

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region 2**

In the Matter of:)
) **Honorable Christine Donelian Coughlin,**
) **Presiding Officer**
)
New York State)
Department of Transportation,)
)
) **Docket Number: CWA-02-2016-3403**
Respondent.)
)
)
Proceeding pursuant to Section 309(g) of)
of the Clean Water Act, 33 U.S.C. § 1319(g))
)

COMPLAINANT’S CORRECTED INITIAL PREHEARING EXCHANGE

On July 28, 2017, Complainant, the Director of the Division of Enforcement and Compliance Assistance (“DECA”) of the United States Environmental Protection Agency (“EPA” or “Agency”), Region 2, filed and served its initial prehearing exchange pursuant to the “Prehearing Order,” dated June 13, 2017. Due to an inadvertent clerical error, Complainant hereby submits the following Corrected Initial Prehearing Exchange.

I. RESPONSE TO PARAGRAPH ONE (1) OF THE PREHEARING ORDER

1.(A) COMPLAINANT’S WITNESSES

The EPA anticipates that it might call any or all of the following witnesses:

1. Christy M. Arvizu

Ms. Arvizu is an Environmental Scientist at EPA, Region 2, based in New York City. Ms. Arvizu received a B.S. in Agronomy and Environmental Science, *Summa Cum Laude*, from Delaware Valley College, in May 1998. Ms. Arvizu has been an employee in Region 2’s Water Compliance Branch within the Division of Enforcement and Compliance Assistance since August 9, 2004. Before that, she was an Environmental Scientist at the EPA’s Region 3 office, in Philadelphia, PA, from October 23, 2000 to August 6, 2004, where she worked on NPDES permitting. Ms. Arvizu is the lead EPA staff person for the audits of Respondent’s facilities, operations, and activities at issue in this proceeding, and has been responsible for planning the

audits, evaluating the findings of the audits and related records requests, and initiating the enforcement actions taken in this matter.

Ms. Arvizu's testimony at the hearing on this matter is expected to cover the various aspects of her involvement in the development of the proceeding to date, including, but not limited to, the following: (a) her knowledge of the MS4 regulations and permit requirements applicable to Respondent's facilities, operations, and activities, (b) EPA Region 2's activities to enforce those requirements, including how the EPA chose to audit Respondent's facilities, (c) her preparation for the audits of Respondent's facilities, operations, and activities, including recruitment and coordination of contractors, notifying Respondent, developing the agenda, and requesting information from Respondent, (d) the procedures followed and activities undertaken in the course of the audit, including her participation, that of the contractors, and that of Respondent's representatives, officers, and/or agents, (e) observations she made during the audits about Respondent's compliance with the MS4 regulations and permit requirements, (f) her involvement in the preparation and/or review of the reports from those audits; (g) her review, analysis and evaluation of the submissions Respondent made in response to the EPA's records request, (h) her determinations and conclusions as to which violations existed regarding the facilities, operations and activities audited; (i) her knowledge, as well as her analysis and conclusions, about the seriousness of the alleged violations, Respondent's culpability, and the harms caused by the alleged violations, (j) her involvement in the drafting, development, and issuance of the Administrative Compliance Orders issued by the EPA to Respondent, (k) her knowledge, analysis, and evaluation of the actions taken by Respondent to comply with the Administrative Compliance Orders, including communications with, and submissions from, Respondent about such actions, (l) her role in developing the Administrative Complaint, including calculating the proposed penalty and her consideration of the statutory factors set forth in CWA Section 309(g)(3) as well as conformance with the applicable EPA penalty policy in doing so, (m) her evaluation, analysis and conclusions as to the appropriateness of the penalty sought; and (n) her view of the overall significance of the violations alleged in the Complaint. Finally, Ms. Arvizu's testimony is expected to provide the foundation for introducing many of the exhibits that the EPA would seek to introduce into evidence.

2. Maxwell Kuker

At the time of the audits, Mr. Kuker was an NPDES Compliance Specialist for PG Environmental, LLC, which is headquartered in Chantilly, Virginia, with an office in Golden, Colorado. PG Environmental, LLC, acts as a consultant to the EPA, providing expertise in, among other things, conducting compliance evaluation inspections and audits. Mr. Kuker received a B.A. in Environmental Studies from Randolph-Macon College in 1997, and has more than 15 years of environmental consulting experience, specializing in the application of and compliance with the Clean Water Act (CWA) and National Pollutant Discharge Elimination System (NPDES) regulations. He has extensive expertise conducting NPDES inspections of construction, industrial and municipal (municipal separate storm sewer system - MS4) storm water permit holders and in analyzing compliance with regulations and evaluating the effectiveness of best management practices and pollution prevention measures.

