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

IN THE MATTER OF:

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

Respondent.

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

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

Docket No. CWA-02-2016-3403

COMPLAINANT'S POST-HEARING BRIEF IN SUPPORT OF ITS PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER ASSESSING ADMINISTRATIVE PENALTIES

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Pursuant to 40 C.F.R. § 22.26 and the Presiding Officer's August 1, 2018 Order on Motions for Extension to File Post-Hearing Briefs (August 1, 2018), the United States Environmental Protection Agency, Region 2 ("EPA" or "Complainant") hereby submits this brief in support of its proposed findings of fact, conclusions of law, and penalty.

I. INTRODUCTION

A. The Complaint

This proceeding is a civil administrative enforcement action for penalties under Section 309(g)(1)(A) of the Clean Water Act, 33 U.S.C. § 1319(g)(1)(A) and the Consolidated Rules of Practice, 40 C.F.R. Part 22. Complainant initiated this action by filing 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. The Complaint was received by Renee Graves, acting for DOT Commissioner Matthew J. Driscoll, and thus served on Respondent, on June 20, 2016. CX 61 at 4. The Complaint alleges that Respondent is liable for 16,218 days of violation of Section 301(a) of the Clean Water Act ("CWA" or "Act"), 33 U.S.C. § 1311(a), by discharging pollutants from its municipal separate storm sewer systems ("MS4s") into waters of the United States while 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"), issued pursuant to Section 402(b) of the Act, 33 U.S.C. § 1342(b); the Complaint also proposed to issue a final order assessing an administrative penalty of $150,000. The DOT refused to pay a penalty and invoked its right to a hearing.

B. Statement of the Case

Through over 16,000 outfall pipes, the DOT discharges polluted stormwater from thousands of miles of roads, dozens of facilities, and hundreds of construction projects into waters of the United States. Because it controls the infrastructure, facilities, and activities that can cause extensive water pollution, the DOT is obligated, under the Clean Water Act, to undertake serious and thoughtful planning, implement thorough and effective procedures, and train and supervise staff and contractors to ensure the success of its efforts to control its pollution.

The DOT recognized its obligation to comply with the CWA in early 2003 by obtaining coverage under New York State's permit for operators of MS4s and committing to numerous specific actions required for compliance with its terms. Among the provisions of the MS4 permit was one notifying the DOT that its failure to comply with the permit could result in liability for significant penalties.

But, as of June 19, 2012, the DOT had failed, in fundamental and far-reaching ways, to undertake its duties under the permit to prevent and control water pollution from its MS4s. Through three comprehensive audits that included requests for dozens of records, interviews with numerous DOT staff members (including managers responsible for its environmental compliance), and inspections of over 36 sites across the state over the course of nine days, the EPA and its contractors learned that, after getting MS4 permit coverage, the DOT significantly failed to comply with its terms.

As a result of its audits, the EPA issued an administrative compliance order directing the DOT to remedy its numerous violations no later than June 30, 2015. After the DOT finally achieved compliance, on February 5, 2016, the EPA determined that the DOT was liable for 16,218 days of violation, and issued the complaint seeking penalties in this matter.

C. The Hearing

The hearing in this matter was conducted on April 3-5, 2018. At the hearing, the EPA proved its allegations, and the propriety of the proposed penalty, through the introduction of the DOT's own records and admissions, the introduction of detailed audit reports and revealing photographs, and the testimony of experienced, thorough, and highly credible inspectors.

Complainant first presented the testimony of Christy Arvizu, an Environmental Scientist for the EPA who has served the agency for more than 17 years, in both the permitting and enforcement programs. CX 77 at 3; Tr. 26:21-27:4. Prior to working for the EPA, Ms. Arvizu earned a Bachelor of Science Degree in Agronomy and Environmental Science. CX 77 at 3; Tr. 28:10-12. While working for the EPA, Ms. Arvizu has received numerous national awards for her work, including five Bronze Medals and a Distinguished Achievement Award. CX 77 at 3. Ms. Arvizu began serving as the lead MS4 inspector for EPA Region 2 in 2005. CX 77 at 1. In that role, she has, among other duties, conducted MS4 compliance and enforcement trainings for regulators and for MS4 operators. CX 77 at 1; Tr. 28:4-7. Ms. Arvizu has conducted over 27 MS4 audits while working for the EPA, and has commenced more than 15 enforcement actions based on the findings of those audits. CX 77 at 1; Tr. 26:15-19. Ms. Arvizu was assigned to lead the planning, performance, and documentation of the audits and the EPA's findings regarding Respondent's MS4 program, including directing and coordinating with the EPA's contractor auditors, and was the lead staff person responsible for issuing the compliance orders and the complaint. CX 30; CX 37; CX 39; Tr. 28:23-24; 30:10-16; 32:2-25; 37:11-14; 40:22-23; *see generally* 49:22-73:6. Ms. Arvizu was also responsible for reviewing all of the actions Respondent took, and information Respondent submitted, to achieve and demonstrate compliance with the compliance order, and for answering any questions Respondent had throughout the process. Tr. 47:11-23. Complainant also presented the testimony of four of the

contractors who helped conduct the audits: Kortney M. Kirkeby, Robert Jacobsen, Anthony D'Angelo, and Jacob Albright. Tr. 132:21-175:5, 177:2-236:19, 245:7-296:5, 297:15-321:3. The contractors testified about a number of the sites audited, their findings, and the audit reports. *Id.*

In rebuttal, the DOT presented, as its main witness, Ellen Kubek, a person who lacked personal knowledge of the vast majority of violations discovered by the EPA during the audits, and whose testimony demonstrated a lack of fundamental knowledge about Respondent's staffing and activities. In addition to her general lack of knowledge regarding the specifics of the violations at issue in this case, Ms. Kubek also made clear her significant bias toward the DOT and demonstrated an unreasonable defensiveness throughout her testimony, both of which served to substantially undermine her credibility. For example, Ms. Kubek, who was qualified as an expert in stormwater management and sediment and erosion controls, testified that she was confused about terminology in the EPA's compliance order, without mentioning (or, perhaps, recognizing) that the terminology came directly from the permit.[1] Tr. 456:6-16. She also seemed to misunderstand that the EPA was well within its authority to require Respondent to certify that it had finally come into compliance with permit terms that it had violated, and, instead claimed that those certifications were somehow "above and beyond." Tr. 459:14-24. Ms. Kubek also contradicted herself when she testified that Respondent had corrected violations that the EPA discovered at several construction sites before Respondent even received the order, but then testified that Respondent had spent $3,318.67 more than they needed to by hiring contractors to expedite the remedy of those violations in response to the EPA compliance order. Tr. 461:15-462:18. She also demonstrated a clear misunderstanding of, or lack of familiarity with, Respondent's SWMP Plan, and the clear language of the EPA compliance order, when she

[1] Significantly, none of Respondent's witnesses testified to having ever sought guidance or clarification about any of their permit obligations prior to receiving the EPA's compliance order.

testified that the EPA's order to submit the goals, procedures, and rating system or checklist for conducting construction site reviews called for in Respondent's SWMP was an order to conduct site reviews. Tr. 466:11-467:8.[2] And, Ms. Kubek further demonstrated her lack of familiarity with the MS4 permit by mistakenly claiming, despite the clear language in Part V.B of the permit, that documentation and records of SWMP implementation are not required to be maintained, and further undermined her purported expertise by claiming that it was confusing to "come up with a written procedure for implementing our stormwater management program." Tr. 467:9-20. Ms. Kubek also, remarkably, claimed that there was no need for Respondent to track its construction site inspections, notwithstanding the explicit requirement in Respondent's SWMP Plan to do just that, and her own testimony that Respondent had an inspection reporting form for just that purpose. Tr. 468:1-9. *See also* CX 30 at 187, 192. She also misunderstood the EPA's clear request, also taken directly from the permit, for a "written directive" as one to "provide updated mechanisms to ensure compliance and enforcing mechanisms on our construction project[s]," a wholly separate permit requirement that was not at issue in this matter, and claimed that the EPA was responsible for the costs Respondent incurred in mistakenly attempting to do the latter. Tr. 469:19-470:5. The DOT's remaining three witnesses presented largely redundant testimony that focused almost entirely on a meritless defense. Significantly, however, Dan Hitt, the Director of the DOT's Office of Environment, actually testified that, with the right incentive, Respondent might have marshalled its substantial resources to come into compliance sooner than it did. Tr. 608:13-609:18.

By the conclusion of the hearing, the EPA had shown, by a preponderance of the evidence, that the DOT had failed to implement four major programmatic requirements, as well

[2] And, without actually testifying to an amount spent, implied that the cost of conducting those inspections was an unnecessary cost imposed on Respondent by the EPA. Tr. 461:15-462:18.

as numerous specific terms, of its MS4 permit, resulting in numerous and widespread failures to control its stormwater runoff and prevent the discharge of numerous pollutants to waters of the United States. Specifically, the documentary and testimonial evidence in this matter demonstrates that the DOT failed to develop, implement, and document a program to locate and eliminate illicit discharges into its sewer systems and educate the public about their hazards; failed to establish the program, goals, procedures, training, and oversight necessary to control the discharge of polluted stormwater from construction sites under its control; failed to ensure the effective long-term operation of post-construction stormwater controls; and failed to develop and implement a program of self-assessments, training, and site-specific planning and implementation to ensure that pollution prevention and good housekeeping practices were employed at its maintenance facilities. In sum, the documentary and testimonial evidence presented at the hearing clearly demonstrated that, for many years, the DOT disregarded clear requirements designed to protect the American public and its waters from the serious risk of harm posed by its activities.

In addition to demonstrating the DOT's extensive liability, the EPA also demonstrated that its proposed penalty was reasonable, appropriate, and consistent with the statutory penalty factors in the Clean Water Act. Although the statutory maximum penalty for the DOT's thousands of days of violations is in the millions of dollars, the EPA proposed to assess a penalty of just $150,000, which it determined was the minimum amount that would be sufficient to adequately punish the DOT for its violations, deter them from committing future violations, compensate the American public, defend the integrity of the EPA's enforcement program, and level the playing field for those who, in good faith, timely dedicate the effort and resources necessary to comply with the law.

In its defense, the DOT argued that it should not have to pay any penalty in this case because it spent more than required to come into compliance, that two lower-level EPA staff members had committed the agency to forgoing a penalty, that the requirements of the permit were unclear, and that, in any event, most of the violations are merely "paperwork" violations. However, the DOT failed to establish that the EPA ever asked it to do more than was legally required, that EPA staff ever promised – or even had the authority to promise - that the agency would forgo a penalty, or that the DOT had made any attempt, prior to the audits, to seek guidance on any of the permit's requirements, and failed to rebut the EPA's abundant evidence that the DOT's violations likely resulted in the discharge of numerous pollutants to over a dozen waters of the United States. Therefore, none of the DOT's arguments support a reduction in the proposed penalty.

II. LEGAL BACKGROUND

A. Clean Water Act

The purpose of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). 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). The CWA is a strict liability statute. *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 374 (10th Cir. 1979). Because CWA enforcement actions are based upon strict liability, intent and good faith are irrelevant to determining liability. *Id.* To that end, the CWA prohibits the discharge of any pollutant to navigable waters by any person except as in compliance with, *inter alia*, a permit issued pursuant to Section 402(p) of the CWA, 33 U.S.C. § 1342(p).

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 term "discharge of a pollutant" means "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). "[P]ollutants" include, among other things, "solid waste, dredged spoil, rock, sand, cellar dirt, sewage, sewage sludge and industrial, municipal and agricultural waste discharged into water." 33 U.S.C. § 1362(6). "Point source" is defined by Section 502(14) of the CWA, 33 U.S.C. § 1362(14), to include any "discernible, confined and discrete conveyance, including, but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." "[N]avigable waters" are "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7).

B. The MS4 Program and Relevant Permit Requirements

Section 402 of the CWA, 33 U.S.C. § 1342, establishes the National Pollutant Discharge Elimination System ("NPDES") Permit Program and authorizes the EPA to issue NPDES permits that allow for the discharge of pollutants, including storm water, into navigable waters, subject to specific terms and conditions. Pursuant to Section 402(b) of the CWA, 33 U.S.C. § 1342(b), on October 28, 1975, the DEC obtained authorization from the EPA to administer the federal NPDES program in New York. 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. § 1311(a).

Section 402(p) of the CWA, 33 U.S.C. § 1342(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..."

EPA's Storm Water Phase II Rule (64 F.R. 68722, Dec. 8, 1999) addresses storm water discharges from small MS4s (those serving less than 100,000 persons). A small MS4 is subject to regulation under this rule either by automatic designation or designation by the NPDES permitting authority. Pursuant to 40 C.F.R. § 122.32(a)(1), all small MS4s located in an "urbanized area" (as determined by the latest Decennial Census by the Bureau of Census) are automatically designated as "regulated small MS4s." 40 C.F.R. §§ 122.33(a) and (b)(1) require operators of regulated small MS4s to seek authorization to discharge under the applicable NPDES general permit issued by the permitting authority, by submitting a Notice of Intent ("NOI") for coverage under such permit.

The DEC issued a SPDES General Permit for Storm Water Discharges from MS4s (GP-0-15-003) on May 1, 2015 ("2015 MS4 GP"), which 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, 2015 ("2010 MS4 GP"). CX 4. That permit superseded the previous SPDES MS4 general permit (GP-0-08-002), which became effective on May 1, 2008, and expired on April 30, 2010 ("2008 MS4 GP"), and the 2008 MS4 GP in turn 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 Part IV.A of the 2003 MS4 GP, all MS4 operators must develop a 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.

Parts IV.D and VIII.A of the 2008 MS4 GP require MS4 operators authorized under the 2003 MS4 GP to continue to fully implement their SWMP, and Part X of that permit states that "[t]he SWMP needs to include measurable goals for each of the best management practices ("BMPs") … and should: (1) describe the BMP/measurable goal; (2) identify time lines/schedules and milestones for development and implementation; (3) include quantifiable goals to assess progress over time; and (4) describe how the permittee will address POCs [pollutants of concern]."

To implement the SWMP, Part IV.A of the 2008 MS4 GP requires MS4 operators to develop, by March 9, 2009, a "SWMP Plan" which Part X of that permit defines as a plan to 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." Part VIII.A of the 2008 MS4 GP provides that, "[f]or each of the elements of the plan, the permittee must identify

(i) the agencies and/or offices that would be responsible for implementing the plan element and (ii) any protocols for coordination among such agencies and/or offices necessary for the implementation of the plan element." The 2008 MS4 GP further requires that the SWMP Plan be made readily available to the permittee's staff and to the public and regulators, such as DEC and EPA staff. Finally, Part IV.D of the 2010 MS4 GP, under which Respondent was operating at the time of the EPA audits, continues the above SWMP and SWMP Plan requirements from the 2003 and 2008 MS4 GPs in the 2010 MS4 GP; Part VIII.A of the 2010 MS4 GP describes the specific MCM requirements applicable to Respondent's operation of its non-traditional MS4s.

C. Enforcement Under the CWA

Section 309 of the Act, 33 U.S.C. § 1319, sets forth a variety of enforcement mechanisms to address violations of the Act, including violations of Section 301. The remedies available include criminal, civil judicial and administrative penalties. The instant case is a proceeding for civil administrative penalties brought pursuant to subsection 309(g)(1)(A), which provides, in relevant part, that:

> "Whenever on the basis of any information available the Administrator finds that any person has violated section [301] … of [the CWA], or has violated any permit condition or limitation implementing any of such sections in a permit issued under section [402] of [the CWA] by the Administrator … the Administrator … may, after consultation with the State in which the violation occurs, assess a … class II civil penalty under this subsection." 33 U.S.C. § 1319(g)(1)(A)

The Act "imposes strict civil liability on violators of its provisions." *Or. State Pub. Interest Research Grp. v. Pac. Coast Seafoods Co.*, 361 F. Supp. 2d 1232, 1240 (D. Or. 2005). Thus, in order to assess a civil penalty, the EPA does not need to prove that the violation was intentional, knowing, or negligent; it need only prove that the violation occurred. *Smith v. Hankinson*, No. 98-0451-P-S, 1999 U.S. Dist. LEXIS 5151, at *15 (S.D. Ala. Mar. 31, 1999).

Pursuant to CWA Section 309(g)(1)(B), 33 U.S.C. § 1319(g)(1)(A), Class II penalties

may be assessed and collected after notice and opportunity for a hearing. Such proceedings are governed by the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination of Permits" ("CROP"). 40 C.F.R. Part 22. Following the conclusion of hearings in matters governed by the CROP, "any party may file proposed findings of fact, conclusions of law, and a proposed order, together with briefs in support thereof. ..." 40 C.F.R. § 22.26. The CROP grants the presiding officer ultimate authority for "the assessment of a penalty under section[s] 309(g)(2)(A) ... of the CWA." 40 C.F.R. § 22.50(a)(1). In this matter, the amount of penalties is determined upon consideration of "the nature, circumstances, extent and gravity of the violation, or violations, and with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require." 33 U.S.C. § 1319(g)(3).

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Respondent

The New York State Department of Transportation ("DOT" or "Respondent") is a public agency established under the laws of the State of New York to develop and maintain, among other things, a state and local highway system that encompasses more than 113,000 miles of highway and more than 17,400 bridges. Jt. Stip. ¶ I.1, 2; N.Y. TRANSP. LAW, art 2; CX 30 at 3; https://www.dot.ny.gov/about-nysdot/history/past-present (last visited Aug. 16, 2018). Respondent operates through its headquarters office in Albany, New York and through eleven (11) regional offices located throughout New York State, including Western New York (Region 5), Hudson Valley (Region 8), and Southern Tier (Region 9). Answer ¶ III.7; https://www.dot.ny.gov/regional-offices (last visited Aug. 16, 2018). As part of its responsibilities, Respondent operates and maintains a statewide network of Municipal Separate

Storm Sewer Systems ("MS4s") located in urbanized areas throughout New York, and has control over the conveyance and discharge of stormwater from those systems. CX 1; CX 73 at 6.

Throughout the state, Respondent's MS4s contain approximately 16,800 outfalls that discharge stormwater to waters of the United States. CX 1; CX 30; CX 59 at 273-74; CX 73; Jt. Stip. ¶¶ I.3, 4. Within Region 9, Respondent operates approximately 722 such outfalls; within Region 8, Respondent operates approximately 6699 such outfalls; and within Region 5, Respondent operates approximately 2368 such outfalls. CX 59 at 274.

On March 10, 2003, Respondent submitted a Notice of Intent ("NOI") to be covered under New York's 2003 MS4 GP. CX 1; Jt. Stip. ¶ I.5; Tr. 33:19-34:9. In its NOI, Respondent committed to several actions. Regarding illicit discharge detection and elimination, Respondent committed, among other things, to inform the public, employees, and businesses of the hazards from illicit discharges, identify illicit discharges, map the system, and identify illicit connections. CX 1 at 4. Regarding construction site stormwater runoff control, Respondent committed, among other things, to conduct site inspections and enforcement, and to conduct education and training of construction site operators. *Id.* Regarding pollution prevention/good housekeeping for municipal operations, Respondent committed, among other things, to prevent the discharge of pollutants from municipal operations, conduct employee pollution prevention training, and implement management practices for vehicle maintenance and washing, hazardous and waste materials management, and road salt storage. *Id.* at 5. On April 2, 2003, the DEC granted coverage. CX 1; Tr. 35:5-6. In doing so, the DEC notified Respondent that, among other things, Respondent's NOI served as its first Stormwater Management Program ("SWMP"), and that the SWMP was required to be fully implemented by January 8, 2008. CX 1 at 1-2; Tr. 34:12-14. The notice of coverage letter from the DEC also provided names and phone numbers of DEC staff

whom Respondent could contact if they had any questions about "any aspect of the requirements" of the permit. CX 1 at 2; Tr. 36:4-15.

