



Cathy Calhoun Chief of Staff

Vertical stamps: U.S. Environmental Protection Agency, Region 2, 2017 FEB 03 AM 10:53, REGIONAL HEARINGS, CHERIE

February 2, 2017

Helen Ferrara, R.J.O.
US Environmental Protection Agency—Region 2
290 Broadway, 16th floor
New York, New York 10007-1866

**Re: New York State Department of Transportation
Docket No. CWA-02-2016-3403**

Your Honor:

Please find enclosed an original and one copy of the Respondent's Answer and an executed Certification of Service for the above-referenced matter.

Very truly yours,

ALICIA McNALLY
Assistant Counsel
New York State Department of Transportation
50 Wolf Road, 6th Floor
Albany, New York 12232

Encls.

cc: (via USPS Overnight Mail)

Karen Maples
Regional Hearing Clerk
US Environmental Protection Agency, Region 2
290 Broadway, 16th floor
New York, New York 10007-1866

U.S. Environmental Protection Agency
2017 FEB -3 AM 10:53
MICHAEL J. HARRIS
CLERK

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 2**

IN THE MATTER OF:

**New York State Department of Transportation
50 Wolf Road
Albany, NY 12232
SPDES Permit No. NYRA20A288**

**PROCEEDING TO ASSESS CLASS II
CIVIL PENALTY**

Respondent

DOCKET NO. CWA-02-2016-3403

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

**RESPONDENT'S ANSWER
TO ADMINISTRATIVE COMPLAINT**

**PURSUANT TO SEC. 22.15 OF THE CONSOLIDATED RULES OF PRACTICE, FOUND AT 40
CODE OF FEDERAL REGULATIONS PART 22, RESPONDENT IN THIS MATTER ASSERTS
THIS, ITS ANSWER.**

AS TO THE ALLEGATIONS OF THE ADMINISTRATIVE COMPLAINT CONTAINED IN THE
SECTION THEREOF CAPTIONED -- I. STATUTORY AND REGULATORY AUTHORITIES, the
Respondent alleges:

1. To the extent that the allegations in paragraph 1 state a legal conclusion, no response is required and to the remainder of the allegations, the Respondent DENIES knowledge sufficient to form a belief or respond.
2. To the extent that the allegations in paragraph 2 state a legal conclusion and purport to interpret a document, the document speaks for itself and no response is required, and to the extent a response is required, the Respondent DENIES the allegations set forth therein.

AS TO THE ALLEGATIONS OF THE ADMINISTRATIVE COMPLAINT CONTAINED IN THE
SECTION THEREOF CAPTIONED -- II. APPLICABLE LEGAL REQUIREMENTS, the Respondent
repeats and re-alleges its ANSWER to the allegations contained within the COMPLAINT at I. 1 and 2,
above, and alleges:

1. To the extent that the allegations in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, and 16 state a legal conclusion, no response is required, and to the extent a response is required, the Respondent DENIES knowledge sufficient to form a belief or response with respect to those allegations.
2. To the extent that the allegations in paragraph 15 purports to interpret a document, the document speaks for itself and no response is required, and to the extent a response is required, the Respondent DENIES knowledge sufficient to form a belief or response with respect to those allegations.

AS TO THE ALLEGATIONS OF THE ADMINISTRATIVE COMPLAINT CONTAINED IN THE SECTION THEREOF CAPTIONED -- III. FINDINGS OF FACT AND CONCLUSIONS OF LAW, the Respondent repeats and re-alleges its ANSWER to the allegations contained within the COMPLAINT at I. 1 and 2, and II. 1 through 16, above, and alleges:

1. With respect to the allegations in paragraph 1, the Respondent ADMITS that NYSDOT is a public body; but to the extent these allegations state a legal conclusion, no response is required, and to any remaining allegations, the Respondent DENIES knowledge sufficient to form a belief or response.
2. To the extent that the allegations in paragraph 2 state a legal conclusion, no response is required, and to the extent a response is required, the Respondent DENIES knowledge sufficient to form a belief or response with respect to those allegations.
3. With respect to the allegations in paragraph 3, the Respondent ADMITS that NYSDOT owned and operated a small MS4; but to the extent these allegations state a legal conclusion, no response is required, and to any remaining allegations, the Respondent DENIES knowledge sufficient to form a belief or response.
4. To the extent that the allegations in paragraph 4 state a legal conclusion, no response is required, and to the extent a response is required, the Respondent DENIES knowledge sufficient to form a belief or response with respect to those allegations.
5. To the extent that the allegations in paragraph 5 states a legal conclusion, no response is required, and to the extent a response is required, the Respondent DENIES the allegations set forth therein.
6. With respect to the allegations in paragraph 6, Respondent ADMITS the existence of the Notice of Intent and the MS4 General Permit, but submits that the documents speak for themselves and DENIES knowledge sufficient to form a belief or respond to any remaining allegations.
7. With respect to the allegations in paragraph 7, Respondent ADMITS that it operates administrative offices for the transaction of business at the locations generally described, but DENIES any remaining allegations.

