 such employees had been trained during the reporting period, with the date of the last training being March 9, 2012. CX 30 at 429; CX 35 at 427. In turn, Respondent indicated in the relevant section of its annual report for the reporting period ending on March 9, 2013, that it had offered 25 storm water management trainings to municipal employees and that 999 such employees had been trained during the reporting period, with the date of the last training being March 8, 2013. CX 39 at 442. While this evidence suggests that Respondent monitored its employees' attendance at trainings at least in some capacity, it is not clear to me from the general references to "stormwater management trainings" and "municipal employees" that the figures and dates reported pertain to trainings covering the topic of pollution prevention and good housekeeping for employees at Respondent's fixed facilities, such that it disproves the opposing evidence.

Based on the foregoing discussion, I find that the evidence supporting Respondent's position on this matter fails to rebut the opposing evidence and that at the time of the audits, Respondent had not developed and implemented a training program for its employees, and ensured that staff received and utilized training, in accordance with Part VIII.A.6.a.iv of the 2010 MS4 Permit. I also find, consistent with the discussion set forth above in the context of Respondent's failure to timely complete its ORI, that the violation at hand is not excused by any purported approval by NYSDEC, as argued by Respondent. Specifically, Respondent urges that "all regional facilities performed semi-annual training covering pollution prevention and control measures" and that "[t]hese training programs were submitted to DEC" each year as part of its annual report, which NYSDEC seemingly accepted as fulfilling the terms of the Permit. Respondent's Br. at 30-31. However, as observed by Complainant, Respondent does not point to any evidence of the materials that it submitted to NYSDEC to evince its purported training programs for NYSDEC's benefit. While it could conceivably be referring to the figures and dates described above, that information seems to refer to "stormwater management training" generally and hardly makes clear that staff at Respondent's fixed facilities participated in trainings addressing pollution prevention and good housekeeping twice per year, as Respondent now claims, let alone that Respondent's activities were, in fact, lacking in the manner found in this Initial Decision. Thus, I am not persuaded that NYSDEC knew of the true nature of Respondent's activities in this regard. Moreover, as previously discussed, any argument that NYSDEC approved of Respondent's reported activities by virtue of any inaction against those activities, thereby excusing a violation, fails as a matter of law.

As for the period that Respondent failed to comply with Part VIII.A.6.a.iv, the record reflects that on November 3, 2014, Respondent submitted to EPA a narrative description of procedures for conducting and recording the attendance of staff at an annual pollution prevention and good housekeeping training, as well as copies of the materials used for the training, that reflects a formal, structured training program, and that on December 8, 2014, EPA deemed that submission as fulfilling the requirements of the revised ACO. CX 50 at 7-8, 28-38; Tr. at 340-41; RX 33 at 3. In turn, Complainant argues in its Initial Brief that Respondent's failure to

comply began as early as July 1, 2011, a date "chosen by the EPA in its discretion," as the record lacks evidence that the required program existed prior to the audits. Complainant's Br. at 73. Respondent does not challenge the period alleged by Complainant. *See* Respondent's Br. at 30-31. Given the circumstances, I can infer that Respondent did not have a program fulfilling the requirements of Part VIII.A.6.a.iv prior to the audits. Accordingly, I find that Respondent's failure to comply with that provision began on or before July 1, 2011, and continued until November 3, 2014, for a total of 1,221 days.

d. Part VIII.A.6.d

The Complaint alleges that Respondent failed to comply with Part VIII.A.6.d of the 2010 MS4 Permit. Compl. ¶ III.10.o. That provision requires covered entities to "[s]elect and implement appropriate pollution prevention and good housekeeping BMPs and measurable goals to ensure the reduction of all POCs in stormwater discharges to the [maximum extent practicable]." CX 4 at 66. The term "measurable goals" is defined by the 2010 MS4 Permit as:

> the goals of the SWMP that should reflect the needs and characteristics of the covered entity and the areas served by its small MS4. Furthermore, the goals should be chosen using an integrated approach that fully addresses the requirements and intent of the MCM. The assumption is that the program schedules would be created over a 5 year period and goals would be integrated into that time frame. For example, a larger MS4 could do an outfall reconnaissance inventory for 20% of the collection system every year so that every outfall is inspected once within the permit cycle.

CX 4 at 91.

i. Parties' Arguments

In support of its position that Respondent failed to comply with Part VIII.A.6.d of the 2010 MS4 Permit, Complainant argues that "EPA observed numerous failures by Respondent to implement appropriate [pollution prevention and good housekeeping] BMPs for its municipal operations that contribute or potentially contribute POCs to Respondent's MS4." Complainant's Br. at 73. With respect to Region 9, Complainant points to observations documented in the audit report for the audit of Region 9 and the maintenance facility inspection reports appended to the audit report that, according to Complainant, demonstrate a high likelihood that numerous pollutants, such as soil, petroleum products, paint, and salt were discharged in storm water from three sites into waters of the United States. Complainant's Br. at 73-75 (citing CX 30 at 36-38, 648-71). Specifically, Complainant notes that the auditors observed at Respondent's Vestal Waste Storage Yard, where staff advised the auditors that storm water runoff from the facility is conveyed to Patterson Creek, that piles of materials collected during street sweeping activities, stockpiles of bulk materials, and piles of soil containing animal remains were stored uncovered and without containment. Complainant's Br. at 74 (citing CX 30 at 36, 649-52). Complainant next notes that the auditors observed at Respondent's Tioga Residency, from which storm water runoff appeared to discharge ultimately to the adjacent Owego Creek, such things as rust and petroleum product staining on impervious surfaces underneath and adjacent to equipment;

discolored water accumulated adjacent to a maintenance garage; petroleum product staining on the ground surface adjacent to material stockpiles; two rusty paint containers stored in an outdoor area without coverage or secondary containment and a large stain from an unknown substance leading from the paint containers to the perimeter fence and offsite; a scrap metal pile stored uncovered and without containment; an uncovered scrap metal container storing visible petroleum product that appeared to be leaking onto the impervious surface underneath the container; a lack of controls to contain salt stored in the salt shed or to prevent discharge of salt during loading and unloading operations upgradient of a drainage way to Owego Creek; and an open lid on a dumpster containing scrap tires and other wastes. Complainant's Br. at 74-75 (citing CX 30 at 36-37, 661-71). Finally, Complainant notes that the auditors observed at Respondent's Broome Residency, a site located adjacent to Stratton Mill Creek that includes the nearby Bridge Crew Facility, such things as petroleum product staining on impervious surfaces; paint spilled on the ground surface adjacent to a drainage ditch; and piles of materials stored uncovered and without containment, including a stockpile of materials directly adjacent to the creek. Complainant's Br. at 75 (citing CX 30 at 37-38, 653-60).

As for Region 8, Complainant points to observations documented in the audit report for the audit of Region 8 and the maintenance facility inspection reports appended to the audit report that, according to Complainant, demonstrate a high likelihood that numerous pollutants, such as petroleum products, salt, battery acid, and other chemicals, were discharged in storm water from six sites into waters of the United States. Complainant's Br. at 75-79 (citing CX 35 at 31-34, 147, 673-742). Specifically, Complainant notes that at Respondent's Fairview Residency, the auditors observed such things as an uncovered and uncontained pile of scrap metal potentially containing hazardous materials; an outdoor vehicle and equipment wash area near storm drains; foam from an unknown source inside a storm drain inlet downgradient from the vehicle wash area; unprotected storm drain inlets downgradient of a salt storage area and vehicle fueling station; and petroleum sheen on wet impervious and ground surfaces. Complainant's Br. at 76 (citing CX 35 at 31, 674-80). Complainant next notes that the auditors observed at the Region 8 Equipment Management Facility, from which storm water runoff is conveyed either to a storm water pond that discharges to an unnamed stream or directly to the unnamed stream by way of storm drain inlets in one portion of the facility, such things as an uncontained and uncovered pile of scrap metal located upgradient from the storm water pond; petroleum sheen on an impervious surface resulting from vehicles leaking petroleum products; an unknown substance staining an impervious surface adjacent to a storm water conveyance culvert; and storage of used 55-gallon drums without the bung caps in place. Complainant's Br. at 76 (citing CX 35 at 31-32, 681-87). Complainant next notes that the auditors observed at Respondent's Kingston Residency, where a Resident Engineer advised the auditors that storm water runoff from the facility is conveyed to storm drain inlets connected to Respondent's MS4, which ultimately discharges to the Hudson River, such things as vehicle washing activities being conducted adjacent to unprotected storm drain inlets; heavy machinery actively leaking petroleum product on an impervious surface; petroleum sheen on impervious surfaces and in a storm drain inlet; brine leaking from a hose onto an impervious surface; unprotected storm drain inlets downgradient of the vehicle wash area; accumulated sediment around an unprotected storm drain inlet; an uncovered and uncontained pile of used vehicle batteries; and uncovered and uncontained piles of salt. Complainant's Br. at 77 (citing CX 35 at 32, 688-99). Complainant next notes that at the Region 8 Special Crews Facility, from which storm water runoff is primarily conveyed to storm drain

inlets that ultimately discharge to Casper Creek, the auditors observed paint accumulated in and around a storm drain inlet; rust and petroleum product staining on impervious surfaces; and containers storing chemicals, paint waste, and other materials that were uncovered and/or uncontained. Complainant's Br. at 77-78 (citing CX 35 at 33, 709-16). Complainant further remarks that at Respondent's Carmel Residency, from which storm water runoff is conveyed to multiple points ultimately discharging to Stump Pond Stream, the auditors observed rust and petroleum product staining on impervious surfaces; an uncontained stockpile of sand adjacent to a unprotected storm drain inlet and accumulated sediment around the inlet; evidence of erosion on a stockpile of sand upgradient of a stormwater conveyance ditch and deposits of sediment in the ditch; a vehicle parked over directly over an unprotected storm drain inlet; and salt on the impervious surface around that unprotected inlet. Complainant's Br. at 78 (citing CX 35 at 33, 718-24). Finally, Complainant states that at Respondent's Katonah Residency, from which storm water runoff is conveyed either via overland flow offsite or via storm drain inlets leading to the New Croton Reservoir, the auditors observed, among other things, rust and petroleum product staining on impervious ground surfaces; containers of chemicals and unidentified liquids stored uncovered and without containment; piles of salt in areas outside of the salt storage dome; stained equipment stored outside uncovered; and an uncovered and uncontained pile of scrap metal containing fuel tanks. Complainant's Br. at 79 (citing CX 35 at 33-34, 726-36).

Turning to Region 5, Complainant points to observations documented in the audit report for the audit of Region 5 and the maintenance facility inspection reports appended to the audit report that, according to Complainant, demonstrate a high likelihood that numerous pollutants, such as petroleum products and sediment, were discharged in storm water from five sites into waters of the United States. Complainant's Br. at 79-81 (citing CX 39 at 30-34, 621-77). Specifically, Complainant notes that at Respondent's Buffalo Sub Residency, where storm water runoff is conveyed to three storm drain inlets but the ultimate destination was unknown, the auditors observed, among other things, uncovered and uncontained sediment and aggregate stockpiles located upgradient of unprotected storm drain inlets; evidence of sediment tracking to, and accumulation around, unprotected storm drain inlets; an uncovered and uncontained bucket of asphalt tack stored outside a building; and petroleum product staining on impervious surfaces in the outdoor vehicle parking area. Complainant's Br. at 79 (citing CX 39 at 31-32, 621-27). Complainant next notes that at Respondent's Clarence Sub Residency, from which storm water runoff is conveyed offsite primarily via two drainage swales, the auditors observed rust and petroleum product staining on impervious surfaces of the outdoor equipment areas. Complainant's Br. at 80 (citing CX 39 at 32, 629, 631-32). Complainant further reports that at Respondent's Equipment Management Facility, from which storm water runoff appeared to flow ultimately into Foster Brook, the auditors observed an uncovered and uncontained pile of scrap metal containing diesel fuel tanks and greasy and rusty scrap metal; petroleum product staining on the impervious surface of the vehicle parking areas; and accumulated sediment inside a storm drain catch basin adjacent to a gravel storage area. Complainant's Br. at 80 (citing CX 39 at 32-33, 635-40). Complainant additionally remarks that at Respondent's North Erie Residency, where the majority of storm water runoff is ultimately discharged to Cayuga Creek, the auditors observed, among other things, vehicle washing activity occurring outside of designated areas and upgradient of a storm drain inlet; containers of fuel and other liquids stored outside without containment; petroleum product staining on an impervious surface upgradient of a storm drain inlet; an uncovered and uncontained pile of scrap metal; and storm drain inlets entirely blocked

by debris. Complainant's Br. at 80-81 (citing CX 39 at 33-34, 654-63). Finally, Complainant notes that at Respondent's Lewiston Sub Residency, where storm water runoff is primarily conveyed to nine storm drain inlets but the ultimate destination was unknown, the auditors observed petroleum product and rust staining on impervious surfaces upgradient of storm drain inlets; accumulated sediment in multiple storm drain catch basins; and an unknown pipe connection into a storm drain inlet. Complainant's Br. at 81 (citing CX 39 at 34, 670-77).

Complainant concludes that Respondent demonstrated its compliance with Part VIII.A.6.d on July 1, 2014, when it submitted documentation reflecting that it had corrected the observed deficiencies. Complainant's Br. at 81-82 (citing CX 48 at 2-45, 54-55, 58-72, 75-101; Tr. at 341-42).

