

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

ENVIRONMENTAL PROTECTION AGENCY REGION 4'S RESPONSE TO  
RESPONDENT'S MOTION TO DISMISS

**I. BACKGROUND**

The United States Environmental Protection Agency Region 4 ("EPA") is seeking penalties against Great Lakes Dredge & Dock ("Respondent") pursuant to Section 105(a) of the Marine Protection, Research, and Sanctuaries Act ("MPRSA") for violations of the MPRSA, the regulations promulgated thereunder, the permit, and for the unauthorized transportation and discharge of material into the ocean. Respondent submitted its bid in response to a solicitation by the United State Corps of Engineers ("USACE") for the dredging of Phase 3 of the Miami Harbor Construction Dredging Project ("Phase 3"). The USACE subsequently awarded the contract to Respondent and, in performing work as part of Phase 3, Respondent transported the dredged material for disposal at the Miami Ocean Dredged Material Disposal Site ("Miami ODMDS").

EPA determined that Respondent violated the MPRSA, the regulations promulgated thereunder, and/or “the dredged material permit”<sup>1</sup> on 95 occasions during the performance of the work for Phase 3 and filed an administrative Complaint (“Complaint”) against Respondent for the assessment of civil penalties. Respondent filed a Motion to Dismiss (“Motion”), stating the Complaint failed to state a claim. Because EPA acted properly within its authority to assess penalties pursuant to Section 105 of the MPRSA, the Tribunal should deny Respondent’s Motion.

**II. THE TRIBUNAL SHOULD DENY RESPONDENT’S MOTION TO DISMISS BECAUSE THE MPRSA AUTHORIZES EPA TO SEEK CIVIL PENALTIES FOR MPRSA VIOLATIONS**

Congress has found that the unregulated dumping of material into ocean waters endangers human health, welfare and amenities and the marine environment, ecological system, and economic potentialities. 33 U.S.C. § 1415(a). Congress enacted the MPRSA to regulate the dumping of all types of materials into ocean waters and 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). The purpose of the MPRSA is to regulate the “transportation by any person of material from the United States” when the “transportation is for the purpose of dumping the material into ocean waters.” 33 U.S.C. § 1401(c).

Section 101(a) of the MPRSA prohibits any transport of material from the United States for the purpose of dumping into ocean waters unless authorized by a permit pursuant to MPRSA

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<sup>1</sup> Under EPA regulations, the term “Dredged Material Permit” includes not only a USACE-issued permit as that term is traditionally understood, but also any “Federal project” reviewed under MPRSA section 103(e). 40 C.F.R. § 220.2(h). This filing refers to the terms and conditions of the “Federal project” applicable to the transportation for the purpose of dumping, and dumping, as a “permit” for simplicity consistent with the regulatory definition of permit.

Sections 102 or 103. 33 U.S.C. § 1411(a). The first category of permits, Section 102 permits, are issued by the Administrator of the Environmental Protection Agency (“Administrator”). The Administrator has the ability to issue Section 102 permits for the transport and disposal of materials other than dredged material. 33 U.S.C. § 1412(a). The second category of permits, Section 103 permits, are issued by the Secretary of the Army (“Secretary”). The Secretary has the ability to issue permits for the purpose of transporting and disposing dredged material. 33 U.S.C. § 1413(a).

With respect to Federal projects involving dredged material, MPRSA section 103(e) authorizes the Secretary to issue regulations “in lieu of the permit procedure.” However, the regulations must apply the same criteria, evaluation factors, procedures, and requirements to federal projects as the MPRSA applies to the issuance of permits. 33 U.S.C. § 1413(e). The definition of a “Dredged Material Permit” under MPRSA’s regulations includes such Federal projects. 40 C.F.R. § 220.2(h). The matter before this Tribunal is a Federal project and Respondent’s activities are subject to Section 103 of the MPRSA.

In order to dump material into the ocean, the Administrator may designate sites or time periods for dumping. 33 U.S.C. § 1412(c)(1). For all such ocean dredged material disposal sites, the Administrator in conjunction with the Secretary is required to develop a site management plan (“SMMP”). 33 U.S.C. § 1412(c)(3).

