UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

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

ORDER ON COMPLAINANT'S MOTION FOR PARTIAL ACCELERATED DECISION

This action was initiated on September 27, 2019, by Complainant, the Director of the Enforcement and Compliance Assurance Division, United States Environmental Protection Agency, Region 4 ("EPA" or "the Agency"), filing an Administrative Complaint against Respondent, Great Lakes Dredge and Dock, LLC. The Complaint alleges that Respondent committed 95 violations of Section 101(a) of the Marine Protection, Research, and Sanctuaries Act of 1972, codified as amended at 33 U.S.C. § 1411(a), and its implementing regulation at 40 C.F.R. § 228.15(h)(19), during the performance of a U.S. Army Corps of Engineers dredging contract.[1]

Respondent filed an Answer to the Complaint on November 5, 2019, denying the violations, raising various defenses, and requesting a hearing. On December 2, 2019, Respondent filed a Motion to Dismiss. I denied the Motion to Dismiss in an Order issued May 28, 2020 ("Order on MTD").[2]

The Agency filed its initial prehearing exchange and rebuttal prehearing exchange containing proposed exhibits ("CX") on July 13, 2020 and August 14, 2020, respectively. Respondent submitted its proposed exhibits ("RX") with a prehearing exchange filed July 31, 2020.

On October 16, 2020, the Agency filed a Motion for Partial Accelerated Decision as to Liability and Memorandum of Law in Support ("Motion"). Respondent filed a response in opposition ("Response") on November 12, 2020. On December 8, 2020, the Agency submitted a reply brief ("Reply") in support of the Motion.

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[1] The "Notice of Proposed Assessment of Civil Penalty" letter accompanying the Complaint identifies 96 alleged violations, while the Complaint alleges only 95. *See* Compl. ¶¶ 30, 31. I construe the number identified in the letter to be a scrivener's error.

[2] The relevant factual and legal conclusions from the Order on MTD are hereby adopted in this Order.

For the reasons discussed below, the Motion is **GRANTED in part** and **DENIED in part**.

I. Accelerated Decision Standard

Under the Rules of Practice that govern this proceeding, Administrative Law Judges are authorized to:

> render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law.

40 C.F.R. § 22.20(a). This standard is analogous to the summary judgment standard prescribed by Rule 56 of the Federal Rules of Civil Procedure. Although the Federal Rules do not directly apply here, the Environmental Appeals Board ("EAB") has consistently looked to Rule 56 and its jurisprudence when adjudicating motions for accelerated decision under Part 22. *See, e.g.*, *Consumers Scrap Recycling, Inc.*, 11 E.A.D. 269, 285 (EAB 2004); *BWX Techs., Inc.*, 9 E.A.D. 61, 74-75 (EAB 2000); *Clarksburg Casket Co.*, 8 E.A.D. 496, 501-02 (EAB 1999). Federal courts have endorsed this approach, describing Rule 56 as "the prototype for administrative summary judgment procedures" and its associated jurisprudence as "the most fertile source of information about administrative summary judgment." *Puerto Rico Aqueduct & Sewer Auth. v. EPA*, 35 F.3d 600, 607 (1st Cir. 1994), *cert. denied*, 513 U.S. 1148 (1995) (rejecting the argument that federal court rulings on motions for summary judgment are "inapposite" to administrative proceedings).

Under the Federal Rules, summary judgment shall be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is material where, under the governing substantive law, it might affect the outcome of the proceeding. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1985). In turn, a dispute is genuine if a fact finder could reasonably resolve the dispute in favor of the non-moving party under the evidentiary standards applicable to the particular proceeding. *Id.* at 248, 250-52.

The party moving for summary judgment bears the burden of showing an absence of genuine dispute as to any material fact. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970). This includes an initial burden of production, which shifts to the non-moving party once it is satisfied by the moving party, and the ultimate burden of persuasion, which always remains with the moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986) (Brennan, J., dissenting) (citing 10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2727 (2d ed. 1983)). A party must support its assertion that a material fact cannot be or is genuinely disputed by "citing to particular parts of materials in the record," such as documents, affidavits or declarations, and admissions, or by "showing that the materials cited do not establish the . . . presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1). Once the moving party satisfies its initial burden of

production, the burden shifts to the non-moving party to show that a genuine dispute exists by "citing to particular parts of materials in the record" or by "showing that the materials cited do not establish the absence . . . of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." *Id.*

Evidentiary material and reasonable inferences drawn therefrom must be construed in a light most favorable to the non-moving party. *See Anderson*, 477 U.S. at 255 ("The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor."); *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) ("On summary judgment the inferences to be drawn from the underlying facts contained in [the moving party's] materials must be viewed in the light most favorable to the party opposing the motion."). The court is then required to consider whether a fact finder could reasonably find in favor of the non-moving party under the applicable evidentiary standards. *Anderson*, 477 U.S. at 252-55. Where the evidence viewed in the light most favorable to the non-moving party is such that the fact finder could not reasonably find in favor of the non-moving party, summary judgment is appropriate. *See Adickes*, 398 U.S. at 158-59. Conversely, where conflicting inferences may be drawn from the evidence and a choice among those inferences would amount to fact-finding, summary judgment is inappropriate. *Rogers Corp. v. EPA*, 275 F.3d 1096, 1105 (D.C. Cir. 2002). Even where summary judgment appears technically proper, sound judicial policy and the exercise of judicial discretion permit denial of the motion in order for the case to be more fully developed at hearing. *Roberts v. Browning*, 610 F.2d 528, 536 (8th Cir. 1979).

In applying these principles to motions for accelerated decision under Section 22.20(a) of the Rules of Practice, the moving party "assumes the initial burden of production on a claim, and must make out a case for presumptive entitlement to summary judgment in his favor." *BWX*, 9 E.A.D. at 76. Where the moving party bears the burden of persuasion on an issue, it is entitled to an accelerated decision only if it presents "evidence that is so strong and persuasive that no reasonable [fact finder] is free to disregard it." *Id.* Where the moving party does not bear the burden of persuasion, it has the "lesser burden of 'showing' or 'pointing out' to the reviewing tribunal that there is an absence of evidence in the record to support the nonmoving party's case on that issue." *Id.* Once the moving party has discharged this burden, the burden of production shifts to the non-moving party bearing the burden of persuasion on the issue to identify specific facts from which a finder of fact could reasonably find in its favor on each element of the claim. *Id.* As noted by the EAB, "neither party can meet its burden of production by resting on mere allegations, assertions, or conclusions of evidence." *BWX*, 9 E.A.D. at 75. Likewise, a party opposing a properly supported motion for accelerated decision is required to "provide more than a *scintilla* of evidence on a disputed factual issue to show their entitlement to a[n] . . . evidentiary hearing: the evidence must be substantial and probative in light of the appropriate evidentiary standard of the case." *Id.* at 76.

Consistent with the jurisprudence of Rule 56, a tribunal adjudicating a motion for accelerated decision is required to consider whether the parties have met their respective burdens in the context of the applicable evidentiary standard. *BWX*, 9 E.A.D. at 75. The evidentiary standard that applies here is proof by a preponderance of the evidence. 40 C.F.R. § 22.24(b). The complainant bears the burdens of presentation and persuasion that a violation occurred as set forth in the complaint, and the respondent bears the burdens of presentation and persuasion for

any affirmative defenses. 40 C.F.R. § 22.24(a).

II. Governing Substantive Law

Seeking "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," Congress enacted the Marine Protection, Research, and Sanctuaries Act of 1972 ("MPRSA" or "the Act"). *See* Pub. L. No. 92-532, 86 Stat. 1052, codified as amended at 33 U.S.C. § 1401 *et seq*. Except as may be authorized by permit or by regulation, the MPRSA prohibits any person from transporting "any material for the purpose of dumping it into ocean waters."[3] 33 U.S.C. § 1411(a). EPA oversees permits for the ocean dumping of most materials under 33 U.S.C. § 1412, but the Act also authorizes the United States Army Corps of Engineers ("Corps")[4] to, with Agency oversight, grant permits for the transport and disposal of "dredged material" under 33 U.S.C. § 1413.[5] *See Huntington v. Marsh*, 859 F.2d 1134, 1138-39 (2d Cir. 1988); *Nat'l Wildlife Fed'n v. Costle*, 629 F.2d 118, 121 & n.6 (D.C. Cir. 1980) (explaining division of MPRSA responsibilities between EPA and the Corps). More specifically, before issuing a permit, the Corps must apply the same criteria, conditions, and restrictions that the Agency would apply under § 1412 and determine "that the dumping will not unreasonably degrade or endanger human health, welfare, or amenities, or the marine environment, ecological systems, or economic potentialities."[6] 33 U.S.C. § 1413(a). Additionally, in connection with "federal projects," the Corps

> may, in lieu of the permit procedure, issue regulations which will require the application to such projects of the same criteria, other factors to be evaluated, the same procedures, and the same requirements which apply to the issuance of permits under

[3] A "person" includes "any private person or entity, or any officer, employee, agent, department, agency, or instrumentality of the Federal Government[.]" 33 U.S.C. § 1402(e). "'Transport' or 'transportation' refers to the carriage and related handling of any material by a vessel[.]" 33 U.S.C. § 1402(l). "'Material' means matter of any kind or description," including "dredged material." 33 U.S.C. § 1402(c). "'Dumping' means a disposition of material." 33 U.S.C. § 1402(f). "Ocean waters" refers to "those waters of the open seas lying seaward of the base line from which the territorial sea is measured[.]" 33 U.S.C. § 1402(b).

[4] The Act directs the Secretary of the Army to carry out various MPRSA provisions. The Secretary has delegated his permitting authority to the Corps. 33 C.F.R. § 325.8(a).

[5] "Dredged material" is "any material excavated or dredged from the navigable waters of the United States." 33 U.S.C. § 1402(i).

[6] The Agency may then concur with the Corps' permit determination, decline to concur, or concur with conditions. 33 U.S.C. § 1413(b), (c). "If the [Agency] declines to concur in the determination of the [Corps] no permit shall be issued. If the Administrator concurs with conditions the permit shall include such conditions." 33 U.S.C. § 1413(c)(3).

> subsections (a), (b), (c), and (d) of this section and section 1414(a) and (d) of this title.

33 U.S.C. § 1413(e).

EPA is also responsible for designating ocean dumping sites "that will mitigate adverse impact on the environment to the greatest extent practicable." 33 U.S.C. § 1412(c)(1). With respect to disposal sites for dredged material, the Agency, in conjunction with the Corps, develops a site management plan to assess and monitor the designated site and impose any conditions or practices necessary for protection of the environment. 33 U.S.C. § 1412(c)(3). For dredged material permits, the Corps must, "to the maximum extent feasible, utilize the recommended sites designated by the Administrator." 33 U.S.C. § 1413(b).

The MPRSA further authorizes the Agency and the Corps to carry out their responsibilities and authorities under the Act by issuing "such regulations as they may deem appropriate." 33 U.S.C. § 1418. The Agency has promulgated its ocean dumping regulations at 40 C.F.R. pts. 220-229. The Corps has issued MPRSA regulations at 33 C.F.R. pts. 324-327, 330-331, 335-337.