As it did with respect to the charged violation of Part VIII.A.4.a.i, Respondent challenges the alleged violation by questioning the reliability of the evidence presented by the auditors, noting that the auditors were not qualified as experts at the hearing and arguing that they lacked expertise, as demonstrated by Mr. Kirkeby's testimony that kitty litter is an effective method of cleaning a petroleum stain. Respondent's Br. at 32 (citing Tr. at 171). Respondent urges that Ms. Kubek refuted this testimony when she explained that kitty litter can be used only to clean a liquid spill and that EPA "clearly agreed because it did not require the Respondent to remove the stains." Respondent's Br. at 32 (citing Tr. at 427-28, 460). Thus, Respondent maintains, "every notation of a petroleum stain as though it is evidence of poor housekeeping evidences the lack of expertise of these auditors." Respondent's Br. at 32 (citing Tr. at 158, 160, 170-71, 208, 215, 218, 268, 273, 276).

Respondent also argues that the auditors neglected to investigate the conditions that they observed such that they determined the identity of unknown liquids or the length of time that the conditions had existed. Respondent's Br. at 33 (citing CX 30 at 20-22, 673; CX 35 at 18-20). Respondent maintains, "[T]hese alleged violations cannot be established without appropriate context, which is information that was never sought, not provided in the audit reports, and is not before this Tribunal." Respondent's Br. 34

Complainant first defends the reliability of the evidence presented by the auditors, maintaining that the auditors demonstrated at the hearing that "their conduct and documentation of the audits, as with their testimony, was thorough, thoughtful, and objective," rendering the evidence in question "highly reliable." Complainant's Reply at 5-8, 19. Complainant further argues that "while the auditors were eminently qualified to audit Respondent's facilities and practices, because their testimony was simply to recount their personal observations, their level of qualification was essentially irrelevant to whether their testimony was reliable." Complainant's Reply at 19.

Complainant then characterizes Respondent's contention concerning the identity of unknown liquids as a "red herring," arguing that the exact contents of containers are irrelevant to whether Respondent failed to implement appropriate BMPs at its fixed facilities given that the definition of the term "pollutant" is expansive under the CWA and Respondent was under a clear duty to prevent discharges of any contaminants in storm water that leaves its facilities. Complainant's Reply at 19 (citing 33 U.S.C. § 1362(6); CX 4 at 6-7). Finally, Complainant

urges that "the ridiculousness of Respondent's suggestion that all of the violations observed and photographed at dozens of sites on nine separate days over the span of 17 months might have just occurred immediately before each audit, was already laid bare by [my] examination of Ms. Kubek." Complainant's Reply at 20 (citing Tr. at 548-50).

ii. Discussion

As outlined by Complainant in its Initial Brief, the audit reports and attached maintenance facility inspection reports, including the photographs taken at each facility visited, reflect that the auditors observed conditions at Respondent's fixed facilities during the audits that included staining on ground surfaces from rust and petroleum products; uncovered and uncontained piles of scrap metal, salt, and other materials; containers of materials stored without coverage or secondary containment; materials such as sediment accumulated in and around storm drain inlets; and petroleum products actively leaking from vehicles and other machinery. The contractors from PG Environmental also testified about their personal observations at the fixed facilities visited during the audits. *See, e.g.*, Tr. at 157-65, 214-22, 257-79. While Respondent challenges the reliability of that evidence, as discussed above in the context of the alleged violation of Part VIII.A.4.a.i., I am unmoved by Respondent's arguments. Mr. Kirkeby and Mr. Jacobsen each testified that the auditors were tasked with observing and documenting potential sources of pollutants and any associated control measures during their visits to Respondent's fixed facilities, *see, e.g.*, Tr. at 162, 211-12, and I find the evidence presented with regard to their observations to be reliable and credible for the reasons previously stated.

When that evidence is held up against the evidence in the record of Respondent's own policies, practices, and procedures adopted for purposes of reducing or preventing the discharge of POCs from its fixed facilities,[50] it is clear that Respondent failed to implement those measures in a number of ways. For instance, in its Environmental Handbook, Respondent advised with respect to washing of vehicles at its fixed facilities, "It is preferred for vehicles to be washed where the wash waters are controlled and treated to remove oils and sediment prior to discharge. Typically, this involves washing vehicles inside specified 'wash bays' where wash waters are sent through sediment/grit collectors and oil/water separators."[51] RX 4 at 45. The evidence adduced by Complainant reflects that the auditors observed practices at certain fixed facilities that contravened this policy. For example, at Respondent's Fairview Residency, the auditors recorded their observation of an outdoor vehicle wash area and information provided by an Assistant Resident Engineer that "wash water from vehicle washing activities discharge to an unprotected storm drain inlet to the southwest, and not into the onsite oil/water separator." CX 35 at 675. As documented by the auditors, the Assistant Resident Engineer stated his belief that all storm drain inlets at the facility discharge to a storm water pond at the neighboring Region 8 Equipment Management Facility, which the auditors described as then discharging to an

[50] As previously noted, the record reflects that Respondent memorialized such policies, practices, and procedures in numerous documents, but only one, Respondent's Environmental Handbook, appears to have been entered into the record of this proceeding.

[51] At the hearing, Mr. D'Angelo described this mechanism as follows: "An oil-water separator would be installed at the facility, not within the storm system itself. The separation -- structural separation is to allow petroleum products to flow and allow uncontaminated water to pass underneath. It's designed to remove oil, grease from wastewater only." Tr. at 293.

unnamed receiving stream. CX 35 at 675, 677, 682. Additionally, at Respondent's Kingston Residency, where a Resident Engineer advised the auditors that storm water runoff from the facility is conveyed to storm drain inlets connected to Respondent's MS4 before ultimately discharging to the Hudson River, the auditors documented their observation that vehicle washing activities occurred directly adjacent to an unprotected storm drain inlet and that wash water from those activities was "not diverted into the on-site oil/water separator." CX 35 at 689-90, 692. Mr. D'Angelo expanded on that description at the hearing, testifying that the vehicle wash area was identified to the auditors by the Resident Engineer, that a snow plow was parked in the area at the time of their visit, and that accumulations of salt visible on the ground around the snow plow and in close proximity to the storm drain inlet, as shown in the photographs taken at the facility, "had slid off of the snow plow."[52] Tr. at 259 (referring to CX 35 at 692).

In its Environmental Handbook, Respondent also described general principles for storing certain products and wastes, including the following guidance related to the maintenance of containers and drums at its fixed facilities:

> *Identify container contents and maintain data on its contents*. Keep products in their original containers whenever possible. Otherwise, label containers with permanent markers, include the date when you first began filling it, and keep a record of what is stored in each one. Retain the material safety data sheets (MSDS) for the product. Also record any other information that relates to a waste, such as "also contains some water" or what activity the waste resulted from, such as "Safe-Strip cleaning solvent from epoxy pavement marking activities."
>
> * * * *
>
> *Store drums in protected (dry) and temperature-compatible manner*. Do not store product or empty drums upright and outdoors where they can collect rain or melting snow, allowing for collection of water (and the potential need for testing of rainwater) in the drums and degradation (even when a lid is originally in place). Rather, store all drums under a roof if possible and store uncovered empty drums on their sides. Do not store materials that can freeze in unheated areas.
>
> *Don't let wastes or empty containers accumulate; dispose of them regularly*. Dispose of wastes before knowledge of their contents is lost and before

[52] Respondent appears to have recognized salt as a pollutant given the following guidance in its Environmental Handbook:

> Salt and other anti-icing/de-icing materials should be handled and stored in a way that minimizes possible contamination of surrounding areas by wind-blown or waterborne "runoff."
>
> ***Salt:*** Piles of salt should not be left exposed to the elements. Good management practices require that salt and mixtures of salt and sand be kept on an impermeable surface like asphalt or concrete and stored in salt storage buildings whenever possible. Under some circumstances, such as storage building maintenance or excess supply, temporary (typically, less than one season) "surge" piles may be utilized if placed on an impermeable surface and covered with adequate (weighted) tarping.

RX 4 at 50.

> deterioration occurs. Keep an inventory of the waste you have on hand and contact the MEC to set up disposal contracts for both hazardous and nonhazardous wastes. Dispose of empty containers promptly before water or other contamination or deterioration occurs.

RX 4 at 48-49. With regard to the handling of empty drums and containers specifically, Respondent went on:

> Drums and containers that have had all of the contents removed by common practices and have less than 25 mm (1 inch) product residue on the bottom and less than 3% of the original product are considered "empty" and nonhazardous, even if the material they contained (such as solvents or coatings with flashpoints below 140°F) would otherwise be classified as hazardous waste . . . . "Empty" containers may be returned to the manufacturer, sent to a reconditioner or handled as scrap metal, cardboard, etc . . . . The original product label and hazard warnings must be left on drums or containers until they are empty as described above and no longer pose the indicated hazard. Remove or obliterate the label and mark the drum "empty" as soon as the drum is empty by these criteria.

RX 4 at 69.

The record contains ample evidence of conditions at Respondent's fixed facilities that deviated from these policies and procedures. For example, in the maintenance facility inspection report for Respondent's Broome Residency, the auditors recorded their observations of an upright 55-gallon drum containing an unknown dark substance present outside at the facility without containment or coverage, aside from a board incompletely covering the top of it. CX 30 at 654, 659. Meanwhile, in the maintenance facility inspection report for the Region 8 Special Crews Facility, the auditors documented their observations of multiple containers stored uncovered and uncontained, including heavily rusted "full chemical cans"; five-gallon buckets of chemicals; and an upright 55-gallon drum containing an unknown fluid. CX 35 at 711, 713. As Mr. D'Angelo described this storage area, "[i]t appeared that the containers had been outside for some time, as labels were not visible. The facility representatives were unaware of what chemicals were stored in these containers." Tr. at 265 (referring to CX 35 at 713). The auditors also documented their observations of an area of the facility where Respondent was storing paint wash water in various containers, including multiple 55-gallon drums stored upright without coverage or containment. CX 35 at 711, 715. The maintenance facility inspection report for Respondent's North Erie Residency reflects that the auditors observed a 55-gallon drum stored upright without coverage or containment at that facility as well. CX 39 at 659. Specifically, the auditors noted that this used drum of antifreeze was located immediately upgradient of a storm drain inlet and that it was stored upside down, with staining visible on the ground surface underneath it and petroleum product residue visible on the lid. *Id.* at 656, 659. According to the maintenance facility inspection report and testimony of Mr. D'Angelo, the auditors also observed multiple five-gallon "asphalt tack buckets" with holes cut into the lids that were present in an area of the facility without coverage or containment. *Id.* at 656, 660; Tr. at 279 (referring to CX 39 at 660). When the auditors inquired about the contents of the buckets, which were entirely full of liquid, personnel at the facility explained that the buckets likely had been emptied and left

outside to dry, where they accumulated storm water until they were full. CX 39 at 656; Tr. at 279 (referring to CX 39 at 660). Additionally, the auditors noted at a number of Respondent's fixed facilities that the piles of scrap metal stored uncovered and uncontained at those facilities consisted of such items as diesel tanks, 55-gallon drums, and containers labeled as storing certain chemicals, which the auditors described as potentially containing hazardous materials. *See, e.g.*, CX 35 at 675-77, 683-84, 727, 734; Tr. at 219 (referring to CX 35 at 734). Respondent's handling of those items as scrap metal suggests that the items were, in fact, empty, yet it does not appear that the items were properly marked as such given the auditors' questioning of their contents.

Another example of Respondent's failure to adhere to its Environmental Handbook concerns paint wash water, a topic that Respondent addressed in the Environmental Handbook as follows: "Washwaters from cleaning of pavement marking equipment and activities must be disposed of as a specialty waste or, with approval of the servicing facility, discharge to the public sanitary treatment works. (It may not be discharged to stormwater or floor drains.)" RX 4 at 71. The record contains evidence suggesting that Respondent's staff discharged paint wash water to a storm water drain, in contravention of this policy, at the Region 8 Special Crews Facility. Specifically, in the maintenance facility inspection report, the auditors identified a variety of activities performed at that facility, including "paint management for road marking activities," and explained that storm water runoff from the facility is primarily conveyed to storm drain inlets that ultimately discharge to Casper Creek. CX 35 at 710. The auditors proceeded to document their observations of white paint residue visible around and inside a storm drain inlet, as well as a five-gallon bucket containing paint residue and a hose located nearby, of which representatives of the facility were unaware. CX 35 at 711-12. At the hearing, Mr. D'Angelo described his observations of this paint residue, including that it was visible in the storm water accumulated inside the storm drain inlet. Tr. at 264. He then proceeded to testify, "One of the special crews that operated at this facility was the painting crew, and our concern, based on this observation, was that paint crews were washing paint equipment into the storm drain resulting in flows to Casper Creek." Tr. at 264.