Contrary to Respondent’s contention, Motion at pg. 6, EPA’s role in the regulation of the transportation and dumping of dredged material is not limited merely to the designation of the disposal site. Section 105(a) of the MPRSA specifies that the Administrator may assess civil penalties for violations of the MPRSA, MPRSA regulations, or any permit issued under the MPRSA. 33 U.S.C. § 1415(a). Only EPA is authorized to assess civil penalties under Section

105 of the MPRSA. In its Complaint, EPA properly seeks an assessment of civil penalties against a person, Respondent, that has violated the MPRSA.

For ease and as further used in this response, the Secretary and the USACE will collectively be referred to as “USACE,” and the Administrator and EPA will collectively be referred to as “EPA.”

**A. Under MPRSA Section 103(e), the Phase 3 Federal Project Requires Compliance with the SMMP**

The MPRSA authorizes a “person” to transport and dispose of dredged material in the ocean only if authorized under the MPRSA Section 103. For Respondent to transport dredged material from the Phase 3 Federal project and to dispose of the material in the Miami ODMDS in compliance with the MPRSA, it must comply with the requirements of a Dredged Material Permit under MPRSA Section 103(e). Pursuant to MPRSA Section 104(a) all permits shall include “such requirements, limitations, or conditions as are necessary to assure consistency with any site management plan...”

Initially, the USACE issued a Section 103 permit to the Port of Miami to dredge its private property (the berthing areas) as part of the Phase 3 project, Complaint ¶ 18. The Port of Miami did not, however, dredge, transport, or dispose of material into the ocean nor engage a third party to do so. Rather, the USACE solicited bids for the entire project, to include the Port’s berthing areas, as well as the Federal navigation basins and channels. Complaint ¶ 19. Upon submittal of bids, the USACE selected Respondent to complete the Phase 3 project. The resulting contract between USACE and the Respondent includes the bid and Respondent’s technical approach, See Attachment 1, and requires compliance with the SMMP.

Contrary to Great Lakes assertions, EPA seeks to enforce the requirements of the SMMP as required by the Federal project. EPA cited contract language in Appendix A of the Complaint simply to illustrate the parallel nature of the contract requirements and the SMMP requirements. Because the USACE engaged Respondent to perform the dredging, transportation, and ocean disposal in connection with a Federal project, pursuant to MPRSA 103(e) the Respondent was required to act in a manner consistent with the SMMP.

For federal projects, Section 103(e) allows the USACE to issue regulations “in lieu of the permit procedure,” and the Federal project must be subject to “. . . the same criteria, other factors to be evaluated, the same procedures, and the same requirements which apply to the issuance of permits[,]” including Sections 104(a) and 103(c) of the MPRSA. 33 U.S.C. § 103(e); 33 C.F.R. § 335.2. Section 103(e)’s “in lieu of” provision is not intended to shield entities engaging in ocean dumping of dredged material as part of a federal project from the compliance obligations under the MPRSA.

i. Under MPRSA Section 103(e), the Phase 3 Federal Project Requires Compliance 104(a)

Section 103(e) itself directs that Federal projects will comply with the requirements, limitations, or conditions in the SMMP<sup>2</sup>. Specifically, Section 103(e) states that federal projects are subject to Section 104(a), which in turn requires the application of “requirements, limitations, or conditions as are necessary to assure consistency with the SMMP.” 33 U.S.C. §§ 1413(e) and 1414(a)<sup>3</sup>. When Respondent transported dredged material for disposal in a manner inconsistent with the SMMP, it was unauthorized under Section 103 of the MPRSA and in violation of

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<sup>2</sup> See 33 C.F.R. § 335.1 stating the purpose of the regulation is to ensure compliance with specific statutes governing Army Civil Works projects involving the transportation for the purpose of disposal of dredged material.

<sup>3</sup> See 33 C.F.R. § 335.2.