Respondent's coverage continued under the 2003 permit until the DEC issued the 2008 MS4 GP, on May 1, 2008, at which time Respondent's coverage continued under that permit. Jt. Stip. ¶ I.6; Tr. 35:12-15. When the 2008 MS4 GP expired, on April 30, 2010, the DEC issued the 2010 MS4 GP, on May 1, 2010, and Respondent's coverage continued thereafter under that permit. Jt. Stip. ¶ I.7; Tr. 35:18-36:1. The 2010 MS4 GP, which was in effect during the EPA's audits of Respondent's MS4s, expired on April 30, 2015. Jt. Stip. ¶ I.8. On May 1, 2015, the DEC issued the current permit ("2015 MS4 GP"), which expired on April 30, 2017, but has been administratively extended, so Respondent's coverage continues under the 2015 MS4 GP. Jt. Stip. ¶ I.9, 10.

Pursuant to its MS4 permits, Respondent developed a SWMP and a Stormwater Management Program Plan ("SWMP Plan") for use by all of its MS4s around New York State. At the time of the first and second audits in this matter (Region 9 and Region 8, respectively), Respondent's May 2012 SWMP Plan was the version in effect. CX 30 at 158-252; Jt. Stip. ¶ I.12. At the time of the Region 5 audit, Respondent was using a version dated June 2013. CX 39 at 174-268. The SWMP Plan changes required for DOT to come into compliance were included in Respondent's January 2016 version, which it submitted to the EPA on January 29, 2016. CX 59 at 3-4 and 37-137; Jt. Stip. ¶ I.18.

B. The EPA Compliance Audits

1. Region 9

On June 19-21, 2012, EPA inspector Christy Arvizu, DEC inspector Ellen Hahn (now

Ellen Kubek),[3] and three EPA contractors, including Kortney Kirkeby, conducted an audit of Respondent's MS4 program in Region 9, which serves Broome, Chenango, Delaware, Otsego, Schoharie, Sullivan, and Tioga counties, and has its regional headquarters in Binghamton, New York. CX 30 at 1-5; Tr. 31:1-6. The purpose of the audit was to assess Respondent's compliance with the requirements of the 2010 MS4 GP in Region 9. CX 30 at 1-5; Tr. 29:19-30:2; Tr. 31:1-5.

Prior to the audit, on May 18, 2012, the EPA sent Respondent a letter announcing the audit, along with an audit agenda and a Pre Audit Questionnaire and Records Request for 48 required written programs, plans, procedures, training materials, and records, nine of which were to be submitted before the audit, with the remainder to be made available during the audit. CX 8 at 1-2; CX 9; Tr. 32:6; Tr. 39:17-25. On May 30, 2012, Respondent sent the EPA a letter confirming the audit. CX 11; Tr. 41:18-25. On June 7, 2012, Respondent submitted the completed questionnaire, but answered that 12 of the requested records were not available and, for many of the others, responded with answers and/or records that were inadequate or unresponsive. *See* CX 13, rows 8, 9, 10, 11, 15, 16, 17, 19, 20, 21, 22, 23, 27, 32, 37, 42; *see also* Tr. 42:1-12; 42:3, 7-12; 55:14-57:4; 59:2-18; 60:18-62:5; 64:4-65:7; 66:25-68:3; 69:24-70:10; 71:21-72:7; 73:2-6.

Both the records request and the audit focused on four of the minimum control measures ("MCMs") that are required by the permit, namely, MCM 3 (Illicit Discharge Detection and

[3] Ms. Kubek was only present for the kick-off portion of the audit, at the Region 9 office, the site inspections to the Interstate 81/86 Bridge Replacement Project, the Prospect Mountain Phase 1 – Route 17/I-81 Interchange Reconstruction Project, the Vestal Waste Storage Yard, and the Broome Residency (9-1) – Barlow Road Facility. She did not attend or participate in any part of the audit related to Respondent's compliance with its IDDE requirements (including the outfall inspections) or its PCSM requirements. *See e.g.* Tr. 402:1-22 (testifying about IDDE outfall inspections by opining on the EPA's photos, but not from personal observations). Nor did she participate in any part of the Region 8 or Region 5 audits. Tr. 508:1-3.

Elimination, or "IDDE"), MCM 4 (Construction Site Stormwater Runoff Control, or "CSSRC"), MCM 5 (Post-construction Stormwater Management, or "PCSM"), and MCM 6 (Pollution Prevention/Good Housekeeping for Municipal Operations, or "PP/GH"). CX 30 at 4; Tr. 38:4-39:9.

The audit began at the Region 9 headquarters, and consisted of a review by the audit team of the documents Respondent made available, interviews with the DOT's Statewide Stormwater Program Coordinator, Dave Graves, and representatives of DOT Region 9, as well as site visits to five outfalls, three of Respondent's construction sites, and three of Respondent's maintenance facilities. CX 30 at 1-39 and 487-89; CX 39 at 462; 691:23-694:11. Others involved in the audit for Respondent included Matt Stiles, Design Quality Control, Mitch Sosnicki, Design Environmental Specialist, Pam Eshbaugh, Regional Planning & Program Manager, Andy Stiles, Regional Director of Operations, Steve Cammisa, Environmental Specialist, Larry Cutting, Construction Environmental Coordinator ("CEC"), Brent Perkins, DOT Seasonal Intern, and Mike Huff, Engineering Technician. CX 30 at 4.

As a result of the audit, the EPA and its contractors produced an audit report that contained Respondent's submissions, key documents, a narrative description of the audit team's findings, and numerous photographs. CX 30; Tr. 42:14-23.

2. Region 8

On November 27-29, 2012, EPA inspectors Christy Arvizu and Chris Mecozzi, DEC inspector Natalie Brown, and three EPA contractors, including Bobby Jacobsen and Anthony D'Angelo, conducted an audit of Respondent's MS4 program in Region 8, which serves Columbia, Dutchess, Orange, Putnam, Rockland, Ulster, and Westchester counties, and has its regional headquarters in Poughkeepsie, New York. CX 35 at 1-5. The purpose of the audit was to assess Respondent's compliance with the requirements of the 2010 MS4 GP in Region 8. CX 35

at 1-5.

As with the Region 9 audit, prior to the Region 8 audit, on October 30, 2012, the EPA sent Respondent a letter announcing the audit, along with a Pre Audit Questionnaire and Records Request for 58 required written programs, plans, procedures, training materials, and records, three of which were to be submitted before the audit, with the remainder to be made available during the audit. CX 31 at 1-2; CX 33; Tr. 42:24-15. The Records Request was largely the same as the one for Region 9. CX 13; CX 34. In response, on November 14, 2012, Respondent submitted the completed questionnaire, but answered that three of those records were not available and, as with its response to the Region 9 records request, responded with answers and/or records that were inadequate or unresponsive. *See* CX 34, rows 10, 11, 17, 18, 20, 22, 23, 24, 25, 26, 44, and 57; *see also* Tr. 52:23-55:10; 66:6-15; and 68:4-24.

The audit began at the Region 8 headquarters, and consisted of a review by the audit team of the documents Respondent made available, interviews with the DOT's Statewide Stormwater Program Coordinator, Dave Graves, and representatives of DOT Region 8, as well as site visits to four of Respondent's construction sites and eight of Respondent's operations and maintenance facilities. CX 35 at 1-37 and 485-87; CX 39 at 462; Tr. 691:23-694:11. Others involved in the audit for Respondent included Sandra Jobson, Acting Regional Environmental Manager, Scott Davis, Environmental Specialist, Gretchen Fitzgerald, Environmental Specialist II/Construction Environmental Coordinator ("CEC"), Aileen Helsley, Environmental Specialist I Stephanie DeLano, Environmental Specialist I, Steve MacAvery, Environmental Specialist II Chris Kappeller, Environmental Specialist I/Acting Maintenance Environmental Coordinator ("MEC"), Jessica Andersen, Environmental Specialist I, Peter M. Teliska, Regional Transportation Maintenance Engineer, Barbara Mattice, Region Construction Engineer, and

Nicolas Choubeh, Acting Regional Design Engineer. CX 35 at 4.

As with the Region 9 audit, both the records request and the audit of Region 8 focused on MCM 3 (Illicit Discharge Detection and Elimination), MCM 4 (Construction Site Stormwater Runoff Control), MCM 5 (Post-construction Stormwater Management), and MCM 6 (Pollution Prevention/Good Housekeeping for Municipal Operations). CX 35 at 4; Tr. 38:4-39:9. As a result of the records request and audit, the EPA and its contractors produced an audit report that contained Respondent's submissions, key documents, a narrative description of the audit team's findings, and numerous photographs. CX 35; Tr. 42:14-23.

3. Region 5

On July 25-27, 2013, EPA inspector Christy Arvizu, DEC inspector Bill Murray, and three EPA contractors, including Jake Albright and Anthony D'Angelo, conducted an audit of Respondent's MS4 program in Region 5, which serves Niagara, Erie, Cattaraugus, and Chautauqua counties, and has its regional headquarters in Buffalo, New York. CX 39 at 1-5. The purpose of the audit was to assess Respondent's compliance with the requirements of the 2010 MS4 GP in Region 5. CX 39 at 1-5.

As with the previous two audits, prior to the audit, on May 22, 2013, the EPA sent Respondent a letter announcing the audit, along with a Pre Audit Questionnaire and Records Request for 49 required written programs, plans, procedures, training materials, and records, seven of which were to be submitted before the audit, with the remainder to be made available during the audit. CX 36 at 2; CX 37; Tr. 42:24-15. The Records Request was largely the same as the previous two. CX 13; CX 34; CX 37. In response, on June 17, 2013, Respondent submitted the completed questionnaire, but answered that five of those records were not available and, as with its previous two responses, in Regions 9 and 8, responded with answers and/or records that were inadequate or unresponsive. *See* CX 37, rows 8, 9, 11, 16, 17, 19, 20, 21, 22, 23, 28, 38,

and 49; *see also* Tr. 57:14-58:6; 62:24-63:11; 63:12-64:3; 66:16-24; 68:25-69:15; and 70:24-71:19.

The audit began at the Region 5 headquarters, and consisted of a review by the audit team of the documents Respondent made available, interviews with the DOT's Statewide Stormwater Program Coordinator, Dave Graves, and other representatives of DOT Region 5, as well as site visits to one of Respondent's active construction sites, seven of Respondent's post-construction sites to inspect the required best management practices, and nine of Respondent's operations and maintenance facilities. CX 36 at 3-4; CX 39 at 1-35, 462; Tr. 691:23-694:11. Others involved in the audit for Respondent included Charles Morgante, Regional Director of Operations, Janine Shepherd, CEC, Kim Lorenz, Associate Landscape Architect, Craig Mozrall, Capital Program Delivery Manager, Sylvia Jones, Environmental Specialist II, Mike Jurkowski, Environmental Specialist I, Frank Garbe, Environmental Specialist I, Justin Przepasniak, Regional GIS Coordinator, Charles Gennaro, Construction Supervisor, John Wind, Construction Supervisor Tom Skummer, Construction Supervisor, and Dan Paskie, Construction Supervisor.

As with the previous two audits, both the records request and the audit focused on MCM 3 (Illicit Discharge Detection and Elimination), MCM 4 (Construction Site Stormwater Runoff Control), MCM 5 (Post-construction Stormwater Management), and MCM 6 (Pollution Prevention/Good Housekeeping for Municipal Operations). CX 39 at 4; Tr. 38:4-39:9. As a result of the audit, the EPA and its contractors produced an audit report that contained Respondent's submissions, key documents, a narrative description of the audit team's findings, and numerous photographs. CX 39; Tr. 42:14-23.

C. The Administrative Compliance Orders

On March 5, 2014, Dore LaPosta, the Director of the Division of Enforcement and Compliance Assistance, issued to Respondent an Administrative Compliance Order ("ACO" or

"Order") (Docket No. CWA-02- 2014-3028) on behalf of EPA Region 2, which was mailed to the Respondent along with copies of the audit reports for each of the three DOT Regions audited. CX 40; Tr. 43:24-44:15. The Order alleged that Respondent had violated 19 separate requirements of its MS4 permit, and cited 72 separate deficiencies in Respondent's erosion and sediment control practices and pollution prevention/good housekeeping practices that the EPA had observed at 19 of the 37 sites inspected during the audits. CX 40 at 4-11.

The Order directed Respondent to implement 24 different types of corrective actions, ranging from developing missing planning and programmatic requirements, to implementing required pollution prevention practices, including developing an updated SWMP Plan incorporating the applicable documentation and procedures called for in the corrective actions. CX 40 at 11-18, 20. On May 13, 2014, the EPA and Respondent met to discuss revisions to the compliance schedule outlined in the ACO, and the parties agreed to a revised schedule for compliance, which was formalized in a new ACO that was issued by the EPA on June 5, 2014 (Docket No. CWA-02- 2014-3041). RX 16 at 1 and 4; CX 47 at 1-23; Tr. 45:12-21; 46:19-47:8. This second Order retained all of 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 20; Tr. 47:5-8.

Over the course of the next twenty months, Respondent made numerous submissions to the EPA to demonstrate its efforts to come into compliance, including quarterly progress reports. CX 47-59; Tr. 47:11-19. During this period, the EPA also had several additional meetings and conference calls with Respondent. Tr. 47:20-23. 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. 47:11-19. Respondent finally demonstrated

that it had corrected all of its violations when, on February 5, 2016, it submitted an updated SWMP Plan and the written directive required pursuant to Part VIII.A.3.f.ii of the 2010 MS4 GP. CX 59; Tr. 48:7-10, 13.

D. The Administrative Complaint

On June 15, 2016, based on the violations identified through the records requests and audits, and originally alleged in the ACO, the 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. 48:13-25. The Complaint alleged that Respondent 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 1, 11. On February 2, 2017, Respondent filed an Answer to the Complaint in which it denied the alleged violations and asserted, as an affirmative defense, that it had "expended in excess of $500,000 … in its efforts to resolve the alleged violations … going well beyond the [permit] … and/or beyond the efforts required for mere compliance with the EPA's orders …." RX 71 at 7-8. Following Respondent's filing of the answer, the parties engaged in Alternative Dispute Resolution ("ADR") in order to attempt to settle the matter without a hearing, but were ultimately unsuccessful.

E. The Administrative Proceeding

1. The Prehearing Order

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

Exchange on February 13, 2018.

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

On November 8, 2017, Complainant filed a Motion for Partial Accelerated Decision on Liability for four of the 17 violations alleged in the Complaint, namely: (1) Respondent's failure to have a written directive for an illicit discharge detection and elimination ("IDDE") program, (2) Respondent's failure to provide required information to the public about the hazards associated with illicit discharges, (3) Respondent's failure to develop a system for receiving public complaints about construction stormwater runoff, and (4) Respondent's failure to retain records of quality control/quality assurance for a construction review program. *See* Complainant's Motion for Partial Accelerated Decision on Liability ("Motion"). Respondent opposed this motion on December 11, 2017, and Complainant replied to Respondent's opposition motion on December 21, 2017. *See* Respondent's Response to Motion for Partial Accelerated Decision ("Response") and Complainant's Reply to Respondent's Response ("Reply"). Significantly, in its Response, Respondent failed to advance its affirmative defense regarding its compliance costs, but interposed a new affirmative defense that "the interest of justice requires a waiver of the penalty in this matter …." Response at 2. However, Respondent alleged no facts, and offered no legal authority, for that untimely argument. Id.

On January 12, 2018, pursuant to the Prehearing Order, as subsequently revised by this tribunal, the parties submitted Joint Stipulations. *See* Joint Stipulations ("Jt. Stip."). And, on January 29, 2018, the Presiding Officer issued an Order on Motion for Partial Accelerated Decision ("Order"). Significantly, the Order held that, "as a matter of law, it is clear that Respondent is obligated to obtain and abide by an MS4 permit issued by the applicable NPDES permitting authority," and found that, "at issue is the extent to which Respondent complied with those permits." Regarding the extent of compliance, this tribunal granted accelerated decision on

liability for two counts, namely, Respondent's failure to have a written directive for an illicit discharge detection and elimination (IDDE) program (Compl. ¶ III.10.e), and Respondent's failure to retain records of quality control/quality assurance for a construction review program (Compl. ¶ III.10.a.i). Accelerated decision on liability on the other two counts on which Complainant moved was denied, leaving those, and the other thirteen alleged violations for resolution at hearing. Order at 11-16.

3. The Hearing

A 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[4]-42, 44, 45, 47-66, 69, and 72-77. Jt. Stip. ¶ II; Tr. 15:14-17; 683:6-8. Likewise, the following 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. Jt. Stip. ¶ 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. Therefore, all references herein to the transcript are referring to the transcript as corrected by this Tribunal's July 31 Order.

IV. STANDARD OF PROOF

Under the CROP, the complainant bears "the burdens of presentation and persuasion that

[4] CX 39 is mispaginated. While the exhibit contains a total of 543 pages, there are two large gaps in the exhibit pagination (pp. 284-402 and 499-514), and the last exhibit page number is 677. The error has no impact on the record, and, for consistency, this brief cites to the pagination in the exhibit.

the violation occurred as set forth in the complaint and that the relief sought is appropriate." 40 C.F.R. § 22.24(a). Once the complainant establishes its prima facie case, the burdens shift to respondent to present "any defense to the allegations set forth in the complaint and any response or evidence with respect to the appropriate relief. The respondent has the burdens of presentation and persuasion for any affirmative defenses." *Id.* In carrying their respective burdens of proof, the parties are subject to a "preponderance of the evidence" standard. 40 C.F.R. § 22.24(b), meaning that "a fact finder should believe that his factual conclusion is more likely than not." *In re City of Marshall*, 10 E.A.D. 173, 180 (EAB 2001) (internal citations and quotations omitted).

V. LIABILITY

The CWA holds owners and/or operators strictly liable for the discharge of a pollutant. "The regulatory provisions of the Federal Water Pollution Control Act were written without regard to intentionality, however, making the person responsible for the discharge of any pollutant strictly liable." *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 374 (10th Cir. 1979). Section 301(a) of the Act states "[e]xcept as in compliance with this section and … 402 … of this Act …, the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a). Therefore, in accordance with the Act's definition of a discharge of a pollutant, any (1) person who (2) discharges a pollutant, into (3) a water of the United States, from a (4) point source, (5) in violation of a permit, is in violation of the Act without regard to intent. As explained more fully below, all five elements of the alleged CWA violations have been satisfied here, therefore, Respondent is strictly liable.

A. Person

Under Section 301 of the Act, the violator must be a "person." The Act defines a person as an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body, pursuant to Section 502(5) of the Act, 33

U.S.C. § 1362(5). "Municipality" is defined at Section 502(4) of the Act, 33 U.S.C. § 1362(4), as including a city, town, borough, or any other public body created pursuant to State law and having jurisdiction over disposal of sewage, industrial waste or other waste. Courts have held that "the CWA imposes liability both on the party who actually performed the work and on the party with responsibility for or control over performance of the work." *United States v. Lambert*, 915 F. Supp. 797, 802 (S.D. W. Va. 1996), *citing United States v. Bd. of Trustees*, 531 F. Supp. 67, 274 (S.D. Fla. 1981). As found by this Tribunal in its Order on Motion for Partial Accelerated Decision, Respondent is a person subject to the prohibitions of the CWA, within the meaning of Section 502(5) of the Act, 33 U.S.C. § 1362(5). Order at 11.