Yet another example relates to the handling of used oil. In its Environmental Handbook, Respondent first identified "used oils" as including spent motor oil, hydraulic oil, cutting oil, transmission fluid, fuel oils, gear oil, and greases and then advised employees to "[c]ollect used oil in clearly labeled tanks or drums." RX 4 at 74. The record contains evidence demonstrating that staff at Respondent's Carmel Residency failed to collect used oil in the prescribed manner, however. As documented in the maintenance facility inspection report for that facility, the auditors observed a five-gallon bucket adjacent to a piece of equipment, surrounded by visible staining on the ground surface, and containing a petroleum product, which a representative of Respondent identified as transmission fluid that another employee had drained into the bucket and failed to dispose of properly. CX 35 at 719, 723. When asked about the bucket at the hearing, Mr. D'Angelo recalled:

> While walking around the facility, we identified a bucket that had appeared to have overflowed and which was indicated by the petroleum staining around the bucket on the ground surface. I believe the [representative of the facility] informed us that

> one of his facility employees had recently drained hydraulic oils off a piece of equipment shown in photograph 9 into that bucket.
>
> It appeared that [the employee] had not properly disposed of that transmission fluid out of that bucket prior to departing for the day. Our observation was that it appeared that the bucket had filled up with storm water as it rained, causing an overflow and putting fluids onto the ground surface.

Tr. at 268-69 (referring to CX 35 at 723).

In sum, the evidence adduced by Complainant with respect to conditions observed and documented at Respondent's fixed facilities during the audits supports a finding that Respondent failed in a number of ways to implement policies, practices, and procedures it had selected as appropriate for purposes of reducing or preventing the discharge of POCs from its facilities.[53] Consistent with my previous discussion regarding the charged violation of Parts VIII.A.6.a.i and VIII.A.6.a.iii of the 2010 MS4 Permit, the record also supports a finding that Respondent failed both to select and to implement appropriate measures for reducing or preventing the discharge of POCs from stockpiles of certain materials at its facilities. One of Respondent's own witnesses, Mr. Kochersberger, in describing his participation in the audit of Region 5 as a representative of Respondent, acknowledged at the hearing that he accompanied the auditors to facilities where "there were certainly things that we needed to correct." Tr. at 622-23. Nevertheless, while Respondent does not deny that the conditions described above existed at its facilities at the time of the audits, it raises a number of arguments related to whether those conditions reflect a failure to implement appropriate pollution prevention and good housekeeping practices.

First, Respondent criticizes the auditors' observations of stains on ground surfaces at its facilities as evidence of poor housekeeping and for support points to the expert testimony of Ms. Kubek, namely, that once a spill of petroleum product is cleaned, the petroleum will leave a stain on asphalt surfaces because it is absorbed and sequestered within the asphalt, a fact that "EPA clearly agreed [with] because it did not require the Respondent to remove the stains." Respondent's Br. at 32 (citing Tr. at 427-28, 460). As observed by Respondent, EPA does not appear to have compelled Respondent to remove petroleum stains observed at its facilities. Respondent submitted documentation to EPA on July 1, 2014, in which it described measures it had taken to remedy the conditions identified by the auditors at its fixed facilities, but it noted for

[53] While I previously found that Respondent had failed to establish procedures addressing certain potential sources of pollutants at its fixed facilities, namely, stockpiles of certain materials, I have focused here on Respondent's failure to implement those procedures it already had in place at the time of the audits. Nothing in the record suggests that the measures highlighted herein were inappropriate on their face, only that they were not properly implemented. Indeed, when asked at the hearing about appropriate BMPs for the potential sources of pollutants that they observed at Respondent's fixed facilities, the auditors identified measures that comported with those described by Respondent in its Environmental Handbook. *See, e.g.*, Tr. at 219 (testimony of Mr. Jacobsen that various measures could be taken to reduce the potential for discharges when storing used fuel tanks, including implementing a process to ensure that the tanks were emptied prior to handling the tanks as scrap metal); Tr. at 259-60 (testimony of Mr. D'Angelo that "vehicle wash water is typically captured and treated through an oil-water separator and/or discharged through sanitation, not the storm system"); Tr. at 264 (testimony of Mr. D'Angelo that paint wash water "should not be discharged through municipal storm systems" and that it "is typically collected and recycled at a facility that can process that type of wastewater"); Tr. at 269 (testimony of Mr. D'Angelo that used oil is typically drained into closed containers such as a "waste oil tank").

a number of the facilities where stains were observed that spills were cleaned at the time of release and stains still resulted, and it was not aware of a requirement to scrub the asphalt to remove the stains. *See* CX 48 at 13, 27, 33. By letter dated September 16, 2014, EPA responded that it "recognizes that there is no requirement to scrub asphalt; however, at the time of the audit, it was not evident that spills were cleaned up at the time of release or discovery." RX 26 at 2. Thus, it appears that EPA's concern regarding staining was not necessarily that the stains had not been removed, as Respondent seems to believe, but that the presence of stains may have pointed to a failure to adopt or implement adequate measures for ensuring that any spills and leaks were promptly recognized, contained, and remediated by Respondent's staff. An example of such a failure was evident at Respondent's Equipment Management Facility, where the auditors observed, among other things, visible sheen and staining from petroleum products on the standing water and impervious ground surface of the facility's auction vehicle parking area. CX 35 at 683, 685-86. The auditors noted, "The NYSDOT Facility Manager stated that NYSDOT hosts vehicle auctions at the Facility annually, and that the majority of petroleum sheen that was observed by the EPA Audit Team was from broken/leaking vehicles that were scheduled for auction. Spill/leak containment practices (e.g., drip pans) were not implemented . . . ." CX 35 at 683. The Facility Manager's statement suggests that personnel were aware of leaks from vehicles stored in the facility's auction vehicle parking area but failed to take steps to identify and contain the leaks, such as those described by Respondent in its July 1, 2014 submission to EPA: "Incoming auction vehicles will be inspected upon arrival for leaks. If required, secondary containment practices will begin at the start of storage. Some leaks may not be immediately obvious. Periodic inspections of the vehicle auction area will continue, with containment practices used as required." CX 48 at 81. Thus, Respondent's argument that the stains were not indicative of poor housekeeping is not particularly persuasive.

Respondent also contends that the auditors neglected to investigate the conditions that they observed further by determining the length of time that the conditions had existed or the identity of unknown liquids, such that Complainant is unable to establish a violation. This argument lacks merit as well. As urged by Complainant, any claim that the multitude of violative conditions observed and documented by the auditors at nearly all of the 20 fixed facilities visited during the audits had occurred immediately before each audit strains credulity. Indeed, some of those conditions – such as the multiple five-gallon "asphalt tack buckets" with holes cut into the lids observed at Respondent's North Erie Residency, which personnel at the facility identified as having once been emptied and left outside to dry, where they then filled with storm water in contravention of guidance in Respondent's Environmental Handbook to "[d]ispose of empty containers promptly before water or other contamination . . . occurs" – clearly had arisen well in advance of the given audit. As for Respondent's criticism of the auditors for not determining the identity of unknown liquids, the fact that the identity of certain liquids was unknown is the root of the violation. As reflected in the excerpts of Respondent's Environmental Handbook quoted above, its staff was obligated to maintain knowledge of the materials at its fixed facilities for purposes of pollution prevention and good housekeeping, which clearly failed to occur in some instances. Respondent essentially claims that the auditors were obligated to perform those duties for Respondent in order for a violation of this provision to be established, which makes little sense to this Tribunal.

In accordance with the foregoing discussion, I find that the conditions observed and documented during the audits evinced a failure to select and implement appropriate pollution prevention and good housekeeping practices at Respondent's fixed facilities, such that it failed to comply with Part VIII.A.6.d of the 2010 MS4 Permit. With respect to the period of violation, Complainant asserts in its Initial Brief that it counted the instances of Respondent's failure to comply with Part VIII.A.6.d as a single violation, and it took June 21, 2012, the date on which violative conditions were first observed during the audit of Region 9, as the state date. Complainant's Br. at 82. As for the end date of the violation, Complainant argues that Respondent demonstrated its compliance with Part VIII.A.6.d on July 1, 2014, when it submitted documentation reflecting that it had corrected the conditions identified by the auditors. Complainant's Br. at 81-82 (citing CX 48 at 2-45, 54-55, 58-72, 75-101; Tr. at 341-42). Complainant's approach appears to be reasonable, and the period of violation is supported by the record and undisputed by Respondent. Accordingly, I find that Respondent's failure to comply with Part VIII.A.6.d of the 2010 MS4 Permit began on June 21, 2012, and continued until July 1, 2014, for a total of 740 days, as alleged.

II. CONCLUSIONS ON LIABILITY

In sum, I find that Complainant met its burden of establishing by a preponderance of the evidence that Respondent violated various terms and conditions of the 2010 MS4 Permit. Specifically, Respondent failed to comply with the following provisions: Part VIII.A.3.f.ii for 1,680 days; Part VIII.A.3.g for 1,614 days; Part VIII.A for a total of 729 days; Part IV.D for 1,236 days; Part VIII.A.4.a.v for 1,552 days; Part VIII.A.4.a.i for 503 days; Part V.B for 1,221 days; Part VIII.A.5.a.vi for 866 days; Parts VIII.A.6.a.i and VIII.A.6.a.iii for 1,614 days; Part VIII.A.6.a.ii for 1,460 days; Part VIII.A.6.a.iv for 1,221 days; and Part VIII.A.6.d for 740 days.

PENALTY

I. BACKGROUND

Having determined that Respondent failed to comply with the particular terms and conditions of the 2010 MS4 Permit described above, I must now consider the appropriate relief to award in this proceeding. As previously discussed, Section 309(g)(1) of the CWA authorizes the assessment of a civil administrative penalty where, as here, a person is found to have violated any permit condition or limitation implementing certain sections of the Act in a permit issued under Section 402. 33 U.S.C. § 1319(g)(1). In turn, Section 309(g)(2)(B) of the CWA specifies the penalty amounts that may assessed, namely, up to $10,000 per day for each day during which a violation continues and a maximum penalty not to exceed $125,000. 33 U.S.C. § 1319(g)(2)(B). These levels have been increased over time as required by the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 note; Pub. L. 101-410, as amended by the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701 note; Pub. L. No. 104-134, Section 31001(s), and the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, 28 U.S.C. § 2461 note; Pub. L. 114-74, Section 701. Consequently, penalties of up to $16,000 per day and $177,500 in total may be assessed for violations occurring after January 12, 2009, and through December 6, 2013; penalties of up to $16,000 per day and $187,500 in total

may be assessed for violations occurring after December 6, 2013, and through November 2, 2015; and penalties of up to $21,933 per day and $274,159 in total may be assessed for violations occurring after November 2, 2015, where the penalty is being assessed on or after February 6, 2019. *See* 40 C.F.R. § 19.4.

Where a violation has occurred and the complainant has sought a civil administrative penalty, I must "determine the amount of the recommended civil penalty based on the evidence in the record and in accordance with any penalty criteria set forth in the Act" and "explain in detail in the initial decision how the penalty to be assessed corresponds to any penalty criteria set forth in the Act." 40 C.F.R. § 22.27(b). Section 309(g)(3) of the CWA sets forth such criteria, requiring that any penalty assessed "take into account the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require." 33 U.S.C. § 1319(g)(3).

As observed by the EAB, "[t]he CWA 'prescribes no precise formula by which these factors much be computed' or otherwise evaluated." *San Pedro Forklift, Inc.*, 15 E.A.D. 838, 878 (EAB 2013) (quoting *Britton Constr. Co.*, 8 E.A.D. 261, 278 (EAB 1999)). Moreover, while I am required to "consider any civil penalty guidelines issued under the Act" when calculating a penalty, 40 C.F.R. § 22.27(b), EPA has not developed a penalty policy specific to litigation under the CWA,[54] *see, e.g., Stevenson*, 16 E.A.D. at 169. In the absence of such a policy, "it is appropriate . . . to analyze directly each of the statutory factors." *Stevenson*, 16 E.A.D. at 169 (citing *Phoenix*, 11 E.A.D. 379, 395 (EAB 2004)). I may also look to the methodologies employed by EPA's general civil penalty policies for guidance. *See id.* at 169 (citing *Smith Farm Enters., LLC*, 15 E.A.D. 222, 282 (EAB 2011); *Phoenix*, 11 E.A.D. at 395). Known as the "Policy on Civil Penalties, EPA General Enforcement Policy #GM-21" (Feb. 16, 1984) ("General Policy") and "A Framework for Statute-Specific Approaches to Penalty Assessments: Implementing EPA's Policy on Civil Penalties, EPA General Enforcement Policy #GM-22" (Feb. 16, 1984) ("Penalty Framework"), these policies are available on EPA's website[55] and set forth "[a]n outline of the general process of the assessment of penalties." General Policy at 1. Specifically, the policies direct that a "preliminary deterrence figure" be calculated based on two factors, the economic benefit resulting from a given violation and the gravity of the violation, and that the preliminary deterrence figure then be increased or decreased based on the other statutory factors. General Policy at 4-5; Penalty Framework at 2-4.

---

[54] EPA does employ a policy for determining appropriate penalties in settlement of civil administrative actions brought under the CWA for violations of NPDES permit limits and conditions, known as the "Interim Clean Water Act Settlement Penalty Policy" (Mar. 1, 1995) ("Settlement Policy"). *See* CX 65. The Settlement Policy states that it "only establishes how the Agency expects to calculate the minimum penalty for which it would settle a case" and "is not intended for use by EPA, violators, courts, or administrative judges in determining penalties at hearing or trial." CX 65 at 3. Moreover, "[t]he Board generally disfavors the use of settlement guidelines outside the settlement context." *Stevenson*, 16 E.A.D. at 169 (citing *Phoenix Constr. Servs., Inc.*, 11 E.A.D. 379, 394 & n.37 (EAB 2004)). Accordingly, any reference to the Settlement Policy in my consideration of the statutory factors will be made for "instructive value" only. *See Stevenson*, 16 E.A.D. at 170.

