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

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

RESPONDENT'S POST-HEARING REPLY BRIEF IN OPPOSITION TO COMPLAINANT'S REPLY BRIEF

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, Respondent, New York State Department of Transportation ("NYSDOT" or "Respondent") hereby submits this brief in reply to Complainant's Post-Hearing Reply Brief in Opposition to the Respondent's Initial Post-Hearing Brief. Unless otherwise noted, Respondent hereby incorporates and maintains all of the factual assertions and legal arguments made in its Initial Post-Hearing Brief.

II. COMPLAINANT'S ARGUMENTS ON TIMELINESS

a. Respondent's Failure to Timely Complete Outfall Reconnaissance Inventory ("ORI")

Complainant avers that Respondent's arguments regarding the reasonableness of the five-year mapping requirement are untimely under 33 USC § 1369(b)(a)—as it should have been brought as a challenge to the validity of the permit within 102 days of its issuance. This argument ignores a point made repeatedly in Respondent's Initial Post-Hearing Brief: that NYSDOT was dedicated to achieving ongoing environmental compliance through a cooperative relationship with the regulating agencies. he Respondent's sister agency, DEC, is the primary regulator and drafter of the MS4 permit at-issue here. Tr., at pp. 487-489. The Respondent and its sister agency engage in a reciprocal working relationship to achieve ongoing environmental compliance. Complainant's heavy-handed arguments flouts that relationship and DEC's role; as established in the record, DEC acquiesced to an extended timeline by accepting the progress in NYSDOT's annual reports. Tr., at pp. 632-633; 640; 665-666.

Moreover, as a practical matter, Complainant is suggesting that State resources should have been used to engage in lengthy litigation to avoid a possible EPA audit and to avoid the enforcement of an unreasonable deadline and request for an unreasonable penalty.[1] Complainant further argues that failing to divert resources in order to engage in said lengthy litigation waives any power of this Tribunal to consider EPA's unreasonableness in calculating a penalty. Respondent is not questioning the validity of the permit or its requirement, but as applied to NYSDOT, the deadline was unreasonable.

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

b. Timeliness of Respondent's Submissions

Complainant accuses the Respondent of dilatory compliance efforts in submitting the following: (1) the certification for NYSDOT's outfall reconnaissance field screening procedures; (2) the program for receipt and follow up on public complaints; and (3) the procedures for identifying, locating, and eliminating illicit discharges. Moreover, Complainant accuses Respondent of overall dilatory compliance with the permit in general. See Complainant's Reply Brief, at p. 10.

Complainant essentially argues that it is irrelevant that all of NYSDOT's submissions were made in accordance with EPA's prioritized compliance schedule. Under this theory, timely

[1] Complainant's additional statement regarding the fact that NYSDOT has 8,000 employees and therefore has the resources to map 16,800 outfalls over five years highlights the ignorance of EPA's knowledge with regard to the monumental number of tasks performed by state transportation agencies to ensure the safety of the traveling public.

submissions are in fact untimely. Instead, NYSDOT should have submitted all documents prior to EPA's compliance dates. Not surprisingly, Complainant gives no timeframe in which timely submissions should have been accepted. Such an argument is illogical.

As acknowledged by the EPA's witness Ms. Arvizu, the volume of this record alone illustrates the breadth of the requested compliance efforts undertaken by the Respondent. Tr., at p. 104. Respondent complied with all priorities and deadlines set by the EPA. Tr., at pp. 46, 11-112, 541. Complainant attempts to conjure delay and minimize the EPA's role in delaying compliance throughout its briefs. Nearly two years—21 months—of noncompliance was while EPA was aware of violations, but the Respondent was not.

Respondent once again requests that should Your Honor determine that violations did occur, that you consider NYSDOT's timely compliance with the Administrative Compliance Order in calculating an appropriate penalty.

III. COMPLAINANT'S ARGUMENTS REGARDING CERTIFICATION OF NYSDOT'S OUTFALL RECONNAISSANCE FIELD SCREENING PROCEDURES

Complainant quotes that Respondent's argument here is that it "merely had to certify that it would implement a procedure that already existed." Complainant's Reply Brief, at p. 12. This quotation has no citation and this line does not appear in Respondent's Initial Post-Hearing Brief. In fact, this is not the Respondent's argument at all.

Indeed, the certification that satisfied this provision of the Administrative Compliance Order says nothing about implementation. As noted in Respondent's Initial Post-Hearing Brief (p. 23),

> [T]he mechanism used to satisfy this provision of the Order was a two-page certification of the *existence* of the outfall inspection instructions signed by the Director of the Office of Environment and submitted in accordance with the EPA's prioritized schedule. CX 49, at pp. 6-7. The certification simply indicates that the appropriate instructions for conducting outfall reconnaissance inspections have been promulgated by the Respondent. *Id.* The EPA was aware of the existence of these instructions and the intern's inadvertent

ignorance is what led to the violation. See CX 30, at pp. 14-15, 183, 524. Emphasis added.

Contrary to the Complainant's representations, the mere existence of these procedures satisfied this provision. There was no requirement to certify implementation.

Respondent once again asserts that these facts do not support a violation of Part 2010 MS4, GP IV.D and reiterates that should Your Honor find a violation, that you consider the following in determining the length of the violation and calculation of the penalty: (1) the isolated nature of the occurrence; (2) that Respondent was not notified of the violation until nearly two years after discovery; (3) that satisfaction of the Order was a certification of the existence of procedures that EPA already knew existed; (4) that the Respondent complied according to the EPA's schedule; and (5) Respondent was not notified that a daily penalty was accruing even if compliance was achieved within that given time frame.

