UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY REGION 4

IN THE MATTER OF

Great Lakes Dredge & Dock Company, LLC

Respondent.

Docket No. MPRSA-04-2019-7500

Proceeding Pursuant to § 105(a) of the Marine Protection, Research and Sanctuaries Act, 33 U.S.C. § 1415(a)

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GREAT LAKES DREDGE & DOCK COMPANY, LLC'S REPLY IN SUPPORT OF MOTION TO DISMISS

Respondent Great Lakes Dredge & Dock Co., LLC ("Great Lakes") hereby submits this reply in support of its Motion for Dismiss (the "Motion").

EPA Region 4's Response to Respondent's Motion to Dismiss (the "Response") narrows the issues before the Tribunal. The Response does not deny that none of the claims in the Complaint are based on alleged violations of U.S. Army Corps of Engineers ("Corps") Permit No. SAJ-2006-6547. The Response also appears to state that EPA is seeking to assess civil penalties only based on alleged violations of the site management and monitoring plan ("Site Plan") for the Miami Offshore Dredged Material Disposal Site ("ODMDS").

The Response fails to demonstrate how EPA can assess civil penalties in this circumstance. It ignores many of the arguments made in Great Lakes' Motion and cites almost no authority (only one case is cited in the entire motion).

The Response also fails to come to grips with the unique status of Federal dredging projects. While the MPRSA establishes a permit system that EPA may enforce through civil penalties, Congress exempted Federal dredging projects by allowing the Corps to proceed "in

lieu of the permit procedure." 33 U.S.C. § 1413(e). The Response offers no coherent explanation as to why Congress would allow the Corps to proceed without a permit on Federal dredging projects other than to limit EPA oversight and enforcement of such projects. The statute must be construed in a way that gives meaning to all of its parts, yet the Response fails to do so.

Great Lakes' Motion makes a narrow point: that the MPRSA does not authorize EPA to bring a civil penalty action against the Corps and its contractors based on the Contract or Site Plan. Great Lakes is not arguing that Section 1413(e) "somehow exempts Federal projects and USACE contractors from the requirements of the MPRSA." (Resp. at 14.) Just because EPA cannot bring a civil penalty action does not mean that Great Lakes is not subject to MPRSA requirements pursuant to the Contract issued by the Corps "in lieu of the permit procedure." And just because EPA cannot assess civil penalties does not mean there are no governmental remedies to assure compliance. The Corps has contract-based mechanisms to address any breach of contractors' obligations under this Contract, which the Response concedes. (Resp. at 13.) Great Lakes' Motion simply argues that the structure of the MPRSA precludes EPA from bringing its Complaint in this case. The Response fails to demonstrate otherwise, therefore the Tribunal should dismiss the Complaint.

I. EPA Has Limited Authority Over Federal Dredging Projects

The MPRSA gives the EPA limited authority related to the offshore disposal of dredged material. EPA has no authority to issue permits for the offshore disposal of dredged material. Instead, Congress expressly gave the Corps authority to issue such permits, 33 U.S.C. 1413(a), and authorized the Corps to proceed "in lieu of the permit procedure" on its own Federal dredging projects. 33 U.S.C. § 1413(e). The effect of this Congressional authorization is to limit EPA's ability to bring civil penalty actions against the Corps and its contractors where there is no permit. Great Lakes' Motion shows how this result is consistent with the legislative history, EPA regulations, and federal policy regarding agency management of contractors.

