

October 22, 2010

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**By FedEx and by
First Class Mail**

Wanda Santiago
Regional Hearing Clerk
U.S. Environmental Protection Agency – Region 1
5 Post Office Square, Suite 100
Mail Code: ORA18-1
Boston, MA 02109-3912

Re: *Burnham Associates, Inc.*
Docket Number MPRSA-01-2010-0078

Dear Ms. Santiago:

Enclosed for filing please find an original and one copy of:

- (1) Answer and Request for Hearing of Respondent Bunnham Associates, Inc. and
- (2) Respondent's Motion to Dismiss for Insufficiency of Service of Process.

Another copy of the foregoing are being sent to you by first class mail as well.
Thank you for your assistance and please call me if you have any questions.

Sincerely,



John D. Fitzpatrick

Enclosures

cc: Tonia Bandrowicz, Esq.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 1

)
 IN THE MATTER OF:)
)
)
)
)
)
 BURNHAM ASSOCIATES, INC.)
 14 Franklin Street)
 Salem, MA 01970)
)
 Respondent)

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 Office of Regional Hearing Clerk

Docket No. MPRSA-01-2010-0078

**ANSWER AND REQUEST FOR HEARING OF
 RESPONDENT BURNHAM ASSOCIATES, INC.**

Respondent Burnham Associates, Inc. (“Burnham” or “Respondent”) responds to the administrative Complaint as follows:

I. INTRODUCTION

Paragraphs 1 and 2 purport to be a description of the Complaint to which no response is required. To the extent that those paragraphs allege any facts against the Respondent and/or call for a response, they are denied.

II. STATUTORY AUTHORITY

Paragraphs 3, 4, and 5 purport to be a description of the regulatory framework on which the Complaint is based, to which no response is required. To the extent that those paragraphs allege any facts against the Respondent and/or call for a response, they are denied. Additionally, Paragraph 5 inaccurately describes the civil penalties available under 33 U.S.C. § 1415(a). Otherwise, admitted that the referenced statutes speak for themselves.

III. GENERAL ALLEGATIONS

6. Respondent admits that it is a corporation incorporated under the laws of Massachusetts, with a place of business at 14 Franklin Street, Salem, Massachusetts, otherwise, denied.

7. Burnham does not have any knowledge of the contents of a letter from the U.S. Army Corp of Engineers (“USACE”), dated January 23, 2009 (the “PGP Authorization”) and thus does not have the ability to admit or deny the allegations, which are therefore denied.

8. Burnham does not have any knowledge of the contents of the PGP Authorization, and thus does not have the ability to admit or deny the allegations, which are therefore denied.

9. Burnham admits that on December 8, 2009, the USCAE sent a letter to the Town of Hingham (“Hingham”). The letter speaks for itself; otherwise denied. Burnham has no knowledge of the referenced Authorization Letters sent to Hingham on November 3, 2009 and January 22 and 26, 2010 and thus does not have the ability to admit or deny the allegations, which are therefore denied.

10. Burnham admits that it contracted with Hingham to dredge Hingham Harbor. The contract documents speak for themselves. Otherwise, denied.

11. Respondent has no basis of knowledge to admit or deny the allegations which are therefore denied. Answering further, Burnham denies it transported materials for the purpose of dumping into the ocean. Interport Towing, a company based in Maine, conducted all transportation and dumping services related to the dredging of Hingham Harbor. Burnham further denies that a disposal buoy was present.

IV. VIOLATIONS

12. Denied. Answering further, Burnham did not transport and dump the material in question.

13. Denied. Answering further, this paragraph as drafted is unintelligible and Burnham did not transport and dump the material in question.

V. PROPOSED PENALTY

14. Denied.

15. Denied.

VI. OPPORTUNITY TO REQUEST A HEARING

15. [sic] This informational paragraph requires no response. Burnham requests a hearing, submits its Answer and Request for Hearing herewith and denies any liability. Otherwise, to the extent any response is further called for, denied.

