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

IN THE MATTER OF: New York State Department of Transportation 50 Wolf Road Albany, NY 12232 SPDES Permit No. NYR20A288 Respondent. Proceeding pursuant to Section 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g)	Proceeding to Assess Class II Civil Penalty Pursuant to Section 309(g) of the Clean Water Act Docket No.CWA-02-2016-3403

RESPONDENT'S INITIAL POST-HEARING BRIEF IN OPPOSITION TO COMPLAINANT'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND PROPOSED ORDER

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I. INTRODUCTION

A. Procedural History

1. The Complaint

This action was commenced by Complainant's filing of an "Administrative Complaint, Findings of Violation, Notice of Proposed Assessment of an Administrative Penalty, and Notice of Opportunity to Request a Hearing" ("Complaint") against the New York State Department of Transportation ("DOT" or "Respondent") on June 15, 2016. Complaint alleges that Respondent violated Section 301(a) of the Clean Water Act ("CWA" or "Act"), 33 U.S.C. § 131 J(a), by failing to comply with numerous limits and conditions contained in the New York State Department of Environmental Conservation ("DEC") State Pollutant Discharge Elimination System ("SPDES") General Permit for Stormwater Discharges from Municipal Separate Storm Sewer Systems ("MS4s"). The Complaint sought an administrative penalty of $150,000.

2. The Pre-Hearing Order

The Prehearing Order was issued on June 13, 2017 by Administrative Law Judge ("ALJ") Coughlin. Pursuant to that Order, Complainant files the Corrected Initial Prehearing Exchange on August 2, 2017. Respondent files its initial Prehearing Exchange on August 17, 2017. Complainant filed a Rebuttal Prehearing Exchange on September 7, 2017 and a Motion to Supplement the prehearing Exchange on February 8, 2018. Respondent filed a Supplement to the Prehearing Exchange on February 13, 2018.

3. Complainant's Motion for a Partial Accelerated Decision on Liability

Complainant filed a Motion for Partial Accelerated Decision on Liability for four of the 17 violations alleged in the Complaint on November 8, 2017. Respondent opposed this motion

on December 11, 2017 and Complainant replied to respondent's opposition on December 21, 2017. Pursuant to the Prehearing Order, on January 12, 2018, the parties submitted Joint Stipulations.

On January 29, 2018, the Presiding officer issued an Order on the Motion for Partial Accelerated Decision on Liability ("Order"). The Order held that Respondent is obligated to obtain and abide by an MS4 permit issued by the NPDES permitting authority and found that there was an issue as to "the extent to which Respondent complied with those permits." The Order did grant an accelerated decision on two counts of the Complaint; Respondent's failure to have a written directive for illicit discharge detection and elimination (IDDE) program (Complaint. III.10.e), and Respondent's failure to retain records of quality control/quality assurance for construction review program (Complaint. III.10.a.i). Decision on the other thirteen alleged violations was reserved for a decision following the hearing.

4. The Hearing

The hearing in this matter was conducted April 3-5, 2018, in Albany, New York, and both parties presented evidence and testimony regarding Respondent 's liability for the violations alleged in the Complaint, as well as the appropriate penalty for the violations. The following Complainant's Exhibits were entered into the record, either by joint stipulation, or by oral motion at the hearing: CX 1-6, 8-11, 13-17, 20-27, 30-37, 39-42, 44, 45, 47-66, 69, and 72-77. Jt. Stip. II; Tr. 15:14-17; 683:6-8. Respondent's Exhibits were entered into the record: RX 1, 4, 5, 7-15, 17-22, 24-29, 31-34, 36-38, 40-43, 45-47, 49, 50, 52-54, 56, 57, 59-64, 66, 67, 70-72. J t. Slip. II; Tr. 16:12-17; 683:6-8. The parties submitted motions to conform the transcript and, on July 31, 2018, this Tribunal issued an Order on the Parties' Motions to Conform the Hearing Transcript, describing over 700 corrections to the transcript. All references herein to the

transcript refer to the transcript as corrected by this Tribunal's July 31 Order.

B. Statement of the Case

Respondent maintains the largest MS4 in New York State with approximately 16,000 outfalls over 13,000 miles of highway statewide. As a state transportation agency, DOT is responsible for maintenance and construction much of the state's transportation infrastructure. This work is primarily federally funded. DOT has always been cognizant of the state-transportation system's effects on the environment and maintains a close cooperative relationship with its sister agency, and EPA's state counterpart, DEC. Since the inception of the MS4 permit program in 2003, DOT has made good faith efforts to comply, annually submitting its progress and compliance documentation to DEC, the permitting agency. Based on these annual submissions along with the acquiescence and cooperation of DEC, for eleven years, DOT believed it was compliant with the permit.

In March of 2014, following three audits that began two years earlier, DOT received the first notice that the EPA believed it was noncompliant. In response, the Respondent immediately expressed its intent to fully comply to the satisfaction of EPA. DOT set aside its disagreement about EPA's interpretation of the actual requirements of the permit and, based on assurances that there would be no penalty if compliance was achieved, DOT made every effort to fulfill EPA's requests. Upon attaining compliance to the satisfaction of the Complainant, DOT was served with the underlying Complaint containing a request for a $150,000 civil penalty. It was at this moment that DOT realized that EPA was not interested in a cooperative and courteous relationship to achieve and maintain compliance. [1]

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[1] The tone of the EPA's brief is illustrative of this agency's approach to compliance. The Complainant's brief makes distasteful and unsupported allegations of "significant bias" and lack

Based on the record before you, it is apparent that the EPA elevated form over substance, relied on inexperienced auditors who failed to properly investigate observations, disregarded the reasonableness of its requests, acted contrary to its mission by unreasonably delaying notification of the alleged violations, acted contrary to statute by ignoring DOT's good faith efforts, lack of culpability, and history of non-violations, and failed to foster a reciprocal working relationship in furtherance of ongoing compliance.

It is within this framework that Respondent requests this Tribunal to invoke the interest of justice and eliminate the penalty. Ultimately, recognizing DOT's commitment to pursue its mission in harmony with the environment by working with the agencies responsible for such protection. DOT does this, not because it could be penalized for noncompliance, but because it is consistent with the policies of New York State and best for the American people.

STATEMENT OF FACTS

A. Respondent

The New York State Department of Transportation ("DOT" or "Respondent") is an executive agency of the State of New York. Tr., at p. 553. DOT is a public agency established under the laws of the State of New York to develop and maintain a transportation network. Jt. Stip. I. 1.2, 2. DOT develops and maintains, among other things, a state highway system that measures approximately 16,000 lane miles that include stormwater systems. Jt. Stip. I. 2.

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of credibility—personally attacking DOT's expert witness as "unreasonably defensive," while for the duration of her four plus hours of testimony, she remained calm and respectful to both the Tribunal and counsel. Complainant's Post-hearing Brief, at p. 10. These unsubstantiated remarks regarding professional testimony given by a DOT employee demonstrates EPA's shortfall regarding the cooperative courtesy or respect necessary to foster the continued relationship needed for ongoing compliance.

These systems include 16,806 stormwater outfalls that discharge runoff from the state highways, and sometimes stormwater from connected local systems as well. Tr., at p. 411.

Respondent has its headquarters office in Albany, New York and there are eleven (11) regional offices located throughout New York State, including Western New York (Region 5), Hudson Valley (Region 8), and Southern Tier (Region 9) has continuously held permits to operate and maintain the statewide network of Municipal Separate Storm Sewer Systems ("MS4s") located in urbanized areas throughout New York State. CX 1; CX 30; CX 59, at pp. 273-274; CX 73; Jt. Stip. I. 3, 4; Tr., at pp. 44, 121-122. Within Region 5, Respondent operates approximately 2,368 such outfalls. CX 59, at p. 274. Within Region 8, Respondent operates approximately 6,699 such outfalls. *Id.* Within Region 9, Respondent operates approximately 722 such outfalls. *Id.*

The initial application from DOT for an MS4 permit goes back to March 10, 2003. CX 1; Jt. Stip.I.5; Tr., at p. 33-34. The initial permit was secured after submittal of a Notice of Intent ("NOI") to be covered under New York's 2003 MS4 permit on March 10, 2003. CX 1; Jt. Stip. 1.5; Tr., at pp. 33-34. Under the terms of the permit that was required to obtain, DOT assumed certain obligations. CX 1, at pp. 1-14. Acting on behalf of EPA, the New York State Department of Environmental Conservation ("DEC") granted coverage to DOT on April 2, 2003. CX 1; Tr., at p. 35.

DOT's coverage continued under the 2003 permit until the DEC issued the 2008 permit on May 1, 2008. CX 2, at pp. 1-28; Jt. Stip. I. 6; Tr., at p. 35. When the 2008 MS4 permit expired, on April 30, 2010, DEC issued the 2010 MS4 permit, on May 1, 2010. CX 3, at pp. 1-91. DOT 's coverage continued thereafter under that permit. Jt. Stip. I.7; Tr., at p. 35-36. The 2010 MS4 permit, that was in effect during the EPA's audits of Respondent's MS4, expired on

April 30, 2015. CX 4, at pp. 1-116. Jt. Stip. I.8. On May 1, 2015, DEC issued the current permit ("2015 MS4 GP") that expired on April 30, 2017 but has been administratively extended. CX 5, at pp. 1-115; Jt. Stip. I. 9, 10.

DOT developed a Stormwater Management Program Plan ("SWMP Plan") for use throughout its MS4. At the time of the first and second audits in this matter (Region 9 and Region 8, respectively), DOT's May 2012 SWMP Plan was the version in effect. CX 30, at pp. 158-252; Jt. Stip. I.12. At the time of the Region 5 audit, DOT was using a version dated June 2013. CX 39, at pp. 174-268. Respondent is one of only a few states that puts environmental staff in both their maintenance and construction programs. Tr., at pp. 656-657. The permit includes multiple requirements with which DOT was in compliance before the first audit was conducted. Respondent had an employee training program for pollution prevention/good housekeeping. Some of these employee training programs were in place prior to the audits. See CX 30, at p. 24; CX 35, at p. 29; Complainant's Post-Hearing Brief, at pp. 71-72. This training included topics such as outfall inspections, erosion and sediment control, construction general permit requirements, and stormwater pollution prevention. CX 30, at 34; CX 35, at 29. All regional facilities performed semi-annual training covering pollution prevention and control measures. Tr., at pp. 492-493. These training programs were submitted to DEC and accepted year after year as part of the Respondent's annual MS4 report. Tr., at pp. 488-489. To Respondent's knowledge, DEC accepted these training programs in satisfaction of the permit. Tr., at p. 489, 492-493.