B. Who Discharged Pollutants

The term "discharge" is defined at Section 502(16) of the CWA, 33 U.S.C. § 1362(16), as including a discharge of a pollutant. A "discharge of a pollutant" means any addition of any pollutant to navigable waters from any point source, as defined by Section 502(12) of the CWA, 33 U.S.C. § 1362(12). A "pollutant" includes, among other things, sewage, garbage, chemical wastes, biological material, rock, and sand, as defined in Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

> "Storm water discharges are a significant cause of water quality impairment because they can contain a variety of pollutants such as sediment, nutrients, chlorides, pathogens, metals, and trash that are mobilized and ultimately discharged to storm sewers or directly to water bodies. Furthermore, the increased volume and velocity of stormwater discharges that result from the creation of impervious cover can alter streams and rivers by causing scouring and erosion. These surface water impacts can threaten public health and safety due to the increased risk of flooding and increased level of pollutants; can lead to economic losses to property and fishing industries; can increase drinking water treatment costs; and can decrease opportunities for recreation, swimming, and wildlife uses."

81 F.R. 89320, 89322 (1999). Accordingly, on December 8, 1999, the EPA promulgated its Phase II stormwater rule, which requires NPDES permits for discharges from certain small MS4s

and from small construction sites. *See* 64 F.R. 68722. Separate storm sewer systems such as those serving, among other things, highways, are included in the regulatory definition of "small MS4." *See* 40 C.F.R. § 122.26(b)(16). As found by this Tribunal in its Order on Motion for Partial Accelerated Decision, Respondent operates small MS4s located in urbanized areas, that discharge pollutants in municipal stormwater from approximately 16,800 outfalls, and therefore discharges pollutants within the meaning of Section 502(12) of the Act, 33 U.S.C. § 1362(16). Order at 11.

C. From a Point Source

The term "point source" means "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). An MS4 consists of a series of catch basins, storm drains, ditches, gutters, pipes, and outfalls that eventually discharge into waters of the United States. "Unlike other individual point sources in a particular area, a municipal sewer system is regulated by a single entity that receives a single National Pollutant Discharge Elimination System permit. 33 U.S.C. § 1342(p)(3)(B)(i). And even though a municipal sewer system contains multiple outflows that can contribute contaminants to the water body, a single entity is responsible for monitoring and controlling all such discharges." *Anacostia Riverkeeper, Inc. v. Jackson*, 798 F Supp 2d 210, 213 (D.D.C. 2011); *see also NRDC, Inc. v. County of Los Angeles*, 673 F. 3d 880, 885 (9th Cir. 2011) ("Under the Clean Water Act, MS4s fall under the definition of 'point sources.'"). *See id.* (holding that an outfall is a point source as defined by 40 C.F.R.§122.2, at the point where a municipal separate storm sewer discharges to waters of the United States); *see also* 40 C.F.R. § 122.26(b)(9). Even though there are multiple point sources located within a MS4, courts have repeatedly held that they are to be

treated as one entity for permitting purposes and therefore, as a single point source as defined by 33 U.S.C. § 1362(14).

As found by this Tribunal in its Order on Motion for Partial Accelerated Decision, Respondent operates and maintains a network of small MS4s in urbanized areas throughout New York state, which discharge municipal stormwater to waters of the United States through thousands of outfalls and, therefore, operates thousands of point sources, within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14). Order at 8.

D. To Waters of the United States

The Act prohibits the discharge of pollutants to "navigable waters." "Navigable waters" mean the waters of the United States and territorial seas, pursuant to Section 502(7) of the Act, 33 U.S.C. § 1362(7). "Waters of the United States" means, but is not limited to,

> (a) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
> (b) All interstate waters, including interstate "wetlands;"
> (c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams) ... the use, degradation, or destruction of which would or could affect interstate or foreign commerce including any such waters:
> (1) which are or could be used by interstate or foreign travelers for recreational or other purposes;
> (2) from which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
> (3) which are used or could be used for industrial purposes by industries in interstate commerce;
> (d) All impoundments of waters otherwise defined as waters of the United States under this definition;
> (e) Tributaries of waters identified in paragraphs (a) through (d) of this definition;
> (f) The territorial sea; and
> (g) "Wetlands" adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) through (f) of this definition.

40 C.F.R. § 122.2.

As found by this Tribunal in its Order on Motion for Partial Accelerated Decision, many of Respondent's approximately 16,800 MS4 outfalls discharge to waters of the United States, within the meaning of Section 502(7) of the CWA, 33 U.S.C. § 1362(7). Order at 8.

E. In Violation of a Permit

Section 301(a) of the Act prohibits the discharge of pollutants except, among other things, in compliance with a permit issued under Section 402 of the Act. 33 U.S.C. § 1311(a). As established above, Respondent is a person that discharges pollutants to waters of the United States from the thousands of point sources in its small MS4s throughout New York state. Accordingly, Respondent applied for and obtained coverage under New York's MS4 General Permit, and that coverage was in effect during the EPA's 2012 and 2013 audits of Respondent's facilities. As described above, New York's MS4 General Permit contains numerous terms and conditions that Respondent must follow in its operation of its MS4s. However, based on its own admissions, the findings of EPA's record requests and compliance audits, and testimony presented at the hearing in this matter, and as already found, in part, by this Tribunal, Respondent failed to comply with the following permit requirements, in violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

1. Respondent Failed to Implement Six Minimum Control Measures for Illicit Discharge Detection and Elimination ("IDDE")

a. Respondent Failed to Have a Written Directive for its IDDE Program (III.10.e)

As found by this tribunal in its Order on Motion for Partial Accelerated Decision, Respondent violated Part VIII.A.3.b.i of the 2010 MS4 GP by failing to have a written directive for an IDDE program from at least June 18, 2012 until February 5, 2016. Order at 12-13. However, Respondent created the written directive only after the EPA ordered it to do so, in its June 5, 2014 compliance order, and there is no evidence that it had ever been created prior to the

audits and order.[5] CX 40 at 7, 19; CX 47 at 7, 19. Respondent was in violation of this requirement for more than five years before the Complaint was served, on June 20, 2016. Therefore, Respondent's noncompliance started on or before July 1, 2011, the later date chosen by the EPA in its discretion, and ended when Respondent submitted the required written directive to the EPA on February 5, 2016, lasting for a total of 1680 days. CX 59 at 3-4, 31-33; Tr. 326:7.

b. Respondent Failed to Develop and Implement Procedures for Identifying, Locating, and Eliminating Illicit Discharges (III.10.f)

Part VIII.A.3.g of the MS4 GP requires permittees to develop and implement a program to detect and address non-stormwater discharges to the small MS4; the program must include, *inter alia*, procedures for identifying and locating illicit discharges (trackdown); procedures for eliminating illicit discharges; and procedures for documenting actions.

In its Records Request to Respondent's Region 9 office, the EPA requested, among many other things, "[w]ritten procedures for field screening outfalls and procedures for IDDE." CX 13 at 2, row 16; Tr. 55:21-23. In the column asking whether the document was provided, Respondent wrote "No," and in the column asking for document title(s) and date(s), Respondent wrote "Instructions for Conducting Outfall Inspections." CX 13 at 2, row 16; Tr. 56:2-11. Regarding the same request to Region 8, Respondent provided "Outfall Inspection and training procedures." CX 34 at 2, row 18. And, in response to the same request to Region 5, Respondent again provided the Instructions for Conducting Outfall Inspections, and also provided a document named "Operations Stormwater Outfall Inventory Form." CX 37 at 2, row 16.

[5] This is true notwithstanding Ms. Kubek's testimony to the contrary, in which she mistakenly conflates two distinct permit requirements. See Tr. 471:4-472:18.

However, as Ms. Arvizu explained at the hearing, instructions for outfall inspections are not, in and of themselves, a program for the detection and elimination of illicit discharges. Tr. 55:16-59:1. The hallmark of a "program" is that it is "a plan of action to accomplish a specified end."[6] Far from demonstrating a program to accomplish the detection and elimination of illicit discharges, Respondent's instructions for outfall inspections merely describe field procedures for how to perform inspections. Tr. 56:10-12; 57:21-58:6. They do not describe a plan for how Respondent would locate and eliminate illicit discharges and document the actions it took to detect and eliminate illicit discharges. *Id.* In fact, the document itself states that "[a]lthough this is beyond the scope of the outfall inspection process, the protocol to eliminate suspected illicit discharges is discussed in the Environmental Handbook for Transportation Operations …" CX 30 at 527. However, the 2011 Environmental Handbook (which was the version in effect at the time of the audits), dedicates less than two pages to illicit discharge detection and elimination, most of which is a recitation of Respondent's permit obligations, and none of which describes a program for detecting and eliminating illicit discharges. CX 58 at 108-09. In fact, the Environmental Handbook takes a completely passive, almost incidental, approach to illicit discharge detection, instructing DOT staff to act only if they happen to discover an illegal connection or illicit discharge during the conduct of other duties. *Id.* at 108. For example, the handbook states, "[d]ischarges or connections that are discovered during construction or reconstruction of a highway facility or appurtenance should be examined and allowed only upon application for, and approval of, a Highway Work Permit," and, "[m]aintenance staff should look for evidence of private connections and illicit discharges while performing their regular

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[6] *See* https://www.dictionary.com/browse/program (last visited August 16, 2018); *see also* https://www.merriam-webster.com/dictionary/program (last visited August 16, 2018); and https://www.google.com/search?q=definition%20of%20program&cad=h (last visited August 16, 2018).

maintenance activities within the right-of-way." CX 58 at 108, 109. As for tracking down and eliminating an illicit discharge that DOT staff might happen to discover, the handbook merely instructs DOT staff that, "Maintenance personnel are not responsible for investigating or cleaning up illicit discharges, illicit connections or illegal dumping not generated by the crew," and to simply "report the finding to their Highway Maintenance Supervisor." CX 58 at 109.

Regarding what happens once the Highway Maintenance Supervisor has been notified, the handbook states that she/he "will immediately report the discovery to the Resident Engineer (RE), who should document the finding and arrange for a site investigation by the appropriate agency...." CX 58 at 109. But it says nothing after that about illicit discharge detection and elimination, and Respondent was unable to provide any written procedures describing which agency might be contacted, what the DOT's role would be thereafter, and how elimination of the illicit discharge would be confirmed and documented.

Respondent's June 2012 SWMP Plan, in a section called "NYSDOT Illicit Discharge Detection and Elimination Plan," incorporates the IDDE section from the Environmental Handbook, and adds the following paragraph (which does not appear in the 2011 Environmental Handbook that was in effect at the time of the audits):

> "If the illicit discharge involves sanitary sewage, the New York State Department of Health (DOH) will take the lead in the investigation. If the illicit discharge does not involve sanitary sewage, the NYSDEC is responsible for performing the investigation. However, the NYSDOT should assist these agencies in their investigations." CX 30 at 180.

This is consistent with the statements of Respondent's representatives to the EPA auditors that Respondent's staff would merely refer any illicit discharges to the DOH or DEC. CX 35 at 14-15; CX 39 at 15: Tr. 57:3-4. And, during the audit of Region 5, Respondent's Maintenance Environmental Coordinator (MEC), who is responsible for, among other things, "integrating environmental stewardship activities throughout NYSDOT Operations," and "improved

environmental training for maintenance staff," stated that on occasion Respondent's staff will accompany the other agencies on follow-up field visits, but would take no action to eliminate the source of the illicit discharge, beyond reporting it. CX 30 at 193; CX 39 at 15. The auditors were also told that Respondent does not have written procedures to investigate illicit discharges other than sending information to other agencies for follow-up activities. CX 39 at 15.

Significantly, Respondent had no procedures for how staff would determine whether a discharge involves sanitary sewage, whom to contact at the Department of Health ("DOH") or DEC, how to follow up, and how to ensure and document the elimination of the illicit discharge. *Id.* In fact, the next section of the SWMP Plan, which refers to a Memorandum of Understanding ("MOU") between Respondent and the DOH for purportedly addressing illicit sewage discharges into Respondent's MS4, contains the following parenthetical:

> "(Note: The content of this MOU is relevant; however, this MOU should be revisited with NYSDOH to determine the need to update the MOU to better reflect Illicit Discharge Detection and Elimination requirements and to identify appropriate agency contact staff. This activity is listed as a measurable goal at the end of this section.)"[7] CX 30 at 180.

Respondent's June 2012 SWMP Plan also refers to the Highway Design Manual, Chapter 8, Highway Drainage, and says:

> "Subsection 8.2.3 of the Highway Design Manual contains the policy regarding private connections and discharges to NYSDOT's stormwater system, including sanitary and non-stormwater connections. This section includes guidance to project designers regarding the consideration, identification and elimination of private connections to NYSDOT's stormwater system and illicit sanitary and stormwater discharges into the drainage system." CX 30 at 179.

That same paragraph states that, "NYSDOT has developed a DRAFT Engineering Instruction to clarify and emphasize department policy regarding sanitary connections,

[7] This is more than eight years after Respondent obtained coverage under the first permit containing this requirement. CX 2 at 14-15. As previously noted, Respondent's original SWMP was due to be fully implemented by January 8, 2008. CX 1 at 1.

stormwater connections, sanitary discharges, and illicit discharges…," but notes that "[t]he draft Engineering Instruction has not been issued, and is, therefore, not yet in effect." *Id.* And Subsection 8.2.3 of the Highway Design Manual[8] contains only two references to possible illicit discharges (without referring to them as such), and provides the same vague guidance described above:

> "The discharge of private sanitary sewer systems into a state highway drainage facility is illegal. Department representatives who suspect a private sanitary sewer connection to a storm sewer, culvert, or open channel within the right of way should contact the local representative of the Department of Health for their recommendation in removing the subject trespass. If the sanitary sewer pipe terminates outside the right of way and the effluent flows into a highway drainage facility, the Department's representative should contact the Department of Health and request the necessary corrective action be taken." Att. A at 18.

And,

> "There will be locations where connections to the state's storm drainage system were constructed without our knowledge or approval and where damage has occurred or may occur in the future. In situations where designers suspect this to be the case, they should first consult with the Resident Engineer for whatever historical information may be available. If there is potential for damage, or if damage has occurred in the past and it is clear that we cannot correct the situation at nominal cost, a coordinated approach by the Department and the municipality is advisable." Att. A at 19.

Neither of these provisions sets forth any procedures or instruction for the detection of non-sewage illicit discharges, nor are there procedures for the actual elimination and documentation of any such discharges; the provisions also contain no details about how or whom to contact at the DOH or municipality, or on how to ensure the elimination of an illicit discharge and document any actions taken. Finally, the "Outfall Inspection and training procedures" provided during the Region 8 audit is a slide presentation that contains only one slide relevant to

[8] The 2011 version of Chapter 8 of the Highway Drainage Manual is included as a link in Respondent's 2012 SWMP Plan. However, that link has since been updated, and now points to a more recent version. As described in the audit reports, the EPA reviewed the 2011 version. CX 30 at 17, 246; CX 35 at 14, 244; CX 39 at 14, 262.

illicit discharges, which merely summarizes the vague procedures for referral described above, and contained in the 2012 SWMP Plan and 2011 Environmental Handbook. CX 35 at 14-15, 541.

During the audit of Region 9, the EPA asked for IDDE trackdown, elimination and documentation procedures, and Respondent's staff explained that formal procedures had not been implemented for identifying, locating, and eliminating illicit discharges. Further, at all three audits, several of Respondent's staff who were interviewed were not aware of what an illicit discharge is, or how to identify one. CX 30 at 15; CX 35 at 15; CX 39 at 15. In addition, notwithstanding the admonition on slide 28 of the "Outfall Inspection and training procedures" that DOT inspectors should notify the Regional Maintenance Environmental Contact (MEC) if a suspected illicit discharge is found, during the outfall site visits conducted as a component of the Region 9 audit, a DOT seasonal intern stated that he had observed dry weather flows at a couple of the outfalls that he had inventoried, but that the flow had "looked like stormwater" and so he had not informed anyone of a potential illicit discharge. CX 30 at 17.

Therefore, Respondent violated Part VIII.A.3.g of the MS4 GP by failing to develop and implement an adequate program to detect and address non-stormwater discharges to the small MS4 that includes procedures for identifying and locating illicit discharges (trackdown), procedures for eliminating illicit discharges, and procedures for documenting actions. CX 13 at 1, row 9; CX 30 at 17-18; CX 34 at 2, row 11; CX 37 at 2, row 16; Tr. 57:14-58:6; 59:2-18; and 59:19-60:4; *see also* CX 37 at 2, row 11; Tr. 303:5-21.

In its June 5, 2014 compliance order, the EPA ordered Respondent to develop and implement a program by January 1, 2015. CX 47 at 19. Respondent demonstrated compliance with this requirement with its submission, on December 1, 2015, of a complete program and

procedures for the detection, elimination, and documentation of actions on illicit discharges. CX 58 at 15-21; Tr. 327:3. Among other things, these six pages of new procedures establish a Regional Illicit Discharge Point of Contact within each DOT region; clarify and detail the process for working with other agencies and/or municipalities to track down and eliminate illicit discharges; establish an "Investigation Team" containing all of the people responsible for tracking down and eliminating the discharge; expand the instructions for DOT staff who initially confirm the illicit discharge to include not only the previously provided instructions for outfall reconnaissance inventory, but also instructions on "indicator monitoring" to help determine the nature of the discharge; and incorporate a new database for tracking illicit discharges from detection through elimination. *Id.*

Respondent created the IDDE program only after the EPA ordered it to, and there is no evidence that such a program ever existed prior to the EPA audits and compliance order.[9] Therefore, this violation began more than five years before the Complaint was served, on June 20, 2012, and lasted from at least July 1, 2011, the later date chosen by the EPA in its discretion, until December 1, 2015, for a total of 1614 days.

c. Respondent Failed to Develop and Maintain a Map of All Outfalls (III.10.c)

Part IV.C.3.b of the 2003 MS4 GP required permittees to develop and maintain a map, showing the location of all outfalls and the names and location of all waters of the United States that receive discharges from those outfalls, and Part VIII.A.3.b.i of the 2010 MS4 GP requires permittees who began coverage under a previous version of the permit to maintain the outfall

[9] This is true notwithstanding Ms. Kubek's testimony that what Respondent submitted to the EPA in satisfaction of this requirement was the "exact same procedures," conceding in the very same sentence that "we were required to elaborate on that program." Tr. 473:9-10.

map, at a minimum within the permittees' jurisdiction in the urbanized area, showing the location of all outfalls.

At the time of the audit, the EPA compared several MS4 outfalls in the field to the geographic information system ("GIS") map that Respondent maintained of its outfalls, and identified at least five outfalls in Regions 5 and 9 that were not on Respondent's map. In Region 9, the EPA observed an outfall from wet pond near the intersection of Nanticoke Drive and Highway 26, in Endicott, New York, that collects stormwater runoff from Highway 26. CX 30 at 12, 678 (Photo 12). Stormwater discharges from the outfall flow north and eventually enter Nanticoke Creek. CX 30 at 12, 679 (Photos 13 and 14). The outfall was not displayed in Respondent's GIS map. *Id.* In Region 5, the EPA visited nine maintenance facilities, and requested GIS information for four of those, and each of the four had an unmapped outfall. CX 39 at 13. In one case, the outfall was located in a different location than depicted on the map. CX 39 at 24-25, 50 (Photo 17). Therefore, Respondent violated Part VIII.A.3.b.i of the 2010 MS4 GP by failing to maintain a map, showing the location of all outfalls and the names and location of all waters of the United States that receive discharges from those outfalls.