Section 101. Therefore, EPA has a right to relief because Section 105 authorizes EPA to assess civil penalties for violations of the MPRSA. 33 U.S.C. § 1415.

ii. Under MPRSA Section 103(e), the Phase 3 Federal Project Requires Compliance with Section 103(c)

In addition, Section 103(e) expressly states that federal navigation projects are subject to the concurrence process of Section 103(c). 33 U.S.C. § 1413(e). Section 103(c) of the MPRSA, as reinforced in 33 C.F.R. § 336.2, grants EPA the authority to concur (entirely or with conditions) or decline to concur with the USACE on compliance with criteria, conditions, and restrictions relating to the environmental impacts of permits or projects. 33 U.S.C. § 1413(c). In addition, if the EPA concurs with conditions, Section 103(c)(3) mandates that the permit or project shall include such conditions. 33 U.S.C. § 1413(c)(3).

For the Phase 3 project, the USACE sought EPA's concurrence under MPRSA 103(c) on the suitability of the dredged material for disposal at the Miami ODMDS. As Phase 3 was a Federal project, the USACE's concurrence request predated the permit issued to the Port of Miami and the Respondent's contract with the USACE for performance of the work. The EPA concurred with the USACE's determination that the material from Phase 3 was appropriate for disposal but also highlighted that the USACE's contractor must comply with the SMMP. Thus, in addition to the already-existing requirement in 104(a) mandating compliance with the SMMP, EPA conditioned its 103(c) concurrence of the Federal project on the "implementation through contract conditions of the requirements of the Miami ODMDS SMMP." See Attachment 2. After reviewing the USACE's proposed contract provisions and becoming satisfied that future contracts would include this notice, EPA fully concurred on the disposal of that material at the Miami ODMDS. See Attachment 3. Subsequently, on May 5, 2013, USACE entered into a

contract with Respondent for the Federal project. Due to concerns with reports of leakage from disposal vessels, on December 19, 2014, EPA conditioned an extension of its 103(c) concurrence “on compliance with all the requirements of the Contract Specifications...” See Attachment 4.

MPRSA Section 103(e) states that the Federal projects must meet the requirements of 103(c). As stated above, EPA’s 103(c) concurrence was conditioned upon compliance with the Miami ODMDS SMMP. When Respondent transported dredged material for disposal in a manner inconsistent with the Miami ODMDS SMMP, it was unauthorized under Section 103 of the MPRSA and in violation of Section 101. Therefore, EPA has a right to relief because Section 105 authorizes EPA to assess civil penalties for violations of the MPRSA. 33 U.S.C. § 1415.

iii. Under MPRSA Section 103(e), the Phase 3 Federal Project is a Permit and Must Comply with Permit Requirements

EPA regulations acknowledge the effect of 103(e)’s in lieu of permit procedure. To maintain consistency in applying the MPRSA to Federal projects, EPA defines “Dredged Material Permit” as “a permit issued by the Corps of Engineers under section 103 of [the MPRSA] and any Federal projects reviewed under section 103(e) of the [MPRSA].” 40 C.F.R. § 220.2(h). Contrary to Respondent’s position, this provision does not contradict the MPRSA and Section 103(e) but clarifies that these two scenarios have matching requirements. Therefore, a Federal project operates as the functional equivalent of a permit and is required to comply with the same enforceable conditions as a non-federal project operating under a USACE-issued permit, and this includes complying with any conditions set forth in EPA’s concurrence letters, the SMMP, and Section 101(a) of the MPRSA.

Federal projects under MPRSA 103(e) must comply with Sections 104(a) and 103(c). When Respondent transported and disposed of material inconsistent with the SMMP,

Respondent transported dredged material for disposal in a manner unauthorized under Section 103 of the MPRSA and in violation of Section 101. EPA has a right to relief because Section 105 authorizes EPA to assess civil penalties for violations of a permit and/or the MPRSA. 33 U.S.C. § 1415.

**B. EPA Regulation Requires Compliance with the SMMP and MPRSA**

Section 108 of the MPRSA further allows the USACE and EPA to issue regulations deemed necessary to carry out the responsibilities and authorities in the MPRSA. 33 U.S.C. § 1418. Transportation of dredge material for disposal is subject to the MPRSA regulations. 33 U.S.C. § 1411. A violation of a regulation issued pursuant to Section 108 of MPRSA is also a violation of Section 101 of MPRSA. 33 U.S.C. § 1411. EPA can assess penalties under Section 105(a) of MPRSA for a violation of “the regulations promulgated under this subchapter” as well as violations of Section 101. 33 U.S.C. § 1415(a).