Respondent did have some employee training programs in place prior to the audits. See CX 30, at p. 24; CX 35, at p. 29; Complainant's Post-Hearing Brief, at pp. 71-72. This training included topics such as outfall inspections, erosion and sediment control, construction

general permit requirements, and stormwater pollution prevention. CX 30, at 34; CX 35, at 29. Moreover, all regional facilities performed semi-annual training covering pollution prevention and control measures. Tr., at pp. 492-493. These training programs were submitted to DEC and accepted year after year as part of the Respondent's annual MS4 report. Tr., at pp. 488-489. To Respondent's knowledge, DEC accepted these training programs in satisfaction of the permit. Tr., at p. 489, 492-493.

Permit requirements concerning Construction Site Contractor Training were in place before the audits. Permit requirements applicable to Inspecting Temporary Erosion and Sediment Controls are part of project management by DOT. The requirements of DEC's Construction General Permit are incorporated into the Respondent's SWMP, including the weekly and rainfall-related construction inspection requirements. Tr., at pp. 477-478; CX 30, at p. 188. Pursuant to the terms of its Standard Specifications, Part 100 and as noted in the SWMP, DOT delegates its construction inspections to its contractors. Tr., at pp. 567-568; CX 30, at pp. 187-188. At the time of the audit, the DEC Construction General Permit no longer required rain-related inspections. CX 30, at p. 22; Tr., at p. 477-478. Although failing to update the SWMP was an oversight on the Respondent's part, the regulatory requirement for the inspections no longer existed. See CX 30, at p.22.

B. The EPA Compliance Audits

None of the EPA auditors were certified as experts before this Tribunal. Tr., at p. 20. These consultants' lack of expertise was demonstrated by Mr. Kirkbey's testimony that kitty litter is an effective way to clean up a petroleum stain. Tr., at p. 171. As the Respondent's expert witness testified, kitty litter can only clean a liquid spill, and even once cleaned, the petroleum leaves a stain because it is absorbed into and sequestered within the asphalt. Tr., at

pp. 427-428. The EPA clearly agreed because it did not require the Respondent to remove the stains. Tr., at p. 460. Every notation of a petroleum stain as though it is evidence of poor housekeeping evidences the lack of expertise of these auditors, particularly in dealing with a transportation agency. Tr., at pp. 158, 160, 170-171, 208, 215, 218, 268, 273, 276. The record shows that all but one consultant, including Ms. Arvizu herself, had never audited a state transportation agency. Tr., at pp. 79, 173, 223, 315. The testifying consultants all played a supportive role to lead auditor, Max Kuker, who did not testify at the hearing. Tr., at pp. 133, 167, 180, 249, 315. Indeed, Mr. D'Angelo and Mr. Kirkbey went so far as to describe their roles in the audits as on-the-job training. Tr., at pp. 133, 315.

1. Region 9

The first EPA Compliance Audit occurred on June 19-21, 2012, in 's Region 9 that includes Broome, Chenango, Delaware, Otsego, Schoharie, Sullivan, and Tioga counties. The audit of the MS4 program was conducted by EPA inspector Christy Arvizu, and three EPA contractors with DEC inspector Ellen Hahn (now Ellen Kubek) participating. CX 30: 1-5; Tr., 31: 1-6. As with all the EPA audits, the purpose was to assess 's compliance with the requirements of the 2010 MS4 GP in Region 9. CX 30: 1-5; Tr.: 29-31.

Each of the audits began with EPA's pre-audit checklist, including records about outfall inspections and illicit discharge detection. In satisfaction of this request, DOT submitted "Instructions for Conducting Outfall Inspections, Outfall Inspection and Training Procedures, and Operations Stormwater Outfall Inventory Form." CX 13, 34, 37. DOT did not have procedures for track down outside of 's right-of-way, an issue that was discussed at length over the compliance process because, as Ms. Kubek testified, the Respondent has no authority to track down beyond its jurisdiction. Tr., at p. 445. One outfall discovered in Region 9 was not

an outfall at all. As explained by Ms. Kubek, according to DEC guidance, an outfall is "either a ditch or a pipe directly discharging towards receiving water." Tr., at pp. 418-419. EPA eventually conceded this point by accepting the practice of referral to the appropriate agency to stay in place. *Id.*

At the six construction sites, the auditors noted uncovered or uncontained dirt and/or gravel, loose asphalt, broken or oddly placed sandbags, uncovered buckets or alleged petroleum products, and damaged silt fences. CX 30, at pp. 631-647; CX 35, at pp. 647-657. At the facilities, the auditors noted uncovered scrap metal and stockpiles, rust stains, petroleum stains, an open dumpster lid, spilled paint, leaking vehicles and machinery, outdoor equipment washing, dirt in a storm drain basis, covered and uncovered salt, uncovered containers of unknown liquid, and two unknown pipe connections. CX 30, at pp. 648-671; CX 35, at pp. 673-736.

Due to delays in providing reports, many of the construction projects had concluded and those alleged violations no longer existed. All of the Region 8 construction sites had been completed prior to receiving the Order, making remediation by the Respondent impossible. Tr., at p. 461. One construction site in Region 9 remained active and the Respondent expended $3,318.67 to remedy these conditions to the EPA's satisfaction within the time frame given. *Id.*; RX. 23. In its July 1, 2014 submission, the provided date-stamped pictures evidencing compliance with the Order. CX 48, at pp. 104-107, 114-124. For those pictures that were not printed with a date-stamp, the Respondent provided a captioned date next to the photo. CX 48, at pp. 104-133.

Prior to the audit and thereafter, DOT has ensured contractor training with the use of its CONR-5 form. Tr., at p. 469; 482-482. Prior to the audit and thereafter, DOT has ensured contractor training with the use of its CONR-5 form. Tr., at p. 469; 482-482. This form and the

procedure for its use were in existence at the time of the audits and were submitted to satisfy the Order as part of 's first submission on July 1, 2014. CX 48, at pp. 135-136; Id.

The audit resulted in a report that contained 's submissions, key documents, a narrative description of the audit team's findings, and numerous photographs. CX 30; Tr. 42: 14-23. This initial audit report was issued on January 30, 2013.

2. Region 8

The second EPA Compliance Audit of DOT's MS4 program occurred on November 27-29, 2012, in DOT's Region 8 that includes Columbia, Dutchess, Orange, Putnam, Rockland, Ulster, and Westchester counties. CX 35, at pp. 1-5. Once again, was conducted by EPA inspector Christy Arvizu, and three EPA contractors. CX 35, at pp. 1-5. The purpose of the audit was to assess Respondent's compliance with the requirements of the 2010 MS4 permit in Region 8. CX 35, at pp 1-5. Once again, the audit began on October 30, 2012 with the same Records Request with no additional information or instructions. CX 13, 34, 37; Tr., at pp. 41-43. At no time prior to the issuance of the Order and final audit reports on March 5, 2014 was the Respondent ever informed of the inadequacy of the information provided or the inadequacy of its program at large. CX 40; Tr., at pp. 96-97. The audit resulted in a report that contained DOT's submissions, key documents, a narrative description of the audit team's findings, and numerous photographs. CX 35; Tr. at pp. 42.

3. Region 5

The third EPA Compliance Audit of DOT 's MS4 program occurred on July 25-27, 2013, in DOT's Region 5 that includes Niagara, Erie, Cattaraugus, and Chautauqua counties. EPA inspector Christy Arvizu, also conducted this audit w/ three EPA contractors. CX 39 at p.

1-5. Again, the audit began with the same Records Request on May 22, 2013 with no additional information or instructions. CX 13, 34, 37; Tr., at pp. 41-43. And again, at no time prior to the issuance of the Order and final audit reports on March 5, 2014 was the Respondent ever informed of the inadequacy of the information provided or the inadequacy of its program at large. CX 40; Tr., at pp. 96-97.

Four outfalls identified in the Region 5 audit as not being inventoried were not owned by the Respondent, but rather by the New York State Office of General Services, and thus were outside of Respondent's jurisdiction. Tr., at p. 478-479. The pipe at issue discharged from a pond and is defined as an outlet, not an outfall. Tr., at pp. 418-419; 478-479. Since none of the EPA identified outfalls were outfalls within the Respondent's jurisdiction, they remain unmapped in compliance with the permit provision. See CX 53, p. 3. The April 30, 2015 submission expressly notes that the number of outfalls dropped from "18,184 to 16,708 outfalls, reflecting the additions and reductions noted" therein. Id. The audit resulted in a report that contained 's submissions, key documents, a narrative description of the audit team's findings, and numerous photographs. CX 39; Tr., at p. 42. This third and final audit report was issued on December 17, 2013.

C. The Administrative Compliance Order

Three months after the third audit and almost two years after the initial audit, on March 5, 2014, EPA issued an Administrative Compliance Order ("ACO" or "Order") on behalf of EPA Region 2. CX 40; Tr. at p.43. The Order alleged that Respondent had violated 19 separate requirements of its MS4 permit and pollution that the EPA had observed at 19 of the 37 sites inspected during the audits. CX 40, at pp. 4-11. The ACO was issued even though DEC was fully aware of the Respondent's progress toward addressing issues being raised by the

audits. Tr. At pp. 487-489. DOT was submitting annual reports indicating the actions that were being taken and specifically included identification and outfall reconnaissance progress. Tr. At 487-488. DEC and DOT had an ongoing working relationship and were working to address the EPA concerns. Tr., at pp. 632-633, 665-666.

In addition to ordering DOT to implement 24 different types of corrective actions, the ACO also provided the first notice of possible civil penalties "for each violation of up to $37,500 per day" as may be further escalated by 19 CFR Part 19. RX 12, at p. 21. This ACO prompted serious concern among the employees of DOT. Tr., at p. 574. The ACO cited numerous violations, with some going back as far as the initial audit in June of 2012 (RX 12) ranging from developing missing planning and programmatic requirements, to implementing required pollution prevention practices, including developing an updated SWMP Plan CX 40, at pp. 1-18, 20.

As a public agency with over 8,000 employees, and a budget funded primarily with federal money, the threatened penalty caused a great deal of concern Tr., at pp. 555, 574. On May 13, 2014, the EPA and DOT officials met to discuss revisions to the compliance schedule outlined in the ACO and the parties agreed to a revised schedule for compliance that was formalized in a new ACO issued by the EPA on June 5, 2014 RX 16, at pp. 1, 4; CX 47, at pp. 1-23; Tr., at pp. 45-47. This second Order retained all the findings and ordered provisions of the original order, but extended several of the original deadlines, setting the final deadline for compliance at June 30, 2015. CX 47, at p. 20; Tr., at p. 47.