[55] The General Policy and the Penalty Framework have been compiled into a single document that is available at https://www.epa.gov/sites/production/files/documents/ epapolicy-civilpenalties021684.pdf.

In sum, penalty calculations under the CWA are "highly discretionary." *Tull v. United States*, 481 U.S. 412, 426-27 (1987). That being said, if the assessed penalty differs from the penalty proposed by the Agency, I must "set forth in the initial decision the specific reasons for the increase or decrease." 40 C.F.R. § 22.27(b).

Here, Complainant has proposed the assessment of a penalty in the amount of $150,000, with Complainant urging in its Initial Brief that the evidence presented at the hearing supports a penalty of at least that amount. Complainant's Br. at 90. On the subject of penalty, Complainant presented the testimony of Ms. Arvizu, who testified that she calculated the proposed penalty for settlement purposes by considering the statutory factors set forth in the CWA and referring to the Settlement Policy.[56] *See* Tr. at 322-23, 366-70. Complainant did not submit any documentary evidence to substantiate Ms. Arvizu's testimony concerning her calculations. In its Initial Brief, Complainant frames its discussion of the appropriate penalty to assess in this proceeding primarily using the elements of a formula set forth in the Settlement Policy for calculating the minimum penalty to be accepted in settlement, arguing that a penalty calculation in accordance with the Settlement Policy "tracks the statutory factors in 33 U.S.C. § 1319(g)(1)(A), and can be reduced to [that formula]." Complainant's Br. at 90-96. The formula in question appears to be similar to the methodology employed by the General Policy and Penalty Framework in that the starting point of the formula is the addition of the economic benefit accrued to the violator as a result of its noncompliance and a valuation of the gravity of the noncompliance, and the resulting figure can then be adjusted based on other factors, including some relevant only in a settlement context, such as litigation considerations, which Complainant nevertheless discusses in its Initial Brief. *See* CX 65 at 4; Complainant's Br. at 94-96. Respondent counters that Complainant's approach fails to account for each of the statutory factors, Respondent's Br. at 38-39, and contends that an appropriate consideration of those factors weighs in favor of reducing or waiving the penalty, Respondent's Br. at 49. Respondent does not propose any particular methodology for facilitating this consideration, however. In response, Complainant argues that Ms. Arvizu simply used the Settlement Policy "to guide her consideration of the statutory factors." Complainant's Reply at 23. Complainant then challenges Respondent's arguments with respect to each of those factors. Complainant's Reply at 23-38.

II. COMPLAINANT'S PRIMA FACIE CASE

As noted above, the Rules of Practice dictate that Complainant bears the burden of presentation and persuasion as to the appropriateness of the proposed penalty. *See* 40 C.F.R. § 22.24(a). The EAB has held that where, as here, a statute enumerates specific factors that EPA "shall" consider in its assessment of a penalty, a complainant is required to present evidence demonstrating that it considered each of those factors, and that the proposed penalty is supported by its analysis, in order to make a prima facie case that the proposed penalty is appropriate.[57]

[56] Ms. Arvizu also testified that if a penalty of $16,000 per day had been assessed for the 16,218 days of violation alleged by Complainant, the total penalty would have amounted to $259,488,000. Tr. at 344.

[57] This holding was premised on "the Board's understanding that this type of analysis is routinely performed in enforcement cases and is required under the Agency's general penalty policy and the program-specific penalty

See, e.g., *CDT Landfill Corp.*, 11 E.A.D. 88, 120-22 (EAB 2003). "The depth of consideration will vary in each case, but so long as each factor is touched upon and the penalty is supported by the analysis[,] a prima facie case can be made." *New Waterbury*, 5 E.A.D. at 538.

Complainant does not appear to have met this burden in the present proceeding. Complainant proffered only the testimony of Ms. Arvizu as evidence of its consideration of the penalty criteria set forth in Section 309(g)(3) of the Act, and her testimony was remarkably short on details as to her calculations. With little elaboration, she testified that she calculated the economic benefit component of the penalty as $89,000 and the gravity component as $77,000, for a total of approximately $165,000. Tr. at 345, 349. While brief, her testimony at least "touched upon" those penalty factors. The same cannot be said for some of the other factors. Specifically, following her testimony concerning the economic benefit and gravity components of the penalty, she testified that, in consultation with management at EPA, the resulting figure was reduced to $150,000. Tr. at 349. When asked about the basis for the reduction, she was unable to provide a cogent explanation:

> Q: When you reduced the penalty from 165, more or less, to 150, what was the rationale for that?
>
> A: Ten thousand is a small amount of money.
>
> Q: So you don't know what the specific rationale was, is that correct?
>
> A: Correct.

Tr. at 371-72. Further questioning of Ms. Arvizu with respect to specific penalty factors other than economic benefit and gravity failed to produce testimony adequately demonstrating that she accounted for each of those factors in her calculation of the proposed penalty. For example, as argued by Respondent, she did not clearly testify that she considered Respondent's degree of culpability, which is expressly identified in the CWA as a factor that Complainant was required to evaluate. *See* Respondent's Br. at 41. Ms. Arvizu was first questioned about this factor on direct examination, and it is not apparent from her response how she considered it, if at all:

---

guidelines." *New Waterbury, Ltd.*, 5 E.A.D. 529, 538 n.18 (EAB 1994). In particular, the EAB referred to the Penalty Framework, *see id.*, which provides, in pertinent part:

> [I]t is essential that each case file contain a complete description of how each penalty was developed. This description should cover how the preliminary deterrence amount [consisting of the economic benefit and gravity components] was calculated and any adjustments made to the preliminary deterrence amount. It should also describe the facts and reasons which support such adjustments. Only through such complete documentation can enforcement attorneys, program staff and their managers learn from each others' experience and promote the fairness required by the [General Policy].

Penalty Framework at 27.

> Q: And you mentioned that one of the statutory factors is the degree of culpability. Did you consider the DOT's -- the fact that the DOT first obtained permit coverage in 2003, did that factor in in your culpability calculation?
>
> A: The fact that DOT had been permitted for nine years prior to the audit, this one was non-compliant in 2013.

Tr. at 348. I also inquired about this factor, and my questioning again yielded an unclear response from her:

> Q: Was it something you considered in determining the $150,000 proposed settlement figure, whether the respondent was intentionally violative, negligently violative -- there's culpability, different types of culpability, like they know it's a violation, they negligently dismiss the violation, or knowingly committed them?
>
> A: The 150,000, you call a penalty?
>
> Q: Well, you said you calculated it for settlement purposes. Did you take this into account --
>
> A: I'm sorry. I'm getting confused, Your Honor, with how the question is posed. The question of settlement figure, I'm finding that calculation, the penalty using the guidance. The penalty has a bottom line that's based on the calculation.

Tr. at 373. This testimony was the only evidence presented on the matter, and it hardly makes clear that Respondent's degree of culpability was considered in the calculation of the proposed penalty. I note that Complainant also did not address this factor in discussing the proposed penalty in its Initial Brief, and it addressed the topic in its Reply only to counter Respondent's arguments that Respondent had very little culpability, without responding to Respondent's contention that Ms. Arvizu had failed to consider it. *See* Complainant's Reply at 25.

In accordance with the foregoing discussion, I am hard put to find from the record before me that Complainant produced sufficient evidence showing that it considered all of the factors set forth in Section 309(g)(3) of the Act in its calculation of the recommended penalty. Therefore, consistent with the principles articulated by the EAB with respect to a complainant's burden of proof on the subject of penalty, Complainant has not made its prima facie case that the penalty proposed in this matter is appropriate.

III. APPLICATION OF THE PENALTY CRITERIA

Apart from Complainant's burden of demonstrating the appropriateness of its proposed penalty, I bear the responsibility of initially deciding the amount of penalty to assess based on a weighing of the evidence in the record.[58] To that end, I will now apply the penalty criteria to the

[58] Section 22.27(b) of the Rules of Practice provides, "If the Presiding Officer determines that a violation has occurred and the complaint seeks a civil penalty, the Presiding Officer shall determine the amount of the recommended civil penalty based on the evidence in the record and in accordance with any penalty criteria set forth

facts of this matter. Consistent with the General Policy and Penalty Framework, I will begin my analysis with the factors pertaining to the economic benefit or savings resulting from Respondent's failure to comply with the 2010 MS4 Permit and the nature, circumstances, extent, and gravity of the noncompliance. I will then consider whether the other statutory factors warrant an adjustment of the latter component. Specifically, as observed by the EAB, certain specific attributes of a violator (namely, the violator's ability to pay, prior history of violations, and degree of culpability), as well as other matters as justice may require, may call for an upward or downward adjustment of the valuation of the nature, circumstances, extent, and gravity of the noncompliance. *San Pedro Forklift*, 15 E.A.D. at 882 (citing Penalty Framework at 17). While I found above that Complainant failed to make its prima facie case that the overall penalty proposed in this matter is appropriate, I will nevertheless consider the parties' arguments pertaining to each statutory factor as I proceed with my analysis.

A. Economic Benefit or Savings

"The recovery of any economic benefit that has accrued to a violator as a result of its noncompliance with environmental laws is a critical component of the Agency's civil penalty program." *San Pedro Forklift*, 15 E.A.D. at 879 (citing *B.J. Carney Indus., Inc.*, 7 E.A.D. 171, 207 (EAB 1997), *appeal dismissed as moot*, 200 F.3d 1222 (9th Cir. 2000); General Policy at 3; Penalty Framework at 6). Economic benefit is calculated as a measure of "delayed costs," "avoided costs," and/or the "benefit from competitive advantage gained through noncompliance." *Id.* (quoting *Britton Construction Co.*, 8 E.A.D. 261, 287 (EAB 1999); Penalty Framework at 6-11). Consistent with the significance of this factor, it is not considered necessary to be able to calculate the full or exact amount of the economic benefit resulting from a violator's noncompliance in order to account for this factor in the assessment of a penalty; rather, a partial amount or reasonable approximation of the economic benefit has been deemed to suffice. *See United States v. Smithfield Foods, Inc.*, 191 F.3d 516, 529 (4th Cir. 1999), *cert. denied*, 531 U.S. 813 (2000); *B.J. Carney*, 7 E.A.D. at 217-19. The imprecise nature of the calculation "does not mean that wholly unsubstantiated guesswork or broad, conclusory

---

in the Act." 40 C.F.R. § 22.27(b). This provision suggests that I have a duty to determine an appropriate penalty to assess in this proceeding, even if Complainant has not met its duty with regard to the appropriateness of its proposed penalty. The EAB's holding in *John A. Biewer Co. of Toledo, Inc.*, 15 E.A.D. 772 (EAB 2013), supports this conclusion. In the underlying matter, the presiding Administrative Law Judge ("ALJ") granted accelerated decision on the respondents' liability but ordered that a hearing be held on the appropriate penalty. *Biewer*, 15 E.A.D. at 778. The complainant effectually refused to participate in the hearing, however, prompting the ALJ to award a penalty of zero on the basis that the complainant presented no evidence of an appropriate penalty at the hearing and thus failed to meet its burden of establishing a prima facie case on that issue. *Id.* at 779. The ALJ also stated that the record was devoid of evidence on the issue of an appropriate penalty. *See id.* at 783. On appeal, the EAB upheld the award of a zero penalty as a sanction against the complainant for defying the ALJ's order to engage in a hearing. *Id.* at 783-84. However, the EAB disagreed with the ALJ's conclusion that "there was no evidence in the record from which to determine a penalty." *Id.* at 783. In describing an ALJ's duties with regard to the assessment of penalties under the Rules of Practice, it noted that ALJs have "the responsibility initially to determine any penalty amount"; that their "role in the process is not to accept without question the Region's view of the case, but rather to determine an appropriate penalty as required by 40 C.F.R. § 22.27"; and that they are in no way constrained by a complainant's proposed penalty, even if the proposal is shown to have taken into account each of the statutory penalty factors, but rather they "may conduct [their] own analysis of the penalty" that considers any additional evidence deemed necessary. *Id.* at 780-82. Here, it has been shown that Complainant did not take into account each statutory factor, prompting my departure from its proposed penalty, but there is still ample evidence in the record from which to determine the appropriate penalty to assess.

statements lacking any reasonable foundation are sufficient to demonstrate an economic benefit." *B.J. Carney*, 7 E.A.D. at 218. Instead, "[a] complainant must provide, on the record, a reasoned explanation of how the 'reasonable approximation' of economic benefit was derived." *Id.*

As previously noted, Complainant offered scant evidence of the economic benefit resulting from Respondent's failure to comply with the 2010 MS4 Permit. In particular, Ms. Arvizu testified concerning her calculation of the economic benefit as follows:

> Q: Did you calculate the economic benefit for DOT's violations in this case?
>
> A: Yes.
>
> Q: How much did you calculate the economic benefit was in this case?
>
> A: I calculated the amount of expenses of around $89,000.
>
> Q: What did you use to determine, what kind of information did you use to estimate how much benefit you arrive at in this case?
>
> A: I used information from DOT's progress report, as well as my best professional judgment.
>
> Q: When you say "best professional judgment," what do you mean, estimates of various costs?
>
> A: Yes.