In its June 5, 2014 compliance order, the EPA ordered Respondent to develop and submit a map showing the location of all outfalls, including, but not limited to those found to be missing, by April 30, 2015. CX 47 at 19. Respondent demonstrated compliance with this requirement with its submission, on April 30, 2015, of its 2015 Outfall Reconnaissance Inventory GIS Database. CX 53 at 3, 7; Tr. 328:17-20. Because Respondent mapped the missing outfalls only after the EPA ordered it to, and there is no evidence that the missing outfalls had been inventoried at any point prior to the EPA audits and compliance order, this violation began more than five years before the Complaint was served, on June 20, 2012. Therefore, it lasted

from at least July 1, 2011, the later date chosen by the EPA in its discretion, until April 30, 2015, for a total of 1399 days.

d. Respondent Failed to Timely Complete an Outfall Reconnaissance Inventory (III.10.d)

Part VIII.A. of the 2008 MS4 GP requires permittees authorized to discharge under the 2003 MS4 GP to continue to implement the MCMs described in Part VIII.A.1-6, and Part VIII.A of the 2010 MS4 GP requires permittees authorized to discharge under the 2008 MS4 GP to continue to implement the MCMs described in Part VIII.A of that permit. Part VIII.A.3.d of the 2008 MS4 GP requires all permittees to conduct an outfall reconnaissance inventory ("ORI") addressing every outfall within the urbanized area within the permittee's jurisdiction at least once every five years, with reasonable progress each year, as described in the EPA publication entitled "Illicit Discharge Detection and Elimination: A Guidance Manual for Program Development and Technical Assessment." Because Respondent obtained coverage under the 2008 MS4 GP on May 1, 2008, its ORI was due to be completed by May 1, 2013.

At the audit of Region 8, Respondent's staff stated that the ORI of outfalls in Dutchess, Rockland, Orange, and Ulster counties might not be completed by the end of the permit term, as they were focusing on completing the ORI in the East of Hudson watershed counties (Westchester and Putnam counties). CX 35 at 11;[10] CX 53 at 7; Tr. 54:23-55:7. According to one DOT Environmental Specialist, as of the date of the audit, the consultant that Respondent had hired to conduct the ORI had completed about 89 percent of the East of Hudson watershed counties, (3,900 out of 4,381 outfalls). And, according to the Acting Regional Environmental Manager, there was no specific performance goal for annual outfall verification and screening

[10] The audit report mistakenly states that, "NYSDOT's outfall reconnaissance activities under the current Permit must be completed by April 30, 2015." As described above, the terms of the permit are clear that it was due by May 1, 2013.

activities, and the inventory of Dutchess, Rockland, Orange, and Ulster counties might not be finished by the end of the permit term. *Id.* Finally, based on an ORI GIS database that Respondent later submitted to the EPA, as of May 1, 2013, Respondent had inventoried just about 50% of the Region 8 outfalls.[11] CX 53 at 7; Tr. 54:23-55:7. Therefore, Respondent violated Part VIII.A of the 2010 MS4 GP by failing to complete the outfall reconnaissance inventory due by May 1, 2013.

In its June 5, 2014 compliance order, the EPA ordered Respondent to complete, and submit documentation of, an outfall reconnaissance inventory for all outfalls in Region 8 by April 30, 2015. CX 47 at 19-20. Respondent demonstrated compliance with this requirement with its submission, on April 30, 2015, of its 2015 ORI GIS database. CX 53 at 3, 7; Tr. 329:5-7.[12] Because this requirement was due to be completed by May 1, 2013, that is the date taken as the start date of the violation. Tr. 329:14-330:8. Therefore, this violation lasted from May 1, 2013 until April 30, 2015, for a total of 729 days. [13]

e. Respondent Failed to Fully Implement its SWMP Plan by Failing to Follow the SWMP Plan's Outfall Reconnaissance Field Screening Procedures (III.10.a.ii)

Part IV.D of the MS4 GP requires permittees to fully implement their SWMP Plans, unless otherwise stated in the permit. Section III.2.d of Respondent's 2012 SWMP Plan, which,

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[11] According to Section III.2.a of Respondent's 2012 SWMP Plan, "By April 2008, NYSDOT had mapped 18,184 outfalls located along state-owned highways within the Designated Urbanized Areas in New York," and 8,188 of those outfalls are in Region 8 CX 30 at 181.

[12] Respondent noted, in its April 30, 2015 submission, that, as a result of re-inspecting its outfalls, in light of changes in the urban area boundaries, the current number of DOT MS4 outfalls, statewide, is 16,708. CX 53 at 3.

[13] Because the permit requires reasonable progress each year of the five-year permit term toward completing the ORI, and Respondent had only completed approximately 50% at the time of the November 27, 2012 audit (with just 6 months remaining in the permit term), the EPA could have chosen the audit date – or even the mid-point in the permit term (November 1, 2010) - as the date of noncompliance, since Respondent had not made reasonable progress by that point. That calculation would have resulted in a total duration of 1,641 days, instead of 729.

in part, implements MCM 3 – IDDE, purports to contain "Instructions for Conducting Outfall Inspections," which include, by reference, the procedures contained in Chapter 11 of the EPA publication, "Illicit Discharge Detection and Elimination: A Guidance Manual for Program Development and Technical Assessments." Chapter 11 is entitled, "The Outfall Reconnaissance Inventory." CX 30 at 183, 524.

During the audit of Respondent's Region 9, the EPA observed that DOT staff were not following the ORI procedures in the EPA guidance. CX 30 at 14-15. First, DOT staff explained that the EPA guidance was used to train seasonal interns who conduct outfall reconnaissance inventories for Respondent. CX 30 at 15. And when asked by the EPA to demonstrate outfall reconnaissance field screening and documentation procedures, a DOT seasonal intern checked for water clarity and color by placing his hand into the flow from an outfall to observe the water, in contravention of the EPA IDDE guidance, which states that sensory indicators (e.g., odor, color, turbidity, and floatables) do not always reliably predict illicit discharges, because the senses can be fooled, and this may result in a "false negative;" it instead recommends that the best way to measure color is to collect the discharge in a clear sample bottle and hold it up to the light. *Id.* The DOT Seasonal Intern did not use a sample bottle as part of his physical indicator detection process. *Id.* Therefore, Respondent violated Part IV.D of the MS4 GP by failing to fully implement the procedures in Section III.2.d of its 2012 SWMP Plan.[14]

In its June 5, 2014 compliance order, the EPA ordered Respondent to submit a certification that ORI inspections and field screening activities would be done in accordance with prescribed procedures by September 1, 2014. CX 47 at 14. Respondent demonstrated compliance

[14] This is true notwithstanding Ms. Kubek's confused testimony that submitting an outfall reconnaissance inventory demonstrated that Respondent had complied with its outfall reconnaissance procedures. Tr. 477:7-13. Significantly, Ms. Kubek was not present for the EPA's observations about the latter. Tr. 508:1-3.

with this requirement on September 2, 2014, when it submitted the required certification. CX 49 at 2, 6-7; Tr. 330:17-331:8. Because this violation was first observed on June 20, 2012, that was taken as the start date. Therefore, this violation lasted from at least June 20, 2012 to September 2, 2014, or 804 days.

f. Respondent Failed to Inform the Public of the Hazards Associated with Illegal Discharges and the Improper Disposal of Waste (III.10.g)

Part VIII.A.3.h of the 2010 MS4 GP requires permittees to inform the public of the hazards associated with illegal discharges and the improper disposal of waste; Part VIII.A of that permit states that traditional non-land use control MS4s and non-traditional MS4s (which include, for example, departments of transportation) should consider their public to be the employee/**user population**, **visitors**, or contractors/developers, and provides examples which include, but are not limited to, the general public using or living along transportation systems. (emphasis added). Notwithstanding Respondent's commitment, in its 2003 SWMP, to ensure that the "[p]ublic, employees, [and] businesses [are] informed of hazards from illicit discharges" Respondent's 2012 SWMP Plan contained no provisions, procedures, or goals to do so. CX 1 at 4; CX 30 at 178-84.

During the audits of all three Regions, the EPA requested documentation that Respondent had informed the public of the hazards associated with illegal discharges and improper disposal of wastes, but was told that Respondent had not provided formal outreach to the public regarding illegal discharges and the improper disposal of waste. CX 30 at 15; CX 35 at 15-16; CX 39 at 16. During the Region 9 audit, DOT staff pointed the EPA to a webpage it had created, about stormwater management issues (http://www.dot.ny.gov/divisions/engineering/environmentalanalysis/water-ecology/stormwater-management). CX 30 at 15. While, at the time, that webpage contained material related to DOT's

Construction and MS4 Stormwater Management Programs, and including reports and websites about the sources of, and potential impacts on, water bodies from Phosphorus, Nitrogen, and Pathogens, and illicit dischargers, Respondent could not demonstrate any affirmative effort to reach its users or visitors with any such information, instead, passively relying on individuals to seek it out. *Id.* Finally, at the hearing, Ms. Kubek admitted that Respondent had made no effort to educate anyone beyond its staff regarding the hazards of illicit discharges when she testified that Respondent took the limited view that the word "public" meant only its employees, whom it also considered to be its entire user population. Tr. 473:20-22. Significantly, that testimony not only contradicts the permit definition of "public," and Respondent's 2003 commitment to inform both the public **and** its employees, but also contradicts Respondent's own statements, in its SWMP Plans (including the 2012 version), that, "NYSDOT directs its education and outreach to its staff, consultants and contractors, local Departments of Public Works, and the public that is affected by the transportation system, **specifically the travelling public** and property owners along the highways owned and maintained by the State," and that "NYSDOT defines 'public' to be its staff, consultants and contractors, local Departments of Public Works, and the public that is affected by the transportation system**, specifically the travelling public** and property owners along the highways owned and maintained by the State." CX 30 at 166, 174; CX 59 at 45, 53 (emphasis added). Moreover, the EPA's Phase II Stormwater Rule gives guidance on the types of activities that MS4 operators should consider using to inform that public, including storm drain stenciling; a program to promote, publicize, and facilitate public reporting of illicit connections or discharges; and distribution of visual and/or printed outreach materials. 64 F.R. 68722 at 68757. Therefore, due to Respondent's limited view of its public, and lack of affirmative efforts to inform its users and visitors, it violated Part VIII.A.3.h of the 2010 MS4 GP by failing to

inform the public of the hazards associated with illegal discharges and the improper disposal of waste.

In its June 5, 2014 compliance order, the EPA ordered Respondent to develop, implement, and submit a written procedure to ensure that the public is informed of the hazards associated with illegal discharges and the improper disposal of waste by January 1, 2015. CX 47 at 19. This violation was corrected on April 1, 2015, when Respondent submitted documentation that it had developed public education posters for placement in highway rest stops, and had developed procedures for maintaining the posters every six months and updating them every two years. CX 52 at 7, 51; RX 1; Tr. 331:13-332:7; 517:22-518:6; 538:12-539:5. Because Respondent created the materials and procedures for informing the public about illicit discharges only after the EPA ordered it to, and admitted that they had never been created before the EPA order, Respondent was in violation of this requirement for at least five years before the Complaint was served, on June 20, 2016. Therefore, Respondent's noncompliance started on or before July 1, 2011, the date chosen by the EPA in its discretion, and ended when Respondent demonstrated compliance on April 1, 2015.[15] Therefore, this violation lasted for at least 1,370 days.

2. Respondent Failed to Implement Five Minimum Control Measures for Construction Site Stormwater Control ("CSSC")

a. Respondent Failed to Implement its SWMP Plan by Failing to Establish Goals and Procedures, a Rating System, or a Checklist for Conducting Construction Project Reviews (III.10.a.i)

As found by this tribunal in its Order on Motion for Partial Accelerated Decision, Respondent violated Part V.B of the 2010 MS4 GP by failing to retain records of the Quality

[15] Ms. Arvizu testified that the EPA chose July 1, 2011 as the beginning of many violations because that was just within the applicable 5-year statute of limitations period. *See e.g.* Tr. 327:11-20.

Assurance/Quality Control ("QA/QC") goals and procedures, a rating system, or checklist called for by its SWMP Plan from at least June 18, 2012 until November 3, 2014, when the EPA received Respondent's certification that it was implementing the required program. Order at 15-16. However, Respondent began implementing the required QA/QC program only after the EPA ordered it to, and there is no evidence that it had ever done so prior to the EPA audits and compliance order. Therefore, Respondent was in violation of this requirement for more than five years before the Complaint was served, on June 20, 2016. Respondent's noncompliance started on or before July 1, 2011, the later date chosen by the EPA in its discretion, and ended on November 3, 2014, for a total of 1221 days.

b. Respondent Failed to Implement its SWMP Plan by Failing to Inspect Temporary Erosion and Sediment Controls Weekly and Within Twenty-Four Hours of Rainfall Over One Half Inch (III.10.a.iii)

As previously noted, Part IV.D of the MS4 GP requires permittees to fully implement their SWMP Plans, unless otherwise stated in the permit. Section IV.i.b. of Respondent's May 2012 SWMP Plan, which is intended to implement MCM 4, requires that all temporary erosion and sediment controls be inspected by the contractor every seven calendar days as well as after each rainfall of 0.5 inch or more within a 24-hour period to determine if the control is functioning as intended. CX 30 at 188.

During the construction site visits conducted as a component of the Region 9 audit, the EPA requested construction stormwater runoff control inspection records for the three months prior to the audit (April 2012 through late June 2012) to assess the frequency and adequacy of the inspections at the Route 201/434 construction project and the I-81/86 bridge replacement project. CX 30 at 23, 636-37. The EPA reviewed the frequency of those inspections, and observed that inspections had not been conducted after rainfall events producing greater than

0.5" of precipitation that falls within a 24-hour period in April, May, or June 2012. *Id.* Specifically, for the Route 201/434 construction project, stormwater inspections were conducted 14 days apart from April 25 to May 9, 2012, and from May 9 to May 23, 2012. *Id.* And, for the I-81/86 bridge replacement project, the inspections conducted between March 20 and June 18, 2012 were identified as "Standard 7 calendar day inspections" on the inspection report forms, and none of the inspections was documented as a post-rainfall event inspection. *Id.* This, despite the fact that meteorological history shows that over 0.5 inch of rain fell in Binghamton, New York on six dates in April, May, and June 2010: April 22 (0.77 inch); April 23 (0.72 inch); May 8 (0.61 inch); May 14 (0.76 inch); May 15 (0.56 inch); June 1 (0.61inch). *Id.*[16] Therefore, Respondent violated Part IV.D of the MS4 GP by failing to fully implement the procedures in Section IV.i.b. of its 2012 SWMP Plan from at least April 1 to June 30, 2012, for a total of 90 days. Tr. 333:9-334:24.

c. Respondent Failed to Develop a Program for the Receipt and Follow Up on Public Complaints about Construction Site Stormwater Runoff (III.10.i)

Part VIII.A.4.a.v of the 2010 MS4 GP requires all permittees to develop, implement, and enforce a program that describes procedures for the receipt and follow up on complaints or other information submitted by the public regarding construction site stormwater runoff.

In its Records Request to Respondent's Region 9 office, the EPA requested "Procedures for receipt and follow up on complaints or other information submitted by the public regarding construction sites," and an example of an "actual complaint call documentation and resolution." CX 13 at 4, row 37; Tr. 60:18-62:5. In the column asking whether the document was provided, Respondent wrote "No," and in the column asking for document title(s) and date(s), Respondent

[16] The EPA also reviewed inspection records for several other construction sites, and found that the time between inspections at several other sites ranged from 8 days to 27 days. CX 35 at 20-21, 641, 650, 661.

wrote "None available." *Id.* Regarding the same request to Region 8, Respondent answered "Yes," but pointed to a document titled "Narrative Construction Procedures" which, as the name makes clear, is not a program for receipt and follow up on public complaints. CX 34 at 5, row 44. And, in response to the same request to Region 5, Respondent again answered "Yes," but then, inexplicably, described a map location in the "Document Provided" column. CX 37 at 4, row 38; Tr. 62:24-63:11.

During each audit, the EPA repeated its requests for the public complaint procedures, but did not receive them. CX 30 at 25-26; CX 35 at 23-24; CX 39 at 20. At the Region 9 and Region 8 audits, Respondent's Statewide Stormwater Program Coordinator pointed to a stormwater complaint e-mail address on Respondent's stormwater web page as a method to receive public complaints about stormwater-related issues. CX 30 at 26; CX 35 at 23. At the Region 8 audit, DOT staff gave the EPA a document entitled "Informal Procedures for Receipt and Follow-up on Complaints from the Public Regarding Construction Sites," but that document only explains follow-up procedures for public complaints that are filed through DEC. CX 35 at 23-24; 627-28. And, at the Region 5 audit, DOT staff gave the EPA several e-mail communications between DOT and DEC staff about complaints received from community members on a 2011 construction project at Route 5 over 18 Mile Creek. CX 39 at 20. However, none of these submissions contained procedures regarding how Respondent would follow up on public complaints it receives about construction stormwater runoff. And, significantly, at all three audits, DOT staff explained that Respondent had no established procedures for receiving and responding to such complaints. CX 30 at 25-26; CX 35 at 23; CX 39 at 20. Therefore, Respondent violated Part VIII.A.4.a.v of the 2010 MS4 GP by failing to develop a system to

receive and respond to public complaints about Respondent's construction site stormwater runoff.

In its June 5, 2014 compliance order, the EPA ordered Respondent to develop, implement, and submit the required procedures by July 1, 2014. Respondent submitted a Progress Report on July 1, 2014, which states, regarding this requirement, that:

> "Comments and inquiries from the public are received by email to Stormwater@dot.ny.gov or by phone to the Office of Environment (OOE). The mailbox is monitored daily by Ellen Kubek and Carl Kochersberger in the NYSDOT Office of Environment, Environmental Science Bureau. Phone calls and emails are also received by the Office of the Commissioner and forwarded to OOE. The Office of Environment is working with the Department's Office of External Relations to develop procedures for responding to public inquiries that are in accordance with official Department protocol." CX 48 at 147.

However, this submission did not constitute the required program. First, it presumed that all public complaints would come through the prescribed email address or particular phone numbers/offices, but says nothing about how complaints will be handled if they come from another contact at DOT. Nor does it indicate what would be done to follow up on the complaints. More importantly, Respondent's submission itself acknowledged that the procedures were still being developed at the time, and, therefore, a complete program to receive and follow up on public complaints did not yet exist – more than two years after first being asked for them in the EPA's May 18, 2012 records request to Region 9.

Respondent finally demonstrated compliance with this requirement on September 30, 2015, when it submitted the required procedures to the EPA. CX 57 at 1-2; Tr. 335:19-336:135:5; 522:2-7. The final procedures changed who at DOT would receive public complaints, from the Office of the Environment to either the Office of Government Affairs or one of the Regional Public Information Officers. And, whereas the first submission contains no procedures

for follow up, the final submission provides that complaints or inquiries will be forwarded to the appropriate Regional Construction Engineer (RCE) for follow up. CX 48 at 147; CX 57 at 1-2.

Notwithstanding its submission of a compliant public complaint procedure, Respondent argues that it was previously in compliance because it had an unwritten program for receiving and following up on public complaints about construction site stormwater before the EPA audits. Tr. 520:3-6; 522:2-7. However, the clear language of the permit requires "a program that **describes procedures**." (emphasis added). Clearly, for a program to describe procedures, it must be written.[17] Moreover, Ms. Kubek's testimony that adequate procedures existed at the time of the audit, and were simply written down for the EPA, strains credibility. The partial procedure submitted on July 1, 2014 likely did not exist at the time of the audit because it refers to Ms. Kubek herself, who did not yet work for Respondent at the time of the audits, and even a quick comparison of that submission with the final one shows that they are significantly different, and that the latter one is more complete. CX 48 at 147; CX 57 at 1-2. And, Ms. Kubek could not adequately explain why it took Respondent over 18 months to submit a procedure that purportedly already existed. Tr. 522:2-523:5. Therefore, Respondent violated Part VIII.A.4.a.v of the 2010 MS4 GP by failing to develop, implement, and enforce a program that describes procedures for the receipt and follow up on complaints or other information submitted by the public regarding construction site stormwater runoff.