The Response does not address most of these points. Regarding the structure of the MPRSA, the Response points out that EPA is the only agency given authority to assess civil penalties under the MPRSA. (Resp. at 13, 16.) Just because EPA has civil penalty authority for certain types of violations (e.g., violations of permit) does not mean that it can assess civil penalties for all types of violations (e.g., violations of contracts and Site Plans). The Response ignores the fact that the civil penalty section, 33 U.S.C. § 1415(a), has a different set of predicate violations than the injunctive relief section, *id.* § 1415(g)(1), which indicates that Congress intended civil penalties to apply to a narrower set of violations. *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers,* 414 U.S. 453, 458 (1974) ("When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.") (quoting *Botany Worsted Mills v. United States,* 278 U.S. 282, 289 (1929)). Also, civil penalties are not the only way that federal agencies can enforce compliance with requirements on Federal dredging projects. The Response admits that the Corps has contract-based remedies over its contractors, (Resp. at 13), so a lack of EPA civil penalty authority does not mean there is no mechanism for federal agencies to enforce their contracts. This is confirmed by one of the documents submitted with the Response, EPA's December 2014 concurrence letter, in which EPA suggested to the Corps that it should "manage the dredging contractors' disposal operations" in order to achieve "joint management objectives." (Resp., Att. 4).

Regarding the legislative history, the Response does not deny that both the proposed Administration legislation and original Senate bill explicitly sought to limit EPA civil penalty authority against the Corps. (*See* Mot. at 7-8.) Instead, the Response argues (without authority) that the removal of language that would have excluded federal agencies from the definition of "person" means that Congress intended to allow civil penalties against the Corps. (Resp. at 16.) The Response overstates the significance of this change. This change meant that Congress intended to include federal agencies within the meaning the term "person," which makes sense for other provisions of the MPRSA, e.g., the injunctive relief section which allows

actions against "any person." 33 U.S.C. § 1415(g)(1). But it does not mean that Congress abandoned the goal of limiting EPA civil penalty authority against the Corps on Federal dredging projects. As pointed out in Great Lakes' Motion, at the same time that the definition of "person" was changed in conference committee, the House and Senate agreed to put the Corps in charge of dredged material permitting and authorized the Corps to proceed "in lieu of the permit procedure" on Federal dredging projects. This was consistent with the expressed desire of limiting EPA regulatory and enforcement authority over Corps projects, and indicates that the Senate simply achieved its goal through a different means.

With regard to EPA's regulations, the Response argues that the limitations in 40 CFR § 220.4 are irrelevant to the issue of enforcement because that section is entitled "Authorities to issue permits." (Resp. at 17.) However, this argument ignores the fact that those regulations explicitly discuss the authority of the EPA Administrator and delegated agency officials to "initiate and carry out enforcement activities," 40 CFR § 220.4(a)-(b), but only with respect to those permits issued by EPA. The only provision in the EPA regulation authorizing enforcement of permits says nothing about Federal dredging projects or permits for dredged material. (Mot. at 8-9.) In contrast, 40 CFR § 220.4(c) authorizes Regional Administrators to review, approve, disapprove, or propose conditions for Federal dredging projects, but notably does not authorize any enforcement activity with respect to such projects. The Response also is notably silent regarding Great Lakes' point that those regulations only delegate to Region 4 the ability to conduct enforcement relating to special permits for non-dredged material, and that they provide no delegation of enforcement authority in connection with a Federal dredging project which proceeded in lieu of the permit procedure. Region 4 does not have the delegated authority to bring this proceeding.

The Response is reduced to arguing that it would be "inequitable" if EPA lacks authority to assess civil penalties against the Corps and its contractors related to Federal dredging projects. (Resp. at 14-15, 16-17.) That is for Congress to decide, not EPA. EPA's authority is

limited to what is provided in the MPRSA, and the agency cannot expand its powers because it thinks it would be more "equitable" to do so. *Utility Air Regulatory Group v. EPA,* 573 U.S. 302, 328 (2014) ("We affirm the core administrative law principle that an agency may not rewrite clear statutory terms to suit its sense of how the statute should operate.").