According to the Agency's regulations, a "dredged material permit" includes either permits issued by the Corps under section 1413 or "any Federal projects reviewed under section [1413(e)]." 40 C.F.R. § 220.2(h). The Agency has delegated authority to its Regional Administrators to approve or disapprove or to propose conditions upon dredged material permits. 40 C.F.R. § 220.4(c).

Relevant to this case, the Agency has designated a one square mile Ocean Dredged Material Disposal Site off the coast of Miami ("Miami ODMDS") for the disposal of "suitable dredged material from the greater Miami, Florida vicinity." 40 C.F.R. § 228.15(h)(19). The Agency further required that "[d]isposal . . . comply with conditions set forth in the most recent approved Site Management and Monitoring Plan." 40 C.F.R. § 228.15(h)(19).

Any person who violates a provision of the MPRSA, a regulation promulgated under the MPRSA, or a permit issued under the MPRSA "shall be liable to a civil penalty of not more than $50,000 for each violation to be assessed by the [Agency]."[7] 33 U.S.C. § 1415(a).

III. Factual Background

In 1996, the Agency designated a one-square-mile ocean dredged material disposal site roughly 4.7 miles off the coast of Miami that would serve as the Miami ODMDS. *See* Ocean Dumping; Final Site Designation, 61 Fed. Reg. 2941 (Jan. 30, 1996) (Final Rule); CX 2 at 8; Compl., ¶ 13; Answer, ¶ 13.

[7] Since passage of the MPRSA, inflation has increased the maximum penalty amount to $75,000 per violation for violations occurring between December 6, 2013 and November 2, 2015. 28 U.S.C. § 2461; 40 C.F.R. § 19.4.

More than a decade later, in 2007, Congress authorized work to deepen the Miami Harbor ("Harbor Project"). This was a Federal project to be conducted by the Corps with financial contribution from local sponsors, including the Port of Miami. Water Resources Development Act of 2007, Pub. L. No. 110-114, § 1001(17), 121 Stat. 1052 (Nov. 8, 2007); Order on MTD at 6-7; Compl., ¶ 16; Answer, ¶ 16; Response, Attach. A, Declaration of Christopher Pomfret,[8] ¶ 2 ("Pomfret Declaration"). Anticipating that dredging the harbor would generate millions of cubic yards of sand and rock for disposal at the Miami ODMDS, the Agency and the Corps issued a new site management and monitoring plan ("SMMP") in 2008, in accordance with 33 U.S.C. § 1412(c)(3). CX 2; Compl., ¶ 14; Answer, ¶ 14.

On August 15, 2011, the Corps requested the Agency's concurrence under 33 U.S.C. § 1413 to disposal of dredged material from the Harbor Project at the Miami ODMDS. CX 4 at 1. In September 2011, the Agency and the Corps revised the 2008 SMMP for the Miami ODMDS. CX 3; Compl., ¶ 14; Answer, ¶ 14. On December 29, 2011, the Agency concurred with the Corps' request to dump dredged material at the Miami ODMDS under various conditions, including that the requirements of the SMMP be implemented through any contract the Corps issued. CX 4 at 4. After the Corps provided additional information, the Agency granted its unconditional concurrence on June 11, 2012. CX 5.

On May 15, 2013, the Corps awarded a contract ("Dredging Contract") to Respondent to complete construction dredging on Phase 3 of the Harbor Project. CX 9; CX 10; Pomfret Decl., ¶ 2. Respondent advertises itself as North America's "largest provider of marine dredging" with "a long history of performing significant international projects." CX 26 at 1. Respondent began dredging the Harbor Project on November 20, 2013. CX 17 at 3; Pomfret Decl., ¶ 2.

Respondent transported dredged material for disposal to the Miami ODMDS primarily on vessels known as "scows." CX 17 at 2. A scow is an unmanned vessel specially designed to carry dredged material. Response, Attach. B, Declaration of Timothy Burke,[9] ¶ 2 ("Burke Declaration"). Scows have two hulls that are hinged together at each end of the vessel, and they open at the bottom with a hydraulic system controlled remotely from another vessel. Response, Attach. C, Declaration of Andrew F. Larkin,[10] ¶ 2 ("Larkin Declaration"); RX 79(A); RX 80(A), (E). Based on the nearly vertical shape of an open-hulled scow, most of the dredged material is

[8] Mr. Pomfret was Respondent's Project Manager for the Harbor Project. He has worked for Respondent since 1991. Pomfret Decl., ¶ 1.

[9] Mr. Burke is the Marine Logistics Manager and Purchasing Agent for Respondent, a position he has held for 25 years. In that role, he is responsible for engaging the services of other companies in connection with dredging projects, including tugboat companies Respondent hired for the Harbor Project. Burke Decl., ¶ 1.

[10] Mr. Larkin is the Mechanical Dredge Fleet Manager for Respondent and an employee there since 2009. He was responsible for the management and maintenance of dredge scows on the Harbor Project. Larkin Decl., ¶ 1.

released within a minute of opening. Larkin Decl., ¶ 4. Once the dredged material drops out of the scow, the hulls come back together. Larkin Decl., ¶ 3; RX 106; RX 108.

During the Harbor Project, as required by the SMMP and the Dredging Contract, multiple sensors on Respondent's scows monitored the vessels' location, speed, aft and forward vessel draft, bin level, and whether the hull was open or closed. CX 2 at 14, 20, 24; CX 7 at 18-19, 671-72, 1073-75, 1085-1097; Mot., Attach. B, Declaration of Christopher McArthur, P.E.[11] ("McArthur Declaration"), ¶¶ 13-21; Larkin Decl., ¶¶ 5-6.[12] Respondent provided to the Corps all of the sensor data collected from its scows as it was collected on a near-real-time basis. Pomfret Decl., ¶ 3; McArthur Decl., ¶¶ 13-21. The Corps monitored scow loads daily for compliance and quality assurance review and management using its Dredge Quality Management ("DQM") system. CX 17 at 3; McArthur Decl., ¶¶ 17-18. After the data went through quality assurance procedures, it was sent to the Agency and to a company then known as the Automated Disposal Surveillance System ("ADISS"), which Respondent also used to implement the electronic tracking that the Dredging Contract required. McArthur Decl., ¶¶ 15, 19. Scow loads that the Corps identified as noncompliant were supposed to be reported to the Agency within 24 hours, "followed by incident description reports from [Respondent] containing dates, times, descriptions of non-compliance items, incidental information surrounding the non-compliance, and remedial measures to alleviate recurrence of described incidents." CX 17 at 3. Both the Agency and Respondent used ADISS to take the electronic data and generate plot reports showing transit track, aft and forward draft loss, and hull status. McArthur Decl., ¶ 20. The sensor data could be used to determine where a scow released its dredged material and how long disposal took once the hulls opened. Larkin Decl., ¶ 5.

Because scows have no independent means of propulsion, they are towed by tugboats from the point of loading to the disposal location. Tugboat personnel steer the scow and remotely operate the opening of its hull. Burke Decl., ¶ 2; RX 106; RX 108. For safety reasons, crew do not ride on Respondent's scows when transporting dredged material, nor do they attempt to board a scow in the open ocean. If there are problems with the hydraulic system or the engine that powers that system, a person must physically board the scow to correct the problem. Respondent undertakes such work only in port or protected waters, as it is Respondent's policy to not board a person on a scow until the vessel is in a safe location. Larkin Decl., ¶ 7.

While working on the Harbor Project, Respondent hired third party companies to provide tugboats and crews to tow Respondent's dredge scows from the point of dredging to the Miami ODMDS. Neither the tugboats nor their crews were owned or employed by Respondent. Burke

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[11] Mr. McArthur is a Professional Engineer employed by the Agency's Region 4 office. McArthur Decl., ¶¶ 1, 5-6. Mr. McArthur has more than 20 years of experience working on and managing the Ocean Disposal Program for the Agency. During Respondent's work on the Harbor Project, he served as Coordinator of the Ocean Disposal Program for Region 4 and was responsible for the Agency's oversight of Phase 3 under MPRSA. McArthur Decl., ¶¶ 6-7, 10.

[12] According to Mr. Larkin, the sensors indicate the scows are closed "when the hulls are pushed together by the hydraulic system. The sensor can read that the hulls are 'open' even when the hulls are touching, but not pressurized together." Larkin Decl., ¶ 6.

Decl., ¶¶ 3, 6; RX 78(A)-(M). Respondent's employees did not generally ride the tugboats when they were towing scows and did not control the moment-to-moment decisions of the tugboat crews, who navigated the scows, decided what routes to follow, and chose when to open and close the hulls. Burke Decl., ¶ 7. The purchase orders through which Respondent hired the tugboat companies incorporated by reference standard terms and conditions stating that the companies were "independent contractor[s]" with no "right or authority to act for, incur, assume or create any objection, responsibility or liability, express or implied, in the name of, or on behalf of, [Respondent] or to bind [Respondent] in any manner whatsoever." Burke Decl., ¶¶ 4, 5; RX 82(A)-(B).

In September 2014, the Corps requested the Agency grant a two-year extension to its 2011 concurrence on the suitability for ocean disposal of dredged material from the Harbor Project. CX 12 at 1. However, on December 19, 2014, the Agency agreed to only a six-month conditional concurrence. The Agency asserted that Respondent had committed "multiple violations" of the Dredging Contract, mostly related to excessive leakage of dredged material from the scows. CX 12 at 1. This concerned the Agency because "of the valuable live bottom resources in the vicinity, including federally-listed species protected under the Endangered Species Act." CX 12 at 1. The Agency conditioned its concurrence on Respondent's compliance with all of the Dredging Contract specifications. CX 12 at 1.

On June 5, 2015, the Agency granted its conditional concurrence for another six months. CX 14. While recognizing improvement in Respondent's performance, the Agency again cited the "leakage problem [that] continues to persist" and conditioned its concurrence on the implementation of various corrective actions that the Corps had recommended. CX 14 at 1. The Agency also noted that it was evaluating whether to assess civil penalties for violations of the MPRSA and regulations promulgated thereunder. CX 14 at 2.

Respondent completed its dredging activity on September 18, 2015. CX 17 at 3; Pomfret Decl., ¶ 2. By that date, Respondent had transported more than 4,600 loads of dredged material to the Miami ODMDS – a gross volume of more than 5.7 million cubic yards of silt, sand, and rock. CX 17 at 2.

IV. Respondent's Preliminary Objections

Before addressing the specific violations alleged in the Complaint, Respondent raises several arguments against finding liability through accelerated decision. These contentions are discussed below.

a. Accelerated decision is procedurally permissible

Respondent asserts summary adjudication is procedurally improper, because it would deny Respondent the opportunity to confront the Agency's witnesses. Response at 3. Because the rules governing this proceeding do not provide discovery as a matter of course, Respondent claims it is barred from deposing Agency witnesses before the hearing. Response at 3. Respondent specifically cites its inability to question Mr. McArthur. Response at 3-4. According to Respondent, "[t]here are substantial questions regarding the weight that should be

given" to the McArthur Declaration because it is not evident that Mr. McArthur possesses personal knowledge of the assertions in his statement. Response at 3. Therefore, Respondent concludes, accelerated decision in general is inappropriate. Response at 4.

