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 REPLY BRIEF IN OPPOSITION TO RESPONDENT'S INITIAL POST-HEARING BRIEF AND IN FURTHER SUPPORT OF ITS PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER ASSESSING ADMINISTRATIVE PENALTIES

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I. INTRODUCTION

Pursuant to 40 C.F.R. § 22.26 and the Presiding Officer's October 24, 2018, Order Granting Joint Motion for Extension of Time to File Post-Hearing Reply Briefs, Complainant, the United States Environmental Protection Agency, Region 2, ("EPA" or "Complainant") hereby submits this brief in reply to Respondent's October 5, 2018 Initial Post-Hearing Brief in Opposition to Complainant's Proposed Findings of Fact, Conclusions of Law, and Proposed Order, and in further support of its August 17, 2018 Proposed Findings of Fact, Conclusions of Law, and Order Assessing Administrative Penalty. Unless otherwise noted, Complainant hereby incorporates and maintains all of the factual assertions and legal arguments made in its Initial Post-Hearing Brief.

II. RESPONDENT'S ARGUMENTS ABOUT COMPLAINANT'S WITNESSES

In its Initial Post-Hearing Brief, Respondent describes the EPA auditors as "inexperienced," implies that transportation-related municipal separate storm sewer systems ("MS4s") such as theirs are so different from other MS4s that the auditors were unqualified to observe and document the conditions of Respondent's MS4[1], and that the auditors' personal observations are somehow unreliable because they were not qualified at hearing as expert witnesses. These arguments ignore the extensive experience of the EPA auditors and compliance staff, exaggerate the differences in stormwater pollution controls applicable to "traditional" versus "non-traditional" MS4s, and conflate expertise with reliability.

[1] Respondent even argues, contrary to the clear evidence in this case, that [a]ll but one consultant ... had never audited a state transportation agency." Resp. Brief at 7. In fact, the hearing testimony makes clear that Mr. Jacobsen, Mr. D'Angelo, and Mr. Albright had all inspected highway system MS4s before participating in the audits of Respondent's MS4.

As demonstrated at the hearing, the EPA's compliance staff and auditors had, prior to the audits of Respondent's MS4, extensive and relevant experience in conducting audits of MS4 systems and stormwater pollution controls in multiple contexts. As described at length in Complainant's Initial Post-Hearing Brief ("Complainant's Brief"), Complainant's first witness, Christy Arvizu, who was responsible for planning and coordinating the audits of Respondent's MS4, has decades of relevant experience. Ms. Arvizu, who until very recently served as the lead MS4 inspector for EPA Region 2, has conducted over 27 compliance audits of MS4s, and has brought 15 enforcement actions against MS4s for violations discovered during those audits. CX 77 at 1; Tr. 26:15-19.

Complainant's other witnesses, auditors Kortney M. Kirkeby, Robert Jacobsen, Anthony D'Angelo, and Jacob Albright, all have extensive experience auditing MS4s, including transportation-related MS4s like Respondent's. Mr. Kirkeby is an aquatic biologist with PG Environmental ("PGE") who has completed national EPA training on conducting stormwater compliance inspections and has completed over 60 inspections relating to compliance with the EPA's industrial and construction stormwater control requirements. Tr. 133:3-134:11. Mr. Jacobsen is an environmental scientist with PGE who manages the operations of PGE's Clean Water Act compliance inspection program. Tr. 177:6-178:6. Mr. Jacobsen has extensive experience with MS4 compliance, including having conducted approximately 50 MS4 inspections, multiple workshops and trainings, and audits of the MS4s for the highway systems in California, Arizona and Virginia prior to the New York State DOT audits. Tr. 178:17-179:15. Prior to the hearing in this matter, Mr. Jacobsen had also conducted audits of the MS4s for the highway systems in Maryland and West Virginia. *Id.* Mr. D'Angelo is also an environmental scientist with PGE. Tr. 246:1-3. In that job, and prior to the hearing, he had conducted between

350-400 stormwater compliance inspections, including 25 audits of the highway-related MS4s in New Jersey, Maryland, and Michigan, as well as audits of construction stormwater compliance at sites related to the highway systems in Hawaii and California. Tr. 246:4-247:18. Mr. Albright is an environmental scientist for PGE, where, among other things, he conducts a variety of Clean Water Act compliance inspections. Tr. 297:23-298:4. Prior to the hearing, Mr. Albright had conducted approximately 40 MS4 compliance inspections, including inspections of several highway-related MS4s, and hundreds of industrial stormwater compliance inspections. Tr. 298:13-300:3.

Ms. Arvizu, and all of the EPA auditors, described the consistent and thorough process by which they observed, recorded, confirmed, and reported the findings of their audits of Respondent's MS4. Tr. 32:13-16; 42:20-43:15; Tr. 136:23-138:9; Tr. 181:2-183:14; Tr. 309:1-4. Notwithstanding Respondent's attempt to cast doubt on the EPA's observations, Respondent does not point to any instances in the hearing transcript where the auditors' observations, documentation, or credibility were seriously called into question. To the contrary, the auditors all testified with precision, professionalism, and objectivity about their personal observations, which were enhanced by their extensive experience and substantiated by extensive documentary and photographic evidence. *See generally*, Tr. 132:21-175; 177:2-236:19; 245:7-296:5; 297:15-321:3.

And, while Respondent argues that its MS4 is so different from other MS4s as to render the EPA's findings about Respondent's MS4 somehow unreliable, Mr. Albright's uncontested testimony established, to the contrary, that the types of stormwater pollution controls applicable in the industrial stormwater context are similar to those applicable in the MS4 context. Tr. 298:21-299:5. Therefore, Respondent's repeated – but unsubstantiated - claim that its status as a

"non-traditional MS4" somehow required the auditors to possess a specialized experience, beyond their extensive experience with all types of industrial and construction stormwater controls, is simply without merit.