8. With respect to the allegations in paragraph 8, Respondent ADMITS that audits were conducted, but DENIES knowledge sufficient to form a belief or respond to the remaining allegations.
9. With respect to the allegations in paragraph 9, Respondent ADMITS those allegations.
10. To the extent that the allegations in paragraphs 10.a, 10.a.i, 10.a.ii, 10.a.iii, 10.a.iii., 10.b, 10.c, 10.d, 10.e, 10.f, 10.g, 10.h, 10.i, 10.j, 10.k, 10.l, 10.m, 10.n, 10.o state a legal conclusion and purport to interpret documents, the documents speak for themselves and no response is required, and to the extent a response is required, the Respondent DENIES the allegations set forth therein.
11. With respect to the allegations in paragraph 11, the Respondent ADMITS the existence of an Administrative Order and submits that the document speaks for itself; and DENIES knowledge sufficient to form a belief or response to the remaining allegations.
12. With respect to the allegations in paragraph 12, Respondent ADMITS that the EPA and Respondent met and discussed a revised compliance schedule, but DENIES the remaining allegations.
13. With respect to the allegations in paragraph 13, the Respondent ADMITS the existence of an Administrative Order and submits that the document speaks for itself, and DENIES knowledge sufficient to form a belief or response to the remaining allegations.
14. With respect to the allegations in paragraph 14, the Respondent DENIES all allegations set forth therein.

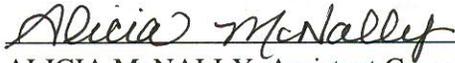
AS TO THE ALLEGATIONS OF THE ADMINISTRATIVE COMPLAINT CONTAINED IN THE SECTION THEREOF CAPTIONED -- IV. NOTICE OF PROPOSED ORDER ASSESSING A CIVIL PENALTY the Respondent repeats and re-alleges its ANSWER to the allegations contained within I. 1 and 2, II. 1 through 16, and III. 1 through 14, above; and DENIES that the EPA has taken into account the nature, circumstances, extent and gravity of the alleged violations, the Respondents prior compliance history, degree of culpability, economic benefit or savings accruing to the Respondent by virtue of the alleged violations; and further DENIES knowledge sufficient to form a belief or respond to any remaining allegations.

THE RESPONDENT DENIES ANY AND ALL REMAINING ALLEGATIONS OF THE COMPLAINT TO WHICH IT HAS NOT HERETOFORE DIRECTLY RESPONDED OTHERWISE.

AS AND FOR AN AFFIRMATIVE DEFENSE, the Respondent submits that it has expended in excess of \$500,000.00 (five-hundred-thousand-dollars) in its efforts to resolve the alleged violations relevant to the events, transactions and occurrences cited in the allegations of the ADMINISTRATIVE COMPLAINT, going well beyond the scope of the MS4 General Permit in effect at the time of the alleged violations and/or beyond the efforts required for mere compliance with the EPA's orders (annexed hereto, and in support thereof, please find letters from Respondent to EPA, Region 2, dated July 11, 2016 and December 1, 2016).

RESPONDENT HEREBY REQUESTS A HEARING IN THIS MATTER.

ISSUED THIS 2nd DAY OF February, 2017


ALICIA McNALLY, Assistant Counsel
Division of Legal Affairs
Office Address:
New York State Department of Transportation
50 Wolf Road, 6th Floor
Albany, NY 12232
Phone: 518-457-2411
Fax: 518-457-4021

SERVICE PURSUANT TO 40 CFR 22.15

Original and One via USPS Overnight Mail to:

Regional Hearing Clerk
US Environmental Protection Agency, Region 2
290 Broadway, 16th Floor
New York, NY 10007-1866

Copy via USPS Overnight Mail to:

Timothy Murphy, Asst. Regional Counsel
Water and General Law Branch, Office of General Counsel
US Environmental Protection Agency, Region 2
290 Broadway, 16th floor
New York, NY 10007-1866

Copy via USPS Overnight Mail to:

Joseph DiMura, P.E., Director
Bureau of Water Compliance Programs
Division of Water
NYSDEC
625 Broadway
Albany, NY 12233-3506