I find Respondent's argument unpersuasive. Depositions are not automatically available to Respondent, because the rules governing this proceeding permit them only under certain conditions. *See* 40 C.F.R. § 22.19(e) (outlining additional requirements for a party seeking discovery after the prehearing exchange). Nevertheless, the rules still allow accelerated decision to be rendered "at any time . . . without further hearing" when there is sufficient evidence to do so. 40 C.F.R. § 22.20(a). To that end, the fact that Respondent has not deposed Mr. McArthur or any of the Agency's other witnesses is not grounds in itself for denying accelerated decision. Further, depositions may be allowed upon a party's motion, but Respondent has made no such request. *See* 40 C.F.R. § 22.19(e)(3). It cannot claim to have been denied an opportunity to confront the Agency's witnesses when it has made no effort to depose them in the first place. And to the extent Respondent disputes the credibility of the McArthur Declaration, it has had the opportunity in its response to the Agency's Motion to present or cite to specific evidence to counter or undermine any of Mr. McArthur's assertions that Respondent contests. On that basis, this Tribunal is equipped to assess the weight that should be given to Mr. McArthur's testimony.

b. Deviations from the Dredging Contract standards may result in MPRSA violations

Respondent contends that accelerated decision cannot be granted with respect to any violations based on the Dredging Contract, asserting that the Complaint does not allege contract violations and that the Agency previously stated that its allegations are solely based on violation of the SMMP.[13] Response at 5. Yet, Respondent argues, the Motion "asks the Tribunal to find Great Lakes liable in part based on violations of the Contract with the Corps." Response at 6. Specifically, Respondent cites the Motion's assertion that Respondent

> committed 36 violations of MPRSA and/or its implementing regulations by: (1) deviating from standards and conditions in its contract with the Corps that relate to transporting and dumping dredged material, contrary to § 1411(a) of MPRSA, and/or (2) by failing to comply with conditions in the SMMP for the Miami ODMDS, contrary to 40 C.F.R. § 228.15(h)(19).

Response at 6; Mot. at 20. According to Respondent, "[t]his is a flip-flop" from the Complaint which "asserted claims on the individual vessel trips to the ODMDS based solely on alleged violations of the SMMP and related planning documents." Response at 6. Respondent complains that "[c]ontract provisions related to those alleged violations were only referenced in Appendix A to the Complaint, and are not included in the actual charging language of paragraph 30." Response at 6.

[13] I previously ruled on Dredging Contract-related arguments made by Respondent in its Motion to Dismiss. *See* Order on MTD. Those rulings are adopted as a part of this Order.

I disagree with Respondent's characterizations of the Complaint and the bases on which the Agency seeks to assess civil penalties. The Complaint states that Respondent was prohibited from transporting any material from the Harbor Project for the purpose of dumping into ocean waters "[e]xcept as authorized by . . . 33 U.S.C. § 1411(a)[.]" Compl., ¶ 27. The Complaint goes on to allege that Respondent exceeded its authorization 95 times by transporting dredged material for the purpose of dumping it "in a manner inconsistent with the Miami ODMDS SMMP and in violation of the Dredged Material Permit,[14] 40 C.F.R. § 228.15(h)(19) and . . . 33 U.S.C. §1411(a)." Compl., ¶ 30. The Complaint further divides these violations into five categories: (a) 37 occasions in which Respondent's vessels "experienced leakage during transit from the dredge project area to the Miami ODMDS in violation of SMMP section 2.8;" (b) 36 occasions in which Respondent's vessels "exited the Miami ODMDS with open doors in violation of SMMP section 2.8;" (c) two occasions in which Respondent's vessels "disposed of dredged material outside of the Miami ODMDS release zone in violation of SMMP section 2.8;" (d) eleven occasions in which "Respondent failed to comply with reporting requirements in violations of SMMP section 3.6.1;" and (e) nine occasions in which Respondent's vessels "transited the Florida Keys Particularly Sensitive Sea Area during transit to and/or from the Miami ODMDS in violation of SMMP section 2.7." Compl., ¶ 30(a)-(e).

For each of the five categories of violative conduct, the Complaint cites an attached appendix containing five tables of dates on which each alleged violation occurred. Compl., ¶ 30(a)-(e) & app. A.[15] Those tables in turn cite specific sections of the Dredging Contract that outline parameters related to the disposal of excavated material, the protection of fish and wildlife resources, vessel monitoring, and reporting requirements following violations. Compl., app. A; CX 7 at 666, 1069, 1076, 1091.

With respect to the 37 alleged leakage violations, Table 1 of Appendix A to the Complaint asserts that "[p]ursuant to authority . . . identified in" Dredging Contract section 35 20 23, Part 3.4.2.1, "water and excavated material shall not be permitted to overflow, leak out, or spill out of barges, dump scows, or hopper dredges while in route to the ODMDS release zone." Compl., app. A, tbl.1. Table 1 of Appendix A to the Complaint lists all of the dates on which Respondent's vessels "leaked, spilled, or overflowed excavated material during transit" in violation of SMMP section 2.8, 33 U.S.C. §1411(a) and 40 C.F.R. § 228.15(h)(19). Compl., app. A, tbl.1.

Regarding the 36 alleged open door violations, Table 2 of Appendix A to the Complaint asserts that "[p]ursuant to authority . . . identified in" Dredging Contract section 35 20 23, Parts 3.4.2.3 and 3.1.5, "the open/closed status of the bin, or split/non-split condition of a split hull scow shall be monitored. An 'open' value shall indicate the hull is open and the hull status shall register closed prior to leaving the disposal area." Compl., app. A, tbl.2. Table 2 of Appendix A to the Complaint lists all of the dates on which Respondent's "vessel's hull was open upon

[14] The term "Dredged Material Permit" refers to a regulatory definition that includes "any Federal projects reviewed under section 103(e)" of MPRSA. 40 C.F.R. § 220.2(h).

[15] The body of the Complaint cites "Appendix 1." The document attached to the Complaint is in fact titled "Appendix A."

exiting the ODMDS" in violation of SMMP section 2.8, 33 U.S.C. §1411(a) and 40 C.F.R. § 228.15(h)(19). Compl., app. A, tbl.2.

Next, in connection with the two alleged mis-dump violations, Table 3 of Appendix A to the Complaint asserts that "[p]ursuant to authority . . . identified in" Dredging Contract section 35 20 23, Parts 3.4.2.2 and 3.4.9, "any scow load or hopper dredge load that is release[d] outside the boundaries of the release zone will be classified as a mis-dump." Compl., app. A, tbl.3. Table 3 of Appendix A to the Complaint lists all of the dates on which Respondent's "vessels mis-dumped outside of the release zone" in violation of SMMP section 2.8, 33 U.S.C. §1411(a) and 40 C.F.R. § 228.15(h)(19). Compl., app. A, tbl.3.

As for the eleven reporting violations, Table 4 of Appendix A to the Complaint asserts that "multiple Contract provisions specify" Respondent's reporting requirements when a violation occurs during disposal operations. Compl., app. A, tbl.4. Table 4 of Appendix A to the Complaint lists all of the dates on which Respondent "failed to report the listed compliance issues" in violation of SMMP Section 3.6.1, 33 U.S.C. §1411(a) and 40 C.F.R. § 228.15(h)(19). Compl., app. A, tbl.4.

Finally, concerning the nine alleged violations for transiting the Florida Keys Particularly Sensitive Sea Area, Table 5 of Appendix A to the Complaint asserts that "[p]ursuant to authority . . . identified in" Dredging Contract section 01 57 20, Part 3.1.5.8, Respondent's vessels "shall not transit in the Particularly Sensitive Sea Area to the south of the navigation channel." Compl., app. A, tbl.5. Table 5 of Appendix A to the Complaint lists all of the dates on which Respondent's vessels "transited into the Particularly Sensitive Sea Area on the way to or after leaving the ODMDS" in violation of SMMP Section 2.7, 33 U.S.C. §1411(a) and 40 C.F.R. § 228.15(h)(19). Compl., app. A, tbl.5.

As provided for by the Federal Rules of Civil Procedure, "[a] copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes." Fed. R. Civ. P. 10(c). To that end, courts "consider documents that are explicitly incorporated into the complaint by reference and those attached to the complaint as exhibits." *Goines v. Valley Cmty. Servs. Bd.*, 822 F.3d 159, 166 (4th Cir. 2016) (citing *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007)). *See also L-7 Designs, Inc. v. Old Navy, LLC*, 647 F.3d 419, 422 (2d Cir. 2011) ("A complaint is [also] deemed to include any written instrument attached to it as an exhibit, materials incorporated in it by reference, and documents that, although not incorporated by reference, are 'integral' to the complaint."). In this case, Appendix A to the Complaint is sufficiently integral to the main body of the pleading itself to be treated as a part of the Complaint. To the extent Appendix A cites sections of the Dredging Contract to illustrate standards from which Respondent deviated, the Complaint alleges that those deviations constitute conduct that violated MPRSA. Further, with respect to provisions of the Dredging Contract, I previously ruled that

> [t]he standards and conditions set forth in Respondent's contract with [the Corps] describe what conduct the [Corps] "authorized" by regulation with respect to transporting and dumping dredged material at the Site. Respondent's conduct that deviated from these

> standards and conditions would not have been authorized by [Corps] regulation and therefore were unauthorized under section 1411(a). It is the fact that this conduct was not authorized – not that the conduct was, simultaneously, a breach of Respondent's contractual obligations to the [Corps] – that is the basis for the alleged violations. In other words, EPA seeks penalties for Respondent's violation of 1411(a), not for breaching its contract with the [Corps].

Order on MTD at 25. That is, noncompliance with certain terms of the Dredging Contract can also constitute noncompliance with 33 U.S.C. § 1411(a), because Respondent would have exceeded the authorization it was granted to transport dredged material for ocean dumping. It is the alleged violation of 33 U.S.C. § 1411(a) that is the ultimate basis for the Agency's penalty assessment.

