IN THE MATTER OF PORT OF OAKLAND AND GREAT LAKES DREDGE AND DOCK COMPANY

MPRSA Appeal No. 91–1

FINAL DECISION AND ORDER

Decided August 5, 1992

Syllabus

EPA Region IX brought an enforcement action against the Great Lakes Dredge and Dock Company ("Great Lakes"), seeking a civil penalty of $175,000 for multiple alleged violations of the Marine Protection, Research, and Sanctuaries Act of 1972 ("MPRSA") and a permit issued to the Port of Oakland, California, under that statute. After a lengthy hearing, the presiding officer issued an Initial Decision holding that Great Lakes, as a contractor to the Port, had committed all three alleged violations involving ocean disposal of dredged, unpermitted sediments. However, he reduced the Region's proposed penalty for these violations from $150,000 to $10,000. The presiding officer also held that Great Lakes had violated the terms of the MPRSA permit by dumping materials at a greater distance from the center of the disposal site than the permit allowed ("off-center dumping") on a least three occasions. However, he assessed no penalty for these violations, based on his finding that Great Lakes had made good faith efforts to comply with this requirement. He denied the Region's motion to file a Second Amended Complaint that alleges additional violations for which the Region seeks $40,000 in additional penalties.

Region IX argues in its appeal from the Initial Decision that the presiding officer's penalty determination for the dredging and disposal violations is based on numerous erroneous conclusions of fact and law. Most significantly, the Region argues that the presiding officer erred when he made a determination whether the Port's permit should have authorized ocean disposal of all of the Oakland Inner Harbor sediments, and then concluded, based on that determination, that the gravity of Great Lakes' conduct in disposing of unpermitted sediments was "slight." The Region further argues that the presiding officer erred when he failed to assess civil penalties for five alleged instances of off-center dumping. The Region also asks the Board to grant its motion for leave to file the Second Amended Complaint. The Region asks the Board to review the record de novo, and to assess to total penalty of $215,000 for the violations alleged in the First and Second Amended Complaints.

Held: A total civil penalty of $125,000 is assessed against Great Lakes for the three counts of disposal of unpermitted sediments ($110,000) and three counts of off-center dumping ($15,000). The Board affirms the presiding officer's determination that other instances of off-center dumping have not been proven, and affirms his denial of the motion for leave to file the Second Amended Complaint.

The Board concludes that the presiding officer impermissibly conducted an independent evaluation of the risk posed by ocean disposal of dredged sediments from the Oakland Inner Harbor. Where a Region has made a permit determination under the MPRSA that particular sediments are unsuitable for ocean disposal, the potential of such sediments to cause environmental harm is thereby established, and will be assumed once exposure or potential for exposure exists. Therefore, the Board assesses its penalty for these violations based on the significant element of harm inherent in the ocean disposal of unpermitted sediments, and on the culpability of the Respondent in its dredging and disposal operations.

Before Environmental Appeals Judges Ronald L. McCallum and Edward E. Reich. Environmental Appeals Judge Nancy B. Firestone did not participate in this Decision.

Opinion of the Board by Judge Reich:

Region IX filed an administrative complaint on June 2, 1988, against the Port of Oakland, California (hereinafter "the Port"), a municipal department, and Great Lakes Dredge and Dock Company (hereinafter "Great Lakes" or "Respondent"), a New Jersey company, alleging violations of Section 101(a)(1) of the Marine Protection, Research, and Sanctuaries Act of 1972 (hereinafter "MPRSA" or "the Act"), 33 U.S.C. § 1411(a)(1), and an ocean dumping permit issued to the Port under the MPRSA § 103, 33 U.S.C. § 1413. The Region amended its complaint on September 30, 1988, alleging additional violations by both the Port and Respondent (hereinafter the "First Amended Complaint"). The First Amended Complaint proposes that a penalty of $225,000 be assessed against the Port and a penalty of $175,000 be assessed against Great Lakes.[1]

A lengthy hearing was held during March and April 1989. On April 4, 1989, the Region made an oral motion for leave to file a Second Amended Complaint, which incorporates the allegations of the First Amended Complaint and alleges additional violations. Tr. v.13 at 178–180. It filed a written motion to the same effect on April 12, 1989. The Second Amended Complaint proposed total penalties of $282,000 against the Port and $225,000 against Great Lakes. The presiding officer deferred ruling on the motion to file the amended complaint pending the receipt of post-hearing briefs.[2] On February 28, 1991, after the submission of post-hearing briefs

[1] The proposed $175,000 civil penalty against Great Lakes is the total of $150,000 for three instances of ocean disposal of dredged unpermitted sediments and $25,000 for five instances of dumping materials at a greater distance from the center of the disposal site than the permit allows (hereinafter referred to as "off-center dumping"). *See* n.33 *infra*.

[2] Tr. v.13 at 180.

by all three parties, the Port entered into a consent agreement with the Region, paying a penalty of $150,000 in compromise of all allegations against it.

The presiding officer issued his Initial Decision on October 24, 1991, holding that Great Lakes had committed the three violations involving ocean disposal of dredged unpermitted sediments that were alleged in the First Amended Complaint. However, he reduced the proposed penalty for the violations from $150,000 to $10,000. Initial Decision at 140. He also found that Great Lakes had performed off-center dumping on "at least three" occasions, but assessed no penalty for these violations. *Id.* at 111. *See also id.* at 134. He denied the Region's motion to file the Second Amended Complaint. *Id.* n.1 at 5.

The Region has appealed,[3] arguing that the presiding officer erred when he reduced its proposed penalties for the violations alleged in the First Amended Complaint; and that he further erred when he denied its motion to file the Second Amended Complaint. The Region asks the Board to assess a total penalty of $215,000 for the violations alleged in the First and Second Amended Complaints,[4] based on the statutory penalty factors. Great Lakes filed a Reply Brief[5] in which it argues that the presiding officer's Initial Decision should be affirmed in all respects. The Board held oral argument on June 11, 1992.

For the reasons stated below, the Board assesses a total civil penalty of $125,000 for three counts of unlawful dredging and disposal, and three counts of off-center dumping, as alleged in the First Amended Complaint. It affirms the presiding officer's denial of the Region's motion to file the Second Amended Complaint.

[3] The Region filed its appeal on December 2, 1991. The Environmental Appeals Board, as the Administrator's delegatee, has authority to decide appeals of initial decisions in MPRSA civil penalty cases. *See* 57 Fed. Reg. at 5324–26 (Feb. 14, 1992) (revising 40 C.F.R. §§22.04(a) and 22.30 to reflect the role of the Environmental Appeals Board as the final decisionmaker in appeals of initial decisions under Part 22).

[4] The Region dropped one count of alleged unlawful spillage of dredged materials and reduced its proposed penalties for unlawful spillage from $20,000 to $10,000. Region's Post-Hearing Reply Brief, at 3 n.2 (Dec. 15, 1989).

[5] Reply Brief of Great Lakes Dredge and Dock Company (February 3, 1992).

BACKGROUND

I. *Statute and Regulations*

The MPRSA prohibits the ocean disposal, and the transportation from the United States for ocean disposal, of any material unless the activity is authorized by permit. MPRSA § 101, 33 U.S.C. § 1411. The U.S. Army Corps of Engineers (hereinafter "the Corps") has authority to issue permits, with EPA concurrence, for the transportation and ocean disposal of dredged materials. MPRSA § 103, 33 U.S.C. § 1413; 40 C.F.R. § 225.2(c), (d), and (e). Generally, the Act provides that ocean dumping may be authorized if it does not "unreasonably degrade or endanger human health, welfare, or amenities, or the marine environment, ecological systems or economic potentialities." MPRSA § 102, 33 U.S.C. § 1412. The Act requires the Administrator to establish regulatory criteria for evaluating proposed ocean dumping, and requires the Corps and the Administrator to apply the criteria in making permit determinations. 40 C.F.R. §§ 225.1, 225.2(c). EPA has issued such regulations at 40 C.F.R. Parts 227 and 228.[6] If EPA and the Corps disagree as to whether particular sediments comply with the criteria, EPA's determination prevails.[7] Section 105(a) of the Act, 33 U.S.C. § 1415(a), authorizes EPA to assess a civil penalty against any person of no more than $50,000 for each day of each violation of the Act, its regulations, or the terms of any permit issued thereunder. Section 105(a) further provides that EPA shall take into account, in determining an appropriate penalty, the gravity of the violation, any history of prior violations, and demonstrated good faith in attempting to achieve rapid compliance upon notification of an alleged violation. Unlike most statutes that EPA administers, there is no Agency penalty policy specifically for the MPRSA. Therefore, there is no Agency guidance for calculating appropriate penalties for these types of violations other than the Agency's broad-based Policy on Civil Penalties and associated Framework for Statute-Specific Approaches to Penalty Assessment

[6] Pursuant to 40 C.F.R. § 227.1(a), "Parts 227 and 228 of [the ocean dumping regulations] together constitute the criteria established pursuant to section 102 of the Act." Section 227.1(b) provides that "[a]n applicant for a permit to dump dredged material must comply with all of Subparts C, D, E, and G and applicable sections of B, to be deemed to have met the * * * criteria * * *."

[7] There is no administrative appeal to the Corps or to EPA from a permit determination under the MPRSA. *See* 33 C.F.R. § 320.1(a)(2). The Corps may, under specified conditions, request that EPA waive the regulatory permit criteria and allow the issuance of a permit. 40 C.F.R. §§ 225.3(b) and 225.4. A permit issued under the MPRSA may be challenged by bringing an action in federal court pursuant to the Administrative Procedure Act, 5 U.S.C. § 702, and 28 U.S.C. § 1331. *See Save Our Sound Fisheries Ass'n* v. *Callaway,* 387 F. Supp. 292, 297–298 (D.R.I. 1974).

discussed in section I, *infra*. In the absence of such guidance, the Board has been required to examine extensively the circumstances of each violation and to relate those circumstances directly to the statutory penalty criteria.

II. *Factual Background*

Oakland Inner Harbor contains a navigation channel (hereinafter the "Federal Channel") approximately four miles long and 600 feet wide,[8] located between the cities of Oakland to the north and Alameda to the south. The Corps currently maintains the Federal Channel to a depth of −35 feet Mean Lower Low Water (MLLW). In 1986, Congress enacted legislation[9] authorizing the Corps to deepen the channel from a depth of −35 feet MLLW to a depth of −42 feet MLLW, and to construct an 1,100-foot diameter turning basin at its eastern end so that the Port can more easily accommodate supercontainerships. The Port, which shares the cost of the project with the Corps, entered into a contract with Respondent on April 20, 1988, to perform the dredging for the initial phase of the project. Port Ex 32. Phase I consists of deepening the existing Federal Channel to a depth of −38 feet MLLW and constructing the turning basin. The entire project is ultimately expected to involve about seven million cubic yards of dredged material.

On May 3, 1988, after considerable discussion and analysis, EPA Region IX sent a letter to the Corps concurring in the use of Ocean Dredged Material Disposal Site B1B[10] for disposal of dredged material from the Oakland Inner Harbor, conditioned on a prohibition against ocean disposal of sediments from the two areas of the proposed turning basin that lie outside the Federal Channel, referred to in the Port's plans and hereinafter as the "A–1" and "A–2" areas.[11]

[8] Federal Channels are navigation channels that are dredged and maintained by the federal government. Tr. v.23 at 36.

[9] Water Resources Development Act of 1986, P.L. 99–162.