Pursuant to 40 C.F.R. § 228.15(h)(19), the Miami ODMDS was designated as a site for ocean dumping, and disposal at the Miami ODMDS shall comply with conditions set forth in the most recently approved SMMP. These provisions define the scope of the ODMDS and set forth parameters for its use. EPA does not simply say an area is appropriate for disposal without placing certain conditions on its use to protect and promote the purpose of the MPRSA.

40 C.F.R. § 228.15(h)(19) set forth the conditions for disposal at the Miami ODMDS, including compliance with the SMMP. When Respondent transported dredged material for disposal in a manner inconsistent with the SMMP, it was unauthorized under regulations and in violation of Section 101. Therefore, EPA has a right to relief because Section 105 authorizes EPA to assess civil penalties for violations of regulation and the MPRSA. 33 U.S.C. § 1415.



### **C. USACE Regulation Requires Compliance with the SMMP and the MPRSA**

In the event that the USACE enters into a contract with a third party for the performance of a Federal project as described in Section 103(e) of the MPRSA, 33 U.S.C. § 1413(e), that contract serves as a regulation for the federal project, and violations of the terms of the contract are violations of Section 101(a) of the MPRSA, 33 U.S.C. § 1411(a) and subject to penalties under Section 105 of the MPRSA, 33 U.S.C. § 1415(a). Pursuant to 1 U.S.C. § 1.1, rule and regulation have the same meaning, and 5 U.S.C. § 551 defines “rule” to mean “the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency.”

The USACE’s contract with Respondent specified the type and amount of dredged material for disposal, the locations where dumping could occur, and other provisions necessary to monitor and surveil the transport and dumping. As such, the contract served as the regulation in Section 103(e) that defined the scope of the Respondent’s authority to transport dredged material for the purpose of dumping in ocean waters under the MPRSA. Among its many requirements, the contract mandated Respondent to comply with all requirements under the terms and conditions set out in the EPA MPRSA Section 103 Concurrence Letters and the Miami ODMDS SMMP. See Attachment 5. The Administrative Procedure Act exempts contracts from the notice requirements of the Federal Register. 5 U.S.C. § 553 (a)(2).

When Respondent transported and disposed of dredged material inconsistent with the SMMP as required by USACE regulation issued pursuant to Section 103(e), Respondent did so in violation of the MPRSA regulation. Thus, Respondent is liable for penalties pursuant to

Section 105(a) of the MPRSA for violations of the regulations promulgated pursuant to the MPRSA. 33 U.S.C. § 1415(a).

**D. A “Person” Transporting Material Without Authorization under the MPRSA Transports in Violation Section 101 of MPRSA**

The MPRSA prohibits the unauthorized transport of dredged material in the ocean for the purpose of disposal. The MPRSA’s foundational provision states that Respondent’s authority to transport dredged material for the purpose of dumping can only arise from a permit and that authorization is further defined by appropriate regulations. 33 U.S.C. § 1411(a). Section 101 does not exempt any transport for disposal from these requirements. If Respondent argues that it has no permit or is not subject to any functionally-equivalent form of authorization, then each transit of dredged material for the purpose of dumping is without a permit or authorization and is a violation of Section 101 of the MPRSA for which EPA can assess civil penalties pursuant to Section 105(a). 33 U.S.C. 1415(a).

**III. THE TRIBUNAL SHOULD DENY RESPONDENT’S MOTION TO DISMISS BECAUSE RESPONDENT HAD PROPER NOTICE OF ITS OPERATING PARAMETERS**

EPA denies that there were any rulemaking or procedural defects in its development or revision of the SMMP or when it incorporated the SMMP by reference in regulation. Furthermore, Respondent cannot deny that it had actual and timely notice of the SMMP provisions that are the basis of EPA’s penalty action.