Moreover, the conduct addressed in the Dredging Contract can also be read as specific kinds of conduct that are prohibited by the broader provisions of the SMMP cited in the Complaint.[16] For example, Section 2.8 of the SMMP provides the boundaries of the disposal release zone in the Miami ODMDS and mandates that "[d]isposal shall be initiated within the disposal release zone and shall be completed (doors closed) prior to departing the ODMDS." CX 3 at 4. Similarly, Section 35 20 23, Part 3.4.2.1 of the Dredging Contract states that "water and excavated material shall not be permitted to overflow, leak out, or spill out of barges, dump scows, or hopper dredges while in route to the ODMDS release zone." CX 7 at 1069. If Respondent breaches this provision of the Dredging Contract because water and excavated material overflows, leaks, or spills out of its scows before they reach the ODMDS, Respondent would simultaneously violate SMMP Section 2.8 because dredged material would have been disposed of outside of the ODMDS release zone. This is also true if the hull doors of Respondents' vessels remain open when leaving the disposal area, in breach of Dredging Contract section 35 20 23, Parts 3.4.2.3 and 3.1.5, or if the vessels "mis-dump" in the manner discussed in Dredging Contract section 35 20 23, Parts 3.4.2.2 and 3.4.9. CX 7 at 1069, 1076, 1091. And Dredging Contract provisions that impose reporting requirements or prohibit transiting the Particularly Sensitive Sea Area likewise restate or reflect specific types of the same obligations and prohibitions contained in SMMP sections 2.7 and 3.6.1. To that extent,

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[16] Respondent has also argued the Agency previously made an affirmative statement "that it was not bringing claims based on alleged violations of the Contract." Response at 6. Respondent points to the Agency's assertion in response to Respondent's motion to dismiss that it "seeks to enforce the requirements of the SMMP as required by the Federal project" and that it "cited contract language in Appendix A of the Complaint simply to illustrate the parallel nature of the contract requirements and the SMMP requirements." Agency's Response to Respondent's Motion to Dismiss at 5 (Dec. 11, 2019). Subsequently, I summarized the Agency's position to be "that it is not seeking penalties for violations of the contract terms themselves in this proceeding." Order on MTD at 13. That is, as stated above, my view is that the Agency is not seeking penalties based on the allegation that Respondent breached a contract with the Corps but based on allegations that Respondent's noncompliance with the Dredging Contract constitutes conduct that is not authorized by either 33 U.S.C. § 1411(a), MPRSA's implementing regulations, or the SMMP.

noncompliance with these terms of the Dredging Contract is also noncompliance with the SMMP.

Thus, contrary to Respondent's contention that the Complaint asserts claims based solely on alleged violations of the SMMP and related planning documents, the Complaint actually alleges five different ways in which Respondent did not comply with the Dredging Contract, the SMMP, 40 C.F.R. § 228.15(h)(19), or 33 U.S.C. § 1411(a).

c. Respondent may be held liable for violating MPRSA because it exercised responsibility for or control over performance of the work resulting in alleged violations

Respondent next argues that there are genuine factual disputes as to whether it caused the alleged violations because "[e]vidence shows that third-party tug captains and even the Corps" may be responsible parties. Response at 5. On that basis, Respondent disputes that the Agency has presented sufficient evidence that shows it is the party that committed the alleged violations. Response at 8. In fact, Respondent contends that "[t]he Motion fails because it simply cites no facts linking the violations" to its actions. Response at 9. Rather, Respondent asserts that many of the alleged violations are based on actions performed by crews of the tugboats towing Respondent's scows and not Respondent itself. Response at 9. Respondent argues the Agency has not established facts about the relationship between Respondent and the tugboat companies demonstrating that Respondent is vicariously liable for decisions made by the tugboat captains. Response at 10. Ultimately, according to Respondent, "[i]t is well established that the owner of a towed vessel is not liable for the acts of a tug." Response at 9.

Respondent relies on a trio of cases in support its proposition that tugboat companies are responsible for their own actions: *Boston Metals Co. v. The Winding Gulf*, 349 U.S. 122, 123 (1955); *People of the State of California v. The Jules Fribourg*, 140 F. Supp. 333, 339 (N.D. Cal. 1956); and *Walker v. The Tug Diane*, 350 F. Supp. 1388, 1389 (D.V.I. 1972). *The Winding Gulf* endorses a general public policy rule invalidating contracts that would otherwise release tugboat companies from all liability for their negligence. 349 U.S. at 122; *Bisso v. Inland Waterways Corp.*, 349 U.S. 85, 89-90 (1955). In *The Jules Fribourg*, the court held that "when a tug company is *hired to dock a vessel*, it does so, not as agent for a vessel owner, but as an independent contractor." 140 F. Supp. at 339 (emphasis added). And in *The Tug Diane*, the court ruled that the tugboat company, and not the owner of the unmanned barge being towed, was responsible for damages that occurred when a strong cross wind caused the barge to collide with the plaintiff's yacht. 350 F. Supp. at 1389.

But I do not find these cases persuasive here. They generally concern private claims for damages brought through suits in admiralty or proceedings in rem and focus on the nature of the relationship between the tugboat company and the vessel owner who hired it. As discussed below, the question is not whether Respondent is vicariously liable for its subcontractors' MPRSA violations based on agency principles but whether Respondent itself violated the statute given its responsibility for or control over performance of the work resulting in alleged violations. In this proceeding, where the strict liability of a federal environmental regulatory

regime is being assessed, Respondent's tugboat cases devoted to various principles of duty and negligence are inapplicable.

Ultimately, Respondent cannot escape liability by simply shifting blame to the subcontractor tugboat companies that towed its dredge scows. As Respondent has recognized, the MPRSA is a strict liability statute that "does not require proof of intent or fault," and the Agency may penalize "any person" who violates the Act. Response at 8; 33 U.S.C. § 1415(a); *Cf. United States v. Reilly*, 827 F. Supp. 1076, 1077 (D. Del. 1993) (under 33 U.S.C. § 1415(a) "there is strict liability for violating either the statutes, regulations or permits issued thereunder"). The Agency correctly observes that in the context of other strict liability environmental statutes, federal courts have rejected arguments that parties cannot be liable because they did not themselves engage in the prohibited activity. In particular, the Clean Water Act ("CWA") also holds "any person" strictly liable for the unauthorized discharge of pollutants into navigable waters. *See* 33 U.S.C. § 1311(a). Courts have held that the CWA "'imposes liability both on the party who actually performed the work and on the party with responsibility for or control over performance of the work'" that led to an illicit discharge. *Puget Soundkeeper Alliance v. Cruise Terminals of Am.*, 216 F. Supp. 3d 1198, 1223 (W.D. Wash. 2015) (quoting *Assateague Coastkeeper v. Alan and Kristin Hudson Farm*, 727 F. Supp. 2d 433, 442 (D. Md. 2010)). Consequently, the "stated defense … that an independent contractor actually performed the work" that caused a violation "is no defense to liability under the CWA." *United States v. Lambert*, 915 F. Supp. 797, 803 (S.D. W.Va. 1996). *See also Cal. Sportfishing Prot. Alliance v. Shiloh Grp., LLC*, 268 F. Supp. 3d 1029, 1048 (N.D. Cal. 2017) (parties exercising sufficient control may be liable for CWA violations even if they do not themselves commit the act that causes the violation); *United States v. Bobby Wolford Trucking & Salvage, Inc.*, No. C18-747 TSZ, 2019 WL 5693928, at *6 (W.D. Wash. Nov. 4, 2019) ("[c]ausation may be established by showing that a defendant actually performed the polluting activity or that it had control over the performance of the polluting activity"); *Sierra Club v. MasTec N.A.*, Nos. 03-1697-HO, 06-6071-HO, 2007 WL 4387428 at *3 (D. Or. Dec. 12, 2007) (liability under CWA is predicated on either performance of the work or control over performance of the work).

As with CWA violations, it follows that Respondent may be held liable for MPRSA violations based not just on its own actions but on the actions of subcontractors where Respondent had responsibility for or control over the work that created the violation.[17] *Cf. Lambeth v. Three Lakes Corporation*, --- F. Supp. 3d ---, 2020 WL 6018708, at *5 (N.D. Ga. Aug. 10, 2020) (quoting *Jones v. E.R. Snell Contr., Inc.*, 333 F. Supp. 2d 1344, 1349 (N.D. Ga. 2004) ("Defendant . . . is liable [under the CWA] if it actually discharged the pollutants into the waters or if it 'had responsibility for, or control over, the performance of work which created ... the discharge of pollutants.'"). Further, in circumstances similar to this case, the Environmental Appeals Board ("EAB") has held Respondent liable for MPRSA violations related to work it had responsibility for or control over. *See Port of Oakland and Great Lakes Dredge and Dock Co.*, 4 E.A.D. 170, 1992 WL 211981 (EAB, 1992). In *Port of Oakland*, Respondent entered into a

[17] Notably, "MPRSA generally applies to ocean waters beyond U.S. territory, and in this regard, complements the Clean Water Act, which prohibits the discharge of pollutants into the navigable waters of the United States." *Rosado v. Wheeler*, 473 F. Supp. 3d 115, 122 (E.D.N.Y. July 17, 2020) (citing 33 U.S.C. §§ 1311, 1362(12)).

contract with the Port to dredge a federal navigation channel under its Corps-issued permit. *Id.* at 174-75, 1992 WL 211981, at **3-4. In carrying out Respondent's dredging and dumping work, tugboats towed Respondent's scows and misdumped dredged material at a greater distance from the center of the disposal site than the permit allowed, resulting in three MPRSA violations. *Id.* at 200-01, 1992 WL 211981, at *18. Additionally, in a separate violation, the EAB enhanced the culpability component of Respondent's penalty because Respondent failed to stop a tug-towed scow before it dumped unpermitted sediments at the disposal site. The EAB determined that Respondent could have prevented the unauthorized dumping by simply calling the tugboat while it was en route and that Respondent "acted irresponsibly and with callous disregard for the environment" by not doing so. *Id.* at 197-98, 1992 WL 211981, at *16.

Consequently, the issue at this point in the proceeding is whether there is a genuine dispute of material fact as to Respondent's responsibility for or control over performance of the work resulting in the alleged violations. I do not see any dispute.

The Dredging Contract describes Respondent's responsibility for completing construction dredging on Phase 3 of the Harbor Project in comprehensive fashion, outlining the many tasks it was obligated to perform. Respondent agreed to "furnish[ ] all labor, materials, and equipment, and perform[ ] all excavation and disposal of all material . . . ." CX 7 at 1058; CX 9; CX 10. The Dredging Contract mandates that Respondent place "all dredged material" in the Miami ODMDS and take "all necessary measures for protection of the environment" when doing so. CX 7 at 544, 1058, 1068-69; CX 9; CX 10. Included in Respondent's duties were requirements to "manage [the] project and coordinate activities of own employees, *subcontractors*, suppliers and offsite fabricators" and to "coordinate activities and manage resources to construct project conforming to contract[.]" CX 7 at 558; CX 9; CX 10 (emphasis added). Additionally, the Dredging Contract instructs Respondent to "keep construction activities under surveillance, management, and control to avoid pollution of surface, ground waters, estuarine and ocean waters[.]" CX 7 at 657-58; CX 9; CX 10. Through contractual terms like these, it is clear that Respondent's role in the construction and dredging of Phase 3 of the Harbor Project was presumed to be all-encompassing, and it would necessarily include ultimate responsibility for and control over the actual transport and dumping of dredged material.