[10] Site B1B is located at 37 degrees 29'00" North latitude, 122 degrees 48'00" West longitude, approximately 25 nautical miles southwest of the Golden Gate Bridge, with a radius of 1.0 nautical miles. *See* EPA Comments on the Oakland Inner Harbor Dredging Project (hereinafter "EPA Comments") at 1. Complainant's Exhibit (hereinafter "C Ex") 1. *See also Half Moon Bay Fishermans' Marketing Ass'n* v. *Frank Carlucci,* 847 F.2d 1389, n.1 at 1390 (9th Cir. 1988), amended 857 F.2d 505 (9th Cir. 1988).

[11] C Ex 1. Letter from EPA Regional Administrator Daniel W. McGovern to Colonel Galen Yanagihara, District Engineer for the Corps, May 3, 1988. EPA's letter stated that, based on chemical analyses and bioassay and bioaccumulation data:

The A–1 area lies north of the Federal Channel and south of the Schnitzer Steel Company facility.[12] The A–2 area lies south of the Federal Channel and north of the former Todd Shipyard (now the "Alameda Gateway").[13] The letter stated that EPA lacked data to evaluate adequately the material below a layer of clay in the A–2 area,[14] and, therefore, EPA had assumed that the material below the clay layer posed similar risks to those posed by the material above it. It added that EPA:

> [W]ill reevaluate our decision if the Corps submits the results of * * * additional tests and requests further review of the suitability of this material for ocean disposal.[15]

The Corps issued Permit No. 17317E35 ("the permit") to the Port on May 5, 1988, with EPA concurrence. C Ex 2. The project, as described in the permit, involves dredging the existing lower four

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> Only Oakland Inner Harbor dredged material determined to be suitable for ocean disposal, as described in the enclosed comments, may be disposed [sic] at the B1B * * * site.

EPA Comments, appended to the letter, stated that:

> EPA has determined that only dredged material from Reaches 1, 2 and 3 and the Channel area of the turning basin meets the criteria for evaluating environmental impact defined at 40 CFR 227.4. Therefore, only the above material is suitable for ocean disposal at the B1B site.
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> The unsuitable material is approximately 100,000 cubic yards of dredged material from the areas adjacent to Todd Shipyard and Schnitzer Steel.

EPA Comments at 2. As the bases for its conclusion, the EPA Comments cited "Results of Confirmatory Sediment Analyses and Solid and Suspended Particulate Phase Bioassay Tests on Selected Sediment from Oakland Inner Harbor," April 1988 (Comment Draft); and Preliminary Bioaccumulation Test Results for the Oakland Inner Harbor, April 27, 1988. *Id.* The reports are based on tests that were performed on sediments collected March 21 and March 27, 1988, by Pacific Northwest Laboratory, Battelle Memorial Research Institute, Sequim, Washington, pursuant to a contract with the Port.

[12] *See* Plan for Dredging Oakland Inner Harbor Channel, March 15, 1988. C Ex 21.

[13] *Id.*

[14] Although the letter does not identify the prohibited areas as A–1 and A–2, it is undisputed that the intended reference is to those areas.

[15] The Corps sent a letter to EPA on June 30, 1988, which, among other things, stated that the Corps now considers that the A–2 sediments below the clay layer are suitable for ocean disposal. Port Ex 17. EPA formally agreed with the Corps in an August 4, 1988 letter that stated that EPA will be modifying its May 3, 1988 concurrence letter to allow ocean disposal of A–2 sediments dredged from below the clay layer. Port Ex 18.

miles of the Federal Channel "from −35 feet mean lower low water (MLLW) to −38 feet MLLW plus one foot allowable overdepth," and disposing of approximately 400,000 cubic yards of sediments dredged from the existing Federal Channel at the B1B Ocean Disposal Dredged Material Site. The project also involves construction of an eleven hundred-foot diameter turning circle dredged to the same depth.

The permit provides that the approximately 100,000 cubic yards of dredged material from the areas of the turning basin that lie outside the existing Federal Channel and adjacent to the Schnitzer facility and the former Todd facility (*i.e.*, the A–1 and A–2 areas, respectively) will be disposed of either at the B1B site "or at an approved upland site." Permit at 1a. However, it provides that "[n]o dredging shall occur within those areas of the turning basin located outside of the existing Federal Channel until the location of the appropriate disposal site for the dredged material has been determined, and the permittee has been notified by the Corps of Engineers that dredging and disposal may proceed." *Id.* The permit also provides, among other things, that "[n]o overflow of the dredged material containment barges or scows [16] is allowed;" [17] and that all dredged material must be discharged while the scow is positioned within a specified distance from the center of the B1B disposal site.[18] On April 20, 1988, several weeks before the permit was issued, the Port awarded a contract to Respondent to perform the dredging and disposal. Initial Decision at 10.

Respondent began to dredge on May 6,[19] the day after the permit was issued, but it was required to stop after an hour of dredging

[16] The terms "barge" and "scow" are synonymous.

[17] Special Condition 4(d).

[18] Special Condition 4(g). Specifically, the permit provides that:

> The disposal vessel shall pass within 20 meters of the ODMDS (B1B site) center and disposal shall not commence before closing to within 30 meters of the line perpendicular to the path of travel which also passes through site center. Nor shall disposal continue after the vessel passes 60 meters beyond the aforementioned line. Vessel speed shall be adjusted so that all dredged material is discharged within the given limits.

[19] Respondent's dredging operations for this project involved the use of large mechanical "clamshell" buckets that are attached to crane-like devices mounted on dredge vessels. The dredged material was deposited on scows that are approximately 55 feet wide and 230 feet long, which open in the center to disgorge their loads. The scows are pulled by tugs to the disposal site. Respondent used two scows, No. 34 and No. 35, for the operation, each of which holds 4,000 cubic yards of dredged material. *See* Tr. v.11 at 74,88; Tr. v.24 at 151.

by a temporary restraining order (TRO) issued by the United States Court of Appeals for the Ninth Circuit. *See Half Moon Bay Fishermans' Marketing Association* v. *Frank Carlucci*, 847 F.2d 1389 (9th Cir. 1988), as amended, 857 F.2d 505 (9th Cir. 1988).[20] Dredging resumed on May 12, when the court lifted the TRO.[21]

Respondent dredged permitted materials from the center of the Federal Channel, and filled and dumped Loads No. 1, 2 and 3, and partially filled Load No. 4 between May 12 and May 14. Early Saturday morning, May 14, at the Port's request, Respondent repositioned its dredge vessel and began a dredging cut from east to west, parallel to the Federal Channel.[22] Respondent believed that it had positioned its dredge vessel so that its dredging cut created a "sideslope" outside the southern boundary of the Federal Channel. That is, it intended to dredge up to the channel line at the authorized depth but to extend approximately ten feet to the south of the southern boundary of the channel at the surface.[23] It completed filling Load No. 4 (Scow No. 35) with dredged materials and sent the scow to the disposal site that afternoon. However, the doors on the scow malfunctioned and would not fully open. Although it appears that most of the

[20] The Half Moon Bay Fishermans' Association sued to enjoin the disposal of dredged sediments at the B1B site, claiming that the Corps had not prepared an adequate Environmental Impact Statement (EIS) for the port expansion project, as required by the National Environmental Policy Act. The federal district court denied the request for an injunction. By stipulation of counsel, the court of appeals heard the fishermen's appeal from the district court's ruling.

[21] *Half Moon Bay Fishermans' Marketing Association* v. *Frank Carlucci*, 847 F.2d 1389 (9th Cir. 1988), as amended, 857 F.2d 505 (9th Cir. 1988). The court of appeals held that the district court's denial of the injunction against dumping of dredged sediments at the B1B site was not an abuse of discretion. Although it agreed with the fishermen that the Corps' EIS was inadequate, it held that EPA had "saved the day" for the project by performing additional analyses of the potential impact of the planned dredging and disposal pursuant to its authority to concur in the permit determination. 847 F.2d at 1395.

A Technical Review Panel consisting of Corps and EPA representatives met on May 11, 1988, during the six-day hiatus in dredging. Initial Decision at 28. The Panel confirmed its earlier conclusion that sediments from the A–2 area above the line of undisturbed clay are unsuitable for ocean dumping. However, reversing its earlier conclusion, it determined that A–2 sediments that underlie the clay layer are uncontaminated and are therefore suitable for ocean disposal. *Id.* at 32.

[22] *See* Respondent's Reply Brief at 12 and record references therein.

[23] Testimony of Stuart Hilgendorf, Respondent's project field engineer. Tr. v.11 at 40,79; Testimony of William Hannum, Respondent's Pacific Region Manager, Tr. v.23 at 126. *See also* C Ex 113. Hannum and James Duffy, Respondent's dredge superintendent, said that they believed that it was within the scope of the permit authorization to create a side slope outside the project boundary to minimize material from sloughing into the excavated area. Initial Decision at 85.

dredged material remained on the scow, some of it was dumped at the disposal site.[24]

Respondent filled Scow No. 34 and dumped Load No. 5 on Sunday morning, May 15. It then repaired Scow No. 35, added additional dredged materials, and sent Scow No. 35 to the disposal site at about 5 p.m. Sunday.

Shortly thereafter, Mr. John Beery, the owner of the former Todd Shipyard, approached the dredge vessel, claimed that Respondent was dredging on his property, and demanded that dredging be halted. Mr. James Duffy, Great Lakes' dredge superintendent, consulted the dredge vessel's electronic positioning system (EPS),[25] and concluded from EPS data that the dredge was properly positioned. However, he decided to move it in order to avoid a legal dispute with Mr. Beery. According to Mr. Duffy's testimony, he had his "first inkling that something was wrong" when he entered additional data into the computer in order to re-position the dredge vessel. He found that the computer "had us intersecting the shoreline where we should have been running parallel to the shore." Tr. v.5 at 19–21. This discovery alerted him to the possibility that the dredge vessel had been improperly positioned on May 14 and May 15.[26] Several hours later, Mr. Duffy learned that one of Respondent's employees had mistakenly transposed two numbers when entering data into the EPS, causing the EPS to give inaccurate information about the position of the dredge vessel.[27] At about 9 p.m., Respondent corrected the location of the dredge vessel and resumed dredging. It dumped Load No. 6, carrying sediments that had been dredged on May 14 and 15, at about 10:15 p.m. on May 15. *See* Initial Decision at 44 *et seq.* for a more detailed factual description.

Respondent had dredged in the wrong location from early on the morning of May 14 until about 5 p.m. on May 15. It concedes that, during that time period, it dredged outside the area authorized by the permit, along a path that was parallel to and about 60 to 70 feet south of the southern Federal Channel line. Respondent's

[24] *See* Respondent's Post-Hearing Brief at 12. *See also* Respondent's Daily Performance Record for May 14, 1988 (C Ex 7).

[25] EPS utilizes signals from a transmitter that is located on the mast of the dredge to transmit signals to transponders that are located on the shore, and thereby calculates the position of the dredge vessel. Initial Decision at 49, n.52.

[26] Respondent's Answer admits that "on or about 8:45 p.m. on May 15, 1988, it had some information that indicated that its dredge may have been mispositioned." Answer at Para. 12.

[27] Tr. v.5 at 30–35.

Post-Hearing Brief at 2, 15.[28] All dredging was halted on May 16 by a state court injunction which remains in effect.[29]

III. *Administrative Enforcement Litigation*

Region IX filed an administrative complaint against the Port and Respondent on June 1, 1988.[30] As amended on September 30, 1988, the complaint alleges that Respondent violated the MPRSA and the permit as follows:

(1) Respondent dredged about 8,800 cubic yards of sediments from an unauthorized area located "adjacent to the Inner Harbor Channel"[31] and from the A–2 area on May 14 and 15; and unlawfully disposed of some of the sediments (Load No. 4) within the B1B area (Count 1).[32]

(2) Respondent added additional unpermitted sediments to Scow No. 35 (Load No. 6) and disposed of them at the B1B site at approximately 10:13 p.m. on May 15, in reckless disregard of information that it had dredged in a forbidden area (Count 2).