Mr. Kuker participated in the audits of all three of the audited New York State Department of Transportation (NYSDOT) Regions, and assisted in the preparation of the audit reports. His testimony is expected to cover his involvement in the development of this case, including the following: (a) his preparation for the audits; (b) the methodology he followed while conducting the audits, (c) what he observed and otherwise learned during the audits, including how those observations were documented; (d) the audit reports that he helped write, including his findings and conclusions; and (e) his knowledge of the scope and magnitude of the violations he observed and the basis for his evaluations and conclusions regarding such violations. His testimony is also expected to include information about his qualifications and work experience, his knowledge and familiarity with NPDES regulations and permit requirements for MS4s, and to provide the foundation for introducing some of the exhibits that the EPA would seek to introduce into evidence.

3. Candice Owen

At the time of the audits, Ms. Owen was a Water Resources Engineer for PG Environmental, LLC, and has experience working on a wide range of water resources and environmental engineering projects, including all aspects of regulatory compliance for MS4s. She received a B.S. in Civil Engineering from the University of Tennessee, Knoxville, in 2005, and an M.S. in Environmental Engineering from the same school in 2008. Ms. Owen has been a registered Professional Engineer in the state of Tennessee since 2011, and obtained certification as a Floodplain Manager in 2009.

Ms. Owen participated in the audit of NYSDOT Region 9, and assisted in the preparation of the audit report. Her testimony is expected to cover her involvement in the development of this case, including the following: (a) her preparation for the audit; (b) the methodology she followed while conducting the audit, (c) what she observed and otherwise learned during the audit, including how those observations were documented; (d) the audit report that she helped write, including her findings and conclusions; and (e) her knowledge of the scope and magnitude of the violations she observed and the basis for her evaluations and conclusions regarding such violations. Ms. Owen's testimony is also expected to include information about her qualifications and work experience, her knowledge and familiarity with NPDES regulations and permit requirements for MS4s, and to provide the foundation for introducing some of the exhibits that the EPA would seek to introduce into evidence.

4. Kortney M. Kirkeby

Mr. Kirkeby is an Ecological Services Manager for PG Environmental, LLC, with more than 10 years of experience leading teams, coordinating and managing programs, and providing support to NPDES compliance activities on behalf of State agencies and the EPA pertaining to various disciplines, including the following: (1) municipal separate storm sewer systems (MS4), (2) combined sewer overflows (CSO), (3) sanitary sewer overflows (SSO), (4) industrial stormwater, and (5) wastewater treatment plant compliance evaluation inspections. Mr. Kirkeby

received a B.A. in Biology, *Cum Laude*, with a Minor in Environmental Studies, from Concordia College in Moorhead, Minnesota, in 2005, and is currently an M.S. Candidate in Environmental Engineering at the University of Colorado, Boulder.

Mr. Kirkeby participated in the audit of NYSDOT Region 9, and assisted in the preparation of the audit report. His testimony is expected to cover his involvement in the development of this case, including the following: (a) his preparation for the audit; (b) the methodology he followed while conducting the audit, (c) what he observed and otherwise learned during the audit, including how those observations were documented; (d) the audit report that he helped write, including his findings and conclusions; and (e) his knowledge of the scope and magnitude of the violations he observed and the basis for his evaluations and conclusions regarding such violations. Mr. Kirkeby's testimony is also expected to include information about his qualifications and work experience, his knowledge and familiarity with NPDES regulations and permit requirements for MS4s, and to provide the foundation for introducing some of the exhibits that the EPA would seek to introduce into evidence.

5. Bobby Jacobsen

Mr. Jacobsen is an Environmental Scientist and Environmental Compliance Specialist for PG Environmental, LLC, with more than 8 years of experience as a consultant to EPA and other federal customers in the water resources industry. He has conducted an array of environmental compliance evaluations, case development activities, policy and regulatory analysis, training for federal, state and municipal staff, and project design, management, and support, and has extensive program-specific experience with regulation of MS4s. Mr. Jacobsen received a B.S. in Environmental Geology from the College of William & Mary in 2006.

Mr. Jacobsen participated in the audit of NYSDOT Region 8, and assisted in the preparation of the audit report. His testimony is expected to cover his involvement in the development of this case, including the following: (a) his preparation for the audit; (b) the methodology he followed while conducting the audit, (c) what he observed and otherwise learned during the audit, including how those observations were documented; (d) the audit report that he helped write, including his findings and conclusions; and (e) his knowledge of the scope and magnitude of the violations he observed and the basis for his evaluations and conclusions regarding such violations. Mr. Jacobsen testimony is also expected to include information about his qualifications and work experience, his knowledge and familiarity with NPDES regulations and permit requirements for MS4s, and to provide the foundation for introducing some of the exhibits that the EPA would seek to introduce into evidence.

