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April 11, 2011

By HAND

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 in this matter please find an original and one copy of Burnham Associates, Inc.'s Answer to Amended Complaint and Request for Hearing.

As detailed in the April 7, 2011 Status Report filed by the E.P.A., the parties have reached a settlement in this case, pending approval by the E.P.A. and this Court. Despite this agreement, the response deadlines, as detailed in Consolidated Rules of Practice, have not been stayed. Burnham submits this Answer to Amended Complaint and Request for Hearing in order to preserve its rights.

Thank you for your assistance and please let me know if you have any questions.

Sincerely,

John Fitzpatrick (mni)
John D. Fitzpatrick

cc: (by FedEx – 2 copies)
(by mail – 1 copy)

Hon. Susan L. Biro
Tonia Bandrowicz, Esq.

RECEIVED
APR 12 2011
EPA ORC WJS
Office of Regional Hearing Clerk

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 or about 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

16. 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.

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

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 previously filed 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 DEFENSE

Burnham was not placed on fair notice that the actions complained of the EPA would be the subject to punishment. The EPA’s actions have denied Burnham its rights to due process under the Fifth and Fourteenth Amendments of the United States Constitution.

ELEVENTH AFFIRMATIVE DEFENSE

The EPA's enforcement adjudicatory system is structurally biased and deprives Burnham of procedural and substantive due process of law under the Fifth and Fourteenth Amendments of the United States Constitution

TWELFTH 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 Fitzpatrick (mai)

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Dated: 4/11/11

Certificate of Service

I certify that on this date I served an original and a true copy of the foregoing by same day messenger 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 and two copies by FedEx overnight delivery to Hon. Susan L. Biro, 1099 14th Street, N.W., Suite 350, Washington, DC 2005.

Dated: 4/11/11

[Signature]