



**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR**

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

**ORDER ON THE PARTIES' MOTIONS
TO CONFORM THE HEARING TRANSCRIPT**

The evidentiary hearing in this matter was conducted April 3-5, 2018, in Albany, New York. After the Headquarters Hearing Clerk received the official transcript of testimony taken at the hearing, electronic copies of the transcript were provided by email to counsel for the parties, and I issued an Order Scheduling Post-Hearing Submissions, which established deadlines for the parties to file any motions to conform the transcript to the actual testimony and post-hearing briefs. At the request of the parties, I extended those deadlines multiple times for good cause shown, namely, that review and correction of the transcript proved to be especially difficult for the parties given the extensive typographical and transcription errors, most notably on the second day of the hearing. The deadline for any motions to conform the transcript to the actual testimony was ultimately extended to June 22, 2018.

On behalf of the parties, Complainant timely filed a Joint Partial Motion to Conform the Hearing Transcript ("Joint Motion to Conform") on that date, which identifies hundreds of proposed corrections to the transcript to which the parties agreed.¹ Each party also timely filed its own motion to conform the hearing transcript. In an effort to assist the parties in resolving their disagreements as reflected in their separate motions to conform the transcript, this Tribunal obtained audio recordings of the hearing from the court reporting service and provided those recordings by email to counsel for the parties on July 10, 2018. Complainant subsequently filed on behalf of the parties a Supplemental Joint Partial Motion to Conform the Hearing Transcript ("Supplemental Joint Motion to Conform").² Noting that the audio recordings provided by the court reporting service were incomplete, the Supplemental Joint Motion to Conform indicates that the parties were nevertheless able to agree to corrections for all 21 of the proposed corrections identified in Respondent's Motion to Conform Transcript ("Respondent's Motion to

¹ The Joint Motion to Conform was signed by counsel for Complainant, and Respondent's counsel confirmed by email that she concurs.

² Again, the Supplemental Joint Motion to Conform was signed by counsel for Complainant, and Respondent's counsel confirmed by email that she concurs.

Conform”), rendering that motion moot, and to corrections for three of the 11 proposed corrections identified in Complainant’s Partial Motion to Conform the Hearing Transcript (“Complainant’s Motion to Conform”). Thus, this Order rules on the Joint Motion to Conform, Supplemental Joint Motion to Conform, and Complainant’s Motion to Conform, as set forth below. Additionally, in the course of reviewing the parties’ proposed corrections, I determined that a number of additional corrections to the transcript were necessary. Those corrections are also set forth below.

A. Joint Motion to Conform

As previously noted, the Joint Motion to Conform identifies hundreds of proposed corrections to the transcript to which the parties have agreed. Upon review, I accept each proposed correction set forth in the Joint Motion to Conform subject to the following modifications, rejections, and additions:

1. The correction identified as Page 25, Line 18, was made to “Arviza,” rather than “Arvisu.”
2. The correction identified as Page 56, Line 14, was made to Page 56, Line 17.
3. The corrections identified as Page 88, Line 16, were made to Page 88, Lines 16-17.
4. The correction identified as Page 120, Line 22, was made to Page 120, Line 2.
5. The correction identified as Page 174, Line 14, was made with a question mark added after the corrected text.
6. The first correction identified as Page 262, Line 7, was made, but the second correction identified as Page 262, Line 7, is rejected as it would result in the term “the” being duplicated in the text.
7. The correction identified as Page 299, Line 24, was made with a question mark added after the corrected text.
8. The correction identified as Page 310, Lines 2-3, was made to Page 310, Lines 1-3.
9. The correction identified as Page 318, Line 15, was made to Page 318, Lines 15-16.
10. The correction identified as Page 342, Line 13, was made with a question mark added after the corrected text.
11. The correction identified as Page 347, Line 3, was made except for the proposed addition of the term “a,” as it would have resulted in that term being duplicated in the text. Thus, that part of the proposed correction is rejected.
12. The correction identified as Page 347, Line 22, was made and “--” added in place of the deleted text.
13. The corrections identified as Page 348, Lines 6-7, were made to “more poor residences” and “not precluding town residences,” rather than “more poor residencies” and “not precluding town residencies,” respectively.
14. The correction identified as Page 350, Line 22, is rejected as it does not comport with the available audio recording.
15. The correction identified as Page 362, Line 2, was made with the term following the deleted text capitalized.
16. The correction identified as Page 382, Lines 9-10, was made to “a list of discharge traps found for raccoons,” rather than “a list of discharge traps found for racoons.”