6. Anthony D'Angelo

Mr. D'Angelo has been an Environmental Scientist for PG Environmental, LLC, since February 2012. He received a B.A. in Environmental Studies and Natural Resources from the University of Colorado, Boulder, in 2010. As a project manager, Mr. D'Angelo focuses on the CWA National Pollutant Discharge Elimination System (NPDES) program by preparing,

leading, and supporting various NPDES compliance evaluation inspections of municipal, state, federal, tribal, industrial, construction, and agricultural CWA programs, including those involving Industrial Stormwater, Construction Stormwater, and MS4s.

Mr. D'Angelo participated in the audits of NYSDOT Regions 5 and 8, and assisted in the preparation of the audit reports. His testimony is expected to cover his involvement in the development of this case, including the following: (a) his preparation for the audits; (b) the methodology he followed while conducting the audits, (c) what he observed and otherwise learned during the audits, including how those observations were documented; (d) the audit reports that he helped write, including his findings and conclusions; and (e) his knowledge of the scope and magnitude of the violations he observed and the basis for his evaluations and conclusions regarding such violations. Mr. D'Angelo's testimony is also expected to include information about his qualifications and work experience, his knowledge and familiarity with NPDES regulations and permit requirements for MS4s, and to provide the foundation for introducing some of the exhibits that the EPA would seek to introduce into evidence.

7. Jacob Albright

Mr. Albright is an Environmental Scientist for PG Environmental, LLC, with more than 10 years of experience in environmental science, engineering, and compliance with a specific focus on water quality programs as well as infrastructure and asset assessment. He has performed numerous NPDES compliance and system evaluation activities on behalf of State agencies and the EPA. Mr. Albright has direct experience in evaluating various programs and assets that are components of MS4s, combined sewer systems, sanitary sewer systems, construction site stormwater controls, and industrial stormwater controls. He received a B.S. in Chemistry from the College of William & Mary in 2006. Before working for PG, Mr. Albright engaged in technical consulting work for a civil engineering firm which specialized in post-construction stormwater management best management practice (BMP) design and construction.

Mr. Albright participated in the audit of NYSDOT Region 5, and assisted in the preparation of the audit report. His testimony is expected to cover his involvement in the development of this case, including the following: (a) his preparation for the audit; (b) the methodology he followed while conducting the audit, (c) what he observed and otherwise learned during the audit, including how those observations were documented; (d) the audit report that he helped write, including his findings and conclusions; and (e) his knowledge of the scope and magnitude of the violations he observed and the basis for his evaluations and conclusions regarding such violations. Mr. Albright's testimony is also expected to include information about his qualifications and work experience, his knowledge and familiarity with NPDES regulations and permit requirements for MS4s, and to provide the foundation for introducing some of the exhibits that the EPA would seek to introduce into evidence.

9-13. DOT Employees Dan Hitt, Jonathan Bass, Ellen Kubek, Scott Kappeller and Carl Kochersberger

Respondent has raised what appears to be an equitable estoppel argument for why it should not have to pay a penalty. Specifically, several of Respondent's staff members, listed above, have apparently stated that the EPA's Ms. Arvizu and Ms. Modigliani told them that, if Respondent came into compliance, the EPA would not seek a penalty. The EPA denies that such a statement was ever made, and, if Respondent attempts to assert otherwise, Complainant will seek to call the above listed NYSDOT staff members as witnesses to test that assertion.

14. Justine Modigliani

Ms. Modigliani is the Compliance Section Chief at EPA, Region 2, and supervises Ms. Arvizu's work. Although Ms. Modigliani was not involved in the fact-finding for this case, Complainant may call her to testify as a rebuttal witness to Respondent's argument, above, regarding penalty, and to describe the EPA's practices regarding the assessment of penalties.

Reservation of Rights

The EPA reserves the right to call or not to call any of the aforementioned potential witnesses. The listing of the expected scope of the testimony of each witness is not intended to limit the EPA's right to modify or otherwise expand upon the scope and extent of the testimony of each such witness, where appropriate, including in response to matters to be set forth in Respondents' prehearing exchange. In addition, as this litigation proceeds, if the EPA deems it necessary, it might move to list additional witnesses. If the EPA needs to supplement its witness list, it will provide the requisite notice to this tribunal and Respondents.

1.(B) COMPLAINANT'S EXHIBITS

The EPA anticipates offering into evidence the following documents and records, copies of which are attached hereto and will be identified as "Complainant's Exhibit," with each exhibit numbered with the following Arabic numerals. Complainant reserves the right to renumber exhibits as necessary.

1. April 3, 2003 Notice of Intent filed by the New York State Department of Transportation ("NYSDOT") for coverage under SPDES Permit No. GF-02-02.
2. New York State Pollutant Discharge Elimination System (SPDES) General Permit for Stormwater Discharges from Municipal Separate Storm Sewer Systems, GP-02-02.
3. New York SPDES General Permit for Stormwater Discharges from Municipal Separate Storm Sewer Systems (MS4s), GP-08-002.