(3) Respondent filled Scow No. 34 (Load No. 5) with unpermitted sediments on May 14 and May 15 and disposed of the sediments at the B1B site at about 11:19 a.m. on May 15 (Count 3).

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[28] Respondent's cut was about 110 feet wide, partly inside and partly outside the Federal Channel. Respondent's Reply Brief at 37–38. The area that was dredged outside the Federal Channel consisted of the ten feet that Respondent intended to dredge and an additional area approximately 60 feet wide that resulted from the navigational error. Tr. v.11 at 42.

[29] *Port of Oakland et al.* v. *The Superior Court of San Mateo* (July 15, 1988), cited in Initial Decision n.51 at 48. The injunction is based on the Port's failure to have obtained approval for the project from the California State Coastal Commission.

[30] In response to a May 16 complaint filed by Mr. Beery, a joint Corps-EPA panel was created to investigate the alleged unauthorized dredging. *See* Memorandum from Corps-EPA Joint Panel to B.G. Kelly, U.S. Army Corps of Engineers and Daniel W. McGovern, Regional Administrator, Region IX (June 1, 1988). Port Ex 14. The Panel concluded that Respondent had dredged outside the Federal Channel and within the A–2 area and had disposed of the sediments in the ocean, in violation of the MPRSA. It recommended that EPA assess a civil penalty against the Port and Respondent.

[31] This area is outside the Federal Channel and also outside the turning circle. Since it was not within the scope of the project boundary, it was not sampled for testing.

[32] The Region alleges that Respondent unlawfully disposed of some of the sediments from Scow No. 35 by leakage during transit of Load No. 4 to and from the disposal site and some of the sediments during a failed attempt to dump the load.

(4) Respondent disposed of five loads of dredged material (Load Nos. 1, 2, 3, 4, and 6) more than 60 meters from the center of the B1B site, in violation of the MPRSA and Special Condition 4(g) of the permit (Counts 4–8).

The Region proposed a total penalty of $150,000 for the three counts of unlawful dredging and disposal alleged in the First Amended Complaint.[33] The Region claimed that a maximum penalty of $50,000 should be assessed for each of the three instances of disposal of unpermitted sediments because Respondent "risked substantial environmental harm" by dumping contaminated sediments in a prime fishing ground, and because the violations were caused "in part because of a willful intention and in part because of gross negligence."[34] It argued that "the most serious violation of the Permit that the respondents could have committed was to dump dredged materials into the Pacific Ocean taken from the A–1 or A–2 areas." Complainant's Post-Hearing Brief at 99. The Region proposed an additional total penalty of $25,000 for the five counts of off-center dumping in violation of Special Condition 4(g) of the permit to "reflect that missing the dump site * * * increased the environmental impact of the respondents' operations and tended to defeat federal monitoring goals." Complainant's Post-Hearing Brief at 110.

The Region moved to file a Second Amended Complaint which re-alleged all of the violations alleged in the First Amended Complaint and added the allegations that Respondent: (1) intentionally dredged additional sediments from the A–2 area on May 15 and 16, which it intended to transport for disposal (Count 4); (2) spilled dredged material over the side of the scow during transportation of Load No. 4, in violation of the permit (Count 11);[35] and (3) dredged deeper than the "−38 feet MLLW plus one foot allowable overdepth" authorized by the permit on each of five days (Counts 12–16).[36]

[33] EPA's First Amended Complaint proposed a total penalty for all of the violations alleged therein, and did not propose a separate penalty for each violation. However, EPA's post-hearing brief suggested appropriate penalty amounts for each violation. Complainant's Post-Hearing Brief at 66 *et seq.* *See also* testimony of Loretta Barsamian, Chief, Wetlands, Oceans and Estuaries Branch, Region IX. Tr. v.1 at 110 *et seq.*

[34] Complainant's Post-Hearing Brief at 100.

[35] The Second Amended Complaint contained an allegation that Respondent spilled dredged materials from Load No. 1 during loading. The Region has dropped that allegation. *See supra* n.4.

[36] The Region proposed an additional civil penalty of $25,000 for the additional unauthorized dredging, $10,000 for the spillage of materials from Load No. 4, and $5,000 for dredging deeper than −39 feet MLLW. Complainant's Post-Hearing Brief at 104–105 and 116–117.

The Second Amended Complaint also amended Count 1 of the First Amended Complaint to add that some of the sediments referred to in Counts 1, 2 and 3 were intentionally dredged from an area ten to twenty feet south of the southern boundary of the Federal Channel.

The presiding officer held that:

(1) Respondent dredged and disposed of approximately 7,885 cubic yards of sediment on May 14 and May 15, 1988, from unpermitted areas (Initial Decision at 54, 56).[37]

(2) Respondent dumped "at least three" loads of dredged sediment more than sixty meters from the center of the B1B site, in violation of the Port's permit (Initial Decision at 111).[38]

[37] For purposes of determining the quantities of unauthorized sediments that Respondent dredged, the presiding officer relied on the calculations performed by Sea Surveyor, an independent quality assurance contractor employed by the Port. Initial Decision at 56. Sea Surveyor determined that Respondent dredged approximately 7,885 cubic yards of unpermitted sediment, consisting of about 2,150 cubic yards of sediment from the prohibited A–2 site and the remainder from outside the permitted area and also outside the A–1 and A–2 areas. Initial Decision at 54. *See also* Port Ex 91 and Tr. v.18 at 117–119. It further concluded that about 60% of the sediment dredged from the A–2 site came from below the clay layer. Tr. v.18 at 127.

The presiding officer's Initial Decision contains the inconsistent findings that Respondent dredged "approximately 8,900 cubic yards" of unauthorized sediments from the A–1 and A–2 areas (Initial Decision at 3) and that Respondent dredged 7,885 cubic yards of unauthorized sediments (Initial Decision at 54–56.) The Board's penalty assessment is unaffected by whether the Respondent disposed of 8,990 cubic yards or 7,885 cubic yards of unpermitted sediments.

The Region's appeal challenges the presiding officer's reliance on Sea Surveyor's determination of what percentage of dredged sediments were excavated from the areas above and below the clay layer in the A–2 area. Region's Appeal Brief at 15, n.16. The Region claims that the record does not contain sufficient evidence to permit a finding on this issue. Since the Board's penalty determination is unaffected by this issue, the Board will not address it.

[38] The parties do not agree as to the correct interpretation of Special Condition 4(g). *See* text of Special Condition 4(g) *supra* at n.18. Both parties agreed that dumping may start when the scow's bow reaches a point 30 meters from an imaginary line that is perpendicular to the path of the scow and that intersects the site center. However, the Region maintained that dumping must be completed before the *bow* of the scow reaches a point 60 meters beyond that line, while Respondent maintained that dumping may continue until the *aft* of the scow has passed 60 meters beyond that line.

The presiding officer adopted Respondent's interpretation. Initial Decision at 72, 134. Based on his interpretation of the permit, he found that Load Nos. 1, 2 and 4 (which was only partially dumped) were "clearly outside permit limits") (Initial Decision at 134). He found that Load No. 3 was "well within permit limits." *Id.* at 134 and that Load No. 6 "could have been in compliance with the permit properly interpreted." *Id.* He noted that the Port had admitted that Respondent had not dumped

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He denied the motion to file the Second Amended Complaint. Initial Decision at 5, n.1.

The presiding officer stated that he had determined appropriate penalties for the violations in light of the three statutory penalty factors: the past history of the violator; the gravity of the violations; and the violator's good faith efforts to comply promptly after notification of the violations. He assessed a total penalty of $10,000 for the three dredging and dumping violations alleged in the First Amended Complaint, based on his determination that their gravity was "slight." He concluded that the potential and actual environmental impacts of the violations were slight because:

> [N]otwithstanding the Regional Administrator's determination to the contrary, sediments from the Oakland Inner Harbor were in fact suitable for ocean disposal under the regulations properly construed.

Initial Decision at 127.[39] He added that:

> [I]f the applicable prohibitions, limits and conditions [of the permit regulations] are satisfied, the finding that no unacceptable environmental impact will result has already been made.

Initial Decision at 116, n.102.

The presiding officer acknowledged that he lacked authority to review the validity of the Region's permit determination. Initial Decision at 7.[40] However, he reasoned that he had authority to evaluate whether the sediments are suitable for ocean dumping under the regulatory permit criteria as part of his duty to evaluate the gravity of the violations for purposes of determining an appropriate penalty amount. *Id.* at 110–111, 116.

Load No. 6 within the permit limits, but stated that the Port's admission is not binding on Respondent. *Id.* at 76, n.76.

[39] He added that, even assuming that the A–2 sediments above the clay layer are unsuitable for ocean disposal, they represent only a small percentage of the unpermitted dredging and a small percentage of the total cubic yards dredged by Respondent. Therefore, the presiding officer concluded that "it would be unreasonable to expect any permanent, lasting or measurable affects [sic] from the unpermitted dredging and disposal." Initial Decision at 137.

[40] *See supra* n.7.

The presiding officer concluded that the potential for harm to the Agency's regulatory program from the dredging and disposal violations was also slight because the Region did not comply with its own regulatory criteria when it determined that the A–2 sediments are unsuitable for ocean disposal. He stated that:

> Damage to a government program is a recognized element of the gravity or seriousness of a violation. * * * [However,] * * * it is axiomatic that an agency is bound by its own regulations and the record here much [sic] shows that the Region failed to adhere to that well established principle.

Id. at 138. He rejected the Region's argument that the imposition of a minimal penalty for the violations would weaken the Agency's enforcement program.

Additionally, the presiding officer concluded that Respondent's culpability was slight because its violations were inadvertent. He held that the other two statutory penalty factors—a history of prior violations and demonstrated good faith in attempting to achieve rapid compliance after notification of a violation—were inapplicable in assessing a penalty for these violations.

The presiding officer imposed no penalty for Respondent's failure to comply with Special Condition 4(g) of the permit, which prescribes the position of the dredge vessel when dumping may occur,[41] based on his findings that "the precise navigation contemplated by the permit" involved experimental technology, and that Respondent had made good faith efforts to comply with the permit condition. Initial Decision at 111. He made no express finding with regard to the gravity of the violations.

On appeal, the Region maintains that the presiding officer's penalty determination was based on erroneous findings of fact and conclusions of law. The Region asks the Board to exercise its discretion to set aside the erroneous findings of fact, conclusions of law and penalty assessment of the presiding officer, to perform a *de novo* review of all pertinent factual and legal conclusions, and to assess a penalty of $215,000.[42]

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[41] *See* text of Special Condition 4(g) *supra* at n.18.

[42] The Region notes that applicable procedural rules allow the Board to remand the case to the presiding officer for reconsideration of his penalty assessment but

Continued

The Region challenges the presiding officer's penalty assessment for the dredging and disposal violations. It argues that the presiding officer reached erroneous legal conclusions regarding all three major components of a gravity assessment—risk of environmental harm, risk of harm to the Agency's regulatory program, and Respondent's culpability—and, therefore, seriously underestimated the gravity of the dredging and disposal violations.[43] The Region also challenges the presiding officer's refusal to assess any civil penalties for five allegedly off-center dumps. First, it argues that the presiding officer erred in holding that only three of the dumps were off-target. Second, it maintains that the presiding officer did not comply with Section 105(a) of the MPRSA because he failed to make a gravity assessment for the violations, as the Act requires. Additionally, the Region argues that the presiding officer erred when he denied its motion to file the Second Amended Complaint, which alleges additional violations of the MPRSA.

