

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY REGION 4

IN THE MATTER OF
Great Lakes Dredge & Dock Co, LLC
Respondent
Proceeding Pursuant to § 105(a) of the
Marine Protection, Research and
Sanctuaries Act,
33 U.S.C. § 1415(a)

Proceedings to Assess Civil Penalty
under § 105(a) of the Marine
Protection, Research and Sanctuaries
Act

Docket No.
MPRSA-04-2019-7500

BUSINESS CONFIDENTIALITY ASSERTED

The exhibits submitted with Complainant's Rebuttal Prehearing Exchange contain material claimed to be confidential business information (CBI) pursuant to 40 C.F.R. § 2.203(b). The material claimed as CBI are Complainant's Exhibits CX30 and CX31. These exhibits include information similar to exhibits submitted Respondent's Prehearing Exchange and marked as confidential and are therefore redacted in the e-filed version and further filed under seal pursuant to 40 C.F.R. § 22.5(d). In addition, exhibit CX32 is a witness resume and may contain sensitive personally identifiable information (PII) subject to 5 U.S.C. § 552a.

The rebuttal prehearing exchange, omitting exhibits containing CBI and PPI, has been e-filed with the Court. The complete set has been mailed, via USPS, to the Headquarters Hearing Clerk. A complete set has been provided to Respondent via dropbox as agreed to by the parties. If you have any questions, please contact Natalie Beckwith at 404-562-9051 or at Beckwith.natalie@epa.gov.

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COMPLAINANT’S REBUTTAL PREHEARING EXCHANGE

Comes now, Director, Enforcement and Compliance Assurance Division of the U.S. Environmental Protection Agency (EPA) Region 4 (Complainant), by and through its counsel and in response to the Prehearing Order issued in this matter, respectfully submits its Rebuttal Prehearing Exchanges, stating the following as required by the Court’s Order Lifting Stay and Resetting Prehearing Deadlines filed on May 28th, 2020 (Order):

4(A) Documents in response to Respondent’s Prehearing Exchange

Complainant submits CX30 to CX32 in rebuttal and notes the previously identified witness, Wade Lehmann, may be called as an expert witness. Complainant also reserves the right to use exhibits submitted in Respondent’s Prehearing Exchange filed on July 31st, 2020 (RPHE). Otherwise, Complainant is not persuaded to change its course in this action based on the Affirmative Defenses raised in Section 3(B) of RPHE. Specifically, Complainant intends to show at hearing that EPA has the authority to assess civil penalties against Respondent for its own

actions and the actions of its contractors. Complainant only alleges violations of leakage exceeding one foot. Any emergency at sea provisions do not apply to the situations in which Respondent is accused and Respondent has a responsibility to ensure the equipment functioned properly prior to transiting to the Miami Ocean Dredged Material Disposal Site (ODMDS). EPA has the ability to seek administrative penalties regardless of the percentage of violations to total trips of the project. Respondent did not use a .5 foot margin of error in measuring draft loss and that provision does not impact validity of data when determining violations.

Complainant intends to meet its burden at hearing and is providing a detailed penalty analysis below as required by the Order. Complainant has not reduced the penalty at this time and will consider mitigating evidence if provided by Respondent at hearing.

4(B) Detailed Explanation of Factors and Methodology Utilized for Proposed Penalty

(1) Background on Methodology

In its complaint filed on September 27th, 2019, Complainant alleged Respondent transited for the purpose of disposal into the ODMDS in an unauthorized manner ninety-five (95) times between December 2013 to July 2015. In line with guidance, Complainant sought the maximum penalty under MPRSA Section 105(a) of \$75,000 (CX29) for each on the ninety-five violations in its Complaint. In this rebuttal, Complainant now seeks an administrative penalty in the amount of \$973,266 for the unauthorized actions including mis-dumps, transiting in a restricted area, excessive leakage, leaving the ODMDS with hull open, and failure to timely report.