17. The correction identified as Page 390, Line 2, was made to the second “of” appearing on that line of text.
18. The correction identified as Page 390, Line 6, was made to “are nontraditional,” rather than “are non-traditional.”
19. The correction identified as Page 405, Line 22, was made with the preceding indefinite article modified from “a” to “an.”
20. The correction identified as Page 408, Line 6, was made to “covert construction pipe – or covert concrete pipes,” rather than “covert construction pipe – covert pipes.”
21. The correction identified as Page 422, Line 21, was made to Page 422, Lines 21-22, and it was made to “clarified the list,” rather than “the list.”
22. The correction identified as Page 425, Line 11, was made to “Inter-county,” rather than “Inter County.”
23. The correction identified as Page 427, Line 2, was made with a comma added after the corrected text.
24. The correction identified as Page 440, Line 3, was made to “and Records Plan,” rather than “and Record Plan.”
25. The correction identified as Page 440, Line 4, was made except for the proposed addition of the term “an,” as it would have conflicted with the plural noun immediately following the corrected text. Thus, that part of the proposed correction is rejected.
26. The correction identified as Page 440, Line 8, was made to Page 440, Lines 8-9, and it was made to “and Records Plan,” rather than “and Record Plan.”
27. The correction identified as Page 441, Line 16, was made to Page 441, Lines 16-17.
28. The correction identified as Page 441, Line 24, was made to “list of the,” rather than “list of.”
29. The first correction identified as Page 443, Line 15, was made, and the second correction identified as Page 443, Line 15, was made to “stormwater,” rather than “storwater.”
30. The correction identified as Page 448, Line 19-20, was made to “with the discharge protection minimum managment,” rather than “with the discharge protection minimum management.”
31. The correction identified as Page 450, Line 6, was made to “that for this list of,” rather than “for this list of.”
32. The correction identified as Page 452, Line 3, was made to Page 452, Lines 3-4.
33. The correction identified at Page 452, Line 17, was made to Page 452, Lines 17-18.
34. The correction identified as Page 457, Line 22, was made to Page 457, Lines 22-23, and it was made to “stormwater management practices, operations and maintenance manual.”
35. The correction identified as Page 462, Line 4, was made to Page 462, Lines 4-5.
36. The correction identified as Page 465, Line 14, was made with the term following the corrected text capitalized.
37. The correction identified as Page 470, Line 1, is rejected as it does not comport with the available audio recording.
38. The correction identified as Page 477, Line 25, was made to Page 477, Lines 24-25.
39. The correction identified as Page 477, Line 12, was made to Page 477, Lines 12-13.

40. The correction identified as Page 477, Line 14, is rejected based upon the proposed correction subsequently identified in the parties' Supplemental Joint Motion to Conform, as described below.
41. The correction identified as Page 478, Line 12, was made to Page 478, Lines 12-13.
42. The correction identified as Page 480, Line 9, was made to Page 480, Lines 9-10.
43. The correction identified as Page 480, Line 23, was made to Page 480, Lines 22-25, with the term "an" added before the corrected text.
44. The correction identified as Page 480, Line 15, was made to Page 480, Lines 14-15.
45. The correction identified as Page 481, Line 25, was made to Page 481, Lines 24-25.
46. The correction identified as Page 482, Line 9, was made to Page 482, Lines 9-10.
47. The correction identified as Page 485, Line 5, was made to Page 485, Lines 5-6.
48. The correction identified as Page 528, Line 43416, was made to Page 528, Lines 11-12, and the term "area" following the corrected text was deleted.

B. Supplemental Joint Motion to Conform

As previously noted, the Supplemental Joint Motion to Conform indicates that the parties agreed to stipulate to corrections for 24 of the 32 separately proposed corrections identified in the parties' individual motions to conform the transcript.³ Upon review, I accept each proposed correction set forth in the Supplemental Joint Motion to Conform subject to the following modifications, rejections, and additions:

1. The correction identified as Page 374, Lines 1-3, is rejected in part as it did not entirely comport with the available audio recording. The original transcript text "When you say 'did not do,' or attachment to DOT, and since we got the audit, we took everything as far as -- we did not re-file --" was corrected to "When you say, 'did not do' . . . since we got the audit we took the enforcement action, we did not refile --"
2. The correction identified as Page 471, Lines 13-14, was made with the term following the corrected text capitalized.
3. The correction identified as Page 472, Line 14, was made to Page 472, Line 13, and it was made to "tenant lease agreement," rather than "tenant lease agreements."
4. The correction identified as Page 476, Line 22, was made to Page 476, Lines 22-23.
5. The correction identified as Page 477, Line 14, was made to Page 477, Lines 14-15, and it was made to "And that database dates it prior to the audit?" rather than just to "dates it prior to."