Respondent's third argument about Complainant's witnesses simply confuses expertise with reliability.[2] Expertise allows a witness to give opinion testimony within her/his area of expertise, but does not imply or ensure reliability or, for that matter, credibility.[3] *See* Fed. R. Evid. 702.

III. RESPONDENT'S ARGUMENTS ABOUT THE VIOLATIONS[4]

Complainant relies on its Initial Post-Hearing Brief to demonstrate Respondent's liability for the violations alleged in the complaint, but takes this opportunity to address any new arguments or factual misstatements in Respondent's Initial Post-Hearing Brief ("Respondent's Brief").

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[2] In its only example of the alleged unreliability of Complainant's witnesses, Respondent attempts to demonstrate that certain testimony by Mr. Kirkeby lacked credibility by referring to a statement that Respondent's own witness, Ms. Kubek, confirmed in her testimony. Tr. 170:21-171:14; Tr. 427:6-22. Both Mr. Kirkeby and Ms. Kubek testified that kitty litter can be used to absorb spilled oil, and despite Respondent's counsel's mischaracterization in her questioning of Ms. Kubek, Mr. Kirkeby never testified that doing so would eliminate staining on the pavement. *Id.*

[3] In fact, Respondent's key witness, who was qualified as an expert, offered testimony that seriously undermined both her reliability and credibility. For example, Ms. Kubek testified, in a number of instances, despite clear evidence of its violations, and its having produced and submitted to the EPA new and "elaborated" programs, procedures, and practices to remedy the documented absence or inadequacy of the original versions, that Respondent had always been in compliance, and that its latter submissions were essentially identical to the originally missing or inadequate versions. *See e.g.* Tr. 548:20-550:5 (attempting to dispute clear photographic evidence of numerous violations at numerous sites over a span of 17 months by claiming that those violations – including, for example, the improper management and containment of large, preexisting scrap piles, and the observation of numerous oil stains and evidence of other spills - might have all first occurred the day before the photographs were taken); Tr. 473:9-10 (equating various scattered and reactive procedures in existence at the time of the audit with the comprehensive and proactive Illicit Discharge Detection and Elimination program submitted to the EPA almost two and a half years later); and Tr. 520:3-6; 522:2-7 (equating Respondent's skeletal pre-audit procedure for handling public complaints to the substantively different, far more detailed and complete procedures submitted to the EPA over 25 months later).

[4] Respondent offers several general, recurring reasons for reducing penalties throughout this section of its brief. In the interest of efficiency and clarity, Respondent's general arguments on penalty are addressed at once in Section IV.

A. Respondent's Failure to Develop and Implement Procedures for Identifying, Locating, and Eliminating Illicit Discharges (III.10.f)

Respondent denies liability for this violation because, according to Respondent, its final Illicit Discharge Detection and Elimination ("IDDE") procedures were "substantially similar" to what existed prior to the audit, and asks this Tribunal, should it find Respondent liable for this violation, to consider, among other things, its "good faith efforts to complete a compliant program prior to the audit," and its "timely compliance."

Complainant's Brief establishes Respondent's liability for this violation, and nothing in Respondent's Brief or the record in this case demonstrates the "substantial similarity" of the original and final IDDE submissions. According to Respondent, the only difference between its original and new submissions is that the new procedures include coordination with the actors who control adjoining sewer systems, outside of Respondent's right of way. As Complainant described in its Initial Brief, the differences – and improvements - are far more significant than that, resulting in a thoroughly connected framework for guiding interactions among systems to address illicit discharges where there once was none.

Regarding its purported good faith effort to complete a compliant program prior to the audit, Respondent does not point to any evidence in the record that it had made good faith efforts to comply with this provision. At the very least, such an attempt would be demonstrated by a single, easily located set of policies and procedures, even if incomplete or outdated. Instead, Respondent provided scattered, uncoordinated, and reactive procedures about which its employees were unaware, and for which no one in particular was responsible. Comp. Brief at 35-41. Regarding Respondent's purportedly "timely compliance," it took Respondent until December 1, 2015, more than 12 years after its first notice of the requirement in the 2003 permit, more than 3 years after the first audit, and almost a year and a half after receiving the EPA's

Administrative Compliance Order, to finally achieve compliance. Clearly, Respondent has failed to demonstrate a good faith effort to comply in the first instance, and there is nothing timely about Respondent's eventual compliance with this requirement. Therefore, Respondent fails to refute its liability or justify a reduction in the proposed penalty.

B. Respondent's Failure to Timely Complete an Outfall Reconnaissance Inventory ("ORI") (III.10.d)

Regarding this violation, Respondent does not contest liability, but instead argues that the May 1, 2013 deadline for completing the ORI was unreasonable, and that the DEC "acquiesced" in its noncompliance when it did not complain about Respondent's slow progress, which the DEC purportedly knew about from Respondent's annual reports. As an initial matter, Respondent's argument about the reasonableness of the May 1, 2013 deadline is untimely, because it would be based, if at all, on a challenge to the EPA's action in "making any determination as to a State permit program submitted under section [402(b)] of this title," which must have been brought within 120 days of the promulgation of that permit, in the Second Circuit. 33 U.S.C. § 1369(b)(1). Any such claim which could have been thus raised, cannot be raised in an enforcement proceeding. 33 U.S.C. § 1369(b)(2).