Moreover, the Dredging Contract charges Respondent with complying with MPRSA, the Agency's MPRSA concurrence conditions, and the Miami ODMDS SMMP. CX 7 at 646-47; CX 9; CX 10. Under the Dredging Contract, "[a]ssurance of compliance with" these authorities "shall be the responsibility of [Respondent]." CX 7 at 653; CX 9; CX 10. Respondent also admits that "[t]his provision . . . assigns to Great Lakes, and not the Corps, the contractual responsibility for supervising subcontractors." Response at 10-11. Various other terms in the Dredging Contract impose specific obligations on Respondent that are clearly designed to facilitate this supervision and compliance: The contract required Respondent to record and review within 24 hours the transit paths of the tugboats and scows as well as the draft loss of each scow "to ensure spillage or leakage has not occurred." CX 7 at 671-72; CX 9; CX 10. Respondent was not permitted to allow "[w]ater and excavated material . . . to overflow, leak out, or spill out of barges, dump scows, or hopper dredges while in route to the ODMDS Release Zone." CX 7 at 1069; CX 9; CX 10. The Dredging Contract treated "any scow load . . . released outside the boundaries of the release zone . . . as a mis-dump" and required Respondent to notify

the Corps of a misplaced dump or any other violation of the SMMP. CX 7 at 1069; CX 9; CX 10. It was then Respondent's obligation to implement corrective actions before the next dump. CX 7 at 1076; CX 9; CX 10. Similarly, the Dredging Contract mandated that "[a]ll hopper doors, dump scow doors, or split hull dumping mechanisms shall be closed and sealed prior to exiting the ODMDS," and if this did not happen, Respondent was required to immediately notify the Corps. CX 7 at 1069; CX 9; CX 10. In sum, the Dredging Contract serves as persuasive and unrebutted evidence that Respondent would exercise responsibility for and control over the transport and dumping of dredged material, even if the subcontractors it managed and coordinated actually piloted the tugboats and scows involved in the alleged violations.

As noted above, Respondent hired third-party companies to provide tugboats and crews to tow its unmanned dredge scows from the point of dredging to the Miami ODMDS. Neither the tugboats nor their crews were owned or employed by Respondent, and Respondent's employees did not generally ride the tugboats when they were towing scows or control the moment-to-moment decisions of the tugboat crews. Burke Decl., ¶¶ 3, 6, 7; RX 78(A)-(M). But these facts do not create a dispute as to whether Respondent maintained overall responsibility for or control over activity that led to the alleged violations. Towing Respondent's scows and releasing their contents was but a subcomponent of the overall job for which Respondent was hired. The scows themselves belonged to Respondent and were loaded with material dredged by Respondent. Larkin Decl., ¶¶ 1, 4, 5, 6, 7; Pomfret Decl., ¶¶ 2, 3, 7; RX 81(C) at 3, 5-6; RX 95 at 1. Respondent prepared the scows for transit and controlled when they would be taken to the Miami ODMDS. *See, e.g.*, CX 17 at 23, 35, 52; RX 95 at 1, 4. Moreover, Respondent "provided the tug companies with the [Corps'] general requirements for the Port of Miami Project, and required tug companies to follow certain procedures to maximize compliance." Burke Decl., ¶ 7. For example, [redacted] RX 95 at 4. Respondent [redacted] RX 95 at 4. Respondent further [redacted] RX 95 at 2. Respondent reported to the Corps that [redacted] RX 95 at 2 (emphasis added). In response to violations related to [redacted] RX 95 at 2. To limit overflow of sediment from the scows, Respondent [redacted] RX 95 at 3.

Further, as the Agency observes, Respondent's communications to the Corps during the project also demonstrate that it was exercising responsibility for and control over disposal activity involving tugboat operation. *See, e.g.*, CX 16 at 1 [redacted] ; CX 16 at 8 [redacted]

[redacted]); CX 16 at 35; RX 11(A) ([redacted]); CX 16 at 38 ([redacted]; CX 16 at 50 [redacted]); CX 16 at 92 [redacted]; CX 16 at 243 [redacted]); CX 16 at 247-48; RX 65(A) [redacted]); CX 16 at 253 ([redacted]); CX 16 at 275 [redacted]). Respondent also required tugboat captains to complete a towing tug log. *See, e.g.*, RX 54(F). Respondent's tug log form instructed captains that [redacted] RX 54(F). The forms also required the captains to record [redacted]. RX 54(F).

The purchase orders through which Respondent hired the tugboat companies also contained language illustrating Respondent's controlling role. For example, purchase orders state that Respondent required tug services to tow its scows in the Atlantic Ocean "per the approved tow plan" and/or that tugs would "work as directed." RX 78(A); *see also* RX 78(C); RX 78(B); RX 78(D); RX 78(E); RX 78(F); RX 78(G); RX 78(H); RX 78(I); RX 78(J); RX 78(K); RX 78(L). The purchase orders also declared that "strict compliance with all Great Lakes safety program policies and procedures on this project is mandatory." RX 78(A); *see also* RX 78(D); RX 78(E); RX 78(F); RX 78(G); RX 78(H); RX 78(I); RX 78(J); RX 78(K); RX 78(L). As Respondent notes, the purchase orders incorporated by reference standard terms and conditions stating that the companies were "independent contractor[s]" with no "right or authority to act for, incur, assume or create any objection, responsibility or liability, express or implied, in the name of, or on behalf of, [Respondent] or to bind [Respondent] in any manner whatsoever." Burke Decl., ¶¶ 4, 5; RX 82(A)-(B). However, regardless of how Respondent sought to define its relationship with the tugboat companies through the general application of such boilerplate terms, these terms are not especially relevant to this matter. As discussed above, Respondent is alleged to be directly liable for violating MPRSA through its responsibility for or control over performance of the work resulting in alleged violations, not vicariously liable for violations based on the nature of its relationship to a specific subcontractor.

Consequently, there is sufficient undisputed evidence in the record to hold Respondent liable for violations that occurred due to work actually performed by its tugboat subcontractors, because Respondent exercised ultimate responsibility for or control over that work. [18]

[18] Claims for contribution, subrogation, or indemnification are beyond the scope of this proceeding, and this Order makes no ruling on these issues. *See Cnty. of Bergen*, EPA Docket

V. Respondent's Liability for Violations Alleged in the Complaint

The Agency seeks accelerated decision as to Respondent's liability for 36 of the 95 violations alleged in the Complaint. The Agency argues there are no genuine disputes of material fact with respect to these violations based on Respondent's admissions and electronic tracking system data generated by Respondent. Mot. at 1. Respondent contends there are disputed issues of material fact that preclude summary adjudication. Response at 1.

a. Leakage during transit

The Complaint alleges that on 37 occasions, "vessels used by Respondent to perform Phase 3 experienced leakage during transit from the dredge project area to the Miami ODMDS . . . ." Compl., ¶ 30(a). Specifically, on dates cited in Table 1 of Appendix A to the Complaint, the vessels identified there "leaked, spilled, or overflowed excavated material during transit from the dredging area to the ODMDS," exceeding authority identified in Dredging Contract section 35 20 23, Part 3.4.2.1 and violating SMMP section 2.8, 33 U.S.C. § 1411(a), and 40 C.F.R. § 228.15(h)(19).

Section 2.8 of the SMMP mandates that "[d]isposal shall be initiated within the disposal release zone and shall be completed (doors closed) prior to departing the ODMDS." CX 3 at 4. Dredging Contract section 35 20 23, Part 3.4.2.1 provides as follows:

> Water and excavated material shall not be permitted to overflow, leak out, or spill out of barges, dump scows, or hopper dredges while in route to the ODMDS Release Zone. Failure to repair leaks or change the method of operation which is resulting in the overflow, leakage, or spillage will result in suspension of dredging operations and require prompt repair or change of operation to prevent overflow, leakage, or spillage as prerequisite to the resumption of dredging. Excessive leakage is defined by average loss of draft during transit from the dredging area to the disposal area (forward draft loss plus aft draft loss divided by 2) in excess of 1 foot. Excessive leakage may be classified as a mis-dump.

CX 7 at 1069. *See also* McArthur Decl., ¶ 35.

In its Motion, the Agency seeks accelerated decision as to liability for 11 of the Complaint's 37 leakage allegations based on Respondent's deviation from the Dredging

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No. RCRA-02-2001-7110, 2002 WL 393653, at **4-5 (ALJ, March 7, 2002) (Order on Complainant's Motion to Strike) (striking respondent's cross claims in RCRA proceeding and noting that the strict liability statute does not provide for indemnification or contribution as criteria to be considered in the assessment of penalties). Respondent's liability here does not prevent it from seeking payment from other parties it believes are responsible or obligated to reimburse it for any penalties assessed.

Contract. Mot. at 14-17. Respondent does not generally dispute the facts of the specific leakage events but opposes liability on other grounds. Response at 16-19.

First, Respondent asserts accelerated decision should be denied because "the Motion is based entirely on a provision of the Contract – there is no equivalent provision of the SMMP." Response at 16. However, for the reasons discussed above, I do not find this to be a valid argument. Further, the leakage of material as described by Dredging Contract section 35 20 23, Part 3.4.2.1 is a violation of Section 2.8 of the SMMP because it constitutes disposal taking place outside of the ODMDS release zone.

Second, Respondent contends the Motion incorrectly applies the Dredging Contract by suggesting "that any leakage is a violation of the Contract." Response at 17. Respondent asserts that the Agency ignores the fact "that the Corps is on record that some leakage is inevitable on any scow trip[.]" Response at 17 (citing Pomfret Decl.; RX 91; RX 92). But Respondent mischaracterizes the Agency's Motion, which seeks accelerated decision as to liability for "excessive leakage" events. According to Mr. Pomfret, Respondent's witness, "[t]he Corps acknowledged during the Project that some amount of leakage is inevitable from dredge scows, based on the nature of the technology . . . . For that reason, Corps employees took the position during the Project that only excessive leakage would constitute a violation." Pomfret Decl., ¶ 5. That is, Mr. Pomfret's declaration indicates that the Corps and Respondent understood there to be a distinction between "any" leakage and "excessive" leakage. It is "excessive" leakage, which the Dredging Contract defines as an "average loss of draft during transit from the dredging area to the disposal area . . . in excess of 1 foot," that is the subject of the Motion. The 11 alleged instances of excessive leakage for which the Agency seeks accelerated decision all involve average draft losses that exceed one foot.[19]

Third, Respondent argues that "the Motion does not demonstrate that the draft loss on all of these eleven scow trips was caused by some action or omission by Great Lakes." Response at 17. Respondent suggests the Corps was the cause of some violations because it asked Respondent to change the way it loaded its scows to reduce turbidity at the point of dredging, and the consequence of changing loading procedures was that the scows carried more water and were therefore more prone to leakage. Response at 17-18 (citing RX 92 at 8-9). But as discussed above, Respondent may be held liable for excessive leakage from its scows because Respondent exercised responsibility for or control over the dredging activities. To the extent the Corps asked or required Respondent to change its loading procedures, this would potentially affect the calculation of any penalty assessed. But it would not negate the strict liability that MPRSA imposes on Respondent to not allow excessive leakage to occur in the first place.

[19] Respondent also contends that it previously told the Agency that measurement of draft loss should start when the vessel is at the end of the channel to the disposal area and not at the point of dredging. Response at 17. However, the eleven cases of excessive leakage for which the Agency seeks accelerated decision "understate[ ] the actual amount of leakage because they only include leakage from exiting the navigation channel to entering the ODMDS Release Zone." McArthur Decl., ¶ 38.