Respondent developed the required complaint procedures only after the EPA ordered it to do so, and Ms. Kubek's testimony that it existed prior to the EPA audits and compliance order is both unfounded and contrary to the clear evidence in this matter. Therefore, this violation began

[17] And, as the Environmental Appeals Board has stated, "[a] fundamental canon of statutory construction is that if language is plain and unambiguous it must be given effect." *In re Arecibo & Aguadila Reg'l Wastewater Treatment Plants*, 12 E.A.D. 97, 130 n.60 (EAB 2005).

more than five years before the Complaint was served, on June 20, 2012, and it lasted from at least July 1, 2011, the later date chosen by the EPA in its discretion, until September 30, 2015, for a total of 1552 days.

d. Respondent Failed to Develop a Program to Ensure that Construction Site Contractors Have Received Erosion and Sediment Control Training (III.10.j)

Part VIII.A.4.a.vii of the 2010 MS4 GP requires all permittees to develop, implement and enforce a program that ensures that construction site contractors have received erosion and sediment control training before they do work within the covered entity' s jurisdiction. In its 2003 SWMP Plan, Respondent committed to the "education and training of construction site operators," and Respondent's 2012 SWMP Plan includes the following, under the heading "NYSDOT Construction Site Stormwater Runoff Control Program, 2. Site Inspection and Enforcement:"

> "Contractor/Subcontractor SPDES Permit Certification Form (CONR 5) – This form requires that contractors and subcontractors have staff on site that are Certified Trained Contractors in accordance with the SPDES General Permit for Stormwater Discharges from Construction Activity." CX 30 at 192.

Notwithstanding the requirement that contractors use the CONR-5 form, in Regions 9 and 8, Respondent was unable to demonstrate that the requirement was being enforced, or that a program or procedures were in place to ensure that construction site contractors received erosion and sediment control training.

In its records requests, the EPA requested "[d]ocumentation of education/training for construction site owner/operators, design engineers, DOT staff, and other individuals to whom the construction stormwater requirements apply." CX 13 at 5, row 40; CX 34 at 6, row 47; CX 37 at 4, row 41. In response, Respondent provided numerous documents describing erosion and sediment control requirements, a series of DEC sediment and erosion control training slides, and

other materials designed for training DOT staff in erosion and sediment controls. *Id.* However, those submissions all focus on DOT staff training, and none demonstrated how Respondent ensured that construction site contractors had received training. *Id.*

During the audits of Region 9 and Region 8, the EPA requested written procedures for ensuring that contractors had the proper training, but Respondent was unable to provide any. CX 30 at 24; CX 35 at 21-23. In fact, during the inspection of the Route 201/434 construction project, the EPA observed that the prime contractor had hired a subcontractor to perform the weekly stormwater inspections, but when the EPA requested the subcontractor's erosion and sediment control credentials, the DOT Engineer In Charge was not able to provide them. CX 30 at 24. Therefore, Respondent violated Part VIII.A.4.a.vii of the 2010 MS4 GP by failing to develop, implement, and enforce a program that ensures that construction site contractors have received erosion and sediment control training.

In its June 5, 2012 compliance order, the EPA ordered Respondent to develop, implement, and submit a written program that ensures construction site operator training. CX 47 at 18. At the hearing, Ms. Kubek testified that Respondent had already been in compliance because it used the CONR-5 form, and that the EPA ultimately conceded that the form alone was sufficient. Tr. 482:22-483:11, 568:20-569:13, 569:16-18. However, while the form may be a tool in ensuring that contractors receive the necessary training, the fact that Respondent was unable to produce any completed forms when asked (repeatedly) indicates that Respondent was not using the form, and, therefore, not ensuring compliance with this requirement.

Respondent demonstrated compliance with this requirement on July 1, 2014, when it submitted complete procedures designed to ensure that the form is properly used, submitted, reviewed, and maintained. CX 48 at 135-36; Tr. 336:19-337:1. Because Respondent could not

demonstrate that it had this program at any time prior to the audits or compliance order, this violation began more than five years before the Complaint was served, on June 20, 2012, and lasted from at least July 1, 2011, the later date chosen by the EPA in its discretion, until July 1, 2014, for a total of 1096 days.

e. Respondent Failed to Maintain All Erosion and Sediment Control Practices in the SWPPP in Effective Operating Condition at All Times (III.10.h)

Part VIII.A.4.a.i of the MS4 GP requires all permittees to develop, implement and enforce a program that provides protection equivalent to the New York State General Permit for Stormwater Discharges from Construction Activities ("CGP"), unless more stringent requirements are contained within the MS4 GP, and Part IV.A.1 of the CGP requires owners or operators to ensure that all planned erosion and sediment control practices are maintained in effective operating conditions at all times.

During the audits, the EPA observed numerous erosion and sediment control violations at six sites owned and operated by the Respondent, including evidence that pollutants had very likely been carried from several sources into Respondent's MS4 as well as directly into waters of the United States. CX 30 at 20-22, 631-47; CX 35 at 18-20, 640-46. In Region 9, the EPA found violations at the New York State Route 201/434 Bridge Replacement Project, the Prospect Mountain Phase I Construction Project, and the Interstate 81/Interstate 86 Bridge Project, and, in Region 8, the EPA found violations at the Route 9W over Cedar Pond Brook Stage 2 Project, the Sprain Brook Parkway over Route 119 Project, and the Interstate 287 Interchange 8 Project. *Id.*

The New York State Route 201/434 Bridge Replacement Project involved the replacement of two bridges carrying Route 201 over Route 434, and Route 201 over Vestal Road, with a land disturbance of approximately 18.4 acres, and stormwater runoff from the project discharged from basins to Bunn Hill Creek, a tributary to the Upper Susquehanna River.

CX 30 at 21, 636-41. During the audit, the EPA observed, among other things, inadequate silt fence maintenance, sediment and debris around storm drain drop inlets, improper materials storage, and inadequate perimeter controls. *Id.* Specifically, a storage area containing dirt and gravel stockpiles was observed near the southwest infiltration basin, but the stockpiles were not adequately covered or contained to prevent sediment runoff, and dirt was observed on top of and beyond the silt fence. *Id.* (Photos 1-5). In addition, storm drain drop inlets located along the median of Route 434 were surrounded by loose asphalt and sediment and did not have BMPs for inlet protection, and an unprotected storm drain drop inlet located on the northeast side of Route 434 had an accumulation of sediment and debris over the drain. *Id.*, (Photos 6-10). Sediment was also observed in the outlet pipe and at the outfall to Bunn Hill Creek, silt fences located along Bunn Hill Creek and adjacent to the northwest infiltration basin had gaps between sections, and some sections were detached from their wooden stakes. *Id.* (Photos 12-15). Significantly, the June 18, 2012 SPDES Stormwater Inspection Report provided to the EPA by the contractor, did not indicate any issues identified with the silt fence in this area. CX 30 at 637. Finally, sediment and gravel was observed near a storm drain drop inlet along Route 434 that did not have any inlet protection, and several sandbags were inside of the inlet. *Id.* (Photos 16, 17). Because of Respondent's failure to ensure the installation and maintenance of erosion and sediment controls at this site, there is a high likelihood that sediment, gravel, and other pollutants were discharged in stormwater into Bunn Hill Creek.

The Prospect Mountain Phase I Construction Project involved improvements to the roadways with and around the directional, three-leg NYS 17/I-81 Interchange in the City of Binghamton and Town of Dickson in Broome County, with an estimated planned disturbance of over 108 acres adjacent to the Chenango River. CX 30 at 21-22, 643-47. During the audit, the

EPA observed, among other things, inadequate perimeter controls, sediment and fine particles around several storm drain drop inlets, and a lack of perimeter controls in an active construction area. *Id.* Specifically, one area of the project had been recently graded, with disturbed, exposed soil, and construction staff were just then installing a silt fence around the perimeter of the area. *Id.*, (Photos 1-2). Further, the silt fence installed in a recently graded area along Truesdell Street did not fully enclose the exposed soil. *Id.* (Photo 3). In yet another area of the project, sediment and other fine particulates had accumulated around a storm drain drop inlet that had no inlet protection; in another area, erosion and sediment controls had not been installed on a recently graded embankment. *Id.* (Photos 5-7, 8). Because of Respondent's failure to ensure the installation and maintenance of erosion and sediment controls at this site, there is a high likelihood that sediment and other pollutants were discharged in stormwater into the Chenango River.

The Interstate 81/Interstate 86 Bridge Project involved replacing an existing bridge on the exit ramp from I-81 southbound to I-86 eastbound, that spans Park Creek, a tributary to the Susquehanna River. CX 30 at 22, 631-35. During the audit, the EPA observed, among other things, inadequate maintenance of silt fences and straw bale BMPs, and concrete washout being conducted in a different location than the one designated in the SWPPP. *Id.* Specifically, a section of silt fence on the East side and upgradient of Park Creek was collapsed due to rocks laying against/on top of the silt fence, and the silt fence was not entrenched into the ground in multiple locations upgradient of Park Creek, leaving significant gaps between the ground and the silt fence. *Id.* (Photos 1-3). In addition, a straw bale installed in the disturbed area on the north side of I-86 and East and upgradient of Park Creek as a BMP had fallen into Park Creek. *Id.* (Photo 4). A pile of uncovered and uncontained concrete washout waste was on the ground

upgradient of a storm drain inlet, and a concrete-stained flow pathway was observed from the pile to the storm drain inlet. *Id.* (Photos 5-7). Because the silt fence surrounding the inlet was not properly installed, concrete was downgradient of the silt fence, adjacent to the storm drain inlet. *Id.* (Photo 8). Not only was the concrete uncovered, uncontained, and reaching the storm drain, but the area being used for concrete washout was not a designated concrete washout area in the SWPPP. *Id.* Because of Respondent's failure to ensure the installation and maintenance of erosion and sediment controls at this site, there is a high likelihood that sediment, concrete, and other pollutants were discharged in stormwater into Park Creek.

The Route 9W over Cedar Pond Brook Stage 2 Project involved the replacement of a bridge over Cedar Pond Brook, and, at the time of the audits, was in the second of two phases, which consisted of realigning the intersection to the north of the bridge, widening of the roadway to the south of the bridge, and drainage system installation. CX 35 at 18-19, 640-46. Stormwater from the construction project area discharged to Cedar Pond Brook. CX 35 at 642 (Photo 2). During the audit, the EPA observed, among other things, the improper storage of materials in the northern staging area, deteriorated and broken sand bags spilling sand upgradient of storm drain inlets, improperly installed silt fencing, and accumulated sediment in a construction entrance. *Id.* Specifically, multiple buckets containing liquids and a spray can were stored on the impervious ground surface without coverage or containment behind the portable toilet in the staging area approximately 70 yards northeast of the intersection of Route 9W and County Road 108. *Id.* (Photos 3-5). One of the buckets did not have a cover and contained what appeared to be a liquid petroleum product, and an adjacent bucket, which did have a cover, had material on top of the bucket cover which appeared to contain liquid petroleum products. *Id.* (Photos 4, 5). In addition, several sandbags used as weights for a street sign at the northeast corner of Route 9W and

County Road 108 were deteriorated or broken open near two unprotected storm drain inlets, and sand had spilled out onto the ground. *Id.* (Photos 9-13). There was also a gap in the silt fence behind the soil stockpile in the staging area on the east side of Route 9W near the southern end of the bridge, and an area of silt fence about 15 feet to the south of this section was not entrenched into the ground. *Id.* (Photos 14-17). Finally, accumulated sediment was observed in the rock-lined construction entrance from Highview Area to the staging area on the east side of Route 9W near the southern end of the bridge. *Id.* (Photos 18, 19). Because of Respondent's failure to ensure the installation and maintenance of erosion and sediment controls at this site, there is a high likelihood that sediment, sand, and other pollutants were discharged in stormwater into Cedar Pond Brook.

The Sprain Brook Parkway over Route 119 Project involved the replacement of two bridges on Sprain Brook Parkway over Route 119, and included a temporary construction staging area located about 1.5 miles north of the Sprain Brook Parkway Bridge over Route 119, between the southbound Sprain Brook Parkway exit and entrance ramps at Grasslands Road. CX 35 at 19, 647-57. During the audit, the EPA observed, among other things, inadequate silt fence installation and maintenance in the staging area, inadequate silt fence installation and maintenance in the active construction area, sediment in the roadway from vehicle tracking, and the lack of inlet protection for storm drain inlets in the active construction area. *Id.* Specifically, in the staging area, a silt fence installed around a soil stockpile in the southern portion of the staging area was collapsed and did not encompass the entire stockpile. *Id.* (Photos 1, 2). Significantly, this issue was identified by the DOT Environmental Specialist in her stormwater inspection on November 13, 2012, but had not been addressed prior to the EPA's site visit. CX 35 at 649. The EPA also observed that a silt fence installed along the western perimeter of the

staging area had collapsed in multiple locations (see Photographs 3, 4, and 5), and that silt fence had not been installed around the material stockpile area in the northern portion of the staging area. *Id.* (Photos 3-8). Significantly, the latter issue was identified by the DOT Environmental Specialist in her stormwater inspection on November 20, 2012, but had not been addressed prior to the EPA's site visit. CX 35 at 649. In the active construction area of the project, sediment from vehicle tracking was present on Route 119 at the entrance to the construction staging area and project trailer on the west side of the bridge over Route 119, and a portion of the silt fence installed around a storm drain inlet along the eastern side of southbound Sprain Brook Parkway had collapsed. *Id.* (Photos 9-15). And, multiple sections of silt fence installed along the eastern side of southbound Sprain Brook Parkway had collapsed or accumulated sediment to a height of more than half the height of the silt fence. *Id.* (Photos 16-20). Significantly, both the November 13 and 20, 2012 site inspection reports identify that the contractor should "repair silt fence along toe of slope" for Sprain Brook Parkway, but such repairs had either not been made, or the same problem had recurred and remained uncorrected at the time of the EPA's site visit. CX 35 at 650. Finally, notwithstanding its being called for in the project's March 15, 2012 erosion and sediment control plan, inlet protection had not been installed for a storm drain inlet along the eastern side of southbound Sprain Brook Parkway. Id. (Photos 21-23).

The Interstate 287 Interchange 8 Project, involved the construction of two new service roadways, bridge construction, and bridge removal in three main phases, adjacent to the Mamaroneck River, and was in its third phase at the time of the inspection. CX 35 at 19-20, 659-71. During the audit, the EPA observed, among other things, improper silt fence maintenance, sediment in roadways from vehicle tracking, erosion upgradient of a post-construction BMP, and improper materials storage, inadequate perimeter control, and vehicle tracking in the contractor

staging area. *Id.* Specifically, multiple holes were observed in a length of silt fence installed at the toe of a disturbed slope about 200 feet southeast of the intersection of White Plains Avenue and Westchester Avenue Eastbound along the northern side of the Mamaroneck River (Photos 1-3), sediment from vehicle tracking was present in an area of active construction on Westchester Avenue Westbound a stabilized construction entrance had not been installed in this area (Photographs 4-6), a section of silt fence had collapsed upgradient of the Mamaroneck River (Photos 7-10), material stockpiles upgradient of an unprotected drain inlet located along Westchester Avenue Westbound were uncontained, and sediment was observed adjacent to and within the inlet (Photos 11-14), sediment from vehicle tracking was present in an unstabilized construction entrance at the southeast corner of Westchester Avenue Westbound and White Plains Avenue, and a storm drain inlet in a disturbed area at this location that did not have BMPs for inlet protection and sediment was observed within the inlet (Photos 15-18); evidence of erosion was present near the intersection of White Plains Avenue and Westchester Avenue Westbound (Photos 19-23), sediment had accumulated downgradient of straw bales and silt fencing installed as perimeter controls (Photos 24, 25), ground disturbance and erosion was observed directly upgradient of the outlet from the sand filter at the eastern end of that BMP (see Photo 26); perimeter controls were not installed downgradient of a soils stockpile along Interstate 287 Westbound (Photos 27-28), and multiple pollution prevention and good housekeeping issues were observed in the contractor's construction staging area located adjacent to the Mamaroneck River, including multiple containers of liquids that were stored in an outdoor area without coverage or containment (Photo 30), an uncovered bucket containing what appeared to be a petroleum product (Photos 31, 32), multiple 55-gallon drums of "Hydrozo 100" sealant that were stored without coverage or containment upgradient of the Mamaroneck River,

including one that did not have its bung in place (Photos 33, 34), sediment in the roadway at the unstabilized eastern entrance/exit to Westchester Avenue Eastbound (Photos 35, 36), staining on the ground surface adjacent to the fueling station in the staging area (Photo 37), and a silt fence along the northern perimeter of the staging area upgradient of the Mamaroneck River that had collapsed in multiple locations (Photos 29-38). Because of Respondent's failure to ensure the installation and maintenance of erosion and sediment controls at this site, there is a high likelihood that sediment and other pollutants were discharged in stormwater into the Mamaroneck River, a water body that is listed by New York state as impaired for sediment. *See* CX 30 at 147.

Because the violations in Region 9 were first observed at the audit, the EPA used June 21, 2012, the date of the last construction site inspection where violations were found (I-81/I-86 Bridge Replacement Project) as the start date for all of the Region 9 construction site violations. Likewise, for the violations in Region 8, the EPA used the date of the last construction site inspection where violations were found (November 28, 2012) as the start date for all of the Region 8 construction site violations. Respondent demonstrated that it had corrected the violations on July 1, 2014, when it submitted a description and photographs of the corrections it had made. CX 48 at 102-33. For the Region 9 violations, the duration was from June 21, 2012 to July 1, 2014, for a total of 740 days, and for the Region 8 violations, the duration was from November 28, 2012 to July 1, 2014, for a total of 580 days.[18] Therefore, Respondent violated Part VIII.A.4.a.i of the MS4 GP by failing to maintain all required erosion and sediment control practices in effective operating condition at all times for a total of 1320 days.

[18] While the EPA could have counted each of the numerous instances of Respondent's failure to implement the required controls as separate violations, they were instead treated as just one violation of Part VIII.A.4.a.i of the MS4 GP for each Region.

3. Respondent Failed to Implement Two Minimum Post-Construction Stormwater Controls ("PCSC")

a. Respondent Failed to Provide the EPA with Records of Inspections and Maintenance of Post-Construction Stormwater Controls (III.10.b)

Part V.B. of the 2010 MS4 GP requires permittees to keep all records required by the permit for at least five years after they are generated, and provide them to the EPA when requested. In its records request to Region 9, the EPA requested records of inspections of post-construction storm water management practices ("SMPs") for the most recent reporting year. CX 13 at 6, row 46. Respondent did not provide the requested records, and stated that they were not available. *Id.* Tr. 73:2-6. The EPA also asked Region 9 for records of maintenance for post-construction SMPs for the most recent reporting year. Respondent did not provide the requested records, and stated that there was, "[n]othing for the most recent reporting year." CX 13 at 6, row 47; Tr. 72:8-73:1. During the audits of both Region 9 and Region 5, the EPA requested, but Respondent was unable to provide, any documentation of maintenance practices for post-construction SMPs. CX 30 at 31; CX 39 at 27. In response to this request during the Region 5 audit, the Regional MEC stated that formal records are not kept for inspections and maintenance of post-construction SMPs. CX 39 at 27. Therefore, Respondent violated Part V.B. of the 2010 MS4 GP by failing to keep and produce all records required by the permit for at least five years after they are generated.