Director of the Environment, Daniel Hitt was the highest-ranking DOT employee to be actively involved in the EPA enforcement action. Tr., at pp. 551-607. Mr. Hitt explained that the penalty provisions of the ACO were a source of concern. Tr., at p. 574. The initial reaction

from DOT was to schedule a meeting with EPA officials. RX 15; RX 16. The initial meeting occurred at DOT offices on May 13, 2014 with DOT employees Daniel Hitt, Jonathan Bass, Keith Martin, Carl Kochersberger, Scott Kappeller and Ellen Kubek in attendance. RX 16. Attending the meeting on behalf of EPA, were Christy Arvizu and Justine Modigliani, accompanied by three employees from the DEC (a sister state agency to DOT). RX 16. Dore LaPosta, the Director of the Division of Enforcement and Compliance Assistance, who had issued the ACO, did not attend the meeting. Justine Modigliani represented herself to hold the title of "Compliance Section Chief" for US EPA Region 2 and was the most senior EPA official with which DOT ever dealt RX 16, Tr. 604:19-21. Modigliani was accompanied at the meeting by Christy Arvizu, an Environmental Scientist from EPA who had worked on the audits. RX 16. At the meeting there were extensive discussions about how DOT would get into compliance. Witnesses Daniel Hitt, Jonathan Bass, Carl Kochersberger and Ellen Kubek all heard Justine Modigliani, Compliance Section Chief, indicate that there would be "no penalty." Tr., at pp., 436, 640, 651.

Over the course of the next twenty months, DOT made eleven submissions to the EPA to demonstrate its efforts to come into compliance, including quarterly progress reports. RX 22; RX 24; RX 31; RX 40; RX 41; RX 45; RX 49; RX 53; RX 57; RX 60; RX 62. During this period, the EPA had several additional meetings and conference calls with Respondent. Tr., at p. 47. Many of Respondent's submissions were initially deemed inadequate by the EPA, and, in some cases, Respondent sought additional information about what was required. CX 47-59; Tr., at p. 47. At no point in any of these ongoing discussions was there any mention of any penalties that might otherwise have been accruing at a rate of more than $37,500 per day for each violation. EPA was finally satisfied that DOT had demonstrated that it had corrected all

its violations on February 5, 2016, when DOT submitted its final progress report. CX 59; Tr., at p. 48. This was eleven months after the issuance of the ACO by EPA.

Some of the measures that DOT took to satisfy EPA were simple forms and procedures that were arguably in place before the date of the ACO. Concerning the existence of the outfall inspection instructions, DOT was asked to furnish a two-page certification signed by the Director of the Office of the Environment. CX 49, at pp. 6-7. EPA created the schedule that DOT followed as EPA extended the schedule as necessary. Tr. P. 541. DOT also made available information through DOT's website that included "reports and websites about the sources of, and potential impacts on water bodies from, Phosphorus, Nitrogen, and Pathogens, and illicit dischargers." CX 30, at p. 16. DOT posted more information for the "visiting public" to satisfy the Order. CX 52, at p. 7. This was achieved by creating posters and placing them at several rest stops. CX 52, at p. 51. The poster consisted of a couple clip-art pictures or photographs and some text telling people not to dump oil down their drains and to clean up after their pets—relatively common-sense items. Tr., at pp. 538-539.

DOT took other measures that were not specifically required by EPA to be in compliance with the permits. the EPA required the Respondent to expand its informing procedures beyond its own staff and address the "visiting public" to satisfy the Order. CX 52, at p. 7. This was achieved by creating posters and placing them at several rest stops. CX 52, at p. 51. As testified by Ms. Kubek, the poster consisted of a couple clip-art pictures or photographs and some text telling people not to dump oil down their drains and to clean up after their pets—relatively common-sense items. Tr., at pp. 538-539. Despite the clear language in the permit.

Respondent had an e-mail address in place for submission of public complaints prior to the audit and the e-mail address was monitored by two DOT employees at the time. CX 30, at p. 26; CX 35, at p.23-24; Tr., at pp. 482-483. In the pre-audit process, and during the audits, the individual responsible for fielding those complaints in the regions was not consulted. Tr., at pp. 482-483. That individual is a regional public information officer. Id. The employees present for the audit and responsible for responding to the EPA's pre-audit checklist were not familiar with this process as it is not part of their job duties. Id.

Since this information was not handed over until after the audits, an updated process was submitted. Moreover, as noted in the July 1, 2014 submission, DOT was still updating the process and working with the Office of External Relations to promulgate procedures for responding to complaints. CX 48, at p. 147. In the final submission, those procedures were thoroughly articulated, including reference to page 10 of the Construction Administration Manual—a documented procedure which was already in existence and in writing prior to the audit. See Tr., at pp. 482-483. Since the site was created around January of 2014, DOT has never received complaint or report of an illicit discharge though this medium. Tr., at pp. 539-540.

D. The Administrative Complaint

Four months after satisfactory compliance had been achieved, on June 15, 2016, EPA issued a Notice of Proposed Assessment of a Class II Civil Penalty ("Complaint"), alleging that Respondent had violated 15 separate permit requirements a total of 17 times, and that those violations lasted for a total of 16,218 days. CX 60; Tr. at p.48. EPA alleged that DOT had violated Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311 (a), and, pursuant to CWA Section 309(g), 33 U.S.C. § 1319 (g), proposed to assess a penalty of $150,000. CX 60,

at pp.1, 11. On February 2, 2017, DOT filed an Answer to the Complaint in which it denied the alleged violations and asserted an equitable defense to the penalty being sought. RX 71 at pp. 7-8. Efforts at Alternative Dispute Resolution ("ADR") were unsuccessful so that the hearing and these proceedings ensued.

II. LEGAL BACKGROUND

The Administrator of EPA is authorized to take enforcement action based upon violations of the Clean Water Act (CWA). 33 U.S.C.§ 1319. Pursuant to the CWA, "it is unlawful for any person to discharge a pollutant without obtaining a permit and complying with its terms." EPA v. California,426 U.S. 200, 205 (1976). For purposes of the CWA,a "person "is, inter alia, any "individual, corporation, ... association or municipality."33 U.S.C.§ 1362(5). The term "municipality" is defined by Section 502(4) of the CWA, 33 U.S.C. § 1362(4), to include, among other things, "a city, town, borough, county, parish, district, associations, or other public body created by or pursuant to State law and having jurisdiction over disposal of sewage, industrial wastes, or other wastes." The MS4 Program and Relevant Permit Requirements are set forth in Section 402 of the CWA, 33 U.S.C. § 1342, establishes the National Pollutant Discharge Elimination System ("NPDES") Pem1it Program and authorizes the EPA to issue permits that allow for the discharge of pollutants, including storm water, into navigable waters.

In New York, the DEC obtained authorization from the EPA to administer the federal NPDES program pursuant to Section 402(b) of the CWA, 33 U.S.C.§ 1342(b). In New York, such permits are called State Pollutant Discharge Elimination System ("SPDES") permits, and anyone who will discharge pollutants to waters of the United States within New York State must first obtain coverage under the applicable SPDES permit. 33 U.S.C. § 131l(a). Section

402(p) of the CWA, 33 U.S.C. § 1 342(p), sets forth requirements for the issuance of NPDES permits for the discharge of storm water, including discharges of storm water from MS4s. EPA regulations, at 40 C.F.R. § 122.26(b)(8), 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) owned or operated by a ... city that discharges into waters of the United States; (ii) designed or used for collecting or conveying storm water; (iii) which is not a combined sewer; and (iv) which is not part of a Publicly Owned Treatment Works ..."

The DEC issued a SPDES General Permit for Storm Water Discharges from MS4s (GP- 0- 15-003) on May I , 201 5 ("20 15 MS4 GP"), that will expire on April 30, 2020. CX 5. The 2015 MS4 GP superseded the previous SPDES MS4 general permit (GP-0- 10-002), which became effective on May 1, 2010, and expired on April 30,20 15 ("2010 MS4 GP"). CX4. That permit superseded the previous SPDES MS4 general permit (GP-0-08-002),that became effective on May 1,2008, and expired on April 30, 2010 ("2008 MS4 GP"), and the 2008 MS4 GP in tum superseded the original SPDES MS4 general permit GP-0-02-02, which became effective on January 8, 2003, and expired on January 8, 2008 ("2003 MS4 GP"). CX 3 and CX 2.

Pursuant to the 2003 MS4 GP, DOT assumed certain obligations with respect to the stormwater management program ("SWMP") that covers all areas under their jurisdiction that drain directly or indirectly to either an MS4 or to the waters of the United States. Part IV.B of that permit requires MS4 operators to develop, implement, and enforce a SWMP designed to reduce the discharge of pollutants from small MS4s to the maximum extent practicable ("MEP") in order to protect water quality, including six minimum control measures ("MCMs"),

prior to March 10, 2003, and to provide adequate resources to fully implement the SWMP no later than January 8, 2008. To implement the SWMP, MS4 operators are required to formulate a "SWMP Plan" that can be "used by the permittee to document developed, planned and implemented SWMP elements ... [which] must describe how pollutants in stormwater runoff will be controlled ... (and) should include a detailed written explanation of all management practices, activities and other techniques the permittee has developed, planned and implemented for their SWMP to address POCs and reduce pollutant discharges from their small MS4 to the MEP."

III. ALLEGED VIOLATIONS

A. Violations of 2010 MS4, GP Part VIII.A.3.f.ii (Failure to Have a Written Directive for IDDE Program) and Part V.B (Failure to Retain Records of the Quality Assurance/Quality Control for SWMP Plan)

As a point of correction, Judge Biro's January 29, 2018 Order granted the Complainant's request for an accelerated decision on Part VIII.A.3.f.ii and Part V.B of the 2010 MS4 GP, not Part VIII.A.b.ii, as stated in Complainant's brief. Moreover, Judge Biro's January 29, 2018 Order indicated that these violations existed "from at least June 19, 2016," not from June 18, 2016, as stated in Complainant's brief. See Complainant's Post-Hearing Brief, pp. 34-35; Judge Biro's January 29, 2018 Order, at pp. 13, 16.