Moreover, as pointed out in Great Lakes' Motion, there are good policy reasons why Congress limited EPA's enforcement authority over Federal dredging projects. When one federal agency hires a contractor, other federal agencies should not interfere in the administration of the contract. Allowing EPA to initiate civil penalty enforcement against a Corps contractor risks inconsistent managerial directives, a result that federal policy seeks to avoid. (*See* Mot. at 9 (citing cases).) The fact that EPA is unaware that the Corps deducted payment from Great Lakes based on alleged breaches of the Contract, (Resp. at 13 n.7), demonstrates why this civil penalty action is so misguided. It indicates that the agencies are not coordinating and that there is no coherent enforcement strategy related to this project. This confirms Congress' wisdom in limiting the remedies on Federal dredging projects to one agency – the Corps.

II. EPA Can Not Assess Civil Penalties Based on Great Lakes' Contract with the Corps

The Complaint cites provisions of Great Lakes' Contract with the Corps as the basis for its claims, *see* Complaint, App. A, so Great Lakes' Motion argued that alleged Contract violations are not a sufficient predicate for civil penalties under 33 U.S.C. § 1415(a). Despite the Complaint, the Response appears to indicate that EPA is not bringing claims based on provisions of the Contract. In particular, the Response states that "EPA seeks to enforce the requirements of the SMMP [Site Plan] as required by the Federal project. EPA cited contract language in Appendix A of the Complaint simply to illustrate the parallel nature of the contract provisions and the SMMP requirements." Resp., at 5; *see also* p. 18 ("EPA contends the Respondent violated multiple sections of the SMMP … [and] seeks penalties associated with those violations"). This suggests that the Complaint does not seek to assess penalties based

on alleged violation of any specific provision of the Contract. Instead, the Response appears to assert that the Contract is relevant only because it makes the Site Plan binding on Great Lakes. If that is EPA's position, then it narrows the issues in the case.

Even if EPA was seeking to assess civil penalties based on alleged breaches of the Contract, such breaches would not satisfy any of the three predicates for civil penalties identified in 33 U.S.C. 1415(a), which require violation of a permit, the statute, or applicable regulations.

A. The Contract is Not a Permit

The Response concedes most of the arguments made in Great Lakes' Motion that the Contract is not a permit. MPRSA Section 1413(e) allows the Corps to proceed "in lieu of the permit procedure." Great Lakes cited cases interpreting the phrase "in lieu of" to mean "instead of," (Mot. at 10), to which EPA had no response. If the Corps is allowed to proceed using a contract instead of a permit, then the Contract by definition cannot be a permit.

The Response states that Section 1413(e) was "not intended to shield entities … from compliance obligations under the MPRSA." (Resp., at 5.) That is not Great Lakes' argument, and the Response confuses a party's obligations under the MPRSA with EPA's remedies. Great Lakes had obligations to the Corps set forth in its Contract. Nothing in Great Lakes' Motion suggests that it need not perform under that Contract. The fact that Great Lakes had obligations *to the Corps* does not mean that *EPA* can bring civil penalties based on that Contract. The remedies are left to the Corps through its contract-based mechanisms. In addition, the Response cites no authority for its assertions about Congress' intent, and the legislative history in fact indicates that Congress intended to limit EPA's civil penalty enforcement over the Corps and its contractors on Federal projects.

The Response also asserts that the EPA's regulatory definition of "Dredged Material Permit" found at 40 CFR § 220.2(h) does not contradict the statute, because the regulation "clarifies" that a "Federal project operates as the functional equivalent of a permit." (Resp. at 7.)

That is contradicting the statute. If Congress said that the Corps could proceed without a permit, then EPA cannot say that the mechanism nevertheless is a permit. Such an interpretation would make Section 1413(e) pointless, contradict the statute, and render that regulation invalid. (Mot. at 11-12 (citing cases)).

There is a better way to interpret the definition of "Dredged Material Permit." Great Lakes' Motion points out that the regulatory definition actually only identifies which dredging projects are subject to EPA-Corps pre-project coordination, which avoids contradicting Section 1413(e). 40 CFR § 220.2 clearly states that the EPA's definition only applies "as used in this subchapter H." The only provisions in that subchapter relating to Dredged Material Permits (*i.e.*, "Federal projects *reviewed* under Section 103 of the Act") simply provide for the review of such Dredged Material Permits and the designation of ocean disposal sites, and provide no authority for enforcement activity. The Response ignores this interpretation, which would preserve the validity of the regulation.