4. New York SPDES General Permit for Stormwater Discharges from Municipal Separate Storm Sewer Systems, GP-0-10-002.
5. New York SPDES General Permit for Stormwater Discharges from Municipal Separate Storm Sewer Systems, GP-0-15-003.
6. New York SPDES General Permit for Stormwater Discharges from Municipal Separate Storm Sewer Systems, GP-0-15-003, revised January 2016.
7. July 26, 2017 email from New York State Department of Environmental Conservation (“NYSDEC”) email regarding reauthorization process for MS4 permits.
8. May 18, 2012 Letter from the EPA to NYSDOT notifying NYSDOT about the upcoming audit in Region 9.
9. MS4 Pre-audit records request included with the May 18, 2012 notice letter.
10. Tentative audit agenda included with the May 18, 2012 notice letter.
11. May 30, 2012 Letter from NYSDOT to the EPA confirming the Region 9 audit.
12. June 8, 2012 Email from NYSDOT Region 9 to the EPA transmitting requested records.
13. June 7, 2012 Table tracking NYSDOT Region 9’s response to the EPA records request.
14. February 2, 2010 Sign-in sheet for NYSDOT’s erosion and sediment control training.
15. February 18, 2010 NYSDOT presentation entitled “SPDES in Construction GP 0-10-001.”
16. June 2003 Memorandum of Understanding between NYSDOT and NYSDEC regarding the SPDES General Permit for Stormwater Discharges from Construction Activity, GP-02-01
17. June 3, 2010 Letter from NYSDEC to NYSDOT authorizing the use of “Chito Van” for the treatment of stormwater runoff.
18. 2011 NYSDOT Headquarters and Region 9 organization charts.
19. 2012 Contractor stormwater certification and inspect reports for the I-86 bridge replacement project.
20. May 10, 2012 NYSDOT table and maps of active projects in the Region 9 MS4 area.
21. NYSDOT priority list of risk areas in its storm drain system.

22. Notes from the June 14, 2012 NYSDOT Environmental Program Support Issues Meeting.
23. Map of NYSDOT Region 9 post-construction Stormwater Management Plans (SMPs) in the Binghamton MS4.
24. NYSDOT Map entitled "NYSDOT Region 9 MS4 Compliance Audit."
25. NYSDOT Presentation entitled "Region 9 Lessons Learned."
26. November 20, 2008 NYSDOT drawings of stormwater treatment plan along Route 17 in Parksville.
27. June 21, 2012 NYSDOT internal email regarding record keeping for stormwater complaints and remediation.
28. Table of NYSDOT Region 9 Post-Construction SMPs in Broome and Tioga Counties.
29. Table of NYSDOT Region 9 SPDES permitted project sites in Broome and Tioga Counties.
30. January 30, 2013 NYSDOT Region 9 MS4 audit report appendices and attachments.
31. October 17, 2012 Letter from the EPA to the NYSDOT notifying the NYSDOT about the upcoming audit in Region 8.
32. Tentative agenda for NYSDOT Region 8 MS4 audit included with the October 17, 2012 notice letter.
33. MS4 Pre-audit records request included with the October 17, 2012 notice letter.
34. November 14, 2012 table tracking NYSDOT Region 8 response to the EPA records request.
35. January 29, 2013 NYSDOT Region 8 MS4 audit report and appendices.
36. May 22, 2013 Letter from the EPA to the NYSDOT notifying the NYSDOT about the upcoming audit in Region 5.
37. MS4 Pre-audit records request included with the May 22, 2013 notice letter.
38. November 14, 2012 table tracking NYSDOT Region 5 response to the EPA records request.
- 39a-39h. December 17, 2013 NYSDOT Region 5 MS4 audit report appendices and attachments.
40. March 5, 2014 EPA Administrative Compliance Order (ACO) to NYSDOT, CWA-02-2014-3028.

41. March 21, 2014 Letter from NYSDOT to the EPA requesting an extension of time to comply with the March 5 ACO.
42. March 24, 2014 Letter from the EPA granting the NYSDOT's extension request for complying with the March 5 ACO.
43. Summary of NYSDOT employee salaries.
44. January 26, 2015 Letter from NYSDEC requesting a meeting with NYSDOT and the EPA.
45. June 30, 2014 Email from Arvizu to Bass regarding clarification on the NYSDOT's July 1, 2014 submittal.
46. January 2, 2015 Letter from NYSDOT requesting a meeting with NYSDEC.
47. June 5, 2014 EPA Administrative Compliance Order CWA-02-2014-3041 and related correspondence.
- 48-59. Various submissions by NYSDOT to the EPA relating to compliance with ACO CWA-02-2014-3041.
- 60-63. June 15, 2016 EPA Administrative Complaint, CWA-02-2016-3403, proof of service, and public notice.
64. February 2, 2017 NYSDOT answer to the Administrative Complaint.
65. 1995 EPA Interim Clean Water Act Settlement Penalty Policy.
66. 2016 EPA Final Signed Penalty Inflation Guidance.
67. June 22, 2012 NYSDOT internal email regarding certain compliance costs.
68. NYSDOT Summary of costs to comply with the EPA administrative compliance orders.
69. DEC Final Designation Criteria for MS4s.
70. NYSDEC 2010 Water Quality Assessment Map.
71. NYSDEC document entitled "Top Ten Water Quality Issues in NYS – 2010."
72. NYSDOT Webpage - About NYSDOT-History-Past and Present – last viewed July 27, 2017.
73. April 18, 2014 NYSDOT Acknowledgment and Comments on CWA-02-2014-3028.