B. Violation of 2010 MS4, GP Part VIII.A.3.g (Develop and Implement a Program to Detect and Address Non-stormwater Discharges)

This provision of the permit requires the Respondent to have a program for detecting and eliminating illicit discharges. In response to the EPA's pre-audit checklist request concerning outfall inspections and illicit discharge detection, the DOT submitted the following: Instructions for Conducting Outfall Inspections, Outfall Inspection and Training Procedures, and Operations Stormwater Outfall Inventory Form." CX 13, 34, 37. Ms. Arvizu testified that

those documents were "not detailed to the level that [they] needed to be detailed."[2] Tr., at p. 56.

Nevertheless, Complainant's brief dedicates three pages to detailing the Respondent's program for identifying, locating, and eliminating illicit discharges, which contained procedures for performing outfall inspections, mandating inspections for illicit discharges as part of regular maintenance, and reporting requirements for illicit discharges originating outside of the right-of-way. Complainant's Post-Hearing Brief, at p. 36-38; CX 58, at p. 109. Despite the conceded detail of Respondent's program, Complainant criticizes the DOT's approach as "completely passive, almost incidental" because it mandates inspection for illicit discharges as part of regular maintenance and notes that "maintenance personnel are not responsible for investigating or cleaning up[3] illicit discharges that are not generated by the crew. . . ." Complainant's Post-Hearing Brief, at p. 37. However, despite Complainant's claims of inadequacy, Respondents new program, which did not change the allegedly deficient provisions, was accepted by EPA. CX 58; Tr., at pp. 445.

Moreover, Complainant's brief specifically notes the items there were lacking in the program and were changed as a result of the ACO: "procedures describing which agency might be contacted, what 's role would be thereafter, and how elimination . . . would be confirmed and documented." Complainant's Post-Hearing Brief, at p. 36. None of those changes require

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[2] This was in part because it did not have procedures for track down outside of 's right-of-way, an issue that was discussed at length over the compliance process because, as Ms. Kubek testified, the Respondent has no authority to track down beyond its jurisdiction. Tr., at p. 445. EPA eventually conceded this point by accepting the practice of referral to the appropriate agency to stay in place. *Id.*

[3] Maintenance staff would still be responsible for reporting the illicit discharge or suspected illicit discharge to the appropriate individual in accordance with the DOT's procedures.

the Respondent to play a more proactive role in investigating illicit discharges than it had been prior to the new program. Instead, as Ms. Kubek testified, the changes simply required the Respondent to write down and elaborate on procedures already in place. Tr., at pp. 480-481. In practice, the program accepted by the EPA for investigating illicit discharges is nearly identical to what had existed prior to the audits.[4]

While the program remained substantially the same, it is not disputed that it was not in writing to the extent the EPA demanded to satisfy the Order. Tr., at p. 473. Presumably, this alleged inadequacy was readily apparent such that EPA was aware of it by the conclusion of its first audit, which was conducted on June 19-21,2012 in Region 9. Yet, the EPA sent the same Records Request with no additional information or instructions on October 30, 2012 in preparation for the Region 8 audit, and again sent the same request on May 22, 2013, nearly a year later, in preparation of the Region 5 audit. CX 13, 34, 37; Tr., at pp. 41-43. To no surprise, as highlighted in Complainant's brief, the remaining regional audits resulted in inadequate responses as well. At no time prior to the issuance of the Order and final audit reports on March 5, 2014 was the Respondent ever informed of the inadequacy of the information provided or the inadequacy of its program at large. CX 40; Tr., at pp. 96-97.

Should Your Honor determine that a violation did occur, respectfully requests that you consider the following in calculating an appropriate penalty: (1) DOT's good faith effort to complete a compliant program prior to the audit; (2) the substantial similarity in the program that existed previously and the new program; (3) EPA waiting two years to advise DOT of the program deficiencies; and (4) DOT's timely compliance.

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[4] Contrary to what Complainant claims is contradicting testimony, Ms. Kubek indicated correctly that the process is the same—if an illicit discharge is found, the appropriate agency is contacted. Tr., at p. 473.

C. *Violation of 2010 MS4, GP Part VIII.A.3.b.i (Develop and Maintain a Map of All Outfalls)*

This permit provision requires the Respondent to map outfalls within its jurisdiction. Complainant alleges that during the audits, the EPA discovered five outfalls (out of a total of over 16,000) that were unmapped in Region 5, which has 2,368 outfalls, and Region 9, which has 722 outfalls, and indicated that these five outfalls were subsequently mapped pursuant to the EPA's direction in the Order. CX 53, at p. 15; Complainant's Post-Hearing Brief at p. 42. However, the Respondent's April 30, 2015 submission, which was accepted by the EPA as satisfying the applicable provision of the Order, did not include mapping of the five identified outfalls for the reasons stated in Ms. Kubek's testimony. CX 53, at p. 3; Tr., at pp. 478-479. First, the four outfalls identified in Region 5 were not owned by the Respondent, but by the New York State Office of General Services, and thus were outside of Respondent's jurisdiction. Tr., at p. 478-479. Lastly, the outfall discovered in Region 9 was not an outfall at all. As explained by Ms. Kubek, according to DEC guidance, an outfall is "either a ditch or a pipe directly discharging towards receiving water." Tr., at pp. 418-419. The pipe at issue discharged from a pond and is defined as an outlet, not an outfall. Tr., at pp. 418-419; 478-479. Since none of the EPA identified outfalls were outfalls within the Respondent's jurisdiction, they remain unmapped in compliance with the permit provision. [5] See CX 53, p. 3. The April 30, 2015 submission expressly notes that the number of outfalls dropped from "18,184 to 16,708 outfalls, reflecting the additions and reductions noted" therein. *Id.* These noted changes do not include the five outfalls identified by the EPA. Therefore, Complainant's evidence does not support the

[5] DOT's submission indicates that the map was modified as follows: (1) outfalls were removed due to determinations that they were not outfalls; (2) jurisdictional boundary changes resulted in the removal and addition of several outfalls; (3) outfalls were removed during construction; and (4) newly-constructed outfalls were added. CX 53.

finding of a violation, let alone the imposition of a penalty.

Respondent did not violate Part VIII.A.3.b.i of the 2010 MS4 General Permit. There are no grounds for the imposition of a penalty.

D. Violation of 2010 MS4, GP Part VIII.A.3.d (Outfall Reconnaissance Inventory)

This permit provision required the Respondent to complete its outfall reconnaissance inventory within five years of May 1, 2008.

The Respondent is responsible for 113,000 miles of highway with approximately 16,800 outfalls within the State of New York. CX 30, at p. 3; NY Transp. Law, Art. 2. Comparatively, the Respondent's MS4 is by far the largest in the State. Tr., at pp. 511-512. In fact, DEC, the agency with regular oversight of MS4, does not create reporting forms compatible with such a large system. *Id.* In spite of this, the Respondent's MS4 is regulated by the same permit as all other MS4s and subject to the same requirements, including a five-year deadline for completing the outfall reconnaissance inventory. CX 4; CX 54.

As the entity that was primarily responsible for overseeing compliance with the permit, DEC was fully aware of the Respondent's progress toward completion at the time of the audits. Tr., at pp. 487-489. DOT submitted annual reports identifying the actions it had taken over the previous 12-month period and specifically included identification of outfall reconnaissance progress. Tr., at pp. 487-488. Based on DEC's past practices regarding compliance, Respondent rightfully relied on DEC's expertise and oversight to flag any potential noncompliance. Tr., at pp. 632-633; 640; 665-666. DEC did not flag any noncompliance and appeared to be working with DOT to reasonably achieve this hefty objective.

The EPA determined that regardless of whether the permit date of May 1, 2013 was

reasonable for an MS4 of this magnitude,[6] and regardless of whether the primary regulator was aware of DOT's progress at the time of the audits, the Respondent was not only noncompliant, but subject to a monetary penalty. Tr., at pp. 54-65; 131; 328-330.

Should Your Honor determine that a violation did occur, Respondent respectfully requests that you consider the following in calculating an appropriate penalty: (1) the reasonableness of the timeframe given for compliance with the permit; (2) the acquiescence and apparent cooperation of the state-regulating agency; and (3) DOT's reliance thereon.

E. Violation of Part 2010 MS4, GP IV.D (Fully Implement its SWMP Plan—Outfall Inspection Procedures)

This section of the permit requires the Respondent to fully implement its SWMP, which incorporated EPA guidance on outfall inspection procedures. The Complainant's brief indicates one instance during which a seasonal intern inadvertently neglected to follow the EPA guidance incorporated into the Respondent's SWMP while conducting an outfall reconnaissance field screening. Complainant's Post-Hearing Brief, at p. 44-46. This is sole basis for the alleged violation of Part IV.D, here.

The term implement means to "carry out; accomplish" and fully means "in a full manner or degree; completely." See https://www.merriam-webster.com/dictionary/implement; https://www.merriam-webster.com/dictionary/fully (last visited September 21, 2018). Therefore, fully implement means to carry out to completion, it does not, and cannot by any practical application, mean to carry out to perfection. One isolated instance of an intern inadvertently neglecting EPA's guidance as incorporated in the SWMP is not sufficient to

[6] Ms. Arvizu specifically stated that she did not know whether it was a reasonable time frame for an MS4 this large. Tr., at pp. 131.

prove a lack of full implementation.

Moreover, the EPA argues that this isolated violation should be counted for 804 days, which disregards the fact that the mechanism used to satisfy this provision of the Order was a two-page certification of the existence of the outfall inspection instructions signed by the Director of the Office of Environment and submitted in accordance with the EPA's prioritized schedule. CX 49, at pp. 6-7. The certification simply indicates that the appropriate instructions for conducting outfall reconnaissance inspections have been promulgated by the Respondent. *Id.* The EPA was aware of the existence of these instructions and the intern's inadvertent ignorance is what led to the violation. See CX 30, at pp. 14-15, 183, 524. There 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. These facts do not support a violation of Part 2010 MS4, GP IV.D.

Nevertheless, should Your Honor find that the facts herein support a such a violation, we respectfully request that you consider the following in determining the length of the violation and calculation of the penalty: (1) the isolated nature of the occurrence; (2) that Respondent was not notified of the violation until nearly two years after discovery; (3) that satisfaction of the Order was a certification of the existence of procedures that EPA already knew existed; (4) that the Respondent complied according to the EPA's schedule; and (5) Respondent was not notified that a daily penalty was accruing even if compliance was achieved within that given time frame.