16. This informational paragraph requires no response. Burnham requests a hearing, submits its Answer and Request for Hearing herewith and denies any liability. Otherwise, denied.

17. This informational paragraph requires no response. Burnham requests a hearing, submits its Answer and Request for Hearing herewith and denies any liability. Otherwise, to the extent any response is further called for, denied.

18. This informational paragraph requires no response. Burnham requests a hearing, submits its Answer and Request for Hearing herewith and denies any liability. Otherwise, to the extent any response is further called for, denied.

19. This informational paragraph requires no response. Burnham requests a hearing, submits its Answer and Request for Hearing herewith and denies any liability. Otherwise, to the extent any response is further called for, denied.

20. This informational paragraph requires no response. Burnham requests a hearing, submits its Answer and Request for Hearing herewith and denies any liability. Otherwise, to the extent any response is further called for, denied.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

The Complaint fails to state a claim upon which relief can be granted. In particular, the EPA acknowledges that it is relying upon an order of conditions Burnham was unaware of with an incorrect NAE number. *See* Complaint at 3 n.1. Moreover, the EPA does not advert any facts supporting its contention that marine life was somehow damaged by the return of dredged ocean material back into the ocean as alleged in the Complaint. In addition, the facts alleged by the EPA do not support a claim for fines against Burnham as further described in the Affirmative Defenses.

SECOND AFFIRMATIVE DEFENSE

The Complaint is barred due to impossibility, impracticability and illegality. No tug/dump scow towing combination could safely and legally be operated on the high seas while disposing dredged ocean bottom soil at a standstill over a pinpoint designation on the high seas as suggested by the Complaint. A tug typically tows a dump scow with over a thousand feet of line, the conditions of the sea and mariner and public safety take precedence, and it is physically and practically impossible for a dump scow to be positioned at a halt for the release of dredged ocean material over a particularly defined pinpoint location on the open sea. The applicable

ocean disposal requirements could only be reasonably construed as calling for the disposal of dredged materials within a reasonable distance of the referenced location(s). As the EPA knows or should know, when it claims disposal may have taken place “a half mile or more” beyond the disposal point coordinates (Complaint at 4), it is describing a measurement (a half mile) that is so relatively miniscule as to be insignificant on the open sea. Moreover, there is no allegation by the EPA that disposal occurred outside the lawfully designated Massachusetts Bay Disposal Site.

THIRD AFFIRMATIVE DEFENSE

The Complaint must be dismissed for insufficiency of service of process as per the accompanying Motion to Dismiss.

FOURTH AFFIRMATIVE DEFENSE

The Complaint is barred because Burnham did not commit the complained of conduct that allegedly constitutes a violation of the Marine Protection, Research, and Sanctuaries Act.

FIFTH AFFIRMATIVE DEFENSE

The Complaint is barred because the PGP Authorization and the Authorization Letters were ambiguous, were not all served on Burnham and did not provide adequate notice.

SIXTH AFFIRMATIVE DEFENSE

The Complaint is barred because of lack of notice, i.e., the designated buoy was not on site.

SEVENTH AFFIRMATIVE DEFENSE

The Complaint is barred due to laches, accord and satisfaction, license, estoppel and waiver. During the project at issue Burnham unsuccessfully attempted to receive feedback on the accuracy of the disposal operations from the Silent Inspector. This project and Burnham’s work was approved by local and state government representatives on or about April 13, 2010,

who certified in writing that “the entire work was completed in accordance with the plans and specifications.” During the course of this project neither the USACE nor the EPA objected to Burnham’s work or timely notified Burnham that its work was allegedly noncompliant. It was not until many months after the project has been completed and signed off on that the EPA has brought its Complaint. The EPA cannot, well after the fact, and after this project was certified as compliant without objection from the USACE or EPA, now belatedly claim the work on the project was noncompliant.

EIGHTH AFFIRMATIVE DEFENSE

Burnham did not conduct the disposal(s) at issue and cannot be punished for the alleged violations of a third party (Interport).