C. Complainant's Motion to Conform

In its separate Motion to Conform, Complainant identifies 11 proposed corrections to the transcript to which Respondent would not stipulate as of the filing of that motion. As the

³ In fact, the correction identified as Page 382, Line 16, in Respondent's Motion to Conform and the Supplemental Joint Motion to Conform had already been identified as a correction agreed upon by the parties in the Joint Motion to Conform, and it was made without modification. Additionally, a correction identified as Page 477, Line 14, in Respondent's Motion to Conform was also identified as a correction agreed upon by the parties in the Joint Motion to Conform. I rejected that correction as proposed in the Joint Motion to Conform, however, based upon the differing correction subsequently identified as Page 477, Line 14, in the Supplemental Joint Motion to Conform, which I made as described herein.

Supplemental Joint Motion to Conform reflects, the parties subsequently agreed to stipulate to corrections for three of those proposed corrections upon review of the audio recordings. For the remaining eight proposed corrections, however, “because the audio recordings are either missing or provide no additional clarification, Complainant continues to rely on the corrections proposed in its . . . separate motion.” Supplemental Joint Motion to Conform at physical page 1. Upon review, I accept or reject the eight remaining proposed corrections, subject to certain modifications, as follows:

1. The correction identified as Page 266, Line 18, was made without modification.
2. The correction identified as Page 271, Line 24, was made without modification.
3. The correction identified as Page 307, Line 12, is rejected as the text of the transcript does not clearly reflect that the transcription is incorrect or that the proposed correction is the actual testimony taken, and an audio recording is unavailable.
4. The correction identified as Page 309, Line 15, was made without modification.
5. The correction identified as Page 371, Line 4, is rejected as the available audio recording does not clearly reflect that the transcription is inaccurate.
6. The correction identified as Page 374, Lines 7-8, is rejected based on the available audio recording. The original transcript text “Here’s why. Often it’s not the cause, it’s not the intent of the agency.” was corrected to “Here’s why. Often it’s not the cause, it’s not the intent --”
7. The correction identified as Page 374, Line 13, is rejected based on the available audio recording. The original transcript text “Not since August of ’07.” was corrected to “Not since --”
8. The correction identified as Page 375, Line 10, is rejected based on the available audio recording, and no correction was made.

D. Additional Corrections

As previously noted, I determined that a number of additional corrections to the transcript were necessary in the course of reviewing the parties’ proposed corrections. In the interest of ensuring that the testimony taken at the hearing was transcribed verbatim, as required by the applicable procedural rules, the following corrections were also made to the transcript:

1. On Page 272, Line 11, the term “immobilized” was corrected to “mobilized.”
2. On Page 372, Line 9, the term “receiving” was corrected to “achieving.”
3. On Page 374, Lines 5-6, the original transcript text “Thank you. But wouldn’t the EPA on its own take that into account?” was corrected to “But wouldn’t the DEC if it had done the audit on its own also have been able to take an enforcement action?”

E. Conclusion

In making the above corrections, modifications, rejections, and additions, I reviewed the parties’ proposed corrections and compared them to the text of the transcript. Additionally, when necessary to resolve a disagreement between the parties or a potential issue identified with a proposed correction, I checked the proposed correction and the text of the transcript against the available audio recordings of the hearing. The adopted changes comport with this review, the

Tribunal's recollection and notes from the hearing, and common sense. In accordance with this discussion, the Joint Motion to Conform, Supplemental Joint Motion to Conform, and Complainant's Motion to Conform are **GRANTED IN PART**, and Respondent's Motion to Conform is **DENIED AS MOOT**.

SO ORDERED.



Susan L. Biro
Chief Administrative Law Judge

Dated: July 31, 2018
Washington, D.C.

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

CERTIFICATE OF SERVICE

I hereby certify that true copies of the foregoing **Order on the Parties' Motions to Conform the Hearing Transcript**, issued by Chief Administrative Law Judge Susan L. Biro, were sent this day to the following parties in the manner indicated below.

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Dated: July 31, 2018
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