**A. The MPRSA Does Not Require that the SMMP Itself Be Published in the Federal Register**

The MPRSA requires only that, in developing the SMMP, EPA (in conjunction with USACE) provide an opportunity for public comment. 33 U.S.C. § 1412(c)(3). Neither the

MPRSA nor the APA require that EPA provide prior notice and opportunity for public comment in the Federal Register using that traditional method for informal “rulemaking.” The language in Section 102(c)(3) stands in contrast to the increased level of public participation required by MPRSA applicable to EPA and USACE permits, which can only be issued after “notice and opportunity for public hearings.” 33 U.S.C. §§ 1412(a) and 1413(a).

**B. Relevant Provisions of the SMMP are Implemented through Dredged Material Permits and in Federal Projects Involving Dredged Materials**

The MPRSA provides multiple avenues for the implementation of the SMMP in the transportation of dredged material and disposal of dredged material at the ODMDS. First, MPRSA Section 104(a) requires that any permit must ensure compliance with the SMMP regardless of whether EPA issues the permit under Section 102 or the USACE issues the permit under Section 103. 33 U.S.C. 1414(a). Second, when the USACE issues a permit under Section 103, Section 103(c) authorizes EPA to concur with and include conditions for a project based on its compliance with the SMMP. 33 U.S.C. 1413(c). Here, EPA conditioned its concurrence for the disposal at the Miami ODMDS “upon implementing through contract conditions of the requirements of the Miami ODMDS SMMP.” See Attachment 2. Consistent with EPA’s authority in 103(c), and as identified by Respondent, the SMMP includes an appendix of model contract language for the implementation of the SMMP to ensure adequate notice.

EPA also provided the opportunity for public comment when it published, both in the notice of proposed rulemaking in the Federal Register and in the Code of Federal Regulations at 40 C.F.R. § 228.15(h)(19), the MPRSA regulation that requires disposal at the Miami ODMDS

to comply with the most recent approved SMMP. In this matter, the EPA and USACE approved the most recent SMMP is the 2008 SMMP and the 2011 Revision<sup>4</sup>.

**C. Respondent Had Actual Notice of the Current SMMP**

The Administrative Procedure Act, at 5 U.S.C. § 552(a)(1), expressly states that its notice requirements are met when “a person has actual and timely notice” of a matter that otherwise is required to be published in the Federal Register. Not only does 40 C.F.R. § 228.15(h)(19), which was published in the Federal Register as well as the C.F.R., provide public notice, but the USACE’s bid solicitation, award, and Respondent’s acceptance of the award provided actual and timely notice to the Respondent’s responsibility to comply with the SMMP provisions applicable to transportation and dumping at the Miami ODMDS.

Specifically, the USACE’s solicitation for bids included the requirement for compliance with both the 2008 SMMP and the 2011 Revision. See Attachment 5. Respondent bid on the project with knowledge of these requirements. Both SMMPs are readily available and searchable online. Once USACE awarded the contract to Respondent, Respondent acknowledged the award and the parameters of its contract which included the “terms and conditions of solicitation.” See Attachment 6. The provisions of the solicitation and the resulting contract make clear that Respondent needed to comply with “Miami ODMDS Site Management and Monitoring Plan; Effective Date: September 2008, Revisions: September 2011; Expiration Date: September 2018.”<sup>5</sup>

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<sup>4</sup> See the complete SMMPS at Attachment 7 which includes the 2011 SMMP Revision and Motion’s Exhibit 2 which includes the 2008 SMMP.

<sup>5</sup> See Attachment 5. The solicitation and resulting contract are extremely voluminous. The technical approach submitted by Respondent is CBI and housed with the USACE to prevent accidental release. EPA can provide those documents in full but hopes this page provides Respondent with notice of the provisions in question so it can respond appropriately.