In any event, Respondent provides no record support for why the deadline is unreasonable. Other than noting that it is a large agency, with thousands of MS4 outfalls, Respondent offers no evidence that timely completing the ORI would be infeasible. To the contrary, the fact that Respondent has approximately 8,000 employees, indicates that it might have sufficient resources to inventory 16,800 outfalls over the course of five years. And, Respondent's witness, Dan Hitt, the Director of its Office of Environment, testified that, had Respondent believed it would face a penalty, it might have spent more money to come into compliance with the EPA's order even sooner. Mr. Hitt's testimony demonstrates that

Respondent is able to marshal resources when it deems a task important enough. Tr. 608:16-609:13. In any event, in maintaining permit coverage, Respondent agreed to abide by its terms. *See e.g.*, CX 1 at 1; CX 2 at 21; CX 3 at 16; and CX 4 at 22.

Regarding the DEC's alleged "acquiescence" in its violations, Respondent fails to offer any authority for shifting its liability to the DEC based on the DEC's purported failure to notify Respondent of its violations. In any event, Respondent failed to present any evidence that DEC was aware of its progress before the EPA audit, or that it had made any determination that Respondent's progress was adequate. In fact, Respondent's own witness, Ms. Kubek, admitted that Respondent repeatedly listed a false number when reporting the number of outfalls it had inventoried in its 2012 and 2013 annual reports to the DEC. Tr. 510:6- 512:15. Therefore, Respondent fails to refute its liability for this violation or support a reduction in the proposed penalty.

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

Respondent argues that Complainant's evidence in support of this violation is based solely on one observation of improper field screening, and that "fully implement" does not mean "carry out to perfection." Resp. Brief at 23. Respondent also argues that the existence of the procedures prior to the audit somehow satisfies its duty to fully implement those procedures.

Regarding the "isolated nature of the occurrence," Respondent offers no evidence that screenings were being performed correctly prior to the audit or before submitting its certification. In fact, while Ms. Kubek testified that the proper procedures were generally followed, she conceded that she did not personally implement, nor personally observe or supervise the implementation of, those procedures. Tr. 509:1-18. Further, the observed improper inspection showed both that the procedures were not being implemented properly and that Respondent had

not done adequate training and oversight of its interns. Regarding Respondent's argument about the definition of "implement," as Respondent notes, implement means to completely carry out. Clearly, the EPA observed that Respondent was not fully carrying out the outfall inspection procedures. *See* Comp. Brief at 44-46.

Additionally, Respondent's argument that it "merely had to certify that it would implement a procedure that already existed," actually supports the point that it is trying to refute. Respondent was not fully implementing the procedure, and the EPA needed assurances that Respondent had committed to doing so. The fact that the procedures may have existed at the time of the audit does not prove that they were being followed.

Regarding Respondent's additional argument, that it came into compliance "according to the EPA's schedule," that, of course, does not excuse a violation. Additionally, Respondent does not explain why it needed six months after receiving the first Administrative Compliance Order to submit a "mere" certification. Therefore, none of Respondent's arguments refute its liability, nor do they support a reduction in the proposed penalty.

D. Respondent's Failure to Inform the Public of the Hazards Associated with Illegal Discharges and the Improper Disposal of Waste (III.10.g)

As discussed in Complainant's Brief, Part VIII.A.3.h. of the 2010 MS4 GP requires permittees to inform the public of the hazards associated with illicit discharges. This requirement states that permittees should consider their public to be "the employee/user population, visitors, or contractors/developers," which includes, "the general public using or living along transportation systems." Respondent contends that the "or" in the permit requirement is disjunctive, and therefore allows a permittee to choose any single category in the list as the exclusive target of the information it is required to disseminate. In particular, Respondent argues

that its interpretation of "public," as meaning only its employees, fulfills the permit requirement. Resp. Brief at 14 and 24.

"When a litigant would give a statute a meaning that yields absurd results, that is a fair indication that the statute doesn't mean what that litigant has suggested." *Litwin v. American Express Company*, 838 F. Supp. 855, 859 (S.D.N.Y. 1993). And, "... whether 'or' is conjunctive or disjunctive may well depend on the context and usage ...." *BOKF, N.A. v. Caesars Entm't Corp.*, 162 F. Supp. 3d 243, n.5 (S.D.N.Y. 2016) (citing *Major Oldsmobile, Inc. v. General Motors Corp.*, 1995 WL 326475, at *6 (S.D.N.Y. May 31, 1995), *aff'd*, 101 F.3d 684 (2d Cir. 1996) (holding that "[i]t is well established that [t]he word 'or' is frequently construed to mean 'and' and vice versa, in order to carry out the evident intent of the parties."). Here, giving the term "public" the constrained meaning that Respondent suggests would yield an absurd result, and would thwart the evident intent of the permit requirement.

First, Respondent's interpretation attempts to simply read out the presence of the words "user population," which are joined with the word "employee" as one category in the permit definition ("employee/user population"), thus selectively ignoring the clear language of the permit. Second, as described above, the permit elaborates on the definition of public, as applicable to Respondent's system, by saying that it should include "the general public using or living along transportation systems." Finally, the Clean Water Act has the broad, remedial purpose of reducing, and ultimately eliminating, the discharge of pollutants to all waters of the United States, and Respondent's MS4 permit, promulgated thereunder, is designed to give effect to that goal. *See* 33 U.S.C. §§ 1251(a), 1311(a), and 1342(a). In light of this broad objective, the purpose of the permit requirement at issue is properly understood as preventing all of the people

who use Respondent's MS4 from discharging pollutants into the system, and thus into waters of the United States.