Great Lakes responds that "[t]he Presiding Officer's findings and conclusions are fully supported by the record and should be adopted." Respondent's Reply Brief at 95. It further contends that "it would be patently unfair" to allow the Region to file the Second Amended Complaint because the Region did not make its motion to amend "until it rested" its case, and because the presiding officer "found that no violations had occurred." *Id.* at 92.

DISCUSSION OF FIRST AMENDED COMPLAINT

I. *Introduction*

As both parties recognize, the Board has authority to perform a *de novo* review of the presiding officer's factual and legal conclusions, and to determine an appropriate penalty for a violation of the MPRSA. The Board finds no error in the presiding officer's factual findings relevant to the Board's determination of an appropriate penalty, as discussed herein, and to that extent affirms them. However, the Board agrees with the Region that the penalties assessed by the presiding officer for the dredging and disposal violations do not reflect the gravity of these violations. Accordingly, for the reasons set forth below, the Board is setting aside the presiding officer's penalty assessment and assessing a penalty of $30,000 each for the

argues that a decision by the Board would achieve a more rapid resolution of the case. Region's Appeal Brief at 91–92. *See* 40 C.F.R. §§ 22.31(a) and 22.30(c).

[43] The Region agrees with the presiding officer that, of the three statutory penalty factors, only the gravity factor is applicable to these violations. Region's Appeal Brief at 25.

dredging and disposal violations assessed in Counts 1 and 3 and a penalty of $50,000 for the dredging and disposal violation alleged in Count 2, based on the gravity of the violations, and adjusted to reflect Respondent's culpability. The Board also finds that the presiding officer erred when he did not assess a penalty for each of three off-center dumping violations. For the reasons set forth below, the Board assesses a penalty of $5,000 for each of these violations (totalling $15,000), based solely on the gravity of the violations. The Board has determined that the level of culpability on the Respondent's part does not warrant an increase in these gravity-based penalty amounts.

Although the MPRSA requires the Board to consider the "gravity" of a violation in determining an appropriate civil penalty, neither the statute nor the Agency's implementing regulations prescribe the criteria by which gravity shall be evaluated. EPA issued a Policy on Civil Penalties (GM–21) (hereinafter "the Penalty Policy") on February 16, 1984, that sets forth the Agency's overall goals for civil penalty assessments. The 1984 Policy is accompanied by a Framework for Statute-Specific Approaches to Penalty Assessment (GM–22) (hereinafter "the Framework"), which provides guidance to program offices in writing penalty policies for specific statutes. The Penalty Policy and the Framework are not designed for direct application to specific violations, and are not binding on the Board.[44] However, they provide useful guidance for the Board's penalty analysis.[45]

According to the Penalty Policy, the objective of a gravity assessment is to determine a penalty amount that reflects the seriousness of the violation and "ensure[s] that the violator is economically worse off than if it had obeyed the law."[46] Penalty Policy at 3. A gravity assessment should reflect the importance of the requirement violated to achieving the goals of the statute or regulation; the risk of harm inherent in the violation at the time it was committed; and the

[44] *See In the Matter of City Industries, Inc.*, RCRA (3008) Appeal No. 83–1, at 7 n.11 (Feb. 21, 1985).

[45] The federal courts have relied on the Penalty Policy and the Framework for guidance in assessing penalties under statutes where EPA has not issued a statute-specific penalty policy. *See, e.g., Public Interest Representation Group of New Jersey, Inc.* v. *Powell Duffryn Terminals, Inc.*, 720 F. Supp. 1158, 1166–67 (D.N.J. 1989), *aff'd in part and rev'd in part on other grounds*, 913 F.2d 64, 79 (3d Cir. 1990), *cert. denied* 111 S. Ct. 1018 (1990); *see also United States* v. *Winchester Municipal Utilities*, 944 F.2d 301 (6th Cir. 1991).

[46] The presiding officer held that, "as a minimum, a civil penalty should remove any significant economic benefit from noncompliance." Initial Decision at 139. The Region does not claim and the presiding officer did not find that Respondent enjoyed any economic benefit from any of the violations alleged.

actual harm that resulted from the violation. Framework at 14. Risk of harm has two components: potential and/or actual harm to human health and the environment and potential harm to the Agency's regulatory program. The gravity-based penalty amount determined based on these factors may be adjusted to take other factors into account, including the "willfulness and/or negligence" of the violator and "other unique factors." *Id.* at 17–24.

II. *Dredging and Disposal Violations*

A. *Risk of Environmental Harm.* The MPRSA's prohibitions against transporting and disposing of dredged sediments without permit authorization are central to the Act, predicated on a Congressional finding that unregulated ocean dumping endangers "human health, welfare, and amenities, and the marine environment, ecological systems, and economic potentialities."[47] By dumping unpermitted sediments into the ocean, Respondent engaged in the very activity that the MPRSA was enacted to prevent, and thereby committed violations of major significance. The Agency has stated in regard to a violation of a permit issued under the Resource Conservation and Recovery Act that:

> The * * * permitting requirements are crucial to the effective enforcement of RCRA * * *. If they are disregarded, intentionally or inadvertently, the program cannot function.

In the Matter of A.Y. McDonald, RCRA (3008) No. 86–2, at 24–25 (July 23, 1987), *reconsideration denied* November 9, 1987. *Accord, In the Matter of Ashland Chemical Company,* RCRA (3008) Appeal No. 87–17 (October 25, 1989). Similarly, if MPRSA permits may be violated with impunity, the goals of the statute are frustrated and the statutory program cannot function. Ocean disposal of unpermitted sediments is particularly serious because corrective action cannot eliminate its adverse effects; once unauthorized disposal has occurred, the sediments cannot be retrieved. Therefore, the Board is assessing a significant penalty in this case to reflect the major importance of the statutory requirement that Respondent violated to achieving the goals of the Act.

The Board's penalty assessment also reflects its determination that violations resulting in actual disposal of unpermitted sediments have the potential to pose a substantial risk of environmental harm.

[47] MPRSA § 2(a), 33 U.S.C. § 1401(a).

According to the Framework associated with the Penalty Policy, an assessment of actual or possible harm "focuses on whether (and to what extent) the activity of the defendant actually resulted or was likely to result in an unpermitted discharge or exposure." Appendix to the Framework at 14. In this case, sediments from all three barge loads were transported to the ocean disposal site and were partially or completely dumped into the ocean. Therefore, Respondent's violations not only created a risk that marine organisms would be exposed to unpermitted sediments but also actually resulted in such exposure.[48] Moreover, the potential exists for human exposure through ingestion of contaminated seafood, in light of evidence that commercial and recreational fishing occur in the vicinity of the disposal site.[49] Although the risk of exposure would alone warrant a significant penalty, the Board's gravity assessment is also influenced by the fact that actual exposure occurred.

Respondent urges in its Reply Brief that the risk of harm from its violations is slight because the unpermitted sediments it dredged represent a small percentage of the total amounts that will ultimately be dredged and disposed of as part of the Port expansion project.[50] Respondent's suggested comparison is questionable and we will not entertain it. In recommending passage of the MPRSA, the Senate Commerce Committee expressed its concern that the quantity of waste material being disposed of in the ocean is growing rapidly, and that the oceans will be unable to absorb that waste without environmental deterioration. S. Rep. No. 92–451, 92d Cong. 2d Sess. (November 12, 1971). Therefore, since the Act is intended to address the cumulative effect of ocean dumping from numerous sources, disposal of unpermitted sediments presents a serious environmental risk without regard to the amount of sediments authorized for ocean disposal. The acceptability of the risks involved in disposing of particular sediments is properly addressed through the permitting process.

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[48] *See e.g.,* Testimony of Patrick Cotter, Regional Dumping Coordinator, EPA Region IX, Tr. v.3 at 20 *et seq.*, regarding the presence of marine organisms in the area.

[49] *Id.*

[50] Respondent's Reply Brief at 43–44. It stated that:

> [T]he impact on the B1B site of some 3,000 cubic yards of material (*i.e.,* the total amount of unpermitted material removed from above the clay layer), the suitability for ocean disposal of which is, at worst, the subject of dispute among the experts, will pale in comparison to the impact of the 400,000 cubic yards of harbor material that was expressly authorized for dumping at the same location. *Id.*

Moreover, the fact that a specific discharge may not by itself be of sufficient magnitude to affect the environment significantly does not suggest that the potential for environmental harm is minor. If the amounts of dredged sediments were indeed *de minimis,* and if the circumstances otherwise warranted, the Board might conclude that the gravity of a dredging violation is slight. However, 7,885 cubic yards of unpermitted sediments (the amount determined by the presiding officer) is not a *de minimis* amount.[51]

The unpermitted sediments involved in the dredging and disposal violations alleged in Counts 1, 2 and 3 consist of sediments from the A–2 area that the Region determined to be unsuitable for ocean disposal during the permit issuance process and other sediments as to which the Region has made no suitability determination because they were excavated from an area that was not sampled for testing. Each will be discussed in turn.

The A–2 Sediments. The Board concludes for purposes of its gravity assessment in this case that exposure to the A–2 sediments poses a risk of harm to human health and/or the environment, based on the Region's permit determination that the sediments are not suitable for ocean disposal.[52] Where the Region has made a permit determina-

[51] We note that the presiding officer characterized the 860 cubic yards of sediments dredged from above the clay layer in the A–2 area as "too large to be properly considered *de minimis.*" Initial Decision at 137.

As noted *supra* at n.37, the Initial Decision contains inconsistent findings as to the quantities of dredged unpermitted sediments. It is unnecessary for the Board to determine the amount of dredged sediments with precision.

[52] At the trial and in its appeal brief, the Region argued that the presiding officer erred when he made his own independent assessment whether the A–2 sediments meet the regulatory permit criteria for an ocean dumping permit, and then based his holding that the A–2 sediments posed no environmental threat on his conclusion that the A–2 sediments meet the regulatory criteria for a permit. It stated:

> Given that [the Presiding Officer's] task was not to evaluate the legal propriety of EPA's concurrence decision, but simply the actual risk of harm from the violations, the Presiding Officer should have simply evaluated whether, as a factual matter, EPA's expert testimony concerning this data had a sound scientific basis.

Region's Appeal Brief at 70. The Region conceded that the Respondent was entitled to introduce toxicity evidence at the hearing to dispute the Region's claim that the A–2 sediments are harmful. However, it maintained that the presiding officer should not have considered whether its permit determination was proper. *Id.*

In his rebuttal at oral argument, however, Regional counsel stated that the Region's use of toxicity data at the hearing to prove that the violations posed a risk of environmental harm may have been unnecessary because the Region may be entitled to rely on its permit determination that the A–2 sediments are unsuitable for ocean disposal as proof that the A–2 sediments posed an environmental risk. Transcript of Oral Argument at 57.

tion under the MPRSA that particular sediments are unsuitable for ocean disposal, their potential to cause environmental harm has been established, and will be assumed once exposure or potential for exposure exists. The Board's approach is consistent with the philosophy articulated in the Penalty Policy, which emphasizes the likelihood and extent of environmental exposure as the primary elements in a gravity assessment. It is also consistent with the approach to gravity assessment that the Agency has taken in its statute-specific penalty policies,[53] and with the approach that the Agency has taken in assessing civil penalties under other environmental statutes.