Thus, based on the text of the APA at 5 U.S.C. § 552(a)(1), Respondent cannot reasonably assert that it cannot be “required to resort to, or be adversely affected by” the terms and conditions that apply to transportation to and dumping at the Miami ODMDS as provided in the currently approved SMMP, which is the 2008 SMMP the 2011 Revision.<sup>6</sup>

**IV. THE TRIBUNAL SHOULD DENY RESPONDENT’S MOTION TO DISMISS BECAUSE FEDERAL NAVIGATION PROJECTS ARE NOT EXEMPTED FROM THE MPRSA’S REQUIREMENTS**

Although the MPRSA divides the authority to issue permits between the EPA and the USACE depending on the activity, the MPRSA solely authorizes EPA the ability to assess civil penalties, against “any person” for violations of the MPRSA, regulations, or permits. 33 U.S.C. § 1415(a). The USACE may possess contract remedies, but the MPRSA and its regulations specifically omit any USACE authority to issue civil penalties<sup>7</sup>. EPA’s civil penalty authority is broad, exclusive, and is not limited by any other provision of MPRSA or regulation.

Respondent’s argument that the mere existence of Section 103(e) removes Federal projects from other statutory requirements is incorrect. Section 103(e)’s language and resulting regulations make clear they are not to undercut any requirements of the MPRSA. In fact, USACE regulation 33 C.F.R. § 335.1, issued pursuant to Section 103 of MPRSA and Section 404 of the Clean Water Act states that the purpose of the regulation is to ensure that federal projects comply with specific statutes governing the transportation of dredged material for the

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<sup>6</sup> See *Stickland v. Flue-Cured Tobacco Co-op. Stabilization Corp.*, 643 F. Supp 310, 320-321 stating that the “plaintiff’s actual notice of the rebate program precludes them from complaining that the plan should have been published in the Federal Register.”

<sup>7</sup> EPA does not have evidence that the USACE deducted payments as stated on page 2 of the Motion. It is unclear what payment was withheld, how often, and based on what parameters. It is unclear if any contract remedies were based on violations of the contract that are also violations of MPRSA or which contract remedies were based on environmental concerns. EPA does not have evidence of the Respondent’s assertions on page 2 of Motion stating “Corps concluded Great Lakes did an excellent job ensuring compliance with the environmental requirements but deducted payment for scow trips where the Corps determined there had been breaches of Contract Specifications.”

purpose of disposal into ocean waters. Finding that 103(e) and the words “in lieu of” somehow exempts Federal projects and the USACE’s contractors from the requirements of MPRSA diminishes the purpose of the statute and creates inequitable enforcement. The MPRSA establishes EPA’s enforcement role and expressly authorizes EPA to assess penalties.

**A. Federal Contractors Are Required to Comply with Environmental Statutes**

As noted above, USACE regulation 33 C.F.R. § 335.1, was issued to ensure that federal projects under Clean Water Act Section 404 and MPRSA Section 103 comply with numerous enumerated statutes. For instance, the USACE must conduct an environmental assessment or environmental impact statement (“EIS”) under National Environmental Policy Act (“NEPA”) for dredging projects. The actual dredging of a port includes many processes having little to do with ocean disposal and, if ocean disposal is not a selected alternative, the federal project may avoid the MPRSA requirements altogether<sup>8</sup>. However, if a project includes transporting dredged material from the dredging area to the ocean for disposal, the MPRSA is triggered.

USACE regulations impose additional requirements on dredging projects like compliance with the Statement of Findings (“SOF”) or the Record of Decision (“ROD”). Under Respondent’s theory, the absence of a requirement in the Navigation Study for the Miami Harbor ROD (Miami ROD), means such requirements do not exist. However, the requirement to comply with a SOF or ROD does not override the MPRSA’s requirements and simply documents the USACE’s compliance with NEPA. Again, these documents discuss the entire dredging of a port and are significantly more expansive than complying with the MPRSA for ocean disposal. This explains why the Miami ROD, which Respondent cites as “the only obligation” with which the contractor must comply, predates the dredging project by seven years and is devoid of even a

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<sup>8</sup> For instance, the dredging material may be used in beneficial use or disposed inland.

mention of the MPRSA. USACE dredging projects are large and complex and touch many environmental statutes beyond the MPRSA. The regulations add requirements but do not negate the authorities in the MPRSA or other statutes.