Complainant may request this Court to take judicial notice of appropriate matters in accordance with 40 C.F.R. § 22.22(f) and, should any necessary documents have been inadvertently omitted from this submission, to move this tribunal to supplement its prehearing exchange.

1.(C) STATEMENT OF TIME AND TRANSLATION SERVICES NEEDED

The EPA believes it will need approximately three to four days to present its direct case. An American Sign Language interpreter will be needed for Ms. Arvizu for the entire duration of the hearing.

II. RESPONSE TO PARAGRAPH TWO (2) OF THE PREHEARING ORDER

2.(A&F) DOCUMENTATION SHOWING PUBLIC NOTICE AND SERVICE OF THE COMPLAINT

Complainant includes herein, with its exhibits, (1) a pdf copy of the Public Notice published for the Complaint on July 1, 2016 and the EPA website where it was posted, (2) the cover letter and Certificate of Service showing that the Complaint was served on June 16, 2016, and (3) the United States Post Office Domestic Return Receipt showing that Respondent received the Complaint by Certified Mail, on June 20, 2016.

2.(B&C) STATEMENT OF BASES FOR CONTESTED ALLEGATIONS

Complainant commenced this administrative action pursuant to Section 309(g) of the Clean Water Act, 33 U.S.C. § 1319 (the “CWA” or “Act”). The Proceeding to Assess a Class II Civil Penalty (“Complaint”), was served on Commissioner Matthew J. Driscoll for Respondent on June 16, 2016, and was received by Respondent June 20, 2016. The Complaint alleges 17 distinct violations of the Clean Water Act, many of which lasted for well over 1,000 days, for a total of 16,218 days of violation.

The Complaint is based, in large part, upon observations and documentation made by the EPA and its contractors during audits that the EPA conducted of the facilities, operations, and activities in NYSDOT Region 9, NYSDOT Region 8, and NYSDOT Region 5 on June 19-21, 2012 (Region 9), November 27-29, 2012 (Region 8), and June 25-27, 2013 (Region 5), respectively. The Complaint is also based upon submissions made by Respondent in response to the EPA’s records requests for each of the Regions audited, and submissions made by Respondent in response to the EPA’s Administrative Compliance Orders.

On or about February 2, 2017, Respondents timely filed an Answer. Regarding the Findings of Fact and Conclusions of Law that form the basis of the EPA’s allegations, Respondent denied or otherwise did not admit, the following:

1. That the NYSDOT is an "owner or operator" of a Statewide Municipal Separate Storm Sewer System ("MS4") within the State of New York within the meaning of 40 C.F.R. § 122.2 and has jurisdiction over the conveyance and discharge of stormwater from the system. This allegation is also supported by numerous documents submitted with this prehearing exchange, including, but not limited to, the Notice of Intent ("NOI") submitted by NYSDOT to the New York State Department of Environmental Conservation on March 10, 2003, in which the NYSDOT admits that it owns and operates small MS4s in "various municipalities [and towns] in Designated Urbanized Areas."

2. That Respondent is an agency of the State of New York and, therefore a "person" as defined by Section 502(5) of the CWA, 33 U.S.C. § 1362(5). This allegation is supported by, among other things, the above-referenced NOI, in which the NYSDOT admits that it is applying for permit coverage as a state entity, as well as the page on its website entitled About/History/Past & Present, in which it claims to have been formed by the state in 1967 "to deal with the state's complex transportation system and the ever-increasing need to coordinate the development of transportation with each mode serving its best purpose."

4. The statewide MS4 owned and operated by the Respondent is a point source within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14). This allegation is supported by numerous documents submitted with this prehearing exchange, including the NOI, and audit reports and attachments, which include photos taken by the auditors, as well as several documents prepared by the NYSDOT itself, depicting the location of point sources on NYSDOT property that discharge to surface waters.