For example, in *In the Matter of Briggs & Stratton,* TSCA Appeal No. 81–1 (February 4, 1981), the Agency's Judicial Officer held that it was unnecessary for the Region to introduce evidence of the toxicity of polychlorinated biphenyls (PCBs) in a proceeding to assess a civil penalty for violation of the PCB rules. He stated that:

> [Congress] determined that all PCBs are sufficiently hazardous to require regulation * * *. It therefore did not intend the toxicity of PCBs to be placed in issue in a proceeding whose primary purpose is to determine whether a regulation lawfully promulgated under the authority of § 6(e) had been violated, and if so, what penalty should be imposed for the violation. *Briggs and Stratton, supra,* at 26.

In a subsequent RCRA civil penalty proceeding, *In the Matter of A.Y. McDonald,* RCRA (3008) Appeal No. 86–2 (July 23, 1987), the Chief Judicial Officer held that the toxicological effect of material identified by regulation as hazardous waste should not be evaluated in determining the potential for harm of the waste for penalty purposes because "once a waste is deemed hazardous under the regulations, its potential danger has already been established." *In the Matter of A.Y. McDonald, supra,* at 22–23. Therefore, "the Region was not required (nor is [Respondent] permitted) to look behind those regulations to determine whether the waste is dangerous." *Id.* at 23.

There are several sound reasons for the Board to apply the rationale of the *Briggs and Stratton* and *A.Y. McDonald* decisions to

[53] *See, e.g.*, Final RCRA Penalty Policy (May 8, 1984), which includes a matrix that classifies violations by gravity. The two axes of the matrix represent potential for harm (likelihood of exposure and/or likelihood of an adverse effect on the RCRA program) and extent of deviation from the regulatory requirement. Each box on the matrix represents a range of penalties.

penalty assessments under the MPRSA,[54] rather than to require or even allow a *de novo* review of toxicity data for purposes of a gravity assessment. First, the Corps and the Region are in a better position than either the presiding officer or the Board to make a sound determination as to the suitability of particular sediments for ocean disposal. The Corps and the Region not only have personnel with the technical expertise to evaluate the complex biological data that has been introduced in this proceeding but also had the benefit of public comment during the permitting process. Second, neither the presiding officer nor this Board has authority to review a permit determination under the MPRSA. *See supra* n.7. If the Board were to make an independent determination whether particular sediments are suitable for ocean disposal under the regulations, it would, in effect, be ruling on the correctness of the Region's permit determination, and therefore be doing indirectly what it lacks explicit authority to do. Third, a Board ruling disagreeing with the Region's determination to prohibit ocean disposal of particular sediments might encourage a permittee to disregard the permit prohibition, and would therefore weaken the Region's effectiveness in enforcing the MPRSA.[55] Fourth, as evidenced by the voluminous record in this proceeding,[56] litigating the issue of toxicity in every contested civil penalty proceeding under the MPRSA would place an unwarranted burden on the time and resources of the parties, the administrative law judges, and this Board. Such litigation would unnecessarily duplicate determinations made in the permit process, thereby raising the possibility (as here) of

[54] The presiding officer did not discuss either decision in his Initial Decision. However, he stated at the hearing, in an apparent reference to *Briggs and Stratton*, that he regards that decision as distinguishable because "there have been no Congressional findings * * * as to the hazardousness of these materials." Tr. v.11 at 1–2. The Board agrees with the presiding officer that *Briggs and Stratton* can be distinguished but has decided, for the reasons stated above, that the rationale of that decision should be extended to penalty determinations under the MPRSA. The presiding officer recognized that his decision might be reversed on appeal, stating that the Administrator or his delegatee "could, on appeal, say that I have no authority to * * * set aside the * * * regional administrator's decision in this case." *Id.*

[55] The Region argues that:

> The Presiding Officer's ultimate holding that Great Lakes' ocean dumping violations were not grave and worthy of only a token penalty because the Corps Permit should not have barred the dumping of any Oakland Inner Harbor sediments was the functional equivalent of setting the permit limitation aside altogether. This holding essentially rendered the permit limitation in issue unenforceable.

Although the Region's position is somewhat overstated, the Board believes that the Region's concern is well-founded.

[56] The record consists of 25 volumes of testimony and over 200 exhibits, including a number of lengthy and highly technical scientific publications.

conflicting or partially conflicting, results. Thus, the Board holds that the Region need not introduce evidence of toxicity as part of its affirmative case, and the Respondent may not attempt to show that the gravity of the violation is slight by presenting toxicity data. The permit determination establishes the significant element of harm for these violations.

Although the issue is not before us, we see no reason why the Region may not submit evidence, if it chooses, that the toxicity of the pollutant is *far greater* than assumed in the permitting decision, and justifies augmenting the initial gravity-based penalty.[57] In this narrow context, the presiding officer may consider all credible evidence of toxicity, not only evidence obtained in accordance with the regulatory permit criteria. The Region may also seek to augment the initial gravity-based penalty by introducing evidence as to any unusual characteristics of the marine environment that might increase the potential for environmental harm from a violation of the MPRSA. If the Region chooses to introduce such data, the respondent is free to present evidence to refute them.

The Board does not anticipate that toxicity evidence will be routinely presented in penalty proceedings under the MPRSA. Rather, it anticipates that a Region will present such evidence only in exceptional cases when the pollutant is unusually toxic or the environment unusually sensitive. Such evidence may not, of course, increase a penalty that is already set at the $50,000 maximum based on other factors.

Since the presiding officer heard the testimony of the expert witnesses in this case, he is in the best position to determine whether the evidentiary record here warrants augmenting the penalty based on the toxicity of the sediments and/or the sensitivity of the environment. However, in the interests of resolving this matter promptly, the Board has decided not to remand this case to the presiding officer for a determination whether the toxicity of the materials or the sensitivity of the environment warrants an additional penalty.

[57] As the Chief Judicial Officer stated in *In the Matter of A.Y. McDonald, supra:*

> This is not to say that toxicity levels are always irrelevant to penalty assessments. High toxicity might warrant an upward adjustment as an "other unique factor" or justify a multi-day penalty for a continuing egregious violation * * *. Alternatively, violations involving extremely dangerous wastes might justify departure from the Policy altogether in order to assess a just and equitable penalty.

In the Matter of A.Y. McDonald, supra, at 23.

The presiding officer's factual findings permit the Board to infer that the presiding officer believes that the particular exposure that occurred here did not create substantially greater risks than those that could have been anticipated from a violation of this nature. The Board does not disagree.

The untested sediments. In further support of its argument that the penalty amount for the dredging and disposal violations should be increased, the Region argues that the presiding officer erred when he found that "all of the materials at issue [in this matter] could appropriately have been determined to be suitable for ocean disposal" (Initial Decision at 139). Region's Appeal Brief at 72. It argues that the presiding officer "fail[ed] to distinguish between the A–2 sediments and the sediments dredged from outside the Oakland Inner Harbor project boundaries." *Id.* at 73. The Region points out that the latter material, "which constitutes two-thirds of the unpermitted materials that Great Lakes unlawfully dredged and dumped, *was never sampled and evaluated for suitability* * * *" (emphasis in original).[58] Region's Appeal Brief at 73. Therefore, the Region maintains that "it could not possibly have been determined to be permissible for ocean dumping under the MPRSA regulations." In fact, the Region adds, "the regulations specifically forbid the dumping of materials which have not been adequately characterized by bioassay testing and other analysis." Region's Appeal Brief at 73. Therefore, it argues that:

> [T]he Presiding Officer should have found the dumping of these *untested* materials to be a substantially grave violation. The MPRSA would be reduced to a nullity if dumping of materials without evaluation of their suitability were classified as a slight offense.

Id. The Board agrees. Ocean disposal of untested sediments creates the very risk that the Act was enacted to prevent. As stated at 33 U.S.C. § 1401(b):

> Congress declares that it is the policy of the United States to regulate the dumping of *all types of materials* into ocean waters * * *.

[58] The Initial Decision contains a finding that approximately 5,735 cubic yards of unpermitted dredged sediment came from outside the A–2 area. Initial Decision at 56.

(Emphasis added.) In order to establish the potential environmental harm from the disposal of unpermitted sediments, EPA need not prove that the sediments were in fact harmful but only that their suitability for ocean disposal had not been determined as of the time of their disposal.

B. *Potential for Harm to the Agency's Regulatory Program.* The Board's gravity assessment not only reflects the potential environmental harm from the violations but also reflects the Board's view that ocean disposal of unpermitted sediments weakens the Agency's regulatory program. Even were the Board to conclude that the Region had not complied with its own regulations in making a permit determination, that fact would not excuse Respondent from complying with the permit. Although circumstances may exist where a Region's failure to adhere to its own regulations warrants a penalty adjustment, no such circumstances exist here.

C. *Culpability.* The presiding officer concluded that "the gravity of the misconduct by Great Lakes which resulted in the unpermitted dredging was slight rather than grave or serious" and does not warrant augmenting the penalties. Initial Decision at 137. He held that Respondent's unauthorized dredging resulted from "an inadvertent transposition of data entered into a computer." *Id.* at 135. He added that Respondent's intentional dredging ten feet south of the southern Federal Channel boundary was "reasonable" and does not warrant the imposition of additional penalties based on Respondent's culpability. *Id.* at 112. The Region claims that the presiding officer's assessment of Respondent's culpability is erroneous. First, the Region maintains that the Region's intent to dredge outside the permitted area increases its culpability for the violations. Second, it argues that the penalties should be increased because Respondent's navigational error could have been avoided if Respondent had exercised due care. Third, it argues that Respondent was "grossly negligent" when it disposed of Load No. 6 after becoming aware that it had conducted out-of-position dredging. Region's Appeal Brief at 80 *et seq.*

The Board affirms the presiding officer's factual findings that bear on Respondent's culpability.[59] However, based on the facts as

[59] Although the Board may make its own factual findings, it will generally give weight to the presiding officer's findings since the presiding officer had the opportunity to hear the witnesses and to evaluate their credibility. *See Universal Camera* v. *NLRB,* 340 U.S. 474 (1951), stating that the presiding officer's findings are entitled to weight because he has "lived with the case." *Id.* at 496–497. *See also Photo-*
Continued

determined by the presiding officer, the Board concludes that Respondent's culpability for the dredging and disposal violations warrants an increase in the penalties for these violations.[60] Consistent with the Penalty Policy, the Board has considered, among other things, the degree of control that Respondent had over the events that resulted in these violations, the reasonableness of its efforts to prevent them, and its awareness of the hazards inherent in its conduct.

The Board has adjusted its initial gravity-based penalties for all three dredging and disposal violations to reflect Respondent's culpability for having intentionally dredged unauthorized sediments. By its own admission, Respondent intended to dredge approximately ten feet into the A–2 area of the turning basin along the Federal Channel/A–2 boundary line in order to create a sideslope.[61] William Hannum, Respondent's Pacific Region Manager, and James Duffy, Respondent's dredge superintendent, testified that they believed that the Port's permit allowed Respondent to dredge outside the Federal Channel in order to create a sideslope along the Federal Channel/A–2 boundary line because sidesloping is customary practice in the dredging industry.[62]

The Board does not question their veracity. However, it concludes that their belief that Respondent could dredge in the A–2 area without violating the permit was not reasonable under the circumstances. Therefore, it disagrees with the presiding officer's holding that "it was reasonable, if not necessary for Great Lakes to dredge a slope at the Channel line," and reverses his holding that "there is no basis for against augmenting the proposed penalty for alleged intentional dredging into the prohibited A–2 area."[63]

Respondent cites no authority to support its assertion that the express permit prohibition against dredging in the A–2 area may

Sonics v. *NLRB,* 678 F.2d 121 (9th Cir. 1982); *Carr* v. *United States,* 337 F. Supp. 1172 (N.D. Cal. 1977).