**B. Federal Contractors are Not Immune from EPA's Penalty Authority**

Contrary to Respondent's position, the regulations issued pursuant to Section 103(e) are not meant to prevent EPA from enforcing against another Federal Agency or their contractors. The text of Sections 101 and 105 detail EPA's ability to assess penalties against any "person." The definition of "person" includes a private person or entity, or "any officer, employee, agent, department, agency, or instrumentality of the Federal Government." 33 U.S.C. 1402(e).

As a first example, 33 C.F.R. § 324.3 requires the USACE to issue permits for the transportation of dredge material for the purpose of disposal in ocean waters, for non-federal project, including activities "done by or on behalf of any Federal agency." Because those permits are Section 103 permits and not subject to the "in lieu" provision of Section 103(e), EPA can undeniably assess penalties for violations of those permits under Section 105 of the MPRSA. Adopting Respondent's arguments would mean EPA could penalize all federal agencies except the USACE. This result is clearly inequitable.

Section 102 of the MPRSA demonstrates a second example, authorizing EPA to assess civil penalties against federal agencies and their contractors. Sections 102 and 105 are devoid of language limiting EPA's penalty authority for EPA-issued permits, and EPA can assess penalties against any "person," including federal agencies, if they violate a Section 102 permit. As EPA is the only agency with the ability to assess civil penalties under Section 105 of the MPRSA, there is no risk of federal agencies taking contradictory penalty actions against the same contractor. EPA has properly limited its action based on violations of MPRSA, regulation, and permit.

Respondent submits that the original legislation proposed to exclude federal agencies and their agents from the MPRSA’s definition of “persons” subject to civil penalties. However, the omission of the language in question affirms that the definition of “person” was intended to be broad enough to include federal agencies and their agents. If, as Respondent claims, Congress intended to the limit enforcement of MPRSA and restrict EPA’s ability to issue penalties to federal agencies and their agents, Congress would have stated as much in Section 105, but notably, no such exemption exists.

**C. MPRSA’s Enforcement Provision Reinforces EPA’s Role in Assessing Penalties**

The MPRSA’s “Enforcement” provision illustrates that EPA, rather than the USACE, is the Agency authorized to assess penalties under MPRSA. Section 107(c) of MPRSA, 33 U.S.C. § 1417(c), details the role of the Coast Guard with regard to the enforcement of the MPRSA. The MPRSA states that the Coast Guard is to conduct surveillance and activity to prevent unlawful transport and dumping and that the Coast Guard shall supply “to the Administrator and the Attorney General, as appropriate,” such information and evidentiary material as “they” may require in carrying out their duties relative to “penalty assessments, criminal prosecutions, or other action involving litigation.” 33 U.S.C. § 1417(c). Notably absent from the list of agencies responsible for any type of enforcement in statute is the USACE.

**D. Regulations Do Not Limit EPA’s Enforcement Authority**

Respondent incorrectly cites 33 C.F.R § 326.4 as evidence of USACE enforcement authority pursuant to 103(e). However, this regulation is not issued for the purpose of Federal projects conducted by or on behalf of the USACE<sup>9</sup>. Such Federal projects are governed by the

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<sup>9</sup> 33 C.F.R. § 326.1 states that the 326 regulations describe enforcement policies and procedures applicable to activities performed without, or in violation of, the required USACE permit.



regulations found at 33 C.F.R. §§ 335-338. Respondent also incorrectly cites 40 C.F.R. § 220.4(a) as evidence that EPA's regulations limit penalty authority to violations of a "general, special, emergency, or research permit." 40 C.F.R. § 220.4 only addresses the EPA's "Authority to issue permit" and EPA does not contend that it has authority to issue dredged material permits. Therefore, the regulation cited by Respondent has no impact on dredging projects and EPA's authority to assess penalty under Section 105 of MPRSA.

**V. THE TRIBUNAL SHOULD DENY RESPONDENT'S MOTION TO DISMISS BECAUSE FINDING FOR RESPONDENT WOULD ALLOW AN INEQUITABLE RESULT**

EPA's authority to penalize any "person," including other federal agencies, is broad, exclusive, and not limited by any other provision of MPRSA or other statute. Sections 101 and 105 include no exemption for a USACE contractor, such as Respondent, from the definition of "person" demonstrating that Respondent must comply with MPRSA whether or not it is performing a federal navigation project. If Section 103(e) somehow exempts Respondent's compliance with Sections 101 or 105 or any other provision of the statute, only while performing a federal navigation project, it would create inequitable results.