5. Respondent discharges stormwater, which is a pollutant within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14), to multiple waters of the United States within the meaning of 40 C.F.R. § 122.2, via its statewide MS4. As such, Respondent discharges pollutants within the meaning of Section 502(12) of the CWA, 33 U.S.C. § 1362(12). This allegation is supported by numerous documents submitted with this prehearing exchange, including the NOI and audit reports and attachments, which include photos taken by the auditors, as well as several documents prepared by the NYSDOT itself, depicting the location of point sources on NYSDOT property that discharge to surface waters and the need for compliance with controls on those discharges to limit water pollution.

10.a.1. That Respondent violated Part IV.D of the Permit by failing to fully implement and properly update their Storm Water Management Program ("SWMP") Plan, by failing to produce established goals and procedures, a rating system, or a checklist for conducting construction project reviews as outlined in the Respondent's SWMP Plan. This allegation is supported by Respondent's SWMP Plan and the observations of the auditors during the audit of Region 9, which are documented in the audit report for that audit.

10.a.2. That Respondent violated Part IV.D of the Permit by failing to fully implement and properly update their SWMP, by failing to follow the outfall reconnaissance field screening procedures for staff identified in its SWMP Plan. This allegation is supported by Respondent's

SWMP and the observations of the auditors during the audit of Region 5, which are documented in the audit report for that audit.

10.a.3. That Respondent violated Part IV.D of the Permit by failing to conduct construction site stormwater inspections after rainfall events producing greater than 0.5" of precipitation within a 24-hour period between April and June of 2012 for Respondent's I-81/I-86 Bridge Replacement project. This allegation is supported by Respondent's SWMP Plan, rainfall data, and a review of documents by the auditors during the audit of Region 9, and is documented in the audit report for that audit.

10.b. That Respondent violated Part V.B of the Permit by failing to provide the EPA with adequate SWMP implementation documentation, including, but not limited to, required procedures and training records. This allegation is supported by a review of documents by the auditors during the three audits, and is documented in the audit reports.

10.c. That Respondent violated Part VIII.A.3.a and 3.b.i of the Permit by failing to maintain a map, at a minimum within the permittees' jurisdiction in the urbanized area and additionally designated area, showing the location of all outfalls. This is supported by the observations of the auditors during the audits of Regions 5 and 9, of at least five (5) unmapped MS4 outfalls, which are documented in the respective audit reports.

10.d. That Respondent violated Part VIII.A.3.d of General Permit GP-0-08-002 by failing to conduct a complete outfall reconnaissance inventory, addressing every outfall within the urbanized area and additionally designated area within the permittee's jurisdiction by May 1, 2008, with reasonable progress each year. This allegation is supported by observations and document reviews by the auditors during the Region 8 audit and documented in the audit report for that audit, as well as statements by NYSDOT Region 8 staff to the auditors that outfalls in Dutchess, Rockland, Orange, and Ulster counties may not be completed by the end of the permit term for Permit No. GP-0-10-002 (April 30, 2015), because they were focusing on completing outfalls in the East of Hudson watershed counties. This allegation is also supported by Respondent's submission to the EPA of a completed inventory on April 30, 2015.

10.e. That Respondent violated Part VIII.A.3.f.ii of the Permit by failing to provide a written directive from the person authorized to sign the NOI stating that updated mechanisms must be used, and who is responsible for ensuring compliance with and enforcement of the mechanisms for the covered entity's IDDE program. This allegation is supported by the observations of, and documents reviewed by, the auditors, at all three audits, and is documented in the audit reports. This allegation is also supported by Respondent's submission to the EPA of a compliant SWMP Plan on February 5, 2016.

10.f. That Respondent violated Part VIII.A.3.g of the Permit by failing to develop an adequate written IDDE program that included procedures for identifying and locating illicit discharges (trackdown); procedures for eliminating illicit discharges; and procedures for documenting actions. This allegation is supported by the observations of, and documents reviewed by, the

auditors, and is documented in the audit reports. This allegation is also supported by Respondent's submission to the EPA of a compliant IDDE program on December 1, 2015 (after initial submissions on December 31, 2014, April 30, 2015, and August 14, 2015, that were not fully compliant).

10.g. That Respondent violated Part VIII.A.3.h of the Permit by failing to inform the public of the hazards associated with illegal discharges and the improper disposal of waste. This allegation is supported by the request for, and review of, documents conducted by the auditors, which are documented in the audit reports, and statements by NYSDOT staff in Regions 5, 8 and 9 that NYSDOT had not provided formal outreach to the public regarding illegal discharges and the improper disposal of waste. This allegation is also supported by Respondent's submission to the EPA on April 1, 2015, of a document describing a compliant public information program.

10.h. That Respondent violated Part VIII.A.4.a.i by failing to implement and maintain erosion and sediment controls in effective operating condition at all times by allowing deficiencies at six (6) sites owned and operated by Respondent. This allegation is supported by observations made and documented in the audit reports for Regions 8 and 9.