[60] The Board affirms the presiding officer's determination not to augment the penalties for these violations based on Respondent's conduct associated with the violations alleged in the Second Amended Complaint. *See* Initial Decision at 115–116.

[61] Stuart Hilgendorf, Respondent's dredging engineer, testified that he laid out Respondent's dredging cuts to extend ten feet into the A–2 area. Tr. v.11 at 40; *see also* Tr. v.24 at 12 and 72. James Duffy, Respondent's dredge superintendent, confirmed that Respondent planned to dredge a small portion of the A–2 area. Tr. v.5 at 60,62.

[62] Tr. v.5 at 60. *See also* Initial Decision at 85.

[63] Initial Decision at 112.

be ignored or modified in light of customary industry practice. The United States Court of Appeals for the Federal Circuit recently held that "[n]either a contractor's belief nor contrary customary practice * * * can make an unambiguous contract provision ambiguous, or justify a departure from its term." *Wright Construction Co. v. United States,* 919 F.2d 1569, 1573 (Federal Cir. 1990). *A fortiori,* a contractor cannot rely on customary practice to justify its departure from the unambiguous terms of a federal permit.

Moreover, Respondent failed to exercise due care in ascertaining its responsibilities under the permit. When Respondent was awarded the contract to perform Phase I of the Port expansion project in April 1988, the permit had not yet been issued and neither the Port nor Respondent knew exactly what it would provide. David Browne, an expert witness on dredging, testified at the hearing that when the permit was issued, it contained "drastic changes in the permit conditions" for the job as compared to the conditions of the contract.[64] One significant change concerned dredging in the A–2 area. The Port's contract specifications had been drafted on the assumption that the A–1 and A–2 areas would be dredged first.[65] However, the permit contained an absolute prohibition against dredging in the A–2 area until the Corps had determined an appropriate disposal site for the dredged sediments from those areas.

Respondent knew before it started to dredge on March 6 that the Port's permit prohibited dredging in the A–2 area. The Port hand-carried copies of the permit to Respondent together with a letter dated May 5, 1988, from John O. Wilson, principal engineer for the Port. Initial Decision at 43. The letter informed Respondent that "it must familiarize [itself] with all the provisions of the permit and adhere to them," including the prohibition against dredging in the A–2 area. Port's Exhibit A–63. It directed Respondent to "keep a copy of the permit handy on the dredge." *Id.* A May 5, 1988 speed letter from Ted Mankowski, the Port's resident engineer, to Respondent stated that dredging may not begin in the A–2 area. P Ex 28. Both William Hannum, Respondent's Pacific Region Manager, and Stuart Hilgendorf, Respondent's project engineer, discussed the permit prohibition against dredging in the A–2 area with James

[64] Tr. v.25 at 8. Respondent concedes that "[m]any of the permit provisions were different from the contract requirements, requiring some on-the-job adjustments." Reply at 11.

[65] Testimony of Charles Roberts, chief engineer, Port of Oakland. Tr. v.23 at 123; Testimony of William Hannum, Tr. v.23 at 146.

Duffy, the dredge superintendent, before dredging began.[66] Nevertheless, Respondent did not clarify with the Port or the Corps how it should dredge the A–2/Federal Channel line. Respondent's failure to postpone starting to dredge while it clarified its permit obligations appears to have been influenced by the Port's insistence on speed in performing the contract work.[67]

Respondent had the duty to comply with the permit conditions, even if doing so required it to re-negotiate its contract with the Port. As Mr. Browne testified, a contractor ordinarily "knows exactly" what the permit conditions are before he bids a job, and has the opportunity to say "I can't live with this." Tr. v.24 at 185. Under the present circumstances, where there were major changes in the scope of the work after the bidding, a responsible contractor should have "[tried to] ascertain what part he played * * * and what help he had to give to the permittee in order for the permittee to satisfy these conditions." *Id.* at 8, 11; Tr. v.25 at 8.

Respondent's argument that it was reasonable for it to think that it could straddle the Federal Channel/A–2 line without violating an express permit prohibition is unconvincing. Therefore, the Board concludes that Respondent's conduct warrants a penalty increase for intentionally dredging at least ten feet into the A–2 area, based on Respondent's awareness of the permit prohibition against dredging in the A–2 area and on Respondent's failure to make reasonable efforts to find out whether it was possible to dredge along the Federal Channel/ A–2 line and remain in compliance with the permit.

In addition to intentionally dredging approximately 10 feet south of the Federal Channel boundary line, Respondent inadvertently dredged substantially further outside the authorized area than it had intended, due to circumstances described in section II, *supra.* The Board agrees with the presiding officer's conclusion that the gravity-based penalty for unpermitted dredging and disposal should not be increased based on Respondent's conduct in mispositioning the dredge vessel.

On appeal, the Region does not challenge the presiding officer's conclusion that the unauthorized dredging was unintentional. How-

[66] *See also* Tr. v.24 at 55.

[67] A speed letter from the Port to Respondent, dated May 5, 1988, asked Respondent to commence dredging as soon as possible. Port Ex 28. *See* Deposition of Ted Mankowski, C Ex 151 at 74 *et seq.*, describing the Port's sense of urgency to complete dredging the turning basin before the anticipated arrival in June of the *President Truman*, a supercontainership. *See also* Initial Decision n.67 at 66.

ever, it argues that Respondent's misconduct warrants an increased penalty because its computer error was preventable, and because Respondent would have discovered the error sooner if it had exercised due care in performing its duties. The Region argues that "clearly visible and distinctive landmarks" should have alerted the dredge crew that they were in the wrong place. Region's Appeal Brief at 18. Moreover, it asserts that Respondent's personnel had many additional clues that should have warned them that their dredge vessel was mispositioned, including Mr. Beery's warning, the unexpectedly hard digging they encountered, and their detection of a reduction in the volume of dredged material being excavated. The Region added that Respondent would have discovered its error sooner if it had taken bottom soundings, which were not required by the contract, but which the Region claims were customary practice.

The presiding officer found the Region's testimony unconvincing. Among other things, he found that some hard digging was to be expected in many places in the Oakland Inner Harbor, and therefore that encountering hard digging should not necessarily have indicated to Respondent that it was dredging in the wrong location. Initial Decision at 136. He further found that Respondent may not have realized how close it was to the shoreline because a section of Mr. Beery's pier was missing. *Id.*[68] The presiding officer had the opportunity to hear the testimony of the witnesses and study all of the documentary evidence. The Board hereby affirms his factual findings on these issues and his conclusion that no additional penalty is warranted based on Respondent's culpability for mispositioning the dredge vessel.

However, the Board reaches a different conclusion from that of the presiding officer with regard to Respondent's culpability for dumping Load No. 6 after it became aware that it had conducted out-of-position dredging. The presiding officer stated that, although Respondent was aware of its navigational error, the "exact location where the contents of Load No. 6 had been dredged was not known until the next day." Initial Decision at 136. Respondent urges the Board to adopt the presiding officer's conclusion, arguing that although it was aware that an error had been made at the time that it disposed of Load No. 6, it "still had not discovered where the problem was or what it meant in terms of where they had been

[68] The presiding officer did not address the Region's argument that Respondent was negligent because it failed to take bottom soundings on May 14 and May 15. Since daily bottom soundings were not required, and were not intended to verify the dredge's location, the Board finds that Respondent's failure to take bottom soundings on those dates did not constitute a lack of due care.

dredging during the past two days." Great Lakes Reply Brief at 32. The Board concludes that Respondent's failure to stop the scow carrying Load No. 6 to the disposal site before it deposited its load demonstrated an unwarranted disregard for the possibility that the scow was carrying unpermitted sediments, and warrants an increase in the penalty assessed for this violation. The Board does not disagree with the presiding officer's factual finding that Respondent had not confirmed as of 10:30 p.m., when the load was dumped, that it had dredged in the A–2 area. However, Respondent knew for approximately two hours before Load No. 6 was dumped that it was unsure where the materials in that scow had originated. Respondent acknowledges in its Answer to the First Amended Complaint that "at or about 8:45 p.m. on May 15, 1988, it had some information that indicated that its dredge may have been mispositioned * * *." Answer to First Amended Complaint at Para. 12.[69] The presiding officer found that "it apparently would have been possible for Great Lakes to prevent the dumping [of Load No. 6] by calling the tug." Initial Decision at 68.

The Board concludes that Respondent acted irresponsibly and with callous disregard for the environment when it failed to prevent the dumping of Load No. 6. Accordingly, given this added element of culpability, the Board assesses a maximum penalty of $50,000 for the unauthorized disposal of Load No. 6, in contrast to the penalty of $30,000 each for the other two dredging and disposal violations.

D. *Additional Issues.* The Region raises three additional issues in its appeal that require brief responses. First, the Region argues that:

> The presiding officer failed to begin his penalty assessment at the statutory maximum and then work down from this sum only as justified by specified consideration of the MPRSA statutory penalty factors.

Region's Appeal Brief at 63. The Region claims that the MPRSA requires the Board to begin its penalty assessment at the statutory maximum of $50,000 for each violation, and then reduce the penalty amount, if appropriate, based on the statutory penalty factors. It maintains that federal courts have interpreted language in the Clean

[69] Mr. Mankowski stated in his deposition that he first heard from Mr. Duffy at about 5 p.m. Sunday and that Mr. Duffy "expressed some concern that he was outside—out of position." Deposition of Ted Mankowski, C Ex 151 at 171.

Air Act and Clean Water Act which is similar to that found in the MPRSA and as requiring that a penalty assessment begin at the statutory maximum, citing *United States* v. *A.A. Mactal Construction Co., Inc.,* Civil Action No. 89–2372 (D. Kan. March 31, 1992); *Public Interest Research Group of New Jersey, Inc.* v. *Powell Duffryn Terminals, Inc.,* 913 F.2d 64 (3d Cir. 1990); and *Atlantic States Legal Foundation, Inc.* v. *Tyson Food, Inc.,* 897 F.2d 1128 (11th Cir. 1990).[70]

The Region's argument is without merit. The federal courts of appeals decisions that the Region cites establish a methodology for federal district courts to use in assessing penalties under the Clean Air Act and Clean Water Act. There are no judicial decisions requiring EPA to apply the same methodology in administrative litigation.

EPA's Penalty Policy states that the guidance contained in the Penalty Policy and accompanying Framework is applicable to "administratively imposed penalties and settlements of civil penalty actions," while in contrast, the Agency will request the statutory maximum when it files a complaint in federal court. Penalty Policy at 1. The methodology prescribed by EPA's Framework does not require starting at the statutory maximum. Rather, it provides that a penalty amount shall be determined by calculating a "preliminary deterrence figure" (based on an "economic benefit" component and a "gravity" component") and then adjusting it upward or downward based on other considerations. Framework at 2–3. Thus, the Agency has clearly chosen to establish in administrative penalty proceedings a methodology which does not require starting at the statutory maximum. The Board finds nothing in the MPRSA or the decisions that the Region cites that applies to administratively-imposed penalties or that would invalidate the methodology set forth in the Penalty Policy, to which the Board adheres in this decision.