In light of the language of the permit and the purpose of the CWA, the word "or" in the definition of "public" should clearly be read in the conjunctive, as a list of all the types of people who might interact with, and potentially discharge into, Respondent's MS4. That includes employees, users, visitors, contractors, developers, and people living along transportation systems. To read it as disjunctive, as Respondent urges, would simply frustrate the intent of the permit, and render this permit requirement largely ineffective. Because the conjunctive use of "or" is the only interpretation that gives effect to the intent of the Clean Water Act and the permit requirement at issue, the EPA's interpretation is the correct one, and the additional efforts to inform the public that Respondent developed in response to the EPA's order were warranted. *See e.g. Auer v. Robins*, 519 U.S. 452 (1997); *see also Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012) ("*Auer* ordinarily calls for deference to an agency's interpretation of its own ambiguous regulation ...").

Therefore, Respondent has failed to refute its liability for this violation, and its argument offers no basis for a reduction in the proposed penalty.

E. Respondent's Failure to Fully 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)

Respondent argues that, because rainfall event inspections were no longer required under the construction general permit at the time of the audits, those requirements in its SWMP Plan were no longer applicable, and therefore, were suddenly nullified in Respondent's SWMP. Br at 7. This is incorrect. As an initial matter, proposed changes to a SWMP must be submitted to the DEC by a permittee wishing to make such a change. *See* CX 4 at 15-16. Respondent presented

no evidence at hearing that it submitted such a change to the DEC. Therefore, Respondent remained obligated to implement its SWMP as written at the time of the EPA audits.

Moreover, Respondent's attempt to introduce Ms. Kubek's testimony about the contents of the construction general permit, without admitting the permit into evidence, runs afoul of the so-called "best evidence rule," codified in the Federal Rules of Evidence. That rule provides that, "[a]n original writing, recording, or photograph is required in order to prove its content unless these rules or a federal statute provides otherwise." Fed Rules Evid R 1002. Here Ms. Kubek was offering fact testimony about the contents of a writing that was not in evidence. Therefore, that testimony is inadmissible.[5]

Finally, Respondent tries to diminish the seriousness of the violations by claiming that there were only two instances of inspections not being conducted weekly. In fact, the EPA discovered 17 instances where Respondent failed to inspect with the required frequency, indicating a more systemic problem. CX 35 at 20-21, 641, 650, 661. For the foregoing reasons, Respondent has failed to refute its liability for this violation, and its arguments offer no basis for a reduction in the proposed penalty.

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

Respondent argues that it was in compliance at the time of the EPA audits, because it had an e-mail address in place for submission of public complaints prior to the audits, but that the employees present for the audits, and responsible for responding to the EPA's pre-audit records requests, were not familiar with the process because it was not part of their job duties. Respondent makes this argument despite the fact that Dave Graves, Respondent's Statewide

[5] Respondent's citation to CX 30 at 22 does not save Ms. Kubek's testimony on this point. That page of the Region 9 Audit Report merely recites the weekly inspection requirement, but does not attempt to describe all inspection requirements, and makes no statement about the applicability of the weather-related inspections called for in Respondent's SWMP Plan.

Stormwater Program Coordinator, was present at the audits. CX 30 at 4; CX 35 at 4; CX 39 at 4 and 462; Tr. 621:7-10.[6] Presumably, if the required program existed, Respondent's Statewide Stormwater Program Coordinator would know about it.

Respondent also claims, without any support in the record, that its initial submission, on July 1, 2014 (two years after the first audit), was merely an update of the pre-existing process, to include Ms. Kubek's name. In any event, nearly 14 months later, on September 30, 2015, Respondent finally submitted procedures that satisfied this permit requirement. Comp. Brief at 52.

Finally, despite the significant improvement between its first submission and the final one, Respondent characterizes the latter as merely a "thorough articulation" of the original version that was not substantially different. Resp. Brief at 14, 27. As discussed in Complainant's Brief, the procedures initially submitted likely did not exist at the time of the first audit, because they refer to Ms. Kubek, who did not work for Respondent at the time. Comp. Brief at 53. Therefore, that submission does not prove that Respondent had ANY public complaint process in place at the time of the audits. In any event, a comparison of the initial and final submissions clearly demonstrates that the latter are far more comprehensive than what was submitted after Respondent received the Administrative Compliance Order. *Id.*

For the foregoing reasons, Respondent fails to refute its liability for this violation, and its arguments offer no basis for a reduction in the proposed penalty.

[6] Significantly, Ms. Kubek mistakenly testified, contrary to Respondent's own documented admissions, that Mr. Graves was not Respondent's Statewide Stormwater Program Coordinator, calling into question her reliability. Tr. 518:23-519:14; 691:23-694:11.

G. Respondent's Failure 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)

Respondent appears to partially concede its liability when it admits that what it submitted as a pollution prevention and good housekeeping program for its fixed facilities "did not include procedures for stockpile and scrap metal storage ...." Resp. Brief at 29. Its further statements about site-specific pollution prevention plans are simply red herrings, since the EPA never asked Respondent to develop such plans (though it did require self-assessments of the fixed facilities in compliance with Part VIII.A.6.a.ii of the MS4 permit). CX 54 at 3, 506-965. Therefore, Respondent fails to refute its liability for this violation, and its arguments offer no basis for a reduction in the proposed penalty.

H. Respondent's Failure to Develop and Implement Employee Training for Pollution Prevention/Good Housekeeping ("PP/GH") for Municipal Operations (III.10.n)[7]

Respondent claims that "employee training programs were in place prior to the audits" which included outfall inspections, erosion and sediment control, construction general permit requirements, and stormwater pollution prevention, and cites to CX 30 at 34 and CX 35 at 29. Resp. Brief at 6. However, CX 30 at 34, the Region 9 Audit Report, states that Region 9 employees described various training activities, (not a "training program") that included outfall inspections, erosion and sediment control, and construction general permit requirements, but, notes that, when the training materials were provided, the auditors found that the materials were focused on erosion and sediment control rather than stormwater pollution prevention and good housekeeping, and were only offered for NYSDOT senior management-level staff. And, CX 35 at 29, the Region 8 Audit Report, lists a "stormwater pollution prevention video" and a

[7] Complainant notes that there is a clerical mistake on page 72 of its initial brief, in the second full paragraph. The word "fixed" should be followed by the word "facilities."