10.i. That Respondent violated Part VIII.A.4.a.v of the Permit by failing to produce written procedures for receiving and following up on complaints by the public regarding construction site stormwater runoff. This allegation is supported by document requests and reviews made by the auditors, and is documented in the audit reports for all three Regions. This allegation is also supported by Respondent's submission to the EPA of compliant procedures on September 30, 2015.

10.j. That Respondent violated Part VIII.A.4.a.vii of the Permit by failing, in Regions 8 and 9, to provide adequate documentation that procedures are in place to ensure that construction site contractors have received erosion and sediment control training. This allegation is supported by document requests and reviews made by the auditors, and is documented in the respective audit reports. This allegation is also supported by Respondent's submission to the EPA on July 1, 2014, providing greater detail and instructions for complying with the erosion and sediment control requirements.

10. k. That Respondent violated Part VIII.A.5.a.vi of the Permit by failing to consistently implement an adequate long-term operation and maintenance post-construction BMP program across its regional offices. Specifically, NYSDOT Region 9 had not developed a formal method of assessment to ensure that stormwater management practices are performing properly. NYSDOT Region 9 representatives stated that specific tests for assessing the proper installation of post-construction BMPs were not conducted. NYSDOT Region 9 representatives stated that maintenance had not occurred on post-construction BMPs implemented since 2009, other than practices located at NYSDOT facilities. In addition, NYSDOT Region 9 staff stated that they were not aware of training that had been conducted specifically for employees that conduct post-construction BMPs inspections and maintenance activities. NYSDOT Region 5 representatives stated that inspections of post-construction BMPs are conducted informally and not documented.

NYSDOT Regions 5 and 9 did not provide records of inspections, maintenance, or training for post-construction stormwater practices, leading to the conclusion that maintenance was not performed nor was training provided by Region 9, and inspections were not documented by Region 5. These allegations are supported by observations and document requests made by the auditors during the audits of Regions 5 and 9, and are documented in the respective audit reports. This allegation is also supported by Respondent's notice to the EPA, on November 3, 2014, that it had come into compliance with these requirements by developing and implementing training and a database for tracking compliance.

10.l. That Respondent violated Part VIII.A.6.a.i and 6.a.iii of the Permit by failing to develop and implement a pollution prevention/good housekeeping 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 or 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. This allegation is based on statements by representatives for the Respondent in NYSDOT Regions, 5, 8 and 9, that NYSDOT facilities do not have site specific Best Management Practices (BMP) Plans that addresses potential pollutant sources from multiple NYSDOT facilities, and the auditors' observation that the NYSDOT Environmental Handbook for Transportation Operation, which specifies general procedures to be followed for a subset of potential sources of pollution from their facilities, is too generic, and thus did not provide adequate procedures to prevent the discharge of pollutants, nor did it cover all potential sources of pollutants. This allegation is also supported by Respondent's submissions to the EPA on July 1 and December 1, 2015, describing how it had come into compliance with these requirements.

10. m. That Respondent violated Part VIII.A.6.a.ii of the Permit by failing to 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, if it is not done already. This allegation is supported by statements made to the auditors during the audits by representatives for NYSDOT Regions 5, 8 and 9, that the Respondent had not performed self-assessments of NYSDOT facilities specifically for stormwater purposes, nor did Respondent's program provide for performance or documentation of a self-assessment of its facilities, which statements are documented in the audit reports. This allegation is further supported by Respondent's submissions to the EPA on July 1 and December 1, 2015, describing how it had come into compliance with these requirements.

10.n. That Respondent violated Part VIII.A.6.a.vi of the Permit by failing to 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 all staff receive and utilize training. This allegation is based on responses by Respondent's

representatives in the three audited regions that indicate that the training is not done for all employees in Regions 5 and 8, and not done at all for employees in Region 9. This allegation is further supported by Respondent's submissions to the EPA on November 3, 2014, describing how it had come into compliance with these requirements.

10.o. That Respondent violated Part VIII.A.6.d of the Permit by failing to develop and implement a pollution prevention/good housekeeping for municipal operations and facilities that selects and implements 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"). As identified in sub-paragraph m above, Respondent had not developed site specific plans that addressed potential pollutant sources at multiple facilities. Specifically, the EPA Audit team observed inadequate pollution prevention/good housekeeping practices at multiple facilities in NYSDOT Regions 5, 8 and 9, that contribute or potentially contribute POCs to the small MS4 system. This allegation is also supported by Respondent's submissions to the EPA between July 1, 2014 and April 1, 2015, describing how it had come into compliance with these requirements.

14. That Respondent is liable for sixteen thousand two hundred and eighteen (16,218) days of violation of Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a). This conclusion is based on the findings and allegations preceding it, and is supported by the audit reports, subsequent compliance activity and submissions, and the EPA's penalty calculation.