That leaves the issue of whether there are facts in dispute with respect to the 11 instances of excessive leakage addressed in the Agency's Motion. I do not see any.

The Agency alleges that on August 12, 2014, Respondent's vessel GL 64 (Trip Nos. 7 and 852)[20] experienced excessive leakage of excavated material during transit from the dredging area to the ODMDS. Compl., app. A, tbl.1; Mot. at 15. The trip and draft changes demonstrating excessive leakage were plotted by ADISS. CX 19 at 8-9; CX 20 at 46; RX 19(B). In an email to the Corps, Respondent admitted that its scow experienced a draft loss of 2.3 feet, [redacted]. RX 19(A); McArthur Decl., ¶ 36 & tbl.2. The Corps recorded this draft loss as a noncompliant event in its Post Disposal Summary Report. CX 17 at 18. Respondent does not cite to any evidence to dispute these facts.

The Agency alleges that on September 2, 2014, Respondent's vessel GL 64 (Trip Nos. 8 and 1012) experienced excessive leakage of excavated material during transit from the dredging area to the ODMDS. Compl., app. A, tbl.1; Mot. at 15. The trip and draft changes demonstrating excessive leakage were plotted by ADISS. CX 19 at 12-13; CX 20 at 50; RX 21(B). In an email to the Corps, Respondent admitted that its scow experienced a draft loss of 1.74 feet [redacted]. RX 21(A); McArthur Decl., ¶ 36 & tbl.2. The Corps recorded this draft loss as a noncompliant event in its Post Disposal Summary Report. CX 17 at 19-20. Respondent does not cite to any evidence to dispute these facts.

The Agency alleges that on September 28, 2014, Respondent's vessel GL 701 (Trip Nos. 312 and 1334) experienced excessive leakage of excavated material during transit from the dredging area to the ODMDS. Compl., app. A, tbl.1; Mot. at 15. The trip and draft changes demonstrating excessive leakage were plotted by ADISS. CX 19 at 14-15; CX 20 at 54; RX 23(B). In an email to the Corps, Respondent admitted that its scow experienced a draft loss of 1.49 feet, [redacted]. RX 23(A); McArthur Decl., ¶ 36 & tbl.2. The Corps recorded this draft loss as a noncompliant event in its Post Disposal Summary Report. CX 17 at 20-21. Respondent does not cite to any evidence to dispute these facts.

The Agency alleges that on October 4, 2014, Respondent's vessel GL 65 (Trip Nos. 25 and 1441) experienced excessive leakage of excavated material during transit from the dredging area to the ODMDS. Compl., app. A, tbl.1; Mot. at 15. The trip and draft changes demonstrating excessive leakage were plotted by ADISS. CX 19 at 16-17; CX 20 at 58; RX 25(B). In an email to the Corps, Respondent admitted that its scow experienced a draft loss of 1.7 feet, [redacted]. RX 25(A); McArthur Decl., ¶ 36 & tbl.2. The Corps recorded this draft loss as a noncompliant event in its Post Disposal Summary Report. CX 17 at 21. Respondent does not cite to any evidence to dispute these facts.

[20] The parties' filings and supporting exhibits apply different numbering systems to each load of dredged material transported to the Miami ODMDS. Thus, the same trip, or load, is referred to by two different numbers in the record and in this Order.

The Agency alleges that on October 17, 2014, Respondent's vessel GL 63 (Trip Nos. 407 and 1549) experienced excessive leakage of excavated material during transit from the dredging area to the ODMDS. Compl., app. A, tbl.1; Mot. at 15. The trip and draft changes demonstrating excessive leakage were plotted by ADISS. CX 19 at 22-23; CX 20 at 67; RX 27(B). In an email to the Corps, Respondent admitted that its scow experienced a draft loss of 1.45 feet but [redacted] RX 27(A); McArthur Decl., ¶ 36 & tbl.2. The Corps recorded this draft loss as a noncompliant event in its Post Disposal Summary Report. CX 17 at 22-23. Respondent does not cite to any evidence to dispute these facts.

The Agency alleges that on October 21, 2014, Respondent's vessel GL 702 (Trip Nos. 467 and 1562) experienced excessive leakage of excavated material during transit from the dredging area to the ODMDS. Compl., app. A, tbl.1; Mot. at 15. The trip and draft changes demonstrating excessive leakage were plotted by ADISS. CX 19 at 24-25; CX 20 at 68; RX 28(B). In an email to the Corps, Respondent admitted that its scow experienced a draft loss of 2.03 feet. RX 28(A); McArthur Decl., ¶ 36 & tbl.2. [redacted] RX 28(A). The Corps recorded this draft loss as a noncompliant event in its Post Disposal Summary Report. CX 17 at 23-24. Respondent does not cite to any evidence to dispute these facts.

The Agency alleges that later in the day on October 21-22, 2014, Respondent's vessel GL 702 (Trip Nos. 470 and 1569) again experienced excessive leakage of excavated material during transit from the dredging area to the ODMDS. Compl., app. A, tbl.1; Mot. at 15. The trip and draft changes demonstrating excessive leakage were plotted by ADISS. CX 19 at 26-27; RX 29(B). In an email to the Corps, Respondent admitted that on this trip its scow experienced a draft loss of 1.9 feet, [redacted] RX 28(A); McArthur Decl., ¶ 36 & tbl.2. The Corps recorded this draft loss as a noncompliant event in its Post Disposal Summary Report. CX 17 at 24-25. Respondent does not cite to any evidence to dispute these facts.

The Agency alleges that on October 21-22, 2014, Respondent's vessel GL 701 (Trip Nos. 366 and 1570) experienced excessive leakage of excavated material during transit from the dredging area to the ODMDS. Compl., app. A, tbl.1; Mot. at 15. The trip and draft changes demonstrating excessive leakage were plotted by ADISS. CX 19 at 28; CX 20 at 70; RX 30(B). In an email to the Corps, Respondent admitted that its scow experienced a draft loss of 1.08 feet. According to Respondent, [redacted] RX 30(A); McArthur Decl., ¶ 36 & tbl.2. The Corps recorded this draft loss as a noncompliant event in its Post Disposal Summary Report. CX 17 at 23. Respondent does not cite to any evidence to dispute these facts.

The Agency alleges that on November 10, 2014, Respondent's vessel GL 65 (Trip Nos. 47 and 1696) experienced excessive leakage of excavated material during transit from the dredging area to the ODMDS. Compl., app. A, tbl.1; Mot. at 15.[21] The trip and draft changes demonstrating excessive leakage were plotted by ADISS. CX 20 at 75; RX 35(B). In an email

[21] The Motion refers to the vessel GL 701, but this appears to be a scrivener's error, as the Complaint and exhibits refer to GL 65 as carrying dredged material on this date. *See* Mot. at 15.

to the Corps, Respondent admitted that its scow experienced a draft loss of 1.4 feet. According to Respondent, [redacted] RX 35(A); McArthur Decl., ¶ 36 & tbl.2. The Corps recorded this draft loss as a noncompliant event in its Post Disposal Summary Report. CX 17 at 26-27. Respondent does not cite to any evidence to dispute these facts.

The Agency alleges that on December 21, 2014, Respondent's vessel GL 701 (Trip Nos. 508 and 2098) experienced excessive leakage of excavated material during transit from the dredging area to the ODMDS. Compl., app. A, tbl.1; Mot. at 15. The trip and draft changes demonstrating excessive leakage were plotted by ADISS. CX 19 at 38-39; CX 20 at 90; RX 49(B). In an email to the Corps, Respondent admitted that its scow experienced a draft loss of 1.3 feet. According to Respondent, [redacted] RX 49(A); McArthur Decl., ¶ 36 & tbl.2. The Corps recorded this draft loss as a noncompliant event in its Post Disposal Summary Report. CX 17 at 35-36. Respondent does not cite to any evidence to dispute these facts.

The Agency alleges that on June 17, 2015, Respondent's vessel GL 701 (Trip Nos. 868 and 4060) experienced excessive leakage of excavated material during transit from the dredging area to the ODMDS. Compl., app. A, tbl.1; Mot. at 15. The trip and draft changes demonstrating excessive leakage were plotted by ADISS. CX 20 at 113; RX 72(B). In an email to the Corps, Respondent admitted that its scow experienced a draft loss of 1.2 feet. According to Respondent, [redacted] RX 72(A); McArthur Decl., ¶ 36 & tbl.2. The Corps recorded this draft loss as a noncompliant event in its Post Disposal Summary Report. CX 17 at 53. Respondent does not cite to any evidence to dispute these facts.

Accordingly, the undisputed material facts show that on the 11 occasions set forth above, Respondent's scows experienced excessive leakage as defined in the Dredging Contract during transit to the ODMDS. These excessive leakage events violated 33 U.S.C. § 1411(a), and it is appropriate to grant accelerated decision to the Agency as to Respondent's liability for these violations.

b. Departing ODMDS with open hull doors

The Complaint alleges that on 36 occasions, "vessels used by Respondent to perform Phase 3 exited the Miami ODMDS with open doors in violation of SMMP section 2.8[.]" Compl., ¶ 30(b). Specifically, on each of the dates cited in Table 2 of Appendix A to the Complaint, "the identified vessel's hull was open upon exiting the ODMDS," exceeding authority identified in Dredging Contract section 35 20 23, Parts 3.4.2.3 and 3.1.5, and violating SMMP section 2.8, 33 U.S.C. § 1411(a), and 40 C.F.R. § 228.15(h)(19).

In its Motion, the Agency seeks accelerated decision as to liability for three of the Complaint's open hull door allegations based on Respondent's deviation from either Section 2.8 of the SMMP or Dredging Contract section 35 20 23, Part 3.1.5. Mot. at 12; Reply at 15. Section 2.8 of the SMMP mandates that "[d]isposal shall be initiated within the disposal release

zone and shall be completed (doors closed) prior to departing the ODMDS." CX 3 at 4. According to Dredging Contract section 35 20 23, Part 3.1.5,

> [o]pen/closed status of the bin, corresponding to the split/non-split condition of a split hull scow shall be monitored. An 'OPEN' value shall indicate the hull is split. A 'CLOSED' value shall indicate the hull is not split . . . . *For this contract, hull status shall register closed prior to leaving the disposal area.*

CX 7 at 1091.

Respondent again contends the Agency cannot seek summary adjudication based on alleged violations of the Dredging Contract. Response at 14. But in addition to its previously stated arguments on this point, Respondent asserts that the Dredging Contract and the SMMP impose different obligations: while the Dredging Contract refers to sensor reading requirements, "[f]or there to be a violation of the SMMP, the relevant questions are whether 'disposal [was] completed' and whether the scow hulls were 'closed' when the scow exited to[sic] ODMDS." Response at 14.

I do not fully agree with this characterization. Rather than imposing an additional obligation, the Dredging Contract's requirement that "hull status shall register closed prior to leaving the disposal area" actually gives additional meaning to the SMMP requirement that disposal "shall be completed (doors closed)" before departing the ODMDS. That is, the Dredging Contract clarifies that the doors are *not* "closed" – and disposal not completed – so long as a vessel's hull status registers as open. Regardless, Respondent's arguments related to the Dredging Contract are rejected for the reasons discussed above.