The Response next argues that if the Corps has proceeded without a permit on the Port of Miami Project, then it and its contractors were in violation of Section 1411(a), which prohibits the transportation for ocean disposal without a permit. (Resp., at 10.) This argument would read Section 1413(e) out of existence. Section 1413(e) allows for Federal projects to proceed "in lieu of the permit procedure," and Great Lakes cited multiples cases holding that "in lieu of" means "instead of." (Mot. at 10). Since Congress clearly authorized the Corps to proceed without a permit on its own Federal dredging projects, the Corps and its contractors could not have violated Section 1411(a). It is a basic rule of statutory construction that specific provisions control over the general. "The general/specific canon is perhaps most frequently applied to statutes in which a general permission or prohibition is contradicted by a specific prohibition or permission. To eliminate the contradiction, the specific provision is construed as an exception to the general one." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank,* 566 U.S. 639, 645 (2012).

B. Breach of the Contract is not a Violation of the MPRSA

Great Lakes' Motion pointed out that nowhere in Subchapter I of the MPRSA, 33 U.S.C. §§ 1401-1420, is there any express prohibition on violating the terms and conditions of a Corps Contract, which means that the statute provided no additional remedies beyond the contract-based remedies already available to the Corps. (Mot., at 13-15.) The Response does not address this point at all, conceding it through silence. Significantly, the civil penalty provision at Section 1415(a) does not authorize penalties for contract violations, but is expressly limited to violations of the MPRSA and either regulations promulgated or permits issued thereunder.

C. Breach of the Contract is Not a Violation of MPRSA Regulations

Great Lakes' Motion pointed out that the MPRSA delegated to the Corps the authority to promulgate regulations concerning Federal projects, and that the Corps' regulation in 33 CFR Part 337 regarding supervision of Federal projects only place obligations on Corps personnel, not contractors. Mot., at 14-15. Even if the Corps' regulations did impose requirements on contractors, the only obligation in those regulations is to comply with conditions in the SOF or ROD, 33 C.F.R. § 337.10, which in this case contain none of the provisions that are the basis of the claims in the Complaint.

The Response does not deny that the Corps' regulations in 33 CFR Part 337 do not impose requirements on contractors that can be the basis of legal claims. Instead, it argues that the Corps' Contract with Great Lakes is itself a regulation. (Resp. at 9.) This is a remarkable argument on several levels. Nowhere in the Complaint is there any allegation that that Contract is a regulation. The Response cites no legal authority for the proposition that contracts with Federal agencies necessarily constitute regulations, and presents nothing from the Contract itself to support that proposition. If Great Lakes' Contract with the Corps is a regulation simply based on the definition of "rule" in 5 U.S.C. § 551, as EPA contends, then all federal agency contracts would be regulations, which would upend Federal contracting law in the context of bid protests, jurisdiction of courts to hear disputes, and other matters.

The Contract here cannot be a regulation. Relevant to Federal dredging projects, the MPRSA gives rulemaking authority to the Secretary of the Army. 33 U.S.C. §§ 1413(e), 1418, 1402(g). The Contract was not issued by the Secretary of the Army. Instead, it was issued by a contracting officer in the Corps' Jacksonville District. That contracting officer lacked rulemaking authority, therefore the Contract cannot be a "regulation promulgated under this subchapter" required for civil penalties under 33 U.S.C. § 1415(a). *Cf. Devon Energy Corp. v. Kempthorne,* 551 F.3d 1030, 1040 (D.C. Cir. 2008) (binding rule "must come from a source with authority to bind the agency"); *Sartori v. United States,* 58 Fed. Cl. 358, 361 (Ct. Cl. 2003) ("The United States federal government employs almost 3,000,000 civilians. If any Government employee … could bind the Government to contract, Federal obligations would be uncontrollable.").