IV. EVIDENTIARY OBJECTION

a. 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

Complainant objects to the admission of Ms. Kubek's testimony regarding the requirements in the general construction permit as violative of the Federal Rules of Evidence (FRE) 1002—"best evidence rule." However, it is well established that the Federal Rules of Evidence do not bind administrative tribunals. See *Bennett v. NTSB*, 66 F.3d 1130, 1137 (10th Cir. 1995) ("To begin with, agencies are not bound by the strict rules of evidence governing jury trials . . . . [r]ather the Administrative Procedure Act (5 U.S.C. § 556(d)) renders admissible any 'oral or documentary evidence' except 'irrelevant, immaterial, or unduly repetitious evidence'"); *Veg-Mix, Inc. v. United States Dep't of Agric.*, 832 F.2d 601, 606 (D.C. Cir. 1987) ("Laxer standards of admissibility [than the FRE], however, apply to administrative tribunals.");

Sorenson v. NTSB, 684 F.2d 683, 686 (10th Cir. 1982) ("However, agencies are not bound by the strict rules of evidence governing jury trials.") (citations omitted); *Donovan v. Sarasota Concrete Co.*, 693 F.2d 1061, 1066 (11th Cir. 1982) ("In interest of maintaining their autonomy, administrative agencies are not restricted to rigid rules of evidence."); *Martin-Mendoza v. INS*, 499 F.2d 918, 921 (9th Cir. 1974)("Hearsay is admissible in administrative proceedings, which need not strictly follow conventional evidence rules."); *Marlow v. INS*, 457 F.2d 1314, 1315 (9th Cir. 1972) ("The strict rules of evidence governing the admissibility of hearsay in judicial proceedings are not applicable to administrative hearings."); 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 16.5 (1980).

Moreover, even if the FRE were applied here, the objection to the admission of Ms. Kubek's testimony is untimely. It is well-settled that if an objection to a question posed to a witness or to introduction of other evidence is not raised at a time when the error in allowing the question or admitting the evidence can be corrected, the objection is waived. See *Airline Constr. Co. v. Ascension Parish Sch. Bd.*, 568 So. 2d 1029, 1035 n.8 (La. 1990). For an objection to be timely it must be made at the earliest possible opportunity after the ground of objection becomes apparent, or it will be considered waived. See *Terrell v. Poland*, 744 F.2d 637, 638-39 (8th Cir. 1984). Indeed, courts have held that an objection to the admission of evidence may not be considered a contemporaneous objection "even if made within a few minutes of the objected-to admission." *Small Business in Telecomms. v. FCC*, 251 F.3d 1015, 1022 n.9 (D.C. Cir. 2001) (citing Henry v. Mississippi, 379 U.S. 443 (1965)); *Wilson v. Waggener*, 837 F.2d 220, 222 (5th Cir. 1988)).

Consistent with 40 CFR 22.22, Respondent respectfully requests that Ms. Kubek's testimony stay in the record and that this Tribunal weigh it appropriately. Moreover, should

Your Honor find a violation, we once again request that you consider the following in determining the length of the violation and calculation of the penalty: that the DEC Construction General Permit no longer required rain-related inspections as well as the isolated nature of the cited violations.

V. COMPLAINANT'S ARGUMENT REGARDING RESPONDENT'S FAILURE TO DEVELOP A POLLUTION PREVENTION/GOOD HOUSEKEEPING PROGRAM

The plain language of the permit did not require site-specific pollution prevention plans or procedures for stockpile and scrap metal storage. See 2010 MS4, GP VIII.A.6.a.i. Nevertheless, in response to the EPA's requests, the Respondent created site-specific pollution prevention plans and procedures for stock pile and scrap metal storage to be used on a statewide basis (not confined to the MS4). Tr., at p. 526; CX 52, at pp. 26-27; CX 58, at pp. 3, 68. Complainant's repeated contention that it did not require site-specific pollution prevention plans is refuted by testimony from Ms. Arvizu, Mr. Jacobsen, Mr. D'Angelo, and Ms. Kubek—all of which confirm that the EPA required the Respondent to promulgate site-specific pollution prevention plans to satisfy the Order. Tr., at 65-66, 212, 288, 475, 484; CX 58, at p. 3

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

VI. 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, Respondent respectfully requests an

Order from this Tribunal that (1) finds that Respondent is not liable for any of the cited violations of the Clean Water Act, as the violations are alleged in the Complaint, (2) to the extent that any violations are found, recognizes the technical nature of any such violation and the lack of any proof that there have been any significant discharges, and that the appropriate weight of the statutory factors – including the interests of justice, and reliance on the representations of the EPA Compliance Chief – should reduce or eliminate any penalty, and (3) grants Respondent such other and further relief as this Tribunal deems lawful and proper.

Dated: November 30, 2018
At: Albany, NY

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UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 2

IN THE MATTER OF:

New York State Department of Transportation
50 Wolf Road
Albany, NY 12232
SPDES Permit No. NYRA20A288

Respondent

PROCEEDING TO ASSESS CLASS II CIVIL PENALTY

DOCKET NO. CWA-02-2016-3403

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

RESPONDENT'S CERTIFICATION OF SERVICE

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

On November 30, 2018 via Electronic Filing to:

U.S. Environmental Protection Agency
Office of Administrative Law Judges
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On November 30, 2018 via E-mail and Regular Mail to:

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