"stormwater pollution prevention document," but says nothing about its contents, and notes that only NYSDOT Region 8 residency employees attended the training.

Respondent also claims, based on Ms. Kubek's testimony, that "all regional facilities performed semi-annual training covering pollution prevention and control measures." Resp. Brief at 30-31. However, Respondent could only produce scattered and unresponsive examples in response to the EPA's request for any training plan, syllabus, or records. Comp. Brief at 21. Moreover, Ms. Kubek was not employed by Respondent at the time of the audits, and none of the witnesses who did work for Respondent before and during the audits was able to describe or provided any documentation of the dates, duration, specific content, or attendance at these purported trainings. Finally, as noted in Complainant's Brief, and confirmed by the testimony of the EPA auditors, Respondent was unable to produce any evidence of a PP/GH training program for its employees. *See e.g.* Tr. 255:23-256:7; 288:25-289:3.

Finally, Respondent claims, without record support, that it submitted training materials to DEC annually, with its annual MS4 report, and that the DEC "accepted these training programs in satisfaction of the permit," citing Transcript pages 489 and 492-93. Resp. Brief at 6. However, neither of the cited colloquies supports those claims. In the first colloquy, Ms. Kubek testifies that Respondent submits annual reports to DEC which include construction site "training," but doesn't specify what that training includes (or does not include). Nor does this testimony speak to DEC "accepting" anything. And, in the second colloquy, Ms. Kubek describes several trainings that Respondent purportedly offers, but there is no mention of submitting anything to the DEC or of it "accepting" anything.

For the foregoing reasons, Respondent fails to refute its liability for this violation, and offers no basis for a reduction in the proposed penalty.

I. Respondent's Failure to Maintain All Erosion and Sediment Control Practices in the Stormwater Pollution Prevention Plan ("SWPPP") in Effective Operating Condition at All Times (III.10.h) and Respondent's Failure to Implement Appropriate PP/GH Best Management Practices ("BMPs") for Municipal Operations (III.10.o)

Respondent's arguments about the numerous violations discovered at its construction sites and fixed facilities and the dozens of pages of evidence supporting those findings, amount to the following: (1) the auditors had no prior experience auditing transportation agencies; (2) the auditors did not perform a chemical analysis of certain unknown liquids found uncovered and uncontained at Respondent's fixed facilities, and (3) a few of the conditions observed by the auditors that violated the permit might have only existed for a short time.

Regarding the auditors' qualifications, those are described above. In any event, while the auditors were eminently qualified to audit Respondent's facilities and practices, because their testimony was simply to recount their personal observations, their level of qualification was essentially irrelevant to whether their testimony was reliable. And, as demonstrated at the hearing, their conduct and documentation of the audits, as with their testimony, was thorough, thoughtful, and objective. As a result, their extensive documentation and clear testimony was highly reliable.

Respondent's argument about the content of the 'unknown liquids' is another red herring. Because the definition of "pollutant" in the Clean Water Act is expansive,[8] and because Respondent is under a clear duty to prevent discharges of any non-stormwater contaminants in the stormwater that leaves its facilities,[9] the exact contents of the containers is not relevant to whether Respondent failed to implement the required best management practices.

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[8] "The term 'pollutant' means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water...." 33 USCS § 1362(6)

[9] See CX 4 at 6-7.

Finally, the ridiculousness of Respondent's suggestion that all of the violations observed and photographed at dozens of sites on nine separate days over the span of 17 months might have just occurred immediately before each audit, was already laid bare by the Presiding Officer in her examination of Ms. Kubek. Tr. 548:20-550:5.

For the foregoing reasons, Respondent fails to refute its liability for these violations, and offers no basis for a reduction in the proposed penalty.

J. Respondent's Failure to Ensure the Adequate Long-Term Operation and Maintenance of Post-Construction Stormwater Controls (III.10.k) and Respondent's Failure 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)

Respondent argues that its failures to comply with the above two requirements should be excused because "the breadth of the MS4 permit grew considerably in just seven years," and because "the permit does not require annual self-assessments." Resp. Brief at 36. However, the complexity of the permit is no excuse for the violations and, to the extent that Respondent now challenges the permit, such an argument is untimely, and thus precluded, as discussed earlier. And, despite its second argument, the EPA has never asserted that self-assessments of the fixed facilities must be done annually, and Respondent offers no evidence of any such assertion. The violation of Section VIII.A.6.a.ii is based on the fact that Respondent had never done ANY self-assessments of its fixed facilities, as clearly required by the permit. Incredibly, Respondent now argues, also without any authority or evidence, that, because the language of the permit requirement does not contain a specific frequency for performing self-assessments, it can simply wait as long as it wants to perform one. But Respondent ignores the fact that the permit requires the assessments in order for Respondent to "determine the sources of pollutants potentially generated by the permittee's operations and facilities and identify the municipal operations and facilities that will be addressed by the pollution prevention and good housekeeping program ..."

CX 4 at 64. Thus, without completing the assessments, Respondent would be (and was) unable to develop a proper pollution prevention and good housekeeping program, as required by the permit.

Other than these two arguments, Respondent does not even attempt to refute the numerous violations observed and documented by the EPA. Therefore, Respondent fails to refute its liability for these violations and offers no basis for reducing the proposed penalty.