F. Violation of 2010 MS4, GP Part VIII.A.3.h (Inform the Public of Hazards Associated with Illegal Discharges)

This part of the permit required the Respondent to "[i]nform the public of hazards

associated with illegal discharges and the proper disposal of waste . . . ." Part VII.A of the permit indicates that non-traditional MS4s should consider the public to be "employee/user population, visitors, *or* contractors/developers" (emphasis added). Prior to receiving the Order, DOT "consider[ed] this public to be the employees, as identified in the permit." Tr., at pp. 446. To the extent DOT 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 dischargers." CX 30, at p. 16.

Inconsistent with the plain disjunctive language in the permit, the EPA required the Respondent to expand its informing procedures beyond its own staff and address the "visiting public" to satisfy the Order.[7] CX 52, at p. 7. This was achieved by creating posters and placing them at several rest stops. CX 52, at p. 51. As testified by Ms. Kubek, the poster consisted of a couple clip-art pictures or photographs and some text telling people not to dump oil down their drains and to clean up after their pets—relatively common-sense items. Tr., at pp. 538-539. Despite the clear language in the permit,[8] EPA not only argues that there is a violation but proposes that it be counted for 804 days in calculating a penalty.

Should Your Honor find that the facts herein support a violation, we respectfully request that you consider the following in determining the length of the violation and calculation of the

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[7] Confusingly, Ms. Arvizu testified that during the pre-audit process, the EPA requested the Respondent's procedures for receiving and investigating public complaints to demonstrate that Respondent was compliant with this section of the permit. Tr., at p. 59. This is not consistent with the record.

[8] As Complainant points out in its brief, the DOT's SWMPs contained language indicating that the traveling public was envisioned to be part of the DOT's education efforts. Complainant's Post-hearing Brief, at p. 47. That fact does not support a violation, here, where the language of the permit itself does not require outreach beyond the Respondent's employees.

penalty: (1) the plain language of the permit supports DOT's interpretation; (2) the proportionate benefit that is likely to result from the use of the above-described posters; (3) that Respondent was not notified of the violation until nearly two years after discovery; and (4) Respondent was not notified that a daily penalty was accruing.

G. Violation of 2010 MS4, GP Part IV.D (Failure to Implement its SWMP—Inspecting Temporary Erosion and Sediment Controls)

As discussed previously, this provision requires the Respondent to fully implement its SWMP. As Ms. Kubek testified, the requirements of DEC's Construction General Permit are incorporated into the Respondent's SWMP, including the weekly and rainfall-related construction inspection requirements. Tr., at pp. 477-478; CX 30, at p. 188. Pursuant to the terms of its Standard Specifications, Part 100 and as noted in the SWMP, DOT delegates its construction inspections to its contractors. Tr., at pp. 567-568; CX 30, at pp. 187-188.

At the time of the audit, the DEC Construction General Permit no longer required rain-related inspections and therefore, the Respondent was not ensuring that its contractors were performing them. CX 30, at p. 22;[9] Tr., at p. 477-478. Although failing to update the SWMP was an oversight on the Respondent's part, the regulatory requirement for the inspections no longer existed. See, CX 30, at p.22.

Turning to the two instances on the Route 201/434 construction project that were identified as violations because they were performed 14 days apart, rather than seven as required by the SWMP, again, full implementation cannot mean perfection. The Complainant cites two instances (April 25-May 9; May 9-May 23) at one construction site in Region 9 where

[9] As indicated in the audit report for this region, the only requirement for inspections in DEC General Construction Permit at that time was for weekly inspections. CX 30, at p. 22.

the Respondent's contractor failed to do as they were directed. CX 30, at p. 23. During this audit, the consultants reviewed the inspection record for multiple construction sites and these were the only discrepancies identified. *Id.* Indeed, the audit report notes that DEC found no issues with the frequencies of inspections at the other two construction sites. *Id.* Nevertheless, based on these two occasions, the EPA determined that Respondent failed to fully implement its SWMP and determined it was in violation for 90 days.

Should Your Honor find that the facts herein support such a violation, we respectfully request that you consider the following in determining the length of the violation and calculation of the penalty: that the DEC Construction General Permit no longer required rain-related inspections and the isolated nature of the cited violations.

H. Violation of 2010 MS4, GP Part VIII.A.4.a.v (Procedures for Receipt and Follow-up on Public Complaints)

This provision requires the Respondent to have procedures in place for the receiving and following-up on complaints from the public regarding construction site stormwater runoff. Pursuant to Ms. Kubek's testimony, the Respondent had an e-mail address in place for submission of public complaints prior to the audit and the e-mail address was monitored by two DOT employees at the time. CX 30, at p. 26; CX 35, at p.23-24; Tr., at pp. 482-483. In the pre-audit process, and during the audits, the individual responsible for fielding those complaints in the regions was not consulted. Tr., at pp. 482-483. That individual is a regional public information officer. *Id.* The employees present for the audit and responsible for responding to the EPA's pre-audit checklist were not familiar with this process as it is not part of their job duties. *Id.*

Complainant's brief alleges that that this process did not exist prior to the audit because

Ms. Kubek is named in it. Complainant's Post-hearing Brief, at p. 53. However, 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. Since this information was not handed over until after the audits, an updated process was submitted. Moreover, as noted in the July 1, 2014 submission, DOT was still updating the process and working with the Office of External Relations to promulgate procedures for responding to complaints. CX 48, at p. 147. In the final submission, those procedures were thoroughly articulated, including reference to page 10 of the Construction Administration Manual—a documented procedure which was already in existence and in writing prior to the audit. See Tr., at pp. 482-483. As a closing note, Ms. Kubek testified that since she has been responsible for this task, which was around January of 2014, she has never received complaint or report of an illicit discharge. Tr., at pp. 539-540.

Should Your Honor find that the facts herein support a violation, we respectfully request that you consider the following in determining the length of the violation and calculation of the penalty: (1) DOT's good faith efforts to have a mechanism to receive complaints prior to the audits; (2) that Respondent was notified of the violation nearly two years after discovery; and (3) Respondent was not notified that a daily penalty was accruing.

I. Violation of 2010 MS4, GP Part VIII.A.4.a.vii (Construction Site Contractor Training)

This provision of the permit requires the Respondent to ensure that its contractors receive appropriate sediment and erosion control training. Prior to the audit and thereafter, DOT has ensured contractor training with the use of its CONR-5 form and pursuant to Part 100 of the Standard Speifications. Tr., at p. 469; 482-482. This form and the procedure for its use were in

existence at the time of the audits[10] and were submitted to satisfy the Order as part of 's first submission on July 1, 2014. CX 48, at pp. 135-136; Id. In contrast to DOT Complainant's unsupported factual assertion, DOT was not "asked (repeatedly)" to produce completed CONR-5 forms. There is nothing in the record to support Complainant's puzzling allegation. Furthermore, and also contrary to Complainant's assertions, there is nothing in the record to indicate that the CONR-5 forms were not being used.

The pre-audit checklist requested "documentation of education/training for construction site owner/operators, design engineers, DOT staff and other individuals to whom the construction stormwater requirements apply." In response, Respondent submitted documentation for the training that it must conduct. CX 30, at p.5; CX 34, at p. 6; CX 37, at p. 4. During the audit, the consultant asked the engineer in charge for the contractor's credentials, not for the CONR-5. CX 30, at p.24. There is no requirement in the permit that the Respondent conduct and document training of its contractors. See 2010 MS4, GP Part VIII.A.4.a.vii. This is a fact that was conceded by the EPA when they accepted the CONR-5 form in satisfaction of the Order.

Should Your Honor find that the facts herein support a violation, we respectfully request that you consider the following in determining the length of the violation and calculation of the penalty: (1) submitted documents already in existence to satisfy the Order; (2) that Respondent was not notified of the violation until nearly two years after discovery; and (3) Respondent was not notified that a daily penalty was accruing.

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[10] As appropriate, the Respondent submitted the most recent version of the Site Log Book as indicated by the "January 2014 version" notation. CX 48, at pp. 135-136. Such a notation would not have been necessary had prior versions not already existed. Moreover, the Order was not received by the Department until March 2014, which is three months after January 2014. CX 40. Therefore, proving it was not produced or modified in response to receiving the Order.

J. Violation of 2010 MS4, GP VIII.A.6.a.i (Pollution Prevention/Good Housekeeping Program for Municipal Operations and Facilities)

The plain language of the permit simply requires a pollution prevention/good housekeeping program for municipal operation and facilities and goes on to list examples of operations and facilities. In its brief, Complainant concedes that the Respondent submitted several documents evidencing a pollution prevention/good housekeeping program during the audits, including its Spill Prevention Control and Countermeasure Plans Template, Petroleum Bulk Storage Inspection and Reporting Checklist, and Chapter 4 of the 2011 Environmental Handbook for Transportation Operations. See CX 13; CX 34; CX 37; CX 30. See also, Complainant's Initial Post-hearing Brief, at pp. 67-68.

Subsequent to the audits, the EPA determined that these documents did not satisfy the requirement in the permit. Specifically, as noted by the Complainant, these documents did not include procedures for stockpile and scrap metal storage or site-specific pollution prevention plans.[11] Complainant's Post-Hearing Brief, at p. 68. Notably, as the Complainant apparently concedes in its brief, the permit did not require site-specific pollution prevention plans or procedures for stockpile and scrap metal storage. See 2010 MS4, GP VIII.A.6.a.i. Nevertheless, in response to the EPA's requests, the Respondent created site-specific pollution prevention plans and procedures for stock pile and scrap metal storage to be used on a statewide basis (not confined to the MS4). Tr., at p. 526; CX 52, at pp. 26-27; CX 58, at pp. 3, 68.

Should Your Honor find that the facts herein support a violation, we respectfully request that you consider the following in determining the length of the violation and calculation of the

[11] Contrary to the backpaddling assertion in Complainant's brief, testimony from Ms. Arvizu, Mr. Jacobsen, Mr. D'Angelo, and Ms. Kubek confirms that the EPA required the Respondent to promulgate site-specific pollution prevention plans to satisfy the Order. Tr., at 65-66, 212, 288, 475, 484; CX 58, at p. 3

penalty: (1) DOT's good faith efforts to comply, despite that fact that the plain language of the permit did not support EPA's requests for compliance; (2) that Respondent was not notified of the violation until nearly two years after discovery; and (3) Respondent was not notified that a daily penalty was accruing.