At an eventual hearing (if these matters remain in contention at that point), EPA's witnesses are anticipated to discuss at length what they observed and why many of these observations support the violations alleged in the Complaint. Further, EPA witness Christy Arvizu is expected to testify as to the extent to which Respondent's various responses to EPA's record requests and Administrative Compliance Orders provide corroboration for the findings of violations alleged in the Complaint.

2.(D&E) STATEMENT OF BASES FOR THE PROPOSED PENALTY

At hearing, Complainant's witness, Christy Arvizu, is expected to testify about how the penalty for each count was derived, e.g., the basis for each determination, the factual underpinning for each penalty sought, and the justification for each penalty sought, all in light of the mandatory statutory factors and applicable EPA guidance. The following discussion is intended to give an overview.

a. Statutory Maximum

CWA § 309(g)(2)(B) provides, in relevant part, that "the amount of a class II civil penalty under paragraph [309(g)](1) may not exceed \$10,000 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.*

Based on the five-year statute of limitations on penalties, and the date of the Complaint, July 1, 2011 was used as the first day of violations, with the exception of specific requirements which were required to be developed by a specific timeframe (e.g. conduct outfall reconnaissance of 100% of outfalls by May 2013). Other violations were considered to have begun on the date they were observed (i.e. during the respective audit). The compliance dates were chosen based on the dates of submissions from NYSDOT that proved Respondent had come into compliance, the latest date being February 5, 2016.

b. Statutory Factors

CWA § 309(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.”

c. EPA Penalty Policy

To ensure consistent and fair application of the statutory maximum penalties and statutory factors, the EPA calculates penalties for violations of the Clean Water Act using the EPA’s 1995 Clean Water Act Settlement Penalty Policy.

The overall calculation of a penalty under the Clean Water Act Settlement Penalty Policy tracks the statutory factors (highlighted in bold, below), and can be reduced to the following formula:

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

Economic Benefit

As required in CWA § 309(g)(3), and in order 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**. 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. Some actual costs associated with remedying violations identified by the EPA were provided by NYSDOT in its Quarterly Progress Reports, and those were included in the EPA's BEN calculation.

Gravity and Adjustment Factors

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 follows this formula:

$$\text{Monthly gravity component} = (1 + A + B + C + D) \times 1,000.$$

A, B, C, and D are gravity factors which are assigned values according to the tables and text of the EPA's 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 to deter future violations by Respondent and other similarly situated actors.

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). The Respondent's demonstrated inability to pay may justify reducing the gravity factor. In this matter, the EPA has no evidence to indicate that the State of New York is unable to pay the proposed penalty. The history of recalcitrance factor increases the amount of the gravity based on bad faith or unjustified delay. In this matter, no increase was calculated under this factor because Respondent was cooperative and responsive in remedying the violations that the EPA identified. The quick settlement adjustment factor encourages violators to be reasonable and responsive during negotiations. In this matter, it was originally used in the penalty calculation, but because Respondent has not agreed to settle on reasonable terms, the quick settlement adjustment factor is no longer appropriate.

Finally, for municipal entities such as NYSDOT, there are National Municipal Litigation Consideration (NMLC) tables that provide further penalty mitigation for municipalities violating the CWA, where the municipality has engaged in good faith efforts to comply with the CWA. By

applying the NMLC tables, the preliminary penalty can be reduced, while taking into consideration the economic benefit, environmental impact, duration and size of the facility.

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, however, Respondent did not propose a SEP. Therefore, this factor does not support a reduction in the penalty.

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%. However, in this case, given the strong record of Respondent's extensive and long-enduring violations of the Clean Water Act, and the fact that Respondent has refused to settle before litigation, such considerations do not justify a reduction in the proposed penalty.

Dated: August 2, 2017
New York, New York

Respectfully submitted,

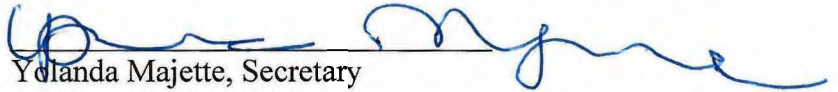


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In the Matter of *New York State Department of Transportation*, Respondent.
Docket No. CWA-02-2016-3403

CERTIFICATION OF SERVICE

I hereby certify that the foregoing Complainant's Corrected Initial Prehearing Exchange, dated August 2, 2017, was sent this day to the following parties in the manner indicated below.


Yolanda Majette, Secretary

Original by Electronic Filing to:
Office of Administrative Law Judges
U.S. Environmental Protection Agency
Office of Administrative Law Judges
Ronald Reagan Building, Room M1200
1300 Pennsylvania Avenue, NW
Washington, DC 20004

Copy by Regular Mail to:
Alicia McNally, Esq.
Assistant Counsel
Division of Legal Affairs
New York State Department of Transportation
50 Wolf Road, 6th Floor
Albany, NY 12232
For Respondent

Dated: August 2, 2017
New York, NY