NINTH AFFIRMATIVE DEFENSE

The penalties sought by the EPA are excessive and not authorized by statute. The EPA incorrectly sites the maximum fine for a violation under 33 U.S.C. § 1415. 33 U.S.C. § 1415(a) authorizes a maximum penalty of \$50,000 per violation. Furthermore, the EPA erroneously seeks to prosecute each act on the part of Burnham that allegedly constitutes a violation under section 1415 as a double violation, that is, a violation of two distinct permits.

TENTH AFFIRMATIVE AND GENERAL DEFENSE

Burnham denies all allegations of the Complaint not otherwise answered above, and denies any liability or wrongdoing.

HEARING REQUEST

Burnham requests a hearing on the Complaint and a Jury Trial to the extent allowed under law.

Respectfully Submitted,
BURNHAM ASSOCIATES, INC
By its attorney
DESIGNEE TO RECEIVE SERVICE,




John D. Fitzpatrick, BBO# 550059
PINGITORE & FITZPATRICK, LLC
929 Massachusetts Avenue, Suite 103
Cambridge, MA 02141
Phone: (617) 225-2400
Fax: (617) 225-2480
Email: jdf@pingitorelaw.com

Dated: 10/22/10

Certificate of Service

I certify that on this date I served an original and a true copy of the foregoing by FedEx next business day delivery, with a copy of same by first class mail, postage pre-paid on Wanda Santiago, Regional Hearing Clerk with a copy by first class mail, postage pre-paid to Tonia Bandrowicz, Esq., both at 5 Post Office Square, Suite 100, Boston, MA 02109-3912.

Dated: 10/22/10



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 1

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Office of Regional Hearing Clerk

IN THE MATTER OF:

BURNHAM ASSOCIATES, INC.
14 Franklin Street
Salem, MA 01970

Respondent

Docket No. MPRSA-01-2010-0078

**RESPONDENT'S MOTION TO DISMISS FOR
INSUFFICIENCY OF SERVICE OF PROCESS**

Respondent Burnham Associates, Inc. ("Burnham" or "Respondent") moves pursuant 40 C.F.R. §§ 22.16 and 22.20 for the dismissal of the Complaint due to insufficient service of process.

On or about September 30, 2010, the Environmental Protection Agency (EPA) filed an administrative complaint ("Complaint") against the respondent with the Regional Hearing Clerk. See Complaint. The EPA certified that it sent the Complaint to the Respondent via certified mail, return receipt requested. See Complaint at 9. However, no return receipt was signed by the Respondent.

The Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. § 22.00 et al (the "Rules") has specific procedures for the effective service of the complaint.

- The Complainant must serve the complaint on the Respondent or someone authorized to receive service on the Respondent's behalf. 40 C.F.R. § 22.5(b)(1)(i).

- In the case of a corporation, the complainant shall serve an officer, partner, a managing or general agent or any other person authorized by appointment or by federal or state law to receive service of process. 40 C.F.R. § 22.5(b)(1)(ii).
- The Complainant must serve in person, by certified mail with return receipt requested, or by any reliable commercial delivery service that provides written verification of delivery. 40 C.F.R. § 22.5(b)(1)(i).
- Finally, service of the complaint is complete only when the return receipt is signed. 40 C.F.R. § 22.7(c).

According to these Rules, the Complaint was never properly served on the Respondent. Respondent's understanding is that no "officer, partner, a managing or general agent or any other person authorized by appointment or by federal or state law to receive service of process" signed a return receipt as required by the Rules. The EPA has not produced any such signed receipt. Because the Rules were not followed, service was insufficient and the Complaint must be dismissed.

Respectfully Submitted,
 BURNHAM ASSOCIATES, INC
 By its attorney,



 John D. Fitzpatrick, BBO# 550059
 PINGITORE & FITZPATRICK, LLC
 929 Massachusetts Avenue, Suite 103
 Cambridge, MA 02141
 Phone: (617) 225-2400
 Fax: (617) 225-2480
 Email: jdf@pingitorelaw.com

Dated: 10/22/10

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