Tr. at 345. That excerpt is the entirety of her testimony on the subject. The progress report to which she referred is presumably the one submitted by Respondent to EPA on February 5, 2016, which Complainant cited in its Initial Brief. *See* Complainant's Br. at 91 (citing CX 59 at 9). As part of that progress report, Respondent provided EPA with a list of "labor costs" that Respondent had expended up until that date in order to achieve compliance with the revised ACO. *See* CX 59 at 3, 9. Specifically, under the heading "Labor costs to date associated with Administrative Compliance Order CWA-02-2014-3041," Respondent identified three sets of costs related to "personal services" rendered during certain periods of time, followed by five sets of costs related to specific tasks that Respondent had performed, such as "Maintenance Facility and Rest Area poster printing," for a total of $517,601.03. CX 59 at 9. At the hearing, Ms. Kubek described this document as the final summary "of the costs that DOT expended on labor, materials, all of the costs associated with meeting the ordered provisions [of the revised ACO]." Tr. at 485; *see also* Tr. at 486-87.

Relying on this evidence and an assertion made by Respondent in correspondence to EPA that it spent over $500,000 to satisfy the provisions of the revised ACO, Complainant argues in its Initial Brief that "Respondent benefited from its delayed expenditure relating to $517,601.03 that it ultimately spent to come into compliance with its permit obligations" and that the figure advanced by Ms. Arvizu "is reasonable given the significant economic benefit Respondent

achieved by failing to comply with its permit for over five years." Complainant's Br. at 91 (citing Tr. 345; CX 59 at 9; RX 71 at 11). Respondent counters that Ms. Arvizu provided "very little explanation as to how she arrived at the number of $89,000 for economic benefit" and "[no] explanation as to how DOT's progress reports informed her determination." Respondent's Br. at 42. Consequently, Respondent argues, that figure should be disregarded. I agree with Respondent. Ms. Arvizu's testimony consisted of only a few conclusory statements lacking in any detail as to how she drew information from the summary of Respondent's expenditures and exercised her professional judgment to derive the figure that Respondent allegedly received as a result of its noncompliance. Such statements simply do not suffice to establish economic benefit. Even when Ms. Arvizu's testimony is considered in conjunction with the documentary evidence in the record reflecting the amounts spent by Respondent to satisfy the revised ACO, it is still impossible to reproduce her calculations. Therefore, I am compelled to find that Complainant failed to present sufficient evidence to support the amount of economic benefit it is seeking to recover in this proceeding.

Given that the record is not totally devoid of evidence on the subject, however, I can still endeavor to approximate at least part of the economic benefit resulting from Respondent's noncompliance – namely, the benefit that Respondent derived from delaying expenditures necessary to comply with the 2010 MS4 Permit – based on the evidence before me. As reflected in the summary of Respondent's expenditures that Respondent submitted to EPA in its February 5, 2016 progress report, the bulk of those expenditures consisted of labor costs. *See* CX 59 at 9. In particular, the first three sets of costs listed by Respondent are labor costs, the first for the period beginning on June 4, 2014, and ending on May 26, 2015; the second for the period beginning on May 27, 2015, and ending on December 31, 2015; and the third for "Additional Personal Services" not included in the first two sets of costs. *Id.* This information is otherwise undifferentiated, rendering it impossible to determine how those costs specifically relate to Respondent's efforts to achieve compliance with the provisions of the 2010 MS4 Permit that it was found in this Initial Decision to have violated.[59] Moreover, the sum of those three sets of labor costs – $499,635.19 – inexplicably does not match the labor costs of $452,766.68 shown in another document that Ms. Kubek described at the hearing as a compilation of the labor costs expended by Respondent and that she purportedly relied upon in preparing the summary of Respondent's expenditures. *See* Tr. at 485-86 (describing RX 72). In light of these issues, the labor costs associated with Respondent coming into compliance cannot be considered as a basis for recovering economic benefit.

The remaining figures listed in the summary of Respondent's expenditures relate to specific tasks that Respondent performed to satisfy the provisions of the revised ACO, and I may estimate the economic benefit that Respondent derived from delaying those expenditures, as they pertain to violations found in this proceeding, using a formula identified in the Penalty Framework as the "rule of thumb for delayed compliance" method. Penalty Framework at 7-8. The Penalty Framework describes this approach to measuring delayed costs as follows:

[59] A document that purports to identify the costs that Respondent expended for particular provisions of the revised ACO was identified by Complainant in its Initial Prehearing Exchange as CX 68 but never entered into evidence at the hearing.

> [I]t is possible to estimate the benefit of delayed compliance through the use of a simple formula. Specifically, the economic benefit of delayed compliance may be estimated at: 5% per year of the delayed one-time capital cost for the period from the date the violation began until the date compliance was or is expected to be achieved.

Penalty Framework at 7-8. Applying that formula to the two tasks listed by Respondent in its summary of expenditures that appear to relate to the violation of Part VIII.A.6.d of the 2010 MS4 Permit found in this Initial Decision,[60] namely, Respondent's efforts to select and implement appropriate measures to reduce or prevent the discharge of pollutants from stockpiles of materials in Region 9 and Region 5, yields the following results:

Listed Task	Reported Cost of Task	Number of Days of Violation	Delayed Cost
Region 5 stockpile stabilization	$500	740	$1,064.38
Region 9 stockpile stabilization	$3,000	740	$6,386.30

Therefore, based on the record before me, I find that the amount of economic benefit that Complainant can recover in this proceeding is the sum of the delayed costs, $7,450.68.

B. Nature, Circumstances, Extent, and Gravity of the Violations

As observed by the EAB, the Penalty Framework identifies a number of factors to be considered in assessing the nature, circumstances, extent, and gravity of violations. *San Pedro Forklift*, 15 E.A.D. at 881 (citing Penalty Framework at 13-16). Those factors include the actual or potential harm caused by the violative activity and the importance of the requirements at issue to achieving the goals of the CWA. Penalty Framework at 14. For purposes of evaluating the actual or possible harm caused by the violative activity, the Penalty Framework identifies additional considerations, namely, the amount and toxicity of the pollutant discharged, the sensitivity of the environment where the violation occurred, and the length of time that the violation continued. *Id.* at 15.

In addressing the gravity component of its proposed penalty, Complainant first refers to a formula set forth in the Settlement Policy.[61] Complainant's Br. at 91-92. It then argues that Ms.

[60] After the three sets of labor costs, there are two tasks listed in the summary of expenditures, "Erosion and Sediment Control measures at Route 17 over I-82" and "Maintenance Facility and Rest Area poster printing," which relate to alleged violations found not to have been proven. The next task listed is "Region 5 North Erie Bridge Facility drainage repairs," and it is unclear from the record which alleged violation Respondent was seeking to remedy by performing it. Therefore, none of those tasks are being considered in calculating the economic benefit resulting from Respondent's noncompliance.

[61] Pursuant to the Settlement Policy, a monthly gravity component is calculated for each month in which a violation occurred, and the total gravity component of the penalty is a sum of each monthly gravity component. CX 65 at 6. The Settlement Policy provides a formula for calculating the monthly gravity component, namely, "(1 + A + B + C + D) x $1,000," with "A," "B," "C," and "D" representing gravity factors that are assigned values according to the

Arvizu's valuation of the gravity of Respondent's offenses as $77,000 is reasonable. *Id.* at 92 (citing Tr. at 346-49). In support, Complainant argues that "Respondent is liable for numerous, fundamental, and substantial permit violations lasting thousands of days." *Id.* It also urges that the violations likely led to "significant environmental harm," Complainant's Br. at 92, in that Respondent's network of MS4s discharge to countless water bodies throughout the State of New York, including 98 deemed to be impaired pursuant to Section 303(d) of the Act, 33 U.S.C. § 1313(d), *id.* at 92 (citing CX 30 at 141-48, 214-15), and Respondent likely discharged pollutants, including petroleum products, paint, and sediment, to those water bodies "[a]s a result of its widespread failure to effectively control its stormwater pollution" at the sites and facilities visited during the audits, *id.* at 92-93 (citing CX 30 at 20-22, 36-38, 631-71; CX 35 at 18-20, 31-34, 640-46, 673-742; CX 39 at 30-34, 621-77; Tr. at 158, 161, 163-64, 170, 187-88, 190, 191, 196-97, 208, 215-17, 259, 261-62, 264, 273, 274-75, 280-81). Complainant maintains that "[i]n one particularly egregious and harmful example, the audit reports contain photographs capturing numerous significant failures by the DOT to protect the Mamaroneck River – [a] water body impaired by sediment – from sediment runoff." Complainant's Br. at 93 (citing CX 35 at 19-20, 659-71; Tr. at 196-205).

Complainant further contends that "[m]any of the violations in this case are symptomatic of Respondent's long-term, systemic failure to adhere to its permit requirements, which resulted in delayed implementation of practices designed to minimize the discharge of pollutants into storm water." Complainant's Br. at 93. Finally, Complainant argues that a substantial penalty may be imposed based on proof of potential environmental harm and that actual environmental harm need not be shown. Complainant's Br. at 94 (citing *United States v. Mun. Auth. Union of Township*, 929 F. Supp. 800, 807 (M.D. Pa. 1996); *Labarge, Inc.*, 1997 EPA ALJ LEXIS 6, at *9 (EPA ALJ Mar 26, 1997) (Decision and Order as to Penalty); *United States v. Gulf Park Water Co.*, 14 F. Supp. 2d 854, 860 (S.D. Miss. 1998)).

Respondent counters that "there is no evidence indicating that the violations alleged created any cognizable difference in water quality" and that Ms. Arvizu offered little testimony on the subject. Respondent's Br. at 39 (citing Tr. at 345-48). Respondent also urges that "[t]he alleged violations mostly consisted of a failure to document or elaborate on programs or procedures already in place." *Id.* Finally, Respondent disputes Complainant's characterization of the violations as "fundamental and substantial," arguing, in essence, that the violations could not be as serious as alleged given that EPA allowed two years to elapse between its discovery of the violations and its notice to Respondent of Respondent's failure to comply. *Id.*

In considering the parties' arguments and the facts as they relate to this component of the penalty, I note, as did Respondent, that Ms. Arvizu's testimony about how she quantified the gravity of Respondent's offenses is sparse. In particular, she explained that she assessed the seriousness of the violations by MCM. Tr. at 346. However, the record lacks any indication of

---

text and tables set forth in the Policy. *Id.* In particular, "A," which may be assigned a value between zero and 20, represents the significance of the violation and "is based on the degree of exceedance of the most significant effluent limit violation in each month." *Id.* at 7. Meanwhile, "B" may be assigned a value between zero and 50 "for each month in which one or more violations present actual or potential harm to human health or to the environment." *Id.* at 8. "C," which may be assigned a value between zero and five, is "based on the total number of effluent limit violations each month." *Id.* at 9. Finally, "D" may be assigned a value between zero and 70 and is "based on the severity and number of the six different types of non-effluent limitation requirements violated each month." *Id.* at 9.

the gravity that she actually attributed to the set of violations associated with each MCM, with the exception of her testimony that she found Respondent's noncompliance with the requirements related to MCM 3 (IDDE) to be significant.[62] *See* Tr. at 346. The record is also devoid of any explanation of how she arrived at $77,000 as the total gravity component.

Nevertheless, I am persuaded that the record of this proceeding supports a finding that the nature, circumstances, extent, and gravity of Respondent's noncompliance were significant enough to warrant a valuation as sizeable as $77,000. With regard to the actual or potential environmental harm caused by the violations, Complainant presented ample evidence, which was not specifically called into question, demonstrating that Respondent engaged in practices at its construction sites and fixed facilities that likely led to the mobilization and discharge of a number of pollutants to the storm drains or other storm water conveyances at those locations and beyond. *See, e.g.*, Tr. at 199-200 (testimony of Mr. Jacobsen that he observed a storm drain inlet at the Interstate 287 Project for which inlet protection had not been installed as called for by the revised erosion and sediment control plan and sediment that had accumulated in and around the storm drain) (referring to CX 35 at 660, 664-665) (documentation of sediment accumulated adjacent to and within the improperly unprotected storm drain inlet at the Interstate 287 Project and uncontained material stockpiles present directly upgradient of the inlet); Tr. at 267-68 (testimony of Mr. D'Angelo concerning evidence of erosion from one of the stockpiles of sand at Respondent's Carmel Residency, namely, that the storm water conveyance below the stockpile "appeared to be inundated with sediment," creating "the potential for sand that had eroded off the pile [to be] mobilized via that conveyance into a culvert pipe inlet" leading to Stump Pond Creek) (referring to CX 35 at 719, 721-22) (documentation of uncovered and uncontained stockpiles of sand at Respondent's Carmel Residency, with accumulated sediment visible in a storm water conveyance ditch located just downgradient from one stockpile and accumulated sediment visible around an unprotected storm drain inlet located directly adjacent to another stockpile); Tr. at 287-88 (testimony of Mr. D'Angelo that while it may be difficult to discern from the still photographs taken, he observed storm water runoff commingled with petroleum product actively entering storm drains during the audit of Region 8, explaining that "it was raining quite a bit in the Region 8 audit" and "[w]e observed quite a bit of petroleum sheen on the storm water at the facility that was ultimately draining into the storm drain as well"). I note, however, that Complainant has not pointed to any evidence of the particular effects that such pollutants have on aquatic ecosystems. The only probative evidence that the pollutants potentially discharged from Respondent's construction sites and fixed facilities inflict harm seems to be that pollutants such as sediment and oil have been identified as pollutants of concern for purposes of designating waterways as "impaired" pursuant to Section 303(d) of the Act, 33 U.S.C. § 1313(d), including some of the waterways into which Respondent's systems discharge,[63] which means that the waterways are incapable of fully supporting their designated

[62] When asked about the significance that she attributed to each MCM, Ms. Arvizu responded by identifying the violative conduct that seemingly most troubled her. *See* Tr. at 346-48. She was questioned further only with regard to MCM 3 (IDDE) and MCM 5 (post-construction storm water management), and while she affirmed that, "[a]ccording to [her] calculations," she found the violations related to MCM 3 to be significant, her response with regard to MCM 5 was indecipherable from the transcript. *See* Tr. at 346-47.