In its June 5, 2014 compliance order, the EPA ordered Respondent to develop, implement and submit written procedures for documenting and maintaining required records by October 1, 2014. Respondent demonstrated compliance with this requirement on November 3, 2014, when it submitted new procedures for documenting and maintaining records of inspections and maintenance of post-construction stormwater management practices. CX 50 at 7.

Respondent developed the required procedures and began maintaining the required records, only after the EPA ordered it to, and there is no evidence that it had ever done so prior to the EPA audits and compliance order. Therefore, Respondent was in violation of this requirement for more than five years before the Complaint was served, on June 20, 2016, and this violation lasted from at least July 1, 2011, the later date chosen by the EPA in its discretion, until November 3, 2014, for a total of 1221 days.

b. Respondent Failed to Ensure the Adequate Long-Term Operation and Maintenance of Post-Construction Stormwater Controls (III.10.k)

Part VIII.A.5.a.vi of the 2010 MS4 GP requires all permittees to develop, implement, and enforce a program that ensures adequate long-term operation and maintenance of management practices by trained staff, including assessment to ensure that practices are performing properly.

During the audits, the EPA observed several failures in Respondent's maintenance of post-construction SMPs in Regions 9 and 5. CX 30 at 680-87; CX 39 at 41-55. Specifically, the EPA observed inadequately maintained vegetative cover and/or rip rap SMPs on the side slope of two wet ponds that allowed the edges of the ponds to erode, likely causing sediment to enter the ponds and limiting their effectiveness in retaining water. CX 39 at 44 (Photo 5), 51 (Photo 19); Tr. 308:5-16; 313:7-314:2. And, the EPA also observed erosion downgradient of an in-ground SMP leading to Rush Creek, indicating that the SMP was discharging water too quickly, and likely resulting in the discharge of scoured sediment into the creek. CX 39 at 46 (Photos 9, 12, 13); Tr. 309:17-311:21.

In addition to the violations observed during the audits, when the EPA asked DOT staff in Region 9 for procedures for inspecting installed stormwater management practices ("SMPs"), the DOT staff said that they had not been developed. CX 30 at 31. The Regional MEC explained that ensuring the proper operation and maintenance of post-construction stormwater controls

would eventually be his responsibility, but that the process was still in development and was a goal for the future. *Id.* The DOT design staff stated that, once construction is complete, they do not conduct additional follow-up inspections to ensure the continued operation of SMPs. *Id.* Therefore, Respondent violated Part VIII.A.5.a.vi of the 2010 MS4 GP by failing to ensure the adequate long-term operation and maintenance of post-construction stormwater management practices.

In its June 5, 2014 compliance order, the EPA ordered Respondent to develop, implement, and submit, a written program to ensure adequate long-term operation and maintenance of post-construction stormwater management practices by October 31, 2014. CX 47 at 19. Respondent demonstrated compliance with this requirement on November 3, 2014, when it submitted new procedures for inspecting and maintaining post-construction stormwater management practices ("SMPs"), including a database for use by all regions to identify the locations and record the inspections and maintenance of SMPs. CX 50 at 7, 8; Tr. 337:8-338:1; *see also* CX 48 at 46-52. Because these violations were first discovered during the Region 9 compliance audit, on June 20, 2012, that is the date that the EPA took as the start date. Therefore, this violation lasted from June 20, 2012 until November 3, 2014, for a total of 866 days.[19]

4. Respondent Failed to Implement Four Minimum Control Measures for Pollution Prevention and Good Housekeeping ("PP/GH") for Municipal Operations

[19] While the EPA could have counted each instance of Respondent's failure to ensure the long-term performance of its post-construction stormwater controls as separate violations, they were instead treated as just one violation of Part VIII.A.5.a.vi of the MS4 GP.

a. Respondent Failed to Develop a Pollution Prevention/Good Housekeeping Program for Municipal Operations that Determines Management Practices, Policies, and Procedures for Reducing or Preventing the Discharge of Pollutants (III.10.l)

Part VIII.A.6.a.i of the 2010 MS4 GP requires all permittees to develop and implement a pollution prevention/good housekeeping ("PP/GH") program for municipal operations and facilities that addresses municipal operations and facilities that contribute or potentially contribute pollutants of concern to the small MS4 system, and Part VIII.A.6.a.iii of the Permit requires all permittees to develop and implement a pollution prevention/good housekeeping program for municipal operations and facilities that determines the management practices, policies, procedures, etc. that will be developed and implemented to reduce or prevent the discharge of (potential) pollutants.

In its records request to Region 8, under the PP/GH heading, the EPA requested copies of management practices and policies developed and implemented by DOT to reduce or prevent the discharge of pollutants. CX 34 at 3, row 24. In response, Respondent submitted two documents: a "Spill Prevention Control and Countermeasure Plans Template," and a "Petroleum Bulk Storage Inspection and Reporting Checklist." *Id.* While those documents address and seek to prevent potential discharges from oil spills, they are not management practices for reducing or preventing the discharge of pollutants in stormwater from Respondent's facilities. Under the same heading, the EPA also requested "[o]perational BMPs developed to reduce stormwater pollution from DOT facilities and activities." CX 13 at 3, row 20; CX 34 at 3, row 23; CX 37 at 2, row 20. While Respondent answered yes, and submitted several documents, they do not contain all of the management practices, policies, and procedures required to reduce or prevent the discharge of POCs from its municipal operations. The first document listed in the response to this request was Chapter 4 of the 2011 Environmental Handbook for Transportation Operations.

Id.; CX 30 at 239.[20] Although that document does discuss several management practices applicable to municipal facilities, it does not include any practices, policies, or procedures for preventing the discharge of pollutants from stockpiles or from the storage of scrap metal and other waste piles which, as described below, were found to be a significant problem. *Id.* at 45-54; CX 30 at 35-36; CX 35 at 30; CX 39 at 30. Likewise, each of the other documents provided is addressed to a single practice, and do not (alone or in combination), constitute a complete program. CX 13 at 3, row 20; CX 34 at 3, row 23; CX 37 at 2, row 20; Tr. 64:4-66:5; 66:6-15; 66:16-24. Finally, the EPA records requests sought records of DOT facility inspections conducted for stormwater purposes in the most recent reporting year. CX 13 at 3, row 22; CX 34 at 3, row 26; CX 37 at 3, row 23. In all three responses, in the "Document Provided" column, Respondent answered "No," and in the Region 9 response, Respondent noted that those documents were "Not available." *Id.* Therefore, Respondent violated Part VIII.A.6.a.i of the 2010 MS4 GP by failing to develop and implement a pollution prevention/good housekeeping program for municipal operations.

In its June 5, 2014 compliance order, the EPA ordered Respondent to correct this violation by April 30, 2015. CX 47 at 20. Respondent corrected this violation on December 1, 2015, when it submitted updated management practices, policies, and procedures based on its assessment of its facilities and identification of pollutants of concern.[21] CX 58 at 2-3, 68-73; Tr. 338:9-22; *see also* CX 48 at 53, 56-57, 73-74.

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[20] https://www.dot.ny.gov/divisions/engineering/environmental-analysis/repository/oprhbook.pdf (last visited August 16, 2018).

[21] Ms. Kubek's testimony that the EPA had ordered Respondent to prepare site-specific pollution prevention plans for its municipal facilities is belied by the clear terms of the compliance order. Tr. 475:3-6; Tr. 484:7-9; CX 47 at 20 (¶ C.2.v).

Respondent developed the required program only after the EPA ordered it to do so. There is no evidence that such a program had been developed prior to the EPA audits and compliance order. Therefore, this violation began more than five years before the Complaint was served, on June 20, 2012, and lasted from at least July 1, 2011, the later date chosen by the EPA in its discretion, until December 1, 2015, for a total of 1614 days.

b. Respondent Failed to Perform Self-Assessments of All Municipal Operations to Determine the Sources of Pollutants to be Addressed by its PP/GH Program (III.10.m)

Part VIII.A.6.a.ii of the Permit requires that all permittees develop and implement a pollution prevention/good housekeeping program for municipal operations and facilities that includes the performance and documentation of a self-assessment of all municipal operations to determine the sources of pollutants potentially generated by the permittee's operations and facilities and identify the municipal operations and facilities that will be addressed by the pollution prevention and good housekeeping program.

In its records requests to all three regions, the EPA requested "[d]ocumentation of self-assessment of all DOT operations and facilities (current permit term)." CX 13 at 3, row 21; CX 34 at 3, row 25; CX 37 at 3, row 22. In response to the Region 9 records request, Respondent answered "No" in the "Document Provided" column, and instead submitted a document entitled "Spill Prevention Control and Countermeasure Plans and Spill Prevention Report." CX 13 at 3, row 21. In response to the Region 8 records request, Respondent this time answered "Yes" in the "Document Provided" column, but provided two documents entitled "Spill Prevention Control and Countermeasure Plans Template" and "Petroleum Bulk Storage Inspection and Reporting Checklist." And in response to the Region 5 records request, Respondent again answered "Yes" in the "Document Provided" column, but provided three different documents titled

"TonawandaSPCCplan.docx," "AST Inspection.doc," and "Ten Day PBS Reconciliation Blank.xls." None of these documents was a self-assessment of any facility, much less of all facilities. Tr. 66:25-68:3; 68:4-24; 68:25-69:15. In addition to requesting the self-assessments, the EPA records requests also sought records of DOT facility inspections conducted for stormwater purposes for the most recent reporting year. CX 13 at 3, row 22; CX 34 at 3, row 26; CX 37 at 23. Respondent's response to all three requests answered "No" in the document provided, and, on the Region 9 response, stated "Not available." *Id.*; Tr. 69:24-70:10. And for all three audits, DOT staff told the EPA that Respondent had not performed any such self-assessments, and that there was no program for performing or documenting such self-assessments. CX 30 at 33; CX 35 at 28; CX 39 at 28. Therefore, Respondent violated Part VIII.A.6.a.ii of the 2010 MS4 GP by failing to perform and document PP/GH self-assessments of all of its municipal operations.

In its June 5, 2014 compliance order, the EPA ordered Respondent to conduct and submit PP/GH self-assessments of all municipal operations and facilities by April 30, 2015. CX 47 at 20. Respondent demonstrated compliance with this requirement on June 30, 2015, when it submitted completed self-assessments for all municipal operations and facilities. CX 54 at 3, 506-965.

Respondent performed the self-assessments only after the EPA ordered it to do so, and admitted that they had not been performed prior to the EPA audits and compliance order. Therefore, this violation began more than five years before the Complaint was served, on June 20, 2012, and lasted from at least July 1, 2011, the later date chosen by the EPA in its discretion, until June 30, 2015, for a total of 1460 days.

c. Respondent Failed to Develop and Implement Employee Training for PP/GH for Municipal Operations (III.10.n)

Part VIII.A.6.a.vi of the Permit requires that all permittees develop and implement a pollution prevention/good housekeeping program for municipal operations and facilities that includes an employee pollution prevention and good housekeeping training program, and ensures that staff receive and utilize training.

In its records requests, the EPA asked Respondent for an employee/maintenance personnel training plan, records, and syllabus pertaining to pollution prevention/good housekeeping for the most recent reporting year. CX 13 at 3, row 27; CX 34 at 4, row 33; CX 37 at 3, row 28. In its Region 9 response, Respondent said that the requested documents are not available. CX 13 at 3, row 27. In response to the Region 8 records request, Respondent provided a document entitled "Employee Maintenance Personnel Training." CX 34 at 4, row 33. And, in its response to the Region 5 records request, Respondent provided nothing. CX 37 at 3, row 28.

During the Region 9 audit, DOT staff described the various training activities that had been conducted on topics including erosion and sediment control, outfall inspections, and construction general permit requirements, but were unable to provide documentation of training or attendance records, and also stated that no PP/GH training existed for staff working at the residencies or other fixed facilities. CX 30 at 34. In a follow-up conference call on July 17, 2012, the EPA asked for additional training materials and records that were not provided during the audit. *Id.* In response, DOT staff provided documentation of a DEC-endorsed 4-hour "Erosion and Sediment Control Training," with the most recent training having been conducted over a year earlier, on June 9, 2011. *Id.* Upon review, the EPA noted that these trainings were only provided for DOT senior management-level staff, and that the training was primarily focused on erosion and sediment control rather than stormwater pollution prevention and good

housekeeping. *Id.* DOT staff also told the EPA that staff working at the residencies or other fixed facilities do not receive that training. *Id.*

Regarding the "Employee Maintenance Personnel Training" provided by Region 8 staff, that document describes two types of stormwater pollution prevention trainings provided to DOT Region 8 staff since 2008. CX 35 at 29. The first was a stormwater pollution prevention video presented by the Acting MEC to staff at various maintenance facilities. *Id.* The second training was a stormwater pollution prevention training administered by Dutchess County in 2008 and 2010. Nowhere in this submission does it specify which facilities or staff received either training, although the Region 8 Environmental Specialist I/Acting MEC explained that only DOT Region 8 residency employees attended the training. *Id.*

During the audit of Region 5, the MEC stated that a semi-annual safety meeting is conducted each spring and fall for all DOT maintenance personnel and that the training will sometimes touch on the subject of good housekeeping with regard to employee safety and work hazards. CX 39 at 29. The MEC also said that he visits each facility every two to three weeks to discuss facility operations and answer any environmental questions that staff may have. *Id.* Through onsite discussions during the audits of Respondent's residencies and fixed, the EPA observed a widely varying level of stormwater awareness amongst DOT staff. *Id.* And while it was reported that multiple DOT employees from different facilities had attended an SPDES stormwater webinar class on June 19, 2013, there was nothing to indicate that the class had been offered to, or attended by, all DOT municipal operations personnel. *Id.*

Therefore, Respondent violated Part VIII.A.6.a.vi of the 2010 MS4 GP by failing to develop and implement an employee pollution prevention and good housekeeping training program and ensure that staff receive and utilize the training.

In its June 5, 2014 compliance order, the EPA ordered Respondent to develop and implement PP/GH training by October 1, 2014. CX 47 at 18. Respondent demonstrated compliance with this requirement on November 3, 2014, by submitting the required training materials, procedures, and documentation. CX 50 at 7-8, 28-38;[22] Tr. 340:13-341:7.

Respondent developed the required training program only after the EPA ordered it to, and there is no evidence that it had been created prior to the EPA audits and compliance order. Therefore, this violation began more than five years before the Complaint was served, on June 20, 2012, and lasted from at least July 1, 2011, the later date chosen by the EPA in its discretion, until November 3, 2014, for a total of 1222 days.

d. Respondent Failed to Implement Appropriate PP/GH Best Management Practices ("BMPs") for Municipal Operations (III.10.o)

Part VIII.A.6.d of the Permit requires all permittees to select and implement appropriate pollution prevention and good housekeeping BMPs and measurable goals to ensure the reduction of pollutants of concern ("POCs") in stormwater discharges to the Maximum Extent Practicable ("MEP"). During all three audits, the EPA observed numerous failures by Respondent to implement appropriate PP/GH BMPs for its municipal operations that contribute or potentially contribute POCs to Respondent's MS4.

In Region 9, the EPA discovered numerous failures to implement appropriate PP/GH BMPs, including evidence that numerous pollutants had been carried from several sources into waters of the United States, including Patterson Creek, Owego Creek, and Stratton Mill Creek. CX 30 at 36-38, 648-71.

[22] N.B. Several of the photos of improper practices in the training materials are taken from the EPA audit reports, which contradicts Ms. Kubek's testimony that Respondent actually had this training prior to the EPA audits. CX 50 at 37; Tr. 470:6-20.

At the Vestal Waste Storage Yard, Respondent's activities are storing stockpiles of soil, aggregate, sweepings, millings, and vegetation debris, and composting deer remains. CX 30 at 36. Stormwater runoff from the yard is primarily conveyed to Patterson Creek, and, according to DOT staff, the facility is subject to frequent flooding, and was completely washed out in 2006 and 2011 by water from Patterson Creek. *Id.* During the audit, the EPA observed, among other things, that piles of materials collected during street sweeping, stockpiles of bulk materials and piles of soil containing animal remains were stored uncovered and without containment. CX 30 at 36, 649-52 (Photos 1-7). Because of Respondent's failure to control pollutants at this site, there is a high likelihood that numerous pollutants, including soil, aggregate, sweepings, millings, vegetation, and biological materials, were discharged in stormwater into Patterson Creek.

At the Tioga Residency (9-8), Respondent's activities are vehicle/equipment washing, storage, repair, and fueling, and snow removal and de-icing operations. The facility comprises multiple buildings, including a salt shed, and is located adjacent to Owego Creek. CX 30 at 36-37. During the audit, the EPA observed, among other things, visible rust staining and petroleum product staining on the impervious surface underneath salt spreader equipment and near storm drain inlets, discolored water accumulation in standing water located adjacent to the maintenance garage, multiple petroleum product stains on the impervious ground surface adjacent to road maintenance equipment and vehicles, two large petroleum product stains on the ground surface and close to a drainage way to Owego Creek, two rusty paint containers stored in an outside area without coverage or secondary containment, a large stain from an unknown substance leading from the rusty paint containers to the perimeter fence and offsite toward a drainage way to Owego Creek, an uncontained and uncovered scrap metal pile, an uncovered scrap metal

container holding petroleum product that appeared to be leaking onto the impervious surface underneath the container, lack of BMPs to contain the salt stored in the salt shed or to prevent discharge of salt during loading/unloading operations upgradient of the drainage way to Owego Creek, and an open lid on a dumpster containing scrap tires and other wastes. CX 30 at 36-37, 661-71 (Photos 1-32). Because of Respondent's failure to control pollutants at this site, there is a high likelihood that numerous pollutants, including petroleum products, rust, and salt, were discharged in stormwater into Owego Creek.

And, at the Broome Residency, Respondent's activities include vehicle/equipment fueling, storage and maintenance, storage of millings, road painting equipment, and bulk storage. CX 30 at 37. The residency also includes the Bridge Crew Facility on the north side of Barlow Road. That facility is primarily used for bridge maintenance and contains storage buildings for bridge equipment and materials, a staging area, a dirt stockpile, a scrap metal stockpile, and a salt shed. The residency is located adjacent to Stratton Mill Creek, a tributary to the Susquehanna River. *Id.* During the audit, the EPA observed, among other things, visible petroleum staining on pavement impervious surfaces, paint spilled on the ground adjacent to a drainage ditch, uncovered and uncontained millings stockpiles stored directly adjacent to the creek, and uncovered and uncontained scrap metal and other parts stored on an impervious surface. CX 30 at 37-38, 653-60 (Photos 3-16). Because of Respondent's failure to control pollutants at this site, there is a high likelihood that numerous pollutants, including petroleum products, rust, paint, and salt, were discharged in stormwater into Stratton Mill Creek.

In Region 8, the EPA also discovered numerous failures to implement appropriate PP/GH BMPs, including evidence that numerous pollutants had been carried from several sources into

waters of the United States, including the Hudson River, Casper Creek, Stump Pond Creek, and the New Croton drinking water reservoir. CX 35 at 31-34, 673-742.

At the Fairview Residency 8-2, Respondent's activities include vehicle/equipment fueling, storage and maintenance, storage of millings, salt, and scrap metal, and snow removal and deicing operations. CX 35 at 31, 673. During the audit, the EPA observed, among other things, an uncovered and uncontained scrap metal pile containing hazardous materials, outdoor vehicle and equipment washing near storm drains, foam from an unknown source inside a storm drain inlet downgradient from the vehicle wash area, petroleum sheen on impervious and pervious surfaces, unprotected storm drain inlets downgradient of the salt storage and vehicle fueling station, and an open dumpster. CX 35 at 31, 674-80 (Photos 1-19).