MPRSA Section 105(a), 33 U.S.C. 1415(a), requires EPA to consider "the gravity of the violation, prior violations, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation" when determining the

amount of penalty. EPA has additionally issued broad policies including General Enforcement Policy #GM-21, entitled Policy on Civil Penalties (GM-21)(CX27), and EPA General Enforcement Policy #GM-22, entitled A Framework for Statute-Specific Approaches to Penalty Assessments: Implementing EPA's Policy on Civil Penalties (GM-22)(CX28). Although these general policies are directed towards settlement and not specific to MPRSA, they illustrate factors considered important to EPA.

GM-21 establishes a set of goals for penalty assessment in EPA administrative and judicial enforcement actions including deterrence (both specific and general), fair and equitable treatment of the regulated community and swift resolution of environmental problems. Deterrence includes a need for specific and general deterrence along with the removal of any significant economic benefits resulting from not complying with the law. In determining the penalty, GM-22 highlights the goals to assess “gravity” which includes the seriousness of the violations including actual or possible harm, the importance to the regulatory scheme and the availability of data from other sources. Combined, the amount of economic benefit and gravity form the preliminary deterrence figure. This preliminary deterrence figure can be adjusted based on the degree of willfulness or negligence, cooperation through pre-settlement, a history of noncompliance, and an ability to pay among other unique factors. Complainant reviewed the statutory factors, specifics outlined in GM-21, GM-22, a prior action in the Region (CX24), and EAB findings (CX25) when calculating the penalty as further discussed below.

(2) Economic Benefit Calculation

Removing the economic benefit is important so that regulated parties don’t have a general economic incentive to delay compliance until the agency commences an enforcement

action. A penalty is appropriate in this case to prevent the non-compliant user of the ODMDS from benefitting the same or more as compliant users. Although Complainant contends Respondent benefited economically and competitively from all the violations, leakage of material during transit is of significant concern. Respondent benefitted economically from not employing preventative measures throughout the project. Therefore, economic benefit is calculated based on the most viable method for preventing leakage: a draft stabilization protocol (See CX15 for an example of a draft stabilization protocol).

Complainant proposes such a protocol would add approximately one-half hour to each trip to the ODMDS and should have been instituted upon the first leakage event for each scow to be most effective. Complainant also proposes that each scow would be removed from service for on average twelve (12) hours for inspection/repair/offloading following any excessive leakage event. The economic benefit is based on the cost of implementing such a protocol throughout the life of the project. The hourly rate for each scow is based on \$1/cy/day.

Scow	Total Number of Trips	Load# of first leakage event	protocol delay (days)	Number of leakage events	Repair/Inspection delays (days)	Scow Volume(cy)	Scow Rate (\$/day)	Protocol Cost	Inspection Delay Cost	Sum of Protocol Cost and Inspection Delay
GL63	461	407	1.125	2	1	5000	\$5,000	\$5,625	\$5,000	\$10,625
GL64	520	5	10.73	4	2	5000	\$5,000	\$53,645	\$10,000	\$63,645
GL65	81	25	1.17	2	1	5000	\$5,000	\$5833	\$5,000	\$10,833
GL66	876	367	10.41	8	4	5000	\$5,000	\$52083	\$20,000	\$72,083
GL701	876	26	17.7	16	8	6000	\$6,000	\$106,250	\$48,000	\$154,250
GL702	991	217	16.125	5	2.5	6000	\$6,000	\$96,750	\$15,000	\$111,750
Total								\$320,186	\$103,000	\$423,186

(3) Gravity Calculation

MPRSA does not define “the gravity of a violation” or provide a number range. Therefore, in accordance with GM-22, Complainant considers actual or possible harm, the importance to the regulatory scheme, and the availability of data from other sources when ranking the seriousness of different types of violations.

