

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

Honorable Susan L. Biro,
Chief Administrative Law Judge
Presiding Officer

Respondent

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 RESPONSE TO MOTION FOR PARTIAL ACCELERATED
DECISION ON LIABILITY**

Respondent, the New York State Department of Transportation ("Respondent" or "NYSDOT" or "DOT" or "Department"), herein submits, upon information and belief, the following in response to Complainant's Motion for Partial Accelerated Decision on Liability. The Department engaged with the United States Environmental Protection Agency ("Complainant") in a completely cooperative approach. While the Department neither admits nor denies liability, the Department submits that the Complainant's Memorandum of Law in Support of the Motion for Partial Accelerated Decision on Liability is missing relevant facts and contains mischaracterizations of facts. Both issues will be addressed herein. It remains the Department's position that the interest of justice requires the waiver of the penalty sought by the Complainant.

I. PRELIMINARY STATEMENT

Respondent has no comment.

II. LEGAL BACKGROUND

Respondent has no comment.

III. FACTUAL BACKGROUND

Complainant states that "DEC issued the current permit ("2015 MS4 GP) [sic], which will expire on April 30, 2020; Respondent's coverage continues under the 2015 MS4 GP." See Memorandum of Law in Support of Complainant's Motion for Partial Accelerated Decision on Liability. While it is accurate that the Respondent is still operating under the 2015 MS4 GP

terms, the current permit expired on April 30, 2017. *See* Exhibit 1. There has not been a subsequent permit issued and the 2015 MS4 GP terms are in effect until a subsequent permit is issued.

Additionally, the Complainant implies that the Respondent's compliance with the Administrative Compliance Order was not timely. The implication that the Respondent was dilatory in any way when it "finally corrected all of its violations" is entirely untrue. Over the two (2) years between the issuance of the Administrative Compliance Order and successful compliance, the Respondent was entirely and timely responsive to the Complainant's requests and made submissions in accordance with the Complainant's timeline.

Lastly, although the Respondent maintains its position that the interest of justice requires a waiver of the penalty in this matter, it should be noted that the Respondent did reach out to the Complainant with a monetary settlement offer on November 27, 2017. This offer was not accepted.

IV. CWA LIABILITY

In response to the Complainant's descriptions of the violations, the Respondent would like to submit the following clarifications.

While stormwater is a pollutant under the applicable regulations, an important point is that there were not any illicit discharges discovered during the audits. As the Administrative Compliance Order shows, the violations discovered mostly consisted of housekeeping issues and record-keeping procedures that the Complainant determined were inadequate.

E. In Violation of a Permit.

1. Failure to Have a Written Directive.

The Respondent failed to produce a written directive "for ensuring compliance with and enforcement of mechanisms for the IDDE Program" because the 2010 MS4 GP states that connection permits (e.g., highway work permits and use and occupancy permits) and contract provisions are accepted mechanisms for ensuring compliance. *See* 2010 MS4 GP VIII.A.3.f.ii. The Respondent has no jurisdiction to enforce the IDDE Program outside of its limited right-of-way, and thus, had no written directive for such.

2. Failure to Provide Required Information to the Public.

During the audits, the Respondent informed the Complainant that its public information efforts had been focused on its employees, as permitted by the 2010 MS4 GP (*see* 2010 MS4 GP VIII.A), and directed the Complainant to a webpage that contained stormwater management information. The 2010 MS4 GP does not specifically require outreach to the general public.

3. Failure to Development a Public Complaint System.

As noted by the Complainant, the Respondent did have an e-mail address for public complaints regarding construction site stormwater run-off. Additionally, as the Complainant also notes, staff in Region 8 and Region 5 indicated that there was a non-written procedure for

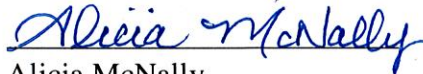
directing those complaints to the appropriate entities with jurisdiction over the construction sites. Since Respondent's jurisdiction is limited to its right-of-way, procedures beyond referral to appropriate entities were never created.

CONCLUSION

Based upon the information contained above, the Department sought to clarify the Complainant's exclusion of relevant facts and mischaracterizations of facts in the Memorandum of Law in Support of Motion for Partial Accelerated Decision on Liability. The Department neither admits nor denies liability and believes that the interest of justice requires the waiver of the penalty sought by the Complainant.

Dated: December 11, 2017
Albany, New York

Respectfully submitted,



Alicia McNally
Assistant Counsel
Division of Legal Affairs
New York State Department of Transportation
50 Wolf Road
Albany, NY 12232

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PROCEEDING TO ASSESS CLASS II
CIVIL PENALTY

Respondent

DOCKET NO. CWA-02-2016-3403

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RESPONDENT'S CERTIFICATION OF SERVICE

I CERTIFY that I served the foregoing Respondent's Response to Motion for Partial Accelerated Decision on Liability, bearing the above referenced docket number, on the person(s) listed below, in the following manner(s):

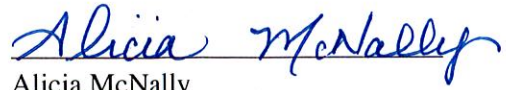
On December 11, 2017 via Electronic Filing to:

U.S. Environmental Protection Agency
Office of Administrative Law Judges
1200 Pennsylvania Avenue, N.W.,
Mail Code 1900R
Washington, DC 20460

On December 11, 2017 via E-mail and Regular Mail to:

Chris Saporita
Assistant Regional Counsel
United States Environmental Protection Agency – Region 2
290 Broadway
New York, NY 10007

Dated: 12/11/17



Alicia McNally
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Albany, NY 12232