IV. RESPONDENT'S ARGUMENTS ABOUT THE PENALTY

As noted in Complainant's Brief, upon appropriate consideration of the factors contained in 33 U.S.C. § 1319(g)(3) for the seventeen distinct types, and more than 16,218 separate days, of CWA violations, this Tribunal should assess a penalty of at least $150,000 against Respondent in this matter. Nothing in Respondent's Brief contradicts this assessment. Respondent's Post-Hearing Brief fails to establish any viable legal, or credible factual, reason why this tribunal should not impose the penalty requested by the Complainant.

A. Respondent's Argument on Deterrence

Respondent first argues that a penalty is not warranted in this matter because it would have no deterrence value. Resp. Brief at 37. In support thereof, Respondent argues that "[t]he Complainant has offered no evidence and made no argument as to why it believes that this penalty is required to deter the Respondent from any future noncompliance." Resp. Brief at 41. This statement elucidates Respondent's misunderstanding of the use of "deterrence" in administrative (and judicial proceedings).

Respondent relies upon the Environmental Appeals Board (EAB) decision in *In re Ocean State Asbestos Removal Inc.*, 7 E.A.D. 522, 548-549 (EAB 1998) to support its proposition that its cooperation and compliance upon notification of its violations should serve to obviate the

need for the assessment of a penalty for deterrent purposes. However, Respondent's argument is misguided.

As an initial matter, deterrence is not a stand-alone penalty determinant, but rather serves as an overarching goal, and can be used as an adjustment factor when determining a penalty based on applicable statutory penalty factors. *See e.g. In re Sav-Mart, Inc.* 5 E.A.D. 732, 740 (EAB 1995) ("An adjustment based on the need to achieve deterrence without being unduly punitive should also logically be applied to the total calculated penalty.") And, a full reading of the *In re Ocean* decision cited by Respondent makes clear that the EAB analysis there focused on evaluating a penalty *increase* in situations where a "violation subsequently occurs in spite of the specific notice provided." *Id.* at 549. The *In re Ocean* decision certainly does not stand for the proposition that an entity like NYSDOT, observed to have committed 17 distinct types, and more than 16,218 separate days, of CWA violations, over a 5-year period, should not be penalized because it would not serve any deterrent value.

Moreover, as discussed below, Respondent offers no support for its vague argument that despite its numerous violations, a penalty is unwarranted because it didn't fully understand its permit requirements and was "cooperative and accommodating upon notification of its noncompliance." Resp. Brief at 37. In fact, if this were true as a legal precedent, an entity would need only feign ignorance of its legal obligations and cooperate with authorities upon discovery of its violations to avoid any penalty, regardless of the extent of its actions.

Finally, despite Respondent's suggestion, the Government has no obligation to put forth evidence specifically tailored to suggest that a penalty is required to deter "... the Respondent from any future non-compliance." Resp. Brief at 37. As an initial matter, this suggestion ignores the overarching concept of "general" deterrence and its import in deterring future societal

violations, not just that of the violative actor. *See e.g.* Interim Clean Water Act Settlement Penalty Policy, CX 65 at 2: "As part of an enforcement action, EPA also seeks substantial monetary penalties which promote environmental compliance and help protect public health by deterring future violations by the same violator *and deterring violations by other members of the regulated community"* (emphasis added); *see also Catskill Mts. Chapter of Trout Unlimited, Inc. v. City of New York*, 244 F. Supp. 2d 41, 48 (2003) ("the purpose of the CWA's penalty provision is deterrence with respect to both the violator's future conduct (specific deterrence) and the general population regulated by the Act (general deterrence)."). Nevertheless, the evidence presented by Complainant establishing Respondent's commission of 16,218 separate days of CWA violations more than adequately supports the imposition of a significant penalty to deter Respondent from future violative conduct, and other members of the regulated community from committing similar behavior in the future.

B. Respondent's Argument on the Applicable Penalty Factors

Respondent argues that the EPA failed to consider several statutory factors in determining the proposed penalty. This is neither factually correct, nor legally supported. In her testimony, Ms. Arvizu described how she used the EPA's Clean Water Act Settlement Penalty Policy to guide her consideration of the statutory factors contained in CWA Section 309(g)(3). Tr. 322:17-377:10. Moreover, based on the extensive record in this case, this Tribunal's consideration of the penalty factors could easily result in the assessment of the proposed – or greater - penalty.

1. Nature, Extent, and Gravity

Regarding the nature, extent, and gravity of the violations, Respondent argues that the EPA failed to present evidence to support its penalty because it introduced "no evidence indicating that the violations alleged created any cognizable difference in water quality." Resp.

Brief at 39. This simply ignores the extensive evidence presented at hearing, and described at length in Complainant's Brief, of the numerous violations that occurred over many years, and resulted in the likely discharge of uncontrolled pollutants from Respondent's construction and maintenance operations into its MS4.

2. Ability to Pay

Regarding its ability to pay, Respondent argues, without support, that "any penalty assessed by the EPA will require the Respondent to abandon or underfund a necessary project." Notably, Respondent offered no evidence of its income, assets, liabilities, or expenses, and does not even claim in its brief that this factor justifies a reduction in the proposed penalty.