Even if the Contract were a regulation, it would not be exempt from notice-and-comment rulemaking. The exemption from notice-and-comment rulemaking in 5 U.S.C. § 553(a)(2) for "a matter relating to agency … contracts" is narrowly construed. *American Hosp. Ass'n v. Bowen,* 834 F.2d 1037, 1044 (D.C. Cir. 1987) ("Congress intended the exceptions to § 553's notice and comment requirements to be narrow ones"); *Housing Auth. Of the City of Omaha v. U.S. Housing Auth.,* 648 F.2d 1, 9 (8th Cir. 1972) (noting that public contract exemption was intended to avoid having notice requirements apply to Department of Labor minimum wage determinations). EPA is now treating the Contract as a legislative rule because the agency apparently is basing enforcement on it. *National Mining Ass'n v. McCarthy*, 758 F.3d 243, 251 (D.C. Cir. 2014) ("An agency action … that would be the basis for an enforcement action for violations of these obligations or requirements … is a legislative rule."). To the extent that contracts contain legislative rules, they are subject to notice-and-comment rulemaking. *Am. Hosp. Ass'n,* 834 F.2d at 1054 ("any contract provisions that are legislative are subject to § 553's notice and comment requirements"); *see also Cal-Almond, Inc. v. U.S. Dept. of Agric.,* 14 F.3d 429, 446-47 (9th Cir. 1993) (interpreting *Am. Hosp. Ass'n* to apply where "HHS would

assume the role of unelected legislative body and promulgate statutory law under the guise of PRO contract terms").

III. EPA Cannot Assess Civil Penalties Based on Alleged Violations of the Site Plan

Nothing in the MPRSA allows EPA to assess civil penalties based on alleged violations of the Site Plan. The civil penalty statute requires there to be a violation of "a permit issued under this subchapter," "any provision of this subchapter," or "regulations promulgated under this subchapter." 33 U.S.C. § 1415(a). The Response does not even address most of the reasons provided in Great Lakes' Motion why alleged violations of the Site Plan do not meet any of the predicates for civil penalties.

A. The Site Plan is Not a Permit

The Response does not respond to any of the reasons provided in the Great Lakes' Motion as to why the Site Plan is not a "permit" that can be the basis of civil penalties. The Response ignores the fact that the Site Plan is called a "plan," not a "permit," and that a Site Plan could not be a permit because EPA lacks authority to issue permits for dredged material. (Mot., at 15-16).

The only arguments made in the Response related to this issue is the assertion that the overall Federal dredging project is a "permit" under EPA's regulation defining "Dredged Material Permit," 40 CFR § 220.2(h). (Resp. at 7-8). This argument is addressed above in connection with the Contract. In addition, even assuming for sake of argument that the entire Port of Miami Project is a "permit," that does not indicate that the Site Plan itself is a permit. Nothing in the regulations indicates that EPA can just pick and choose which documents associated with a $200 million Federal project function as the "permit," especially when the document it is choosing here (the Site Plan) was written by an agency which lacks authority to issue a permit for dredged material.

The Response also argues that if there is no permit, then the entire Port of Miami Project was unauthorized under Section 1411(a). (Resp. at 10). As discussed above, this ignores

Section 1413(e), which authorizes the Corps to proceed "in lieu of the permit procedure" and the genera/specific canon of statutory interpretation.

B. Activities Inconsistent with the Site Plan Do Not Constitute a Violation of the Statute

Great Lakes' Motion points out that nothing in Subchapter I of the MPRSA, 33 U.S.C. §§ 1411-1420, states that civil penalties may be assessed for violations of a Site Plan. The Response argues that "Section 103(e) [33 U.S.C. § 1413(e)] expressly states that Federal navigation projects are subject to the concurrence process of Section 103(c), 33 U.S.C. § 1413(c)." (Resp. at 6). Since Section 1413(c) allows EPA to concur in the use of an offshore disposal site with conditions, the Response asserts that EPA has the authority to assess civil penalties against the Corps and its contractors for violation of those conditions. (Resp. at 6-7).