First, when assessing actual or possible harm, GM-22 states five factors should be considered: amount of pollutant, the toxicity of a pollutant, the sensitivity of the environment, the length of time of the violation, and the size of the violator. Thus, Complainant considers the amount of dredged material, the sensitivity of the environment, and the size of the violator as relevant factors to this action.

Second, GM-22 states that the importance of the regulatory scheme factor should focus on the importance of the requirement to achieving the goal of the statute or regulation. The goal of the MPRSA is to " ... prevent or strictly limit the dumping into ocean waters of any material which would adversely affect human health, welfare, or amenities, or the marine environment, ecological systems, or economic potentialities." 33 U.S.C. § 1401 (b). Dumping outside of an approved disposal zone and leaking material run counter to these goals by introducing unauthorized material into the marine environments. In addition, transit and potential discharge of sediment into the waters threatens the purpose of the designated Florida Keys Particularly Sensitive Sea Area (PSSA) and EPA's designation of an ODMDS designed to minimize any environmental impacts from ocean disposal of dredged material to the greatest extent possible. Complainant reviewed a 1992 Environmental Appeals Board decision (CX25) as well as a prior penalty action in Region 4 (CX24) when designating amounts for possible harm and regulatory

scheme as detailed below. Complainant finds that the potential harm, seriousness, and regulatory importance to the Miami ODMDS is higher than in these prior cases.

Third, Complainant does not propose additional penalty for the availability of data from other sources. Respondent did not always self-report timely, but all monitoring data was eventually provided.

Complainant proposes the following amounts for gravity and lists violations from highest gravity to lowest gravity:

(a) Mis-Dumps

Mis-dumps deserve the highest gravity amount because of the danger they pose. EPA designated the Miami SMMP to minimize impact to the local aquatic environment. Significant resources were invested in evaluating the ODMDS and disposal zone to ensure limited environmental impact during placement of dredged material inside the site. Generally, the disposal material lands as a mass and can result in significant volumes deposited in limited areas. Dumped material placed in areas that have not been studied may contain sensitive aquatic life that would suffer significant effects due to the presence of the material, including but not limited to burial or loss of hard structure habitat including the presence of hardbottom habitats in this region. Maintaining disposal within the authorized area is incredibly important to uphold the regulatory scheme, the purposes of MPRSA, and prevent additional monitoring burdens on federal agencies. Complainant proposes amounts of \$20,000 for potential harm and \$14,000 for regulatory scheme resulting in a gravity value of \$34,000 for the two (2) violations totaling \$68,000.

(b) Transiting in the Florida Keys Particularly Sensitive Area

Although no specific environmental harm was noted in the current case, transit through and leakage into unauthorized areas has the potential to cause harm to sensitive resources. The potential environmental impact due to transiting through the PSSA south of the channel is very high as vessel groundings are a severe threat to coral reefs. Additionally, the PSSA is habitat to corals and associated reef organisms, and any material loss in this zone would have had direct impacts to resident species, including listed species pursuant to the Endangered Species Act. Prevention of transit in areas such as the PSSA is important to the regulatory scheme and the purpose of MRPSA to limit possible harm during transit. Complainant proposes amounts of \$5,000 for possible harm and \$400 for regulatory scheme resulting in a gravity value of \$5,400 for nine (9) violations totaling \$48,600.

(c) Excessive Leakage

Loss of material during transit to the ODMDS is a potentially detrimental event, especially if drawn out over time. The port of Miami is located behind sensitive coral reefs so material was transported across the coral reefs to the ODMDS. Due to difficulty in calculating how much material and the location of loss, the range of potential environmental impacts covers significant (deposition onto coral reefs) to insignificant (high dispersion in deep water on approach to ODMDS). The constant leaking of the scows indicates that some degree of environmental impact occurred and, more importantly, that preventative measures designed to minimize environmental impacts were not properly implemented during disposal operations. Complainant proposes amounts of \$3,000 for potential harm and \$500 for regulatory scheme for a total gravity value of \$3,500 for thirty-seven (37) violation totaling \$129,500.