3. Prior History of Violations

Regarding its prior history of violations, Respondent purports to cite *In re Sav-Mart, Inc.*, 5 E.A.D. at 739 for the statement that a "reduction in the amount of penalty [is] appropriate for a first time violator when the evidence showed that a lower penalty was a sufficient deterrent." However, that statement does not appear in that case, or the subsequent case cited by Respondent, *In re Ocean State Asbestos Removal Inc.*, 7 E.A.D. at 549 (1998). In any event, in *Sav-Mart*, the Board upheld the Administrative Law Judge's penalty, merely noting that the absence of prior violations *can be* (not "is" as Respondent states) a valid basis for reducing a penalty for a first-time violator who had no other notice of his obligations, and where there was no need for specific deterrence. That simply is not the case in this matter. Respondent is a large, sophisticated organization that was well-aware of its obligations, and presents no evidence to contradict that essential fact. Therefore, this factor does not justify the reduction or elimination of a penalty in this matter.

4. Degree of Culpability

Regarding degree of culpability, Respondent argues that it has very little culpability for its extensive violations. This argument is clearly contradicted by the fact the Respondent had been responsible for the obligations it shirked for many years, most for as many as nine years before the first audit, but had significantly failed to comply with so many of those obligations. Interestingly, Respondent appears to admit its own negligence when it says, "any alleged violations, if found, were the result of ... (negligence)." Resp. Brief at 42.

5. Economic Benefit

Regarding economic benefit, Respondent simply attempts to ignore Ms. Arvizu's testimony on this point because she did not also consider other "statutorily mandated factors," when calculating Respondent's economic benefit for its violations. Resp. Brief at 42. Notably, Respondent does not say what those other factors are. *Id.* In any event, the EPA is under no obligation to conflate the statutory factors in determining the economic benefit of Respondent's violations, and the record in this matter, including the numerous submissions by Respondent detailing its costs in returning to compliance, clearly supports the EPA's economic benefit calculation. *See* Comp. Brief at 91.

6. Other Matters as Justice May Require

Finally, Respondent asks this Tribunal to disregarding the clear, abundant, and credible evidence of Respondent's numerous, widespread, and longstanding violations of the Clean Water Act, and assess no penalty because it is required to do so in the interest of justice. Nothing in this case even recommends, much less requires, such a result.

As described more fully in Complainant's Initial Post-Hearing Brief (pp 96-98), this factor 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, Respondent has not shown why manifest injustice would result if this Tribunal assesses the proposed penalty against it in this matter.

Respondent's first line of argument in support of an interest of justice penalty reduction relates to its purportedly good behavior before and after the audits. Respondent first argues that its "good faith efforts to complete a compliant IDDE program prior to the audits" supports its call for zero penalty. The EPA does not dispute that Respondent was complying with some aspects of its permit at the time of the audit. However, this does not mitigate the unlawfulness or potential harm of the numerous requirements that Respondent failed to seriously attempt and/or timely complete prior to the audits. Respondent next argues that its "active cooperation throughout this proceeding" supports its call for zero penalty. [10] The EPA does not dispute that Respondent was cooperative over the nearly two years that it took to remedy all of its violations after receiving the Administrative Compliance Order. However, Respondent never should have been in violation, and continued to be liable until its violations were remedied. Respondent further argues that the proposed penalty should be reduced or eliminated because of "its initiative

[10] It is noted that Respondent mistakenly calculated the time it took from the issuance of the order for it to finally come into compliance with its previous obligations. In its brief, Respondent claims it demonstrated full compliance on February 5, 2016, which is correct, but then claims that date is "eleven months after the issuance of the ACO by the EPA." In fact, February 5, 2016 is 23 months after the issuance of the first order, and 20 months after the issuance of the second order. In either event, the remedy period was about twice as long as Respondent claims.

in expanding some of EPA's compliance requests beyond the MS4 into statewide programs." Resp. Brief at 43. However, to justify a penalty reduction in the interest of justice, "the evidence of environmental good deeds must be clear and unequivocal." *In re Spang & Co.*, 6 E.A.D. at 250. In this matter, while some of Respondent's witnesses made this general claim, there is no specific evidence of the location, extent, duration, or effectiveness of any such efforts. Therefore, the evidence of Respondent's purported environmental good deeds is far from clear and unequivocal. Finally, Respondent makes the related argument that it should be credited for timely complying with the administrative order. This argument ignores that fact that compliance with an administrative order is not voluntary, and that the failure to do so would have potentially exposed Respondent to additional penalties. *See* 33 U.S.C. § 1319(d); *see also* CX 40 at 21. It also ignores the fact that Respondent took nearly 23 months to come into compliance with obligations that should have been met long before the order was issued.[11] In sum, Respondent's efforts to remedy its extensive violations after they were discovered, its compliance with some of its obligations prior to the audits, its efforts to comply with a lawful order, and its unsupported claims of extra environmental efforts do not justify the reduction or elimination of a penalty for its numerous, well-documented violations. [12]

Respondent's next line of argument in support of an interests of justice penalty reduction deals with the supposed complexity and ambiguity of the MS4 permit. However, as discussed above, those arguments are time-barred challenges to the permit and cannot be raised in this matter. Moreover, the fallacy of Respondent's argument is demonstrated by the clear language of

[11] This includes 18 months to submit a program for responding to public complaints that Respondent continues to insist existed at the time of the audits.

[12] Significantly, Respondent has abandoned its unsupported assertion that the proposed penalty should be eliminated because the EPA had required Respondent to spend more than required to remedy its violations. This is because Respondent failed to introduce any evidence of the amount of these purportedly "excess" expenditures, and because Respondent's own witness, Mr. Bass, contradicted this claim when he conceded that the EPA had not asked Respondent to go beyond their permit requirements. Tr. 681:8-10.

the requirements, as described at length in Complainant's Brief. And, finally, Respondent offers no evidence that it ever sought clarification from the DEC or the EPA of any permit requirements before the EPA's audits. Therefore, none of these arguments justifies the reduction or elimination of a penalty for Respondent's numerous, well-documented violations.