This argument, which is made without citation of any authority, has several flaws. Section 1413(e) provides that the Corps "may … issue regulations which will require the application to such projects of the same criteria" which would apply to the issuance of permits under 33 U.S.C. § 1413(c)." 33 U.S.C. § 1413(e). As pointed out in the Motion, Corps regulations governing Federal projects at 33 CFR Part 337 do not impose an independent obligation on contractors to comply with Site Plans, but rather require Corps personnel to ensure that contractors follow requirements contained in contract specifications. (Mot. at 14-15, 17 (citing *In re Katrina Canal Breaches Consolidated Litigation,* No. 06-4066, 2007 WL 763742, *5 (E.D. La. 2007)). The Response has nothing to say on this point.

Next, this argument ignores the fact that that nothing in the MPRSA says that EPA can assess civil penalties based on violations of the Site Plan. Another provision of the statute concerning actions for injunctive relief would appear to allow actions to enforce a Site Plan, because it would allow actions to enforce against the "violation of any prohibition, limitation, criterion or permit," 33 U.S.C. § 1415(g)(1), but Congress did not use this language in the civil penalty statute. (Mot. at 7). The use of different language means that Congress intended a

different result. *National R.R. Passenger Corp.,* 414 U.S. at 458. The Response simply ignores this point.

This argument also confuses obligations with remedies. Section 1413(e) provides that Corps regulations must provide for application of the same criteria, procedures and requirements on its own projects, but allows the Corps to do so without a permit. The fact that the Corps and its contractors have the same substantive obligations does not mean that EPA has the same remedies. By allowing the Corps proceed on its own projects without a permit, Congress left the remedies for noncompliance to the Corps.

The Response also argues that "Section 103(e) states that projects are subject to Section 104(a), which in turn requires the application of requirements, limitations or conditions as are necessary to ensure consistency with the SMMP." (Resp. at 5). The Response then makes the intellectual leap (without citation of authority) that somehow this means that EPA can assess civil penalties under 33 U.S.C. § 1415(a) based directly on violations of the Site Plan.

This argument fails for the same reasons as the Response's arguments based on Section 1413(c). MPRSA Section 1414 ("Permit Conditions") does not create some free-floating requirement to follow a Site Plan, but provides that "[p]ermits issued under this subchapter shall designate and include … such requirements, limitations, or conditions as are necessary to ensure consistency with any site management plan." 33 U.S.C. § 1414(a)(4) (emphasis added). As discussed with regard to the similar arguments based on Section 1413(c), since Section 1413(e) provides that the Corps can proceed without a permit, EPA lacks the remedy of civil penalties based on permit conditions. Once again, the Response also confuses the Corps' obligations with EPA's remedies.

The Response does not explain – and cites no authority – how a provision that addresses "permits" gives EPA authority to assess civil penalties where Congress authorized the Corps to proceed without a permit. If Section 1413(e) means anything, it is that the Corps and its contractors must follow the same substantive criteria and procedural requirements on

Federal projects, but cannot be subject to EPA civil penalties based on the permit scheme. The Response once again ignores that Congress appeared to authorize injunctive relief on Federal projects in Section 1415(g)(1), but the different language in Section 1415(a) indicates an intention to limit the assessment of civil penalties.