At the Region 8 Equipment Management Shop, Respondent's activities include vehicle/equipment storage and maintenance. CX 35 at 31. The facility contains an on-site stormwater pond that discharges to an unnamed stream, and storm drain inlets in the southwest corner of the facility discharge directly to the stream. CX 35 at 682. During the audit, the EPA observed, among other things, an uncontained and uncovered scrap metal pile located upgradient of the stormwater pond, visible petroleum sheen on an impervious surface in the outdoor vehicle/equipment storage areas, vehicles and equipment leaking petroleum products, unknown fluid staining on an impervious surface adjacent to a stormwater conveyance culvert, and improper storage of used 55-gallon drums. CX 35 at 31-32, 681-87 (Photos 2-14). Because of Respondent's failure to control pollutants at this site, there is a high likelihood that numerous pollutants, including petroleum products, rust, and other chemicals, were discharged in stormwater into the unnamed creek.

At the Kingston Residency 8-7, Respondent's activities include vehicle washing, storage, repair, and fueling, brine mixing and loading, and salt loading. Stormwater runoff from the facility is primarily conveyed to two storm drain inlets along the western perimeter of the site, and the DOT Resident Engineer said that all facility storm drain inlets are connected to the municipal storm sewer system and eventually discharge into the Hudson River. CX 35 at 32, 689. During the audit, the EPA observed, among other things, outdoor vehicle/equipment washing being conducted near storm drains, heavy machinery leaking petroleum product onto impervious surfaces, visible petroleum sheen on impervious surfaces and in a storm drain, brine leaking from a hose onto an impervious surface, improper loading/unloading practices for brine equipment, unprotected storm drain inlets downgradient of the vehicle wash area and salt storage dome, accumulated sediment around and inside of storm drain inlets, an uncovered and uncontained pile of used batteries, and small piles of uncovered and uncontained salt. CX 35 at 32, 688-99 (Photos 1-31). Because of Respondent's failure to control pollutants at this site, there is a high likelihood that numerous pollutants, including petroleum products, salt, brine, and battery acid, were discharged in stormwater into the MS4 and ultimately into the Hudson River.

At the Region 8 Special Crews Facility, Respondent's activities include vehicle/equipment fueling, storage and maintenance, storage of chemicals, paint, and salt, paint strip testing (for road marking), tree operations, and bridge operations. Stormwater runoff from the facility is primarily conveyed to multiple storm drain inlets along the interior of the facility that discharge through ditches to Casper Creek. CX 35 at 33, 710. During the audit, the EPA observed, among other things, visible paint accumulation in and around a storm drain inlet, visible petroleum and rust staining on impervious surfaces in outdoor vehicle/equipment storage areas, uncovered and uncontained storage of multiple containers of chemicals, paint waste, and

other, unidentifiable, fluids. CX 35 at 33, 709-16 (Photos 2-17). Because of Respondent's failure to control pollutants at this site, there is a high likelihood that numerous pollutants, including petroleum products, rust, paint, and other chemicals, were discharged in stormwater into Casper Creek.

At the Carmel Residency, Respondent's activities include vehicle/equipment fueling, storage and maintenance, and storage of sand and salt. Stormwater runoff from the facility is primarily conveyed to multiple points of discharge along the western perimeter of the site which discharge to Stump Pond Stream. CX 35 at 33, 718. During the audit, the EPA observed, among other things, visible petroleum and rust staining on impervious surfaces, outdoor vehicle/equipment washing near storm drains, uncovered and uncontained storage of sand stockpiles upgradient of an unprotected storm drain inlet and accumulated sediment around the inlet, erosion downgradient of a stormwater discharge location, erosion of a sand stockpile upgradient of a stormwater conveyance ditch and sediment in the ditch, a truck parked over an unprotected storm drain inlet, and spilled salt near that same inlet. CX 35 at 33, 718-24 (Photos 2-14). Because of Respondent's failure to control pollutants at this site, there is a high likelihood that numerous pollutants, including petroleum products, rust, and sand, were discharged in stormwater into Stump Pond Creek.

At the Katonah Residency, Respondent's activities include vehicle/equipment fueling, storage, and maintenance, storage of sand and salt, and snow removal and de-icing operations. The facility is located on a peninsula in the New Croton Reservoir and is surrounded by water on three sides (north, west, and south). Stormwater runoff from the active areas of the facility is primarily conveyed via overland flow offsite, and three storm drain inlets in the employee vehicle parking area in the western portion of the facility discharge to the reservoir. CX 35 at 33-

34, 726. During the audit, the EPA observed, among other things, petroleum and rust staining on impervious ground surfaces, containers of liquids and chemicals stored outside without coverage or containment, salt stored outside of the salt storage dome, equipment with residue and staining stored outside in an uncovered area, and a gas container and a fuel tank in an uncovered an uncontained scrap metals disposal pile. CX 35 at 33-34, 726-36 (Photos 1-25). Because of Respondent's failure to control pollutants at this site, there is a high likelihood that numerous pollutants, including petroleum products, rust, chemical, and salt, were discharged in stormwater into the New Croton Reservoir, that was listed as impaired by New York state for phosphorous. *See* CX 30 at 147.

In Region 5, the EPA discovered numerous failures to implement appropriate PP/GH BMPs, including evidence that numerous pollutants had been carried from several sources into waters of the United States, including, but not limited to, Foster Brook and Cayuga Creek. CX 39 at 30-34, 621-77.

At the Buffalo Sub Residency, Respondent's activities include vehicle/equipment fueling, storage, washing, and maintenance, and storage of salt and aggregate. CX 39 at 31-32, 622. Stormwater runoff from the facility is primarily conveyed to Respondent's MS4 by three storm drain inlets along the south, southeast, and southwest perimeter of the site. *Id.* During the audit, the EPA observed uncovered and uncontained sediment and aggregate stockpiles located upgradient of unprotected storm drain inlets; sediment tracking to, and accumulation around, unprotected storm drain inlets, an uncovered bucket of asphalt tack sitting outside the maintenance building, and petroleum staining on impervious surfaces in the outdoor vehicle/equipment storage areas. CX 39 at 31-32, 621-27 (Photos 3-14). Because of Respondent's failure to control pollutants at this site, there is a high likelihood that numerous

pollutants, including petroleum and sediment, were discharged in stormwater into Respondent's MS4 and ultimately into waters of the United States.

At the Clarence Sub Residency, Respondent's activities include vehicle/equipment storage, washing, and maintenance, fueling, deer composting, snow removal and deicing, and storage of salt and aggregate. CX 39 at 32, 629. Stormwater runoff from the facility is primarily conveyed to two drainage swales along the northeastern and southwestern portion of the facility. *Id.* 631-32 (Photos 4-7). During the audit, the EPA observed petroleum and rust staining on impervious surfaces of the outdoor equipment storage areas. *Id.* (Photos 8-12).

At the Region 5 Equipment Management Shop, Respondent's activities include vehicle/equipment storage and maintenance, and stormwater from the facility discharges to Foster Brook. CX 39 at 635, 637 (Photos 2, 3). During the audit, the EPA observed an uncontained and uncovered scrap metal pile containing used diesel tanks and greasy and rusty scrap metal, visible petroleum staining on the impervious surface of the outdoor vehicle and equipment storage area, and accumulated sediment inside a storm drain catch basin on the south side of facility, adjacent to a gravel storage area. CX 39 at 32-33, 637-40 (Photos 4-15). Because of Respondent's failure to control pollutants at this site, there is a high likelihood that numerous pollutants, including petroleum, rust, and sediment, were discharged in stormwater into Foster Brook.

At the North Erie Residency, Respondent's activities included vehicle/equipment fueling, storage, washing, and maintenance, deer composting, and storage of sand and salt. CX 39 at 33. Stormwater runoff from the facility is primarily conveyed to multiple storm drains that ultimately discharge to Cayuga Creek. *Id.* During the audit, the EPA observed outdoor vehicle/equipment washing occurring near storm drains, improper materials and fluid storage,

petroleum staining on the impervious surface upgradient of a storm drain inlet, an uncontained and uncovered scrap metal pile containing used, greasy, rusted scrap metal, blocked/plugged storm drains, and what appeared to be an illicit connection to the storm sewer system from the bridge crew maintenance garage sink. CX 39 at 33-34, 654-63 (Photos 2-23). Because of Respondent's failure to control pollutants at this site, there is a high likelihood that numerous pollutants, including petroleum, rust, and sediment, were discharged in stormwater into Cayuga Creek.

At the Lewiston Sub Residency, Respondent's activities included vehicle/equipment storage, washing, and maintenance, fueling, and material storage (i.e., salt, street sweepings, and aggregate). Stormwater runoff from the facility is primarily conveyed to multiple storm drain inlets to Respondent's MS4. CX 39 at 34. During the audit, the EPA observed visible petroleum and rust staining on the impervious surface of the outdoor vehicle/equipment storage areas, accumulated sediment in multiple storm drain catch basins, and an unknown pipe connection into a storm drain catch basin. CX 39 at 34, 670-77 (Photos 3-19). Because of Respondent's failure to control pollutants at this site, there is a high likelihood that numerous pollutants, including petroleum, rust, and sediment, were discharged in stormwater into Respondent's MS4 and ultimately into waters of the United States.

Therefore, Respondent violated Part VIII.A.6.d of the 2010 MS4 GP by failing to implement appropriate PP/GH BMPs ensure the reduction of pollutants of concern in stormwater discharges to the Maximum Extent Practicable. In its June 5, 2014 compliance order, the EPA ordered Respondent to immediately correct the deficiencies observed during the audits, and to immediately implement appropriate PP/GH measures at its municipal facilities. CX 47 at 14-17. Respondent demonstrated compliance with this requirement on July 1, 2014, when it submitted

documentation that it had corrected the deficiencies. CX 48 at 2-45, 54-55, 58-72, 75-101; Tr. 341:8-342:14. Because these violations were first discovered at the Region 9 audit, that was taken as the start date.[23] Tr. 344:5-10. Therefore, this violation lasted from June 21, 2012 to July 1, 2014, for a total of 740 days.

VI. RESPONDENT'S DEFENSE

A. Respondent has Failed to Meet its Burdens on its Affirmative Defenses.

In its Amended Answer, Respondent asserts as an affirmative defense "that it has expended in excess of $500,000.00 ... in its efforts to resolve the alleged violations relevant to the events, transactions and occurrences cited in the allegations of the Administrative Complaint." CX 64 at 6. However, as this court has already acknowledged, Respondent's alleged affirmative defense regarding DOT's excess spending "relates to the issue of penalty and not to liability." Order on Motion for Partial Accelerated Decision (January 29, 2018). As such, Respondent's sole affirmative defense listed in its Answer does not provide any appropriate basis for dismissal of any counts contained within the Complaint.

1. Respondent's Defense of Estoppel was not Properly Pled, is Unsupported by the Facts, and is Legally Incorrect.

While not formally framed as an affirmative defense, Respondent argues via its opening argument and by proffering repeated testimony throughout the hearing, that EPA should not be allowed to collect penalties in this matter because DOT was told orally by an EPA employee that penalties would not be imposed in this matter if DOT complied with EPA's Compliance Order. Tr. 383:24-384:8; 436:6-12; 546:15-25, 640:1-14; 650:24-651:11. Though not appropriately

[23] While the EPA could have counted each of the numerous instances of Respondent's failure to implement PP/GH BMPs as separate violations, they were instead treated as just one violation of Part VIII.A.6.d of the MS4 GP.

labelled as such, Respondent's arguments in this regard amount to an affirmative defense of estoppel against the government, and fails for several reasons.

First, this affirmative defense was not properly pled, as it was not listed in Respondent's Answer. *See Curry v. City of Syracuse*, 316 F.3d 324, 330-31 (2d Cir. 2003) (estoppel is an affirmative defense that "normally must be pled in a timely manner or it may be waived."); *see also* Fed. R. Civ. P. 8(c) (listing estoppel as an affirmative defense). Therefore, Respondent has waived any such defense.

Second, even assuming arguendo that Respondent had properly pled this affirmative defense, it would fail as a legal matter. Generally, the federal government may not be equitably estopped from enforcing public laws, even though private parties may suffer hardship as a result in particular cases. *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990); *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51 (1984); INS v. Miranda, 459 U.S. 14 (1982); *Schweiker v. Hansen*, 450 U.S. 785 (1981); *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947). In fact, no decision of the Supreme Court has ever held that equitable estoppel lies against the government in any circumstance.

Furthermore, as the Supreme Court has made clear, even if a set of facts were to ever exist whereby it would be appropriate for a court to consider estopping the government from an enforcement action, a private party must at a minimum demonstrate that all the traditional elements of an estoppel are present. *See Heckler v. Community Health Services*, 467 U.S. 51, 59-61 (1984). These elements include 1) a detrimental reliance on the governmental representation, which caused the private citizen to change his position for the worse; 2) the representation to have been made by a government official with actual authority to bind the government by their

statements, and 3) a written record of this representation. *Id.* at 61-65. Respondent has failed to satisfy any of these elements.

As an initial matter, Respondent failed to establish, by a preponderance of evidence, that Complainant promised to forgo seeking a penalty in this matter. Justine Modigliani, who Respondent alleges made that promise on the EPA's behalf, denied making such a promise, and testified that, in response to Respondent's question about whether a penalty would be assessed, she stated that the focus of the order was to get the DOT back into compliance. Tr. 698:7-19. Ms. Kubek's note from the meeting that, "No monetary penalty included with this order," actually comports with Ms. Modigliani's testimony. RX 16 at 3. And, the clear language of the order itself contradicts Respondent's claim that the EPA promised to forgo a penalty, when it says that, "[i]ssuance of this Order shall not be deemed an election by EPA to forego any civil or criminal actions for penalties, fines, imprisonment, or other appropriate relief under the CWA." CX 47 at 21 (¶ D.5). The more likely fact is that Respondent's staff, who were understandably interested in avoiding a penalty, simply heard what they wanted to hear, and/or mistakenly assumed that, because the DEC and U.S. Army Corps of Engineers had issued them combined compliance and penalty orders in the past, that this was also the EPA's practice. Tr. 584:4-12, 586:4-12, 633:5-21.

In any event, Respondent has failed to establish its legal entitlement to have the government estopped from assessing a penalty. First, Respondent failed to show that it detrimentally relied upon Ms. Modigliani's alleged promise. In fact, Respondent's own designated party representative, Ellen Kubek, made quite clear in her testimony, that Respondent did not in any way change its position for the worse in reliance upon its belief that the EPA would not collect a penalty if Respondent complied with the Administrative Compliance Order:

15 Q. Okay. Now, as a result of your conversations
16 in this meeting, where you understood the agency to
17 suggest that no penalty would be imposed if you
18 complied with the Administrative Compliance Order,
19 did you take any action or withhold taking any action
20 as a result of that alleged commitment on EPA's part?
21 A. We complied with every ordered provision and
22 that was our intent, was to fully comply with
23 everything in the order, and we, in the course of
24 complying, did some activities a little bit beyond
25 what was specifically stated in there.
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1 Q. And had you anticipated a penalty might be
2 imposed afterwards, would you have not taken those
3 additional measures?
4 A. No, we would have done everything --
5 Q. The same?
6 A. -- the same.

Tr. 546:15-547:6. This was reinforced by Respondent's second witness, Dan Hitt, the Director of DOT's Office of Environment, who testified that, had Respondent believed it would face a penalty, it might have spent **more** money and come into compliance with the EPA's order even sooner. Tr. 608:16-609:13. Therefore, not only did Respondent fail to prove detrimental reliance, it actually proved the opposite, namely, that it benefitted from its mistaken belief that the EPA would not seek a penalty.

And, despite Ms. Kubek's testimony that Respondent spent more than required to come into compliance, Respondent failed to produce any dollar amount of the purportedly excess expenses. In one instance, described above, Ms. Kubek claimed that Respondent had spent $3,318.67 more than they needed to, by hiring contractors to expedite the remedy of construction stormwater control violations in response to the EPA compliance order. Tr. 461:15-462:18. In fact, Ms. Kubek contradicted herself with her testimony that Respondent had corrected those violations before Respondent even received the order. *Id.* Of course, those violations never

should have occurred, so the costs incurred in belatedly correcting them cannot be considered a detriment.

Secondly, Respondent failed to show that the alleged promise was made by someone with the authority to do so. Ms. Modigliani testified that she does not have that authority, Dan Hitt admitted that Respondent never asked if Ms. Modigliani had such authority, and Respondent did not seek the input of, nor engage in any communications with, the Director of the Division of Compliance Assurance, Dore LaPosta, who was the signator of the compliance order and the only official with the authority to decide whether to seek penalties in this matter. *See* Tr. 535:1-7, 601:4-7, 606:3-607:13, 698:7-25.

Finally, the evidence makes clear that any alleged statement made by EPA staff was done orally, and not in writing. Tr. 640:1-14, 651:5-11. And, as noted earlier, the most relevant document relating to this discussion – the compliance order itself – makes clear that monetary penalties can be pursued after compliance with the order. CX 40 at 21 (¶ D.5).

Therefore, Respondent's argument that the government should be estopped from collecting penalties in this matter fails for the numerous reasons explained above.

2. EPA Properly Proceeded Under Both CWA 1319(a) and 1319(g).

Respondent also infers throughout the hearing, that it was improper for the EPA to first bring a compliance order against the DOT pursuant to CWA subsection 1319(a), and subsequently bring an administrative action for penalties under subsection 1319(g). Tr. 384:7-23; 546:15-547:5. Respondent's claim, however, which is essentially an election of remedy argument, is simply legally incorrect.

Although Complainant issued two administrative compliance orders to Respondent (CX 40 and 47) those two orders are not at issue in this proceeding, as Complainant is not seeking to

enforce those orders under 33 U.S.C. § 1319(b), nor is Complainant seeking a civil penalty for failure to comply with those orders under subsection 33 U.S.C. § 1319(d). Rather, Complainant is seeking an administrative civil penalty pursuant to 33 U.S.C. § 1319(g).

As noted above, the statutory basis for this proceeding is found in 33 U.S.C. § 1319(g), which provides EPA with the authority to assess administrative penalties. The exercise of this authority does not impact EPA's authority to issue administrative orders under 1319(a). On the contrary, subsection 1319(g) explicitly provides that:

> Action taken by the Administrator . . . under [subsection 1319(g)] *shall not affect or limit the Administrator's . . . authority to enforce any provision of this chapter*; except that any violation—
>
> (i) with respect to which the Administrator or the Secretary has commenced and is diligently prosecuting an action under this subsection [1319(g)],
> (ii) with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection [1319(g)], or
> (iii) for which the Administrator, the Secretary, or the State has issued a final order not subject to further judicial review and the violator has paid a penalty assessed under this subsection, or such comparable State law, as the case may be, shall not be the subject of a civil penalty action under subsection (d) of this section or section 1321(b) of this title or section 1365 of this title.

33 U.S.C. § 1319(g)(6)(a).[24] In other words, this provision only bars the filing of a civil penalty action for any violation for which administrative penalties are being sought, or have already been paid under 1319(g), or equivalent state authorities. There is no such limitation on seeking penalties for violations that have been the subject of *an administrative order*. It would be "… plainly inconsistent with the strong enforcement policy of the Act to declare the EPA must choose between prevention of future pollution discharges and punishment of past violations through civil penalties. The administrator needs both sanctions." *United States v. Earth Sciences.*, 599 F.2d 368, 375-76 (10th Cir. 1979).