Second, the Region argues that the presiding officer may have erroneously reduced the Region's proposed penalty for the dredging and disposal violations based on the presiding officer's finding that the Region improperly determined that sediment samples from a part of the A–1 area designated "SN–2" did not meet regulatory

[70] Respondent objects to EPA's Table of Authorities submitted after oral argument on the ground that it contains additional arguments and case citation beyond those authorized by the Board's Order Granting Oral Argument, June 25, 1992. In light of the Board's determination on this issue, Respondent's objection is moot.

criteria for ocean disposal.[71] Since the Board has set aside the presiding officer's penalty assessment for the dredging and disposal violations for other reasons (*see* section II, *supra*), this issue is moot.

Third, the Region maintains that the presiding officer was improperly influenced in his penalty assessment by his opinion (*see* Initial Decision at 135–140) that the Region's penalty proposal reflects the Regional Administrator's "vindictive motive" and personal embarrassment that the permit had been violated. Region's Appeal Brief at 64–65. It argues that "[t]he Consolidated Rules * * * require that the reasons for a penalty assessment must follow from consideration of the MPRSA statutory penalty factors *only*," citing 40 C.F.R. § 22.28(b).[72]

The MPRSA does not require the presiding officer to limit his penalty analysis to the three prescribed statutory criteria. The Act merely provides that, in making his decision, the presiding officer must take the three statutory criteria into account. *See Atlantic States Legal Foundation* v. *Tyson Foods, Inc.*, 897 F.2d 1128, 1141 (11th Cir. 1990). *Cf. In the Matter of City Industries, Inc.*, RCRA (3008) Appeal No. 83–1 (Feb. 21, 1985). However, since the Board has set aside the presiding officer's penalty assessment for other reasons, this issue is moot.

III. *OFF-CENTER DUMPING*

The presiding officer found that "at least three of the * * * scow loads dumped at the B1B site were not within limits set by [Special Condition 4(g) of] the permit * * *." Initial Decision at 111. However, he concluded that none of Respondent's off-target dumps "warrants [either] a penalty for a violation as a separate count [or] an augmentation of the penalty for unpermitted dredging." Initial Decision at 135. He stated that Respondent was using "state-of-the-art" equipment to achieve navigational accuracy, and that "a learning curve or 'shakedown' period would be necessary in order for the precision dumping contemplated by the permit to be consistently

[71] Region's Appeal Brief at 66. The presiding officer characterized as arbitrary the Region's determination that materials from the SN–2 area were unacceptable for ocean disposal. He acknowledged that no dredging had occurred there, but stated that the Region's determination "shows the Region's application (disregard) of the Regulations." Initial Decision at 90. He did not explain what effect, if any, his finding had on his penalty assessment.

[72] It appears that the Region's intended reference is to 40 C.F.R. § 22.27(b), which provides that "the Presiding Officer shall determine the dollar amount of the recommended civil penalty to be assessed * * * in accordance with any criteria set forth in the Act relating to the proper amount of a civil penalty * * *."

achieved." Initial Decision at 135. Therefore, based on his conclusion that Respondent acted in good faith to comply with the permit, he concluded that no penalty is warranted for any of the violations.

The Board assesses a penalty of $5,000 each for Respondent's failures to comply with Special Condition 4(g) when it disposed of Loads 1, 2, and 4, based on the gravity of the violations.[73] The Board is not increasing the penalty for culpability. The Board affirms the presiding officer's finding that the Region has not established that two additional dumps also violated the permit.[74]

According to the Region's witnesses, the permit required Respondent to dump its loads while the disposal vessel was in a particular location so that dredged sediments would be concentrated in a mound on the ocean floor. The primary purpose of the requirement is to enable monitoring of the sediments to determine migration and erosion rates. Tr. v.4 at 143, 164, 176. EPA's concurrence in the issuance of the permit was conditioned on an agreement by the Corps "to monitor the disposal site to evaluate impacts on the marine environment."[75] Moreover, concentrating the dredged sediments minimizes the surface area buried by dredged sediments and thereby decreases the adverse environmental impact of their disposal. Region's Appeal Brief at 29. Additionally, the provision was designed to enable EPA and the Corps to consider the feasibility of capping

[73] Since the Board has assessed some penalty for every violation that the Region proved, Respondent's contention that section 105 of the MPRSA requires the assessment of some penalty for each violation (*see* Region's Appeal Brief at 59) need not be addressed.

[74] On appeal, the Region argues that the presiding officer held the Region to a higher standard of proof than the Agency's Consolidated Rules of Practice require, and that the Region has established "by a preponderance of the evidence" that Load Nos. 3 and 6 were also dumped outside permit limits. Region's Appeal Brief at 82. Both parties introduced charts at trial purporting to show the locations of the dumps and provided witnesses to interpret them. *See* C Ex 117 and Port Ex 92; Initial Decision at 74–76. The evidence is inconsistent. Where the credibility of witnesses is involved, the Board will give substantial weight to the presiding officer's finding. The Board affirms the presiding officer's finding that the Region has not established that Loads No. 3 and 6 were dumped in violation of the permit.

In its appeal brief, the Region questions the presiding officer's "apparent holding that Barge Load No. 5 was dumped within limits," complaining that the presiding officer "apparently relied solely on a finding that EPA Region 9 conceded this point * * * [but] pointed to no admission or concession by the Region in its post-hearing briefs or in the testimony of its witnesses." Region's Appeal Brief at 40. The Board notes that the Region's First Amended Complaint does not allege that Load No. 5 was dumped outside the permit limits.

[75] Letter from Regional Administrator Daniel W. McGovern to Colonel Galen Yanagihara, U.S. Army Corps of Engineers, May 3, 1988. C Ex 1.

the contaminated material with uncontaminated material so as to insulate the marine environment. Tr. v.23 at 29–32; Tr. v.16 at 22–25, 28. The permit emphasizes the importance of the requirement to achieving the purposes of the MPRSA by expressly requiring the use of a navigational system to position the disposal vessel which is accurate to plus or minus three meters. *Id.* at 12. Therefore, the violations posed a potential risk of harm to the environment and a risk to the Agency's regulatory program.

John Wilson, the principal engineer for the Port's construction division, testified that he was surprised that the permit included a provision for targeted dumping, and considered the provision difficult to comply with. He said that:

> A lot of the things that we had been discussing as monitoring objectives had suddenly become regulation. And that was matter of some surprise to me. * * *. Things like the tolerance for dump, I hadn't expected to see that in the permit.

Tr. v.16 at 87. Respondent assumed that Special Condition 4(g) was included in the permit as an objective, rather than as a requirement.[76] However, neither the Port nor Respondent sought to clarify this with the Corps or informed the Corps that they had doubts about their ability to comply.

Although Respondent's claimed misunderstanding of the permit does not excuse its violations, several factors militate against augmenting the penalty based on Respondent's culpability. There is considerable evidence that the requirement was difficult to meet,[77] that Respondent made conscientious efforts to comply,[78] and that its performance improved with experience.[79] Taking these considerations into account, the Board will not increase the gravity-based penalties for these violations based on Respondent's culpability. The statutory penalty factors other than the gravity of the violations do not affect

[76] *See, e.g.*, Tr. v.16 at 87.; C Ex 150 at 82,85.

[77] *See* Initial Decision at 44 *et seq.* for a detailed description of testimony that harassment by local fishermen affected the accuracy of dumping of the earlier loads. *See also* Initial Decision at 73–74, and the citations therein to the testimony of Brian Walls concerning the experimental nature of precision dumping.

[78] James Duffy testified to Respondent's efforts to "do what we could do as far as attaining as much accuracy as possible." Tr. v.5 at 198. He said that "we agreed to try and meet these specifications to the best of our ability," and that Respondent was "getting much better at getting to the center of the dump site." *Id.* at 200.

[79] *See* Initial Decision at 135.

the penalty amount. Since there is no history of prior violations in the record, there is no basis for adjusting the penalties based on this factor. The third statutory penalty factor, "demonstrated good faith in attempting to achieve rapid compliance after notification of a violation," is inapplicable because all of the off-center dumps had occurred before Respondent received notification from the government of these violations.[80]

DISCUSSION OF SECOND AMENDED COMPLAINT

I. *Introduction*

At the conclusion of the hearing, the Region moved for leave to amend the First Amended Complaint to allege three additional violations of the MPRSA.[81] It claims that Respondent will not be prejudiced by the amendment and that the public interest in full enforcement of the MPRSA will be served by allowing it to be filed. The Second Amended Complaint alleges that: (1) Respondent intentionally dredged sediments outside the authorized area which it intended to transport for ocean disposal (Count 4); (2) Respondent allowed dredged materials to overflow from the barge during transit to the disposal site (Count 11); and (3) Respondent dredged deeper than −39 feet MLLW (a practice hereinafter referred to as "overdredging") in the Federal Channel on five occasions (Counts 12–16). The Second Amended Complaint also alleges that some of the unpermitted dredging alleged in Counts 1, 2 and 3 of the First Amended Complaint was intentional. (Count 1, ¶ 10).

A complainant may amend his complaint once as a matter of right before the answer is filed, and thereafter upon motion granted by the presiding officer. 40 C.F.R. §22.14(d). The presiding officer denied the Region's motion to amend, citing two reasons. First, he stated that he admitted evidence bearing on "two of the counts * * * based on Complainant's argument the evidence was relevant to the amount of an appropriate penalty." Initial Decision at 110. He stated

[80] S. Rep. No. 92–451, 92d Cong. 2d Sess. (1972) states with regard to this provision that it requires the Administrator to consider "the individual's good faith in seeking to correct the situation after he has been notified of a violation."

[81] The Port filed an Opposition to the motion on April 28, 1991, arguing that the Region knew or should have known of the facts on which the additional allegations were based before the hearing, and that allowing the amendment after the hearing had been concluded would foreclose the Port's opportunity to defend against the charges. Respondent filed an Opposition to the motion on May 8, 1989, incorporating the Port's arguments by reference. Respondent opposes the amendment on the grounds that the evidence will be considered in the context of the gravity assessment and that none of the charges are "well-taken." Great Lakes Post-Hearing Brief at 50.

that "Complainant is bound by the choice he made" and "may not now shift ground and claim that an amendment is proper in order to conform the complaint to the proof."[82] Initial Decision at 110. Second, he held that "none of the counts against [Respondent] in the Second Amended Complaint have been substantiated." *Id.*

The Board does not adopt the presiding officer's procedural reason for denying the Region's motion to file the Second Amended Complaint. However, for the reasons set forth below, it agrees with the presiding officer's conclusion that none of the additional violations alleged therein have been proven. Therefore, since the outcome of this litigation would be unaffected by granting the Region's motion, the Board affirms the presiding officer's ruling denying the motion to file a Second Amended Complaint.

The Board finds that the record does not demonstrate that the Region introduced evidence of either overdredging or spillage for the sole purpose of augmenting the penalties proposed by the Region for the violations alleged in the First Amended Complaint. The Board finds that the Region did give Respondent notice of its intention to file a Second Amended Complaint.[83] Therefore, the Board does not adopt the presiding officer's first reason for denying the motion to file the Second Amended Complaint.

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[82] The two counts to which he apparently refers are Count 11, alleging unlawful spillage of dredged sediments, and Counts 12–16, alleging dredging below −39 feet MLLW. *See* Initial Decision at 80 n.79 and 113.