C. Activities Inconsistent with the Site Plan Do Not Constitute a Violation of Applicable Regulations

The Response fails to address most of the reasons set forth in Great Lakes' Motion why activities inconsistent with a Site Plan do not constitute a violation of applicable regulations. The Response ignores that Section 1413(e) empowers the Corps – not EPA – to issue regulations governing Federal projects, and that nowhere in the Corps' regulations is there any provision requiring contractors to follow Site Plans. (Mot. at 17). The Response points out that there is an ancillary grant of rulemaking authority to EPA, the Corps and the U.S. Coast Guard in 33 U.S.C. § 1418. (Resp. at 8). But this ignores the cases holding that such ancillary grants of rulemaking authority only provide authority with regard to matters over which an agency has substantive authority, which EPA lacks with respect to Federal dredging projects. (Mot. at 18 (citing *Gonzalez v. Oregon,* 546 U.S. 243, 258-59 (2006), and *Am. Library Ass'n v. Fed. Commc'ns Comm'n,* 406 F.3d 689, 691, 705 (D.C. Cir. 2005)).

Even if EPA regulations somehow govern Federal dredging projects, the Response ignores the fact that those regulations expressly state that they do not govern actual disposal at those sites. 40 CFR § 228.1 provides that only regulatory provisions governing procedures for site designation and monitoring apply to dredge material disposal sites. (Mot. at 18-19). The Response also ignores the fact that a Site Plan is a planning document (hence, the word "plan"), which needs to be translated into permit conditions in order to create requirements enforceable through civil penalties. (Mot. at 19). The Response also has nothing to say about the fact that the Site Plan itself states that the Corps is in charge of "regulating site use" and does not give

EPA any permitting or enforcement role. (Mot. at 19-20). EPA simply cannot proceed in this action without addressing these points.

IV. If The Site Plan Is A Rule, It Is Illegally Promulgated and Cannot be Enforced

If the Tribunal were to agree with EPA that the Site Plan imposes direct obligations on Great Lakes that are subject to civil penalties, then the Site Plan is a legislative rule that is invalid under the Administrative Procedure Act.

The Response does not deny the essential aspects of Great Lakes' Motion. EPA is treating the Site Plan as a legislative rule by basing this enforcement proceeding on it. (Mot. at 21). Legislative rules require notice-and-comment rulemaking in the Federal Register in order to be valid. (Mot. at 20-21). EPA never engaged in notice-and-comment rulemaking in the Federal Register for the 2008 and 2011 Site Plan revisions at issue in this proceeding. (Mot. at 21-22). The Response has nothing to say about any of these points.

The Response points out that the original 1995 Site Plan went through Federal Register notice and comment procedures, as did the 1995 Miami ODMDS designation. (Resp. at 11-12). This ignores the authorities cited in Great Lakes' Motion that each revision to a rule needs separate Federal Register notice-and-comment rulemaking. (Mot. at 21-22). The Response also has nothing to say about the case cited in Great Lakes' Motion that public notice outside of the Federal Register process does not satisfy the Administrative Procedure Act. (Mot. at 21-22).

The Response also argues that the notice requirement was satisfied because Great Lakes was informed of the 2008 and 2011 Site Plans when the company bid on the project in 2013. (Resp. at 12-13). The Response argues that such notice was sufficient under 5 U.S.C. § 552(a)(1), which creates an exception for "a person [who] has actual and timely notice of the terms" of a rule. The Response does not indicate that Great Lakes was given the opportunity to comment on the 2008 and 2011 Site Plans in the bid solicitation process, or that EPA would even accept such comments years after the revised Site Plans were issued.

This exception applies only to pre-promulgation notice, not after-the-fact notice. The Administration Procedure Act requires that there be "timely notice," and notice is not timely if a person has no opportunity to comment while a rule is being promulgated so that it could affect the agency's decision. For that reason, after-the-fact notice is insufficient. *U.S. Steel Corp. v. EPA,* 595 F.2d 207, 214-15 (5th Cir. 1979) (rejecting EPA argument that post-promulgation comment period was sufficient to validate a rule; "Permitting the submission of views after the effective date is no substitute for the right of interested parties to make their views known to the agency in time to influence the rulemaking process in a meaningful way") (quoting *City of New York v. Diamond,* 379 F.Supp. 503, 517 (S.D.N.Y. 1974)); *see also U.S. v. Dean,* 604 F.3d 1275, 1280-81 (11th Cir. 2010) (following *U.S. Steel* and holding that "allowing post-promulgation comments … would render the notice and comment provision toothless").