K. Violation of 2010 MS4, GP Part VIII.6.a.vi (Develop and Implement Employee Training for Pollution Prevention/Good Housekeeping)

This permit provision requires the Respondent have an employee training program for pollution prevention/good housekeeping. It is undisputed that the Respondent did have employee training programs in place prior to the audits. See CX 30, at p. 24; CX 35, at p. 29; Complainant's Post-Hearing Brief, at pp. 71-72. This training included topics such as outfall inspections, erosion and sediment control, construction general permit requirements, and stormwater pollution prevention. CX 30, at 34; CX 35, at 29. Moreover, all regional facilities performed semi-annual training covering pollution prevention and control measures. Tr., at pp. 492-493. These training programs were submitted to DEC and accepted year after year as part of the Respondent's annual MS4 report. Tr., at pp. 488-489. To Respondent's knowledge, DEC accepted these training programs in satisfaction of the permit. Tr., at p. 489, 492-493.

Complainant's brief notes the auditors' observations that there "was a widely varying level of stormwater awareness amongst staff" in support of its argument that Respondent did not have a training program in compliance with the permit. Complainant's Post-hearing Brief, at p. 72. While the audit report does indicate this observation, it does not indicate whether the auditors enquired how long those staff members had been employed by DOT, or what their duties were. Notwithstanding the EPA's failure to further investigate this varying level of awareness, the permit does not require a consistent level of stormwater awareness amongst staff.

Indeed, such a requirement would be impractical because even with EPA approved training in place, those individuals who have more training and more experience will be more aware of stormwater issues. In sum, Complainant tries to elevate a training requirement into a complete knowledge requirement.

Despite this argument, should Your Honor find that the facts herein support a violation, we respectfully request that you consider the following in determining the length of the violation and calculation of the penalty: (1) DEC's oversight and assumed acceptance of the training in place prior to the audit; (2) that Respondent had a good faith belief that it was in compliance prior to the audit; (3) the Respondent was not notified of the violation until nearly two years after discovery; and (4) Respondent was not notified that a daily penalty was accruing.

L. Violations of 2010 MS4, GP Parts VIII.A.4.a.i (Maintain Erosion and Sediment Practices) and VIII.A.6.d (Implement Best Management Practices)

These provisions of the permit require implementing a program for erosion and sediment control and implementing good housekeeping practices for pollution prevention.

The alleged violations were observed at construction sites and facilities located in Regions 8 and 9. At the six construction sites, the auditors noted uncovered or uncontained dirt and/or gravel, loose asphalt, broken or oddly placed sandbags, uncovered buckets or alleged petroleum products, and damaged silt fences. CX 30, at pp. 631-647; CX 35, at pp. 647-657.[12] At the facilities, the auditors noted uncovered scrap metal and stockpiles, rust stains, petroleum stains, an open dumpster lid, spilled paint, leaking vehicles and machinery, outdoor equipment

[12] Pursuant to the Respondent's SWMP and conveyed and consented to by its contractors in the Standard Specifications, Part 100, delegates its duties for environmental compliance to its contractors. CX 30, at pp. 20, 187-188; Tr., at pp. 567-568.

washing, dirt in a storm drain basis, covered and uncovered salt, uncovered containers of unknown liquid, and two unknown pipe connections. CX 30, at pp. 648-671; CX 35, at pp. 673-736.

Despite the EPA's assertion that its auditors were "highly credible," none of them were certified as experts before this Tribunal. Tr., at p. 20. Illustrative of these consultants' lack of expertise is Mr. Kirkbey's testimony that kitty litter is an effective way to clean up a petroleum stain. Tr., at p. 171. As the Respondent's expert witness testified, kitty litter can only clean a liquid spill, and even once cleaned, the petroleum leaves a stain because it is absorbed into and sequestered within the asphalt. Tr., at pp. 427-428. The EPA clearly agreed because it did not require the Respondent to remove the stains. Tr., at p. 460. Therefore, every notation of a petroleum stain as though it is evidence of poor housekeeping evidences the lack of expertise of these auditors, particularly in dealing with a transportation agency. Tr., at pp. 158, 160, 170-171, 208, 215, 218, 268, 273, 276. The record shows that all but one consultant, including Ms. Arvizu herself, had never audited a state transportation agency. Tr., at pp. 79, 173, 223, 315. Moreover, the testifying consultants all played a supportive role to lead auditor, Max Kuker, who did not testify at the hearing—leaving the Respondent and this Tribunal unable to ascertain the level of competency of the primary auditor. Tr., at pp. 133, 167, 180, 249, 315. Indeed, Mr. D'Angelo and Mr. Kirkbey went so far as to describe their roles in the audits as on-the-job training. Tr., at pp. 133, 315.

During their testimony, the auditors made it clear that the audit report was a compilation of their observations and nothing more. Tr., at pp. 25, 137-138, 142, 146-148, 150-165, 181-227, 232, 252, 256-320. As Mr. Jacobsen noted, the auditors were not tasked with identifying violations of the permit. Tr., at p. 223. In further support, when questioned about the necessity

of a silt fence surrounding a grass covered pile of sediment, the EPA's consultant, Mr. Jacobsen, agreed that grass was an effective measure to prevent sediment runoff and that he was simply making observations about the surrounding damaged (but unnecessary) silt fence. Tr., at p. 227. Additionally, when questioned about a silt fence abutting a concrete barrier, the consultant replied that he "wasn't tasked to look at the purpose of the silt fences . . . " and he "didn't fully evaluate the concrete barrier to see if there was sediment to escape that." Tr., at pp. 229-230. There was no effort to determine how long these conditions existed other than consulting a previous inspection report, which as Complainant concedes, even if the inspection noted the same condition, it could have been fixed and reoccurred. CX 30, at pp. 20-22, 637; Complainant's Post-Hearing Brief, at p. 61. There was also no effort to determine what unknown liquids were, though in some cases, it was just assumed it was petroleum with no confirmation. CX 30, at pp. 20-22, 673; CX 35, at pp. 18-20. Nor was there any investigation into where they the conditions originated from. As Ms. Arvizu testified, it is possible for individuals other than staff to use the stormwater system causing an illicit discharge. Tr., at p. 89.

The photographs in the record supporting the audit reports are just that: snap shots in time with absolutely no context. The results of observations made by inexperienced auditors used by the EPA to support what they allege to be violations of the permit. Is an unnecessary, but damaged, silt fence a violation of the permit? Is an open dumpster, which was potentially open for five minutes, a violation of the permit? Respectfully, the Respondent submits that these 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.

While it is apparent from this record, and Your Honor is fully aware, it is vital to note the

inconsistent behavior of the EPA particularly regarding these violations, which they allege to seriously threaten at least 17 water bodies of the United States. CX 30; CX 35. Despite the impassioned concern expressed by the EPA during the hearing and in its brief, it waited two years before informing the Respondent of the existence of these alleged violations. The EPA's witnesses offered no explanation for this passive concession and delay. Indeed, had the EPA truly believed these conditions were as egregious as they now claim, waiting two years to address them is entirely inconsistent with their mission and their commitments to the American people.

Moreover, due to this delay, many of the construction projects had concluded and those alleged violations no longer existed. As Ms. Kubek testified, all of the Region 8 construction sites had been completed prior to receiving the Order, making remediation by the Respondent impossible. Tr., at p. 461. However, one construction site in Region 9 remained active and the Respondent expended $3,318.67 to remedy these conditions to the EPA's satisfaction within the time frame given. *Id.*; RX. 23.[13] In its July 1, 2014 submission, the provided date-stamped pictures evidencing compliance with the Order. CX 48, at pp. 104-107, 114-124. For those pictures that were not printed with a date-stamp, the Respondent provided a captioned date next to the photo. CX 48, at pp. 104-133. The EPA disregarded those dates, some which were more than six months prior to the submission date and proposes to count these violations for a combined total of 2,060 days.

Nevertheless, should Your Honor find that the facts herein support a violation, we respectfully request that you consider the following in determining the length of the violation and

[13] Confusingly, the Complainant's brief calls this testimony inconsistent. Complainant's Post-hearing Brief, at p. 10. It is plain from the transcript, however, that Ms. Kubek was testifying about two different Regions.

calculation of the penalty: (1) the lack of expertise of the consultants and the EPA in auditing a state transportation agency; (2) the lack of investigation into the alleged violations and the lack of context provided in the audit reports; (3) the Respondent was not notified of the violation until nearly two years after discovery; and (4) Respondent was not notified that a daily penalty was accruing.

M. Violations of 2010 MS4, GP Part V.B. (Recordkeeping of Post-Construction Inspections)

As described in Complainant's brief, this provision of the permit required the Respondent "to keep all records required by the permit for at least five years." Complainant's Post-Hearing Brief, at p. 64. The plain language of this permit provision, however, does not require tracking of post-construction inspections and the Complainant does not point to any section of the permit that does. Without a more fully developed rationale for this violation, the Respondent respectfully submits that the Complainant has not carried its burden of proof and this alleged violation must be dismissed.

N. Violations of 2010 MS4, GP Part VIII.A.5.a.vi (Post-Construction Stormwater Controls) and VIII.A.6.a.ii (Self-assessments)

These permit provisions require long-term operation and maintenance of post-construction stormwater management practices and performance and documentation of self-assessments.

The first MS4 permit in 2003 was 28 pages. CX 2. The 2008 MS4 permit was 91 pages and the 2010 MS4 permit, which was in place at the time of the audits, was 116 pages. CX 3; CX 4. As discussed previously, the Respondent is by far the largest MS4 governed by the terms of this permit. Tr., at pp. 511-512. While Respondent made good faith efforts to fully develop

and implement every requirement of the permit upon issuance, the breadth of the MS4 permit grew considerably in just seven years. With the growing regulatory load, coupled with the fact that this permit exclusively regulated much smaller MS4s, it is not surprising that some items remained outstanding. At the time of the audits, the Respondent was developing a program for the long-term operation and maintenance of post-construction management and the Respondent had not yet performed a self-assessment. CX 30, at p. 31; CX 30, at p. 33.

Notably, the permit does not require annual self-assessments. Indeed, there is nothing in the permit regarding the frequency of self-assessments. Therefore, the mere fact that the Respondent had not performed one yet, is not a violation of the permit.

Should Your Honor find that the facts herein support a violation, we respectfully request that you consider the following in determining the length of the violation and calculation of the penalty: (1) the rapidly increased breadth of the MS4 permit from its inception; (2) the size and resources required for perfect compliance within the identified time frame; (3) the Respondent was not notified of the violation until nearly two years after discovery; and (4) Respondent was not notified that a daily penalty was accruing.