[63] For example, the Interstate 287 Project was undertaken adjacent to the Mamaroneck River, a waterway identified pursuant to Section 303(d) as impaired for silt and sediment. CX 35 at 478. The evidence adduced by Complainant establishes that the auditors observed sediment accumulated in and around a storm drain inlet located downgradient from uncontained material stockpiles at the site and a lack of protection for the inlet, in contravention of the

uses because of a given pollutant. *See* CX 30 at 214, 477-80; CX 35 at 212, 475-78; CX 39 at 231, 489-92. The EAB has held that a waterway's designation as impaired pursuant to Section 303(d) indicates that it "more likely than not . . . already is under considerable stress." *San Pedro Forklift*, 15 E.A.D. at 881. The addition of a pollutant of concern to a waterway that is already considered impaired because of the pollutant is likely only to increase that "stress" and further inhibit the use of the waterway, while the addition of a pollutant of concern to a waterway that is not yet designated as impaired could result in such impairment.

The potential for this harm was heightened in the present case by the length of time that the violations persisted. As advised by the EAB, "[a] general rule of thumb is that 'the longer a violation continues uncorrected, the greater is the risk of harm.'" *San Pedro Forklift*, 15 E.A.D. at 881 (quoting Penalty Framework at 15). Here, Respondent's failure to comply fully with the terms and conditions of the 2010 MS4 Permit was found to have spanned multiple years, extending from at least July 1, 2011, until compliance was ultimately achieved on February 5, 2016. This protracted delay in Respondent's implementation of programs and practices designed to reduce the discharge of pollutants in storm water runoff undoubtedly increased the risk of a discharge and the associated environmental harm.

Turning to the harm to the regulatory program caused by Respondent's noncompliance, the EAB has stressed the importance of a permit holder abiding by the conditions of its permit under the CWA in order to fulfill the Act's objectives. *See San Pedro Forklift*, 15 E.A.D. at 881 ("The CWA permitting requirements 'go to the very heart' of the storm water program, which cannot successfully function to 'restore and maintain the chemical, physical, and biological integrity' of our Nation's waters if the permit requirements . . . are disregarded or delayed."); *Phoenix*, 11 E.A.D. at 399 ("[T]he obtaining of permits and the following of such conditions is *critical* to the basic purpose of . . . the CWA."). In this matter, Respondent's lapses ranged across four MCMs and over a dozen provisions of the 2010 MS4 Permit, thus supporting a finding that its noncompliance significantly undermined the intent and purpose of the Act. While Respondent urges that the violations charged in this proceeding stemmed primarily from a simple "failure to document or elaborate on programs or procedures already in place," as discussed in earlier sections of this Initial Decision, I largely rejected Respondent's claims in this regard and found that the record shows that Respondent's implementation of multiple provisions of the 2010 MS4 Permit was lacking in fundamental respects, if not altogether. Accordingly, I disagree with Respondent's characterization of the violations as primarily technical in nature.

I am also unmoved by Respondent's argument concerning the amount of time that elapsed between the audits and EPA's notice to Respondent, by way of the ACO issued on March 5, 2014, that EPA considered it to be out of compliance. In essence, Respondent claims that the violations could not be as serious as now alleged given the slow pace of EPA's enforcement efforts. I disagree with this line of reasoning. Far from demonstrating that Respondent's noncompliance was minor in nature, the amount of time that elapsed before EPA

---

applicable erosion and sediment control plan. Tr. at 199-200; CX 35 at 660, 664-665. While nothing in the record appears to speak directly to the issue, it seems likely that the inlet in question ultimately directs storm water runoff to the Mamaroneck River given the proximity of the waterway to the construction site. Therefore, as urged by Complainant, Respondent failed to implement practices identified in the site's SWPPP aimed at "protect[ing] the Mamaroneck River – [a] water body impaired by sediment – from sediment runoff." Complainant's Br. at 93.

issued the ACO – approximately one year and eight months after the initial audit was conducted from June 19 through June 21, 2012, and approximately eight months after the final audit was conducted from June 25 through June 27, 2013 – signals to me, if anything, the broad scope of the violations and the commensurate amount of investigation and deliberation conducted by EPA in developing the ACO. Accordingly, this attempt to downplay the significance of the violations is not compelling.

Consistent with the foregoing discussion, and in consideration of the range of penalties authorized under the CWA, I find the nature, circumstances, extent, and gravity of Respondent's failure to comply with the 2010 MS4 Permit to be significant, such that it is appropriate to quantify this component of the penalty as $77,000.

C. Respondent's Ability to Pay

"[A] respondent's ability to pay may be presumed until it is put at issue by a respondent." *New Waterbury*, 5 E.A.D. at 541. Respondent did not raise any claim that it lacked the ability to pay the proposed penalty until its Initial Brief, in which it urges that its large size "is not indicative of its ability to pay a penalty" but rather that it "has a plethora of financial responsibilities to which its tax payers funding is already committed." Respondent's Br. at 40. Respondent further argues that as the State of New York is primarily responsible for funding maintenance of State-owned infrastructure, any penalty assessed in this proceeding would require it "to abandon or underfund a necessary project." *Id.* As observed by Complainant in its Reply, Respondent did not support this claim with any evidence. Accordingly, it is hereby rejected, and I find that this factor does not warrant any adjustment of the penalty assessed in this proceeding.

D. Respondent's Compliance History

The record of this proceeding also does not contain any evidence demonstrating that Respondent has a history of violations such as those found here.[64] Thus, this factor does not serve as a basis for increasing the penalty.

In its Initial Brief, however, Respondent urges that the absence of prior violations be considered as a mitigating factor to reduce or eliminate the penalty. *See* Respondent's Br. at 40-41. In support of its position, Respondent quotes from a decision by the EAB, asserting that the EAB "has held that 'a reduction in the amount of the penalty [is] appropriate for a first time violator when the evidence showed that a lower penalty was a sufficient deterrent.'" Respondent's Br. at 40 (quoting *Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 549 n.27 (EAB 1998)).[65] Respondent thus ties in another argument with regard to penalty, namely, that a

[64] At the hearing, Dan Hitt, acting Director of Respondent's Office of Environment at the time of the audits, described his experience with actions initiated by the United States Army Corps of Engineers against Respondent because of "potential permit violations with construction activities." Tr. at 610. Mr. Hitt explained that penalties were not assessed in those instances, but he did not elaborate on the nature of the flagged issues. *Id.* at 610-11. Accordingly, any similarity between those issues and the violations found here is unknown.

[65] Following the quotation, Respondent cites to two decisions by the EAB, *Sav-Mart, Inc.*, 5 E.A.D. 732 (EAB 1995), and *Ocean State*. To be clear, the language quoted by Respondent appears in *Ocean State* and refers to the holding in *Sav-Mart*.

penalty is not necessary for purposes of deterrence in this matter given its good faith efforts to comply with the 2010 MS4 Permit prior to the audits, its inability to know that it, in fact, was failing to comply under EPA's interpretation of the Permit, and its cooperation upon being notified of its noncompliance. Respondent's Br. at 37 (citing RX 22, 24, 31, 40, 41, 45, 49, 53, 57, 60, 62; Tr. at 103, 109).

Complainant counters that this matter is distinguishable from *Sav-Mart*, in which the EAB, in upholding the penalty recommended in the underlying proceeding, "merely not[ed] that the absence of prior violations *can be* (not 'is' as Respondent states) a valid basis for reducing a penalty for a first-time violator who had no other notice of his obligations, and where there was no need for specific deterrence." Complainant's Reply at 24. That concept does not apply here, Complainant argues, given that "Respondent is a large, sophisticated organization that was well-aware of its obligations," and it has not presented any evidence to refute "that essential fact." *Id.* Complainant further argues that Respondent's position ignores the notion of general deterrence and "its import in deterring future societal violations, not just that of the violative actor." Complainant's Reply at 22-23 (citing CX 65 at 2; *Catskill Mts. Chapter of Trout Unlimited, Inc. v. City of New York*, 244 F.Supp. 2d 41, 48 (N.D.N.Y. 2003)). Nevertheless, Complainant urges, "the evidence presented by Complainant establishing Respondent's commission of 16,218 separate days of CWA violations more than adequately supports the imposition of a significant penalty to deter Respondent from future violative conduct, and other members of the regulated community from committing similar behavior in the future." Complainant's Reply at 23.

Upon consideration, I am inclined to agree with Complainant and find that the circumstances here with respect to Respondent's history of compliance do not warrant a reduction in the penalty assessed in this proceeding. While Respondent may not have been cited for violations of the 2010 MS4 Permit or its earlier iterations prior to the events underlying this proceeding, the record reflects that Respondent understood, or should have understood, the many terms of the 2010 MS4 Permit that it was found in this Initial Decision to have violated; that its failure to comply with those terms, in most instances, spanned multiple years; and that, as discussed more fully below, the violations reflect a long-standing lack of due care with regard to compliance. Given these considerations, I am not entirely convinced that a substantial penalty is unnecessary for purposes of deterring Respondent from falling into noncompliance again. As argued by Complainant, even if the assessment of a substantial penalty was deemed unnecessary for that purpose, Respondent's position ignores the role of a penalty in discouraging others from exhibiting the same inattentiveness to their obligations under the CWA, the significance of which is noted in the General Policy. *See* General Policy at 3 ("[T]he penalty should persuade the violator to take precautions against falling into noncompliance again (specific deterrence) and dissuade others from violating the law (general deterrence). Successful deterrence is important because it provides the best protection for the environment."). For the foregoing reasons, I decline to reduce the penalty assessed in this matter on the grounds argued by Respondent here.

E. Respondent's Degree of Culpability

"Civil penalties under the Clean Water Act are intended to punish *culpable* individuals and deter future violations, not just to extract compensation or restore the status quo." *Kelly v. EPA*, 203 F.3d 519, 523 (7th Cir. 2000) (emphasis added). Thus, this penalty factor serves to

measure the level of a violator's culpability, which can be defined as fault or blameworthiness. *See Phoenix*, 11 E.A.D. at 418. The Penalty Framework identifies the following factors as relevant to the assessment of a violator's culpability: 1) how much control the violator had over the events constituting the violation; 2) the foreseeability of the events constituting the violation; 3) whether the violator took reasonable precautions against the events constituting the violation; 4) whether the violator knew or should have known of the hazards associated with the conduct; 5) the level of sophistication within the industry in dealing with compliance issues; and 6) whether the violator knew of the legal requirement that was violated. Penalty Framework at 18.

Here, Respondent argues that it had "very little culpability," in that any violations found "were the result of differing permit provision interpretations, misunderstanding of EPA's expectations, reliance on DEC's acquiescence and cooperation for long-term compliance, unreasonable deadlines for a uniquely large MS4, or a mere lack of perfect attention to detail (negligence)." Respondent's Br. at 41-42. Complainant challenges Respondent's characterization of its culpability, arguing that "Respondent had been responsible for the obligations it shirked for many years . . . but had significantly failed to comply with so many of those obligations." Complainant's Reply at 25.

As acknowledged by Respondent, it was at least negligent in committing the violations established in this proceeding. The record before me demonstrates that Respondent is a large, sophisticated entity whose network of MS4s had been subject to some form of regulation for nearly a decade prior to the audits and that it knew or should have known of its obligations under the terms of the 2010 MS4 Permit that it was found to have violated, yet it left many of those obligations only partially fulfilled, where it endeavored to fulfill the obligations at all. At best, these widespread lapses point to an attitude towards compliance that was insufficiently serious and that is at odds with the level of care and commitment that Respondent now claims to have exhibited prior to the audits.

Moreover, I am unmoved by Respondent's suggestion that it was any less culpable in committing the violations because other factors were to blame.[66] For instance, Respondent points to its reliance on NYSDEC's oversight of and acquiescence to its activities prior to the audits as a cause for violations found. As discussed above, Respondent makes clear in its Initial Brief that it considers NYSDEC to have acquiesced in particular to its delayed completion of the ORI, and it argues that it rightfully relied upon NYSDEC's expertise and oversight "to flag any potential noncompliance," which it did not do in this instance. *See* Respondent's Br. at 22 (citing Tr. at 632-33, 640, 665-666). Accordingly, Respondent urges, NYSDEC "acquiesced to an extended timeline by accepting the progress in NYSDOT's annual reports." Respondent's Reply at 2 (citing Tr. at 632-33, 640, 665-66). However, as I previously found, Respondent's

[66] In the context of this argument, Respondent cites "differing permit provision interpretations" and "misunderstanding of EPA's expectations." Presumably, this reference relates to the alleged violation of Part VIII.A.3.h of the 2010 MS4 Permit, which requires covered entities to "[i]nform the public of the hazards associated with illegal discharges and the improper disposal of waste," and the parties' differing interpretations of the term "public" as used in that provision. As discussed above, I rejected Respondent's interpretation but found that a preponderance of the evidence failed to establish that Respondent had violated this particular provision. Therefore, I am not considering such differences in interpretation of the 2010 MS4 Permit or understanding of Respondent's obligations in the assessment of a penalty.

position on this issue is flawed in light of the evidence – namely, the particular representations that Respondent made in its annual reports to NYSDEC – suggesting that NYSDEC was unaware that Respondent would not be timely in completing the ORI. Thus, I am hard-pressed to find that NYSDEC knew of and tacitly accepted Respondent's dilatory performance, such that Respondent's culpability was diminished. Respondent also claims that it submitted its "training programs" concerning pollution prevention and good housekeeping to NYSDEC as part of its annual report each year, which NYSDEC seemingly accepted as fulfilling the terms of the 2010 MS4 Permit. Respondent's Br. at 30-31. Once again, as I found above, I am not persuaded by the record before me that NYSDEC knew of the true nature of Respondent's activities with respect to the training of staff at its fixed facilities on issues related to pollution prevention and good housekeeping, such that Respondent was less culpable in committing the violation at hand. Given these circumstances, I find that blame for the violations cannot be assigned to any other actor but Respondent.