Examining different fact patterns possible under Phase 3 illustrates inequity in Respondent's argument. As stated in this brief, the USACE issued the Port of Miami Section 103(a) permit for Phase 3, but Respondent performed the entirety of Phase 3 pursuant to its USACE contract. If, for example, the Port hired a contractor to perform the work rather than allowing the USACE to contract the entire project, and if the Port's contractor violated the MPRSA Section 103 permit, the EPA could penalize the Port's contractor for violations of the permit. But, under Respondent's argument, EPA cannot penalize the Respondent for violations of transporting material because the Respondent claims it does not have a Section 103 permit. As

a second example, if the COE elected to issue Respondent a permit under Section 103(a) of MPRSA for Phase 3, under Respondent's theory of the case, EPA could penalize the Respondent as a "person" for any violations of that permit.. This creates inequitable enforcement results for the same conduct.

Further, under Respondent's theory, if Section 105(a) of MPRSA does not authorize the EPA to penalize a "person" transporting dredge material during a federal navigation project when it does not possess a 103(a) "permit", it must follow that a "person" is not be subject to Section 101 of MPRSA which makes it illegal to discharge without a permit. Respondent's theory means that contract remedies would be the only deterrent to unfettered disposal. This is counter to the purpose of MPRSA.

## **VI. CONCLUSION**

The MPRSA authorizes EPA to seek civil penalties for violations of the MPRSA regulations promulgated under the MPRSA, and permits issued under the MPRSA. EPA can penalize "any person," and that authority is not limited based on the person, type of material, or type of project. EPA contends the Respondent violated multiple sections of the SMMP, thereby violating the statute, the regulations, and the functional equivalent of a permit, and EPA properly seeks penalties associated with those violations.

The USACE's authorization of a federal project under Section 103(e) provides for "in lieu" permitting procedures which require compliance with the underlying standards for authorization to transport and dispose under the MPRSA. EPA's regulations define Federal projects involving dredged material as a "permit" to acknowledge the parallel requirements for Federal projects and permits issued by the USACE.

In addition, both Sections 104(a) and 103(c) require Respondent to comply with the SMMP. EPA and USACE regulations also require compliance with the SMMP, and Respondent had actual notice of the requirement to comply with the 2008 SMMP and 2011 Revision. If Respondent is not subject to either a permit or an equivalent authority, the result is that Respondent can violate MPRSA with impunity defeating the purpose of the statute.

“Persons,” including federal contractors, are not exempt from the MPRSA’s requirements. Should the Tribunal adopt Respondent’s creative reading of the statute, then contractors who perform work for private companies will be subject to penalties whereas those same contractors who perform work for the USACE will be given a “free pass” to violate the MPRSA without federal enforcement. Such a result diminishes an important purpose of the statute and creates inequitable enforcement.

Because EPA possesses the authority to assess penalties against any person pursuant to Section 105 of the MPRSA, including any person performing a Federal project, the Tribunal should deny Respondent’s Motion.

Respectfully submitted this 11th day of December 2019.



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**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 4**

**In the Matter of:** )  
 )  
**Great Lakes Dredge and Dock, LLC** ) **Docket No. MPRSA-04-2019-7500**  
 )  
**Respondent.** )

**CERTIFICATE OF SERVICE**

I certify that the foregoing "RESPONSE TO RESPONDENT'S MOTION TO DISMISS" and Attachments 1-7 were sent to the following parties in the manner indicated below on December 11, 2019.

OALJ E-Filing System

Mary Angeles, Headquarters Hearing Clerk  
U.S. Environmental Protection Agency  
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Washington DC 20004

\*Documents filed electronically are deemed to have been filed with the Headquarters Hearing Clerk and served electronically on the Honorable Susan Biro, the Presiding Administrative Law Judge

Consented to Service by Email

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12.11.2019  
DATE

  
NAME