(d) Open Vessel Doors upon leaving ODMDS

Scow doors were to be closed before leaving the ODMDS to prevent material from being placed outside of the designated area. In the case of open hull status, it is most likely that the majority of the material was deposited inside the ODMDS and only smaller amounts were released or dispersed outside of the site. However, some degree of environmental harm likely resulted from this material being dispersed outside of the site. Complainant proposes amounts of \$1,000 for possible harm and \$500 for regulatory scheme for a total gravity value of \$1,500 for thirty-six (36) violations totaling \$54,000.

(e) Reporting Violations

Reporting is a requirement utilized to manage the ODMDS and to prevent damage to marine habitats. Failure to report in a timely manner may have delayed mitigations responses to address the problems and increased the potential damage from each following event. Due to the lack of harm a penalty of \$0 was assessed. Complainant proposes \$500 for each of the eleven (11) violations due its importance to the regulatory scheme totaling \$5,500.

(4) Flexibility Adjustment Factors

GM-22 identifies various adjustment factors for the initial gravity figure: degree of cooperation, history of noncompliance, ability to pay, degree of willfulness or negligence, and other unique factors. Complainant proposes adjustments for of historical noncompliance, degree of willfulness and negligence, and cooperation. Complainant proposes increasing the preliminary deterrence amount by 50% due to Respondent's history of non-compliance and continued practice of similar behavior (CX21-25). Complainant proposes increasing the preliminary deterrence amount by 20% for Respondent's degree of willfulness and negligence. Respondent is

a sophisticated and major international dredging contractor yet did not take reasonable precautions against foreseeable events during the life of the project even after knowledge of issues. Complainant proposes increasing the preliminary deterrence amount by 10% for degree of cooperation due to Respondent's failure to decrease non-compliance events during the project.

Complainant respectfully reserves the right to modify its approach as needed during further negotiation or after evidence by both parties is submitted and weighed at hearing.

(5) Final Calculations

Economic Benefit (\$423,186) + Preliminary Gravity (\$305,600) = \$728,786

Upward Gravity Adjustment \$152,800 + \$61,120 + \$30,560 = \$244,480

Total of \$973,266

(6) Summary

As demonstrated above, Complainant considered each of the three MPRSA statutory factors in calculating a penalty of \$973,266: the gravity of the violation, prior violations, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance.

Complainant's penalty amount proposes to recoup the economic benefit from the Respondent to ensure they do not benefit and gain a competitive edge over compliant users of an ODMDS.

Complainant proposes a gravity amount informed by two prior actions against Respondent, the potential harm of Respondent's noncompliance, and the importance of each requirement to the regulatory scheme. In this case, it is important to specifically deter the Respondent considering they are one of the most common dredging companies for navigation projects and continue to exhibit similar behavior in other projects. It is also important to seek deterrence for others in the same field to prevent the belief that noncompliant behavior will go unnoticed and unpunished.

As noted above, Complainant also proposes to adjust the gravity amount upwards to reflect Respondent's prior history of noncompliance, the lack of preventative measures, and failure to achieve rapid compliance as illustrated by continuing violations throughout the project.

Complainant ask this Court to consider and issue the proposed penalty.

Respectfully submitted this 14th day of August 2020.

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REGION 4**

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CERTIFICATE OF SERVICE

I certify that the foregoing “COMPLAINANT’S REBUTTAL PREHEARING EXCHANGE” was sent to the following parties in the manner indicated below on August 14, 2020.

Redacted:
OALJ E-Filing System

Unredacted:
Mary Angeles, Headquarters Hearing Clerk
U.S. Environmental Protection Agency
Office of Administrative Law Judges
Ronald Reagan Building, Room M1200
1300 Pennsylvania Ave., NW
Washington DC 20004

Unredacted via Dropbox as agreed to by the parties:
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