Department of
Transportation

ANDREW M. CUOMO
Governor

MATTHEW J. DRISCOLL
Commissioner

Cathy Calhoun
Chief of Staff

July 11, 2016

Timothy Murphy
Assistant Regional Counsel
Water and General Law Branch
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 2
290 Broadway, 16th Floor
New York, NY 10007-1866

RE: Notice of Proposed Assessment of a Civil Penalty Class II
Docket No. CWA-02-2016-3403

Dear Mr. Murphy:

The New York State Department of Transportation (the Department) is in receipt of the Proceeding to Assess a Class II Civil Penalty, Docket No. CWA-02-2016-3403 (the Complaint). The Department is disputing the penalty proposed in the Complaint and requesting a hearing to contest the proposed penalty; however, we hereby request an informal conference prior to this matter proceeding further.

The Department has expended over \$500,000, which includes several thousand staff hours, labor, and materials to comply with the Order, and considers that to be more than adequate to satisfy any monetary penalty.

The Department has been proactive in complying with and completing all of the Ordered Provisions of the Administrative Compliance Order, Docket No. CWA-02-2014-3041 (the Order). During meetings to discuss the provisions of the Order, the Department had been assured by EPA compliance staff that no penalties would be assessed if the Department successfully completed all of the Ordered Provisions. The Department has received no indication that we have not complied with any provisions of the Order.

Item D.6. on page 19 of the Order states that "...failure to comply with the terms of the CWA Section 309(a)(3) Compliance Order may result in your liability for civil penalties....". Additionally, the cover letter to the Order states "Failure to comply with the enclosed Order may subject NYSDOT to civil or criminal penalties pursuant to Section 309 of the CWA, 33 U.S.C. § 1319." Neither the Order, nor the cover letter, identifies a situation whereby these penalties would be assessed even though the



Department of
Transportation

ANDREW M. CUOMO
Governor

MATTHEW J. DRISCOLL
Commissioner

Cathy Calhoun
Chief of Staff

December 1, 2016

Tim Murphy
U.S. Environmental Protection Agency
290 Broadway, 16th Floor
New York, New York 10007-1866

RE: Civil Penalty Class II Docket No. CWA-02-2016-3403

Dear Mr. Murphy:

During the pendency of this matter the NYS Department of Transportation (the "Department") has been proactive in complying with, and completing all of the Ordered Provisions of the March 5, 2014 Administrative Compliance Order ("the Order"), Docket No. CWA-02-2014-3041. During meetings over the past several years to discuss the provisions of the Order, the Department had been assured by EPA compliance staff that no penalties would be assessed if the Department successfully completed all of the Ordered Provisions. The Department has received no indication that we have not complied with all of the provisions of the Order. As EPA staff knows, the Department has expended over \$500,000, including several thousand staff hours, labor and materials to comply with the Order.

On June 15, 2016 the EPA issued a Notice of Proposed Assessment of a Civil Penalty Class II in the amount of \$150,000, together with an Administrative Complaint, the material allegations of which the Department disputes. In response thereto, the Department prepared, served and duly filed an Answer, asserting among other things, that the EPA has not taken into account the nature, circumstances, extent and gravity of the alleged violations, the Department's prior compliance history, degree of culpability, economic benefit or savings accruing to the Department by virtue of the alleged violations.

Following the service and filing of the Answer, above-mentioned, legal staff for both EPA and the Department spoke. Based upon those conversations, possible options for resolution were discussed and the Department acted in good faith withdrawing its Answer, without prejudice based on the representations from EPA staff that no penalty would be assessed. Subsequently, EPA has advised that it will be assessing a penalty in this matter.

Moving forward, in an effort to continue discussions and facilitate a productive and environmentally beneficial resolution, the Department respectfully requests that the EPA eliminate consideration of any monetary penalty above and beyond the \$500,000 already expended to achieve compliance.

Sincerely,

Janice A. McLachlan,
Assistant Commissioner and
Acting Chief Counsel

JM/mjr/ek

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 2

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New York State Department of Transportation
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Proceeding pursuant to Section 309 (g)
Of the Clean Water Act, 33 U.S.C. 1319(g)

I CERTIFY that on February 2, 2017, I served the foregoing answer, bearing the above referenced docket number, on the person(s) listed below, in the following manner(s):

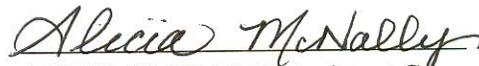
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Copy via USPS Overnight Mail to:
Joseph DiMura, P.E., Director
Bureau of Water compliance Programs
Division of Water
NYSDEC
625 Broadway
Albany, NY 12233-3506

Dated: February 2, 2017


ALICIA McNALLY, Assistant Counsel
New York State Department of Transportation