Respondent also points to the unreasonableness of the terms of the 2010 MS4 Permit, as applied to its system of MS4s in light of its system being larger in size than those of other covered entities, as a factor relevant to its level of culpability. This argument is also unpersuasive. Aside from my conclusion, set forth above, that this proceeding is an inappropriate forum in which to challenge the reasonableness of the terms and conditions of the 2010 MS4 Permit, there is little concrete evidence in the record establishing that Respondent's circumstances differed from those of other covered entities to such an extent that requiring Respondent to abide by the terms of the 2010 MS4 Permit would be unreasonable. For example, the record lacks evidence as to the number of staff and funding available to Respondent for purposes of compliance as compared to other covered entities in the State. It may very well be that Respondent's system of MS4s is larger by a certain degree but that the amount of resources available to it is correspondingly greater. Additionally, as argued by Complainant, Dan Hitt, the Director of Respondent's Office of Environment, testified that Respondent could have spent more money to achieve compliance with the revised ACO sooner had Respondent understood that a penalty was accruing on a daily basis, which suggests that "Respondent is able to marshal resources when it deems a task important enough." Complainant's Reply at 10-11 (citing Tr. at 608-09). I also note that some of the permit provisions that Respondent was found to have violated, such as the requirement that it develop and implement a program ensuring adequate long-term operation and maintenance of post-construction storm water management practices, were first imposed not by the 2010 MS4 Permit but by prior iterations, such that Respondent had been subject to those requirements for as many as 10 years prior to the audits. I do not see how Respondent's failure to fulfill such long-standing requirements can simply be ascribed to the size of its network of MS4s, without assigning some degree of fault for the delay in compliance to Respondent.

In accordance with the foregoing discussion, I consider it appropriate to increase the penalty by five percent of the valuation of the nature, circumstances, extent, and gravity of the noncompliance, or $3,850, in recognition of Respondent's relative culpability for the violations.

F. Such Other Matters as Justice May Require

In its Initial Brief, Complainant argues that a violator is required to satisfy a high standard in order to demonstrate that a downward adjustment under this factor is appropriate, namely, that "the circumstances [are] 'such that a reasonable person would easily agree that not giving some form of credit would be manifest injustice.'" Complainant's Br. at 96 (quoting *Spang & Co.*, 6 E.A.D. 226, 250 (EAB 1995)). Accordingly, Complainant contends, this factor "is only to be 'sparingly wielded'" when application of the other factors would fail to achieve a fair result. Complainant's Br. at 96 (quoting *Service Oil, Inc.*, 14 E.A.D. 133, 156 (EAB 2008), *vacated on other grounds by Service Oil, Inc. v. EPA*, 590 F.3d 545 (8th Cir. 2009)). Complainant then contends that the law and facts of this matter do not support any claims that assessing the proposed penalty of $150,000 would result in "manifest injustice" and urges that I thus deny any requests for the penalty to be reduced in the interests of justice. *See C*omplainant's Br. at 97-98.

Respondent, meanwhile, requests that I consider a number of items under the "such other matters as justice may require" factor. In large part, Respondent's arguments merit little to no consideration. For example, a few of the items identified by Respondent, such as NYSDEC's purported knowledge and approval of Respondent's violative activities prior to the audits and the unreasonableness of the terms of the 2010 MS4 Permit as applied to Respondent, have already been discussed and rejected as unproven under other criteria. Respondent also argues in favor of reducing the penalty under this factor on account of the amount of time that elapsed before EPA notified Respondent by way of the ACO that it considered Respondent to be noncompliant with the 2010 MS4 Permit. However, I do not consider that period – approximately one year and eight months after the initial audit was conducted from June 19 through June 21, 2012, and approximately eight months after the final audit was conducted from June 25 through June 27, 2013 – to be excessive, especially given the scale of the audits and the violations found. As argued persuasively by Complainant, the record of this proceeding reflects:

> [T]he EPA's audits involved numerous staff and contractors, included extensive records requests and reviews, covered three separate geographic areas and over 36 locations, involved conversations with dozens of people, and produced audit reports totaling several hundred pages. In light of the large record in this case, the EPA's extensive findings, and Respondent's thousands of violations, the EPA's process was appropriately deliberative and thorough, and certainly does not justify the reduction in, or elimination of, a penalty in this matter.

Complainant's Reply at 28. I agree. Accordingly, I find that an adjustment of the penalty based on the foregoing items is not warranted under the rubric of "such other matters as justice may require."

Respondent requests that I also treat Complainant's failure to "consider the statutory factors and use an appropriate penalty policy" as a matter that justice requires to be considered. Respondent's Br. at 43. As previously discussed, I agree with Respondent that Complainant failed to proffer sufficient evidence demonstrating that it considered all of the factors set forth in Section 309(g)(3) of the Act in its calculation of the recommended penalty. For that reason, I found that Complainant did not carry its burden of proving the appropriateness of the penalty proposed in this matter, and I embarked on my own analysis of the penalty criteria. Beyond

rejecting Complainant's proposed penalty, however, I do not consider Respondent's suggestion – namely, that the penalty be reduced as a sort of sanction against Complainant – to be appropriate. Therefore, this argument is also rejected for purposes of mitigating the penalty under this factor.

Meriting greater discussion, Respondent requests that I consider oral representations purportedly made by Justine Modigliani of EPA to representatives of Respondent with regard to the assessment of a penalty, urging that I determine whether "it is fundamentally unfair for EPA to impose a penalty when the Respondent was previously told otherwise."[67] Respondent's Br. at 48-49. At issue is an exchange involving Ms. Modigliani, then a Section Chief in the Division of Enforcement and Compliance Assistance at EPA's Region 2, at a meeting attended by representatives of Respondent, EPA, and NYSDEC on May 13, 2014, where the participants discussed the provisions of the ACO and a timetable for Respondent to complete the corrective actions described therein. *See, e.g.*, Tr. at 45-46, 431-32, 434, 697, 699; RX 16. Ms. Kubek took handwritten notes during the meeting, and on the final page she penned the following words: "NO monetary penalty included with this order – meet all requirements and there will be no penalty assessed." RX 16 at 3. As she explained at the hearing, Dan Hitt, the acting Director of the Office of Environment for Respondent at the time, inquired at the conclusion of the meeting as to whether any penalties would be associated with the ACO if Respondent fulfilled its terms. Tr. at 435. According to Ms. Kubek, Ms. Modigliani responded that "if [Respondent] satisfied each of the order provisions, that the order would be closed and there would be no monetary penalty associated with it." Tr. at 435.

Mr. Hitt confirmed this sequence of events during his testimony. He explained that Respondent's staff arranged the May 13, 2014 meeting because of concerns raised by the following language set forth in the ACO: "Notice is hereby given that failure to comply with the terms of the CWA Section 309(a)(3) Compliance Order may result in your liability for civil penalties for each violation of up to $37,500.00 per day." Tr. at 573-74 (referring to CX 40 at 21). He then explained that he asked Ms. Modigliani and Ms. Arvizu about the potential for monetary penalties to be assessed against Respondent because he was unfamiliar with EPA's processes for such matters. *See* Tr. at 582-86. He testified that, while he could not recall the precise wording of his question or the answer given, Ms. Modigliani responded that there would be no monetary penalties assessed. Tr. at 583-84, 587, 601-03.

Carl Kochersberger and Jonathan Bass, who also attended the May 13, 2014 meeting as representatives of Respondent, testified about their observations during the meeting as well. Mr.

[67] In requesting that I consider Ms. Modigliani's purported representations, Respondent insists that it "has maintained it [sic] position that a fair weighing of the statutory factors, including the 'justice factor,' which should include consideration of the EPA's misrepresentations about penalty, should result in a waiver of the penalty" and that "[s]uch consideration is not a request for estopple [sic]." Respondent's Br. at 43-44. Given its express disavowal of the doctrine, I am not treating Respondent's arguments as invoking the doctrine of equitable estoppel as an affirmative defense and undertaking the exercise of determining whether Respondent has satisfied the elements of such a claim against Complainant. Rather, I am considering the representations at issue merely in connection with the equity of the penalty assessed, an approach that has been recognized by the EAB in the course of rejecting estoppel claims. *See B.J. Carney*, 7 E.A.D. at 204 ("Any harshness perceived to result from [the EAB's denial of the respondent's estoppel claim] is tempered by the principle that the facts upon which [the respondent] unsuccessfully relies to show estoppel may nevertheless be considered in connection with assessing a penalty.") (citing *United States v. Marine Shale Processors*, 81 F.3d 1329, 1349 n.11 (5th Cir. 1996); *United States v. City of Toledo*, 867 F.Supp. 603, 608 (N.D. Ohio 1994)).

Kochersberger explained that Mr. Hitt asked Ms. Modigliani about whether there would be "some kind of penalty with this [ACO]." Tr. at 639. He too could not recall the exact words spoken by Mr. Hitt or Ms. Modigliani, only that Mr. Hitt asked a "general question of whether or not there was going to be a penalty" and that Ms. Modigliani responded that a penalty would not be assessed unless Respondent disregarded the ACO. Tr. at 640. Mr. Bass, in turn, described the exchange between Mr. Hitt and Ms. Modigliani as follows:

> [A]t the end of the meeting, Dan Hitt asked Justine Modigliani, quite frankly, so how does this [ACO] get closed, how does the order get closed out, and the answer was, once all of the provisions were met, we would get something in writing that closes out the order. And then, Dan followed up with a question: Would there be an associated penalty with the order, and she responded, no, as long as you meet all of the provisions in the order, there will be no penalty.

Tr. at 670-71.

During her testimony, Ms. Modigliani affirmed that she was asked about any potential penalties associated with the ACO during the May 13, 2014 meeting. Tr. at 698. As for her response to that inquiry, she explained:

> I don't recall the exact response, but I know that my response, at least in part, would have been that this order was for compliance, that was the purpose of the meeting, that was what we were there to discuss, and the order that had been issued was for compliance.

Id. She also denied promising to waive a penalty for the violations underlying the ACO, testifying that she "absolutely [does] not" possess the authority to offer such a waiver. Tr. at 698, 704-05.

Based on the foregoing evidence, I am inclined to find against Respondent on this matter. In my view, the documentary and testimonial evidence presented by Respondent's witnesses does not appear to be at odds with the testimony of Ms. Modigliani, and while the precise wording of Mr. Hitt's inquiry and Ms. Modigliani's response is unknown, it is still evident to me that the focus of their exchange was the ACO and any potential penalties associated with a failure to comply with that particular document, the purpose of which was to facilitate Respondent's compliance with the 2010 MS4 Permit. As reflected in the evidence presented by Respondent, Ms. Modigliani may have informed Respondent's staff that a penalty would not be levied against Respondent *pursuant to the ACO* if Respondent fulfilled its terms, but I am not persuaded that Ms. Modigliani promised to forgo potential penalties for prior violative conduct, which was independent of any actions that Respondent took with respect to the ACO.

What the evidence lays bare is that Respondent's staff did not understand, and seemingly still fails to grasp, that multiple mechanisms for enforcement, and correspondingly, avenues for the imposition of a monetary penalty, are available to EPA under Section 309 of the CWA, 33 U.S.C. § 1319, and that only one of those mechanisms – issuance of the ACO pursuant to Section 309(a)(3) in order to achieve future compliance and the authority to impose a penalty for

failure to comply with that document – was the subject of discussion at the May 13, 2014 meeting. However, the ACO provides notice of this scheme as follows:

> 5. This Order does not constitute a waiver from compliance with, or a modification of, the effective terms and conditions of the CWA, its implementing regulations, or any applicable permit, which remain in full force and effect. This Order is an enforcement action taken by EPA to ensure swift compliance with the CWA. Issuance of this Order shall not be deemed an election by EPA to forego any civil or criminal actions for penalties, fines, imprisonment, or other appropriate relief under the CWA.
>
> 6. Notice is hereby given that failure to comply with the terms of the CWA Section 309(a)(3) Compliance Order may result in your liability for civil penalties for each violation of up to $37,500.00 per day under Section 309(d) of the CWA, 33 U.S.C. § 1319(d), as modified by 40 C.F.R., Part 19. Upon suit by EPA, the United States District Court may impose such penalties if, after notice and opportunity for hearing, the Court determines that you have violated the CWA as described above and failed to comply with the terms of the Compliance Order. The District Court has the authority to impose separate civil penalties for any violations of the CWA and for any violations of the Compliance Order.