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[24] Under CWA Section 1319(g), "the Secretary" refers to the Secretary of the Army, who has concurrent authority with the EPA for enforcing permits issued under CWA Section 404. 33 U.S.C. § 1319(g)(1)(B). No such permit is at issue in this case and thus the Secretary has no role in this action.

Thus, "several federal courts have rejected election of remedy defenses raised in federal NPDES permit enforcement actions." *United States v. Citizens Utils. Co.*, No. 92 C 5132, 1993 U.S. Dist. LEXIS 10340, at *16 (N.D. Ill. July 27, 1993). The same principle applies to administrative penalty actions. *See In re Dr. Marshall C. Sasser*, 3 E.A.D. 703 n.9 (CJO 1991), *aff'd, sub nom, Sasser v. EPA*, 990 F.2d 127, 36 ERC 1421 (4th Cir. 1993) (EPA may, but is not required to, issue a compliance order prior to bringing a penalty action). Therefore, Respondent's election of remedy argument lacks merit.

VII. ARGUMENT ON PENALTY

A. The EPA Properly Considered the Statutory Factors Under CWA Section 309(g) in Determining the Proposed Penalty and These Factors Support Awarding a Substantial Penalty Equal to, or Greater Than, the Proposed Penalty

1. The Statutory Factors and Statutory Maximum

Complainant proposes that the Presiding Officer assess a penalty of $150,000, or greater, against Respondent in this matter upon appropriate consideration of the factors contained within 33 U.S.C. § 1319(g)(3) for the seventeen distinct types, and more than 16,218 separate days, of CWA violations.[25]

33 U.S.C. § 1319(g)(3), provides, in relevant part, that,

> "[i]n determining the amount of any penalty assessed under this subsection, the Administrator or the Secretary, as the case may be, shall take into account the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require."

Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(1)(A), provides, in relevant part, that "the amount of a class II civil penalty under paragraph [309(g)](1) may not exceed $10,000

[25] As the evidence in this case demonstrates, the actual number of days of violations is far larger than the number that the EPA chose to seek penalties for.

per day for each day during which the violation continues; except that the maximum amount of any class II civil penalty under this subparagraph shall not exceed $125,000." Those maximums have been adjusted by subsequent inflation adjustment rules. As relevant to this Complaint, for violations that occurred after January 12, 2009, and through December 6, 2013, the daily maximum penalty is $16,000, and the maximum total penalty is $177,500. See 78 F.R. 66646. For violations that occurred after December 6, 2013, and through November 2, 2015, and violations occurring after November 2, 2015, where penalties are assessed before August 1, 2016, the daily maximum penalty is $16,000, and the maximum total penalty is $187,500. 40 C.F.R. 19.4. For violations that occurred after November 2, 2015, and assessed on or after August 1, 2016 but before January 15, 2017, the daily maximum penalty is $20,628, and the maximum total penalty is $257,848. 82 F.R. 3633. Finally, for violations that occurred after November 2, 2015, and assessed on or after January 15, 2017, the daily maximum penalty is $20,965, and the maximum total penalty is $262,066. *Id.*

As described in specific detail above, in determining the beginning date of these fifteen types of violations, the EPA used three general approaches. First, for programmatic violations where the Permit explicitly requires development, implementation and enforcement of a program as they relate to Minimum Control Measures, EPA determined that the violation began more than five years before the Complaint was served, on June 20, 2011, and lasted from at least July 1, 2011, the later date chosen by the EPA in its discretion. Second, for violations relating to a permit condition that was required to be developed by a specific timeframe (e.g. a requirement to conduct outfall reconnaissance of 100% of outfalls by May 2013), the date of that permit requirement was utilized as the violation start date. Finally, some violations were considered to have begun on the date that they were observed (i.e. during the respective audit). In those cases,

the compliance dates used in the penalty analysis were the dates of Respondent's submission of responsive documents establishing that it had come into compliance. *See* Tr. 324-344.

2. The EPA Properly Considered the Clean Water Act Statutory Penalty Factors

While the Agency has not issued a CWA-specific penalty policy to determine penalties under the Act, it has issued a Clean Water Act Settlement Penalty Policy, to ensure that proposed penalties are derived through the consistent and fair application of the statutory maximum penalties and statutory factors. *See* CX 65; Tr. 377:5-10. The overall calculation of a penalty under the Clean Water Act Settlement Penalty Policy tracks the statutory factors in 33 U.S.C. § 1319(g)(1)(A), and can be reduced to the following formula:

> Penalty = Economic Benefit + Gravity +/- Gravity Adjustment Factors – Litigation Considerations – Ability to Pay – Supplemental Environmental Projects.

As described below, in accordance with the Clean Water Act Settlement Penalty Policy, the EPA performed a penalty calculation following the above-listed formula, prior to filing the administrative complaint in this case. And, at hearing, the EPA introduced evidence to support this calculation, and its belief that a $150,000 penalty assessment is appropriate in this matter. The following discussion is intended to give an overview of the testimony and other evidence relating to penalty consideration that was introduced by the EPA at hearing, and to show how that evidence supports the EPA's request for this Tribunal to impose at least a $150,000 penalty upon Respondent in this matter.[26]

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[26]In assessing a penalty, this Tribunal is required by the applicable rules of procedure to consider EPA's penalty guidance. *Biewer Co. of Toledo, Inc.*, 15 E.A.D. 772, 780 (EAB, 2013) (quoting 40 C.F.R. § 22.27(b)). However, this Tribunal is not obligated to follow the penalty guidance or to impose the Agency's recommended penalty calculated thereunder. *Id.* Rather, the Tribunal is only ultimately constrained by the statutory penalty factors and any statutory cap limiting the size of the assessible penalty. *In re U. S. Army*, 11 E.A.D. 126, 137, 170 (EAB 2003); *M.A. Bruder & Sons, Inc.*, 10 E.A.D.

a. Economic Benefit

As required in CWA § 309(g)(3), and to discourage violations and put the violator in the same position they would have been had they complied in a timely manner, the EPA's penalty policies require penalties to include **any economic benefit that the violator enjoyed as a result of their violations**. 33 U.S.C. § 1319(g)(3). This is known as Benefit of Economic Noncompliance, or BEN. In this matter, BEN calculations were based on delayed and avoided costs associated with the violations in the Complaint. When calculating BEN, the EPA utilizes actual costs when available, and best professional judgment when actual costs are not available.

At the hearing, Ms. Arvizu testified that she had utilized information gathered from Respondent's progress reports and her best professional judgment to arrive at a calculated economic benefit figure of $89,000. Tr. 345:11-24. The evidence at hearing indicates that this $89,000 figure is reasonable given the significant economic benefit Respondent achieved by failing to comply with its permit for over five years. Specifically, Respondent benefited from its delayed expenditure relating to $517,601.03 that it ultimately spent to come into compliance with its permit obligations. *See* CX 59 at 9; RX 71 at 11.

b. Gravity

The gravity component of the penalty calculation allows for the amount of the penalty to better reflect the **nature, circumstances, extent, and gravity** of the damage caused by non-compliance. This component is calculated for every month in which a violation occurred, and is determined using the following formula: Monthly gravity component = (1 + A + B + C + D) x 1,000. A, B, C, and D are gravity factors that are assigned values according to the tables and text

598, 610 (EAB 2002). Therefore, the Tribunal can award a penalty amount greater than $150,000 in this case upon its own consideration of the statutory penalty factors.

of the EPA's settlement penalty policy. A is the significance of the violation with a range from 0 to 20, B is the health and environmental harm with a range from 0 to 50, C is the number of effluent limit violations with a range of 0 to 5, and D is the significance of non-effluent limit violations with a range from 0 to 70. In this matter, based upon the findings of widespread violations, and in fairness to the MS4s that have earnestly attempted to comply with the CWA, the EPA determined that a significant gravity component was necessary to penalize Respondent for its many violations, and to deter future violations by Respondent and other similarly situated actors.

At the hearing, Ms. Arvizu indicated that she considered the gravity of the offenses for each of the different types of violations, and used that information to calculate a total gravity component of the penalty to be $77,000. Tr. 346-349. The extensive evidence of violations in this matter establishes that this $77,000 figure is reasonable. Respondent is liable for numerous, fundamental, and substantial permit violations lasting thousands of days. Moreover, the evidence establishes that the DOT's failures to implement the programs, procedures, and pollution controls required by its permit likely led to substantial water pollution and significant environmental harm.

Respondent's MS4s discharge to countless water bodies throughout New York State, including 98 that are impaired by water pollution. *See* CX 30 at 141-148, 214-15. As a result of its widespread failure to effectively control its stormwater pollution, Respondent likely discharged pollutants to, among other water bodies, Bunn Hill Creek, the Chenango River, Park Creek, Cedar Pond Brook, the Mamaroneck River, Rush Creek, Patterson Creek, Owego Creek, Stratton Mill Creek, the Hudson River, Casper Creek, Stump Pond Creek, and the New Croton Reservoir. *See* CX 30 at 20-22, 36-38, 631-71; CX 35 at 18-20, 31-34, 640-46, 673-742; CX 39 at 30-34,

621-77. These pollutants included, among others, petroleum products, paint, sediment, sand, salt, concrete, gravel, metals, rust, tar, brine, and biological materials. *See Id.*; Tr. 158:18-22; 161:3-13; 163:11-17; 163:23-164:8; 170:6-19; 187:16-188:5; 190:11-23; 191:1-8; 196:23-197:2; 208:11-13; 215:10-216:3; 216:4-217:5; 259:1-21; 261:15-262:8; 264:1-24; 273:13-19; 274:19-275:25; 280:21-281:10; 281:11-20. In one particularly egregious and harmful example, the audit reports contain photographs capturing numerous significant failures by the DOT to protect the Mamaroneck River – water body impaired by sediment – from sediment runoff. *See* CX 35 at 19-20, 659-71; *see also* Tr. 196:10-205:24. And given the fact that the EPA's audits only focused on a subset of sites in only three of Respondent's eleven regions throughout the State, these observations likely represent only a small fraction of the water bodies impacted by Respondent's failure to comply with its permit obligations.

Many of the violations in this case are symptomatic of Respondent's long-term, systemic failure to adhere to its permit requirements, which resulted in delayed implementation of practices designed to minimize the discharge of pollutants into storm water. Respondent failed to adequately develop and implement programs relating to each of the minimum control measures at issue in this case including those relating to illicit discharge and detection elimination, construction and post-construction stormwater controls, and pollution prevention or good housekeeping programs. For example, extensive pavement staining observed at multiple sites/residencies indicates that Respondent did not follow or have appropriate or adequate pollution prevention and good housekeeping practices in place to address spills and leaks at its facilities for significant periods of time. Tr. 158: 18-22; 208:11-13; 215:10–216. Similarly, silt fencing — one of the primary best management practices Respondent selected to prohibit sediment from entering water bodies at Respondent's construction sites — was observed to be either missing, or

in various states of disarray and failure throughout numerous of the construction sites visited during EPA's audits. *See e.g.* Tr. 140:20-143:7; 146:7-15; 147:2-14; 149:18-24; 150:9-16; 153:24-155:4; 184:3-21; 185:2-6; 185:23-186:14; 189:20-190:14; 191:1-22; 196:14-197:2; 197:23-198:7; 198:20-25; and 208:9-22.

Finally, in order to justify a penalty in this case, Complainant need not prove that the DOT's failure to comply with its permit conditions for numerous years actually led to environmental harm, but only that it had the potential to do so. Courts agree that a substantial civil penalty may be imposed without finding that the violation caused actual environmental harm; the potential harm posed by the violation is sufficient. *United States v. Mun. Auth. Union of Township*, 929 F. Supp. 800, 807 (M.D. Pa. 1996) ("It must be emphasized, however, that because actual harm to the environment is by nature difficult and sometimes impossible to demonstrate, it need not be proven to establish that substantial penalties are appropriate in a Clean Water Act case."); *see also Labarge, Inc.*, EPA Docket No. CWA-VII-91-W-0078, 1997 EPA ALJ LEXIS 6, *9 (Decision and Order as to Penalty)(ALJ, Mar. 26, 1997); *United States v. Gulf Park Water Co.*, 14 F. Supp. 2d 854, 860 (S.D. Miss. 1998). Therefore, the EPA properly considered the gravity of Respondent's violations in calculating its proposed penalty.

c. Adjustment Factors

The gravity calculation can also be adjusted, based on three additional factors: the violator's ability to pay (can decrease gravity), the violator's prior history of recalcitrance (can increase gravity), and the quick settlement reduction factor (can reduce gravity). A Respondent's demonstrated inability to pay may justify reducing the gravity factor.

i. Ability to Pay

"[A] respondent's ability to pay may be presumed until it is put at issue by a respondent." *JHNY, Inc.*, 12 E.A.D. 372, 397 (EAB 2005) (quoting *Spitzer Great Lakes, Ltd.*, 9 E.A.D. 302,

321 (EAB 2000)). In this case, Respondent has not raised any issue regarding DOT's ability to pay the proposed penalty in this case. To the contrary, the parties have jointly stipulated to the fact that Respondent is a large entity with a vast network of facilities and employees located throughout New York State. *See* Joint Stipulations at 1. Respondent's witness Dan Hitt also testified at hearing that DOT had more than 8,000 employees. Tr. 554:23-25; *see also* RX72 (detailing the payment of $452,766.68 in labor costs for DOT compliance efforts.) As such, it is reasonable to conclude that Respondent can pay the proposed penalty. Moreover, Respondent has not asserted that it cannot pay the proposed penalty, nor has it provided financial documentation in the record to support such a claim. Consequently, the EPA properly considered Respondent's ability to pay in this case, and this factor does not require any reduction in the proposed penalty.

ii. History of Recalcitrance

The history of recalcitrance factor can increase the amount of the gravity based on bad faith or unjustified delay by a Respondent. In this matter, no increase was calculated under this factor because Respondent was cooperative and responsive in remedying violations once they had been identified by the EPA.

iii. Quick Settlement Adjustment

The quick settlement adjustment factor encourages violators to be reasonable and responsive during negotiations, and can support a reduction in the proposed penalty where Respondent is willing to resolve a complaint through a reasonable settlement. In this matter, an adjustment for quick settlement is not warranted because no settlement was achieved.

d. Supplemental Environmental Projects (SEP)

The amount of a penalty may be reduced to some extent, but not to zero, if the violator is willing to perform a supplemental environmental project, which is an environmentally beneficial

project proposed by the violator, that the violator is not legally required to do, but which has a specific nexus to the harms caused by the violation at hand and is otherwise acceptable to the EPA. In this case, the EPA did not consider a SEP in its penalty calculation because a SEP was not performed.

e. Litigation Considerations

Where the EPA believes there is a weakness in its case that might result in obtaining a lower penalty at hearing or trial, it may reduce the proposed penalty by up to 30%. In this case, given the strong record of Respondent's extensive and long-running violations of the Clean Water Act, such considerations do not justify a reduction in the proposed penalty.

3. A Penalty Reduction is Not Warranted Based on "Such Other Matters as Justice May Require"

In addition to the enumerated factors discussed above, 33 U.S.C. §1319(g)(3) of the Clean Water Act requires the Administrator to consider whether any other factors including "such other matters as justice may require," warrant an increase or decrease in the proposed penalty. The phrase, while not defined by the CWA, has been interpreted in a number of administrative law decisions. These decisions make clear that this "justice" factor is rarely invoked, and should only come into play when consideration of the other listed criteria is insufficient to achieve a fair result. Respondents must meet a high bar to show that a penalty is unfair – the circumstances must be "such that a reasonable person would easily agree that not giving some form of credit would be manifest injustice." *In re Spang & Co.*, 6 E.A.D. 226, 250 (EAB 1995). Courts have noted the "extraordinary nature" of the criterion, and stated that it is only to be "sparingly wielded." *In Re Service Oil, Inc.*, 14 E.A.D. 133, 156 (EAB 2008) (vacated on other grounds by *Service Oil v. United States EPA*, 590 F.3d 545 (8th Cir., 2009) . The

criterion "only com[es] into play where application of the other adjustment factors has not resulted in a 'fair and just' penalty." *Id.*

Here, the proposed penalty of $150,000 is a fair and just penalty given Respondent's multi-year, widespread failure to comply with clear, significant permit requirements that are designed to protect the waters of the United States. Nevertheless, Respondent appears to argue that the penalty should be off-set by the money that it spent belatedly coming into compliance, including money allegedly spent on environmental expenses not strictly required by the Administrative Compliance Order. Tr. 384; *see also* Respondent's Response to Motion for Partial Accelerated Decision on Liability at 2-3, December 11, 2017. Any sums of money that Respondent may have spent on compliance, however, should not reduce the penalty in this case. As the case law makes clear, "[t]he cost of compliance with the law does not seem a proper set-off to apply to penalties for noncompliance." *EPA v. Environmental Waste Control*, 710 F.Supp. 1172, 1244 (N.D. Ind. 1989); *see also U.S. v. Vineland Chemical Co.*, 1990 U.S. Dist. LEXIS 8881, 31 ERC 1720 at 30 (D.N.J. 1990).

Moreover, the hearing testimony does not adequately support Respondent's contention that it spent in excess of what was strictly required to comply with its environmental obligations under its permit. Respondent did not actually admit into evidence any documentary proof regarding these purported additional expenditures, nor did Respondent proffer any evidence of the amounts allegedly spent in this regard. *See generally* Tr. 456-550.[27] Rather, Respondent's entire evidence in this regard is based on their party representative's testimony regarding her opinion as to what was required for Respondent to comply with its permit requirements. Significantly, Ms. Kubek admitted that her experience in stormwater management issues does

[27] Respondent's witness, Ms. Kubek, was shown Complainant's Exhibit 68 at hearing, to which she referred briefly, however, this document was never admitted into evidence.

not qualify her to interpret legal language and, as described earlier, her testimony repeatedly demonstrated her lack of competence in that regard. Tr. 507:4-6; 456:6-16; 459:14-24; 466:11-467:8; 467:9-20; 468:1-9; 469:19-470:5. Thus, Respondent's unsupported claim that it spent more than necessary to comply does not justify an off-set for, nor a reduction of, penalties in this matter.

Similarly, the justice does not require this Tribunal to credit Respondent's legally misguided estoppel argument. As described above, this argument fails on the facts and the law, and the equities of this case clearly do not support a penalty reduction based on this theory.

Since Respondent has not offered support for any arguments that the proposed penalty calculation will clearly result in "manifest injustice," this court should not entertain any request for a penalty reduction in the interests of justice. Rather, as described above, Complainant's proposed penalty is well supported by the record, and Complainant therefore respectfully proposes that this court, upon consideration of the evidence and the statutory penalty factors, assess a penalty of no less than $150,000.

VIII. PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ADMINISTRATIVE PENALTY

Based on the foregoing pleadings, admissions, documents, and testimony, Complainant proposes that this Tribunal (1) find Respondent liable for at least 16,218 days of violation of the Clean Water Act, as alleged in paragraph III.10 of the Complaint, (2) order Respondent to pay a penalty of no less than $150,000, and (3) grant Complainant such other and further relief as this Tribunal deems lawful and proper.

Respectfully submitted,

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Dated: August 17, 2018
New York, NY

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

CERTIFICATION OF SERVICE

I hereby certify that the foregoing **Complainant's Post-Hearing Brief in Support of Its Proposed Findings of Fact, Conclusions of Law, and Order Assessing Administrative Penalties**, dated August 17, 2018, was sent this day to the following parties in the manner indicated below.

Yolanda Majette, Secretary

Original and One Copy by OALJ E-Filing System to:
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Dated: August 17, 2018
New York, NY