Respondent also points the finger for its violations and penalty liability at the EPA and the DEC. In this regard, Respondent argues that the proposed penalty should be reduced or eliminated because the EPA's order was issued *21 months* (not two years, as Respondent claims) after the first audit. As an initial matter, Respondent offers no authority for the proposition that a regulatory agency is obligated to notify a violator about its violations or forgo penalties for those violations, because there simply is none. In any event, Respondent fails to acknowledge that the final audit of its MS4 occurred on July 25-27, 2013, which is less than nine months prior to the issuance of the order. And, as thoroughly demonstrated by the record in this matter, the EPA's audits involved numerous staff and contractors, included extensive records requests and reviews, covered three separate geographic areas and over 36 locations, involved conversations with dozens of people, and produced audit reports totaling several hundred pages. In light of the large record in this case, the EPA's extensive findings, and Respondent's thousands of violations, the EPA's process and timing was appropriately deliberative and thorough, and certainly does not justify the reduction in, or elimination of, a penalty in this matter.

Respondent's final argument in support of an interests of justice penalty reduction is based on its assertion that EPA failed to notify Respondent that a daily penalty was accruing. Respondent offers no authority for the proposition that the EPA is obligated to notify Respondent about its potential penalty liability, and it is well-settled that "ignorance of the law is no excuse." *In re Air Disaster at Lockerbie Scot.*, 37 F.3d 804, 818 (2d Cir. 1994) ("The reason for this

ancient rule is ... because ignorance ... is a ready excuse easily raised and difficult to refute."). In any event, Respondent had actual notice of its potential liability, because it is clearly stated in the MS4 permits. CX 2 at 21, CX 3 at 16, and CX 4 at 22.

For the numerous reasons described above, Respondent's request for a penalty reduction in this matter based on "such other matters as justice may require," should be summarily rejected.

C. Respondent's Argument on Estoppel

Despite its apparent abandonment of any estoppel argument, Respondent's Brief in various sections continues to attempt to fit its round peg of an estoppel argument, based on alleged oral statements made by an EPA employee about penalties, into the square hole of an estoppel against the government defense. But, as described at length in Complainant's Brief, these arguments simply fail.

As an initial matter, Respondent has not actually shown that a clear representation was made to its employees that the Government would forego penalties in this matter if Respondent complied with its permit conditions, because Respondent's testimony to that effect was directly contradicted. Tr. 698:16-19. In any event, as described more fully in Complainant's Brief, Respondent cannot show that it has satisfied any of the basic requirements to establish an estoppel against the government claim, including the following required elements: 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. *See* Comp. Brief at pp. 83-86; *Heckler v. Community Health Services,* 467 U.S. 51, 61-65 (1984). In fact, Respondent's Brief appears to confirm its failure to satisfy any of these legal elements. *See* Resp. Brief at 48-49.

Rather, in an effort to bolster its argument about the alleged unfairness of the EPA's actions, Respondent's Brief alleges that Justine Modigliani "deliberately refused to confirm" her authority to bind the EPA to forego penalties. Resp. Brief at pp 47. Such arguments appear comical in light of the mountain of facts and law contradicting this position. First, Ms. Modigliani testified that she did not have the authority to bind the EPA in this regard. Tr. 698:16-25. Second, it is undisputed that Ms. Modigliani was not the signatory on the administrative order, and there is no evidence that Respondent attempted a single instance of follow up (oral or written) to confirm their understanding of Ms. Modigliani's alleged oral statement.

In fact, the most significant fact undermining Respondent's continued insistence of the unfairness of the EPA's proposed penalties is the hearing testimony of Respondent's own employees. Both Ellen Kubek and Dan Hitt acknowledged 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. Comp. Brief at 84-85.

Finally, clearly lacking any valid legal arguments in support of this estoppel defense, Respondent attempts to characterize the EPA's actions in seeking injunctive relief and subsequent administrative penalties as a "rigged game," and implies that Respondent should be granted relief based on the EPA's use of a dual track enforcement regime. Resp. Brief at 48. Yet, this colorful argument simply ignores the clear, and independent, provisions of the Clean Water Act that give the EPA the authority to both order compliance with the law and to assess penalties for its violation. *See* 33 U.S.C. §§ 1319(a)(3) and (g). In fact, relevant case law further holds, directly contrary to Respondent's argument, that any limitation on EPA's ability to seek penalties

for violations that have been the subject of *an administrative order,* 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); *see also* 33 U.S.C. §§ 1319(a)(3) & (g).

In support of its "rigged game" argument, Respondent selectively quotes a paragraph of the Administrative Compliance Order relating to penalty assessment. Resp. Brief at 45. However, Respondent's selection leaves out the significant and clearly specified instruction contained in that same document, 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).

In conclusion, Respondent has failed to put forth any viable argument why this Tribunal should not assess the proposed, or greater, penalty in this matter, consistent with Complainant's hearing testimony and evidence. Respondent's arguments to the contrary are simply post-hoc attempts to justify its "head-in-the-sand" approach to environmental compliance, which brought about the current action. 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, Complainant's proposed penalty of $150,000 is appropriate, fair, and just, and we respectfully ask this Tribunal to assess a penalty at least as great.

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

Based on its Initial Post-Hearing Brief, this Reply, and all other pleadings, admissions, documents, testimony, and decisions in this matter, 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: November 2, 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 Reply Brief in Opposition to Respondent's Initial Post-Hearing Brief and in Further Support of its Proposed Findings of Fact, Conclusions of Law, and Order Assessing Administrative Penalties**, dated November 2, 2018, was sent this day to the following parties in the manner indicated below.

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Dated: November 2, 2018
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