With respect to SMMP section 2.8, Respondent argues that the Agency has presented insufficient evidence of a violation, because "[t]here is no evidence whether disposal of dredged material was completed (i.e., all of the dredged material had dropped out of the bottom of the scows) or whether the hulls were closed when the scows left the ODMDS." Response at 14. Respondent contends the sensor data is unreliable on this point because the Agency has not backed it with evidence "as to who or what caused the scow hull sensor to read 'open' on those trips." Response at 15. Respondent suggests that the open hull sensor readings may be "due to some failure by the tug captain to wait to leave the ODMDS until the hulls were closed, . . . some failure of the scows' hydraulic systems so that the hulls were not pressurized shut, or … some fault with the sensor." Response at 15. In support of these arguments, Respondent cites Mr. Larkin's declaration that the dredged material is released "very quickly" when the hull doors are opened, and that based on his experience with Respondent's fleet, he "believe[s] that substantially all of the dredged material is released from the scows within 1 minute from when the scow hulls open." Larkin Decl., ¶ 4. Mr. Larkin further declares that the hull sensors are "designed to show that the scow is 'closed' when the hulls are pushed tightly together by the hydraulic system. The sensor can read that the hulls are 'open' even when the hulls are touching, but not pressurized together." Larkin Decl., ¶ 6. Respondent also cites its emails to the Corps at the time of the alleged violations, arguing they indicate the dredged material was properly disposed of or that a faulty sensor was involved. Response at 15 (citing RX 3(A); RX 37(A)).

In the first open hull violation, the Agency alleges that on March 13, 2014, Respondent's scow GL 63 (Trip Nos. 49 and 117) exited the ODMDS with open hull doors. Compl., ¶ 30(b) & app. A, tbl.2. The trip was plotted by ADISS, showing where the hull doors were open. CX 20 at 9-10; RX 3(B). Respondent's ADISS plot states that [redacted] RX 3(B) at 1, 3. In an email to the Corps, Respondent reported that [redacted] RX 3(A). Respondent further indicated in the email that [redacted] RX 3(A). The Corps recorded this open hull door violation in its Post Disposal Summary Report. CX 17 at 5-6. Respondent does not cite to any evidence that specifically disputes these facts. Respondent admitted that [redacted] RX 3(A). Mr. Larkin's assessment of the speed with which dredged material is generally released has no bearing on this particular event because, regardless of whether the vessel had emptied its load, Respondent admitted the doors remained open. Further, I am not persuaded in this case by Mr. Larkin's statement that "[t]he sensor *can* read that the hulls are 'open' even when the hulls are touching, but not pressurized together." (emphasis added). The fact that this is a general possibility does not, without some further corroboration specific to this event, create a factual dispute. *See Urquilla-Diaz v. Kaplan University*, 780 F.3d 1039, 1050 (11th Cir. 2015) ("to survive summary judgment, the nonmoving party must offer more than a mere scintilla of evidence for its position"). Further, even if the hull doors were touching but not pressurized together, then they were not at that point *completely* closed. And the fact that the hull status sensor remained in the "open" position in itself demonstrates noncompliance because, for purposes of the Dredging Contract and SMMP, that status demonstrated that the doors were not closed.

In the second open hull violation, the Agency alleges that on November 8, 2014, Respondent's scow GL 65 (Trip Nos. 41 and 1677) exited the ODMDS with open hull doors. Compl., ¶ 30(b) & app. A, tbl.2. The trip was plotted by ADISS. CX 20 at 74; RX 34(B). Respondent's ADISS plot shows the hull doors' status as open as the vessel departed the release zone and ODMDS, and states that [redacted] RX 34(B). The Corps also recorded this as a non-compliant load for leaving the ODMDS with an open hull in its Post Disposal Summary Report. CX 17 at 26. Unlike the other violations, it appears Respondent did not provide further explanation or admission of noncompliance to the Corps. *See* CX 17 at 26; RX 34(A). However, Respondent does not now point to any evidence to dispute the fact that GL 65 left the ODMDS with an open hull. And it remains insufficient for Respondent to rely on the general possibility that the sensor was not working correctly without something more. Moreover, as with the first open hull violation, the fact that the sensor showed an open status means the vessel by definition did not have its "doors closed" under the Dredging Contract and SMMP.

In the third open hull violation, the Agency alleges that on November 16, 2014, Respondent's scow GL 701 (Trip Nos. 429 and 1791) exited the ODMDS with open hull doors.

Compl., ¶ 30(b) & app. A, tbl.2. The trip was plotted by ADISS. CX 20 at 78; RX 37. Respondent's ADISS plot shows the hull doors' status as open as the vessel departed the release zone and the ODMDS, and states "[h]ull status sensor reading open on return transit." RX 37(B). In an email to the Corps, Respondent admitted that "[d]uring the return transit, the hull sensor status read 'OPEN,' until just inside of the Channel limits." RX 37(A). In its Post Disposal Summary Report, the Corps also recorded this trip as a non-compliant load for leaving the ODMDS with an open hull. CX 17 at 27-28. In this instance, however, Respondent also wrote in its email to the Corps that during an inspection following a subsequent trip with GL 701, "it was found that the limit switch for the hull status sensor was not making contact with the stop plate, preventing the sensor from being able to send a signal to the computer to register the scow as 'OPEN' or 'CLOSED.'" RX 37(A). This could appear to raise a question as to whether the sensor was properly functioning on GL 701's first trip that is the subject of the Agency's allegations. But it does not create a genuine dispute of fact as to liability. Even if a malfunction was causing the sensor to incorrectly register as "open," this would be noncompliant with the Dredging Contract's definition of "closed" because the sensors did not register as closed prior to GL 701's leaving the disposal area. As the Agency observes, it is consistent with MPRSA for vessels to possess accurate hull sensors to enable the automated monitoring that serves the statutory purpose of preventing or strictly limiting ocean dumping. *See* Reply at 15 (citing CX 7 at 18; 33 U.S.C. § 1401). Consequently, liability is established even if the sensor malfunctioned.

Finally, Respondent suggests that these open hull events were excused by 33 U.S.C. § 1415(h), which states that "[n]o person shall be subject to a civil penalty . . . for dumping materials from a vessel if such materials are dumped in an emergency to safeguard life at sea." But this section of MPRSA does not apply here, because it concerns the dumping of materials in response to a life-threatening emergency. There is no evidence that such an emergency prompted GL 63 or any of Respondent's other scows to depart the ODMDS with open hull doors. Rather, the evidence demonstrates either an equipment failure or operator error is to blame.[22]

Accordingly, the undisputed material facts show that on the three occasions set forth above, Respondent's scows exited the Miami ODMDS with open hull doors, exceeding the authority identified in Dredging Contract section 35 20 23, Part 3.1.5 and violating SMMP section 2.8, 33 U.S.C. § 1411(a), and 40 C.F.R. § 228.15(h)(19). It is appropriate to grant accelerated decision to the Agency as to Respondent's liability for these violations.

c. Disposal outside of the release zone

The Complaint alleges that on two occasions, "vessels used by Respondent to perform Phase 3 disposed of dredged material outside of the Miami ODMDS release zone . . . ." Compl., ¶ 30(c). Specifically, on dates cited in Table 3 of Appendix A to the Complaint, the vessels

[22] Respondent contends that it is unsafe to board a scow at sea to fix a malfunctioning hydraulic system and that people have been killed doing so. Response at 15-16 (citing Larkin Decl.). But even accepting this as true, if the system malfunction did not occur within Respondent's effort to avoid a life-threatening emergency, then Respondent cannot avoid MPRSA's strict liability for its failure to maintain a properly functioning hydraulic system.

identified there "misdumped outside of the release zone," exceeding authority identified in Dredging Contract section 35 20 23, Parts 3.4.2.2 and 3.4.9 and violating SMMP section 2.8, 33 U.S.C. § 1411(a), and 40 C.F.R. § 228.15(h)(19).

Section 2.8 of the SMMP mandates that "[d]isposal shall be initiated within the disposal release zone and shall be completed (doors closed) prior to departing the ODMDS." CX 3 at 4. Dredging Contract section 35 20 23, Part 3.4.2.2 provides that "[a]ny scow load or hopper dredge load that is released outside the boundaries of the release zone as shown on the plans will be classified as a mis-dump . . . ." CX 7 at 1069. Similarly, Dredging Contract section 35 20 23, Part 3.4.9 states that "[m]aterials deposited outside of the designated disposal/placement area(s) will be classified as misplaced material . . . ." CX 7 at 1076.

In its Motion, the Agency seeks accelerated decision as to liability for both of the alleged misdumps of dredged material outside of the ODMDS release zone. Mot. at 7-9. Respondent does not generally dispute the facts of the specific leakage events but opposes liability on other grounds. Response at 12. In particular, Respondent argues accelerated decision should be denied to the extent it is based on the Dredging Contract and because the Agency has not demonstrated that Respondent, and not the tugboat companies, committed the violations. Response at 12. I reject both arguments for the reasons stated previously.

In the first misdump violation, the Agency alleges that on March 6, 2014, Respondent's scow GL 63 (Trip Nos. 31 and 80) disposed of dredged material outside of the Miami ODMDS release zone. Compl., ¶ 30(c) & app. A, tbl.3. The boundaries of the release zone are shown in the SMMP and the Dredging Contract. CX 3 at 5; CX 6 at 30. ADISS plots and Respondent's records of GL 63's trip on that date show the scow released its load outside of the release zone. CX 20 at 5; RX 1(B); RX 104 at 1. Respondent's ADISS plot states that [redacted] RX 1(B) at 2. In an email to the Corps, Respondent admitted that [redacted] RX 1(A). The Corps recorded this misdump as noncompliant in its Post Disposal Summary Report. CX 17 at 4-5. The Corps further noted that [redacted] CX 17 at 5. Respondent does not cite to any evidence that specifically disputes these facts.

In the second misdump violation, the Agency alleges that on March 7, 2014, Respondent's scow GL 702 (Trip Nos. 41 and 83) disposed of dredged material outside of the Miami ODMDS release zone. Compl., ¶ 30(c) & app. A, tbl.3. ADISS plots and Respondent's records of GL 702's trip on that date show the scow released its load outside of the release zone. CX 20 at 7; RX 2(B); RX 104 at 1. Respondent's ADISS plot states that [redacted] RX 2(B). In an email to the Corps, Respondent admitted that [redacted] RX 2(A). The Corps recorded this misdump as noncompliant in its Post Disposal Summary

Report. CX 17 at 5. Respondent does not cite to any evidence that specifically disputes these facts.