O. Timeliness of Compliance

Lastly, despite Complainant's numerous attempts to make the Respondent appear dilatory in its compliance efforts, the EPA agreed to extend the deadlines for all of the submissions. Tr., at pp. 46, 111-112, 541. As acknowledged by the EPA's witness Ms. Arvizu, the volume of this record alone illustrates the breadth of the requested compliance efforts undertaken by the Respondent. Tr., at p. 104. Respondent complied with all priorities and deadlines set by the EPA. Tr., at pp. 46, 11-112, 541.

IV. ARGUMENT ON PENALTY

A. Deterrent Nature of Penalty

The Board has "held that a primary purpose of civil penalties is deterrence." *In re Ocean State Asbestos Removal Inc.*, 7 E.A.D. 522, 548, 1998 EPA App. LEXIS 82, *61 (E.P.A. March 13, 1998) (citing *In re Sav-Mart, Inc.*, 5 E.A.D. 732, 738 [EAB 1995]).

The record shows that DOT made good faith efforts to comply long before the audit, that in many cases DOT could not and did not know it was noncompliant under EPA's interpretation of the permit,[14] and that DOT was cooperative and accommodating upon notification of its noncompliance. RX 22; RX 24; RX 31; RX 40; RX 41; RX 45; RX 49; RX 53; RX 57; RX 60; RX 62; Tr., at pp. 103, 109. Considering DOT's compliance history, environmental efforts, and that it zealously complied upon learning of the alleged violations, there is no legitimate argument that DOT requires any penalty as a deterrent to noncompliance and certainly not a penalty of $150,000.

B. Statutory Penalty Factors

Pursuant to 33 U.S.C § 1319(g)(3), the following factors must be considered in calculating a penalty for violations of the CWA: "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."

Despite the statutory mandate that the EPA consider nine distinct factors in appropriately calculating a penalty in this proceeding, Ms. Arvizu's testimony indicates that she merely

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[14] See *supra,* at pp. 18 - 37.

considered two: the economic benefit and the gravity. Tr., at pp. 345-348; 371-373. Indeed, the settlement policy[15] that Ms. Arvizu used to calculate the proposed penalty only cites to five factors for consideration (economic benefit, gravity, litigation considerations, ability to pay, and supplemental environmental projects)—two of which are not even listed within the statute. CX 65; Tr., at pp. 377. However, despite this, Complainant characterizes this formula as a simple reduction of the statute. Complainant's Post-hearing Brief, at p. 90. This approach is a clear violation of the Respondent's statutory rights.

The Complainant appears to argue that the "adjustment factors" used in the penalty calculation appropriately incorporate the seven outstanding statutory factors. See Complainant's Post-hearing Brief, at pp. 94-95. These adjustment factors include the Respondent's ability to pay, history of recalcitrance (but only to increase penalty), and quick settlement. *Id*; CX 65. As discussed more thoroughly below, this still does not give appropriate consideration to the statutory penalty factors by ignoring any potential reduction for a first-time violation, or negligent culpability, or good faith efforts to comply prior to and after the finding of the violation. Moreover, the "quick settlement" factor is entirely inappropriate for a penalty that is proposed for litigation.[16]

1. ***Nature, Extent, and Gravity of the Violations***

EPA claims that the violations discovered nearly two years prior to the issuance of the

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[15] Board precedent makes it clear that the use of settlement policies for the calculation of penalties in an Administrative Hearing is disfavored as it does not ensure appropriate consideration of the statutory factors. See *In re Phoenix Constr. Servs.*, 11 E.A.D. 379, 394-95, 2004 EPA App. LEXIS 9, *101 (E.P.A. April 15, 2004) Indeed, the policy itself states that it is not to be used for litigation.

[16] Ironically, EPA requested perfect compliance from DOT and proposes a hefty penalty to deter any future noncompliance, but fails to follow their own statutes, policies, and case law with respect to the calculation of the penalty before Your Honor.

Administrative Compliance Order were "fundamental and substantial." Complainant's Post-hearing Brief, p. 90. Notwithstanding the EPA's allegations, there is no evidence indicating that the violations alleged created any cognizable difference in water quality. Moreover, Complainant's penalty witness, Ms. Arvizu, offered very little testimony to this effect, specifically focusing on the alleged defects in DOT's illicit discharged detection, training, post-construction, and good housekeeping procedures. Tr., at pp. 345-348. The alleged violations mostly consisted of a failure to document or elaborate on programs and procedures already in place. See *supra*, at pp. 18-37. Moreover, EPA set aside any speculative effect these violations had on the environment for two years after their discovery before notifying DOT, which adds an additional 730 days to the accumulated penalty time. The Respondent respectfully submits that under these circumstances, the violations were not "fundamental and substantial" and the EPA's gravity calculation is not only unsupported, but unjust and inaccurate. The supporting argument given in the Complainant's brief was invented by counsel after the penalty was proposed and is significantly more complex and more detailed than the testimony given by Ms. Arvizu. Complainant's Post-hearing Brief, at pp. 91-94; Tr., at pp. 345-348.

2. *Ability to Pay*

Contrary to Complainant's theory that mere fact that DOT is a large agency with many facilities and more than 8,000 employees is not indicative of its ability to pay a penalty. Indeed, it shows that the Respondent has a plethora of financial responsibilities to which its tax payers funding is already committed.

The DOT has two main functions as an executive agency of New York: construction and maintenance. Tr., at pp. 555-556. The Respondent is responsible for the construction and maintenance of all State-owned infrastructure. *Id.* While construction is primarily funded by the

Federal Highway Administration, maintenance is a primarily state-funded expenditure. *Id.* This means that any penalty assessed by the EPA will require the Respondent to abandon or underfund a necessary project.

3. Prior History of Violations

The EPA Board of Appeals 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." Sav-Mart, 5 E.A.D. at 739. *In re Ocean State Asbestos Removal Inc.*, 7 E.A.D. 522, 549, 1998 EPA App. LEXIS 82, *62 (E.P.A. March 13, 1998). Ignoring the applicable statute and case law, Ms. Arivizu testified that she did not consider DOT's first-time violator status for the proposed penalty. Tr., at p. 371. Indeed, her testimony was that "it was not a factor," despite the clear statutory mandate and case law requiring its consideration. *Id.*

It is undisputed that the Respondent had no prior violations and we respectfully submit that this factor should reduce or eliminate the penalty. Tr., at p. 371. The Complainant has offered no evidence and made no argument as to why it believes that this penalty is required to deter the Respondent from any future noncompliance. DOT's genuine efforts towards compliance before and after the issuance of the Administrative Compliance Order evidences this agencies commitment to comply with the MS4 permit without the need for a penalty. See *supra,* at pp. 18- 37 (compliance efforts before); RX 22; RX 24; RX 31; RX 40; RX 41; RX 45; RX 49; RX 53; RX 57; RX 60; RX 62; Tr., at pp. 103, 109 (compliance efforts after).

4. The Degree of Culpability

Pursuant to Ms. Arvizu's testimony and the Complainant's brief, the Respondent's degree of culpability was never considered in the calculation of the proposed penalty. This is

entirely inconsistent with the statute and the Board precedent, which make it clear that gravity and culpability are two distinct factors. See *In re Henry Stevenson & Parkwood Land Co.*, 16 E.A.D. 151, 176-177, 2013 EPA App. LEXIS 36, *60 (E.P.A. October 24, 2013); *In re Phoenix Constr. Servs.*, *supra*, at 413-414 (E.P.A. April 15, 2004) ("Culpability is defined as the quality or state of being culpable; blameworthiness . . . knowing or willful violations can give rise to criminal liability, and *the lack of any culpability may, depending upon the particular program, indicate that no penalty action is appropriate*. Between these two extremes, the willfulness and/or negligence of the violator should be reflected in the amount of the penalty.") (emphasis added) (internal quotations and citations omitted). Moreover, in some circumstances, a lack of culpability can be indicative of the need for no penalty. *Id.*

The Complainant does not claim that the Respondent willfully disregarded the plain language of the statute. The record shows that any alleged violations, if 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 respectfully submits, based on the record before Your Honor, that DOT's has very little culpability, here. See *supra,* at pp. 18-37.

5. Economic Benefit

As noted in the Complainant's brief, this factor is highly dependent on the professional judgement of an individual. Complainant's Post-hearing Brief, at p. 91. Ms. Arvizu, who was never certified as an expert, gave very little explanation as to how she arrived at the number of $89,000 for economic benefit other than: "I used the information in DOT's progress reports, as well as my best professional judgment." Tr., at p. 345. However, as noted above, that judgment

did not appear as to include consideration of statutorily mandated factors or the governing precedent and the plain language of EPA'spolicy regarding penalties. Based on this, without any explanation as to how DOT's progress reports informed her determination, Respondent respectfully requests that this calculation be disregarded as unsupported by the record.

6. *Others Matters as Justice May Require*

Both federal courts and the Board have recognized that a Respondent's good faith efforts in achieving compliance both before and after a violation is found may . . . decrease a penalty for a violation of the CWA. *See Smithfield Foods*, 972 F. Supp. 338, at 353 (under the CWA justice factor, "courts may either *increase* or decrease the penalty in light of other matters, such as a violator's attitude toward achieving compliance") (internal citations omitted); *In re Spang & Co.*, 6 E.A.D. 226, 249, 1995 EPA App. LEXIS 33, *55 (E.P.A. October 20, 1995) ("historically, courts have always taken past actions of violators into account for purposes of penalty mitigation . . . . It is therefore within the presiding officer's prerogative to consider what type of environmental citizen [Respondent] has been in deciding upon an appropriate penalty to assess. The justice factor, which vests the Agency with broad discretion to reduce the penalty *when the other adjustment factors prove insufficient or inappropriate to achieve justice,* . . . is clearly suited to this end) (internal citations omitted); *In re Phoenix Constr. Servs.*, 11 E.A.D. 379, 414-415, 2004 EPA App. LEXIS 9, *89-95 (E.P.A. April 15, 2004)

DOT actively cooperated throughout this proceeding. From receipt of the Administrative Compliance Order, receipt of the Complaint, the Alternative Dispute Resolution process, and the hearing, the Respondent has recognized the importance of complying with the EPA's requests, has relied on E's promises, and has made genuine efforts to foster a continued working relationship. In addition, this commitment toward compliance and toward being an responsible

environmental citizen as a whole is evidenced by the DOT's many procedures and programs in place at the time of the audit, [17] its continued cooperative attitude with its sister agency DEC, its willingness to accommodate all of EPA's requests, and its initiative in expanding some of EPA's compliance requests beyond the MS4 into statewide programs.