The Response also argues that because the MPRSA requires that EPA and the Corps "shall provide opportunity for public comment" when developing Site Plans, 33 U.S.C. § 1412(c)(3), this somehow overrides the general Administrative Procedure Act requirement that rules are subject to public notice and comment in the Federal Register. (Resp. at 11). Nowhere in the MPRSA is there an express repeal of the Administrative Procedure Act requirements as they relate to Site Plans, so the Response must be arguing that Congress impliedly repealed the Administrative Procedure Act. There is a "strong presumption against implied repeals," and the Response does not demonstrate that Congress had the necessary "clear and manifest intent" to repeal the Administrative Procedure Act when it enacted that provision of the MPRSA. *Ray v. Spirit Airlines, Inc.,* 767 F.3d 1220, 1221 (11th Cir. 2014) (finding "no 'repeal by implication' because Congress has not exhibited the requisite clear and manifest intent"). Moreover, for "an implied repeal, a conflict [between the two statutes] is a minimum requirement." *Miccosukee Tribe v. U.S. Army Corps of Eng'rs,* 619 F.3d 1289, 1299 (11th Cir. 2010). The MPRSA and Administrative Procedure Act are entirely consistent with one another: both statutes require public notice before the EPA finalizes either its Site Plan or a

rule. The reason Congress might have included the notice requirement in the MPRSA is because Site Plans are planning documents, which might not otherwise be subject to public notice and comment. Since these two statutes do not conflict, there is no implied repeal of the Administrative Procedure Act's notice and comment requirements. Thus, to the extent that EPA now claims that the Site Plan is a legislative rule, the agency's failure to follow notice-and-comment rulemaking in the Federal Register renders it invalid and unenforceable.

Finally, the Response fails to address the independent argument relating to incorporation of rules by reference. The EPA regulation designating the Miami ODMDS incorporates by reference future versions of the Site Plan that did not exist when the regulation was issued. 40 CFR § 228.15(h)(19)(vi) ("Disposal shall comply with conditions set forth in the most recent approved Site Management and Monitoring Plan."). As pointed out in Great Lakes' Motion, it violates the Administrative Procedure Act regulations to incorporate by reference future rules, which renders that provision of the EPA regulation invalid. (Mot. at 22-23). The Response said nothing in response to this argument, essentially conceding the point. This reason alone is enough for the Tribunal to dismiss any portion of the Complaint dependent on alleged violations of the Site Plan.

V. Conclusion

The MPRSA limits EPA's role in Federal dredging projects, and leaves to the Corps responsibility to regulate the use of offshore disposal sites. While the Corps and its contractors may be obligated to follow environmental requirements on those projects, EPA does not have the authority to assess civil penalties based on alleged violations of a Corps Contract or the Site Plan. Instead, management of Corps contractors is left to the Corps, through its contract-based remedies.

VI. Request for Oral Argument

Great Lakes respectfully requests that the Court allow for oral argument on the Motion to Dismiss.

Dated: December 23, 2019

Respectfully Submitted,

/s/ T. Neal McAliley
T. Neal McAliley (Florida Bar No. 172091)
Email: nmcaliley@carltonfields.com
David Chee (Florida Bar No. 109659)
Email: dchee@carltonfields.com
CARLTON FIELDS, P.A.
100 S.E. Second Street, Suite 4200
Miami, Florida 33131-2113
Telephone: (305) 530-0050

Counsel for Respondent Great Lakes Dredge & Dock Co., LLC

CERTIFICATE OF SERVICE

I hereby certify that a copy of this document was sent by email on this date to Natalie Beckwith, Office of Regional Counsel, U.S. Environmental Protection Agency, Region 4, 61 Forsyth St., SW, Atlanta, Georgia 30303.

/s/ T. Neal McAliley
T. Neal McAliley