CX 40 at 21. As the foregoing passage reflects, Section 309(d) of the CWA establishes the mechanism by which EPA may impose a civil penalty against "any person who violates any order issued by the Administrator [of EPA] under subsection (a) of this section," such as the ACO. 33 U.S.C. § 1319(d). Meanwhile, the Complaint initiating this proceeding was issued pursuant to Section 309(g) of the CWA, which authorizes EPA to assess administrative civil penalties for past violations of permits issued under the Act. *See* 33 U.S.C. § 1319(g). As argued by Complainant in its Initial Brief, the law makes plain that these distinct remedies are not mutually exclusive and that EPA's exercise of the latter authority is not limited by the previous issuance of an administrative order pursuant to Section 309(a). Complainant's Br. at 87-88 (citing 33 U.S.C. § 1319(g)(6)(A); *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 375-76 (10th Cir. 1979); *United States v. Citizen Utils. Co. of Illinois*, 1993 WL 286463, at *5 (N.D. Ill. July 28, 1993); *Sasser*, 3 E.A.D. 703, 1991 WL 319991, at *2 n.9 (CJO 1991)).

I am sympathetic to Respondent's misperceptions of these enforcement mechanisms and the alarm that its staff experienced in receiving the Complaint after it had achieved compliance, which appear to have been sincere based on the record before me. However, I cannot find that these considerations serve as an equitable basis for mitigating the penalty where the evidence fails to establish that Ms. Modigliani misled Respondent's staff as to whether a penalty could be imposed for its past violations of the 2010 MS4 Permit, independent of whether a penalty could be associated with the ACO, and both the law and the ACO are clear on those points. To do so would encourage ignorance of the law, and such ignorance is not considered to be an appropriate basis for reducing the penalty assessed in proceedings like the one at hand. *See, e.g.*, *Service Oil*, 14 E.A.D. at 155 ("[I]n no CWA case have such claims [of ignorance] prevailed before the Board . . . .") (citing various cases); Penalty Framework at 18 ("[L]ack of knowledge of the legal requirement[] should never be used as a basis to reduce the penalty. To do so would encourage

ignorance of the law."). In a similar vein, I also reject Respondent's request, raised throughout its Initial Brief, that I consider EPA's failure to notify Respondent that a daily penalty could be accruing for its past violations of the 2010 MS4 Permit, even if compliance was achieved in accordance with the ACO.

I turn now to the final argument raised by Respondent that merits discussion, namely, that it acted in good faith in its efforts to comply with the 2010 MS4 Permit both prior to and after it was notified by EPA of its noncompliance. Respondent urges that various legal authorities have recognized that such good faith efforts in achieving compliance may warrant a reduction in the penalty assessed for a violation of the CWA. Respondent's Br. at 42-43 (citing *United States v. Smithfield Foods, Inc.*, 972 F.Supp. 338, 353 (E.D. Va. 1997); *Spang*, 6 E.A.D. at 249; *Phoenix*, 11 E.A.D. at 414-415). Respondent then argues that a number of considerations demonstrate "[its] commitment toward compliance and toward being an [sic] responsible environmental citizen as a whole," including the procedures and programs that it already had in place at the time of the audits and "its initiative in expanding some of EPA's compliance requests beyond the MS4 into statewide programs." Respondent's Br. at 43 (citing Tr. at 656-57). Complainant counters that it does not dispute that Respondent was complying with some aspects of the 2010 MS4 Permit at the time of the audits and that it was cooperative during the process of remedying the violations after receipt of the ACO. Complainant's Reply at 26. It urges, however, that "this does not mitigate the unlawfulness or potential harm of the numerous requirements that Respondent failed to seriously attempt and/or timely complete prior to the audits" and that "Respondent never should have been in violation and continued to be liable until its violations were remedied." *Id.* Finally, Complainant challenges Respondent's claim concerning the initiative it allegedly took to expand its compliance efforts beyond what was ordered by EPA as insufficiently supported by the record. *Id.* at 27.

As observed by Respondent, the EAB has recognized that a violator's activities prior to and after a violation has occurred may warrant consideration for purposes of mitigating a penalty under the rubric of "other matters as justice may require." *See, e.g.*, *Phoenix*, 11 E.A.D. at 415-16; *Spang*, 6 E.A.D. at 249. Specifically, it held that, as with other arguments under this rubric, "the standard for invoking this factor is high, such that 'the evidence of environmental good deeds must be clear and unequivocal, and the circumstances must be such that a reasonable person would easily agree that not giving some form of credit would be a manifest injustice.'" *Phoenix*, 11 E.A.D. at 415 (quoting *Spang*, 6 E.A.D. at 250).

Holding this standard up against the record before me, I am not convinced that the evidence of Respondent's efforts to comply with the 2010 MS4 Permit prior to the events underlying this proceeding demonstrate a level of commitment and good faith towards environmental protection that warrants due credit in the form of a reduction in the penalty. Respondent may not have been previously cited for violations of the 2010 MS4 Permit or its earlier iterations, and it may have been complying with some aspects of the Permit at the time of the audits. However, the record reflects that its efforts were incomplete or entirely absent with regard to more than a dozen others, often times over the course of multiple years, even though it knew or should have known of its obligations. Such lapses can hardly be regarded as minor blemishes on its environmental record. Additionally, I note that some of Respondent's representations to NYSDEC regarding its compliance appear to be suspect. For instance,

Respondent affirmed in the annual reports for the relevant reporting periods that it had performed a self-assessment of its operations, activities, and facilities within the past three years, CX 30 at 428; CX 35 at 426; CX 39 at 441, but then it proceeded to admit in the course of this proceeding that it had, in fact, failed to perform and document the self-assessments as required. While Ms. Kubek professed at the hearing that Respondent was unsure of what a self-assessment should entail, *see* Tr. at 455, Respondent does not appear to have ever sought direction from NYSDEC prior to the audits with respect to this or any other requirement imposed by the 2010 MS4 Permit or its earlier iterations. Accordingly, I find that Respondent's past actions do not merit a reduction in the penalty in the interests of justice.

I similarly find that the actions taken by Respondent after being notified of its offenses also do not support a reduction in the penalty. Undoubtedly, the record is replete with evidence, including testimony elicited from Ms. Arvizu and Ms. Modigliani, concerning Respondent's efforts to achieve compliance and its degree of cooperation with EPA. This evidence reflects that Respondent endeavored to respond to and remedy the issues identified by EPA beginning promptly upon its receipt of the ACO; that it was in frequent contact with EPA for purposes of seeking guidance on the tasks required of it and demonstrating its efforts to complete those tasks; that EPA readily granted extensions of time to Respondent where the dates and priorities it had set for compliance were found to be infeasible; and that Respondent expended over $500,000 on its efforts before it was deemed to be compliant. *See, e.g.*, Tr. at 103, 111, 455-57, 541, 573, 579-81, 638-39, 668, 706; RX 15, 22, 24, 31, 39, 40, 41, 45, 48, 49, 53, 55, 57, 58, 60, 62, 72; CX 59 at 9. It is clear to me that while it took Respondent close to two years to achieve compliance, which I would not necessarily regard as swift, EPA was agreeable to the pace of Respondent's efforts. It is also clear that Respondent was earnest, diligent, and cooperative as it undertook those extensive efforts, even where it questioned the necessity of a particular action required by EPA. Thus, whatever commitment to environmental protection that Respondent was previously lacking seems to have been invigorated by its receipt of the ACO. That attitude distinguishes it from the respondent in *Phoenix*, whose "post-complaint compliance" was characterized by the EAB as "a case of 'too little, too late'" for purposes of reducing the penalty assessed in that matter under the rubric of "other such matters as justice may require." *Phoenix*, 11 E.A.D. at 415. Specifically, the EAB explained:

> Phoenix initially failed to install appropriate erosion control devices, failed to adequately repair them after DEP and the City recommended such measures, and even failed to adhere to the terms of the after-the-fact permit, which required such measures, *until* the State uncovered the inadequate measures during a follow-up inspection. Only then did Phoenix finally erect adequate erosion control devices, albeit in a short time frame following the inspection.

Id. at 415-16 (citation omitted). Here, Respondent exhibited no such disinclination towards compliance after receipt of the ACO.

All of that being said, I regard the fact that Respondent began to engage in good faith efforts to comply with the 2010 MS4 Permit only after EPA's discovery of its offenses as a consideration that weighs against it under this rubric, consistent with the EAB's endorsement of decisions not to reduce the penalty assessed where, among other things, the actions taken by the

respondent to come into compliance occurred not because of the respondent's own willingness to comply but because of pressure exerted by a regulator's discovery of the violations in question. *See Phoenix*, 11 E.A.D. at 415 n.83, 416; *Pepperell Assocs.*, 9 E.A.D. 83, 110 (EAB 2000), *aff'd*, 246 F.3d 15 (1st Cir. 2001). Additionally, I agree with Complainant that the evidence adduced by Respondent regarding the purported actions it took to expand its compliance efforts beyond what was ordered by EPA in the ACO and required by the 2010 MS4 Permit was insufficiently specific with respect to the location, extent, duration, effectiveness, and cost of those actions to find that it met the high standard for "clear and unequivocal" evidence set by the EAB in *Spang*. *See, e.g.*, Tr. at 459-75, 673-75, 680-81. Thus, I am not persuaded that the actions taken by Respondent after its receipt of the ACO constituted environmental good deeds that exceeded the duties required of Respondent under the CWA, such that a manifest injustice would result if the actions were not recognized with some form of credit given to Respondent.

In accordance with the foregoing discussion, I find that no downward adjustment of the penalty is warranted in this matter under the "such other matters as justice may require" factor.

IV. CONCLUSIONS ON PENALTY

For the reasons described above, I find that it is appropriate to assess a penalty in the amount of $88,300.68, which is the sum of $7,450.68 for the economic benefit that Complainant can recover in this proceeding, $77,000 for the valuation of the nature, circumstances, extent, and gravity of Respondent's failure to comply with the 2010 MS4 Permit, and $3,850 for Respondent's relative culpability in committing the violations.

ORDER

1. Respondent is liable for violating the Clean Water Act as set forth above.

2. For this violation, Respondent is hereby assessed a civil penalty of **$88,300.68**.

3. Payment of the full amount of this civil penalty shall be made within **30 days** after this Initial Decision becomes a final order under 40 C.F.R. § 22.27(c), as provided below:

   Payment shall be made by submitting a certified or cashier's check[68] in the requisite amount, payable to "Treasurer, United States of America," and mailed to:

   U.S. Environmental Protection Agency
   Fines and Penalties
   Cincinnati Finance Center
   P.O. Box 979077
   St. Louis, MO 63197-9000

[68] Respondent may also pay by one of the electronic methods described at the following webpage: https://www.epa.gov/financial/additional-instructions-making-payments-epa.

A transmittal letter identifying the subject case and EPA docket number (CWA-02-2016-3403), as well as the Respondent's name and address, must accompany the check.

If Respondent fails to pay the penalty within the prescribed statutory period after entry of this Initial Decision, interest on the penalty may be assessed. *See* 31 U.S.C. § 3717; 40 C.F.R. § 13.11.

4. Pursuant to 40 C.F.R. § 22.27(c), this Initial Decision shall become a final order **45 days** after its service upon the parties and without further proceedings unless: (1) a party moves to reopen the hearing within **20 days** after service of this Initial Decision, pursuant to 40 C.F.R. § 22.28(a); (2) an appeal to the Environmental Appeals Board is taken within **30 days** after this Initial Decision is served upon the parties pursuant to 40 C.F.R. § 22.30(a); or (3) the Environmental Appeals Board elects, upon its own initiative, to review this Initial Decision, under 40 C.F.R. § 22.30(b).

SO ORDERED.

Susan L. Biro
Chief Administrative Law Judge

Dated: July 14, 2020
Washington, D.C.

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

CERTIFICATE OF SERVICE

I hereby certify that true copies of the foregoing **Corrected Initial Decision and Order**, issued by Chief Administrative Law Judge Susan L. Biro, were sent this day to the following parties in the manner indicated below.

Mary Angeles
Paralegal Specialist

Original and One Copy by Hand Delivery to:
Mary Angeles
Headquarters Hearing Clerk
U.S. Environmental Protection Agency
Office of Administrative Law Judges
Ronald Reagan Building, Room M1200
1300 Pennsylvania Ave., NW
Washington, DC 20004

Copy by Electronic Mail to:
Christopher Saporita, Esq.
Assistant Regional Counsel
U.S. Environmental Protection Agency, Region 2
290 Broadway, 16th Floor
New York, NY 10007
Email: saporita.chris@epa.gov
For Complainant

Jason P. Garelick, Esq.
Assistant Regional Counsel
U.S. Environmental Protection Agency, Region 2
290 Broadway, 16th Floor
New York, NY 10007
Email: garelick.jason@epa.gov
For Complainant

Alicia McNally, Esq.
Assistant Counsel
Division of Legal Affairs
New York State Department of Transportation
50 Wolf Road, 6th Floor
Albany, NY 12232
Email: alicia.mcnally@dot.ny.gov
For Respondent

Copy by Electronic Mail to:
Eurika Durr
Clerk of the Board
Environmental Appeals Board
U.S. Environmental Protection Agency
WJC Building 1103M
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460-0001
Email: durr.eurika@epa.gov

Dated: July 14, 2020
Washington, D.C.