Accordingly, the undisputed material facts show that on both of the occasions above, Respondent's scows GL 63 and GL 702 disposed of dredged material outside of the Miami ODMDS release zone, exceeding the authority identified in Dredging Contract section 35 20 23, Parts 3.4.2.2 and 3.4.9 and violating SMMP section 2.8, 33 U.S.C. § 1411(a), and 40 C.F.R. § 228.15(h)(19). It is appropriate to grant accelerated decision to the Agency as to Respondent's liability for these violations.

d. Failure to report violations

The Complaint alleges that on 11 occasions, "Respondent failed to comply with reporting requirements in violation of SMMP section 3.6.1." Compl., ¶ 30(d). Specifically, on dates cited in Table 4 of Appendix A to the Complaint, Respondent "failed to report the listed compliance issues" in connection with the vessels identified therein, in violation of SMMP section 3.6.1, 33 U.S.C. § 1411(a), and 40 C.F.R. § 228.15(h)(19). Section 3.6.1 of the SMMP mandates that users of the Miami ODMDS "notify the [Corps] and the EPA within 24 hours if a violation of the permit and/or contract conditions related to MPRSA Section 103 or SMMP requirements occur during disposal operations." CX 2 at 24.

In its Motion, the Agency seeks accelerated decision for Respondent's failure to notify the Corps within 24 hours of eleven listed violations. Mot. at 18. However, of the dates and compliance issues listed in the Motion, only one is alleged in the Complaint. *Compare* Mot. at 18, tbl.5 *with* Compl., app. A, tbl.4. The Agency cannot obtain accelerated decision as to Respondent's liability for violations that were not alleged in the Complaint.

With respect to the one failure to report event that matches an allegation in the Complaint, the Agency contends Respondent failed to timely report to the Corps the open hull violation of scow GL 701 on November 16, 2014. Mot. at 18. Respondent notified the Corps of its alleged violation in an email on January 31, 2015. RX 37(A). According to the Agency, this is the first time it had done so. Mot. at 18. But the Agency relies on Mr. McArthur's declaration that after reviewing his emails and files, he found no record of Respondent notifying the Corps or the Agency of nine violations *related to transiting the Florida Keys Particularly Sensitive Sea Area.* McArthur Decl., ¶ 32 & tbl.1 (emphasis added). Mr. McArthur makes no reference to any notifications related to the open hull violation of scow GL 701. This is insufficient evidence on which to find liability for failing to report the open hull violation.

Accordingly, accelerated decision is denied as to the failure to report violations set forth in the Motion.

e. Transiting the Florida Keys Particularly Sensitive Sea Area

The Complaint alleges that on nine occasions, "vessels used by Respondent to perform Phase 3 transited the Florida Keys Particularly Sensitive Sea Area during transit to and/or from the Miami ODMDS in violation of SMMP section 2.7." Compl., ¶ 30(e). Specifically, on each

of the dates cited in Table 5 of Appendix A to the Complaint, "the identified vessels transited into the Particularly Sensitive Sea Area on the way to or after leaving the ODMDS," exceeding the authority identified in Dredging Contract section 01 57 20, Part 3.1.5.8 and violating SMMP section 2.7, 33 U.S.C. § 1411(a), and 40 C.F.R. § 228.15(h)(19).

According to SMMP section 2.7, "[d]isposal vessels are also not allowed to transit the Particularly Sensitive Sea Area south of the channel." CX 2 at 13. Dredging Contract section 01 57 20, Part 3.1.5.8 further provides that Respondent "shall avoid the area labeled 'Particularly Sensitive Area' on NOAA Chart 11466." CX 7 at 666; McArthur Decl., ¶¶ 24-25. NOAA Chart 11466 declares that the Particularly Sensitive Sea Area "is an environmentally sensitive area around which mariners should exercise extreme caution." CX 8 at 1. It contains fish havens and the Florida Keys National Marine Sanctuary. CX 8 at 1; McArthur Decl., ¶ 26. Mr. McArthur declares that during the Harbor Project, he "provided ADISS with the boundaries of the Particularly Sensitive Sea Area in NOAA Chart 11466 and had them include the Area on the plot reports." ¶ 27. Later, Mr. McArthur verified that the Area boundaries shown on the ADISS system and the plot reports as shown in CX 19 were true and correct. McArthur Decl., ¶ 28.

In its Motion, Respondent asserts that on the specified dates, electronic tracking of Respondent's scows shows they transited the Particularly Sensitive Sea Area described in NOAA Chart 11466. Mot. at 22. Respondent does not dispute the specific incidents but again argues that penalties cannot be imposed based on violations of the Dredging Contract or the actions of tugboat captains towing the scows. Response at 12-13. As discussed above, I do not accept Respondent's arguments with respect to the Dredging Contract or the notion that it cannot be liable for conduct actually performed by subcontracted tugboat companies. Accordingly, the question is whether there is a factual dispute regarding the transit paths of Respondent's vessels. I see none.

The Agency alleges that on December 17, 2013, Respondent's vessel Terrapin Island (Trip No. 112) transited into the Particularly Sensitive Sea Area on the way to or after leaving the ODMDS. Compl., app. A, tbl.5;[23] Mot. at 11, 22. The path of the vessel was plotted by ADISS and shows it passing through the Particularly Sensitive Sea Area. CX 19 at 46; CX 20 at 1-2; McArthur Decl., ¶¶ 28-31 & tbl.1. Respondent does not cite to any evidence to dispute these facts.

The Agency alleges that on January 15, 2014, Respondent's vessel GL 701 (Trip No. 2) transited into the Particularly Sensitive Sea Area on the way to or after leaving the ODMDS. Compl., app. A, tbl.5; Mot. at 11, 22. The path of the vessel was plotted by ADISS and shows it passing through the Particularly Sensitive Sea Area. CX 19 at 53; CX 20 at 3-4; McArthur Decl., ¶¶ 28-31 & tbl.1. Respondent does not cite to any evidence to dispute these facts.

[23] The Complaint appears to misdate this event as occurring on May 15, 2014. However, the Agency's Motion and supporting documentation indicate the trip actually took place December 17, 2013. Respondent does not dispute the trip taking place in 2013, and it further acknowledges that the Terrapin Island is a hopper dredge owned and operated by Great Lakes that would not be subject to vicarious liability arguments. Response at 13 n.3.

The Agency alleges that on June 17, 2014, Respondent's vessel GL 702 (Trip No. 212) transited into the Particularly Sensitive Sea Area on the way to or after leaving the ODMDS. Compl., app. A, tbl.5; Mot. at 11, 22. The path of the vessel was plotted by ADISS and shows it passing through the Particularly Sensitive Sea Area. CX 19 at 50; CX 20 at 37-38; McArthur Decl., ¶¶ 28-31 & tbl.1. Respondent does not cite to any evidence to dispute these facts.

The Agency alleges that on June 20, 2014, Respondent's vessel GL 701 (Trip No. 191) transited into the Particularly Sensitive Sea Area on the way to or after leaving the ODMDS. Compl., app. A, tbl.5; Mot. at 11, 22. The path of the vessel was plotted by ADISS and shows it passing through the Particularly Sensitive Sea Area. CX 19 at 52; CX 20 at 41-42; McArthur Decl., ¶¶ 28-31 & tbl.1. Respondent does not cite to any evidence to dispute these facts.

The Agency alleges that on September 28, 2014, Respondent's vessel GL 702 (Trip No. 402) transited into the Particularly Sensitive Sea Area on the way to or after leaving the ODMDS. Compl., app. A, tbl.5; Mot. at 11, 22. The path of the vessel was plotted by ADISS and shows it passing through the Particularly Sensitive Sea Area. CX 19 at 49; CX 20 at 55-56; McArthur Decl., ¶¶ 28-31 & tbl.1. Respondent does not cite to any evidence to dispute these facts.

The Agency alleges that on October 16, 2014, Respondent's vessel GL 701 (Trip No. 355) transited into the Particularly Sensitive Sea Area on the way to or after leaving the ODMDS. Compl., app. A, tbl.5; Mot. at 11, 22. The path of the vessel was plotted by ADISS and shows it passing through the Particularly Sensitive Sea Area. CX 19 at 51; CX 20 at 63-64; McArthur Decl., ¶¶ 28-31 & tbl.1. Respondent does not cite to any evidence to dispute these facts.

Also on October 16, 2014, the Agency alleges that Respondent's vessel GL 702 (Trip No. 457) transited into the Particularly Sensitive Sea Area on the way to or after leaving the ODMDS. Compl., app. A, tbl.5; Mot. at 11, 22. The path of the vessel was plotted by ADISS and shows it passing through the Particularly Sensitive Sea Area. CX 19 at 48; CX 20 at 65-66; McArthur Decl., ¶¶ 28-31 & tbl.1. Respondent does not cite to any evidence to dispute these facts.

The Agency alleges that on November 13, 2014, Respondent's vessel GL 66 (Trip No. 331) transited into the Particularly Sensitive Sea Area on the way to or after leaving the ODMDS. Compl., app. A, tbl.5; Mot. at 11, 22. The path of the vessel was plotted by ADISS and shows it passing through the Particularly Sensitive Sea Area. CX 19 at 54; CX 20 at 77-78; McArthur Decl., ¶¶ 28-31 & tbl.1. Respondent does not cite to any evidence to dispute these facts.

The Agency alleges that on February 14, 2015, Respondent's vessel GL 702 (Trip No. 624) transited into the Particularly Sensitive Sea Area on the way to or after leaving the ODMDS. Compl., app. A, tbl.5; Mot. at 11, 22. The path of the vessel was plotted by ADISS and shows it passing through the Particularly Sensitive Sea Area. CX 19 at 47; CX 20 at 96-97; McArthur Decl., ¶¶ 28-31 & tbl.1. Respondent does not cite to any evidence to dispute these facts.

Accordingly, the undisputed material facts show that on the nine occasions set forth above, Respondent's scows transited the Particularly Sensitive Sea Area south of the federal navigation channel, exceeding the authority identified in Dredging Contract section 01 57 20, Part 3.1.5.8 and violating SMMP section 2.7, 33 U.S.C. § 1411(a), and 40 C.F.R. § 228.15(h)(19). It is appropriate to grant accelerated decision to the Agency as to Respondent's liability for these violations.

VI. Conclusion

For the reasons set forth above, the Agency's Motion is **GRANTED in part** and **DENIED in part** as follows:

For the 11 excessive leakage violations, accelerated decision is **GRANTED** as to Respondent's liability.

For the three open hull door violations, accelerated decision is **GRANTED** as to Respondent's liability.

For the two misdump violations, accelerated decision is **GRANTED** as to Respondent's liability.

For the failure to report violations, accelerated decision is **DENIED**.

For the nine transiting the Particularly Sensitive Sea Area violations, accelerated decision is **GRANTED** as to Respondent's liability.

A hearing will be scheduled to determine Respondent's liability for the remaining allegations for which the Agency did not seek accelerated decision, the failure to report violations for which accelerated decision has been denied, and to determine an appropriate penalty.

SO ORDERED.

Susan L. Biro
Chief Administrative Law Judge

Dated: February 24, 2021
Washington, D.C.

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

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Order on Complainant's Motion for Partial Accelerated Decision**, dated February 24, 2021, and issued by Chief Administrative Law Judge Susan L. Biro, was sent this day to the following parties in the manner indicated below.

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Attorney Advisor

Original by Electronic Delivery to:

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Dated: February 24, 2021
Washington, D.C.