[83] The Region gave ample notice that it might amend the complaint to conform to the evidence. According to the Region, "Regional counsel orally informed the respondents and the Presiding Officer in a telephone conference before the hearing began that EPA would probably be seeking to amend its complaint." Region's Appeal Brief at 88, n.37. On March 15, the second day of the hearing, EPA counsel stated that "if the evidence does establish that there is, in fact, overflow of dredge material, it is EPA's intention to amend its complaint to conform to proof * * *." Tr. v.2 at 197. On the following day, EPA counsel stated that if the presiding officer accepted a proffered tape recording into evidence, EPA would "move to amend our Complaint to proof." Tr. v.3 at 122–123. On March 31, 1989, nearly a month before the close of the hearing, the Region's attorney stated that:

> [W]e just want to notify the respondent that it's EPA's intent to move to amend our complaint to conform to proof at the close of our case. We have already alluded to that possibility. I just wanted to provide some further notice on that point that we are intending to move to amend our complaint to allege that the respondents violated their permit by allowing overflow of the disposal barge [and] by dredging deeper than the authorized 39 feet in the Federal Channel * * *. The evidentiary basis for these charges have [sic] been developed in the course of the hearing.

Tr. v.11 at 2.

Moreover, the Board adheres to the generally accepted legal principle that "administrative pleadings are liberally construed and easily amended," and that permission to amend a complaint will ordinarily be freely granted. *Yaffe Iron & Metal Co., Inc.* v. *U.S. Environmental Protection Agency,* 774 F.2d 1008, 1012 (10th Cir. 1985), affirming *In the Matter of Yaffe Iron & Metal Co., Inc.,* TSCA Appeal No. 81–2 (August 9, 1982). *See also* Gellhorn and Byse, *Administrative Law and Process* (2d ed. 1981).[84]

As stated in *In the Matter of Yaffe Iron & Metal Co., Inc.,* TSCA Appeal No. 81–2, at 5:

> T]he purpose of a complaint is to give adequate notice of the alleged charge so that the charged party has an opportunity to prepare a defense.
>
> * * * * * * *
>
> A corollary to this principle is that whenever pleadings vary from the issues actually litigated, the pleadings may be amended to conform to the proof as long as there is no undue surprise. [citing Davis, Administrative Law Treatise § 8.06 (1958).]

[84] The Federal Rules of Civil Procedure express the philosophy that amendments to pleadings shall be liberally granted. The philosophy underlying the Federal Rules applies to administrative proceedings as well as judicial proceedings.

The Court of Appeals for the Ninth Circuit has stated with regard to Rule 15(a), which provides that "leave to amend [a complaint] shall be freely given when justice so requires," that:

> Several factors are usually used as criteria to determine the propriety of a motion for leave to amend. These criteria include undue delay, bad faith, futility of amendment, and prejudice to the opposing party. While all these factors are relevant, the crucial factor is the resulting prejudice to the opposing party.
>
> [W]e know of no case where delay alone was deemed sufficient grounds to deny a Rule 15(a) motion to amend. Where there is a lack of prejudice to the opposing party and the amended complaint is obviously not frivolous, or made as a dilatory maneuver in bad faith, it is an abuse of discretion to deny such a motion. The purpose of the litigation process is to vindicate meritorious claims.

Howey v. *United States,* 481 F.2d 1187, 1190–91 (9th Cir. 1973).

The Court of Appeals for the Fifth Circuit has stated with regard to Rule 15(b), which provides that pleadings may be amended to conform to the evidence unless the opposing party would actually be prejudiced thereby; and that a demonstration of actual prejudice requires evidence of "serious disadvantage." *Hodgson* v. *Colonnades, Inc.,* 472 F.2d 42, 48 (5th Cir. 1973).

The Chief Judicial Officer found in *Yaffe* that "Respondent did not demonstrate how its presentation would have been different if the complaint had been amended before or at a point earlier in the proceeding." *In the Matter of Yaffe Iron & Metal Co., Inc.*, at 4.

In the instant proceeding, although Respondent claims that it would be "unfair" to allow the Region to amend its complaint, it has shown neither that it was surprised by the proposed amendment nor that it would be prejudiced were the amendment allowed. Respondent admits in its Opposition to the Region's Motion for Leave to File a Second Amended Complaint that "[o]n several occasions during the six week long hearing in this matter, counsel for Complainant advised that a motion to amend the complaint was contemplated." Opposition at 1 (May 8, 1989). Therefore, it was not caught off guard by the amendment. Moreover, it had ample opportunity to rebut any evidence that the Region introduced to support its allegations. In fact, Respondent's counsel stated at oral argument that "the focus [at the hearing] was on showing that those particular incidents that became the subject of the second amended complaint either had not occurred at all or did not warrant any further penalties." Transcript of Oral Argument at 53–54. When asked at oral argument how Respondent would be prejudiced if the motion to amend were granted, Respondent's counsel merely stated: "Whether or not Great Lakes would have done anything different * * * I really can't say." *Id.* at 53. Therefore, there is a significant question as to whether the presiding officer should have denied the motion to amend in the absence of a demonstration by the Respondent that it was caught off guard by the Region's motion or that it would be prejudiced if the amendment were allowed.[85]

However, the Board agrees with the presiding officer's conclusion that none of the new violations alleged in the Second Amended Com-

[85] The Board recognizes that "a Hearing Examiner has wide latitude as to all phases of the conduct of the hearing." *Fairbank* v. *Hardin,* 429 F.2d 264, 267 (9th Cir. 1970), *cert. denied* 400 U.S. 943 (1970). *Cf. Copeland* v. *Bowen,* 861 F.2d 536 (9th Cir. 1988). The Administrative Procedure Act provides that presiding officers may "regulate the course of the hearing" and "dispose of procedural requests or similar matters." *See* 5 U.S.C. §556(c)(5) and (7). Congress intended that presiding officers in administrative hearings have "the authority and duty—as a court does—to keep the hearing orderly and efficient." S. Doc. No. 248, 70th Cong., 2d Sess. 207 (1946). The Agency's Consolidated Rules of Practice authorize the presiding officer to "take all measures necessary for the maintenance of order and for the efficient, fair and impartial adjudication of issues arising in proceedings governed by these rules." 40 C.F.R. §22.04(c)(10). However, in the instant case, the presiding officer did not base his ruling denying the motion to amend the complaint on considerations relating to the conduct of an orderly and efficient hearing.

plaint have been proven. Therefore, the result of this litigation would be the same whether or not the amendment is filed. Accordingly, the Board affirms the presiding officer's order denying the motion to file a Second Amended Complaint. The Board will not interfere with the presiding officer's ruling on a procedural matter in a case where a reversal would not change the outcome of the litigation, and therefore was, at worst, harmless error.[86]

Each of the alleged additional violations will be considered in turn, and has been determined to be unproven.

II. *Intentional Dredging of Additional Unpermitted Sediments: Count 4.*

The Second Amended Complaint alleges that Respondent dredged unpermitted sediments from an area "in the vicinity of and west of a line identified as Station 182+00 on Great Lakes' pre- and post-dredge survey charts" on the last day before dredging was halted by a court order. Initial Decision at 113. The presiding officer held that the Region had not proven that the alleged unauthorized dredging occurred. He relied on a statement of Mr. Stephen M. Sullivan, president of Sea Surveyor, Inc., that "he could find no evidence of dredging south of the south Federal Channel line in the 'node' area." Tr. v.18 at 139. The presiding officer characterized Mr. Sullivan as a "knowledgeable, competent and forthright witness." Initial Decision at 63. By contrast, he characterized the assertions by Mr. Duffy and Mr. Hilgendorf that the dredging occurred as "vague." Initial Decision at 113. In making his determination, the presiding officer was required to evaluate conflicting and confusing results from pre-dredge and post-dredge bathymetric and side scan surveys. Initial Decision at 54–63. Although the Board is not required to defer to the presiding officer's findings, the presiding officer has seen and heard the witnesses, and has expended considerable effort in studying the highly technical contradictory evidence introduced in this proceeding. His findings deserve consideration. The Board affirms them.

III. *Overflow of Dredged Materials: Count 11.*

The Second Amended Complaint alleges that Respondent allowed dredged material to spill over the side of the barge, in violation of the permit. The presiding officer found that the Region had not

[86] An appellate tribunal will generally disregard an error "which does not affect the substantial rights of the parties." *Texas-Capital Contractors, Inc.* v. *Abdnor*, 933 F.2d 261 (5th Cir. 1990), n.7 at 270.

substantiated this allegation. He found that the only evidence that spillage occurred was a notation in an Inspector's Daily Report that two feet of dredged material was missing from Load No. 4.[87] Initial Decision at 114. The inspector who made this notation was not called as a witness during the hearing. The presiding officer characterized the Report notation as "too slender a reed upon which to premise any augmentation of the proposed penalty." Initial Decision at 114. The Board affirms his holding.

IV. *Overdredging: Counts 12–16.*

The Second Amended Complaint alleges that Respondent violated the MPRSA and the permit when it dredged below the authorized depth of "−38 feet MLLW plus one foot allowable overdepth." The presiding officer held that the permit language merely restates a contract term that establishes a "limit for pay purposes" and does not establish a permit limitation on the depth to which the permittee or his contractor may dredge. Initial Decision at 115. Based on his interpretation of the permit, the presiding officer concluded that Respondent did not violate either the permit or the Act when it dredged below −39 feet MLLW. Initial Decision at 115. The presiding officer was influenced by the testimony of Mr. Charles Roberts, chief engineer for the Port and a former district engineer for the Corps, who stated that, in his opinion, the contractor could dredge below −39 feet MLLW without violating the permit. Initial Decision at 82. Mr. David A. Browne, a dredging expert, also testified that allowable overdepth means "the limits of pay." Tr. v.24 at 191.

The permit language is ambiguous. While it can be read as an absolute limit on dredging, it can also be interpreted as merely restating the contractual limit for pay purposes. The Corps' use of contractual language bolsters the presiding officer's conclusion that the permit was intended to be interpreted in the same manner as the contract. Moreover, the phrase "−38 feet MLLW plus one foot allowable overdepth" appears in the permit under the heading "Project Description" and is not included as one of the itemized "Permit Conditions." Since the presiding officer heard extensive testimony as to the meaning of the provision, the Board will accept the interpretation which the presiding officer determined to be correct based on the record.

[87] Inspector's Daily Report No. 54213, for the evening of May 14, contains an entry made when the tug was 2.8 miles from the disposal site center, reading "Cannot read draft on barge, but looks like approx. 2 feet is missing from top of load—roll, pitch & yaw of scow is doing it." Tr. v.5 at 175. C Ex 8 at 12.

V. *Intentional Unpermitted Dredging: Count 1, ¶10.*

The Second Amended Complaint restates the charges in Counts 1, 2 and 3 of the First Amended Complaint and adds that the unpermitted dredging and disposal on which they are based was partially intentional. The presiding officer concluded that "there is no basis for augmenting the proposed penalty for alleged intentional dredging into the prohibited A–2 area." Initial Decision at 112. For the reasons set forth at section II.C., *supra,* Respondent's intent to dredge in the A–2 area in order to create a sideslope has been taken into account in determining an appropriate penalty for these violations.

CONCLUSION

For the reasons set forth above, the Board assesses a total civil penalty of $125,000 against Respondent as follows: $30,000 for unlawful dredging and disposal of unpermitted sediments, as alleged in Count 1; $30,000 for unlawful dredging and disposal of unpermitted sediments, as alleged in Count 3; $50,000 for unlawful dredging and disposal of unpermitted sediments, as alleged in Count 2; $15,000 ($5,000 each) for three counts of off-center ocean dumping of dredged sediments, as alleged in Counts 4, 5, and 7.

Payment of the civil penalty shall be made within 60 days after receipt of this order by sending a certified or cashier's check in the amount of $125,000, payable to Treasurer, United States of America, to:

U.S. EPA, Region IX
Regional Hearing Clerk
P.O. Box 360863M
Pittsburgh, PA 15251

So ordered.