In addition to the DOT's good faith efforts, Respondent respectfully requests consideration of the following under the "justice factor:" (1) EPA's two year delay in notifying DOT of the violations; (2) the plain language of the statute and DOT's reasonable interpretations thereof; (3) EPA's representation that no penalty would be assessed; (4) DEC's oversight and acquiescence to the Respondent's compliance efforts prior to the audit; (5) the reasonableness of deadlines imposed on an MS4 that is significantly larger than any other entity regulated thereunder; (6) EPA's overall lack of follow-up and investigation as to observed violations; and (7) EPA's failure to consider the statutory factors and use an appropriate penalty policy.

C. EPA's Representations/ Estopple

EPA attempts to mischaracterize the Respondent's justice argument as estopple. DOT has maintained it 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. Such consideration is not a request for estopple. Nevertheless, we shall address their estopple argument in response below.

Respondent challenges this enforcement action by the EPA to the extent that EPA seeks to impose a monetary penalty for the alleged violations. The Order (RX 12) that was served upon DOT on March 5, 2014 was the first notice received indicating that EPA might impose a penalty

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[17] Respondent is one of only a few states that puts environmental staff in both their maintenance and construction programs. Tr., at pp. 656-657.

for failure to comply with the terms of the Order, but an EPA official presumed to have authority to speak for EPA then advised that there would be no penalty. Tr., at pp. 435, 544-546, 583, 640, 650-651.

DOT is an executive agency of the State of New York. Tr., at pp. 553: 23- 554:13. It has no separate legal existence except as an executive agency and in this sense it is no different from the DEC with which EPA partners in permitting and enforcement activity. The MS4 permit and all enforcement action covered by these proceedings are effectively against the State of New York.

A federal agency should be estopped from imposing penalties for a violation when its "Compliance Section Chief" induced compliance by representing that there would be "no penalty." The general rule is that an agent must have either actual or implied authority to bind a principal in a contract or agreement. *Brunner v. United States,* 70 Fed. Cl. 623 (Fed. Cl., 2006). The "apparent authority" of an agent is normally sufficient to bind a principal even where the principal has placed restrictions on the authority of the agent that are unknown to the third party. RESTATEMENT (SECOND) OF AGENCY § 7 (1958). DOT officials dealing with Justine Modigliani relied upon her apparent authority in concluding that there would be no penalty for the violations.

Paragraph 6 of the Compliance Order signed by Dore LaPosta, Director of the Division of Enforcement and Compliance Assistance provides:

> 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. Section 1319(d), as modified by 40 C.F.R., Part 19. Upon suit by the 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. RX 12, at p. 21.

As a public agency with over 8,000 employees (Tr., at p. 555), funded by tax payers (Tr., at pp. 554), the threatened penalty caused a great deal of concern (Tr., at p. 574). The concern by DOT employees should be understood in the context of the way that the ACO was written. Without knowledge of the inflationary adjustments referenced in the ACO, even a single violation could carry a penalty as high as $13,687,750 per year. DOT was facing penalties for 19 distinct violations for a period that had begun nearly two years before the ACO was issued. With 16,218 days of violation, without the statutory maximums, the penalty could have been as high as $608,175,000. Furthermore, the process of working with EPA to achieve satisfactory compliance on all the cited violations involved a long-term commitment that lasted until February of 2016. RX 62.

The ACO was served on March 5, 2014, causing considerable concern about the threatened penalty for which there is no dedicated funding source. The initial reaction from Respondent was to schedule a meeting with EPA officials. RX 16. This meeting was convened on May 13, 2014 and included both EPA and DOT officials. RX 16. This initial meeting occurred at DOT offices with DOT employees Daniel Hitt, Johnathan Bass, Keith Martin, Carl Kochersberger, Scott Kappeller and Ellen Kubek in attendance. RX 16. Director of the Environment, Daniel Hitt was the highest-ranking DOT employee to be actively involved in the EPA enforcement action and present at the meeting. Tr., at pp. 551-607. Attending the meeting on behalf of EPA were Christy Arvizu and Justine Modigliani. RX 16. During the meeting, Mr. Hitt explained that the penalty provisions of the Order were a source of concern. Tr., at p. 574.

Justine Modigliani represented herself at this meeting as holding the title of "Compliance Section Chief" for US EPA Region 2 and was the most senior EPA official with whom DOT

ever dealt. RX 16, Tr., at p. 604. Ms. Modigliani was accompanied to the meeting by Christy Arvizu, an Environmental Scientist from EPA who had worked on the audits. RX 16. At least four DOT employees heard the EPA Compliance Section Chief tell them at the meeting on May 13, 2015 that there would be no penalty. Tr., at pp. 436, 583, 640, 651. Ms. Modigliani, while denying that she had or has any authority to waive penalties, admits that she was asked about the penalty and that it would be reasonable for DOT employees to believe that she had the authority to speak for EPA on this issue. Tr., at pp. 704-705. Ms. Modigliani testified at Tr., at pp. 705:

3 Q. Wouldn't it be reasonable for people attending
4 a meeting with you, the EPA Section Chief, to believe
5 that you had authority to speak for the agency that
6 you work for?
7 MR. GARELICK: Objection, Your Honor.
8 He is asking her to speculate and he is
9 really testifying here in this question.
10 ALJ BIRO: Overruled. But let's
11 maintain a calm. Go ahead.
12 A. I'm guessing that if somebody knew that I was a
13 section chief, they might think I had authority to
14 say whether they would get a penalty or not.
15 Q. There was a sign-in sheet, wasn't there?
16 A. Yes.
17 Q. And you had introductions at the meeting, did
18 you not?
19 A. We did.
20 Q. When you signed the sign-in sheet, you put your
21 title down as the -- I want to quote this exactly,
22 Compliance Section Chief?
23 A. That's right.
24 Q. Isn't that right?
25 A. Yes.

The truth is that EPA has deliberately refused to confirm the authority of its "EPA Section Chief" because acknowledging that she had authority to waive the penalty would have binding effect in this proceeding. If Justine Modigliani, as "EPA Compliance Section Chief" or

the "EPA Section Chief," had the authority to bind EPA, then the Complainant's position that no estoppel attaches, and Modigliani cannot waive the penalty is legally supportable. Granted, estoppel is a harsh remedy and the ability of federal officials to waive or disregard laws is extremely limited to the point where the Supreme Court has yet to find circumstances warranting estoppel against the federal government in the context of a contract. *Brunner v. United States,* 70 Fed. Cl. 623, 630, *citing OPM v. Richmond,* 496 U.S. 414, 421-23, 110 S. Ct. 2465, 110 L. Ed. 2d 387 (1990).

Additionally, the question of whether implied power exists to waive or disregard a law, or to interpret one, remains within the power of a government official. *Brunner v. United States,* 70 Fed. Cl. 623, 630-631, *citing United States v. Stewart,* 311 U.S. 60, 70, 61 S. Ct. 102, 85 L. Ed. 40, 1940-2 C.B. 199 (1940). EPA enforcement officials continue to enjoy broad authority to determine the applicability of environmental regulations and have broad discretion about the assessment of penalties. It was perfectly reasonable for DOT officials to believe that the "Compliance Chief" had the authority to address the penalty provision that was of such great concern when they met to discuss the Order.

That EPA refuses to ratify the authority of Justine Modigliani is testament to the apparent fact that the EPA prefers a rigged game where only the Director of Division Enforcement and (possibly) the attorneys claim the authority to agree to penalties and their waiver. Ms. Modigliani could have explained at the meeting with DOT that there might be or would still be a penalty to be decided by people behind the curtain at EPA and that she had no authority to speak with DOT on this guarded topic. She could have comforted the Respondent by saying that the threatened $37,500 per day was a simple scare tactic and that the actual penalty is typically much lower. Ms. Modigliani could have referred DOT to Dore LaPosta or one of the lawyers to

provide advice as to how the eventual penalty might be somehow minimized. If there had been a forthright discussion about the penalty, DOT would have had an opportunity to negotiate a penalty as part of its compliance commitment. Ms. Modigliani did none of this, and although she doesn't agree about the exact wording of her response, the four DOT employees all heard her say that there would be no penalty. Tr., at pp. 436, 583, 640, 651. Certainly, the EPA officials who attended the meeting with DOT all agree that compliance was of paramount importance, and everyone cooperated to achieve that objective. RX 22; RX 24; RX 31; RX 40; RX 41; RX 45; RX 49; RX 53; RX 57; RX 60; RX 62; Tr., at pp. 103, 109.

Furthermore, even if Justine Modigliani had no authority to speak and bind EPA on the issue of the penalty, and even if DOT could not establish a detrimental reliance on Ms. Modigliani's statement, there remains the issue of whether it is fundamentally unfair for EPA to impose a penalty when the Respondent was previously told otherwise. EPA may choose not to ratify the representations of its "EPA Compliance Section Chief" and send the message that respondents are responsible for checking the authority of every EPA official who says anything. EPA might want to consider how the viability of having an "EPA Compliance Section Chief" that cannot guarantee her agency will let her keep her promises.

V. PROPSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ADMINISTRATIVE PENALTY

Based on the foregoing, Respondent respectfully requests an Order from this Tribunal that (1) finds that Respondent is not liable for any of the cited violations of the Clean Water Act, as the violations are alleged in the Complaint, (2) to the extent that any violations are found, recognizes the technical nature of any such violation and the lack of any proof that there have been any significant discharges, and that the appropriate weight of the statutory factors,

including the interests of justice, and based on the representations of the EPA Compliance Chief, an order that any such penalty be reduced or waived, and (3) grant Respondent such other and further relief as this Tribunal deems lawful and proper.

Dated: October 5, 2018
At: Albany, NY

Alicia McNally
Assistant Counsel
New York State Department of Transportation
50 Wolf Road,
Albany, New York 12232

GP-02-10-002
EPA Docket CWA-02-2016-3403
Certificate of Service

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

Respondent

PROCEEDING TO ASSESS CLASS II CIVIL PENALTY

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 CERTIFICATION OF SERVICE

I CERTIFY that I served the foregoing Respondent's Initial Pre-Hearing Brief, bearing the above referenced docket number, on the person(s) listed below, in the following manner(s):

On October 5, 2018 via Electronic Filing to:

U.S. Environmental Protection Agency
Office of Administrative Law Judges
1200 Pennsylvania Avenue, N.W.,
Mail Code 1900R
Washington, DC 20460

On October 5, 2018 via E-mail and Regular Mail to:

Chris Saporita
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Dated: 10/5/18

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